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**Richard Lynch v. State of Florida**

**SC06-2233 | SC07-1246**

>> ALL RISE.

HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.

ALL THOSE HAVING BUSINESS BEFORE THIS COURT DRAW NYE. GIVE ATTENTION AND YOU SHALL BE.

GOD SAVE THE UNITED STATES, GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

FRIENDS, WELCOME TO THE FLORIDA SUPREME COURT AND THE ORAL ARGUMENT CALENDAR FOR FRIDAY, APRIL 11th.

FIRST CASE ON OUR CALENDAR THIS MORNING IS LYNCH VERSUS STATE OF FLORIDA.

READY TO PROCEED?

>> THANK YOU.

GOOD MORNING.

MAY IT PLEASE THE COURT.

MARIE LUIS PARMER AND RICHARD TUCKER ON BEHALF OF RICHARD LYNCH.

ISSUE I WANT TO ADDRESS THE CLAIM TWO OF THE BRIEF INEFFECTIVE ASSISTANCE OF COUNSEL IN PENALTY PHASE PROCEEDINGS SPECIFICALLY FOCUSING ON JURY WAIVER AND FAILURE TO INVESTIGATE AND PRESENT MITIGATION.

IN LOOKING AT THIS CLAIM I THINK THERE ARE THREE FACT THIS IS COURT SHOULD KEEP IN MIND WHEN ANALYZING THIS CLAIM.

FIRST, MR. ^LYNCH WAIVED SENTENCING JURY ON THE ADVICE OF COUNSEL.

SECOND, TRIAL COUNSEL MADE THE

MOST MEAGER OF EFFORTS IN INVESTIGATING MITIGATION IN THIS CASE.

>> LET'S GO BACK TO THE FIRST. WHAT PART DOES THE STRATEGY OF COUNSEL, EVALUATION, THE SEARCHING OF LOOKING AT WHAT THIS TRIAL JUDGE HAD DONE THE PAST, SHOULD THAT BE FACTORED IN OUR DECISION MAKING OR IS THAT TO BE IGNORED?

WHAT PART DOES THAT PLAY?

>> I THINK IN ANSWERING THAT YOU HAVE TO LOOK AT WHAT THE UNITED STATES SUPREME COURT HAS SAID IN WIGGINS, WILLIAMS V. TAYLOR AND --

>> I DON'T BELIEVE THEY HAVE ADDRESSED THAT SPECIFIC ISSUE IN THOSE CASE.

>> WELL WHAT THEY HAVE SAID IS THAT, COUNSEL'S STRATEGY DECISION IS ONLY REASONABLE TO THE EXTENT IT'S BASED ON REASONABLE INVESTIGATION.

AND --

>> I'M NOT ASKING ABOUT THE INVESTIGATION AT THIS POINT. IT IS, THE STRATEGIC DECISION, INITIALLY.

AND THEN THE NEXT POINT IS WHEN YOU'RE GETTING INTO THE SUBSTANCE WHAT HE DID, DIDN'T DO, WHAT HE SHOULD HAVE DONE. I'M TALKING SPECIFICALLY ABOUT THAT INITIAL DECISION-MAKING PROCESS.

>> WELL, I THINK THAT, ARGUABLY, THE STATE COULD ARGUE THAT COUNSEL HAD SOME PRIOR EXPERIENCE WITH THIS JUDGE, AND THAT THEY FELT, OR GUESSED THAT THIS JUDGE WOULD NOT IMPOSE DEATH.

>> IS THAT AS STRONG AS IT IS? IS THAT A FAIR STATEMENT FACTUALLY WHAT WE'RE DEALING WITH?

I DON'T PERCEIVE IT THAT WAY. SO I NEED TO BE CORRECTED IF I'M WRONG.

>> MY POSITION --

>> IT'S NOT A POSITION. WHAT ARE THE FACT.

>> WHAT TRIAL COUNSEL SAID, WAS, THAT THEY COULD NOT POINT TO ANY ARTICABLE FACT WHY THEY ADVISED LYNCH TO WAIVE THE JURY.

WHAT THEY SAID WAS, HE WAS IN FRONT OF JUDGE EATON HE THOUGHT WOE PROBABLY GET LIFE.

>> WELL, THERE WAS ANOTHER PART OF THEIR STRATEGY, THIS WAS A TERRIBLE CRIME IN TERMS OF THE, AND, AGAIN, ASSUMING THE GUILTY PLEA IS APPROPRIATE, PLEADING GUILTY, TO THE KILLING A THE MOTHER AND A, A 13-YEAR-OLD?

>> A 13-YEAR-OLD THAT'S RIGHT.

>> AND FELT THAT THAT, SITUATION, IN FRONT OF A JURY WOULD BE SO EMOTIONAL, THAT HERE IS JUDGE EATON AND THAT THANK GOD THAT THE CHANCES OF HIM MAKING A LIFE

RECOMMENDATION WERE, WERE BETTER THAN BEFORE A JURY.

AND I'M HAVING, IN TERMS OF THIS, THAT ISSUE, WHICH I DIDN'T KNOW IT WASED AS A SEPARATE ISSUE, THAT, THE, YOU WOULD HAVE TO THAT THE WAIVER OF THE JURY TRIAL IN THE PENALTY PHASE WAS NOT KNOWING OR VOLUNTARY.

ISN'T IT THE HILL VERSUS LOCKHART TEST THAT WOULD APPLY TO THE PENALTY PHASE AS WELL AS THE GUILT PHASE?

>> WELL, I THINK THAT IS SOMETHING THAT IS SUGGESTED IN MY BRIEF.

I THINK THERE'S, I DON'T KNOW, IN ALL CANDOR I AM NOT SURE IT'S ABSOLUTELY CLEAR.

I WAS NOT ABLE TO FIND CASE LAW THAT DEFINITELY APPLIES THE HILL v. LOCKHART STANDARD TO THE WAIVER.

>> I DON'T THINK WE'VE HAD SOMEBODY ACTUALLY MAKE THAT PRECISE ARGUMENT.

BUT I, I DON'T SEE, EVEN IF YOU, ANALYZE IT UNDER A DEFICIENCY, HOW, MAKING A JUDGMENT, AND THEN, THE PERSON

DOING IT KNOWINGLY, KNOWING HE HAS A RIGHT TO A JURY TRIAL, HE WAIVES THAT RIGHT.

HOW IS THAT, AN INVOLUNTARY WAIVER?

>> THE ARGUMENT IS THAT IT'S INVOLUNTARY BECAUSE IT'S NOT KNOWING, INTELLIGENT BECAUSE HE DIDN'T KNOW WHAT THE MITIGATION WAS BECAUSE THEIR INVESTIGATION WAS DEFICIENT. THERE WAS WEALTH OF MITIGATION THAT WASN'T PRESENTED. TRIAL COUNSEL CONCEDED AT EVIDENTIARY HEARING HE DIDN'T KNOW ABOUT THE BRAIN DAMAGE. IF HE HAD KNOWN ABOUT THE BRAIN DAMAGE HE WOULD HAVE ADVISED MR. LYNCH TO GO WITH SENTENCING JURY BECAUSE IN HIS EXPERIENCE, SENTENCING JURY, THAT IS THE TYPE OF TESTIMONY THAT SENTENCING JURIES CAN UNDERSTAND AND, OR THAT NOT CAN UNDERSTAND, BUT THAT, SEEMS TO HAVE A GREAT EFFECT ON THEM.

>> WHAT WAS THE STRONGEST CHARACTERIZATION OF BRAIN DAMAGE AND ANY EFFECT ON THE DEFENDANT THAT ULTIMATELY YOU PRESENTED IN THE POSTCONVICTION HEARING?

WHAT WAS THE STRONGEST CHARACTERIZATION?

>> THE STRONGEST CHARACTERIZATION WAS THAT EVERY DEFENSE EXPERT SAID THAT THE BRAIN DAMAGE, ALTHOUGH CLINICALLY CALLED MILD, ALTHOUGH CALLED MILD, SCIENTIFIC TERM WOULD BE MILD, WAS CLINICALLY SIGNIFICANT AND THAT IT WOULD, THAT IT WOULD SUBSTANTIALLY, THAT THEY ABILITY TO CONFORM HIS CONDUCT TO THE LAW WAS SUBSTANTIALLY IMPAIRED.

ALL THREE NEUROPSYCHOLOGY GIFTS NEUROLOGIST ALL ADDRESSED THAT.

IN PARTICULAR THE NEUROLOGIST EXPLAINED WHAT HE CALLED THE PERFECT STORM.

HE EXPLAINED THAT MR. LYNCH HAS

HAD THIS BRAIN DAMAGE.  
THAT IS, NO ONE HAS TESTED THE  
BRAIN DAMAGE BECAUSE NONE OF  
THE STATE, DR.^REESBAN WAS  
DISCREDITED AND DR.^DANZIGER  
DIDN'T ADDRESS THE BRAIN  
DAMAGE BECAUSE HE WASN'T  
QUALIFIED TO ASSESS THE  
NEUROPSYCHOLOGICAL DATA.  
>> THOUGHT THE FIRST MENTAL  
HEALTH EXPERT THAT EXAMINED THE  
DEFENDANT CAME UP WITH  
SOMETHING LIKE THIS.  
>> DR.^COX DID AND HE WAS NOT  
CALLED AT TRIAL.  
ONE OF THE BRINGINGEST BREAK  
DOWN IN TRIAL COUNSEL IS THAT --  
>> BUT A MINUTE AGO YOU THAT  
THE DEFENSE COUNSEL DIDN'T KNOW  
ABOUT ANY OF THAT.  
>> HE SAID HE DIDN'T KNOW.  
I THINK THAT'S, THAT'S THE, ONE  
OF THE BIGGEST PROBLEMS.  
DEFENSE COUNSEL GOT A REPORT ON  
APRIL 1st OF 2000 FROM DR.^COX.  
THAT SAID I THINK THIS MAN HAS  
BRAIN DAMAGED AND I RECOMMEND  
FURTHER NEUROPSYCHOLOGICAL  
TESTING.  
FOR WHATEVER REASON, COUNSEL  
DIDN'T FOLLOW UP ON THAT.  
>> WELL, I MEAN THE FACTS ARE  
THEY WERE DISSATISFIED FOR SOME  
REASON WITH THE REPORT OR  
APPROACH OR SOMETHING ABOUT  
THIS DR.^COX, CORRECT?  
AND --  
>> WHAT THEY SAID HIS REPORT  
WAS AMATEURISH AND THEY DIDN'T  
FEEL LIKE THEY HAD THE TIME.  
>> THEY WERE DISSATISFIED AND  
THEY HAD ANOTHER EXPERT,  
EXCORRECT?  
>> CORRECT.  
>> THEY DID HAVE A  
NEUROPSYCHOLOGY GIFT THAT WAS  
INVOLVED.  
>> RIGHT.  
>> AND THAT INDIVIDUAL  
TESTIFIED IN PROCEEDINGS.  
>> TESTIFIED AT TRIAL AND POST  
CONVICTION AND AT TRIAL SHE  
SAID HE DIDN'T HAVE BRAIN  
DAMAGE.

