David Miller, Jr. v. State of Florida

CHIEF JUSTICE: GOOD MORNING. READY?

YES, MA'AM.

ALL RIGHT.

GOOD MORNING TO EVERYBODY. MY NAME IS BOB NORGUARD ON BEHALF OF THE APPELLANT, DAVID MILLER. ESSENTIALLY MR.^MILLER WAS CONVICTED OF FIRST DEGREE MURDER. HE WAS ALSO CONVICTED OF AN AGO -- AGGRAVATED BATTERY OF A DIFFERENT VICTIM. THE JURY RECOMMENDATION IN HIS CASE WAS 7-5. IT WAS AFFIRMED ON APPEAL WITH TWO JUSTICES DISSENTING AS TO THE SENTENCE. THE AGGRAVATING FACTORS IN MR.^MILLER'S CASE WERE VERY LIMITED, COMPARED TO I THINK MANY CASES THIS COURT DEALS WITH. THERE WAS A FINDING OF A PRIOR VIOLENT FELONY, AGGRAVATING FACTOR, THAT WAS IN PART BASED ON AN AGGRAVATED BATTERY CHARGE WHICH WAS A CONTEMPORANEOUS CONVICTION AT TRIAL. MR.^MILLER ALSO HAD --

HE ALREADY HAD A PREVIOUS CONVICTION THAT WAS NOT ATTACHED TO THIS ONE, CORRECT?

YES, MA'AM.

A PREVIOUS?

AND THE OTHER FACTOR THAT WAS FOUND WAS HIS PRIOR CONVICTION FOR SECOND DEGREE MURDER, AND WHAT IS IMPORTANT TO MY DISCUSSION IS I GET INTO ISSUE NUMBER 2 THAT RELATES TO THE FAILURE TO MITIGATE THAT AGGRAVATING FACTOR IS THAT THE TRIAL JUDGE IN DISCUSSING THIS AGGRAVATING FACTOR POINTED OUT THAT THIS AGGRAVATING FACTOR, PRIOR VIOLENT FELONY, WAS GIVEN GREAT WEIGHT, PARTICULARLY BECAUSE OF THE PRIOR CONVICTION FOR THE MURDER.

CHIEF JUSTICE: YOU ARE TALKING ABOUT THE TRIAL JUDGE IN THE SENTENCING ORDER?

YES, MA'AM. THE ONLY OTHER AGGRAVATING FACTOR WAS THE FACT THAT THIS IS PREDICATED FOR PECUNIARY GAIN AND THAT -- PECUNIARY GAIN.

CHIEF JUSTICE: I NOTICE FOR REALLY ALL OF YOUR POINTS THAT YOU MAKE THESE SEEM TO BE CLASSIC HINDSIGHT MONDAY MORNING QUARTERBACK SECONDGUESSING STRATEGIC DECISIONS, AND YOU CERTAINLY AS AN EXPERIENCED DEFENSE LAWYER, KNOW THAT THERE IS NO SUCH THING AS A PERFECT TRIAL. AS TO THE FAILURE TO CHALLENGE THE PRIOR AGGRAVATOR THE DEFENSE LAWYER TESTIFIED THAT HE SPECIFICALLY MADE A STRATEGIC DECISION TO NOT GO INTO THE WHAT WOULD BE, QUOTE, THE MITIGATING FACTORS OF THAT PRIOR VIOLENT FELONY, BECAUSE IT MIGHT HAVE DIMINISHED WHAT HE WAS TRYING TO SHOW AS THE MITIGATORS IN THIS CASE, SUCH AS HE SHOWED REMORSE AFTER THE LAST MURDER AND LOOK WHAT HAPPENED, HE JUST MURDERED AGAIN, AND SO WHAT IS IT -- THAT'S A VERY HIGH BURDEN TO GET OVER WHEN WE ARE REALLY DEALING WITH SOMETHING WHERE SOMEONE -- HE INVESTIGATED IT BUT THEN DECIDED HE DIDN'T WANT TO USE IT AND THAT'S ALSO THE SAME THING ON THE MENTAL HEALTH MITIGATION. SO HELP WITH THAT, HOW DO YOU GET AROUND THAT VERY HEAVY, HIGH BURDEN THAT YOU HAVE?

