

>> PLEASE RISE.

>> FLORIDA SUPREME COURT IS
AGAIN IN SESSION.

PLEASE BE SEATED.

>> THE NEXT CASE ON OUR DOCKET
IS BUZIA V. THE STATE OF
FLORIDA.

>> MAY IT PLEASE THE COURT, I AM
MARIA DeLIBERATO AND I
REPRESENT JOHN BUZIA.

I'M GOING TO FOCUS THIS MORNING
ON ISSUE ONE WHERE DESPITE
PRESENTING A NUMBER OF
WITNESSES, COUNSEL RENDERED
INEFFECTIVE ASSISTANCE AT THE
PENALTY PHASE BY PRESENTING A
FALSE PICTURE OF MR. BUZIA'S
LIFE.

SPECIFICALLY, BY FAILING TO
DISCOVER AND TELL THE JURY ABOUT
HIS BRAIN DAMAGE AND THE
DEVASTATING CONSEQUENCES OF
SUBSTANCE ABUSE AND MENTAL
ILLNESS THAT HAVE PLAGUED THE
BUZIA FAMILY.

FOCUSING FIRST ON THE FALSE
PICTURE OF THE BRAIN DAMAGE.
THE DOCTOR TESTIFIED IN THE
PENALTY PHASE THAT MR. BUZIA WAS
NOT BRAIN DAMAGED.

IN FACT, AT POSTCONVICTION AFTER
NUMEROUS EVALUATIONS AND A PET
SCAN, COUNSEL PRESENTED EVIDENCE
THAT MR. BUZIA HAS BRAIN DAMAGE.

>> WAIT, I THOUGHT THERE WAS
SOME DISPUTE WITH REGARD TO THE
PET SCANS.

AM I WRONG?

I THOUGHT THERE WAS OTHER
EVIDENCE AND EXPERTS THAT TALKED
ABOUT TILTING OF HEADS AND THOSE
KINDS OF THINGS?

>> YOUR HONOR --

>> ISN'T THAT IN THE RECORD?

>> THE RECORD AS FAR AS THE DISPUTE ON THE PET SCAN ITSELF. THE TESTIMONY BELOW SAID THE PET SCAN SHOWED DAMAGE IN THE EXACT SAME AREA WHERE MR. BUZIA WAS STRUCK --

>> YOU SAID IT WAS UNDISPUTED, AND I'M NOT SURE I'M SEEING THAT UNDISPUTED NATURE, THAT'S WHY I'M ASKING.

I THOUGHT THERE WAS EVEN TESTIMONY FROM MAYBE SOMEONE AT EMORY, AN EXPERT IN THIS KIND OF THING, THAT SAID THAT THEY'D EACH LOOKED AT AND RE-EXAMINED OTHER CASES IN WHICH THIS, IS IT DR. WU?

IS THAT WHO IT IS?

>> HE WAS ONE OF THE DEFENSE EXPERTS ON THE PET SCAN.

>> RIGHT.

AND SAID THAT HE CONSISTENTLY MISREADS THEM.

AGAIN, YOU MAY DISAGREE, AND THERE MAY BE OTHER EVIDENCE, BUT ISN'T THAT SOMETHING THAT'S PART OF WHAT WAS BEFORE THE TRIAL COURT, AND YOU CAN'T JUST IGNORE --

>> YES.

AND I WANT TO BE CLEAR MY STATEMENT WAS THERE WAS NO CONTRADICTING EVIDENCE THAT MR. BUZIA HAS EVIDENCE.

>> THAT'S WHAT THEY RELIED ON, DIDN'T THEY?

>> ONLY IN PART.

IN PART.

THE MAIN RELIANCE WAS THE NEUROPSYCHOLOGICAL TESTING COMPLETED BY DR. SESTA WHICH WAS UNCONTRADICTED.

DR. WU READ THE PET SCAN AS

ABNORMAL, THE DOCTORS FOR THE STATE VIEWED IT AS NORMAL. BUT THEY BOTH TESTIFIED THEY COULD NOT RULE OUT DAMAGE, ESPECIALLY DR. --

>> WELL, LET'S GO OVER.

FIRST OF ALL, THERE WAS AN EVIDENTIARY HEARING.

>> CORRECT.

>> AND WHAT DID THE TRIAL COURT FIND ABOUT THIS CLAIM, THAT TRIAL COUNSEL WAS INEFFECTIVE IN USING AN EXPERT THAT DIDN'T FIND BRAIN DAMAGE?

>> WITH RESPECT TO THE BRAIN DAMAGE, MISSTATED THE LAW AND MISAPPLIED THE PREJUDICE --

>> BUT WHAT EXACT FACTS DID THE TRIAL COURT --

>> THE TRIAL COURT STATEMENT ON THE BRAIN DAMAGE WAS THE QUESTION -- WAS NOT WHETHER OR NOT MR. BUZIA HAS BRAIN DAMAGE, THE QUESTION IS WHETHER TRIAL COUNSEL'S ACTIONS WERE REASONABLE.

THE TRIAL COURT NEVER MADE A FINDING WHETHER OR NOT MR. BUZIA SUFFERS FROM BRAIN DAMAGE.