>> OKAY.

>> HOW ABOUT CONNECTING THIS UP  
THOUGH TO, TO YOUR QUESTIONING  
COUNSEL'S ADVICE TO THE CLIENT?  
THAT THEY SHOULD GO WITH A  
WAIVER OF THE JURY.

IN OTHER WORDS, THAT'S WHAT  
YOU'RE SAYING ARE YOU NOT?  
YOU'RE SAYING IF COUNSEL HAD  
GONE FURTHER, NOW, HE DID, HOLD  
ON JUST A MINUTE.

>> I'M SORRY, APOLOGIZE.

>> BECAUSE HE DID CONSULT WITH  
TWO MENTAL HEALTH EXPERTS IS  
THAT CORRECT?

>> HE DID.

>> I REALIZE THEY HAD A LITTLE  
DIFFERENT VERSIONS BUT, TELL US  
WHAT IT IS THAT IS SO  
COMPELLING NOW BUT THE  
DISCOVERY OF OTHER MENTAL  
HEALTH EXPERTS EVIDENCE AND  
OPINIONS THAT YOU FEEL JUST  
WOULD HAVE ABSOLUTELY, ANY  
REASONABLE ATTORNEY THEN WOULD  
HAVE SAID TO THEIR CLIENT, NOW  
DESPITE THE RECORD OF THIS  
JUDGE, AND MY STRONG FEELING  
ABOUT THIS, NOW I WANT TO YOU  
GO BEFORE A JURY?

IN OTHER WORDS, OKAY, WHAT IS  
IT THAT IS SO COMPELLING?

>> I THINK ONE, THAT'S WHAT  
TRIAL COUNSEL TESTIFIED TO.  
NUMBER TWO, DR.^OLANDER --

>> WAIT A MINUTE.

TRIAL COUNSEL TESTIFIED IF HE  
HAD HAD THIS MITIGATION HE  
WOULD HAVE GONE BEFORE A JURY?

>> YES.

>> TELL ME WHAT HIS TESTIMONY  
WAS IN THAT REGARD.

>> WHAT HE SAID IF HE HAD KNOWN  
OF THE BRAIN DAMAGE, BECAUSE  
BRAIN DAMAGE IS SUCH A WEIGHTY  
MITIGATOR AND IT'S TYPE OF  
EVIDENCE THAT IS SOMETHING YOU  
CAN PUT FORWARD TO A JURY AND  
THEY'RE MORE LIKELY TO ACCEPT,  
THAT HE WOULD IN FACT HAVE  
ADVISED HIS, ADVISED MR.^LYNCH  
NOT TO WAIVE THE JURY.

IN ADDITION, DR.^OLANDER WHO  
TESTIFIED AT TRIAL AND

POST-CONVICTION, SAID IF SHE HAD KNOWN OF THE BRAIN DAMAGE, IF SHE HAD TESTED FOR THE BRAIN DAMAGE IT WOULD HAVE OPENED UP, IT WOULD HAVE OPENED UP A WORLD OF MITIGATION SHE WOULD HAVE PROVIDED TO THE COURT AND IT WOULD AFFECT HIS PSYCHOSIS IN AN EXPONENTIAL MANNER.

>> WASN'T THAT AN AREA HER RESPONSIBILITY IN DOING A MENTALITY HEALTH EXAMINATION? YOU'RE TALKING ABOUT THIS IS A NEUROPSYCHOLOGIST?

>> WELL --

>> IS THIS A NEUROPSYCHOLOGIST?

>> SHE IS A NEUROPSYCHOLOGIST.

>> SHE SAID IF SHE HAD KNOWN?

>> YES, HER TESTIMONY WAS THAT TRIAL COUNSEL TOLD HER THAT THEY HAD RETAINED DR.^COX AND THEY WERE DISSATISFIED WITH DR.^COX.

SHE KNEW DR.^COX TO BE A VERY REPUTABLE NEUROPSYCHOLOGIST. SO SHE ASSUMED DR.^COX DID NOT FIND BRAIN DAMAGE SO SHE DID NOT TEST FOR IT.

>> DOESN'T THAT REALLY, DOESN'T THAT REALLY JUST SHOW HER NEGLIGENCE.

THAT IS, THAT, IF WE'RE TALKING ABOUT SOMEBODY THAT SAYS BOY, IF I HAD KNOWN ABOUT BRAIN DAMAGE BECAUSE SHE DIDN'T TESTIFY THAT SHE TALKED TO DR.^COX, RIGHT?

>> NO.

SHE DIDN'T TALK TO DR.^COX BUT YOU THINK IT SHOWS COUNSEL'S NEGLIGENCE BECAUSE, TRIAL COUNSEL KNEW OR SHOULD HAVE KNOWN THAT DR.^COX SAID THAT MR.^LYNCH HAD BRAIN DAMAGE.

SO WHEN THEY RECEIVED DR.^ --

>> SAY OR SHOULD HAVE KNOWN. DID KNOW?

>> WELL, IT'S REALLY NOT CLEAR THAT HE KNEW.

IT'S DEFINITELY CLEAR THAT HE HAD THE REPORT, DR.^COX'S REPORT IN HIS FILE.

IN THAT REPORT, IT SAYS THAT

MR. LYNCH HAS COGNITIVE DISORDER NOS AND THAT REPORT IS AN EXHIBIT IN EVIDENCE. WHICH I URGE THE COURT TO LOOK AT.

>> DID HE PROVIDE THAT REPORT TO THE SECOND EXPERT?

>> NO. THAT REPORT WAS IN THE TRIAL. WAS FAXED TO TRIAL COUNSEL. BUT THE POINT I WANTED TO MAKE IN RESPONSE TO JUSTICE ANSTEAD'S QUESTION IS THAT, UPON RECEIVING. DR. OLANDER'S REPORT, TRIAL COUNSEL HAD AN OBLIGATION TO SEE WHETHER OR NOT DR. OLANDER DID NEUROPSYCHOLOGICAL TESTING OR TEST FOR BRAIN DAMAGE. DR. NORGART PREVAILING STANDARDS AND PREVAILING NORMS. THEY WERE VERY AWARE OF BRAIN DAMAGE AS A DEFENSE MITIGATOR.

>> LET'S GO BACK TO THIS. I AGREE IT'S HARD TO UNDERSTAND HOW THE TRIAL COUNSEL WOULDN'T HAVE TOLD THE NEW EXPERT ABOUT THE BRAIN DAMAGE. BUT, IN TERMS OF PREJUDICE, BECAUSE THAT'S WITH WE'RE REALLY, I THINK THE THRUST OF THE QUESTIONS FROM JUSTICE ANSTEAD HAVE BEEN ABOUT PREJUDICE, IN TERMS OF UNDERMINING CONFIDENCE IN THE RESULT, FIRST OF ALL IF WE ASSUME WE HAVE A JUDGE TRIAL THAT IS VALID, PENALTY PHASE, THE JUDGE HIMSELF SAYS, THAT HE'S LOOKED AT THIS WHOLE THING, CAREFULLY CONSIDERED THE BRAIN DAMAGE ISSUE, REVIEWED THE TRANSCRIPTS AND, CONCLUDE THAT THE MITIGATING CIRCUMSTANCES WERE PREPARE RATLY WEIGHED AFTER THE PENALTY PHASE HEARING AND DESERVES NO FURTHER WEIGHT. ASSUME IF WE AGREE WITH THAT, THAT IS, THE MITIGATORS WERE FOUND AND, APPROPRIATELY WEIGHED, WHERE IS THE PREJUDICE, ESPECIALLY -- I

UNDERSTAND THE BRAIN DAMAGE  
MAKES YOU THINK, SOMETHING BUT,  
HERE, IN TERMS OF THE CRIME,  
THIS WAS NOT A SPUR OF THE  
MOMENT CRIME.

IT WAS A, A WELL-THOUGHT OUT  
CRIME THAT I DON'T SEE WHERE  
THE BRAIN DAMAGE FITS IN TO  
SAYING, THAT IT MITIGATES THIS  
CRIME CONSIDERING THE  
AGGRAVATORS.

I THINK THAT'S WHAT YOU REALLY  
HAVE TO CONVINCING US OF, IN A  
VERY COMPELLING WAY TO, BECAUSE  
I THINK THAT, WOULD BE YOUR  
STRONGEST POINT.

BUT I'M CONCERNED THAT I'M JUST  
NOT SURE I SEE PREJUDICE.

>> WELL, FIRST OFF, THE BRAIN  
DAMAGE IS NOT THE ONLY  
MITIGATION THAT WASN'T  
PRESENTED.

THE COURT HAS TO LOOK AT ALL  
THE MITIGATION THAT WASN'T  
PRESENTED BUT LOOKING  
SPECIFICALLY AT THE BRAIN  
DAMAGE, TO ANSWER YOUR  
QUESTION, THE BRAIN DAMAGE  
WOULD LESSEN THE, ONE OF THE  
AGGRAVATORS THAT WAS FOUND WAS  
CCP THE BRAIN DAMAGE WOULD  
LESSEN THE CCP.

