

>> PLEASE RISE.

HEAR YE, HEAR YE, HEAR YE.

SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

ALL WHO HAVE CAUSE TO PLEAD,  
DRAW NEAR, GIVE ATTENTION AND  
YOU SHALL BE HEARD.

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

LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING AND WELCOME TO  
THE FLORIDA SUPREME COURT.

I UNDERSTAND THAT IN OUR  
AUDIENCE TODAY WE HAVE PEOPLE  
FROM, AND YOUNG ADULTS AND  
SCHOOL-AGED FROM ALL OVER THE  
STATE OF FLORIDA THROUGH THE  
FLORIDA ELECTRIC CO-OP  
ASSOCIATION.

SO, WELCOME TO THE FLORIDA  
SUPREME COURT.

I AM JUSTICE PARIENTE AND I  
WILL BE SIDING ON THE FIRST TWO  
CASES THIS MORNING IN WHICH  
JUSTICE QUINCE IS RECUSED SO  
THAT WE WILL CALL THE FIRST  
CASE OF KENNETH ALLEN STEWART  
VERSUS THE STATE OF FLORIDA.

>> GOOD MORNING.

MY NAME IS ANDREA NORGARD.

I'M APPEARING ON BEHALF OF  
MR. STEWART AND I HAVE RESERVED  
FOUR MINUTES FOR REBUTTAL  
ARGUMENTS.

MY INTENTION TODAY WOULD BE TO  
FOCUS ON ISSUE ONE OF THE  
INITIAL BRIEF THIS CASE AND  
THAT ISSUE ADDRESSES WHETHER  
THE TRIAL COURT PROPERLY

EVALUATED THE EVIDENCE PRESENTED AT THE 2001, AT THE EVIDENTIARY HEARING IN THE POST-CONVICTION PROCEEDINGS ARISING FROM THE 2001 PENALTY PHASE.

ESSENTIALLY WHAT HAPPENED IN PARTICULAR CASE, IS AFTER REVERSALS BY THIS COURT, MR. STEWART WAS GRANTED A PENALTY PHASE IN 2001.

AND AT THAT PENALTY PHASE PROCEEDING HIS TRIAL ATTORNEY PRESENTED THE EVIDENCE OF TWO MENTAL INDIVIDUALS, DR. SULTAN AND DR. MAHER.

EACH OF THOSE DOCTORS ALTHOUGH THEY CONDUCTED SOME CLINICAL INTERVIEWS WITH MR. STEWART, NONE OF THEM CONDUCTED ANY TYPE OF NEUROLOGICAL TESTING.

IN FACT NEITHER ONE WERE NEUROPSYCHOLOGISTS AND NEITHER ONE WAS REALLY IN THE POSITION TO DO THAT TYPE OF TESTING.

NEITHER ONE RECOMMENDED TO TRIAL COUNSEL TO SEEK FURTHER TESTING ALTHOUGH TRIAL COUNSEL

IT APPEARS FROM A LETTER THAT WAS ENTERED EVIDENCE DID CONSULT WITH A DR. WEINER WHO DID AN I.Q. TEST, WHO DID SEVERAL OTHER SUBTESTS THAT

PRIMARILY ADDRESSED INTELLIGENCE AND MMPI AND DID ONE RUDIMENTARY NEUROPSYCHOLOGICAL SCREENING

TEST, BENDER-GESTALT TEST WHICH IS A TEST THAT ADDRESSES AND ONLY IDENTIFIES RIGHT BRAIN FUNCTIONING SKILLS.

>> LET'S GO BACK OVER WHAT WE

HAVE IN THIS CASE.

>> SURE.

>> AS YOU SAID THIS WAS THE  
THIRD PENALTY PHASE.

>> THAT IS CORRECT.

>> SO THE LAWYERS HAD THE  
ADVANTAGE OF LOOKING AT  
WHATEVER HAD WORKED OR HADN'T  
WORKED IN THE FIRST TWO PENALTY  
PHASES.

>> THAT IS CORRECT.

>> AND THEY ALSO, ALTHOUGH THE  
SECOND PENALTY PHASE HAD  
RESULTED IN UNANIMOUS VERDICT,  
THIS PENALTY PHASE ACTUALLY  
ENDED UP WITH A 7-5 JURY  
RECOMMENDATION.

>> THAT IS CORRECT, YOUR HONOR,  
ONE RECOMMENDATION AWAY FROM A  
LIFE SENTENCE.

>> YOU COULD LOOK AT IT AND  
SAY, INSTEAD OF THERE BEING  
DEFICIENCY IN WHAT THEY DID, THEY  
ACTUALLY MUST HAVE DONE A VERY  
GOOD JOB CONSIDERING THESE  
MURDERS TO GET THAT KIND OF  
RECOMMENDATION?

THAT WOULD PUT THIS IN A  
DIFFERENT CATEGORY THAN WHEN WE  
LOOK AT 7-5 RECOMMENDATIONS AND  
SAY, WELL ONE MORE VOTE WOULD  
HAVE PUSHED IT OVER.

IF WE LOOK BACK AT THE OTHER,  
AT THE OTHER VOTES THOSE OTHER  
VOTES HAD BEEN MUCH MORE  
UNFAVOR TO THE DEFENDANT.  
HOW WOULD YOU, HOW WOULD YOU  
SAY WE SHOULD EVALUATE THAT  
FACT IN LOOKING AT, SORT OF AN  
OBJECTIVE VIEW THAT DEFENSE  
COUNSEL DID ACTUALLY A  
EXCELLENT JOB, NOT A DEFICIENT

JOB?

>> WELL, I WOULD DISAGREE WITH THE COURT THAT MR. ^FRASER DID AN EXCELLENT JOB.

I WOULD AGREE WITH YOUR HONOR THAT HE DID A BETTER JOB THAN WAS DONE IN THE FIRST TWO PENALTY PHASES.

OBVIOUSLY IN THE FIRST PENALTY PHASE THIS COURT REVERSED BECAUSE THERE ALMOST NO PSYCHOLOGICAL TESTIMONY PRESENTED.

THERE WAS ALMOST NO BACKGROUND OR FAMILIAL HISTORY PRESENTED.

WHAT ACTUALLY HAPPENED IN THE SECOND PENALTY PHASE WAS THAT THE TRIAL ATTORNEY ADMITTED DURING THE POST-CONVICTION PROCEEDINGS TO HAVING ABUSED ALCOHOL AND COCAINE DURING HIS REPRESENTATION OF MR. ^STEWART, INCLUDING ACTUALLY DURING THE PENALTY PHASE.

HE HAS, WAS THEN DISBARRED BY THE FLORIDA BAR AND THE STATE STIPPED THAT THAT SECOND PENALTY PHASE WAS SO FRAUGHT WITH ERROR BASED ON HIS ATTORNEY'S DRUG ABUSE, THAT THEY AGREED THAT A THIRD ONE WAS NECESSARY.

SO I DON'T THINK IT WOULD BE APPROPRIATE TO COMPARE THE NUMERICAL RECOMMENDATIONS IN THOSE TWO CASES WHEN CERTAINLY THERE'S ABSOLUTELY NO ALLEGATION OR SUGGESTION THAT MR. ^FRASER SUFFERED ANY OF THE DEFICIENCIES, ESPECIALLY THAT WERE DEBILITATING IN THAT SECOND PENALTY PHASE

PROCEEDING.

>> BUT AS WE LOOK AT THE PERFORMANCE OF COUNSEL HERE --

>> CORRECT.

>> CERTAINLY NOT WITHIN THOSE CASES WHERE THERE IS NO MENTAL HEALTH WORKUP, DO YOU AGREE WITH THAT?

>> I WOULD AGREE THERE WAS A MENTAL HEALTH WORKUP.