>> AND AS FAR AS THE ACTIONS OF TRIAL COUNSEL, THEY OBTAINED A MENTAL HEALTH EXPERT.

WAS THERE, WAS THERE INDICATION THAT THERE WAS BRAIN DAMAGE AND THERE SHOULD HAVE BEEN FURTHER TESTS DONE?

YOU KNOW, IN OTHER WORDS, CAN'T JUST HAVE THIS SORT OF SECOND GUESSING AS YOU ARE CERTAINLY FAMILIAR WITH.

BUT I FIND THESE CASES WHERE DEFENSES HAVE RETAINED AN EXPERT AND DONE A REASONABLE JOB WITH THAT EXPERT THAT JUST BECAUSE

YOU NOW FIND AN EXPERT THAT SAYS
SOMETHING ELSE ISN'T EQUIVALENT
TO SUFFICIENT PERFORMANCE.

>> ABSOLUTELY, YOUR HONOR.

AND THE ISSUE HERE IS TRIAL
COUNSEL DID HAVE INFORMATION
BEFORE HIM THAT SHOULD HAVE LED
HIM TO INVESTIGATE FURTHER.

FIRST OFF, DR. RIEBSAME IS NOT
QUALIFIED TO ASSESS BRAIN DAMAGE
AND PREVAILING NORMS AND
OBJECTIVE STANDARDS, AND THIS
COURT CASE LAW AND THE UNITED
STATES SUPREME COURT CASE LAW
INDICATE THAT A PSYCHOLOGIST, A
30-MINUTE SCREENING, IS NOT
SUFFICIENT TO RULE OUT BRAIN
DAMAGE.

TRIAL COUNSEL HAD AN ABNORMAL
MRI, A CLIENT WITH A HISTORY OF
A SKULL FRACTURE, SHEERING INTO
THE BRAIN WHICH IS WHERE THE
BRAIN DAMAGE WAS DISCOVERED BY
NEUROPSYCHOLOGICAL TESTING AND
THE PET SCAN.

TRIAL COUNSEL ALSO HAD A REPORT
FROM DR. BERNSTEIN WHO THEY
HIRED AFTER DR. RIEBSAME CAME IN
THIS CASE WHICH SAID FURTHER
NEUROLOGIC TESTING WAS CRITICAL.
TRIAL COUNSEL OBTAINED AN MRI
THAT SHOWED AN ABNORMALITY
ASSOCIATED WITH SEIZURES.

TRIAL COUNSEL WENT AS FAR TO
SEEK AND APPROVE A PET SCAN.

THEY CONTACTED DR. HALL WHO
TRIAL COUNSEL BELIEVED WAS A
NEUROLOGIST.

THEY GOT THE APPROVAL FOR THE
PET SCAN.

THERE'S NO STRATEGIC DECISION
FOR THEM TO JUST STOP.

>> SO LET'S GO, YOU'VE GIVEN ME
ANSWERS TO AT LEAST HOW YOU

WOULD HAVE BEEN UNREASONABLE.
THE EXPERTS THAT YOU PRESENTED,
YOU'RE SAYING BRAIN DAMAGE, AND
BRAIN DAMAGE CAN MEAN SO MANY
DIFFERENT THINGS.

WHAT, WHAT EXACTLY DID YOUR
EXPERTS SAY THAT WERE
UNCONTROVERTED ABOUT THE STATE
OF ANY ORGANIC PROBLEMS THAT HE
SUFFERED FROM?

>> LEFT TEMPORAL LOBE DAMAGE,
AND THE TEMPORAL LOBE OBVIOUSLY
REGULATES --

>> WHAT ABOUT HIS IMPAIRMENT?
WHAT KIND OF IMPAIRMENT?

>> THAT IT WAS, OVERALL, A MILD
IMPAIRMENT.

>> MILD COGNITIVE IMPAIRMENT.

>> THAT'S CORRECT.

>> SO AS TO WHETHER -- ARE YOU
ALLEGING THAT THIS WOULD GO TO
ESTABLISH STATUTORY MITIGATION?

>> THAT'S CORRECT, YOUR HONOR.

DR. SESTA AND THE OTHER EXPERTS
THAT TESTIFIED AT CONVICTION
TESTIFIED THAT MR. BUZIA MET THE
MENTAL HEALTH MITIGATORS.

>> IN WHAT WAY THOUGH?

BECAUSE IF YOU HAVE A MILD
COGNITIVE IMPAIRMENT, HOW IS
THAT REALLY EXPLAINING THE, WHAT
APPEARS TO BE A PLANNED AND VERY
VIOLENT ACT?

>> DR. SESTA EXPLAINED THAT
MR. BUZIA MEANT THE ABILITY TO
PERFORM MISCONDUCT, THAT WHILE
THE BRAIN DAMAGE WAS OVERALL
MILD, IT WAS STILL CLINICALLY
SIGNIFICANT AND STILL VERY MUCH
AFFECTING MR. BUZIA, AND IN THIS
CASE --

>> HOW DID IT EFFECT HIM IN HIS
LIFE?

HOW OLD WAS HE AT THE TIME?