>> YOU CAN SAY IT COULD BUT  
HOW?

IN OTHER WORDS YOU STILL HAVE,  
YOU'VE GOT THE LETTER HE WRITES  
TO HIS WIFE.

YOU HAVE HIM COMING WITH A BAG  
FULL OF GUNS.

YOU HAVE HIM MAKING A CAREFUL  
PLAN TO KILL THIS WOMAN, NOT --

>> NOT THE DAUGHTER.

>> NOT THE DAUGHTER, BUT  
EVERYBODY, CCP WASN'T FOUND AS  
IT RELATES TO THE DAUGHTER.

>> IT WOULD EXPLAIN THE BRAIN  
DAMAGE, WHAT DR. ^MCRANY REALLY  
SUMS IT UP.

HE CALLED IT THE PERFECT STORM.  
THIS WAS A MAN WHO WAS BARELY  
GETTING BY.

HE HAD, HE WAS JUST BARELY  
HOLDING IT TOGETHER.

WHEN HE WAS CONFRONTED WITH,

ANNIVERSARY --

>> WOULD YOU EXPLAIN BARELY  
HOLDING IT TOGETHER.

SEEMS LIKE HE WAS HAVING A  
PERFECTLY NORMAL LIFE.

HE WORKED.

HE HAD A WIFE.

HE WAS SEEING SOMEONE ELSE ON  
THE SIDE AND KEPT ALL OF THAT  
FROM HER AND SO, WHAT WAS THIS  
BARELY KEEPING IT TOGETHER?

>> HE DID NOT WORK.

>> HE WAS STAY AT HOME DAD?

>> HE WAS STAY AT HOME DAD  
AND --

>> WAS THERE A DISABILITY?

>> THERE WAS NO OFFICIAL  
FINDING OF A DISABILITY BUT  
CERTAINLY HE HAD A MENTAL  
DISABILITY.

I THINK, IF YOU LOOK AT LAY  
WITNESS TESTIMONY IN  
CONJUNCTION WITH THE EXPERT  
TESTIMONY, THIS IS A MAN WHO  
HAD LIVED WITH HIS MOTHER WELL  
INTO HIS 30s.

HE, DID NOT HAVE FRIENDS.

HE DID NOT HAVE A GIRLFRIEND  
UNTIL HE MARRIED HIS WIFE.

HE HAD HAD A JOB AS BUS.

WHEN HE CAME TO FLORIDA HE  
COULD NEVER REALLY MAINTAIN A  
JOB, WHICH IS CONSISTENT WITH  
MENTAL ILLNESS.

HE HAD SPENT OVER \$6,000 IN A  
MONTH ON PROVIDING A CAR AND AN  
APARTMENT FOR THIS GIRLFRIEND.

AND THE GIRLFRIEND HAD  
REJECTED HIM ON ANNIVERSARY  
DATE OF THE DEATH OF HIS  
MOTHER.

HIS WIFE CERTAINLY WAS GOING TO  
LEAVE HIM SOON AS SHE FOUND OUT  
WHAT HE HAD DONE.

HE WAS GOING TO LOSE HIS

CHILDREN AND HE WAS IN DEBT.

AND THESE MENTAL STRESSORS  
CREATED THE PERFECT STORM FOR A  
MAN WHO WAS PSYCHOTIC SEVERELY  
PSYCHOTIC.

ALL THE TESTING SHOWS THAT THIS  
MAN IS SEVERELY PSYCHOTIC.

ONE OF THE MOST SERIOUS MENTALLY  
ILL OF INMATES AND --

>> WAS THAT REFLECTED IN HIS DAILY LIFE BEFORE THIS HAPPENED?

>> WELL --

>> IS THERE ANY EVIDENCE OF ALL OF THAT?

YOU HAVE SCHOOL RECORDS.

>> HE HAD DELUSIONAL BELIEF HE HAD LONGSTANDING AFFAIR WITH A WOMAN WHICH WAS DISPROVED AT THE POST-CONVICTION HEARING. HE HAD WAS JUST SORT OF A GEEKY WEIRDO, I SUPPOSE A LAY TERM TO DESCRIBE HIM.

BUT THAT IS WHAT EXPERTS ALL SAY.

>> THAT DOESN'T MAKE SOMEBODY PSYCHOTIC THOUGH.

DON'T YOU NEED A LITTLE MORE THAN THAT?

>> DELUSIONAL BELIEF WAS EVIDENCE OF --

>> HOW MANY OF THE MENTAL HEALTH EXPERTS AT POST-CONVICTION, TESTIFIED THAT HE WAS SEVERELY PSYCHOTIC?

>> DR.^COX'S MMPI.

>> HOW MANY EXPERTS TESTIFIED? ABOUT SEVEN WEREN'T THERE?

>> THEY ALL SAID HE WAS PSYCHOTIC.

ALL THE DEFENSE EXPERTS WERE IN AGREEMENT THAT HE WAS PSYCHOTIC AND BRAIN-DAMAGED.

NONE OF THE EXPERTS SAID HE WASN'T PSYCHOTIC.

>> HOW MANY SAID HE WAS SEVERELY?

>> DR.^COX'S MMPI SAID IT SHOWED HE WAS SEVERELY PSYCHOTIC.

DR.^OLANDER SAID HE WAS SEVERELY PSYCHOTIC AT THE TIME AND LINKED ALL THOSE FACTS TO HIS BELIEF AT TIME OF THE CRIME.

>> SHE TESTIFIED AT TRIAL.

>> WERE FINDINGS NOT STATUTORY BUT FINDINGS OF MEANT AT THAT TIME MITIGATION WITH REGARD TO THOSE BUT THEY DIDN'T SATISFY THE STATUTORY ELEMENTS.

>> NOT FINDING OF PSYCHOTIC. REJECTED THAT, BECAUSE

DR.^OLANDER WAS OUT ON A LIMB  
ON HER OWN.

SHE DIDN'T HAVE ANY SUPPORT.

I SEEN I'VE GONE INTO MY

REBUTTAL TIME.

I LIKE TO RESERVE FOR REBUTTAL.

>> CERTAINLY.

>> MAY IT PLEASE THE COURT.

MY NAME IS BARBARA DAVIS.

I REPRESENT THE STATE OF

FLORIDA AS FAR AS WAIVING THE

JURY I WOULD DIRECT THE COURT,

ATTENTION TO PAGES 2045 TO 2047

OF JUDGE EATON'S WHEREIN HE

SAID, THERE IS NOTHING IN THE

RECORD TO SHOW THAT HE WOULD

NOT HAVE WAIVED THE JURY HAD HE

BEEN GIVEN ANY FURTHER

INFORMATION.

>> YOUR OPPONENT JUST SAID THAT

DEFENSE ATTORNEY SAID THAT HE,

IF HE HAD HAD THIS INFORMATION

ABOUT THE BRAIN PROBLEMS, THAT

HE WOULD NOT HAVE RECOMMENDED

TO HIS CLIENT THAT HE WAIVE A

JURY BECAUSE THIS IS THE KIND

OF INFORMATION THAT JURIES CAN

UNDERSTAND AND MAYBE BE

SYMPATHETIC ABOUT.

SO, IS THAT, FINDING, IN

KEEPING WITH THE EVIDENCE THAT

WAS PRESENTED?

>> MR.^FIGGATT ON PAGE 81 OF

THE EVIDENTIARY HEARING SAID,

IF I HAD EVIDENCE OF BRAIN

DAMAGE I MIGHT HAVE CONSIDERED

SELECTING A JURY, IF I HAD,

IRONCLAD EVIDENCE OF BRAIN

DAMAGE.

IT MIGHT HAVE AFFECTED MY

RECOMMENDATION.

PAGE E-84.

HE ALSO ADMITTED --

>> ISSUE OF, IF THE DEFENSE

ATTORNEYS HAD THIS REPORT FROM

DR.^COX, WHICH SAYS THAT THIS

MAN HAS SOME KIND OF BRAIN

IMPAIRMENT, AND THAT FURTHER

TESTING SHOULD BE DONE TO BEAR

THIS ALL OUT, WHY WASN'T THAT

IN FACT DONE?

>> IT WAS.

DR.^COX SAID THAT THERE'S A

COGNITIVE DYSFUNCTION AND WOULD

RECOMMEND FURTHER  
NEUROPSYCHOLOGICAL TESTING.  
DEFENSE COUNSEL BOTH TESTIFIED  
THEY HIRED DR.^OLANDER BECAUSE  
SHE IS A NEUROPSYCHOLOGIST.  
SHE TESTIFIED AT THE PENALTY  
FACE, I AM A  
NEUROPSYCHOLOGIST.  
SHE GAVE THEM A REPORT.  
THEY DID EVERYTHING THEY COULD.  
>> WHY IN THE WORLD DID THE  
LAWYER NOT PROVIDE DR.^COX'S  
REPORT TO HER?  
>> THEY TESTIFIED THEY BOTH  
TESTIFIED THEY DID NOT WANT TO  
SLANT DR.^OLANDER'S DECISION.  
THEY DID NOT WANT TO BIAS HER  
IN ANY WAY BECAUSE DR.^COX HAD  
A CERTAIN HISTORY.  
HE HAD A CERTAIN BENT.  
HE FOUND HIM ANTISOCIAL.  
>> SO THEY TESTIFIED THEY  
INTENTIONALLY, KEPT THAT REPORT  
AWAY.  
>> YES.  
>> FROM DR.^OLANDER.  
>> YES.  
>> WOULD YOU GO INTO THAT LAST  
STATEMENT THAT DR.^COX WAS  
DIRECTED TOWARDS AN ANTISOCIAL?  
>> DR.^COX HAD SOME INDICATIONS  
OF ANTISOCIAL PERSONALITY  
TRAITS.  
>> FOR THIS DEFENDANT?  
>> AND THE PARANOID PERSONALITY  
TRAITS WHICH THEY DID NOT WANT,  
THEY WERE EXPERT SHOPPING.  
>> BUT I CAN UNDERSTAND, NOT  
GIVING THE REPORT BECAUSE THEN  
THE REPORT WOULD BECOME  
DISCOVERABLE.  
SO I CAN UNDERSTAND THAT.  
BUT, I AM TRYING TO UNDERSTAND  
THAT YOU HAVE AN EXPERT, AGAIN,  
THEY HAVE ALREADY DECIDED, THIS  
GUY IS, HE'S GUILTY.  
ADMITTED, CAUGHT WITH  
EVERYTHING, THIS IS CLEARLY THE  
ONLY THING YOU CAN DO IN THIS  
CASE IS SAVE THIS MAN FROM  
DEATH PENALTY.  
AND, HE CONCLUDED, DR.^COX  
CONCLUDED, HE SUFFERED FROM A  
TYPE OF BRAIN IMPAIRMENT AND,

RECOMMENDED FURTHER  
NEUROPSYCHOLOGICAL TESTING.  
HOW IN THE WOULD SOMEBODY WHOSE  
ONLY JOB IS TO SAVE THE PERSON  
FROM THE DEATH PENALTY NOT TELL  
THE NEXT EXPERT, I'D LIKE YOU  
TO DO FURTHER  
NEUROPSYCHOLOGICAL TESTING?  
THAT'S KIND OF LIKE PENALTY  
PHASE 101 FOR SAVING SOMEBODY  
FROM THE DEATH PENALTY.