>> IT IS A QUESTION WITH REGARD TO THE AMOUNT OF THAT WORKUP AND WHETHER THE INFORMATION THAT IS AVAILABLE TO A LAWYER, WITH REGARD TO WHAT TESTING IS NEEDED, THAT'S REALLY WHAT WE'RE TALKING ABOUT.

UNLESS YOU ARE ASSERTING THAT NEUROPSYCHOLOGICAL TESTING IS AN ABSOLUTE REQUIREMENT IN EVERY CASE?

>> I AM NOT ASSERTING IT IS AN ABSOLUTE REQUIREMENT IN EVERY CASE.

>> OKAY. WE HAVE TO LOOK AND SEE WHAT THE LAWYER HAD AND WHAT THE LAWYER WAS WORKING WITH TO MEASURE THE DEFICIENCY PRONG, CORRECT?

>> I WOULD NOT AGREE WITH THAT ANALYSIS WITH THIS CAVEAT. WHILE I DO NOT BELIEVE EVERY DEFENDANT REQUIRES NEUROPSYCHOLOGICAL TESTING, HOWEVER, THERE WERE CLEAR INDICATORS IN THIS CASE EVEN FROM THE SECOND PROCEEDING, FROM DR. ^MAHER, AND FROM DR. ^WEINER, THAT THERE WOULD BE A NEED.

HAD THEY PERFORMED THEIR

TESTING IN, AND BY A STANDARD THAT WOULD MEET A REASONABLE DEGREE OF MEDICAL CERTAINTY.

WHAT YOU HAD --

>> LET'S GO BACK.

THIS CASE, NOW YOU MAY TAKE, HAVE QUARREL OR DISPUTE, WITH THE QUALITY OF THE NEUROPSYCHOLOGICAL TESTING, BUT, AM I CORRECT THAT THE TESTIMONY AT THE EVIDENTIARY HEARING SHOWS THAT THE DEFENSE COUNSEL ACTUALLY CONSULTED A NEUROPSYCHOLOGIST AS PART OF THE PENALTY PHASE INVESTIGATION?

>> HE CONSULTED A NEUROPSYCHOLOGIST, DR. ^WEINER. ALL WE HAVE IS DR. ^WEINER'S LETTER TO MR. ^FRASER.

>> SO HE, AT THE SUGGESTION, NOT ONLY DID DEFENSE LAWYER CALL TWO MENTAL HEALTH EXPERTS AT THE PENALTY PHASE, BUT HE ACTUALLY CONSULTED WITH A NEUROPSYCHOLOGIST WHO DID TESTING AND FOUND THAT THERE WAS NO IMPAIRMENT.

NOW ARE WE SAYING THAT EVEN IN THAT, SO GOING BEYOND JUST, TO NEUROPSYCHOLOGICAL TESTING BE DONE IN EVERY CASE, IT WAS DONE IN THIS CASE AND IT DIDN'T FIND IMPAIRMENT.

NOW ARE YOU GOING TO SAY WELL, IT WASN'T THE RIGHT KIND OF NEUROPSYCHOLOGICAL TESTING? IS THAT THE KIND OF ANALYSIS WE DO WHEN WE'RE TRYING TO DETERMINE WHETHER THERE'S DEFICIENCY IN PERFORMANCE?

>> WELL, IN THIS RECORD,

DR. ^WEINER DID NOT DO  
NEUROPSYCHOLOGICAL TESTING.  
HE DID AN I.Q. TEST WHICH IS  
NOT A NEUROPSYCHOLOGICAL TEST  
THAT CAN IDENTIFY THE NEED FOR  
OR THE ADDITIONAL TESTING THAT  
WOULD IDENTIFY ORGANIC BRAIN  
DAMAGE WHICH IS WHAT  
MR. ^STEWART HAS AND WAS NEVER  
DETERMINED BEFORE BECAUSE ONCE  
AGAIN THE TESTING WAS NOT DONE.

DR. ^WEINER --

>> WHAT ARE YOU, WHAT DO WE  
EXPECT OF A LAWYER WHO HAS  
ASKED SOMEBODY WHO IS A  
NEUROPSYCHOLOGIST TO EVALUATE A  
CLIENT FOR THE PURPOSE OF  
SEEING WHETHER THERE IS  
NEUROPSYCHOLOGICAL IMPAIRMENT?

I'M NOT SURE I UNDERSTAND, AND  
I APPRECIATE THE SIGNIFICANCE  
OF BRAIN DAMAGE IF IT EXISTS,  
BUT THAT THIS DEFENSE LAWYER  
LOOK REASONABLE STEPS TO  
INVESTIGATE EVEN THAT  
POSSIBILITY.

>> IN ADDITION TO HAVING AN  
ATTORNEY WHO PERFORMS  
REASONABLY UNDER THE STRICKLAND  
STANDARD, THE ATTORNEY THOUGH  
IS, NEEDS TO HAVE EXPERTS WHO  
ADEQUATELY PERFORM THEIR JOBS  
AS WELL.

CLEARLY UNDER AKE VERSUS  
OKLAHOMA, CRIMINAL DEFENDANT  
WHO IS FACING THE ULTIMATE  
PENALTY OF EXECUTION IS  
ENTITLED TO THE COMPETENT  
ASSISTANCE OF HIS MENTAL HEALTH  
EXPERT.

I BELIEVE IT IS ABUNDANTLY  
CLEAR IN THIS RECORD BY THE

ULTIMATE FINDINGS OF  
DR.^EISENSTEIN AND DR.^WOOD,  
THAT DR.^WEINER WAS DEFICIENT  
AS THE CONSULTING EXPERT IN  
THAT HE DID NOT DO THE  
NEUROLOGICAL TESTING THAT WOULD  
BE CONSIDERED ACCEPTABLE IN THE  
COMMUNITY.

HE DID ONE NEUROPSYCHOLOGICAL  
TEST THAT HAS BEEN RECOGNIZED  
AT LEAST BY THIS COURT IN  
SUMMARIES OF TESTIMONY IN  
HITCHCOCK, THAT IS NOT A  
SCREENING TOOL THAT IS NOT, AN  
ADEQUATE SCREENING TOOL UPON  
WHICH THE DETERMINATION OF  
WHETHER OR NOT YOU NEED TO DO A  
MORE COMPLETE BATTERY OF  
TESTING TO DETERMINE THAT HE  
DID NOT NEED TO GO FURTHER.

>> DO YOU BELIEVE THAT THE  
FACTS THAT YOU ARE NOW  
ASSERTING, AND MAKING A GOOD  
ARGUMENT ON ARE UNDISPUTED IN  
THIS RECORD?

DO YOU THINK THAT THERE IS, AS  
YOUR VIEW, THAT THE RECORD IS  
INDISPUTABLE ON THIS ASPECT?  
THAT THERE IS NO TESTIMONY, NO  
TESTIMONY, NO EVIDENCE THAT  
WOULD UNDERMINE THE ARGUMENT  
THAT YOU'RE MAKING?

>> I DO NOT BELIEVE THAT THERE  
IS.

BRIEFLY ADDRESSING IT FOR THE  
COURT, THE REASON I TAKE THAT  
POSITION IS THIS.

DR.^MAHER, WHO WAS THE ONLY  
EXPERT CALLED BY THE STATE IN  
THE EVIDENTIARY HEARING, WHO  
DISAGREED WITH DR.^EISENSTEIN'S  
CONCLUSION ABOUT ORGANIC BRAIN

DAMAGE, I THINK WE HAVE TO REMEMBER THAT WHEN THE JUDGE INTERVIEWED HIM IN 2001, SHE DISREGARDED THE BULK OF HIS TESTIMONY AND DID NOT FIND HIS ANALYSIS TO BE CREDIBLE OR HIS DIAGNOSING OF MR. STEWART TO BE PERSUASIVE.