>> HE WAS, I BELIEVE, 39 YEARS OLD.

>> AND HE HAD THE INCIDENT OF WHERE HE WAS STRUCK IN THE FACE WITH THE PIPE AT HOW OLD?

>> THAT WAS IN 1994, SIX YEARS BEFORE THE CRIME.

>> AND WHAT WAS THE TESTIMONY ABOUT HOW HE FUNCTIONED BETWEEN -- THIS IS CERTAINLY, AS A LAWYER, THESE ARE THE KINDS OF THINGS TO THINK ABOUT -- FROM THE TIME HE HAD THE INCIDENT WHERE HE WAS STRUCK IN THE FACE WITH A PIPE UNTIL THE MURDER? HOW DID HIS BEHAVIOR CHANGE? WHAT WAS --

>> YES.

POSTCONVICTION COUNSEL PRESENTED AND UNCOVERED EVIDENCE THAT TRIAL COUNSEL FAILED TO UNCOVER ABOUT AFTER THE HEAD INJURY, THE DECLINE INTO ADDICTION REALLY, REALLY SUCCUMBED MR. BUZIA.

HE WAS AT THIS POINT THEN HAVING MENIAL JOBS, BASICALLY, TO SUPPORT HIS DRUG HABIT.

HE BECAME ADDICTED TO COCAINE.

>> WELL, NOW DRUGS, TAKING DRUGS AND HAVING BRAIN DAMAGE, THE ARGUMENT IS AFTER HE HAD THIS INCIDENT, HE BECAME ADDICTED TO, WHAT, PRESCRIPTION DRUGS?

>> NO.

MR. BUZIA HAD A GENETIC PREDISPOSITION TO SUBSTANCE ABUSE.

THAT EVIDENCE WAS NOT PRESENTED AT TRIAL AND WAS PRESENTED AT POSTCONVICTION.

IN ADDITION, MR. BUZIA USED COCAINE IN THE EARLY '90s.

AFTER THE HEAD INJURY.

THE TESTIMONY WAS HIS ADDICTION,

BECAUSE OF THE BRAIN DAMAGE,
EFFECTS HIS ABILITY AND MAKES
HIM MORE SUSCEPTIBLE TO THE
ADDICTION HE'S ALREADY
GENETICALLY PREDISPOSED TO.
SO THE TESTIMONY BY DR. MORTON,
DR. CUNNINGHAM AND DR. SESTA WAS
THAT THE BRAIN DAMAGE AND DRUG
ADDICTION WERE INTERACTING WITH
ONE ANOTHER WHICH IS MUCH LIKE
THIS COURT'S FINDING WHERE TRIAL
COUNSEL PRESENTED EVIDENCE ONLY
OF MR. ORMAY'S DRUG ADDICTION.
>> BUT IN ORMAY, THE COUNSEL
DIDN'T TELL THE EXPERTS ABOUT
THE PRIOR DIAGNOSIS.
TO ME, AGAIN, YOU HAVE A
SITUATION OF WHETHER A COUNSEL
AND, YOU KNOW, YOU ENTITLED TO A
REASONABLE INVESTIGATION, A
REASONABLE COUNSEL, YOU KNOW,
WHETHER YOU'RE ENTITLED TO WHAT
THE BEST LAWYER IN THE WORLD
WOULD DO OR WHAT IS REASONABLE
UNDER THE CIRCUMSTANCES.
SO IN ORMAY THE LAWYER DIDN'T
TELL THE EXPERT ABOUT IT.
HERE DR. RIEBSAME KNEW ABOUT THE
1994 INCIDENT.
SO I DON'T SEE THAT AS BEING AN
ORMAY SITUATION.
IN THIS CASE THE ARGUMENT IS THE
DOCTOR IS NOT QUALIFIED TO
DIAGNOSE BRAIN DAMAGE, AND THE
PREVAILING NORMS DICTATE THAT
COUNSEL SHOULD HAVE KNOWN THAT
GETTING A PSYCHOLOGIST TO DO
LESS THAN A 30-MINUTE SCREENING
IS NOT SUFFICIENT TO RULE OUT
BRAIN DAMAGE IN A DEATH PENALTY
CASE.
WE HAVE AN 8-4 VOTE.
THIS IS A VERY CLOSE VOTE.
>> LET'S GO BACK TO THE NATURE

OF THE BRAIN DAMAGE HERE AND
THE, THE TESTIMONY AT THE
EVIDENTIARY HEARING THAT THERE
WAS A MILD COGNITIVE IMPAIRMENT.
IS THAT CORRECT?

>> THAT'S CORRECT.

>> WHAT'S A COGNITIVE
IMPAIRMENT?

>> BASICALLY, IT AFFECTS YOUR
ABILITY TO THINK, TO FUNCTION,
TO PLAN.

>> WHAT DOES THE RECORD SHOW
ABOUT THE DEFENDANT'S IQ?

>> HIS IQ IN THIS CASE IS
OVERALL AVERAGE.

HE HAS A VERBAL AND A SPLIT, I
BELIEVE IT'S 19 POINTS, WHICH IS
STATISTICALLY SIGNIFICANT.