>> REMEMBER, DR.^OLANDER  
TESTIFIED AT THE PENALTY PHASE  
THERE WERE NO SIGNS OF BRAIN  
DAMAGE.

THEY HIRED HER AS A  
NEUROPSYCHOLOGIST.  
THEY WERE ALLOWED TO RELY ON  
WELL-KNOWN EXPERT IN HER FIELD.

>> THAT IS THE NORMAL CASE, YOU  
RELY, IF YOU HAVE AN EXPERT YOU  
GET A DIFFERENT EXPERT.  
BUT NOT WHEN YOUR KNOWLEDGE IS  
ALREADY COMMUNICATED BY AN  
EXPERT.

THAT, TO ME THAT'S DIFFERENT.

>> OKAY.

LET'S LOOK AT DR.^DANZIGER.  
HE TESTIFIED AT THE EVIDENTIARY  
HEARING, THERE ARE NO SIGNS OF  
BRAIN DAMAGE.

SO, IS THE, STATE'S, ARE YOU  
SUPPOSED TO TAINT HIM BY SAYING  
OKAY, DR.^DANZIGER, WE HE HAS  
BRAIN DAMAGE, GO IN AND FIND  
IT? NO YOU, REMEMBER SHE GAVE  
THEM SCHIZOAFFECTIVE  
DISORDER HE IS SCHIZOPHRENIC  
WITH A MOOD DISORDER.  
HE IS PSYCHOTIC.

>> WITH ALL THIS BRAIN DAMAGE  
INFORMATION, I DON'T SEE THE  
DOWNSIDE OF DEFENSE ATTORNEYS  
HAVING SAID TO THE SECOND  
EXPERT, LOOK, DR.^COX SAYS THIS  
MAN HAS SOME BRAIN IMPAIRMENT.  
WOULD YOU FOLLOW UP ON THAT  
BRAIN IMPAIRMENT AS A PART OF  
YOUR NEUROPSYCHOLOGICAL  
EXAMINATION?

THAT WAS A STRATEGIC DECISION  
NOT TO GIVE HER DOCTOR COX'S  
REPORT BECAUSE THEY --

>> WE UNDERSTAND NOT GIVING THE

REPORT.

BUT JUST GIVING THE INFORMATION  
BIT AND TELLING HER TO GO FROM  
THERE?

>> THEY BOTH TESTIFIED THAT'S  
WHY WE HIRED A  
NEUROPSYCHOLOGIST.  
THEY DIDN'T LIKE DR.^COX'S  
REPORT BECAUSE IT WAS  
DISCONNECTED TO THE FACT THEY  
WANTED A NEUROPSYCHOLOGIST TO  
CONNECT IT TO THE FACTS.

IF SHE TOLD HIM NO BRAIN DAMAGE  
AND TESTIFIES NO BRAIN DAMAGE,  
WHAT ARE YOU SUPPOSED TO DO?  
YOU'RE A LIAR, DR.^COX SAYS  
THERE IS BRAIN DAMAGE.

>> LET'S GO ONE STEP.  
RATHER THAN DIG YOUR HEELS ON  
THIS ISSUE.  
STEP OVER TO THE PREJUDICE  
ISSUE AND HOW DID THIS IMPACT  
THE CASE, THE CONDUCT AND WHAT  
WAS REFLECTED LET'S MAKE AN  
ASSUMPTION IF YOU CAN, WIPE IT  
CLEAR THE ATTORNEY ARGUMENT  
THAT WE REALLY JUST NEED TO  
FOCUS ON THE PREJUDICE ASPECT.  
WHAT, HOW DID BRAIN DAMAGE  
FIGURE INTO THIS WHOLE  
SCENARIO?

>> JUDGE EATON HAD FOUND THAT,  
BECAUSE, DR.^OLANDER HAD  
TESTIFIED ABOUT THE  
SCHIZOAFFECTIVE DISORDER AND,  
DOCTOR REIBSAME SAID THERE WERE  
PERSONALITY DISORDERS.  
HE HAD FOUND EMOTIONAL  
DISTURBANCE AND IMPAIRED BEHAVIOR.  
HE GAVE BOTH OF THOSE MODERATE.  
THEY DID NOT RISE TO THE LEVEL  
OF STATUTORY MITIGATION BUT HE  
GAVE THEM MODERATE WEIGHT AS  
NONSTATUTORY MITIGATION.  
IN HIS ORDER, THIS IS 2051 TO  
2054 HE WENT THROUGH EACH  
EXPERT'S TESTIMONY.  
EXPERTS DIFFER IN THEIR  
TESTIMONY.

DR.^WU SAID THERE IS FORENSIC  
EVIDENCE OF BRAIN DAMAGE.  
DR.^HOLDER SAID THERE ISN'T.  
THESE PEOPLE SAY THERE IS  
EVIDENCE OF BRAIN DAMAGE TO THE

MMPI.

DOCTOR DANZIGER SAID I LOOKED AT HIM AND INTERVIEWED HIM. I DON'T SEE BRAIN DAMAGE.

I SEE OTHER THINGS.

PUTTING THIS ALL TOGETHER AND LOOKING AT THAT JUDGE EATON FOUND THAT THE MILD EVIDENCE OF BRAIN DAMAGE WOULD NOT HAVE CHANGED THE WEIGHT HE GAVE TO EXTREME EMOTIONAL, THE EMOTIONAL DISTURBANCE OR THE SUBSTANTIAL IMPAIRED.

>> SO THE BOTTOM LINE THAT WE'RE TALKING ABOUT IS, THESE MITIGATION FACTORS WERE FOUND, NOT AS STATUTORY BUT AS MITIGATION?

>> YES, SIR.

>> AND THERE IS NO EVIDENCE IN THE, OR THE EVIDENCE AT THE EVIDENTIARY HEARING WOULD NOT ELEVATE THESE INTO THE LEVEL OF STATUTORY MITIGATION OR, I MEAN SEEMS YOU'RE OPPOSING COUNSEL IS ASSERTING THAT THIS CONSISTENT, CONSISTENT, NOT, FRAGMENTED BUT CONSISTENT, ALL THE EXPERTS AT THE EVIDENTIARY HEARING, HERE, WOULD HAVE PLACED THE NATURE OF THAT MENTAL ILLNESS TO THE LEVEL THAT IT WOULD HAVE REQUIRED A FINDING OF STATUTORY MITIGATION?

>> NO, SIR.

AND THAT'S NOT WHAT JUDGE EATON FOUND AT ALL.

>> I KNOW HE DIDN'T FIND THAT. THAT'S THE ISSUE WE ARE TALKING ABOUT, ARE WE NOT?

DOES THIS ELEVATE -- THERE WAS SOME DISCUSSION ABOUT THE MENTAL ILLNESS AND THERE WAS DISCUSSION OF QUALITY AND TO UNDERMINE OUR CONFIDENCE AND WHAT OCCURRED HERE.

>> IT DOESN'T.

WE HAD EIGHT MENTAL HEALTH EXPERTS.

THEY EACH HAD SOMETHING DIFFERENT TO SAY WE ALL AGREE, PSYCHOLOGISTS AND PSYCHIATRISTS MAY ALL FIND DIFFERENT THINGS.

COMMON DEFENSE AMONG THE DEFENSE WAS PSYCHOTIC ILLNESS WHICH IS SCHIZOAFFECTIVE DISORDER WHICH DR.^OLANDER ORIGINALLY FOUND AND SHE STUCK WITH THAT DIAGNOSIS.

>> YOU TALKED ABOUT EIGHT EXPERTS.

IN THE ORIGINAL PENALTY PHASE, JUST, IT WAS DR.^OLANDER.

>> YES.

>> OR WAS THAT THE ONLY MENTAL HEALTH EXPERT?

>> SHE WAS THE ONLY PENALTY PHASE WITNESS BECAUSE THEY MADE A STRATEGIC DECISION --

>> I UNDERSTAND.

AND, REIBSAME WAS FOR THE STATE?

>> YES.

>> IN THE EVIDENTIARY HEARING, THE EIGHT, THE DEFENDANT CALLED EIGHT EXPERTS OR HOW MANY EXPERTS.

>> THEY HAD FIVE.

THEY HAD THREE.

>> OKAY.

NOW MY CONCERN ABOUT THIS IS YOU'VE GOT, A, YOU'VE GOT A PICTURE OF SOMEBODY, AGAIN THIS IS THE QUESTION OF THE PICTURE, WE REALLY HAVEN'T FOCUSED HOW WOULD THE PICTURE HAVE CHANGED, ABOUT WHETHER THIS WAS A PERSON WHO HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY, WHICH IS, SIGNIFICANT.