THEN, AT THE EVIDENTIARY HEARING, DR. EISENSTEIN, THE FIRST AND ONLY PHYSICIAN TO CONDUCT A FULL NEUROPSYCHOLOGICAL BATTERY OF TESTING THAT ADMINISTERED TESTS WHICH FOCUSED ON BOTH HEMISPHERES OF THE BRAIN, RIGHT BRAIN, AND LEFT BRAIN, CAME TO THE CONCLUSION THAT BASED UPON THE ROUGHLY 50 TESTS THAT HE PERFORMED, THAT OUT OF THOSE, 10, WHICH IDENTIFY LEFT HEMISPHERE BRAIN DAMAGE, HE FELT THAT THAT WAS PRESENT IN MR. STEWART'S CASE.

BASED ON DR. EISENSTEIN'S CONCLUSION, THEY ORDERED TESTING OR TEST SCAN THAT USE AS PROCEDURE CALLED VISUAL VIGILANCE.

WHERE THAT DIFFERS FROM A MEDICAL DIAGNOSTIC TEST SCAN, IT ACTUALLY ENGAGES THE PERSON WHO IS UNDERGOING THE TEST IN VERY SPECIFIC ACTIVITIES WHICH ALLOW THE MRI MACHINE TO TAKE THE SCANS OF THE BRAIN WHILE THE BRAIN IS ENGAGED IN SPECIFIC ACTIVITY.

BASED UPON NEUROLOGICAL RESEARCH AND THE DATABASE THAT DR. FRANK WOOD, WHOSE TESTIMONY WAS UNCONTROVERTED AND UNCHALLENGED THAT THE MRI

CONFIRMED THAT NOT ONLY DID MR. STEWART HAVE SIGNIFICANT FUNCTIONING INABILITY IN THE LEFT HEMISPHERE AND LEFT HEMISPHERE AND LEFT SIDE OF HIS BRAIN WAS ACTUALLY SMALLER THAN NORMAL AND SHOWED A PHYSICAL ABNORMALITY AS WELL.

THE ONLY --

>> YOUR KNOWLEDGE OF THIS IS EXCELLENT AND I DON'T WANT TO, SINCE YOU HAVE LIMITED TIME I WANT TO ASK YOU ABOUT THE JUDGE'S FINDINGS.

LET'S ASSUME, THERE IS DEFICIENCY IN FAILING TO PRESENT BRAIN DAMAGE MITIGATING EVIDENCE.

THE JUDGE FOUND THAT, THAT THE, ALTHOUGH THE DEFENDANT PRESENTED EVIDENCE OF POSSIBLE POSSIBLE BRAIN DAMAGE, NEITHER DR. EISENSTEIN OR DR. WOOD TESTIFIED THAT THE BRAIN DAMAGE EVEN IN CONJUNCTION WITH THE ATTENTION DEFICIT HYPERACTIVITY DISORDER OR ALCOHOL ABUSE CAUSED THE DEFENDANT TO BE UNDER EXTREME MENTAL EMOTIONAL DISTURBANCE AT THE TIME HE COMMITTED THE CAPITAL FELONY.

SO WHAT IS, IN TERMS OF THE AGGRAVATORS IN THIS CASE, ESPECIALLY THE PRIOR VIOLENT FELONY AGGRAVATOR, WHAT IS YOUR COMMENT ABOUT OR YOUR OBSERVATION ABOUT PREJUDICE TO THE, TO UNDERMINE CONFIDENCE IN THE OUTCOME BY THE FAILURE TO PRESENT THIS EVIDENCE?

>> WELL THE PREJUDICE IS TWOFOLD.

ALTHOUGH THE COURT'S RULING  
TOOK INTO CONSIDERATION WHAT  
THE COURT FELT HOW THIS MIGHT  
INFLUENCE OR CHANGE HER  
DETERMINATION.

AGAIN, IN ALL HONESTY IT IS A  
BIT DISINGENUOUS TO STATE IN  
THIS PARTICULAR ORDER THAT THE  
TESTIMONY OF DR. ^MAHER WAS FAR  
MORE PERSUASIVE WHEN IN THE  
FIRST ORDER THE 2001 ORDER, SHE  
DISREGARDED ALMOST EVERYTHING  
DR. ^MAHER HAD SAID.

WHERE I BELIEVE THAT THE  
PREJUDICE IN PARTICULAR  
ENENURES IN THIS THE COURT CAN  
NOT OVERLOOK THAT IN FLORIDA,  
THE DEATH PENALTY SENTENCING  
PROCESS RELIES ON A JURY  
RECOMMENDATION.

>> I UNDERSTAND THAT.

>> HAD THE JURY HEARD THIS --

>> WHAT DOES IT HAVE TO DO --

THE CRIME WAS WHERE THEY  
TARGETED A VICTIM WHO WAS IN A  
BAR.

THEY TOOK THE VICTIM OUT.

THEY LIKED THE VICTIM'S CAR.

IT WAS FANCY CAR.

THEY TOOK HIM TO SOME REMOTE  
LOCATION.

AND THEN, MR. ^STEWART, WHO WAS  
I THINK IN THE BACK SEAT, SHOT  
HIM TWICE IN THE HEAD.

IS THAT NOT WHAT HAPPENED?

>> THAT IS CORRECT, YOUR HONOR.

THAT'S WHAT HAPPENED.

>> HOW IS THAT, IN TERMS OF  
SAYING, WELL THIS IS A CRIME  
THAT WAS PRODUCED SUBSTANTIALLY  
BY HIS BRAIN DAMAGE, HOW IS,  
GIVE ME THE CONNECTION HERE

THAT MAKES THAT A COMPELLING  
CASE TO SAY THAT IS SO  
MITIGATING THAT THAT WOULD  
OVERWHELM THE AGGRAVATING  
FACTORS?

>> I BELIEVE THE COURT CAN LOOK  
TO THE JURY RECOMMENDATION FROM  
2001, WHICH WAS 7-5.

WHEN THE JURY DID NOT HEAR  
EVIDENCE THAT MR.^STEWART  
ACTUALLY HAD A PHYSICALLY  
DYSFUNCTIONAL BRAIN, BRAIN THAT  
IS INCAPABLE OF WORKING IN THE  
MANNER THAT YOURS OR MINE OR  
ANY OTHER PERSON WHO DOES NOT  
HAVE THOSE DEFICITS WORKS, THEY  
SIMPLY HEARD HE HAD A  
PERSONALITY DISORDER AND HE WAS  
HYPERACTIVE.

AND THEY CAME BACK WITH A  
RECOMMENDATION OF 7-5.

DESPITE HEARING THE FACT THAT  
MR.^STEWART DID KILL MR.^DIAZ  
AND BURN HIS CAR AFTER THE  
FACT.

THIS COURT HAS REPEATEDLY  
RECOGNIZED, ESPECIALLY WHEN  
EVIDENCE OF ORGANIC BRAIN  
DAMAGE IS CONFIRMED BY A PET  
SCAN AND IS JUST SPECULATIVE OR  
BASED ON ONLY NEUROLOGICAL  
TESTING, THAT THAT IS ONE OF  
THE MOST SIGNIFICANT PIECES OF  
MITIGATION THAT CAN EXIST IN A  
CAPITAL PROCEEDING.

>> I UNDERSTAND YOUR ARGUMENT.  
ARE YOU REALLY ARGUING IT WAS  
INEFFECTIVE ASSISTANCE OF  
EXPERT, NOT THE LAWYER?

>> YES. I DO BELIEVE THAT  
THAT WOULD BE  
THE PROPER WAY TO FRAME THIS

ISSUE.

THAT MR. STEWART WAS ENTITLED TO COMPETENT EVALUATIONS BY THE EXPERTS WHO EVALUATED HIM. IF THEY CAN NOT DO IT , AKE VERSUS OKLAHOMA.

