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Guerry Wayne Hertz v. State of Florida

THE MARSHAL: PLEASE RISE . LADIES AND GENTLEMEN, THE FLORIDA SUPREME C OURT. PLEASE BE SEATE D .

CHIEF JUSTICE: READY FOR THE CASE O F H ER TZ VER SE - - VERSUS THE STATE OF FLORIDA.IT AEARS THA T Y OU A RE R EADY TO PROCEED.

MAY IT PLEASE THE COURT, I'M B AY A H ARRISO N S UB STIT UTIN G T ODAY F OR CLYDE T AYLO R , COUNSEL FOR THE A EL LANT , GUERRY HERTZ. I WOULD LIKE TO R ES ERVE FIV E MINUTES FOR R EBUTTAL IF I M AY . YOUR HONOR, HAVIN G P RESENT ED MORE THAN 12 POS T- CO NVIC TION CASES BEFORE THIS COURT O VER A 2 0-YEAR PERIOD AND H AV IN G OBSERVED MANY MORE, I AM VERY MUCH A WARE THA T SOM ETIM ES CLAIMS O F INE FF ECTIVE ASSISTANCE OF COUNSEL B EC OME A LITTLE FRUSTRATING TO THE COURT AND IT I S E SPEC IA LLY TRUE IN A C ASE LIKE T HIS W E HAVE TO ADMIT T HA T M R. H ERTZ ' TRIAL ATTORNEY WAS BOTH EXPERIENCED A ND VERY C ONCE RN ED ABOUT HIS CLI EN T.

HOW ABOUT WE G O TO

I DID N'T HEAR W HAT HE S AID.

VERY CON CERNED ABOUT HIS CLIENT.

WE ACK NOWL ED GE D T HAT HE W AS CONCERNED VERY MUCH A BOUT HIS CLIENT. THIS WAS A T OU GH CAS E , THE FACTS WER E G RI SL Y AND THE STATE EAS IL Y P ROVE D T HE E XISTENCE O F SEV EN S TA TUTO RY AGGRAVATORS.

LET'S GO TO THE MEAT O F WHAT WE ARE TALKING ABOUT, AND WE WOULD ALL C ER TA INLY HOPE THAT ONCE W E REACH THIS LEVEL WE CAN AT L EA ST A GR EE O N W HA T THE RECORD IS.

YES, SIR.

AND I T S EE MS A S T HOUG H , THIS IN G REAT P AR T S EEMS TO SPIN FROM THE E ARLIER T ESTIMONY OF DR. S ES TA , I F I 'M SAYING THAT CORRECTLY, AND WHETHER DR. SES TA HAD REP OR TE D BRAIN D AMAGE A ND W HAT 'S CONTAINED IN THE CROSS-EXAMINATION OF D R. S ES TA , IN COURT P ROCEEDINGS. I MEAN, IS THA T A F AI R SUMMA RY OF WHERE THIS COMES FRO M?

YES, SIR.

AND I F W E L OO K A T AND R EA D WHA T D R. SES TA H AS SAID , D OE S HE S AY O R D ID HE SAY I N THA T CROSS-EXAMI NATION AFTER BEING C ROSS-EXAMINED , THE END LIN E , THAT BRAIN DAMAGE I S I NVOLVED IN THIS C AS E ?

YOUR HONOR, I HAV E A Q UO TE FROM D R. SES T , AND I W AN T T O S ES TA .

I DO , TOO.

AND I WANT TO MAK E SUR E I REPRESENT THE RECORD CORRECTLY.I THINK HE SAID AT ONE POINT THERE WERE INDICATIO NS O F M IL D CEREBRAL D YSFUNCTION F RO M T HE WRITTEN B ATTERY. IT ALSO HAD M IL D C ER EB RA L DYSFUNCTION , A M IL D P AT TERN O F BRAIN

FUNCTIONING ON THE LEFT SIDE OF THE BRAIN THAT WAS FUNCTIONING MORE POORLY THAN THE RIGHT SIDE. HE SAID THE FRONT OR ANTERIOR PORTION OF THE BRAIN WAS NOT FUNCTIONING AS WELL AS IT SHOULD AND THEN HE SAID , IF I'M NOT MISTAKEN , I SAW FLAGRANT DEFICITS IN THE FRONTAL LOBE FUNCTIONS AS WELL , AND HE EVEN WENT ON TO SAY THAT HE - - THAT HIS NEUROANATOMY PROFESSOR HAD SUMMED THINGS UP WHEN HE SAID YOU ARE TALKING ABOUT FRONTAL LOBE PROBLEMS THAT SEPARATE THE BEHAVIOR OF A FIVE-YEAR-OLD FROM THE BEHAVIOR OF A 30-YEAR-OLD.SO, YOUR HONOR, YES , THAT'S WHAT DR. SETASAI D.

DID HE ALSO SAY THAT HE HAD SOME NEURODEFICIT DEVELOPMENTAL DISORDERS?
YES, SIR.