HERE IS A PERSON THAT HAS, WHETHER HE IS MENTAL ILL OR BRAIN-DAMAGED AND HOW OLD IS HE AT THE TIME?

>> 47.

>> 47?

>> 47.

>> HE LIVED HIS LIFE UP TO AGE 47 WITHOUT HAVING COMMITTED ANY SERIOUS CRIMES, CORRECT?

>> YES.

>> HE LIVED WITH HIS MOTHER INTO HIS 30s?

>> YES.

>> LIVED IN THE SAME BEDROOM AS HIS MOTHER?

>> NOT PICTURES OF THE HOUSE

WERE ADMITTED THE MOTHER HAD,  
THEY LIVED IN A FLAT IN OVER A  
BUSINESS.

AND --

>> WHAT WAS THE TESTIMONY  
THOUGH THAT THE JUDGE EATON  
HEARD IN THE ORIGINAL PENALTY  
PHASE AND THEN THE EVIDENTIARY  
HEARING ABOUT THIS RELATION --  
IS SOMETHING THAT SEEMED TO BE  
MAYBE NOT THE MOST NORMAL  
RELATIONSHIP WITH HIS MOTHER?

>> KNEW ALL ABOUT IT.

DR. ^OLANDER TESTIFIED ABOUT THE  
LIVING IN ONE ROOM, WHICHLY  
WASN'T ONE BEDROOM.

HE HAD, KIND OF A CUTOUT IN THE  
HALL WHICH WAS MORE OF A  
CLOSET.

MONEY WAS TIGHT.

THEY LIVED IN NEW YORK.

SHE HAD A SEPARATE BEDROOM HE  
LIVED IN THE SAME FLAT.

>> NO IMPLICATION AT EITHER THE  
FIRST OR SECOND, THE OR THE  
PENALTY PHASE THERE WAS  
ANYTHING INAPPROPRIATE ABOUT --

>> ABSOLUTELY NOT, NO.

>> HE DIDN'T LIVE ON HIS OWN  
UNTIL HE WAS HOW OLD?

>> WHEN HE GOT MARRIED.

>> HOW HOLD WAS THAT?

>> HE WOULD HAVE BEEN, 36 OR  
37.

HE GOT MARRIED IN 1988.

>> SO HE LIVED WITH HIS MOTHER  
UNTIL HE WAS, 36 OR 37?

>> BECAUSE HIS FATHER HAD DIED  
WHEN HE WAS YOUNGER.

>> I'M JUST TRYING TO GET A  
PICTURE OF SOMEBODY WHETHER  
WE'RE DEALING WITH TRUE  
MENTALLY ILL INDIVIDUAL OF  
WHICH THERE ARE MANY IN THIS  
COUNTRY, OR SOMETHING THAT NOW  
COMES UP AFTER THE FACT AND  
WE'RE TRYING TO SAY, YOU KNOW,  
NOW WE'RE PUTTING ALL THESE  
DIAGNOSIS ON THESE PEOPLE.

SO CAN YOU GIVE ME THE BEST  
EVIDENCE IN FAVOR OF THE STATE,  
TO SHOW THAT REALLY UP UNTIL  
THIS TIME, HE REALLY LIVED A  
NORMAL LIFE AND THEN, SOMETHING

SNAPPED BECAUSE, HE WAS IN A JEALOUS RAGE AND THAT'S WHY THIS HAPPENED BUT THERE WAS CAREFUL PLANNING?

>> WHEN THEY MOVED TO FLORIDA HE AND HIS WIFE BOUGHT A HOME. THEY HAD TWO CHILDREN. SHE WORKED BECAUSE SHE WAS A NURSE. SHE COULD MAKE MORE MONEY THAN HE COULD.

HE HAD BEEN GAINFULLY EMPLOYED.

THAT WAS ONE OF THE NONSTATUTORY MITIGATORS THAT THE JUDGE FOUND, THAT WHEN HE COULD HE FOUND GAINFUL EMPLOYMENT.

WITH TWO SMALL CHILDREN IT WAS MORE FINANCIALLY RIGHT FOR THE FAMILY FOR HIM TO TAKE CARE OF THE CHILDREN.

AND, THE WIFE WORKED.

NOW, REMEMBER, ON DAY OF THE MURDER, HE, HE PICKED UP THE CHILD FROM SCHOOL, CHRISTOPHER. HE HAD STEVEN IN THE CAR.

HE TOOK THEM HOME.

BEFORE HE WENT BACK, SO HE WOULDN'T GET HURT.

HE GOES UP.

HE METHODICALLY WAITS FOR THE CHILD TO GET THERE.

TRICKS HIS WAY INTO THE, APARTMENT.

>> WE KNOW ALL THOSE FACTS. WE'RE GOING TO IS THE BACKGROUND.

WHAT ABOUT, WHILE HE IS LIVING, GAINFULLY EMPLOYED.

WHAT'S THE WORK CIRCUMSTANCE WHILE LIVING IN THE APARTMENT OF HIS MOM?

>> HE WAS A SECURITY GUARD FOR A BANK.

HE WAS ALSO A BUS DRIVER FOR THE TRANSIT AUTHORITY FOR MANY YEARS.

HE WAS ALWAYS GAINFULLY EMPLOYED IN NEW YORK.

>> OKAY.

>> THERE WAS NOTHING ABNORMAL ABOUT ANYTHING UNTIL, AND HE WAS LIVING A NORMAL LIFE.

HIS, HE SAID HIS SEXUAL  
RELATIONSHIP COOLED WITH HIS  
WIFE.  
HE WENT OUT AND FOUND A  
MISTRESS.  
WHEN SHE DUMPED HIM HE MADE HER  
PAY.  
THAT'S IT.  
TOLD THE DISPATCHER THAT.  
TOLD THE HOSTAGE NEGOTIATOR  
THAT.  
TOLD EVERYBODY THAT, SHE DUMPED  
HIM.  
WE HAD THIS WONDERFUL  
RELATIONSHIP.  
HE --  
>> WAS HE PLANING TO KILL  
HIMSELF?  
>> THIS COURT FOUND IN THE  
ORIGINAL LYNCH THAT IT WAS A  
MURDER-SUICIDE PLAN.  
BUT, --  
>> HOW OLD WERE HIS CHILDREN AT  
THE TILE?  
>> CHRISTOPHER WAS FIVE AND  
STEVEN WAS TWO.  
I'M PRETTY SURE --  
>> HE WAS TAKING CARE OF THESE  
CHILDREN?  
>> HE HAD BEEN TAKING CARE OF  
HIS CHILDREN PICKING THEM UP  
FROM SCHOOL.  
TAKING THEM TO THE PARK.  
HE WAS AN EXCELLENT  
PHOTOGRAPHER.  
HE HAD WONDERFUL PICTURES OF  
THE CHILDREN.  
AND THIS DAY HE MADE THOSE  
CHILDREN GOT HOME SAFELY  
BECAUSE WAS GOING TO THE  
APARTMENT.  
>> THERE MAY BE SOME PEOPLE  
WOULD SAY THAT IS EVEN FURTHER  
SIGN OF A SERIOUSLY ILL PERSON.  
THAT IS THE ISSUE COMES BACK  
TO, A IS IT LIFE WORTH SAVING  
BECAUSE, HOW HORRENDOUS THE  
CRIME IS.  
I'M JUST, I GUESS IT'S  
NECESSARY, REALLY TO LOOK AT  
ALL OF MITIGATION NOW PRESENTED  
AND SEE IF THERE WAS ANY  
DEFICIENCY.  
YOU KNOWS FOR US TO SEE WHETHER

IT UNDERMINES OUR CONFIDENCE IN  
THE OUTCOME YOU AGREE THAT'S  
WHAT IS SORT OF COMES DOWN TO?

>> I THINK YOU NEED TO LOOK AT  
JUDGE EATON'S ORDER.

HE DID A VERY COMPREHENSIVE ORDER.  
WENT THROUGH EACH PIECE OF  
EVIDENCE.

REMEMBER THAT JUDGE,  
DR. ^OLANDER TESTIFIED HE HAD  
SCHIZOAFFECTIVE DISORDER,  
SCHIZOPHRENIA PLUS A MOOD  
DISORDER AND JUDGE EATON LOOKED AT  
THE FACTS OF CRIME AND LOOKED  
AT TESTIMONY OF DR. ^REIBSAME.  
HE HAS BRAIN DAMAGE AFFECTS  
IMPULSE CONTROL, THIS WAS SO  
COLD, SOCIAL LATED.

HE USED TWO DIFFERENT GUNS ON  
ROSE.

HE WAITED FOR HER 30 MINUTES TO  
GET THERE ONCE HE SHOT HER  
OUTSIDE HE DRAGGED HER IN.

>> WHAT WAS DR. ^OLANDER'S  
TESTIMONY AT THE  
POST-CONVICTION HEARING ABOUT  
THE SIGNIFICANCE NOW OF THE  
BRAIN DAMAGE?

THAT IS, THAT, HOW THAT  
AFFECTED HER DIAGNOSIS AND HER  
OPINIONS OF THIS PATIENT?

>> SHE SAID IT WOULD HAVE BEEN  
BETTER IF I TESTIFIED THAT I  
COULDN'T MAKE AN ASSESSMENT  
BRAIN DAMAGE BECAUSE I HADN'T  
DONE NEUROPSYCHOLOGICAL TESTING  
IS SHE SAID AT EVIDENTIARY  
HEARING BUT SHE STUCK WITH HER  
DIAGNOSIS OF A SCHIZOAFFECTIVE  
DISORDER.

SO IT WOULDN'T HAVE CHANGED  
ANYTHING IS THAT WHAT SHE SAID?  
IN OTHER WORDS THIS DOESN'T  
REALLY AFFECT MY OPINION IN ANY  
MATERIAL WAY?

OR WHAT DID SHE SAY?

>> NOT EXACTLY, NOT JUST LIKE  
THAT.