>> WHAT IS YOUR BEST CASE SUPPORTING FROM THIS COURT THAT CLAIM?

>> MY BEST CASE, ACTUALLY I'M RELYING ON THE UNITED STATES SUPREME COURT IN AKE.

MY BEST CASE THAT I WOULD RELY ON IN SUPPORT OF FOR THIS IS THE FACT THAT, IT IS REALLY MORE DISTINGUISHMENT OF OTHER CASES BY THIS COURT.

IN SEXTON, DARLING AND HITCHCOCK ALL CITED IN THE INITIAL BRIEF, WHERE THE PROBLEM THIS COURT HAD IN NOT REVERSING WAS WHERE THERE WAS REALLY NO SIGNIFICANT DIFFERENCE BETWEEN ORIGINAL PENALTY PHASE PROCEEDINGS AND WHAT WAS ABLE TO BE DETERMINED --

>> YOU MENTIONED A CASE, WE CALL AKE.

>> APOLOGIZE.

>> THAT IS A CASE THAT IS TO BE RAISED ON DIRECT APPEAL.

AS RECENTLY IN RALEIGH, WE SAID THE ONLY TIME THAT A DEFENDANT IN A POST-CONVICTION CLAIM CAN LITIGATE THE COMPETENCY OF A MENTAL HEALTH EXPERT IF IT IS SO GROSSLY INSUFFICIENT THAT EXPERT IGNORED CLEAR INDICATIONS OF MENTAL RETARDATION OR ORGANIC BRAIN DAMAGE.

YOU AGREE YOU HAVE TO MEET THAT STANDARD?

>> I AGREE THAT I DO AND IN THIS CASE WE HAVE THAT. WE HAVE ORGANIC BRAIN DAMAGE. WE HAVE, DR.^SULTAN, WHO PERFORMED NO NEUROPSYCHOLOGICAL TESTING.

WE HAD DR.^MAHER WHO PERFORMED NO NEUROPSYCHOLOGICAL TESTING. AND THEN WE HAVE DR.^WEINER WHO PERFORMED ONE TEST.

>> ARE YOU SAYING THEY ARE NOT COMPETENT OR JUST DIDN'T DO A VERY GOOD JOB?

>> I'M SAYING THEIR EVALUATIONS ACCORDING TO UNREBUTTED TESTIMONY OF DR.^EISENSTEIN WOULD NOT BE CONSIDERED ACCEPTABLE WITHIN THE MEDICAL COMMUNITY AS FAR AS WHAT WOULD BE GENERALLY ACCEPTED BY PERSONS IN THE FIELD OF NEUROPSYCHOLOGY AND NEUROPSYCHIATRY.

>> [INAUDIBLE]

>> I'M SAYING DR.^WEINER IN THIS CASE DID NOT PERFORM A COMPETENT EXAM.

>> STILL ISN'T THAT DIFFERENT THAN SAYING IT IS GROSSLY INSUFFICIENT WHICH IS THE STANDARD JUSTICE PARIENTE MENTIONED IN THIS CASE?

>> I BELIEVE IT WAS GROSSLY INSUFFICIENT.

IT IS VERY CLEAR THAT THERE IS IN EXCESS OF 70 NEUROPSYCHOLOGICAL TESTS THAT CAN BE DONE.

DR.^WEINER DID ONE WHICH IS CONSIDERED A RUDIMENTARY SCREENING TOOL

ONLY.

BASED ON THAT SINGLE TEST WHICH ONLY ADDRESSES RIGHT HEMISPHERE ISSUES HE SAID, DON'T GO ANY FURTHER.

SURPRISINGLY, GUESS WHAT? MR. STEWART'S PROBLEMS ARE NOT ON THE RIGHT SIDE OF HIS BRAIN.

THAT IS ACTUALLY A HIGHLY FUNCTIONING PART OF HIM.

IT HOLDS THE ARTISTIC TALENT.

>> WANT TO REMIND YOU YOU'RE IN YOUR REBUTTAL.

>> OKAY.

>> YOU'RE VERY ENTHUSIASTIC.

WE APPRECIATE THAT, BUT I DON'T WANT TO STOP YOUR ANSWER BUT I JUST WANT TO REMIND YOU OF YOUR TIME.

>> YES, JUSTICE CANADY, IT WAS GROSSLY INSUFFICIENT AS BORNE OUT BY THE ULTIMATE DIAGNOSIS WE HAVE IN THIS CASE.

>> GOOD MORNING.

MY NAME IS MEREDITH CHARBULA STATE ATTORNEY GENERAL AND I REPRESENT THE APPELLEE IN THIS CASE.

COUPLE THINGS TO CLEAR UP IN THE RECORD.

THIS COURT NEVER REVERSED THIS CASE BECAUSE OF A FAILURE TO PRESENT PSYCHOLOGICAL EVIDENCE OR FAMILY HISTORY.

WHAT HAPPENED IS THE FIRST, THE FIRST TRIAL SENTENCING PORTION GOT REVERSED BECAUSE THE TRIAL COURT FAILED TO INSTRUCT ON THE SUBSTANTIAL IMPAIRMENT MENTAL MITIGATOR AND GOT REVERSED FOR A SECOND PENALTY PHASE.

AT THAT SECOND PENALTY PHASE,  
MR. STEWART WAS REPRESENTED BY  
MICHAEL JONES WHO REPRESENTED  
HIM AT FIRST TRIAL.

THEN SUBSEQUENTLY, THE STATE  
STIPULATED TO A NEW PENALTY PHASE  
BECAUSE OF THE EVIDENCE OF  
MR. JONES' IMPAIRMENT AT THE  
SECOND.

SO THIS COURT NEVER  
REVERSED IT.

SO ANY NOTION THAT THIS COURT  
SHOULD IGNORE FIRST 10-2 VOTE I  
THINK NOT SUPPORTED.

I THINK LOTS OF THINGS THAT  
COUNSEL HAS SAID IS NOT IN THE  
RECORD.

FOR INSTANCE, WOULD URGE THE  
COURT TO LOOK AT VOLUME 6 OF  
THE POST-CONVICTION RECORD,  
PAGE 1149 TO 1150.

THAT IS DR. WEINER'S REPORT.  
THIS CLAIM SORT OF STARTED OFF  
AS INEFFECTIVE ASSISTANCE OF  
COUNSEL.

WHEN YOU LOOK REPLY BRIEF ON  
PAGE 8, IT MORPHED TO  
INEFFECTIVE ASSISTANCE OF  
MENTAL HEALTH EXPERT.

AND WHAT COUNSEL IS SAYING NOW,  
OH, NO, THIS IS NOT A CLAIM OF  
INEFFECTIVE ASSISTANCE OF  
COUNSEL, THIS IS A CLAIM OF  
INEFFECTIVE ASSISTANCE OF  
MENTAL HEALTH EXPERT.

THIS COURT RECOGNIZED THAT IS  
NOT A CLAIM THAT WOULD  
INFLUENCE THE INEFFECTIVE  
ASSISTANCE OF COUNSEL.