CONSISTENT IN PART WITH HIS UPBRINGING AND THIS NONVERBAL CIRCUMSTANCE THAT UNFORTUNATELY THE YOUNG PERSON WAS IN , BUT ALSO FOUND NO INDICATION, RETARDATION , BORDERLINE INTELLECTUAL FUNCTIONING , A XIS 1 MAJOR ILLNESS AND THE TRIAL JUDGE STATED AND FOUND THAT THERE WAS NO BRAIN DAMAGE. IS THAT A MISREADING OF THIS RECORD?

NO, YOUR HONOR, I DON'T THINK THAT'S A MISREADING , BUT I THINK THAT WHAT DR. SETASAI SPEAKS FOR ITSELF AND THAT HE DID INDICATE THAT THERE CERTAINLY WAS SOME CEREBRAL DYSFUNCTION HERE , AND I DON'T KNOW IF THAT'S TOTALLY ANALOGOUS WITH BRAIN DAMAGE BUT I GET SCLOSE AND DR. MOSSMAN WHO WE ASKED TO PARTICIPATE DURING THE POST- CONVICTION HEARING CLEARLY SAID THAT HE FELT THERE WAS BRAIN DAMAGE AND HE WENT EVEN FURTHER AND SAID THAT HE THOUGHT IT WAS GENETIC IN NATURE. SO MY POINT IS THERE WAS DEFINITELY INFORMATION HERE TO THE EFFECT THAT THIS YOUNG MAN WAS A LOT MORE MENTALLY ILL THAN DR. DERRICO INDICATED HE WAS - - DERRICO.

NOW , DR. MOSSMAN , DIDN'T HE USE THE SAME TESTS - - HE DIDN'T DO ANY INDEPENDENT TESTING, DID HE? HE USED THE SAME TESTS THAT WERE DONE BY THE DOCTOR WHO HAD, IN FACT, TESTIFIED AT THE PENALTY PHASE?

NO, YOUR HONOR. DR. MOSSMAN WENT TO THE PRISON AND CONDUCTED HIS OWN TESTING . NOW, DID SOME OF THOSE TESTS OVERLAP? YES, YOUR HONOR , I'M SURE THAT THEY DID, BUT HE DID HIS OWN INDEPENDENT TESTING, AND HE CAME UP WITH CONCLUSIONS THAT INDICATED THAT THIS YOUNG MAN HAD A LOT MORE SERIOUS PROBLEMS MENTALLY OF - - THAN DR. DERRICO SAID.

DID DR. MOSSMAN SAY ESSENTIALLY THAT WE INTERPRET THIS DATA DIFFERENTLY ?
I THINK IT WAS MORE THAN JUST DEGREE. I THINK THAT THAT'S PART OF IT , BUT DR. MOSSMAN WAS PRETTY INSISTENT THAT THIS YOUNG MAN HAD MENTAL PROBLEMS , THAT FAR EXCEEDED THOSE POINTED OUT BY DR. DERRICO, BUT WHAT I WANT TO

WE'RE GETTING DOWN TO , ARE WE NOT, TO TRY TO EVALUATE WHETHER THIS LAWYER , HAVING DONE WHAT WAS ACCOMPISHED WITH REGARD TO MENTAL HEALTH IN THIS CASE , WHETHER THAT LAWYER OPERATED AS COUNSEL SHOULD OPERATE? I MEAN THAT'S REALLY WHAT WE ARE HERE ABOUT, ISN'T IT?
ABSOLUTELY.

AND WE KNOW DR. MOSSMAN HAS EXPRESSED OPINIONS THAT THE COURT HAS FOUND NOT CREDIBLE. YOU AGREE WITH THAT. THE TRIAL JUDGE FOUND THIS WITNESS NOT CREDIBLE?

YOUR HONOR, I KNOW ABOUT WHAT YOU ARE REFERRING TO. I DON'T THINK THEY FOUND DR. MOSSMAN NOT CREDIBLE.

HOW ABOUT HIS TESTIMONY NOT CREDIBLE?

THEY DID NOT ACCEPT HIS TESTIMONY. I DON'T THINK THEY FOUND HE WAS FAKING ANYTHING OR ANYTHING LIKE THAT.

BUT AGAIN WOULD YOU GO IMMEDIATELY THEN TO WHAT IS IT THAT THIS LAWYER FAILED TO DO OR DID UNDER THESE CIRCUMSTANCES THAT BRING SIT INTO THAT CATEGORY UNDER STRICKLAND SO THAT, NUMBER ONE, IT WAS IN EFFECT. NUMBER TWO, THE PREJUDICE BY THAT.

I DON'T THINK COUSEL REALIZED THE SERIOUSNESS OF THE EMOTIONAL PROBLEMS, THE MENTAL PROBLEMS THAT THIS YOUNG MAN HAD, AND HE CONNECTED HIM TO THE STATUTORY MITIGATORS. NOW, LET ME BE SPECIFIC. FOR EXAMPLE, DR. MOSSMAN POINTED OUT THAT THERE SHOULD HAVE BEEN AN AGEMITIGATOR HERE. THIS SHOULD HAVE BEEN A GIVEN MORE PROMISE. THIS COURT - -.