>> WELL, THE VERBAL IS ACTUALLY
ABOVE AVERAGE, ISN'T IT?

>> THAT'S CORRECT.

>> SIGNIFICANTLY ABOVE AVERAGE.

>> HIS VERBAL IQ IS ABOVE
AVERAGE.

HIS AGGREGATE IQ IS IN THE
AVERAGE RANGE, BUT WHAT'S
SIGNIFICANT IN THIS CASE IS THE
STATISTICALLY SIGNIFICANT SPLIT
THAT DR. SESTA TESTIFIED IS A
CLEAR INDICATOR THAT SOMEBODY
HAS BRAIN DAMAGE.

>> WHAT WERE THE FACTORS THAT
YOU BELIEVE DEMONSTRATE THAT
COUNSEL SHOULD HAVE HAD SOMEONE
ELSE EVALUATE TO DO THE TESTING,
THE NEUROPSYCHOLOGIST TO DO THE
TESTING FOR THE BRAIN DAMAGE?
WAS THERE SOMETHING THAT YOU'RE
POINTING TO THESE ARE THE SET OF
FACTS?

YOUR FELLOW WAS A, WORKED FOR
UNIVERSAL OR SOMETHING AT SOME
POINT?

>> AT ONE POINT THE TESTIMONY IN

CONDUCTING THIS PSYCHOSOCIAL HISTORY WAS HE WAS ABLE TO SORT OF HOLD IT TOGETHER FOR LONGER IN HIS FAMILY THAN ANYONE ELSE.

>> WHAT ARE THE, WHAT WERE THE FLASHES?

WHAT ARE THE RED FLAGS THAT YOU THINK THAT SO YOU SAY THIS LAWYER KNEW THIS AND SHOULD HAVE DONE X?

>> THEY HAD THE 1994 HEAD INJURY WHERE HE HAD A FACIAL FRACTURE, HE WAS STRUCK IN THE HEAD WITH A LEAD PIPE.

THEY HAD THE KNOWLEDGE THAT HE HAD BEEN USING AND ABUSING CRACK COCAINE FOR MANY, MANY YEARS PRIOR TO THE MURDER, THE KNOWLEDGE THAT DR. BERNSTEIN HAD DONE A SCREENING THAT INDICATED THERE ARE SOME DEFICITS THAT NEEDED FURTHER TESTING.

>> OKAY, SO THAT'D BE THE KEY REALLY.

I THINK YOU MUST AGREE SIMPLY BECAUSE SOMEONE HAS AN INCIDENT OF FACIAL FRACTURE, THAT THAT AUTOMATICALLY SAYS YOU HAVE INEFFECTIVE ASSISTANCE IF YOU DON'T DO BRAIN -- SO THE LAST ONE'S REALLY THE KEY, RIGHT?

>> I THINK, YOUR HONOR, THEY'RE ALL IMPORTANT TO LOOK AT, AND WHAT CAPITAL DEFENSE ATTORNEYS ARE TAUGHT, THEY'RE TAUGHT TO LOOK AT RED FLAGS SUCH AS HEAD INJURIES, SUCH AS DRUG ABUSE.

I THINK THE REASON DR. BERNSTEIN FOUND, MADE THAT, MADE THAT FINDING THAT, LOOK, YOU NEED TO TEST THIS GUY FURTHER IS BECAUSE OF THOSE THINGS, BECAUSE OF THE HEAD INJURY, BECAUSE OF THE DRUG USE.

SO I THINK IT'S --

>> AND THAT'S WHAT HE TOLD THE
DEFENSE COUNSEL IN THIS CASE?

>> AND DEFENSE COUNSEL TESTIFIED
THAT THERE WAS ABSOLUTELY NO
DOWNSIDE TO OBTAINING A
NEUROPSYCHOLOGICAL EVALUATION.

>> WHY DIDN'T HE DO IT?

>> HE DIDN'T HAVE AN ANSWER.

HE DIDN'T HAVE A STRATEGIC
DECISION, HE SIMPLY DIDN'T HAVE
AN ANSWER.

AND HE TESTIFIED THERE WAS NO
DOWNSIDE TO DOING SO.

>> IN THE TRIAL COURT'S RULING,
TRIAL COURT RULED THAT BECAUSE
THE MURDER WAS NOT IMPULSIVE
THAT A SHOWING OF BRAIN DAMAGE
WOULD NOT HAVE NEGATED THE
PREMEDITATION NECESSARY FOR IT
TO BE A FIRST-DEGREE,
PREMEDITATED MURDER.

COULD YOU ADDRESS THAT
STATEMENT?

>> CERTAINLY.

AND I THINK WE ARGUED BOTH THE
BRAIN DAMAGE WAS IMPORTANT IN
THE GUILT PHASE AND THE PENALTY
PHASE.

CERTAINLY, NEGATING THE FINDING
OF PREMEDITATION WOULD GO TO A
GUILT PHASE ARGUMENT.

DR. CUNNINGHAM TOUCHED ON THIS
IN HIS TESTIMONY THAT IN A GUILT
PHASE YOU'RE DEALING WITH AN
INSANITY VERSUS, YOU KNOW, NOT
GUILTY BY REASON OF INSANITY
WHICH, SO IN THAT SITUATION THAT
WAS THE JUDGE'S FINDING WITH
RESPECT TO PREMEDITATION.