THIS IS ONE OF THE DAYS I AM GLAD YOU ASKED THAT QUESTION BECAUSE I'VE BEEN LOOKING FORWARD TO -- I ADDRESSED THIS IN THE TRIAL COURT AND IT IS SOMETHING THAT I LOOK FORWARD TO ADDRESSING IN THIS COURT AS FAR AS DISCUSSING THE TRIAL ATTORNEY'S ALLEGED STRATEGIC REASONS FOR FAILING TO MITIGATE THAT AGGRAVATING FACTOR. IT AS A STARTING POINT OBVIOUSLY IF YOU DO HAVE A STRATEGIC DECISION I UNDERSTAND THE LAW ON THAT. YOU EXPLAINED IT VERY WELL, BUT IT IS NOT AN UNLIMITED RULE. YOU HAVE TO LOOK AT THE REASONABLENESS OF THE TRIAL ATTORNEY'S TACTICS, AND ONE OF THE COMMENTS MADE BY THE TRIAL ATTORNEY AT THE EVIDENTIARY HEARING WAS THAT HIS STRATEGY WAS TO GLOSS OVER THE PRIOR SECOND DEGREE MURDER, AND I, YOU KNOW, I AM SORRY, BUT THERE IS NO WAY IN A CAPITAL MURDER CASE WHERE THE MOST SIGNIFICANT AGGRAVATING FACTORS FOR SECOND DEGREE MURDER THAT YOU CAN GLOSS IT OVER. THAT'S LIKE INVITING SOMEBODY OVER TO YOUR HOUSE AND YOU HAVE AN ELEPHANT IN YOUR LIVING ROOM AND YOU DON'T SAY ANYTHING ABOUT IT AND YOU HOPE THEY WON'T NOTICE IT AND JUST OVERLOOK IT. WE ARE NOT TALKING ABOUT A BRIEF COMMENT THAT'S MADE ON A WITNESS' TESTIMONY SIMILAR TO THE ISSUE THAT YOU DEALT IN THE PREVIOUS CASE WHERE A PASSING COMMENT IS MADE THAT IS ARGUABLY OBJECTIONABLE BUT IT IS NOT HIGHLIGHTED, IT IS NOT SOMETHING THAT'S A FEATURE OF THE CASE. WE ARE TALKING ABOUT AN AGGRAVATING FACTOR THAT IS ONE OF THE MOST SIGNIFICANT AGGRAVATING FACTORS THAT THIS COURT LOOKS AT. WE ARE TALKING ABOUT SOMETHING THAT THE TRIAL JUDGE PLACED PARTICULAR EMPHASIS ON. WHEN HE WENT THROUGH HIS WEIGHING PROCESS HE NOT ONLY EARLIER IN THE OPINION SAID THAT PARTICULARLY WAS THE DEFENDANT'S PRIOR MURDER COMPELLING BUT HE WENT ON TO SAY THAT THE DEFENDANT'S PRIOR CONVICTION FOR MURDER IS MOST APPALLING AND HAS BEEN GIVEN GREAT WEIGHT. THE COURT CANNOT IMAGINE A GREATER FACTOR UNLESS IT PERTAINS TO THE METHOD OF THE PRIOR MURDER OR THE NATURE OF THE VICTIM. NOW, I'M SORRY, BUT THAT IS NOT SOMETHING THAT IS STRATEGICALLY THAT YOU CAN REASONABLY GLOSS OVER.

ARE YOU TALKING ABOUT A DOUBLE MISTAKE ON THE PART OF DEFENSE COUNSEL AND THAT IS ARE YOU CLAIMING HERE THAT THE DEFENSE COUNSEL NOT ONLY CHOSE WHILE THIS WAS BEING PRESENTED TO THE JURY NOT TO BRING UP ANY MITIGATING CIRCUMSTANCES SURROUNDING THE COMMISSION OF THAT PRIOR VIOLENT FELONY BUT THAT HE ALSO FAILED TO BRING ANY MITIGATING CIRCUMSTANCES UP ABOUT THAT OFFENSE TO THE TRIAL COURT JUDGE THAT WAS THE SENTENCER IN THE CASE?

YES, SIR.

BECAUSE I DIDN'T UNDERSTAND YOUR ARGUMENT AND YOUR BRIEF TO ADDRESS THIS SEPARATELY, BUT IS THAT, IN FACT, WHAT YOUR CLAIM IS?

I THINK CLEARLY UNDER FLORIDA LAW, YOU GET TWO BITES AT THE APPLE GIVEN THAT THE JUDGE IS THE ULTIMATE SENTENCER UNDER FLORIDA LAW. YOU HAVE THE PRESENTATION OF THE JURY BUT CERTAINLY YOU HAVE THE SPENCER HEARING WHERE DESPITE ANY TACTICAL REASONS NOT TO PRESENT SOMETHING TO THE JURY THERE IS CERTAINLY NO REASON THAT YOU SHOULD NOT --

WASN'T THE DEFENSE LAWYER QUESTIONED ABOUT THIS SORT OF SEPARATE ISSUE? THAT IS, THAT IT APPEARS THAT THEN IN THE QUESTIONING OF THE DEFENSE LAWYER THAT IT IS FOCUSING ON HIS DECISION NOT TO BRING THAT UP DURING THE JURY PRESENTATION, BUT I DON'T SEE ANY QUESTIONING AND THAT'S WHERE I AM ASKING YOU TO HELP BECAUSE YOU ARE MUCH MORE FAMILIAR OBVIOUSLY. WAS HE QUESTIONED ABOUT WHAT WOULD HAVE BEEN A FURTHER DECISION NOT TO ELABORATE ON THAT WITH THE TRIAL COURT JUDGE? SO WAS THERE A FOCUS ON THAT?

MY RECOLLECTION OF THE RECORD WAS THAT THE FACT THAT IT WAS NOT BROUGHT TO THE TRIAL COURT'S ATTENTION AS WELL IT WAS MORE OF A PASSING REFERENCE. THE FOCUS GIVEN WHAT I WAS DEALING WITH SINCE I DID DO THE EVIDENTIARY HEARING WAS FOCUSING ON THE TRIAL LAWYER'S REASONS FOR NOT MITIGATING THAT AGGRAVATING FACTOR WAS NOT JUST ME STANDING UP HERE ARGUING BUT SHOWING THROUGH THE EXAMINATION OF THE ATTORNEY IN HIS OWN WORDS THAT HIS STRATEGY WAS NOT SOUND SO THAT IS WHAT APPEARS TO BE THE MAJOR FOCUS IN THE RECORD. I DO NOT RECALL HIM GIVING ANY SPECIFIC REASONS WHY HE DID NOT BRING THAT TO THE TRIAL JUDGE'S ATTENTION IN A SEPARATE SPENCER HEARING.

DID YOU PRESENT ANY OTHER DEFENSE WITNESSES AS EXPERTS OR OTHERWISE AS EVIDENCE THAT THIS WAS WHOLLY UNREASONABLE?

NO, SIR.