NOT JUST LIKE YOU JUST SAID IT  
BUT SHE TESTIFIED MY BETTER  
TESTIMONY WOULD HAVE BEEN  
RATHER THAN SAY THERE IS NO  
EVIDENCE OF BRAIN DAMAGE, I  
REALLY SHOULD HAVE TESTIFIED

THAT I CAN'T MAKE A DIAGNOSIS OF BRAIN DAMAGE BECAUSE I DIDN'T DO NEUROPSYCHOLOGICAL TESTING.

AND YET SHE GOT UP THERE AS A NEUROPSYCHOLOGIST AND TOLD THE JUDGE, THERE ISN'T A SIGN OF BRAIN DAMAGE.

>> LET'S GO BACK TO, WHAT JUSTICE ANSTEAD IS LOOKING FOR, SHE HEARS, SHE KNOWS NOW, ALL THIS OCCURRED AND THERE IS SOME FINDINGS OF BRAIN DAMAGE. HOW DOES THAT IMPACT HER OPINION?

I THINK THAT'S WHERE WE'RE GOING.

AND YOU DIDN'T ANSWER THAT QUESTION.

>> SHE STILL SAID HE IS SCHIZOAFFECTIVE WHICH IS SAME THING SHE SAID AT THE PENALTY.

>> JUSTICE QUINCE.

>> DID SHE NOW SAY THAT THE STATUTORY MITIGATION AS OPPOSED TO HAVING EMOTIONAL PROBLEMS AND NOT BEING ABLE TO CONTROL BUT NOT MEETING THE STATUTORY REQUIREMENTS DOES SHE NOW SAY THAT THE STATUTORY REQUIREMENTS ARE MET WHEN YOU COMBINE THE BRAIN IMPAIRMENT WITH HER SCHIZOID DISORDER?

>> SHE ALWAYS SAID THE STATUTORY ELEMENTS WERE MET. SO, SHE DIDN'T SAY, WELL, THIS MAKES MY SCHIZOAFFECTIVE DISORDER WORSE.

SHE DIDN'T SAY ANY OF THAT.

>> THERE IS ONE THING, THAT WE TALKED ABOUT JUDGE EATON'S ROLE IN THIS AND I'VE GOT A QUESTION.

IN HIS ORIGINAL SENTENCING ORDER, PAGE 15, HE SAID THAT, DR.^OL' LANDER THE DEFENDANT TO HAVE A SCHIZOAFFECTIVE DISORDER.

DR.^REIBSAME DISAGREES.

THE COURT ACCEPTED DR.^REIBSAME'S OPINION.

NOW, HE THEN GOES AND HE REWEIGHS IT IS AGREEING THAT ACCEPTS THE TESTIMONY THAT IS

ACCURATE THAT HE, YOU KNOW, HAS BRAIN DAMAGE, THERE IS BRAIN DAMAGE.

AND IS AWARE THAT IT CAN BE A SIGNIFICANT MITIGATING FACTOR. AND THEN HE GOES ON AND SAYS, WELL, I WOULDN'T HAVE WEIGHED IT ANY DIFFERENTLY.

MY QUESTION TO YOU IN TERMS OF PREJUDICE, BECAUSE THIS IS A JUDGE-ONLY PENALTY PHASE, IS DOCTOR, IS JUDGE EATON'S ASSESSMENT OF BOTH WHAT HE FOUND ORIGINALLY AND WHAT HE WOULD HAVE FOUND, TO BE GIVEN, ACCORDED GREATER DEFERENCE BY THIS COURT THAN IF THIS HAD BEEN A JURY TRIAL?

WHICH IS, THIS IS A STATE-FRIENDLY QUESTION.

IN OTHER WORDS THE FACT THAT IT IS A JUDGE-ONLY CASE, AND NOW HE IS SAYING LISTEN I'VE HEARD ALL OF THIS AND I REALLY WOULDN'T WEIGH IT ANY DIFFERENTLY, THEN WE DEFER TO HIM, SHOULD WE GIVE THAT GREATER WEIGHT THAN WE WOULD, OKAY HE WOULD HAVE STILL FOUND THIS, WE DON'T KNOW THE WHAT THE JURY WOULD HAVE DONE, HOW DO WE FACTOR THIS IN?

>> THERE IS A BECAUSE, BECAUSE HE JUDGES THE CREDIBILITY OF THE EXPERTS AND HE JUDGED THE CREDIBILITY OF DR.^REIBSAME AGAINST DR. OLANDER. HE JUDGED CREDIBILITY OF DR.^DANZIGER AGAINST THE OTHERS.

HE NOTES THAT DR.^DANZIGER SAID THAT HE IS NOT SUFFERING FROM ANY PSYCHOSIS OR DEMENTIA. THERE WAS NO INDICATION THAT THESE WERE THE, THAT THE MURDERS WERE THE RESULT OF ANY PULL SIEVE BEHAVE OR BRAIN DAMAGE.

HE HAD SUFFICIENT SELF-CONTROL TO REFRAIN FROM KILLING HIM AND SPOKE VERY CLEARLY TO THE 911 OPERATOR AND THE HOSTAGE NEGOTIATOR.

THE FACTS JUST DON'T SHOW THIS

OUT OF CONTROL, PSYCHOTIC,  
BRAIN-DAMAGED INDIVIDUAL.  
AND WHEN, AND HE NOTES THAT  
NONE OF THEM CONCLUDED HIS  
BRAIN DAMAGE DIRECTLY  
CONTRIBUTED TO THE EVENTS.  
OKAY, SO BRAIN DAMAGE IN  
ISOLATION, CAN BE MITIGATING.  
BUT, TO SAY THAT HE DID THIS  
BECAUSE HE IS BRAIN-DAMAGED IS  
ANOTHER THING.

SO, JUDGE EATON, TOOK THIS, AND  
HE LOOKED AT EVERYTHING.  
AND, YOU LOOK AT ALL THE  
TESTIMONY.

YOU JUST DON'T LOOK AT DEFENSE  
TESTIMONY.

YOU ALSO LOOK AT STATE EXPERTS.  
HE CONCLUDED THAT THIS WOULD  
NOT HAVE CHANGED THE MODERATE  
WEIGHT THAT HE HAD GIVEN TO  
THESE MENTAL MITIGATORS IN THE  
BEGINNING.

>> I GOT A QUESTION BEFORE YOU  
SIT DOWN AND YOUR OPPOSITION  
WAS QUESTIONED SO HEAVILY SHE  
DIDN'T GET TO MOVE ON IN A  
COUPLE POINT HERE.

I'M TROUBLED BY COUPLE THINGS  
AND TECHNICAL NATURE OF THOSE  
THINGS.

THAT IS THE PULLING OF THE  
TRIGGER.

>> AND THE MOTION TO  
DISQUALIFY AND THE JUDGE  
ACTUALLY RESPONDING TO THAT  
RATHER THAN, JUST SAYING,  
DENIED FOR LACK OF SPECIFICITY.  
IF THE FINDER OF FACT TAKES A  
FIREARM, IT'S PLACED INTO  
EVIDENCE, AND TAKES IT INTO  
EITHER A JURY ROOM OR A  
CHAMBERS AND THEY CONDUCT TEST  
FIRING, THAT WOULD BE  
INAPPROPRIATE?

THAT IS A TESTING OUTSIDE THE  
PRESENCE OF THE PARTIES?

>> NOW IF HE DID SOMETHING LIKE  
CS AND FIRED IT.

>> LET'S WALK THROUGH THIS.  
REALLY I'M CONCERNED ABOUT SOME  
OF THESE TECHNICAL THINGS.  
AND BUT THAT'S A DIFFERENT  
CATEGORY IS WHAT YOU'RE SAYING

PULLING OF TRIGGER IS NOT REALLY TESTING IT, IS THAT --?  
>> LET ME GO BACK TO YOUR FIRST QUESTION.

THE ISSUE ABOUT -- HE DENIED THE MOTION TO DISQUALIFY AS LEGALLY INSUFFICIENT.

>> HE WENT IN AND ADDRESSED IT FACTUALLY.

>> AFTERWARDS.

>> I UNDERSTAND BUT HE WENT AHEAD AND IT FACTUALLY.

>> AFTER THE SECOND --

>> SO THAT MAKES A DIFFERENCE.

>> OH ABSOLUTELY.

>> KEEP GOING.

WE'RE OUT TIME, SO.

>> I'M SORRY.

>> HE ADDRESSED IT FACTUALLY IN DENYING MOTION FOR REHEARING WHAT YOU'RE SAYING.

>> HE SAID THAT, THE SECOND MOTION FOR REHEARING.

WHICH WAS WAY AFTER THE MOTION TO DISQUALIFY.

NOW, HE DID NOT TEST FIRE THE GUN.

>> UNDERSTAND I'M TRYING TO WORK MY WAY THERE TO -- IS IT DIFFERENT?

IS THIS A SENSUAL, SENSE OF PERCEPTION WATER IS WET WHEN I LOOK AT PHOTOGRAPH?

THERE IS SOMEPLACE THIS LINE BREAKS.

>> IF WATER IS WET I LOOK AT A PHOTOGRAPH.

THERE WAS EXPERT, RUDOLPH --

>> I KNOW THAT BACKGROUND.

WE ALL KNOW THAT BACKGROUND OF THE TRYING TO GET TO THE POINT, WHAT OCCURRED OUT OF THE PRESENCE OF THE PARTIES AND, WHETHER THAT SOME KIND OF VIOLATION OR IS NOT?

>> IT'S NOT A VIOLATION WHATSOEVER.

THE 3.400 IS THE CRIMINAL RULE THAT ALLOWS THE FINDER OF FACT TO LOOK AT THE EVIDENCE --

>> I AGREE LOOK AT IT.

THEN THE QUESTION BECOMES, SEES THE GUN.

LISTENING TO THE TESTIMONY BUT

HE WENT IN AND TESTED THEORY OF THE TESTIMONY BY PULLING ON THE TRIGGER.

>> WELL HE TOUCHED THE TRIGGER TO SEE IF IT'S A HAIR TRIGGER.

>> AGAIN HE TRIED TO PULL THE TRIGGER.

THAT'S WHAT WE'RE TALKING ABOUT.