I WOULD LIKE TO ALSO SAY THAT,  
APPELLANT'S ARGUMENTS THAT  
DR. WEINER'S NEUROPSYCHOLOGICAL

EVALUATION WAS GROSSLY INADEQUATE BECAUSE YOU OWNLY PERFORMED ONE TEST IS REALLY NOT IN THE RECORD. DR.^EISENSTEIN SAID HE ONLY PERFORMED HALF AN EVALUATION THAT WAS DR.^EISENSTEIN'S OPINION. IF YOU LOOK AT THE REPORT, ANY NOTION HE DID NOT SUBMIT, DID NOT CONDUCT A NEUROPSYCHOLOGICAL EVALUATION IS JUST NOT SUPPORTED. ON THE FIRST PAGE, WHICH IS 1149. FOR PURPOSES OF THIS NEUROPSYCHOLOGICAL EXAMINATION I ADMINISTERED MR.^STEWART THE FOLLOWING BATTERY OF COGNITIVE TESTS. NO ONE TESTIFIED AT THE EVIDENTIARY HEARING WENT DOWN THOSE, SAID NONE OF THESE ARE NOT NEUROPSYCHOLOGICAL SCREENINGS. THIS IS SOMETHING PERHAPS COUNSEL RESERVED BUT WAS NOT BEFORE THE COLLATERAL COURT. SO THIS COURT IN DARLING HAS SAID THAT TRIAL COUNSEL CAN RELY ON A COMPETENT MENTAL HEALTH EXPERT. DR.^WEINER IS A CLINICAL AND FORENSIC PSYCHOLOGIST. HE CONDUCTED A NEUROPSYCHOLOGICAL EXAM. MORE IMPORTANTLY, LOOK AT DR.^MAHER'S TESTIMONY DURING THE EVIDENTIARY HEARING. DR.^MAHER TESTIFIED THAT HE IS A PSYCHIATRIST BY THE WAY. HE SAYS, I DO BRAIN DAMAGE. AND I EVALUATED MR.^STEWART

AS WELL AS REVIEWING REPORTS OF MANY, MANY OF THE DOCTORS AND PREVIOUS MENTAL HEALTH EXAMINATIONS.

I FOUND NO BASIS TO CONDUCT NEUROPSYCHOLOGICAL SCREENING. I DID NOT RECOMMEND IT TO TRIAL COUNSEL.

AND IF I WOULD HAVE SAW THE NEED FOR IT, I WOULD HAVE RECOMMENDED IT.

ALSO, HE LOOKED AT DR.^WEINER'S REPORT AND HE SAID, BASED ON DR.^WEINER'S REPORT AND TESTING HE PRESENTED, I SEE NO EVIDENCE OF BRAIN DAMAGE.

>> DID DR.^MAHER LOOK AT NOW, WHAT, THE PET SCAN IS NOW DONE AND DR.^EISENSTEIN'S TESTING -- [NO AUDIO]

>> IF YOU LOOK AT POSSIBLE BRAIN DAMAGE YOU SEE THE COLLATERAL COURT WASN'T REALLY CONVINCED HE ABSOLUTELY HAD BRAIN DAMAGE.

DID IT SORT OF ALTERNATIVELY WHEN SHE FOUND NO PREJUDICE.

FIRST SHE FOUND NO DEFICIENT PERFORMANCE BECAUSE COUNSEL DID CONSULT WITH A QUALIFIED MENTAL HEALTH EXPERT, DR.^WEINER.

IN MARCH 2001 WE HAVE A REPORT BEFORE THE SECOND RESENTENCING, NO BRAIN DAMAGE.

DR.^MAY AT EVIDENTIARY HEARING, TESTIFIED, NO BRAIN DAMAGE.

UNEQUIVOCALLY TESTIFIED.

NOW, ANY NOTION, FIRST OF ALL, ANY NOTION THAT DR.^WOOD'S TESTIMONY IS UNREBUTTED IS SIMPLY NOT SUPPORTED BY THE RECORD.

DR.^WILF WHO IS A RADIOLOGIST,  
HE SPECIALIZES IN NUCLEAR  
MEDICINE.

HE TESTIFIED AT THE EVIDENTIARY  
HEARING, LOOKED AT THE SAME PET  
SCAN THAT DR.^WOOD PERFORMED  
AND FOUND NO EVIDENCE OF BRAIN  
DAMAGE.

IT WAS PERFECTLY NORMAL BRAIN.

NOW --

>> WHAT WAS, WAS THIS THE CASE  
THERE IS EXPLANATION FOR  
SOMETHING ABOUT THE POSITIONING  
OF THE, OF THE HEAD DURING THE  
SCAN?

>> EXACTLY. TWO THINGS.

NOW ONE I WANT TO BE ABSOLUTELY  
UP FRONT WITH THE COURT IS THE  
COLLATERAL COURT FOUND  
DR.^WILF'S TESTIMONY ON THAT  
ISSUE NOT PERSUASIVE FOR ONE  
REASON.

THAT IS BECAUSE, SHE WAS NOT  
FAMILIAR WITH THE PROCEDURES  
DR.^WOOD USED.

THAT IS PRETTY REASONABLE UNDER  
THE CIRCUMSTANCES BECAUSE  
DR.^WOOD TESTIFIED AT  
EVIDENTIARY HEARING THAT HIS  
PROTOCOL, THIS, THIS TEST HE  
DOES WHERE HE STIMULATES BRAIN  
PRIOR TO SCANNING, IS NOT  
ACCEPTED IN ANY SINGLE CLINICAL  
PRACTICE AND THAT MORE KNEW  
ROLL EXISTS DON'T KNOW ABOUT IT  
THAN DO BECAUSE IT IS, NO ONE  
USES IT.

AND DR.^WILF SAID HE WASN'T  
FAMILIAR WITH IT BECAUSE NO ONE  
USES IT.

SO --

>> YOU'RE REALLY SAYING THIS

ISN'T, IF WE ACCEPT WHAT THE STATE'S EVIDENCE IS, AS THE JUDGE FOUND IT, YOU'RE SAYING THIS ISN'T REALLY EVEN A CASE OF CLEARLY ESTABLISHED DAMAGE?

>> ABSOLUTELY NOT.

>> I MEAN, SO WE FIRST HAVE TO GET TO THE FINDING OF THE CREDIBILITY AS TO WHETHER THERE IS BRAIN DAMAGE BEFORE WE COULD DECIDE WHETHER SOMEBODY WAS GROSSLY INADEQUATE IN PERFORMING THEIR EVALUATION? WE WOULD HAVE TO FIND THAT WHAT DR. MAHER NOW SAYS IS TOTALLY, THAT HE STILL REMAINS AN INCOMPETENT MENTAL HEALTH EXPERT ESSENTIALLY?

>> WELL, DOCTOR, AND I THINK, THAT, --

>> NOT REMAINS ONE BUT HE WOULD HAVE -- IN OTHER WORDS IT IS SO CLEAR THAT THIS MAN HAD BRAIN DAMAGE, THAT ANYBODY WHO IS A PRACTICING PHYSICIAN WOULD BE ABLE TO DISCERN THAT THIS PERSON IS CLEARLY IMPAIRED? IS THAT -- THAT IS THE WAY I SEE THIS RALEIGH TESTING.

>> IF YOU ARE NOW GOING TO ACCEPT THIS, AN AKE CLAIM WHICH EVOLVED FROM THE CLAIM PRESENTED ON APPEAL WHICH COUNSEL WAS INEFFECTIVE --

>> ON THAT POINT ISN'T IT THE CASE THAT THE AKE CLAIM WAS NOT PRESENTED TO THE TRIAL COURT?

>> THAT'S RIGHT.

>> POST-CONVICTION.

>> CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

>> SO THE AKE CLAIM WAS NOT

PRESENTED THERE?

>> NO.

>> SIMPLY AN UNPRESERVED CLAIM?

>> EXACTLY. THE AKE CLAIM  
IS A DIRECT APPEAL CLAIM.

BUT EVEN IF SAY, WE'RE GOING TO  
LOOK FURTHER, FIRST OF ALL, YOU  
CAN'T FIND DEFICIENT  
PERFORMANCE BECAUSE, COUNSEL IS  
ENTITLED TO RELY ON COMPETENT  
MENTAL HEALTH EXPERT AND I  
DISPUTE THERE IS EVIDENCE,  
UNDISPUTED OR OTHERWISE THAT  
DR.^WEINER WAS INCOMPETENT OR  
DR.^MAYOR WHO IS A PSYCHIATRIST  
WHO DOES BRAIN DAMAGE.  
HE DOES THAT ACCORDING TO HIS  
TESTIMONY.