AND WHAT DO WE HAVE ON THE RECORD THAT INDICATES -- DO WE HAVE ANYTHING ON THE RECORD INDICATING THE MITIGATING CIRCUMSTANCES OF THAT PRIOR FELONY?

YES, MA'AM. THE EVIDENCE THAT WAS PRESENTED WAS THROUGH MENTAL HEALTH RECORDS WHERE IN THE MENTAL HEALTH RECORDS IT WAS BROUGHT OUT THAT MR.^MILLER HAD A MIXED PERSONALITY DISORDER. THIS WAS BASED ON MENTAL HEALTH EVALUATIONS RIGHT AFTER AND BEFORE HIS PLEA IN NORTH CAROLINA. IN ADDITION TO THAT, THE EVIDENCE THAT WAS IN THOSE RECORDS WAS ALSO THAT MR.^MILLER WAS EXTREMELY INTOXICATED AT THE TIME OF THE INCIDENT AND ALSO THAT THIS PARTICULAR INCIDENT AS OPPOSED TO BEING A ROBBERY WHERE SOMEBODY WAS KILLED, INVOLVED AN ARGUMENT BETWEEN HIM AND ANOTHER INDIVIDUAL IN A ROOMING HOUSE. IN ADDITION TO THAT, I DON'T KNOW IF IT WAS IN THE RECORD ALTHOUGH MR.^ELLER, THE TRIAL ATTORNEY, WAS QUESTIONED ABOUT THIS WAS THE FACT THAT HE WAS AWARE OF THE FACT THAT THE TRIAL JUDGE IN NORTH CAROLINA HAD MADE A SPECIFIC FINDING THAT MR.^MILLER'S ABILITY TO PERFORM HIS CONDUCT UNDER THE REQUIREMENTS OF THE LAW WAS SUBSTANTIALLY IMPAIRED.

AND IT CAME OUT BUT HE WAS CONVICTED OF THE SECOND DEGREE MURDER UNDER THOSE CIRCUMSTANCES? WAS HE ACTUALLY CHARGED WITH SECOND DEGREE AND OR WAS HE ACTUALLY CHARGED WITH SOMETHING ELSE AND CONVICTED OF SECOND DEGREE?

ORIGINALLY HE WAS CHARGED WITH FIRST DEGREE MURDER IN THE NORTH CAROLINA COURTS, THE MITIGATION THAT I WAS THE BASIS FOR THE SUPPORT OF THE PLEA OF SECOND DEGREE MURDER.

CHIEF JUSTICE: BUT DID THAT COME OUT IN THE ORIGINAL TRIAL?

THIS WAS THE INFORMATION THAT WAS PRESENTED IN NORTH CAROLINA.

BUT YOU ARE TALKING ABOUT THE INFORMATION THAT WAS PRESENTED AT THE POST-CONVICTION EVIDENTIARY HEARING?

YES, SIR.

TO DESCRIBE THOSE CIRCUMSTANCES, RIGHT?

YES, SIR, THAT EVIDENCE WAS PRESENTED.

CHIEF JUSTICE: BUT IT WASN'T PRESENTED AT THIS TRIAL, THE ORIGINAL DEATH CASE?

JUST TO BE CLEAR --.

CHIEF JUSTICE: OKAY. IN THE CASE IN WHICH MR.^MILLER GOT THE DEATH PENALTY, THE ONLY THING THAT THE JURY KNEW WAS JUST THAT THERE WAS A SECOND DEGREE MURDER CONVICTION?

YES, MA'AM.

CHIEF JUSTICE: NOTHING ABOUT WHY THE JUDGE, WHAT THE JUDGE FOUND?

EXACTLY. WHAT THE STATE DID IN MR.^MILLER'S CASE IN THE PENALTY PHASE OF THE DEATH PENALTY CASE WAS TO SIMPLY PRESENT THE JUDGMENT AND SENTENCE OF THE PRIOR CONVICTION FOR SECOND DEGREE MURDER. AS I INDICATED, AS WE ALREADY TALKED ABOUT, ONE OF THE TRIAL ATTORNEY'S REASONS FOR NOT MITIGATING THAT WAS THAT HE WANTED TO GLOSS IT OVER AND I DISCUSSED THAT POINT. HIS OTHER REASON AS TO WHY HE GAVE IN TERMS OF WHAT HE WAS SAYING WAS HIS STRATEGY WAS THAT MR.^MILLER HAD PLED TO THAT OFFENSE AND BECAUSE MR.^MILLER PLED TO THAT THAT THAT WAS MITIGATION, AND AS I ARGUED TO THE TRIAL COURT AT THE POST EVIDENTIARY HEARING IN CLOSING ARGUMENT AND AS I WOULD PRESENT TO THIS COURT, IT IS SIMPLY NOT REASONABLE STRATEGY AS A TRIAL JUDGE IF A PERSON WAS CHARGED --.

CHIEF JUSTICE: I GUESS ALL I AM STILL TRYING TO GET TO THAT ALL THE JURY AND THE JUDGE HAD IN THE ORIGINAL MILLER DEATH SENTENCE CASE WAS JUST THE JUDGMENT AND SENTENCE?

THAT HE WAS CONVICTED OF SECOND DEGREE MURDER AND THAT HE HAD PLED TO THOSE CHARGES.