DID ANYONE MENTION TO THE LAWYER ANYTHING OTHER THAN THE CHRONOLOGICAL AGE? ANY OF THE MENTAL HEALTH EXPERTS THAT WERE SELECTED, DID THEY BRING THIS TO HIS ATTENTION?

NO, SIR.

THEN HOW COULD HE HAVE DONE SOMETHING IF IT WAS NEVER BROUGHT TO HIS ATTENTION? ARE YOU SAYING THESE TWO EXPERTS HE HIRED WERE JUST CLEARLY NOT EXPERTS AT ALL? THAT THEY WERE JUST FUNDAMENTALLY NONEXPERTS IN THIS AREA?

BUT COUSEL SHOULD HAVE KNOWN THAT THE AGEMITIGATOR CAN DEAL WITH THE MENTAL AGE.

I UNDERSTAND THAT. I'M ASKING DID SOMEONE ALERT, IS THERE SOMETHING THAT ALERTED THIS LAWYER THAT SOMETHING OTHER THAN CHRONOLOGICAL AGE IS INVOLVED WITH THIS INDIVIDUAL?

SECTION 921.141.6 SHOULD HAVE ALERTED COUSEL.

SO THIS PERSON. HE IS NOT IN THE STATUTE. THIS PERSON, MR. HERTZ, IS THERE ANYTHING THAT HAD ANYONE DID TO ALERT THE LAWYER, MR. LAWYER, THIS IS CHRONOLOGICAL AGE IS NOT APPROPRIATE, THAT THERE IS A SUBTLE AGE PROBLEM HERE, BECAUSE OF HIS MENTAL CONDITION?

NO MENTAL HEALTH EXPERT DID THAT, YOUR HONOR, BUT COUSEL SHOULD HAVE KNOWN THAT, AND PROCEEDED ACCORDINGLY.

HOW WOULD AN ATTORNEY KNOW THAT?

BECAUSE THE STATUTE IS NOT JUST LIMITED TO CHRONOLOGICAL AGE.

I'M ASKING HOW WOULD HE KNOW THAT ABOUT MR. HERTZ IF MR. HERTZ IS FUNCTIONING AND HE GETS EXPERTS?

WELL, THIS COURT HAS MADE THAT POINT IN HERTZ VERSUS STATE AND FOSTER VERSUS STATE. TWO CASES DECIDED BY THIS COURT HAVE INDICATED THAT THIS MITIGATOR IS NOT

LIMITED TO CHRONOLOGICAL AGE .

WE ACCEPT THAT. BUT WHAT WAS THERE ABOUT THIS EVIDENCE THAT WOULD ALERT SOMEONE, THIS LAWYER , THAT MR. HERTZ WAS IN THAT CATEGORY?

I THINK THAT DR. SESTA 'S INFORMATION WOULD HAVE ALERTED THAT THIS YOUNG MAN HAS GOT SOME PROBLEMS. THAT ARE A LOT MORE SERIOUS THAN CAN BE ATTRIBUTED TO A BAD CHILDHOOD AND OTHER FACTORS , HIS CLUBFOOT AND THINGS OF THAT NATURE.

DID DR. SESTA EVER TELL THE LAWYER, MR. HERTZ HAS THE MENTAL AGE OF X , EVEN THOUGH HE IS OVER THE AGE OF 18?

HE DID NOT, YOUR HONOR .

I THINK THAT'S THE QUESTION JUSTICE LEWIS IS TRYING TO GET TO.

I HOPE I DIDN'T Dodge THE QUESTION. THE EXPERTS DIDN'T DO THAT , BUT THE ATTORNEY SHOULD HAVE KNOWN THAT THIS MITIGATOR IS NOT LIMITED TO CHRONOLOGY . THIS ALSO , ANOTHER STATUTORY MITIGATOR THAT COULD HAVE BEEN EMPHASIZED MORE HAD TO DO WITH EXTREME EMOTIONAL DISTURBANCE . THIS STATUTORY MITIGATOR FOUND IN 921 .161 B. DEFENSE COUNSEL NEVER EVEN MENTIONED THIS TO THE JURY AND JUDGE DURING THE PENALTY PHASE , AND WHEN YOU LOOK AT WHAT DR. SESTA SAID AND LOOK AT WHAT DR. MOSMAN POINTED OUT , THIS YOUNG MAN WOULD SEEM TO FIT UNDER THIS PARTICULAR CATEGORY.

NOW, WE DID HAVE A MENTAL HEALTH EXPERT WHO TESTIFIED AT THIS PENALTY PHASE?

DR. DERRICO.

THAT TALKED ABOUT ATTENTION DEFICIT , HYPERACTIVITY DISORDER, THAT KIND OF INFORMATION?

YES, YOUR HONOR.