>> BUT THERE'S, THERE'S TWO, DIRECTLY OPPOSITE TESTIMONIES. NANETTE RUDOLPH AND ROY RUEL

--

>> WE UNDERSTAND THAT TRYING TO PROVE ONE OR THE OTHER.

TRYING TO VERIFY.

THERE NOTHING AT ALL WRONG WITH THE FINDER OF FACT DOING SOMETHING LIKE THIS WITH EVIDENCE?

>> NO, SIR.

IF, NOW IF HE HAD TAKEN IT OVER TO THE SHERIFF'S OFFICE AND DONE A TEST FIRE LIKE "C.S.I." AND --

>> I UNDERSTAND.

HE DIDN'T DO THAT.

>> WHERE IS THE TRIAL JUDGE COME UP WITH THE CONCLUSION THAT THE, WHEN THE GUN IS FIRED THAT IT MAKES AN EXTREMELY LOUD NOISE?

DID THE EXPERT TESTIFY TO THAT?

>> FIRST, WELL, MR.^LYNCH SAID THAT IN HIS STATEMENT THAT WHEN HE FIRED, IT ALMOST HE DEAFENED HIM.

THAT WAS IN HIS VIDEOTAPE STATEMENT.

THAT IS RIGHT OUT OF HIS MOUTH.

>> DID THE EXPERT TESTIFY ABOUT WHETHER THE GUN MAKE AS LOUD NOISE WHEN IT'S FIRED?

>> I'M NOT ABSOLUTELY SURE ABOUT THE NOISE BUT I KNOW MR.^LYNCH --

>> SO YOU THINK THE TRIAL JUDGE'S SOURCE, SOUNDS, AWFUL LOT LIKE THE TRIAL JUDGE IS COMMENTING FROM HIS OWN PERSONAL KNOWLEDGE, THAT THIS GUN MAKES AN AWFUL LOUD NOISE WHEN IT DISCHARGES.

>> I THINK IF YOU'RE IN A SMALL

APARTMENT, ANY GUN IS GOING TO MAKE A LOUD NOISE.

>> I'M NOT TALKING ABOUT WHETHER, NOW, YOU'RE TELLING US WHAT HAPPENS IN A SMALL APARTMENT.

I'M TALKING ABOUT THE TRIAL JUDGE, DID HEARSAY ONE OF THE THINGS THAT HE CONCLUDED WAS, THAT, IN TERMS OF THIS THING NOT GOING OFF ACCIDENTALLY SEVEN TILES OR WHATEVER IT WAS, THAT EACH TIME THE GUN DISCHARGES IT MAKE AS VERY -- MAKES A VERY LOUD NOISE.

I'M ASKING YOU WHAT IS THE APPARENT SOURCE OF THE TRIAL JUDGE'S COMMENT ABOUT THAT?

>> ALL THE NEIGHBORS HEARD IT. THEY HEARD THE THREE GUNS. REMEMBER THE S.W.A.T.

TEAM WAS --

>> SO YOU DO NOT BELIEVE THAT THE TRIAL JUDGE WAS COMMENTING ABOUT HIS OWN SPECIAL KNOWLEDGE OF THIS GUN?

>> NO, SIR.

NO, SIR.

HE WOULDN'T SHOOT THE GUN OFF IN CHAMBERS, SAY OH IT'S LOUD.

>> I'M NOT SAYING HE WOULD SHOOT THE GUN OFF IN CHAMBERS.

I'M SAYING AT SOME POINT THE TRIAL JUDGE ALSO SAID THAT KNOWS SOMETHING ABOUT GUNS. IS THAT CORRECT?

>> HE DID.

AND DEFENSE COUNSEL, MR. FIGGATT SAID, I KNOW A LOT ABOUT GUNS.

IT'S NOT A HAIR TRIGGER.

I MEAN --

>> IF WE PUT THIS IN THE CONTEXT OF A JURY, A JUROR, DURING VOIR DIRE A JUROR HAD SOME EXPERIENCE FIRING GUNS OR WHATEVER AND GOES BACK WITH THE JURY IT'S IN JURY DELIBERATION IS THERE ANY CASE LAW SAYS THAT IF IS IT'S QUALIFY JUROR THE JUROR IN DISCUSSION, FIREARMS OFTEN GO BACK IN THE JURY ROOMS UNLOADED THAT IT WOULD BE INAPPROPRIATE FOR THE JUROR TO

TAKE THEIR OWN INDIVIDUAL KNOWLEDGE, COMMON SENSE AND, IN MAKING A FINDING?

>> THEY SHOULD NOT BE BACK THERE TESTIFYING AS AN EXPERT ON GUN.

>> I AGREE TO THAT.

BUT THE EXPERTS TESTIFY IN ORDER TO GIVE ASSISTANCE TO THE JURIES IN MAKING AND THEY CAN EITHER ACCEPT OR REJECT WHAT THE EXPERTS SAY, CORRECT?

>> YES.

>> IS ANY EVIDENCE THAT JUDGE EATON HERE AS THE TRIER OF FACT, ACCEPTED OR REJECTED?

>> OH, YES THERE IS, HE ACCEPTED NANETTE RUDOLPH'S TESTIMONY OVER ROY RUEL, THE DEFENSE EXPERT SAYS HE WAS THE LEAST CREDIBLE EXPERT HE HEARD IN HIS 20 YEARS ON THE BENCH, THE DEFENSE EXPERT.

I DON'T WANT TO ABSOLUTELY SAY NANETTE RUDOLPH TESTIFIED IT WOULD MAKE A VERY LOUD NOISE, I DO KNOW THERE IS ABSOLUTE BASIS IN THE RECORD BECAUSE ALL THE NEIGHBORS HEARD THE SECOND SET OF THREE SHOTS AFTER HE WAS INSIDE.

AND THE S.W.A.T. TEAM WAS EVACUATING THEM AS QUICKLY AS THEY COULD.

>> WHERE IS THE LINE DRAWN WITH REGARD TO THE DIFFERENCE BETWEEN THE FIRING, THE TOUCHING, THE TESTING? IS THERE A LINE?

>> I THINK THERE WOULD BE A LINE WHEN YOU GO OUTSIDE OF WHAT THE COMMON KNOWLEDGE OF A LAYPERSON WOULD BE, WHAT THE FINDER OF FACT CAN BRING TO THE TABLE.

>> I'M TALKING ABOUT THE TOUCHING, DOING SOMETHING WITH A PIECE OF EVIDENCE, WHERE DOES THE LINE, WHERE IS THE LINE DRAWN?

>> I THINK IF I'M A JUROR I COULD TAKE THE GUN AND LOOK AT IT GO, OKAY, THERE IS A TRIGGER HERE.

>> AND PULL IT?

>> WELL, I DON'T SEE WHY NOT.

>> I'M JUST ASKING.

AND THE LINE WOULD BECOME,  
WOULD COME IF YOU'RE DOING SOME  
KIND OF SCIENTIFIC TESTING?

YOU CAN USE IT AND LOOK AT IT  
DO WHATEVER IN YOUR OWN SENSES,  
JUST A QUESTION OF FURTHER SOME  
KIND OF SCIENTIFIC TESTING, IS  
THAT --

>> OF COURSE.

>> OKAY.

>> ANY PHOTOGRAPH, ANYTHING.

>> YOU'RE WAY OVER TIME.

>> OH I'M SORRY.

I WOULD ASK THE COURT TO AFFIRM  
THE TRIAL COURT DECISION.

>> THANK YOU.

REBUTTAL?

>> I REALLY WANT TO FOCUS ON  
THE PREJUDICE PRONG IN MY  
REBUTTAL.

OPPOSING COUNSEL INDICATED THAT  
MR. LYNCH DID NOT SHARE A  
BEDROOM WITH HUSBAND MOTHER.  
INACCURATE.

OWE DID SHARE A ROOM WITH HIS  
PARENTS UNTIL HIS FATHER DIED  
WHEN HE WAS 17.

HE CONTINUED TO SHARE A BEDROOM  
WITH HER COUPLE YEARS.

THEY THEN MOVED TO ANOTHER  
APARTMENT.

THAT'S WHEN THEY HAD A SEPARATE  
ROOM.

>> IS THERE SUGGESTION HE  
HAVING INMATE RELATIONSHIPS WITH  
FAMILY MEMBERS?

IS THAT --

>> THERE IS NOTHING IN THE  
RECORD TO SUGGEST THAT.

CERTAINLY IT GOES TO SHOW, I  
THINK WHAT WAS ABNORMALLY CLOSE  
RELATIONSHIP.

HIS MOTHER OVERLY DOTING.

AND --

>> THE HOME THEY LIVED IN, ONE  
OR TWO, OR THREE BEDROOM HOME  
AND THEY LIVED IN ONE BEDROOM  
TOGETHER?

>> THEY LIVED IN APARTMENT.

>> HOW MANY BEDROOMS?

>> INITIALLY WHEN HE WAS

GROWING UP AND SHARING A BEDROOM WITH HIS PARENTS, IT WAS ONE BEDROOM BUT THERE WERE MULTIPLE ROOMS IN THE APARTMENT.

THEN WHEN HE MOVED INTO THE APARTMENT WITH HIS MOTHER THERE WAS ACTUALLY, A LITTLE ROOM, HE HAD A SEPARATE BEDROOM THAT WAS A SMALL ROOM.

>> WHAT DID THE MENTAL HEALTH EXPERT SAY ABOUT THAT FACTOR?

DID THEY SAY THAT THIS IS SIGNIFICANT IN TERMS OF HIS MENTAL HEALTH HISTORY?

>> I THINK WHAT THE TESTIMONY WAS, MORE A NATURE OF THE OVERLY CLOSE RELATIONSHIP WITH THE MOTHER.

HE DROVE HER AROUND WELL INTO HIS 20s.

TOOK HER PLACES.

HE REALLY DIDN'T HAVE FRIENDS AND FAMILY.