BUT I MEAN ISN'T IT A VERY HARD LINE TO DRAW HERE BECAUSE OF THE FACT THAT IF YOU BEGIN TO GET DEEPLY INTO WHAT HAPPENED IN NORTH CAROLINA AND YOU SPEND A DAY TALKING ABOUT THAT MURDER AND THE STATE TALKS ABOUT HOW HE WAS INVOLVED IN THE MURDER AT THE ROOMING HOUSE IN NORTH CAROLINA, THAT'S A VERY TOUGH TESTIMONY FOR THE JURY TO FIND AND WITHOUT REALLY MITIGATING OF THE FACT THAT NOW HE HAS COMMITTED ANOTHER MURDER. I MEAN IT SEEMS TO ME THAT THERE IS A DEGREE OF REASONABLENESS IN THE TRIAL ATTORNEY SAYING HOW IN THE WORLD AM I GOING TO DEAL WITH THE JURY NOW THAT WE'VE TRIED TWO MURDER CASES IN FRONT OF THEM?

AND THAT'S THE EXACT POINT IS THAT WHAT THIS JURY WAS LEFT WITH WAS HE HAS KILLED BEFORE, NOW HE HAS KILLED AGAIN.

WE TYPICALLY SEE, AND THIS IS FOLLOWING UP ON JUSTICE LEWIS' QUESTION, RECORDS WHERE THE STATE AS OPPOSED TO JUST THE RECORD OF CONVICTION ALSO BRINGS IN WITNESSES, REALLY, TO DESCRIBE WHAT HAPPENED IN THE PRIOR OFFENSE THAT'S BEING USED AS AN AGGRAVATOR, AND I THINK THAT'S WHAT JUSTICE WELLS IS PARTIALLY WHAT HE MAY BE ALLUDING TO, AND SO I MEAN YOU ALLUDED TO THE FACT FOR INSTANCE IN QUESTIONING THE DEFENSE LAWYER HERE IF I RECALL YOU SAID YOU WERE AWARE THAT THE STATE DIDN'T HAVE THE SHERIFF FROM FRANKLIN COUNTY NORTH CAROLINA OR WHATEVER, YOU KNOW, OUT IN THE HALLWAY I THINK OR SOMETHING LIKE THAT.

CORRECT.

BUT HOW CAN WE BE SAFE AS REALLY AS JUSTICE WELLS INDICATES, THAT ONCE, YOU KNOW, YOU STARTED TO TALK ABOUT THE DETAILS OF THAT, FOR INSTANCE JUST ON THE FACE OF IT YOU HAVE GOT THE FACT THAT IT WAS ORIGINALLY CHARGED AS A FIRST DEGREE. THAT IS, THAT, YOU KNOW, AND THEN THAT PERHAPS IT IS ONLY THROUGH THIS MITIGATION THAT IT GOT DOWN TO WHAT IT GOT DOWN TO. ISN'T IT A TWO-EDGED SWORD? AT THE BOTTOM?

NOT REALLY.

I'M HAVING MORE DIFFICULTY SEEING WHAT YOU DIDN'T REALLY ARGUE HERE AND THAT IS THAT THE SEPARATE ISSUE ABOUT, YES, I WOULD CHOOSE TO DO THAT WITH THE JURY AND PERHAPS MAKE A SEPARATE DECISION WHEN IT COMES TO THE JUDGE AND I WANT THE JUDGE TO KNOW ALL ABOUT THAT, EVEN THOUGH I DIDN'T -- I WANTED IT TO BE PASSED OVER, QUOTE, IN FRONT OF THE JURY.

YES. THE LINE OF LOGIC THAT WE ARE DISCUSSING HERE IS SIMPLY YOU'VE GOT A PRIOR MURDER, AND STANDING ALONE, BASED ON THIS COURT'S OWN CASE LAW, HE IS A DEADMAN. I MEAN, MR.^MILLER IS A DEADMAN WITH THAT AS A PRIOR AGGRAVATING FACTOR. THE ROLE OF DEFENSE COUNSEL IS TO MITIGATE THAT AGGRAVATION.

CHIEF JUSTICE: BUT I GUESS WHAT I WANTED TO TRY TO UNDERSTAND IS SO YOUR MITIGATION IS THAT IT WASN'T A ROBBERY, IT WAS AN ARGUMENT, BUT THAT THE JUDGE FOUND THAT HE COULDN'T CONFORM HIS BEHAVIOR TO THE REQUIREMENTS OF LAW. I WOULD STILL SAY AND AGAIN THE QUESTION ON JUST ASSUME IT FOR A MOMENT THAT IT IS NOT REASONABLE STRATEGY TO GIVE THAT BACKGROUND TO THE JURY OR THE JUDGE, I'M REALLY NOT SURE HOW YOU STILL HAVE THE PRIOR VIOLENT FELONY AGGRAVATEOR YOU SAY HE OBVIOUSLY DIDN'T LEARN ANYTHING FROM THIS PRIOR BEING INCARCERATED, OTHER THAN HE KILLED AGAIN, AND YOU STILL HAVE THE CONTEMPORENDE FELONY OF THE COMPANION OF THE VICTIM SO I'M NOT SURE YOU GIVE US THE BEST ARGUMENT ON HOW THIS SHOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME ASSUMING THAT THERE WAS ERROR IN NOT BRINGING OUT AT LEAST THE JUDGE'S FINDING IN THE PRIOR MURDER THAT, YOU KNOW, HE WAS A MITIGATOR SO TO SPEAK.

WITHOUT ANY MITIGATION OF THE PRIOR MURDER, THE JURY SIMPLY KNOWS THAT HE HAS KILLED BEFORE, AND IN CASES SUCH AS F FELLER WHICH WAS CITED IN THE SENTENCING ORDER THOSE SENTENCES ARE UPHELD. CONTRAST THAT WITH THE COURT'S OPINION IN JORGENSON WHERE THE DEFENSE ATTORNEYS PRESENTED EVIDENCE THAT MITIGATED THE PRIOR MURDER.