SO WHAT WAS IT ABOUT THAT MENTAL HEALTH INFORMATION THAT WOULD HAVE SUPPORTED THE EXTREME MENTAL OR EMOTIONAL DISTURBANCE?

I WILL HAVE TO ADMIT I DON'T THINK DR. DERRICO 'S TESTIMONY WOULD DO THAT, BUT DR. SESTA 'S WOULD AND ONE OF THE POINTS WE HAVE MADE IS THAT COUNSEL SHOULD HAVE CALLED DR. SESTA AS A WITNESS , BECAUSE DR. SESTA WAS A NEUROPSYCHOLOGIST AND HE DID FIND THAT THERE WERE A LOT MORE PROBLEMS WITH THIS YOUNG MAN IN TERMS OF HIS CEREBRAL DYSFUNCTION .

CHIEF JUSTICE: THIS JUST SEEMS TO ME AND I KNOW YOU UNDERSTAND THAT THIS IS A VERY HYPHENS TO CROSS , THAT YOU ACKNOWLEDGE AT THE BEGINNING THIS WAS AN EXPERIENCED COUNSEL . THAT DID HIS BEST , AND YOU ALSO ACKNOWLEDGE THAT THIS IS A TERRIBLE , TERRIBLE CRIME WITH SIGNIFICANT , MULTIPLE AGGRAVATORS , AND I'M NOT SURE I EVEN SEE , JUST ASSUME WE GET THE FIRST PRONG , HOW YOU GET TO THE PREJUDICE PRONG THIS IS THAT OUR CONFIDENCE IN THE OUTCOME WOULD BE UNDERMINED .

YOUR HONOR, DURING CLOSING ARGUMENTS AND ALL DURING THE PENALTY PHASE , THE STATE ON THE ONE HAND HAMMERED AWAY AT THE STATUTORY AGGRAVATORS. NOW , WHEN YOU READ COUNSEL 'S ARGUMENTS, THERE IS NO REFERENCE WHATSOEVER UNLESS I'M MISTAKEN AND I'M TRYING TO BE ACCURATE HERE , EVER TO ANY OF THE STATUTORY MITIGATORS. SO WHAT YOU HAVE IS A SITUATION WHERE THE JURY IS THERE, THE JURY I

S LOOKI NG F OR GUIDANCE, A ND WHA T T HE JUR Y GETS I S SEV EN P ROVE N S TA TU TORY AGGRAVATO R S. THE E XISTENCE O F A T L EAST THREE STA TUTORY M ITIGAT OR S , AND NEVER ONE M EN TION W HATSOEVER B Y D EFEN SE C OU NS EL OF THESE S TA TU TO RY M IT IG ATOR S , INCLUDING THE ONES THAT I HAV E DISCUSSED HERE TODAY. AND THAT IS P REJUDI CE .

W HE N T RIAL COU NSEL IS MAKING AN ARGUMENT ABO UT A MITIGATING CIRCUMSTANCE , I T I S G ENERALLY B EC AUSE EVI DENCE HAS BEEN INTRODUCED T O SUP PORT THOSE MITIGATORS.

YES, YOUR HONOR.

WHETHER THEY B E S TA TU TORY OR NON ST AT UTOR Y . I'M HAVING A HARD TIM E H ER E WITH WHY D EF ENSE COUNSEL SHOULD HAVE ARGUED MIT IG AT OR S WHEN THERE WAS N O E VI DENC E THAT WAS INTRODUCED T O SUP PORT THOSE M ITIGATORS.

THE POINT IS E VI DENC E SHOULD HAVE BEE N P RO DU CED , EVI DENCE W AS AVA ILAB LE .

THERE ARE R EALL Y T WO ARGUMENTS THEN. THIS EVIDENCE SHO UL D HAVE B EEN PRESENTED AND THEN HE W OU LD HAVE HAD AN ARGUMENT TO MAK E TO THE JURY?

THE EVIDENCE W AS E XT AN T A T THE TIME OF THIS P ENALTY P HASE , ACC ORDING T O DR. SES TA THA T THERE WER E F LAGR AN T D EF ICIT S IN THE FRONTAL L OB E FUNCTIONING AND THE JURY NEVER HEARD THAT.

AND THAT EVIDENCE OF DR. SESTA WOULD HAVE S UP PO RTED THESE THREE STA TUTORY MITIGATORS?

T HA T' S M Y A RG UMENT , YOUR HONOR, AND I THINK CLEARLY I T WOULD HAVE . I 'D LIKE TO, I F I MAY , R ESER VE THE REST OF MY TIME.

JUST ONE Q UEST IO N. DOES T HE P ROBL EMAT IC H OM E L IF E WITH THE NONVE RB AL CIRCUMSTANCES PLAY ANY PART I N THE FRONT AL L OB E I SSUE ?

A CC OR DING T O DR. D'E RR IC O IT WOULD HAVE.

IT DID?

YES, YOUR HONOR.