HE LOOKED AT DR.^WEINER'S  
REPORT, BASED ON HIS OWN  
EVALUATION AS WELL AS  
EVALUATIONS OF NUMEROUS OTHER  
PEOPLE WHO HAD SEEN HIM.

>> DR.^MAHER IS ONE OF THE NAMES WE  
SEE FREQUENTLY AS EXPERTS  
THAT TESTIFY FOR THE DEFENSE.

>> EXACTLY.

NOW, ANOTHER CASE BEEN  
PERCOLATING THROUGH THE SYSTEM  
ALREADY THROUGH THE 11th  
CIRCUIT, DR.^AFIELD, HE  
EXAMINED STEWART.  
CONDUCTED NEUROPSYCHOLOGICAL  
TESTING AND FOUND NO BRAIN  
DAMAGE.

THOSE OPINIONS YOU CAN SEE IN  
THE HARRIS CASE BECAUSE, AND IN  
THE HARRIS CASE WAS USED  
AGGRAVATION IN THIS CASE.

SO I DISPUTE THERE IS ANY, --

>> YOU'RE TALKING ABOUT, JUST  
MAKE SURE, YOU'RE TALKING ABOUT

ANOTHER CASE, DEATH CASE  
INVOLVING THIS DEFENDANT?

>> YES.

BUT DR.^EISENSTEIN SAID HE  
REVIEWED THAT REPORT AS WELL.

HE AT LEAST REVIEWED --

DR.^EISENSTEIN YOU HAVE TO LOOK  
AT -- DR.^MAHER, IN FACT, SAID HE  
DISAGREED COMPLETELY WITH  
DR.^EISENSTEIN'S EVIDENCE.

FOR INSTANCE, DR.^MAHER SAID  
ONE THE TESTS THAT

DR.^EISENSTEIN CONDUCTED WHICH  
IS WISCONSIN CARD SORTING TEST  
VERY SENSITIVE TO BRAIN DAMAGE.  
STEWART WAS WELL ABOVE AVERAGE  
ON HIS PERFORMANCE ON THAT.

DR.^MAHER SAID, I THINK

DR.^EISENSTEIN'S WRONG BECAUSE  
HE SIMPLY IGNORES THE WISCONSIN  
CARD SORTING TEST IS SENSITIVE  
TO BRAIN DAMAGE.

STEWART DID WELL ON IT AND  
DOESN'T UNDERMINED HIS OPINION.

ANY NOTION THAT

DR.^EISENSTEIN'S OPINION WAS  
UNCONTROVERTED OR DR.^WOOD'S  
OPINION WAS NOT UNCONTROVERTED  
IS SIMPLY NOT TRUE.

WHEN COURT LOOKED AT DR.^WOOD  
TESTIFIED AGAIN THAT HIS METHOD  
IS NOT ACCEPTED IN ANY MEDICAL  
SETTING, COMMUNITY WHATSOEVER.

IT IS IN RESEARCH COMMUNITY.

AND HE DID TESTIFY HE HAD BEEN  
PEER-REVIEWED AND PUBLISHED

ARTICLES AND HAD BEEN ACCEPTED

BUT HE AND DR.^WILF TESTIFIED

THAT THE WAY HE DID A PET SCAN  
WAS NOT ACCEPTED IN THE MEDICAL  
COMMUNITY.

I THINK ALSO, YOU KNOW, YOU

HAVE TO LOOK AT WHAT COUNSEL DID.

HE WENT TO DR. ^WEINER.

HE, HE WAS TOLD, NO EVIDENCE OF BRAIN DAMAGE.

MR. ^STEWART'S IQ IS AVERAGE.

HE'S, RANGE WAS FROM 90 TO 100.

I THINK, OR SO IN HIS LIFETIME.

HE HAS AVERAGE INTELLIGENCE.

COUNSEL CONSULTED WITH TWO OTHER MENTAL HEALTH EXPERTS.

A PSYCHIATRIST, DR. ^SULTAN, A CLINICAL PSYCHOLOGIST WHO TESTIFIED HE HAS PTSD.

SO YOU IF EVER GET PAST SUFFICIENT PERFORMANCE WHICH I SUBMIT THIS COURT SHOULD NEVER GET PAST SUFFICIENT PERFORMANCE OF COUNSEL, EVEN IN APPELLANT'S REPLY BRIEF, SHE SAYS, WHY WAS COUNSEL INEFFECTIVE?

BECAUSE HE WAS WRONGLY ADVISED BY DR. ^WEINER.

ACCORDING TO THIS COURT'S DECISION IN DARLING AND ITS PROGENY YOU DON'T GET PAST A SUFFICIENCY PRONG.

SAY YOU DO BECAUSE YOU WANT TO LOOK AT PREJUDICE PRONG, JUSTICE PARIENTE, YOU TOLD ME MANY, AT LEAST A COUPLE TIMES WE DON'T KNOW HOW JURIES THINK.

SO WHAT IS A REASONABLE EXPLANATION FOR 7-5?

FIRST OF ALL YOU HIT THE NAIL ON THE HEAD IS THAT COUNSEL PRESENTED EVIDENCE, TWO MENTAL HEALTH EXPERTS, FAMILY, SUSAN MOORE, LINDA ARNOLD, LILLIAN BROWN, WHO TESTIFIED ABOUT THE CHILDHOOD ABUSE THAT MR. ^STEWART ENDURED AT THE

HANDS OF BRUCE SCARPO.  
THAT ABUSE DIDN'T EMERGE UNTIL  
THE FIRST RESENTENCING AND ONLY  
A LITTLE BIT.  
ONLY IN THE SECOND RESENTENCING  
DID MR.^FRAZIER REALLY DEVELOP  
THAT.  
THEY HEARD THAT EVIDENCE.  
ONE THING ALSO IS, IF YOU'RE,  
MAYBE, TRYING TO FIND A  
REASONABLE EXPLANATION FOR THE  
7-5, OTHER THAN THE SIGNIFICANT  
MENTAL MITIGATION THAT COUNSEL  
DID PUT ON WAS, THAT, COUNSEL  
PERSUADED THE JUDGE TO INSTRUCT  
THE JURY THAT MR.^STEWART HAD  
BEEN SENTENCED TO 192 YEARS FOR  
OTHER OFFENSES.  
SO THE TRIAL COUNSEL ASKED FOR  
THAT INSTRUCTION.  
THE TRIAL COURT GAVE THAT  
INSTRUCTION.  
SO, IF ONE WONDERS, FOR,  
FINDING A REASONABLE  
EXPLANATION, IS THAT THE TRIAL  
COUNSEL SUCCESSFULLY PERSUADED  
THE COURT WHICH I THINK WAS  
CONTRARY TO SOME OF THIS  
COURT'S CASE LAW BUT  
NONETHELESS PERSUADE THE COURT  
TO INSTRUCT THE JURY THAT  
MR.^STEWART WAS SENTENCED TO  
192 YEARS ON OTHER OFFENSES  
THAT OF COURSE TRIAL COUNSEL  
USED TO ARGUE THAT HE SHOULDN'T  
BE SENTENCED TO DEATH.  
SO, I THINK WHEN ONE LOOKS AT  
THE RECORD, WHAT TRIAL COUNSEL  
DID, THE FACT THAT THE BRAIN  
DAMAGE WAS CONTESTED, NOT EVEN  
REALLY FULLY ACCEPTED BY THE  
COLLATERAL COURT BECAUSE SHE

STILL REFERRED TO IT AS  
POSSIBLE BRAIN DAMAGE, THE  
EVIDENCE FROM DR.^MAHER,  
DR.^WEINER, I THINK THIS COURT  
CAN SEE THAT COUNSEL IS NEITHER  
DEFICIENT NOR THERE WAS  
PREJUDICE.