REGARDLESS OF WHETHER IT COULD
HAVE BEEN USED IN PREMEDITATION,
IT'S CERTAINLY RELEVANT IN THE
PENALTY PHASE.

AND THE UNITED STATES SUPREME COURT IN PORTER TALKED ABOUT THE IMPORTANCE OF, YOU KNOW, GIVING THE JURY REASONS TO UNDERSTAND THE DEFENDANT'S MORAL CULPABILITY.

WHILE HIS LEGAL CULPABILITY IN THE GUILT PHASE THAT YOU'RE DISCUSSING, THE BRAIN DAMAGE MAY NOT RISE TO THAT LEVEL --

>> DID THE TRIAL JUDGE, DID THE TRIAL JUDGE IN THIS CASE FIND ANY MENTAL MITIGATION?

>> NO.

NOT STATUTORY.

THE TRIAL JUDGE IN THIS CASE FOUND NONSTATUTORY MITIGATORS. HOWEVER, WHAT'S INTERESTING AND WHAT CANNOT BE SQUARE WITH THE THE POSTCONVICTION COURT'S ORDER IS HE FOUND IT ONLY AS IT RELATES TO SUBSTANCE ABUSE.

AND HE SAID THE REASON HE'S NOT GIVING THE STATUTORY MITIGATORS IS THEY PRESENTED NOTHING OTHER THAN SUBSTANCE ABUSE, AND THEN IN POSTCONVICTION HE FAILED TO ADDRESS THE FACT THAT THE BRAIN DAMAGE WAS PRESENT, HE FAILED TO UNDERTAKE THE PROPER PREJUDICE ANALYSIS AS STATED IN WILLIAMS TO REWEIGH THE EVIDENCE.

>> YOU STILL HAVE WHAT IS IN THIS RECORD SEEMS TO BE SORT OF MILD COGNITIVE DYSFUNCTION FOR LACK OF A BETTER WORD.

AND SO HOW DOES THAT ALL PLAY INTO THE FACT THAT THE TRIAL JUDGE SAYS THAT, BASICALLY, THAT WOULDN'T HAVE MADE --

>> I THINK, YOUR HONOR, HE DOESN'T SAY THIS WOULDN'T HAVE MADE A DIFFERENCE BECAUSE HE DOESN'T ADDRESS IT.

HE DOESN'T ADDRESS THE BRAIN
DAMAGE AS IT RELATES BECAUSE HE
FAILS TO UNDERTAKE THE PROPER
PREJUDICE ANALYSIS WHERE HE
NEEDS TO REWEIGH THE EVIDENCE
PRESENTED IN POSTCONVICTION
PRESENTED WITH THE EVIDENCE
IN --

>> SO YOUR PREJUDICE ARGUMENT IS
THAT THE MENTAL MITIGATORS WOULD
HAVE BEEN FOUND?

>> THAT'S CORRECT.

ALL THE EXPERTS AT
POSTCONVICTION TESTIFIED THEY
WOULD HAVE BEEN, AND I WANT TO
REMIND THE COURT THIS IS AN 8-4
VOTE, SO IT'S NOT LIKE THIS WAS
A 12-0.

MR. BUZIA NEEDED TWO MORE JURORS
TO VOTE FOR A LIFE SENTENCE, AND
NONE OF THE TESTIMONY ABOUT HIS
ADDICTION WAS EVEN PRESENTED TO
THE JURY BECAUSE IT WAS
PRESENTED AT THE CENSOR HEARING.

>> SO YOU GO BACK FOR NEWS, SOME
NEW PENALTY PHASE, AND YOU HAVE,
HOWEVER, THE SAME EXPERTS WHO,
BASICALLY, YOU KNOW, SAY THAT
THERE WASN'T, THIS PET SCAN DOES
NOT SHOW THIS DAMAGE THAT THE
DEFENSE ARGUES, ETC.

SO THEN YOU GET INTO THAT KIND
OF SITUATION.

>> AND I WANT TO ANSWER THAT
BRIEFLY WITH TWO QUESTIONS.

I SEE I'M INTO MY REBUTTAL.

FIRST OFF, THAT'S THE SIMILAR
THING THAT HAPPENED IN PORTER.
JUST BECAUSE EXPERTS DISAGREE,
THE COURTS CANNOT REDUCE THE
RELEVANCE, THE EFFECT IT WOULD
HAVE ON THE JURY BECAUSE IT'S UP
TO THE JURY TO DETERMINE WHETHER
THEY BELIEVE THE STATE'S EXPERT

OR THE DEFENSE EXPERT.

THE OTHER POINT I WANT TO
MAKE --

>> IF THAT'S THE LAW, THEN EVERY
POSTCONVICTION CASE RESULTS IN A
REVERSAL.

ALL YOU HAVE TO DO IS BRING IN
PEOPLE WHO WILL DIFFER WITH THE
EXPERT TESTIMONY.

DO YOU HAVE TO HAVE A
CREDIBILITY WEIGHING?