ACCORDING TO D R. S ESTA AND MOSSMAN, THE PROBL EM W AS ORGANIC, THE PROBLEM D EALT WIT H A F RONT AL L OB BY DYSFUNCTION LOB E DYSFUNCTION AND THAT'S THE POINT. THE JURY DID NOT GIVE THE F ULL PICTURE.

DO YOU AGREE T HA T COU NSEL TESTIFIED AT THE E VIDENT IARY HEARING THAT THE REASON HE DID NOT CALL D R. SES TA A S A WITNESS WAS BECAUSE OF DR. SESTA'S POOR PERFORMANCE AT THE C OM PE TENC Y H EA RING O N CRO SS-EXAMINATION, AND HE SAID , QUOTE, AFTER SEEING WHAT HAENED TO D R. S ESTA O N CROSS-EXAMINATION, I D ECID ED THAT THE DOC TO R W AS NOT A GOO D WITNESS AND NOT THAT HELPF UL AMONG OTHER THINGS D R. SES TA TESTIFIED TO POS SI BL E FRO NT AL LOBE DAMAGE ON CROSS-EXAMINATION AND THE N BACKED OFF O N CRO SS-EXAMINATION. WHY ISN'T THAT A STR AT EGIC D ECISION THAT C OUNSEL M ADE NOT TO CALL THIS WITNESS ?

THA T COULD B E , I A DMIT , A STRATEGIC DECISION. HOWEVER, AS I A DDRESSED I N M Y BRIEFS, THA T R EALL Y W ASN' T T HE CASE. IF YOU LOOK AT T HE CROSS-E XAMINATION, DURING THA T COMPETENCY PROCEEDING, THE STATE ATTORNEY DIDN'T DO AS GOOD A J OB A S I T HI NK M R. RAN D FELT HE DID.

NOW WE'RE GETTING INTO SECONDGUESSING THE JUDGMENT AS TO WHETHER HE THOUGHT CROSS-EXAMINATION WAS EFFECTIVE OR NOT. IF A COUNSEL SAYS I BELIEVE HE WAS CROSS-EXAMINED AND HE WAS NOT A GOOD WITNESS, DO WE THEN GO BEHIND HIS CONCLUSION AND ANALYZE OURSELVES WHETHER THAT WAS A GOOD WITNESS OR NOT TO SECONDGUESS THE STRATEGIC DECISION?

NO, YOUR HONOR, I CERTAINLY AGREE WITH YOU, DEFERENCE MUST BE GIVEN TO COUNSEL, I WILL AGREE, BUT THAT DOESN'T MEAN YOU CAN'T LOOK AT IT AND I ASK YOU TO LOOK HARD AT IT, LOOK AT THAT TESTIMONY AND I THINK YOU WILL SEE THAT DR. SESTA HELD UP A LOT BETTER THAN MR. RAND THOUGHT HE DID. THANK YOU, YOUR HONOR.

CHIEF JUSTICE: THANK YOU, MR. HARRISON. MISS SNURKOWSKI? AFTER THE LAST CASE.

A LOT OF SKIS. MAY IT PLEASE THE COURT, I AM CAROLYN SNURKOWSKI. I'M ASSISTANT DEPUTY ATTORNEY GENERAL FOR THE IN TALLAHASSEE. I THINK FIRST REMARK I WOULD LIKE TO MAKE WITH REGARD TO DR. SESTA IS HE WAS THE ONE THAT ALSO TIED IN THE FACT THAT THERE WAS A DISPARATE NUMBER BETWEEN THE VERBAL IQ AND THE PERFORMANCE IQ OF MR. HERTZ AND THAT WAS DUE TO HIS PARENT'S DEAFNESS AND SO AT THAT POINT I THINK DR. D'ERRICO GOT THAT INFORMATION. HE CONCURRED WITH IT BUT DR. MOSSMAN WAS THE ONE WHO CAME AT POST-CONVICTION PLEADING MOTION HEARING AND DECIDED THAT THAT WAS NOT ADEQUATE. SO THE EXPLANATION WAS THAT HE HAD AN IQ OF 91, AND HIS VERBAL IS 76 AND HIS PERFORMANCE IS 118 AND AVERAGING THAT OUT IT COMES UP TO A 91. THE EXPLANATION BY BOTH DOCTORS, AND EVEN DR., I WANT TO SAY DR. CONGER BECAUSE IF YOU RECALL IN THIS CASE, MR. WAS HERTZ PRETRIAL CHALLENGE, HIS COMPETENCY TO STAND TRIAL AND THAT'S WHEN A LOT OF THE TESTIMONY CAME OUT WITH REGARD TO DR. SESTA, DR. D'ERRICO AND DR. CONGER WHO WAS HIRED BY THE STATE TO TESTIFY AS TO WHETHER HE WAS COMPETENT TO TESTIFY. TWO DOCTORS FOUND IF GIVEN MEDICATION HE COULD BE MADE COMPETENT TO STAND TRIAL. DR. CONGER SAID WHILE THIS INDIVIDUAL DID SUFFER FROM ADHD, THAT WHEN HE TOOK HIS RITALIN HE WAS BETTER, BUT HE DIDN'T NEED TO HAVE MEDICATION TO BE COMPETENT AND ABLE AND I THINK THERE IS EVIDENCE THAT IS RESPONSIBLE AND REFLECTIVE IN THIS RECORD THAT EVEN THOSE DOCTORS, DR. D'ERRICO AND DR. SESTA ALSO CONCURRED THAT WHILE THE MEDICATION WOULD HELP, THAT HE KNEW WHAT HE WAS DOING, HE KNEW HOW TO OPERATE, HE WOULD CONTROL HIS BEHAVIOR, AND ALTHOUGH HE MAY HAVE SUFFERED FROM A ADHD, IT WAS NOT AN OVERBEARING PROBLEM IN HIS LIFE. HE NEEDED MEDICATION BUT HE COULD CONTROL HIMSELF.