I LIKE TO LEAVE THIS WITH ONE  
MORE COMMENT ON THE PREJUDICE  
PRONG.

IF YOU LOOK AT FIRST OF YOU  
WILL DR.^WOOD TESTIFIED TO  
NOTHING ABOUT THE MURDER.  
HE DID TESTIFY THAT BRAIN  
DAMAGE AFFECTS IMPULSE CONTROL  
AND COHERENT THINKING AND  
RATIONAL JUDGMENT BUT HE MADE  
NO OPINION AS TO THE STATUTORY  
MENTAL MITIGATORS BECAUSE HE  
DIDN'T EVALUATE THAT.

HE DID THE PET SCAN.

DR.^EISENSTEIN SIMPLY AGREED  
DURING CROSS-EXAMINATION WITH  
DR.^MAHER AND DR.^SULTAN THAT  
THE STATUTORY MENTAL MITIGATORS  
APPLIED.

>> BUT THEY DIDN'T GIVE, THAT'S  
WHAT I LOOKING FOR.

SOMETIMES WE HAVE EXPERTS SAY,  
WELL THEY HAVE THESE MENTAL  
HEALTH ISSUES OR, BRAIN DAMAGE.  
BUT THEN THEY DON'T EVER LINK  
IT UP TO EXPLAIN HOW DOES THAT  
THEN EXPLAIN THIS CRIME?

SO ARE YOU SAYING THERE IS AN A  
ABSENCE OF THAT CONNECTION TO  
BE A POWERFUL STATUTORY  
MITIGATOR, NOT THAT IT IS NOT  
MITIGATING, IT IS MITIGATING  
EVEN IF IT IS NOT CONNECTED BUT  
TO BE POWERFUL MITIGATION IT  
HAS TO MAKE SENSE AS HOW IT

RELATES TO THIS CRIME AND WHAT THEY, DID THEY DISCUSS THAT IN TERMS OF HIS IMPAIRED DECISION-MAKING?

>> ABSOLUTELY.

DR.^EISENSTEIN TESTIFIED THAT THE BRAIN DAMAGE WOULD NOT, YOU KNOW, CAUSE SOMEONE TO GO OUT AND KILL SOMEONE.

HE WOULD HAVE TO HAVE A GREATER AMOUNT OF DISINHIBITION.

BUT HE TALKED ABOUT IN GENERAL TERMS ABOUT HOW BRAIN DAMAGE PLUS ADHD PLUS ALCOHOL, AND OF COURSE THE ONLY EVIDENCE WE HAVE AT THE, THAT, STEWART WAS DRINKING AT THE TIME OF THE MURDER ITSELF WAS STEWART'S OWN SELF-SERVING STATEMENT.

THERE WAS NEVER ANY EVIDENCE HE WAS INTOXICATED AT TIME OF THE MURDER.

IF YOU LOOK AT FACTS OF THE MURDER, YOU'LL SEE THAT, YOU KNOW, HE, THEY TARGETED AN INDIVIDUAL.

THEY TOOK HIM OUT TO A REMOTE LOCATION.

THEY GOT HIM DOWN ON THE GROUND.

MR.^STEWART EXECUTED HIM BY SHOOTING HIM TWICE.

THEY STOLE MONEY.

THEY STOLE COCAINE.

THEY TOOK THE CAR.

THEY TOOK THE LICENSE PLATE OFF THE CAR AND BURNED IT.

AND, MR.^STEWART HAD MENTIONED TO RANDY BILLBURY, A MAN HE BURNED THE CAR TO GET RID OF FINGERPRINTS.

WE SEE A VERY DELIBERATE CRIME.  
THE CAR WAS DUMPED, VERY CLOSE  
IN TIME AFTER THE MURDER.  
IN OTHER WORDS, WE DON'T HAVE  
HIM DOING THIS DESTRUCTION OF  
EVIDENCE, FAR IN TIME WHEN HE  
MIGHT HAVE HAD A CHANCE TO  
SOBER UP.

>> I WOULD HAVE TO LOOK BACK.  
I THOUGHT THE MOTIVE FOR THE  
MURDER WAS TO GET THE CAR BUT  
THEY BURNED THE CAR SO --

>> IT WASN'T TO GET THE CAR.  
WELL, IT WAS TO ROB, TO GET  
MONEY.

HE TOLD MR.^BILBURY TO GET  
MONEY.

>> THE CAR LOOKED EXPENSIVE.

>> HE LOOKED RICH. DRESSED WELL.  
SILVER NECKLACE.

ASSUMED HE WAS RICH.

HE HAD 50 BUCKS IN HIS POCKET.  
THEY KILLED 21-YEAR-OLD REUBEN  
DIAZ FOR \$50.

HE TOLD TWO STORIES.

HE TOLD RANDALL BILBURY THAT  
ANOTHER GUY COMMITTED CRIME.

HE TOLD TERRY SMITH HE ALONE  
COMMITTED CRIME.

THAT MR.^DIAZ PICKED HIM UP  
HITCHHIKING, REMARKABLY SIMILAR  
TO WHAT HAPPENED TO MARK HARRIS  
AND MICHELLE ACOSTA WHEN THEY  
PICKED HIM UP HITCHHIKING.

HE SHOT MR.^HARRIS AND KILLED  
HIM AND SHOT MISS ACOSTA IN THE  
BACK AND, BUT SHE SURVIVED.

SO, AND THEN FOUR DAYS AFTER  
THAT HE WALKED INTO A 7-ELEVEN,  
PULLED A GUN ON A TELLER.

HE WAS WITH TERRY SMITH.

PULLED A GUN, SAID THIS IS

ROBBERY, BANG.  
DIDN'T EVEN GIVE THE GUY A  
CHANCE TO MOVE. AND HE LIVED.  
SO I THINK WHEN YOU LOOK AT THE  
NOTION OF ALCOHOL CONSUMPTION  
COMBINED WITH ADHD, COMBINED  
WITH BRAIN DAMAGE, YOU SEE THAT  
REALLY THE EVIDENCE OF HIS  
INTOXICATION IS ONLY  
SELF-SERVING STATEMENT.  
WHEN YOU LOOK AT FACTS AND  
CIRCUMSTANCES OF THE CRIME THEY  
DON'T INDICATE THAT.  
ALSO, THE, EVEN IF YOU ACCEPT  
DR.^EISENSTEIN'S STATEMENT, THE  
CRUX OF HIS TESTIMONY WAS,  
SOMEONE WITH BRAIN DAMAGE, ADHD  
AND ALCOHOL CONSUMPTION WILL  
HAVE POOR IMPULSE CONTROL,  
INCOHERENT THINKING, EXACTLY  
WHAT DR.^MAHER AND DR.^SULTAN  
TESTIFIED TO.  
AS A RESULT OF THE TESTIMONY,  
YOU HAVE, THE, DR.^SULTAN, AND  
DR.^MAHER COMBINED TESTIFYING  
THAT BOTH STATUTORY MENTAL  
MITIGATORS APPLIED.  
THEY'RE TELLING, THEY'RE  
TALKING TO THAT TO THE JURY,  
THE TRIAL COURT DID FIND THEM  
MORE PERSUASIVE BUT THAT  
TESTIMONY IS BEFORE THE JURY.  
AND, TRIAL COUNSEL IS  
PRESENTING THAT TO THE JURY SO THE  
JURY IS HEARING ABOUT HIS  
TERRIBLE CHILD ABUSE.  
THEN THEY'RE HEARING TESTIMONY  
FROM DR.^MAHER AND DR.^SULTAN  
ABOUT THE TERRIBLE CHILD ABUSE  
COMBINED WHICH CAUSED PTSD.  
ALL THAT TESTIMONY THEY'RE  
HEARING.

THEY'RE OPINING BOTH STATUTORY  
MENTAL MITIGATORS APPLY.