CHIEF JUSTICE: BUT YOU STARTED OUT SAYING THIS WAS A 7-5 EVEN WITH HIS PRIOR VIOLENT FELONIES THAT HE IS A DEADMAN THE DEFENSE DID GET FIVE PEOPLE TO VOTE FOR LIFE, AND, YOU KNOW, EVEN I'M STILL CONCERNED THAT WE ARE SECONDGUESSING WHETHER THIS -- ANOTHER STRATEGY WOULD HAVE BEEN BETTER FOR HIM TO, YOU KNOW, I CAN UNDERSTAND IT IF THE STATE HAD BROUGHT OUT A LOT OF FACTS ABOUT THE CRIME AND YOU WOULD SAY WHY WOULDN'T HE HAVE MITIGATED IT, BUT WITH THE STATE JUST CONTENT TO PUT ON THE JUDGMENT AND CONVICTION I THINK IT IS A JUDGMENT CALL.

TIME IS SHORT, BUT I THINK THE BEST EXAMPLE I CAN GIVE TO EXPLAIN MY POINT IS THAT IF SOMEBODY WERE CHARGED WITH FIRST DEGREE MURDER AND ENTERED A PLEA IN THE TRIAL COURT AND CAME IN BEFORE THE TRIAL COURT AND THE STATE CHOSE TO SIMPLY JUST PRESENT THE BARE BONES FACTUAL BASIS OF A SECOND DEGREE MURDER AND THEN THE TRIAL ATTORNEY STOOD UP AND SAID, JUDGE, MY CLIENT PLED. CUT HIM A BREAK ON THE SENTENCE WITHOUT PRESENTING MITIGATION, IT WOULD BE INEFFECTIVENESS WITH NO IF'S, AND'S OR BUT'S ABOUT IT. TO LET THE PRIOR CONVICTION FOR MURDER STAND WITHOUT MITIGATION IS UNREASONABLE. THIS ATTORNEY --.

CHIEF JUSTICE: AND THAT'S WHAT WE WOULD HAVE TO FIND AS A MATTER OF LAW?

YES.

CHIEF JUSTICE: BECAUSE THIS IS -- THAT WOULD ALWAYS BE UNREASONABLE.

AND HE COULD HAVE CERTAINLY PRESENTED THAT INFORMATION KNOWING THAT THE STATE COULD NOT COME IN WITH UNLISTED WITNESSES TO ALL OF THE SUDDEN CHANGE THEIR STRATEGY AND SAY NOW WE ARE GOING TO PRESENT FACTS TO THE OTHER MURDER.

BUT HOW DOES IT UNDERMINE OUR CONFIDENCE IN THE OUTCOME?

WE HAVE A 7-5 VOTE WHERE TWO JUSTICES DISSENTED IN THE ORIGINAL DEATH SENTENCE SIMPLY BASED ON WHAT WAS PRESENTED IN THE ORIGINAL RECORD AND WITHOUT ANY BENEFIT OF THE MITIGATION THAT WAS AVAILABLE ON THE PRIOR MURDER TO HELP THE JURY UNDERSTAND AND KNOW WHAT HAPPENED PREVIOUSLY. THANK YOU.

MAY IT PLEASE THE COURT, CURTIS FRENCH REPRESENTING THE STATE OF FLORIDA. THIS IS NOT A CASE IN WHICH TRIAL COUNSEL -- THEY HAVE NOT PRESENTED ANYTHING THAT TRIAL COUNSEL WAS UNAWARE EXCEPT FOR THE PET SCAN WHICH AT BEST CORROBORATES THE PENALTY PHASE THAT THE DEFENDANT HAS FRONTAL LOBE IMPAIRMENT AND OUR EXPERT TESTIFIED THE PET SCAN WAS NORMAL AND DIDN'T SHOW ANYTHING. AS FAR AS THE PRIOR MURDER IS CONCERNED, THIS IS STRICTLY A QUESTION OF STRATEGY, REASONABLE STRATEGY BY TRIAL COUNSEL. ALL WELL AND GOOD TO SUGGEST YOU'VE GOT TO TRY TO MITIGATE THIS IF YOU CAN. COUNSEL HAS FAILED TO DEMONSTRATE HOW WHAT HE COULD HAVE DONE TO MITIGATE THIS CRIME AND THE FACTS ARE IF YOU GO INTO THE CRIME ITSELF ALTHOUGH HE WAS ULTIMATELY CONVICTED OF SECOND DEGREE MURDER THE CRIME APPEARS TO BE FIRST DEGREE MURDER WITH PREMEDITATION BECAUSE WHAT HAPPENED WAS THAT THE DEFENDANT WAS IN A ROOMING HOUSE, GOT INTO SOME SORT OF ARGUMENT ABOUT SOME MINOR ISSUE WITH SOMEONE ELSE. WENT UP TO HIS OWN ROOM AND THOUGHT ABOUT IT AWHILE AND GOT HIS GUN AND WENT BACK DOWN AND KILLED THE GUY.

CHIEF JUSTICE: WAS THERE ANY DISCUSSION BY THE DEFENSE LAWYER OR THE PROSECUTOR AS TO WHETHER ANY KIND OF AGREEMENT WAS STRUCK WHERE THE STATE AGREED WE WILL JUST PUT IN THE CONVICTION AND SENTENCE AND NOT GET INTO THE DETAILS?

I'M NOT AWARE OF ANY PRIOR AGREEMENT BUT THAT'S ALL THE STATE DID.

CHIEF JUSTICE: NORMALLY AS JUSTICE WELLS POINTS OUT, THE STATE LIKES TO GET INTO SOME OF THE DETAILS OF THE PRIOR CRIME.

WELL, THEY DID NOT DO SO IN THIS CASE AND HAD SUBPOENAED NO WITNESSES FROM NORTH CAROLINA AND --.