I THINK IT WAS MORE FOCUS ON -- THERE WAS NEVER ANY SUGGESTION OF IMPROPER SEXUAL RELATIONSHIP. I'M NOT TRYING TO IMPLY THAT BUT --

>> BUT DID THEY SAY THIS IS FACTOR IN THEIR DIAGNOSIS AND EVALUATION OF HIS MENTAL HEALTH?

THAT THIS IS A RED FLAG OR WHATEVER AS TO HIS CONDITION?

>> I CAN'T, I CAN'T POINT TO SPECIFICALLY.

I DO REMEMBER GENERAL TESTIMONY ABOUT THE GENERAL NATURE OF RELATIONSHIP WITH HIS MOTHER BUT I CAN'T THINK OF ANYTHING --

>> YOU'RE SAYING THAT IS SORT OF UNUSUAL FACTOR IN HIS BACKGROUND, IN HIS MATURING AS MALE ADULT?

>> I JUST WANTED TO CORRECT. I WANT TO MAKE SURE THAT THE RECORD WAS CLEAR.

THAT'S REALLY WHY I WANTED TO GO TO THAT.

I WANT TO TALK REALLY ABOUT THE COURT'S ORDER.

I THINK I REALLY ASKED THIS COURT TO LOOK VERY CLOSELY AT THE COURT'S ORDER AND FOR PURPOSES OF LIMITED TIME THAT I HAVE, IT'S JUST THAT IF YOU LOOK AT THE COURT'S ORDER ON THE RATIONALE AS TO THE BRAIN DAMAGE, THE COURT ACTUALLY, I THINK MISQUOTES, OR MISCHARACTERIZES WHAT THE EXPERT SAID.

FOR EXAMPLE HE SAYS THAT DR.^SESTA SAID MR.^LYNCH WAS NOT LEGALLY INSANE, HE KNEW RIGHT FROM WRONG AND HE NYE WHAT HE WAS DOING AND THAT DR.^SESTA SAID WAS UNABLE TO CONFORM HIS BEHAVIOR TO THE STANDARDS OF THE LAW AND THAT MAKE HIM LESS CULPABLE. THAT IS TECHNICALLY ACCURATE. IN MY BRIEF I ADDRESS AN AREA WHERE DR.^SESTA SAYS THIS IS VERY SUBSTANTIAL MITIGATING EVIDENCE AND ALSO ASK THE COURT TO LOOK AT PAGE 1015, 1016 IN THE RECORD WHICH I DIDN'T CITE IN MY PREVIOUS WHERE DR.^SESTA DIDN'T MEAN LESS CULPABLE. WHAT HE MEANT WAS SUBSTANTIALLY CONFORMING CONDUCT.

>> LET ME ASK A QUESTION ON THAT.

THE CRITICAL FINDING OF JUDGE EATON IS ON PAGE 27 OF HIS ORDER.

HE SAID NONE OF THE EXPERTS CONCLUDED CLAIMED THAT BRAIN DIRECTLY DIRECTLY CONTRIBUTED TO EVENTS SURROUNDING MURDER. WHERE IS THE CONTRARY?

>> I'M VERY GLAD YOU ASKED THAT JUSTICE BELL.

OLANDER IN FOOTNOTE FOUND TO BE CREDIBLE.

ONLY FOUND TO BE CREDIBILITY.

MADE EXPRESS FINDING OF CREDIBILITY.

I ACTUALLY MADE A MISTAKE IN MY BRIEF IN THAT.

HE SAID HE FOUND NO ONE WITH CREDIBILITY.

SHE SAID THE BRAIN DAMAGE WOULD

HAVE EXPONENTIAL EFFECT ON  
PSYCHOSIS AND MENTAL ILLNESS.  
THAT IS AT 2049 OF THE ROA.  
PAGE 672 AND 673 OF THE ROA  
DR. ^OLANDER SAID IT WOULD HAVE  
ADDED TO STATE OF EXTREME  
EMOTIONAL STATE MR. ^LYNCH WAS  
EXPERIENCING AT TIME OF  
COMMISSION OF THE OFFENSE.

>> YOU DIDN'T ANSWER MY  
QUESTION.

WHERE DID THEY SPECIFICALLY SAY  
BECAUSE OF THIS SCHIZOAFFECTIVE  
DISORDER IT HAD THIS  
DIRECT RELATIONSHIP WITH THIS  
PARTICULAR CRIME, OTHER THAN  
SUFFERING FROM THAT?

>> WELL THE FOCUS AT PENALTY  
PHASE WAS ON THE BRAIN DAMAGE  
THERE HAD BEEN TESTIMONY BY  
DR. ^OLANDER ALREADY OF THE  
SCHIZOAFFECTIVE DISORDER.  
BUT THEY ALL SAID THAT THE  
BRAIN DAMAGE WAS A STATIC  
CONDITION.

MEANING IT'S ON GOING.

IT'S ALWAYS THERE.

AND, SO THAT IT ABSOLUTELY  
WOULD HAVE TO HAVE AN EFFECT  
BECAUSE IT'S THERE AND YOU  
COMBINE THAT WITH THE  
PSYCHOSIS, SO THEY ALL, ALL  
SQUARELY ADDRESSED THE  
MITIGATORS IN ASSESSING, IN BY  
IMPLICATION IF THE MITIGATORS,  
STATUTORY MITIGATORS ARE LINKED  
TO THE CRIME --

>> THAT'S YOUR POSITION, IF A  
MITIGATOR IS FOUND IT APPLIES  
TO THE COMMISSION OF A CRIME?

>> NO NO,.

MY POSITION IS, MY  
UNDERSTANDING OF THIS COURT'S  
LAW IN THAT AREA IS, FOR THE  
STATUTORY MENTAL MITIGATORS TO  
APPLY GENERALLY THIS COURT HAS,  
SOUGHT A LINK.

OTHERWISE THEN I SUPPOSE IT  
COULD BE NONSTATUTORY BUT, THE,  
I THINK THE TESTIMONY WHAT I  
SAID EARLIER, DR. ^MCRANEY SAID  
ABOUT THE PERFECT STORM.  
WE HAD TESTIMONY ABOUT GENE  
CODY, THE BARBER DESCRIBED

MR. ^LYNCH LOOKING ILL.

HE DYED HIS HAIR.

ALL THE EXPERTS SAID THAT WAS EVIDENCE OF DECOMPENSATION?

>> I HAVE A PRACTICAL QUESTION

IF I MAY BECAUSE YOU'RE

DEFINITELY OUT OF TIME.

IF WE DON'T FIND THAT COUNSEL

WAS DEFICIENT IN ADVISING HIS

CLIENT ON THE WAIVER OF THE

PENALTY PHASE, BUT IF WE LOOK

AT THIS EVIDENCE AND SAY, WELL,

WE THINK THAT IT SHOULD HAVE

BEEN PRESENTED, IF IT WENT

BACK, IF THERE WAS NOTHING

WRONG WITH THE WAIVER, WOULDN'T

IT JUST, AND THERE'S, AND THE

FACT-FINDER BEING, JUDGE EATON,

ASSUMING THERE IS NO PROBLEM

WITH THE RECUSEAL ISSUE,

WOULDN'T IT JUST GO BACK TO

JUDGE EATON?

SINCE WE ALREADY KNOW WHAT

JUDGE EATON WOULD DO, IF WE

LOOK AT IT AND SAY, EVEN THOUGH

WE MIGHT HAVE CAME TO A

DIFFERENT CONCLUSION, JUDGE

EATON ALREADY MADE FINDINGS

AND, WE'RE NOT GOING TO

DISTURB, WHY WOULD WE REVERSE?

DO YOU UNDERSTAND -- THE

QUESTION IS REALLY

PRACTICALITY.

SAY YOU GOT A NEW PENALTY

PHASE.

YOU GET IT IN OF JUDGE EATON.

WE ALREADY KNOW, UNLESS YOU HAD

SOMETHING ELSE TO PRESENT THAT

JUDGE EATON HAS EXPLAINED HIS

CREDIBILITY FINDINGS AS TO

THESE EXPERTS.

>> WELL, I THINK OBVIOUSLY

THERE IS AN ISSUE WITH THE BIAS

OF THIS JUDGE THAT WAS RAISED

IN THE BRIEF.

AND I THINK --

>> I'M SAYING ASSUMING IT GOES,

WE FIND THAT TO BE WITHOUT

MERIT?

>> I WOULD THINK THAT IF HE

WERE, IF YOU FIND THAT

CONFIDENCE IN THE OUTCOME IS

UNDERMINED, THAT MR. ^LYNCH

WOULD BE ENTITLED TO GO BACK

AND HE SHOULD BE ENTITLED TO  
HAVE A JURY SENTENCING, AND  
CERTAINLY, IF THIS, THAT'S A  
NUN FUN RIGHT AND I THINK --  
FUNDAMENTAL RIGHT I THINK IF I  
COULD SUM UP THAT IS ONE OF THE  
BIG THINGS ABOUT THIS CASE.  
THIS WAS A MAN WHO WAS  
CONVICTED AND SENTENCED TO WHO  
NEVER HAD A GUILT PHASE TRIAL  
AND NEVER HAD A SENTENCING  
JURY.

BASED ON ADVICE OF COUNSEL WHO  
THEMSELVES ADMITTED THEY FAILED  
IN INVESTIGATING AND ADVISING  
THEIR CLIENT.

THIS CASE IS FAILURE OF OUR  
ADVERSARIAL SYSTEM OF JUST.

MR. LYNCH NEVER DID HAVE  
ADVERSARIAL TESTING.

BECAUSE OF THOSE FACTS I ASK  
THAT THIS COURT RESPECTFULLY  
ASK THIS COURT REVERSE HIS  
CONVICTION AND SENTENCE AND  
REMAND SO HE CAN HAVE A JURY.

AND IF THERE'S ANYTHING ELSE, I  
HOPE I ANSWERED YOUR QUESTION  
BUT IF THERE'S ANYTHING ELSE?

>> LET'S CONTINUE WITH OUR  
ASSISTANCE YOU'RE WELL OVER  
ADDITIONAL TIME.

WE'LL TAKE THE CASE UNDER ADVISEMENT.  
THANK YOU VERY MUCH.