AND A TRIAL JUDGE HAS TO BE ABLE
TO DO THAT.

THAT'S THE FINDER OF FACT IN
THIS, ISN'T IT?

>> IN POSTCONVICTION?

>> YES, RIGHT.

>> IN THIS CASE THE TRIAL JUDGE
NEVER ADDRESSED WHETHER OR NOT
MR. BUZIA HAS BRAIN DAMAGE OR
WHETHER IT WOULD HAVE AFFECTED
THE JURY.

>> SO THAT'S THE PROBLEM, NOT
THAT THERE'S ONLY ONE KIND OF
TESTIMONY.

THERE IS CONFLICTING TESTIMONY
WITH REGARD TO BRAIN DAMAGE.
IS THAT, AM I UNDERSTANDING
THAT?

>> THE ONLY TESTIMONY IS WITH
REGARD TO THE PET SCAN.
NO ONE CHALLENGED DR. SESTA'S
DATA.

THERE'S NO CHALLENGE FOR A --

>> I UNDERSTAND.

WE SEE THOSE THINGS.

>> RIGHT.

>> IT MAKES A DIFFERENCE IF
THERE'S MERELY A DISPUTE BECAUSE
YOU ARE MAKING AN ARGUMENT THAT
IF THERE'S A DISPUTE, WE HAVE TO
HAVE AN EVIDENTIARY HEARING
AGAIN AND A NEW TRIAL.
PENALTY PHASE ANYWAY.

THAT'S WHAT I'M UNDERSTANDING
YOU TO START SAYING NOW.

>> AND PERHAPS I'M NOT
UNDERSTANDING YOUR --

>> WHAT YOU SEEM TO BE SAYING IS
THAT THERE'S A CASE THAT SAYS IF
THERE'S CONFLICTING EVIDENCE,
YOU HAVE TO SEND IT BACK FOR A
NEW PENALTY PHASE.

>> NO, NO.

WHAT I'M REFERRING TO IS PORTER
DISCUSSES THE ERROR IN THE TRIAL
JUDGE'S AND THE COURT'S FINDING
OF RELEVANCE BECAUSE THERE IS
CONFLICTING TESTIMONY.

IN PORTER, ACTUALLY, THE DEFENSE
EXPERTS AND THE STATE'S EXPERTS
DISAGREED, BUT MUCH LIKE IN
MR. BUZIA'S CASE, THEY COULDN'T
RULE OUT -- AND MR. DANZIGER
TESTIFIED YOU CAN'T RULE OUT
BRAIN DAMAGE, AND NEITHER COULD
DR. COTTON.

THEY FOCUSED THAT THE PET SCAN
WAS NORMAL.

>> I THINK THE ONLY QUESTION,
AND I SEE YOU'RE IN YOUR
REBUTTAL, BUT TO ME THE MORE
SIGNIFICANT ISSUE IS BECAUSE
THIS IS A MILD IMPAIRMENT, HOW
DOES IT REALLY UNDERMINE
CONFIDENCE IN THE OUTCOME BY THE
AGGRAVATORS?

AND WE CAN LOOK AT THAT
SEPARATELY AS TO LET'S ASSUME
THAT YOU'RE CORRECT THAT THERE
IS, WAS EVIDENCE OF COGNITIVE
IMPAIRMENT.

WHY WOULD THAT UNDERMINE OUR
CONFIDENCE?

AND YOU'VE SAID, KEEP ON SAYING
THERE'S A --

[INAUDIBLE]

BUT THAT'S NOT --

>> I WOULD URGE THIS COURT TO REVIEW DR. SESTA'S TESTIMONY WHEREIN HE SPECIFICALLY TALKS ABOUT THAT QUESTION THAT, YES, IT IS MILD, BUT THIS IS SOMETHING THAT EFFECTS MR. BUZIA'S LIFE. EVEN THOUGH IT'S MILD, IT STILL EFFECTS HIS THOUGHT PROCESSES, HIS ACTIONS ON THE DAY OF THE CRIME, AND THAT COUPLED WITH HIS SEVERE ADDICTION TO CRACK COCAINE CAUSED HIS BEHAVIOR ON THIS DAY.

AND I SEE THAT I'M WELL INTO MY REBUTTAL, SO I'M GOING TO SAVE SOME TIME.

>> MAY IT PLEASE THE COURT, MY NAME IS BARBARA DAVIS, I REPRESENT THE STATE OF FLORIDA. RESPONDING TO JUSTICE LEWIS' QUESTION IN THE TRIAL JUDGE'S ORDER, PAGE 8 OF HIS ORDER, PAGE 2289 OF THE RECORD, HE DOES DISCREDIT DR. SESTA'S TESTING. HE SAYS THAT THE TESTING IN ORDER TO OBTAIN A SCORE, DR. SESTA VACILLATED BETWEEN DIFFERENT SCORING METHODS APPARENTLY IN ORDER TO OBTAIN A SCORE THAT BARELY SHOWED THE DEFENDANT TO HAVE MILD BRAIN IMPAIRMENT. FOOTNOTE SIX, HE DISCREDITED DR. SESTA'S TESTING METHODS. IT WAS IMPEACHED. HE WAS CROSS-EXAMINED VIGOROUSLY. ALSO THE JUDGE IN HIS ORDER FOUND THAT THE EVIDENCE THAT BRAIN DAMAGE WAS DUBIOUS AT BEST AND A RED HERRING. THE DEFENSE PRESENTED AT THE EVIDENTIARY HEARING SEVERAL

EXPERTS WHO HAD CONDUCTED TESTING.