CHIEF JUSTICE: SO WHAT WOULD HAVE BEEN THE HARM I GUESS JUST IN PUTTING IN THE ADDITIONAL INFORMATION ABOUT ONCE THE JUDGMENT AND SENTENCE WENT IN ABOUT THE JUDGE'S FINDING THAT HE HAD A MENTAL MITIGATOR SO TO SPEAK?

TRIAL COUNSEL SHOULD HAVE PRESENTED ALL OF THE MEDICAL RECORDS THAT SUPPORTED THAT FINDING, AND THOSE MEDICAL RECORDS INCLUDED SEVERAL THINGS THAT WERE NOT HELPFUL TO THE DEFENDANT, INCLUDING THE FACT THAT ONE EVALUATEOR THOUGHT HE HAD NO REMORSE AND HE SEEMED CONCERNED ABOUT HOW MUCH TIME HE WAS GOING TO SERVE AND HOW SOON HE WAS GOING TO GET OUT. THE MEDICAL RECORDS ALSO SHOWED HE HAD HAD A PREVIOUS COMMITMENT FOR -- HE HAD PREVIOUSLY BEEN COMMITTED A COUPLE OF YEARS EARLIER BY HIS OWN BROTHER AFTER HE CHASED HIS BROTHER DOWN THE STREET WITH A KNIFE.

WELL, DEFENSE COUNSEL DIDN'T TESTIFY THAT THAT WAS THE REASON THAT HE DIDN'T GET INTO IT, DID HE?

HE TESTIFIED THAT HE DIDN'T PUT THE MEDICAL RECORDS IN BECAUSE THERE WERE THINGS IN THE MEDICAL RECORDS THAT WERE HARMFUL TO HIM AS I RECALL AND THAT'S THE JUDGMENT HE MADE ABOUT THAT. WHAT TRIAL COUNSEL DECIDED WAS THAT HE DIDN'T WANT TO EMPHASIZE ANYTHING ABOUT A PRIOR SECOND DEGREE MURDER. THERE WAS JUST THE BARE

FACT OF THE CONVICTION, WHAT HE ARGUED TO THE JURY WAS THAT THEY SHOULDN'T GIVE ANY SUBSTANTIAL WEIGHT TO THAT BECAUSE ALL YOU HAD WAS THE BARE FACT OF THE CONVICTION AND THE STATE HAD NOT PRESENTED ANY OF THE FACTS AND THEN THE TRIAL COUNSEL WENT ON TO PRESENT THE SUBSTANTIAL MITIGATION THAT HE DID PRESENT INCLUDING TESTIMONY FROM ALL OF THE FAMILY MEMBERS ABOUT HIS UPBRINGING AND SO FORTH, TESTIMONY FROM DR.^KROP ABOUT HIS FRONTAL LOBE IMPAIRMENT AND ALSO ALCOHOL. ONE THING I FORGOT TO MENTION ABOUT THE MEDICAL RECORDS THEY ALSO INCLUDE INTERMITTENT EXPLOSIVE DISORDER WHICH THE STATE WOULD NOT HAVE MINDED HAVING COME IN. KROP TESTIFIED, DID NOT TESTIFY TO THAT, AND OUR POSITION VERY SIMPLY IS THE TRIAL COUNSEL WAS AWARE OF ALL OF THIS AND MADE A DECISION TO MINIMIZE ANY REFERENCE TO THE PRIOR MURDER AND GO ON TO THE FACTS MITIGATING THIS MURDER NOT TO GET INTO ALL OF THAT.

WHY DON'T WE HAVE A DIFFERENT SITUATION WHEN IT COMES TO PRESENTING THAT TO THE TRIAL JUDGE IN OTHER WORDS AS OPPOSED TO THE JURY?

I WOULD THINK THE SAME CONSIDERATIONS WOULD APPLY. I MEAN THE PRIOR MURDER IS GOING TO BE A PRIOR VIOLENT FELONY NO MATTER WHAT. I THINK A REASONABLE ATTORNEY COULD DECIDE GOING INTO THE FACTS AND DETAILS OF THESE VARIOUS THINGS WOULD HAVE BEEN MORE HARMFUL THAN HELPFUL TO THE COURT.

THE JUDGE ENDED UP USING THIS REALLY AS THE PRIME REASON FOR IMPOSING THE DEATH SENTENCE, DID HE NOT?

SURE, BECAUSE THAT WAS THE SERIOUS AGGRAVATOR IN THIS CASE. YOU HAD AND A ROBBERY AND THE SECOND DEGREE MURDER IS A SERIOUS AGGRAVATOR. AGAIN, THE QUESTION IS WHETHER TRIAL COUNSEL'S JUDGMENT THAT THIS AGGRAVATED MORE THAN MITIGATING OR THAT IT WAS A TWO-EDGED SWORD OR IT HURT MORE THAN IT HELPED WE THINK WAS A REASONABLE ONE.

I DIDN'T SEE ANY DISCUSSION BY THE DEFENSE LAWYER OF WHETHER IT WOULD HAVE HELPED MORE THAN IT HURT OR WHATEVER. I JUST SEE THIS SIMPLE REFERENCE TO, WELL, MY STRATEGY IS JUST TO GLOSS OVER IT, AND I DON'T SEE, IN OTHER WORDS HELP ME. YOU ARE SAYING HE DID TESTIFY EXTENSIVELY THAT, WELL, I WOULD HAVE BEEN OPENING A PANDORA'S BOX IF I DID THAT. I DON'T SEE ANY TESTIMONY BY HIM TO THAT EFFECT. I JUST SEE THIS TESTIMONY, WELL, YOU KNOW, I JUST WANTED TO GLOSS OVER THAT. SO ARE YOU SAYING HE DID TESTIFY THAT HE WAS AWARE OF ALL OF THAT AND HE MADE A STRATEGIC DECISION THEN FULLY INFORMED AS TO WHAT ALL OF THOSE CIRCUMSTANCES WERE THAT THERE WAS MORE DANGER TO BRINGING IT UP THAN THERE WAS BENEFIT. IS THAT WHAT YOU ARE SAYING?