WHAT ARE THEY OPINING? HIS  
PTSD COMBINED WITH ALCOHOL  
ABUSE AND DR. ^MAHER TESTIFIED  
AT RESENTENCING HE BELIEVED  
THAT, THAT STEWART WAS  
INTOXICATED AT THE TIME AND  
THAT AFFECTS IMPULSE  
CONTROL, CAUSES POOR IMPULSE  
CONTROL.

AFFECTS JUDGMENT.

>> IF THIS WAS DEMONSTRATED  
BRAIN DAMAGE AND IT WAS  
RELATED, JURIES ARE CERTAINLY  
GOING TO BE MORE IMPRESSED WITH  
THERE BEING ORGANIC BASIS FOR  
LOSS OF IMPULSE CONTROL THAN  
VOLUNTARY CONSUMPTION OF  
ALCOHOL, WOULDN'T YOU AGREE?

>> MAYBE SO.

BUT THE FACT IS, IS THAT,  
DR. ^MAHER AND DR. ^SULTAN,  
THE THRUST OF THEIR TESTIMONY  
WAS PTSD COMBINED WITH THE  
ALCOHOL.

AND SO WE'VE GOT, AND EVEN  
DR. ^SULTAN SAID THE PTSD ITSELF  
CAUSES HIS IMPULSE, TO HAVE HIM  
TO HAVE POOR IMPULSE CONTROL  
AND POOR JUDGMENT.

SO I THINK ALSO THE FACT IS, IS  
THAT, THE EVIDENCE OF BRAIN  
DAMAGE WAS CLEARLY CONTESTED.  
I MEAN, EVEN DOCTOR, IF THEY  
WOULD HAVE PUT DR. ^EISENSTEIN  
ON THE STAND FOR INSTANCE WHO  
TESTIFIED HE HAD BRAIN DAMAGE  
AND DR. ^MAHER ON THE STAND  
THEIR OWN EXPERTS WOULD HAVE  
CLASHED.

MAHER HAS SAID AND HAS

CONTINUED TO SAY THERE IS NO  
BRAIN DAMAGE.  
SO, CERTAINLY THAT WOULD, I  
THINK WOULD LESSEN ANY WEIGHT  
THAT THE JURY WOULD GIVE.  
PLUS WHEN DR.^WOOD GETS UP  
THERE AND TESTIFIES, THE WAY I  
DO IT IS NOT ACCEPTED IN ANY  
SINGLE, CLINIC OR MEDICAL  
PRACTICE AND DR.^WILF WOULD GET  
UP THERE AND SAY I EXAMINED  
THIS SAME PET SCAN AND HIS  
BRAIN IS COMPLETELY NORMAL, I  
THINK THE CHANCES AS YOU SAY OF  
BEING MORE IMPRESSED ARE  
SIGNIFICANTLY REDUCED, IF NOT  
COMPLETELY ELIMINATED.  
SO BASED ON THE BRIEF, THE  
APPELLEE WOULD REQUEST THIS  
COURT AFFIRM THE  
POST-CONVICTION ORDER DENYING  
MR.^STEWART POST-CONVICTION  
RELIEF AND ALSO DENY HIS HABEAS  
PETITION.  
>> THANK YOU VERY MUCH.  
REBUTTAL.  
YOU HAVE A LITTLE UNDER TWO  
MINUTES.  
AND I THINK THE ONE THING YOU  
OUGHT TO ADDRESS IS THIS ISSUE  
ABOUT WHETHER THE MODIFIED AKE  
CLAIM ABOUT INEFFECTIVE  
ASSISTANCE OF MENTAL HEALTH  
EXPERT WAS PRESENTED TO THE  
TRIAL JUDGE.  
>> IT WAS PRESENTED TO THE  
TRIAL JUDGE.  
THE CASE WAS CITED IN THE  
POST-CONVICTION MOTION AND  
MEMORANDUM OF LAW.  
IT IS VERY CLEAR A TRIAL  
ATTORNEY CAN NOT DO THEIR JOB

CORRECTLY AND THUS WILL BECOME INEFFECTIVE IF THE EXPERTS THEY RELY ON FOR ASSISTANCE ARE IN AND OF THEMSELVES INEFFECTIVE. THAT WAS THE CLAIM THAT WAS PRESENTED BELOW AND SAME CLAIM THAT IS PRESENTED HERE.

>> LET ME GO BACK TO THE VERY FIRST BEGINNING PART OF YOUR ARGUMENT.

I ASKED YOU THE QUESTION, WHETHER THE FACTS YOU ARE STATING WERE INDISPUTABLE IN THIS RECORD.

YOU DO YOU RECALL THAT QUESTION?

>> YES I DO.

>> IF A NEUTRAL OBSERVER ACCEPTS FACTS WE'VE HEARD FROM THE STATE, WITHOUT CONCLUSION, JUST THE FACTS, DO YOU STILL ASSERT THAT THIS, YOUR POSITION IS INDISPUTABLE?

>> YES.

>> OKAY.

>> THAT'S FINE.

>> DR. WILF TESTIFIED HE IS DIAGNOSTICIAN. ONLY EXPERT CALLED BY THE STATE ON THE ISSUE OF DR. WOOD'S TESTIMONY THAT SHOWS UNREBUTTED EVIDENCE THAT THE PET SCAN HE PERFORMED IS ACCEPTED IN THE SCIENTIFIC COMMUNITY. IT IS FUNDED BY FEDERAL GOVERNMENT.

HE HAS TESTIFIED OVER 60 TIMES IN CRIMINAL CASES IN A FORENSIC CAPACITY.

HIS RESEARCH IS CONSIDERED PIONEERING AND IT IS ACCEPTED IN THE COMMUNITY IN WHICH IT IS

APPROPRIATE, WHICH IS FORENSIC  
NEUROPSYCHOLOGY.

WHAT DR.^WILF SAID WAS THAT HE  
NEVER HEARD OF IT BECAUSE HE  
DOES NOT DO THAT TYPE OF WORK.  
HE LOOKS FOR TUMORS.

HE LOOKS FOR WHETHER YOUR BONES  
ARE IN THE RIGHT PLACES HE  
DOESN'T DO THIS.

HE HAD NOTHING TO DISPUTE WHAT  
DR.^WOOD SAID.

IN FACT HIS CONCLUSION WAS THEY  
SHOULDN'T HAVE USED HIM IN THIS  
CASE BECAUSE HE KNEW NOTHING  
WHEN ABOUT IT AND HE COULDN'T  
SAY IT WAS RIGHT OR WRONG.

HE UNDERSTOOD WHERE DR.^WOOD  
WAS COMING FROM.

HE SAID I'M NOT EVEN THE RIGHT  
PERSON TO SERVE AS EXPERT IN  
THIS CASE.

IT IS OUTSIDE MY FIELD OF  
EXPERTISE AND HE WOULD DEFER TO  
HIM.

BASED UPON THAT, YES, IT IS  
UNDISPUTED.

DR.^MAHER NEVER RETOOK THE  
STAND TO SAY.

>> YOU'VE USED YOUR TIME.

IF YOU JUST WANT TO MAKE --

>> CONCLUDING STATEMENT?

>> CONCLUDING STATEMENT.

>> MY CONCLUDING STATEMENT  
WOULD BE THIS.

ISSUE IS PRESERVED.

THE TESTIMONY IS UNDISPUTED AND  
EVIDENCE OF ORGANIC BRAIN  
DAMAGE AND ATTENDANT EFFECTS ON  
MR.^STEWART WOULD HAVE  
SIGNIFICANTLY INFLUENCED THE  
JURY IN THIS CASE.

>> THANK YOU VERY MUCH.

WE'LL TAKE THE CASE UNDER  
ADVISEMENT AND CALL THE NEXT  
CASE.