WHAT'S THE DISTINCTION BETWEEN THE EFFECT ON ABILITY TO CONTROL ONE'S BEHAVIOR, WHAT'S THE DIFFERENCE BETWEEN THE ADHD DIAGNOSIS AND THE ORGANIC FRONTAL LOBE DAMAGE?

I DON'T THINK, I THINK THE DOCTOR, I DON'T THINK DR. MOSSMAN EXPLAINED THAT. I MEAN HIS DIAGNOSIS AT THE POST-CONVICTION HEARING WAS THAT THIS OCCURRED BASED ON HIS TESTING. THAT THERE WAS FRONTAL LOBE DAMAGE AND THERE WAS AN IMBALANCE WITH REGARD TO THE DEVELOPMENT OF THE BRAIN AND THAT WAS DR. SESTA'S KIND OF REMARKS THAT THERE WAS A DYSFUNCTION AS TO DEVELOPMENT OF THE BRAIN. DR. D'ERRICO DIDN'T HAVE ANY REMARKS WITH REGARD TO THAT. HE CLEARLY WAS OF THE MIND SET THAT THE VERBAL, BECAUSE MR. HERTZ HAD VERBAL DIFFICULTIES, THAT THAT WAS MANIFESTED BY LIVING IN AN ENVIRONMENT WHERE DEAF PEOPLE WERE PRESENT.

MY QUESTION IS THE CONCERN ABOUT FRONTAL LOBE DAMAGE AS I UNDERSTAND IT IS WHETHER YOU ARE ABLE TO

CONTROL.

CONTROL YOUR BEHAVIOR. AS I UNDERSTAND IT , IT IS A SIMILAR CONCERN WITH THE ADHD. SO HOW WAS THAT DIFFERENTIATED?

I DON'T THINK IT WAS . THAT'S THE POINT. I DON'T THINK THERE WAS ANY EVIDENCE IN THIS RECORD TO REFLECT THAT MR. HERTZ COULDN'T CONTROL HIMSELF, AND I DON'T THINK THAT MR. MOSSMAN OR DR. MOSSMAN WAS ABLE TO KNOW THAT. HIS ANALYSIS WAS BULLOOFKING AND TALKING TO HERTZ HE DID , IN FACT , INTERVIEW HIM AND DO TESTING BUT HE HAD NO REAL KNOWLEDGE OF THE RECORD. HE HAD NO KNOWLEDGE OF THE CRIME. HE HAD NO KNOWLEDGE OF THE PRETRIAL COMPETENCY HEARING. HE DIDN'T REALLY KNOW WHAT THE OTHER DOCTORS, HE DIDN'T SPEAK TO THE DOCTORS , HE DIDN'T KNOW WHAT THE DEFENSE WAS. HE WAS IN A VACUUM TRYING TO MAKE AN ANALYSIS OF WHAT THIS INDIVIDUAL WAS LIKE, AND WITHOUT ANY REAL HELP.

AND SO IN THE EVIDENTIARY HEARING IN THE MOTION BEFORE US, WAS HE ASKED TO TRY TO RELATE THE ORGANIC BRAIN DAMAGE THAT WITH THE BEHAVIOR IN THIS CRIME?

HE WAS ASKED, YOU KNOW , THE CRIME AND HE DID NOT KNOW THE CRIME. HE COULD NOT RELATE THAT. HIS IDEA WAS THAT THIS IS AN INDIVIDUAL WHO SUFFERS AND HE HAS GOT A MENTAL PROBLEM , BECAUSE THAT'S WHAT DR. MOSSMAN FOCUSES ON. WHEN THE RUBBER HITS THE ROAD IN THIS PARTICULAR CASE , THE ADDITIONAL EVIDENCE THAT WAS TO BE PRESENTED OR THAT SHOULD HAVE BEEN PRESENTED WAS MENTAL AGE. WE SHOULD HAVE SOMEHOW MASSAGED THAT TO GET MORE INFORMATION OUT OF THAT AND THAT WAS SOMETHING THAT DR. MOSSMAN FEATURED.