THE STATE PRESENTED FOUR EXPERTS, DR. HELEN MAYBERG, THE EXPERT FROM EMORY.

IT WAS DR. ERIC COTTON, THE HEAD OF THE NATIONAL PET SCAN CENTER, WHO SAID THAT IT WAS A NORMAL PET SCAN, AND DR. WU'S PET SCAN HE HAD SEEN THREE OF THEM, AND HE DISAGREED WITH ALL OF THEM.

>> DID ANY OF THEM SAY HE DID NOT HAVE, SAY SPECIFICALLY HE DID NOT HAVE BRAIN DAMAGE?

>> THEY SAID THERE SHOULD BE SOME MILD COGNITIVE IMPAIRMENT, HOWEVER, THAT DID NOT EFFECT ANYTHING THAT HAD TO DO WITH THE CRIMES BECAUSE IT SHOWED CALCULATED ABILITY TO PLAN METHODOLOGY.

THERE WAS NO IMPULSIVITY INVOLVED IN THE METHOD OF THE CRIME.

THE JUDGE IN HIS SENTENCING ORDER, I WOULD POINT OUT, FOUND THAT THIS IS HIS SENTENCING ORDER BACK ON THE DIRECT APPEAL RECORD THAT THE, IT COULD NOT BE DENIED THAT THE DEFENDANT SUFFERED FROM MENTAL AND EMOTIONAL SYMPTOMS AS THE RESULT OF SUBSTANCE ABUSE.

IT WAS THE EFFECT OF THE CRIMINALITY TO APPRECIATE WHERE HE SAID OTHER THAN SUBSTANCE ABUSE THERE WAS NO REAL EVIDENCE THAT HE COULD NOT APPRECIATE THE CRIMINALITY AND THAT HE WAS, CLEARLY, ABLE TO PLAN, CALCULATE, AND THERE WAS NO EVIDENCE WHATSOEVER IN THE FACTS.

>> COULD YOU GO OVER THAT -- THE

1994 INCIDENT WAS KNOWN TO TRIAL
COUNSEL AND KNOWN TO DR. WU,
CORRECT?

>> YES, IT WAS.

IT'S DESCRIBED IN THE TRIAL
COURT'S ORDER AS A FACIAL
INJURY.

>> YES.

>> FACIAL INJURY IS PRETTY
DIFFERENT THAN BRAIN DAMAGE.
WAS HE SENT TO THE EMERGENCY
ROOM AND, I MEAN, IN OTHER
WORDS, WHAT WAS THE AFTERMATH OF
THAT INJURY?

WAS HE HOSPITALIZED?

WAS HE, YOU KNOW, WAS THERE A
MARKED DIFFERENCE RIGHT AFTER IT
IN TERMS OF -- WHAT SHOULD HAVE
BEEN DISCOVERED AS TO THE
SIGNIFICANCE OF THAT INJURY?

>> AND IF YOU LOOK AT DR. HELEN
MAYBERG'S TESTIMONY, SHE TALKS
ABOUT THE FRACTURE.

IT WAS A FRACTURE TO THE EYE
SOCKET.

IT WAS NOT EVEN AN ORBITAL
FRACTURE.

HE WAS -- THEY DID A CT SCAN,
DID NOT SEE ANYTHING.

HE WAS RELEASED IN TWO TO
TWO-AND-A-HALF HOURS FROM THE
HOSPITAL.

THE ALLEGED BRAIN DAMAGE THAT
DR. WU FOUND WAS IN THE TEMPORAL
LOBE WHICH IS BACK IN HERE, AND
BOTH DR. MAYBERG -- WELL,
PRIMARILY DR. MAYBERG --

>> I THOUGHT IT'D BEEN TESTIFIED
AS BEING SOMETHING IN THE
FRONTAL LOBE.

>> THE FRONTAL LOBE CONTROLS
IMPULSIVITY.

>> THAT'S WHAT I'M ASKING.

YOU'RE SAYING WU FOUND EVIDENCE

OF BRAIN DAMAGE IN THE TEMPORAL WHICH IS, YOU'RE POINTING TO THE BACK OF THE HEAD.

>> IT'S AROUND HERE INSIDE, AND DR. MAYBERG SAID NOT ONLY WAS THERE NO BRAIN DAMAGE PURSUANT TO THE PET SCAN, BUT EVEN IF THERE HAD BEEN SOME INJURY TO THE EYE SOCKET, IT WOULD NOT TRANSLATE TO THE TEMPORAL LOBE. ADDITIONALLY, IF THEY WERE TRYING TO SHOW IMPULSIVITY IN ACTIONS OR BRAIN IMPAIRMENT, THAT'S FRONTAL LOBE.

>> RIGHT.