THERE WAS TESTIMONY BY TRIAL COUNSEL. I DON'T KNOW HOW EXTENSIVE IT WAS, BUT REGARDING THE MEDICAL RECORDS AND HOW THERE WAS STUFF IN THERE THAT HE DIDN'T WANT TO BRING OUT, AND THERE WAS CERTAINLY TESTIMONY BY TRIAL COUNSEL THAT HE WAS AWARE OF ALL OF THESE RECORDS AND I DON'T THINK THERE IS ANY DISPUTE ABOUT IT THAT HE HAD THESE RECORDS AND HE HAD READ THE RECORDS, MEDICAL RECORDS, THE RECORDS REGARDING THE PRIOR CONVICTION AND SO ON AND SO FORTH AND DR.^KROP HAD REVIEWED THEM, ALSO, AND MADE THE DECISION NOT TO PRESENT THEM AND THAT'S WHAT HE TESTIFIED TO.

WAS DR.^KROP EVER QUESTIONED BY THE STATE ON THE INTERMITTENT EXPLOSIVE PERSONALITY?

AT THE EVIDENTIARY HEARING?

NO, DID THE STATE HAVE THAT IN ITS POCKET FOR LACK OF A BETTER TERM?

NOT TO MY KNOWLEDGE. THERE WAS NO QUESTIONING. MY RECOLLECTION IS THERE WAS NO MENTION OF INTERMITTENT EXPLOSIVE DISORDER AT THE ORIGINAL SENTENCING PHASE. THAT HIS TESTIMONY WAS FRONTAL LOBE DISORDER OR IMPAIRMENT AND ALCOHOL AND DRUG ABUSE. AND I THINK DR.^KROP ALSO TESTIFIED THAT HE WAS HIGH AT THE TIME OF THE CRIME. THERE WAS SOME EVIDENCE THAT DISPUTED THAT BUT THAT WAS THE TESTIMONY AND THAT WAS ALSO THE DEFENSE POSITION THAT HE WASN'T FULLY SOBER AT THE TIME OF THE CRIME. I THINK IT IS FAIR TO POINT OUT THIS IS A CASE IN WHICH THE DEFENDANT TOOK AN IRON PIPE, ADMINISTERED THREE SKULL-CRUSHING BLOWS TO ALBERT FLOYD AND WHEN LINDA FULLWOOD WOKE UP HE BROKE HER ARMY, BROKE HER FINGERS AND HER RIBS. IT WAS A VERY VIOLENT CRIME COMMITTED BY SOMEBODY WHO HAD PREVIOUSLY COMMITTED A MURDER.

CHIEF JUSTICE: WAS HAC FOUND?

NO, MA'AM.

AND IN LIGHT OF THE MURDER I THINK THE COUNSEL DID A VERY GOOD JOB TO GET A 7-5 JURY RECOMMENDATION IN THIS CASE.

WAS THERE EVIDENCE OF WHETHER OR NOT THE MURDER VICTIM WAS ASLEEP AT THE TIME THAT THIS MURDER TOOK PLACE OR DID HE EVER WAKE UP? IS THAT A PART OF THE RECORD?

HE WAS ASLEEP, AND WAS STRUCK ON THE HEAD WITH ENOUGH FORCE TO CRUSH HIS SKULL SO HE DID NOT WAKE UP, AND THE EVIDENCE INDICATES THAT THE DEFENDANT WAS UNAWARE THAT LINDA FULLWOOD WAS SLEEPING NEXT TO HIM SO SHE DID WAKE UP AND STARTED SCREAMING AND THAT'S WHEN HE ATTACKED HER AND THAT ATTACK CEASED ONLY WHEN JIMMY HALL WHO WAS AROUND THE CORNER HEARD THE SCREAMING AND RAN AROUND THE CORNER AND CONFRONTED THE DEFENDANT WHO DROPPED THE PIPE AND RAN OFF. IF THERE ARE NO OTHER QUESTIONS I WILL RELY ON MY BRIEF. THANK YOU.

CHIEF JUSTICE: REBUTTAL MR.^NORGUARD.

HELP ME WITH THE RECORD WITH REFERENCE TO THE LAWYER'S TESTIMONY, BECAUSE I REALLY UNDERSTOOD FROM YOUR PRESENTATION BOTH IN THE BRIEF AND TODAY THAT IT WAS SIMPLY A MATTER OF THE LAWYER SAYING, WELL, I JUST WANTED TO GLOSS OVER THAT PRIOR CONVICTION AS OPPOSED TO TESTIFYING I FULLY INFORM MYSELF AND I MADE A DECISION THAT THERE WAS AS MUCH BAD AS THERE WAS GOOD AND, THEREFORE, I CHOSE NOT TO --

YES, SIR.