COULD WE GO BACK AND EXPLORE JUST A LITTLE BIT FURTHER , CERTAINLY COMPETENCY EXAMINATIONS ARE DIFFERENT AS FAR AS PURPOSE.

SURE.

FROM MITIGATION KINDS OF THINGS, BUT ARE THERE ANY ISSUES IN THIS CASE WITH REGARD TO WHETHER IT WAS INAPPROPRIATE TO RELY ON THE COMPETENCY ASPECT EXAMINATION AND CONTINUE THAT FORWARD AND USE THOSE SAME PEOPLE WITHOUT ADDITIONAL EXAMS OR AN YTHING LIKE THAT? WAS THERE ANYTHING LIKE THAT IN THIS CASE?

THAT WAS NEVER AN ISSUE AND THAT WASN'T ANYTHING THAT DR. MOSSMAN CRITICIZED?

NO, HIS CRITICISM WAS THAT DR. SESTA SHOULD HAVE BEEN THE ONE TO TESTIFY VERSUS DR. DRECKO HE THOUGHT HIS TESTIMONY WAS BETTER BECAUSE HE WAS THE ONE THAT SEEMED TO SUGGEST BUT NEVER REALLY MANIFEST MENTAL, FRONTAL LOBEDAMAGE , AND THAT JUST REALY NEVER MANIFESTED ITSELF. IT JUST WAS NOT THERE , WHAT THIS INDIVIDUAL HAS , A JUST BELOW AVERAGE IQ. HE FUNCTIONS IN SOCIETY , AND ALL OF THE DOCTORS PRETTY MUCH SAID THAT. THE ONLY ISSUE THAT REALLY CAME TO THE FRONT AT THE MOTION TO DETERMINE COMPETENCY , WAS WHETHER, IN FACT , HE WAS COMPETENT TO ASSIST BECAUSE OF HIS HYPERACTIVITY. AND, AGAIN , DR. CONGERS SAID HE WAS. HIS MEDICINE WOULD HELP BUT HE DIDN'T NEED HIS MEDICINE TO OPERATE IN THE NORMAL WAY OF THINGS AND BOTH DR. SESTA AND DR. D'ERRICO SAID IT WOULD BE NICE TO HAVE THEM SEND HIM AWAY TO A HOSPITAL FOR A COUPLE OF MONTHS BUT WE CAN MAKE HIM CHEMICALLY COMPETENT AND THAT WAS THEIR VIEW BUT EVEN THAT WAS SUSPECT BECAUSE THEY ALSO SAID THAT HE UNDERSTOOD IT - - UNDERSTOOD WHAT WAS GOING ON. HE COULDN'T COOPERATE WITH HIS CLIENT BECAUSE HE WASN'T INTERESTED OR HE HAD A DISINTEREST IN WHAT WAS GOING ON BUT THAT WAS SOMETHING HE COULDN'T TURN ON AND OFF , ALSO. I THINK THE RECORD IS PRETTY CLEAR ABOUT THAT. IF YOU LOOK AT THE LAY WITNESSES AND I THINK IT IS IMPORTANT TO REFLECT WHAT EXACTLY HAPPENED. THIS IS NOT JUST A DOCTOR ,

WHETHER A DOCTOR SHOULD HAVE TESTIFIED. WE HAVE LAY WITNESSES WHO TESTIFY TO HOW MR. HERTZ' LIFE WITH REGARD TO HIS ABILITY TO BE IN SCHOOL AND WHETHER HIS ABILITY TO HANDLE THINGS, HIS AUNT SAID THAT WHEN HE WAS IN SCHOOL AND HE HAD HIS RITUAL IN HE WAS VERY GOOD. HE GOT GOOD GRADES. WHEN HE WASN'T HE DIDN'T DO AS WELL. YOU HAVE SCHOOL TEACHERS SAYING THAT HE WAS HYPER ACTIVE. SO THE RECORDS WERE ALL THERE. AND I THINK THE ONE THING THAT PROBABLY IS SO UPS ETTING IN A WAY IS THAT THERE WE HAD DR. MOSSMAN PONTIFICATING ABOUT WHAT WAS GOING ON WITH THIS INDIVIDUAL AND HE DID NOT KNOW WHAT THE MITIGATION WAS THAT WAS PRESENTED. HE DID NOT KNOW THAT MR. RAND HAD PUT TOGETHER A BOOK ON MR. HERTZ' LIFE. HE DID NOT HAVE ACCESS TO IT. HE DIDN'T SEE ALL OF THE MEDICAL RECORDS, ALL OF THE STUFF WAS IN THERE, AND THAT WAS ALL PRESENTED. HE REALLY DID NOT KNOW WHAT WAS GOING ON AND IN A VACUUM WAS MAKING AN OBSERVATION WITH REGARD TO WHAT HE THOUGHT WAS THE PROPER WAY OR WHO WAS THE DOCTOR OR THE LAWYER SHOULD HAVE DONE WITH REGARD TO WHAT DOCTOR SHOULD HAVE BEEN BROUGHT TO THE FOREFRONT AND TESTIFIED.

WAS IT THE SAME TESTING INSTRUMENTS?

I THINK THEY WERE PRETTY MUCH - -

PRETTY MUCH THE SAME?

YES, AND CONTRARY TO WHAT MR. BAYA SAID - - I'M SORRY, I'M KNOWN BY A FOR EVER. I THINK THE RECORD DOES BEAR ON THE FACT THAT DR. MOSSMAN AT THE ENDED TO SAY IT WAS THE SAME EVIDENCE AND WE'RE MAKING A DIFFERENT ASSESSMENT OF THIS EVIDENCE. IF THE STATE HAS NO FURTHER QUESTIONS SORRY. I HAVE A SECOND CASE TODAY. IF THE COURT HAS NO FURTHER QUESTIONS I WOULD ASK THAT YOU AFFIRM. THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. REBUTTAL ?

THANK YOU. VERY BRIEFLY, COUNSEL. I JUST WANTED TO CORRECT THE RECORD UNLESS I MISUNDERSTOOD COUNSEL. DR. MOSSMAN DID SPEAK TO DR. SESTA PRIOR TO HIS TESTIMONY. HE READ THE ENTIRE PENALTY PHASE TRANSCRIPT. HE READ THIS COURT'S OPINION REGARDING THE DIRECT APPEAL, SO I THINK HE WAS FAMILIAR WITH THE FACTS OF THE CASE ALTHOUGH IT IS TRUE, AND HE DID NOT READ ONE OF THE DOCUMENTS, ONE OF THE THICK DOCUMENTS THAT COUNSEL SUBMITTED, BUT THE POINT IS REALLY THIS, YOUR HONOR, IN CONCLUSION, IF THIS JURY COULD HAVE KNOWN THAT THEY WERE REALLY DEALING WITH A PERSON WITH A MENTAL AGE AROUND 14, WOULDN'T THEIR RECOMMENDATION AS TO LIFE OR DEATH HAVE BEEN DIFFERENT? DR. MOSSMAN AND DR. SESTA INDICATED THAT THE BRAIN DAMAGE THAT THIS YOUNG MAN SUFFERED FROM IN QUOTE - - SUFFERED FROM IN QUOTE TELLING DR. MOSSMAN DIRECTLY RELATED TO IMPULSE, CONTROL, ANALYSIS, JUDGMENT, MATURITY, SELF CONTROL ALL OF THE THING THAT SEPARATES A DOLESCENTS FROM ADULTS.

HOW DID DR. MOSSMAN RELATE THAT DIAGNOSIS TO THE FACTS OF THIS CASE AND DIFFERENT IATE IT FROM THE ADHDI INFORMATION THAT THE JURY ALREADY HAD ?

JUSTICE BELL, WHAT DR. MOSSMAN!!!!!!! MOSSMAN DID WAS EMPHASIZE THE FACT THAT ADH DID NOT PLAY THE ROLE IN TERMS OF WHAT THIS YOUNG MAN'S PROBLEMS WERE THAT THE BRAIN DAMAGE DID. IN OTHER WORDS, DR. MOSSMAN SEEMED TO AGREE WITH DR. SESTA THAT THIS YOUNG MAN'S PROBLEMS WERE MUCH MORE SERIOUS AND MUCH DEEPER.

HOW DID THE DIFFERENT, I GUESS IT IS THE VOLITIONAL ISSUE, WHETHER IT IS CAUSED BY ORGANIC BRAIN DAMAGE OR ADHDI OR OTHER RELATIONSHIP, THE UNDERLYING ISSUE IS THE IMPULSE CONTROL.

YES, SIR.

AND HOW - - THEN THAT'S A PROBLEM, IS IT NOT, WITH ADHD THAT THERE IS INABILITY TO CONTROL YOUR IMPULSES?

THAT'S CORRECT, SIR.

SO HOW DID MOS SMAN DIFFERENTIATE THE QUALITY OF THE VOLITIONAL CONTROL THAT DIFFERENTIATES THE ORGANIC BRAIN DAMAGE FROM THE ADHD?

I THINK HE DID IT UPON HIS KNOWLEDGE OF THE SUBJECT AND HIS TESTING, AND I THINK HE WAS TRYING TO POINT OUT THAT, YOU KNOW, WHEN YOU THINK ABOUT AS THE CHIEF JUSTICE POINTED OUT, THE SERIOUSNESS OF THIS CRIME, THE HORRIBLE NATURE OF THIS CRIME, WHAT WENT ON WITH THESE THREE YOUNG MEN WHEN ALL OF THIS TOOK PLACE, IF PERHAPS THE JURY COULD HAVE UNDERSTOOD EXACTLY WHO THEY WERE DEALING WITH IN TERMS OF MR. HERTZ, THEIR RECOMMENDATION MIGHT HAVE BEEN DIFFERENT. I DO THANK YOU, HONOR AND THE COURT.

CHIEF JUSTICE: THANK YOU, MR. HARRISON. YOU MAY BE HERE FOR THE NEXT CASE.