THE FOCUS OF THE TRIAL LAWYER WAS BASED ON THIS GLOSSING OVER, THE FACT THAT HE HAD PLED. THE ONLY DISCUSSION REALLY IN TERMS OF A FURTHER ANALYSIS AS TO WHY HE WOULD NOT PRESENT THIS EVIDENCE OF MITIGATION WAS THAT HIS COMMENT IF I PRESENT THIS EVIDENCE IN MITIGATION, THEN THE STATE WILL BRING OUT THE FACTS OF THE OFFENSE AND THEN AT THAT POINT THEN THE EXAMINATION OF TRIAL COUNSEL WAS BROUGHT OUT THAT THE STATE LISTED NO WITNESSES -- WITNESSES, HAD NO WITNESSES AVAILABLE AND THAT CERTAINLY DEFENSE COUNSEL --

BUT HE DID TESTIFY AS TO HIS BELIEF IN THE POTENTIAL DANGER OF GOING INTO IT FURTHER?

NO, SIR. IN THE CONTEXT OF ISSUE NUMBER ONE DEALT WITH THE PRESENTATION OF MENTAL HEALTH EVIDENCE. THERE WAS A DISCUSSION AS TO A PRIOR MEDICAL RECORD HE FELT HE WAS NOT GOING TO UTILIZE A MENTAL HEALTH RECORD BECAUSE IT HAD SOMETHING BAD IN IT WHEN, IN FACT, IT REALLY WASN'T IN THE CONTEXT THAT HE UNDERSTOOD IT.

BUT YOU ARE TALKING ABOUT THAT AS A SEPARATE ISSUE THAN THIS ISSUE OF THE PRIOR CONVICTION?

YES, SIR. THE DEFENSE COUNSEL AT THE HEARING NEVER ARTICULATED ANY SPECIFIC REASON SAYING IF I PRESENT EVIDENCE OF HIS CAPACITY UNDER THE REQUIREMENTS OF THE LAW OF BEING SUBSTANTIALLY IMPAIRED, THE FACT THAT HE HAD MENTAL HEALTH ISSUES, WAS DRUNK AT THE TIME OF THE PRIOR MURDER, THE FACT IT INVOLVED AN ARGUMENT HE DID NOT ARTICULATE ANY REASONS AS TO WHAT DOORS THAT WOULD OPEN THAT WOULD BE BAD FOR HIM AND WHEN ASKED THAT QUESTION INDICATED THAT HE COULD NOT INDICATE ANYTHING THAT WOULD COME OUT IN THAT CONTEXT THAT WOULD BE BAD.

SO LET ME SEE IF I UNDERSTAND YOU CORRECTLY. HIS TESTIMONY CONCERNING THE BROTHER, HIS ATTACK ON THE BROTHER, THE TESTIMONY CONCERNING THAT'S SOMETHING IN THE RECORD THAT SHOWS HE WAS NOT REMORSEFUL AND THOSE THINGS WERE NOT TESTIFIED TO IN THAT CONTEXT BUT THEY WERE TESTIFIED TO AT THE EVIDENTIARY HEARING.

THEY WERE NOT. THEY NEVER CAME IN. I MEAN THOSE THINGS JUST TO, OKAY, TO TRY TO UNDERSTAND YOUR QUESTION.

CHIEF JUSTICE: MR.^NORGUARD, YOU RESPOND TO JUSTICE QUINCE, I WANT TO REMIND YOU YOU ARE OUT OF TIME.

I WILL BE AS BRIEF AS I CAN. CERTAINLY THERE WERE SOME THINGS IN THE RECORDS WHICH MAY HAVE -- YOU MAY HAVE NOT WANTED TO COME INTO EVIDENCE BUT CERTAINLY DURING THE EXAMINATION, THE TRIAL ATTORNEY, WE TALKED ABOUT MOTIONS IN LIMINE, THE FACT THAT JUST BECAUSE YOU PRESENT EVIDENCE IN MITIGATION DOESN'T MEAN THAT EVIDENCE OF NONREMORSE WOULD NECESSARILY COME OUT, SO CERTAINLY, YOU KNOW, THERE WERE THINGS NOT IN THE CONTEXT OF THE PRIOR MITIGATION OF THE SECOND DEGREE MURDER BUT IN HIS OVERALL MENTAL HEALTH RECORDS THERE WERE CERTAINLY SOME TWO-EDGED SWORD THINGS IN THERE, BUT I'M NOT SUGGESTING THAT THAT'S WHAT DEFENSE COUNSEL WOULD BRING OUT TO MITIGATE THAT PRIOR MURDER AND THE THINGS HE COULD HAVE BROUGHT OUT TO MITIGATE THAT PRIOR MURDER WOULD NOT OPEN THE DOOR TO ANY OF THOSE THINGS AND DEFENSE COUNSEL DID NOT ARTICULATE THAT.

THESE WERE THINGS THAT WERE ACTUALLY IN THE RECORD THAT WOULD HAVE BEEN USED TO MITIGATE THE SECOND DEGREE MURDER?

AND CERTAINLY WHEN RECORDS ARE PRESENTED ITEMS THAT ARE INADMISSIBLE OR IRRELEVANT OR PREJUDICIAL CAN BE EXCLUDED. YOU DON'T HAVE TO INTRODUCE THE RECORDS. THANK YOU VERY MUCH.

CHIEF JUSTICE: BEFORE YOU SIT DOWN, WERE YOU APPOINTED AS REGISTRY COUNSEL IN THIS CASE OR ARE YOU ACTING AS PRIVATE COUNSEL?

I CAME ON THIS IS ORIGINALLY A CCR NORTH CASE WHEN THAT WAS DISBANDED MISS BREWER TOOK THE CASE WITH HER. I CAME ON BOARD TO HELP HIM WITH THE EVIDENTIARY HEARING AND THEN SHE LEFT PRIVATE PRACTICE AND SO I CONTINUED ON WITH THE CASE.

SO YOU ARE AS REGISTRY COUNSEL?

YES, MA'AM.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE ITS MORNING BREAK OF 15 MINUTES.

THE MARSHAL: PLEASE RISE.