SO NOBODY -- DID THEY TESTIFY THEY HAD FRONTAL LOBE DAMAGE?

>> NO.

IT WAS TEMPORAL LOBE.

>> BUT WHAT ABOUT -- I THOUGHT THAT THE ARGUMENT WAS VERY VERY GOOD, PROFESSIONAL ARGUMENT TODAY IN THIS CASE.

BUT THE IDEA THAT THERE WAS A RED FLAG FOR TRIAL COUNSEL IN THE FORM OF THE OTHER DOCTOR'S REPORT.

COULD YOU ADDRESS THAT?

>> DR. BERNSTEIN HAD DONE AN EXAM OF MR. BUZIA.

HE SAID, I SUSPECT THERE COULD BE SOMETHING.

YOU NEED TO DO SOME NEUROLOGICAL TESTING.

THEY DID TWO MRIs.

THE MRI SHOWED THE VENOUS ANGIOMA WHICH COULD CAUSE SEIZURES.

HE HAD NO HISTORY OF SEIZURES.

HE HAD, DEFENSE COUNSEL HAD OBTAINED THE FUNDING TO DO A PET SCAN AND THE PERMISSION, BUT DR. RIEBSAME SAID THERE'S REALLY NOTHING THERE, AND ALL THE

DOCTORS AGREED A VENOUS ANGIOMA IS NOTHING --

>> THEY ALSO CRITICIZED COUNSEL FOR RELYING ON DR. RIFKIN WHO'S A PSYCHOLOGIST FOR ATTEMPTING TO DIAGNOSE BRAIN DAMAGE.

WHAT IS YOUR RESPONSE TO THAT?

>> AS THE RECORD SHOWS, DR. RIEBSAME HAD ASKED FOR PET SCANS.

AND, REMEMBER, DR. DANZIGER ALSO CAME IN FOR THE STATE.

HE'S A PSYCHIATRIST.

HE SAID THERE'S NO BRAIN DAMAGE.

THEN WE GO TO THE EVIDENTIARY HEARING, AND WE PROVE HE DOESN'T HAVE BRAIN DAMAGE.

THIS MAY BE SOME MILD COGNITIVE IMPAIRMENT PROBABLY BECAUSE OF THE SUBSTANCE ABUSE.

AS FAR AS THE '94 INJURY, HE WORKS AS -- HE WAS IN JUNIOR MANAGEMENT OR MANAGEMENT AT UNIVERSAL UNTIL 1996.

HIS CRIMINAL BEHAVIOR, HIS MINOR CRIMINAL BEHAVIOR WAS SHOWING UP BACK IN THE '90s.

BILL BENNETT TESTIFIED, HE WAS A PROSECUTOR, HE SHOWED UP IN COURT, AND THERE WAS MR. BUZIA ON A SOLICITATION OF PROSTITUTION.

THAT WAS '90-'91.

HE HAD A DUI IN '90-'91.

AT '94, AS THE JUDGE FOUND, THERE WAS NO INDICATION THAT HE STARTED COMMITTING VIOLENT ACTS OR COMMITTING CRIMES.

>> WHAT ABOUT HIS USE OF DRUGS AT THAT TIME?

AS I UNDERSTAND THEIR ARGUMENT IS THAT, YOU KNOW, HE HAD SOME PREDISPOSITION TO THE USE OF DRUGS AND ALCOHOL AND THAT THIS

INJURY IN 1994 MANIFESTED ITSELF
IN THAT HE STARTED REALLY
ABUSING DRUGS.

I THINK THAT'S WHAT PART OF
THEIR ARGUMENT IS.

>> WELL, AND THAT MAY BE PART OF
THEIR ARGUMENT, BUT THE RECORD
SHOWS THAT AT THE PENALTY PHASE
AND AT THE EVIDENTIARY HEARING
IT WAS ESTABLISHED HE STARTED
USING POWDER COCAINE WITH HIS
SISTER AND BROTHER-IN-LAW IN
1996.

HE STARTED USING CRACK IN 1997.
AND --

>> BUT THIS WAS SOMETIME AFTER
THE '94 INJURY.

>> YES.

>> OKAY.

>> YES.

AND HE HAD USED COCAINE
PERIODICALLY.

HE WAS INTRODUCED TO IT WHEN HE
WAS AT FSU IN THE '80s, AND
THEN BILL BENNETT TESTIFIED THEY
WERE AT A WEDDING SUBSEQUENT TO
THAT, AND HE WAS USING POWDER
COCAINE.

SO, AND AS THE JUDGE FOUND IN
HIS SENTENCING ORDER, WHEN HE
SENTENCED HIM, THERE IS NO
QUESTION HE IS A SUBSTANCE
ABUSER.

HE GAVE SUBSTANTIAL WEIGHT TO
THE EXTREME EMOTIONAL AND
SUBSTANTIALLY IMPAIRED ALTHOUGH
IT WASN'T EXTREME AND
SUBSTANTIAL, IT WAS NONSTATUTORY
MITIGATION.

AND AS THE TRIAL JUDGE FOUND AT
THE EVIDENTIARY HEARING,
EVERYTHING THAT WAS PRESENTED AT
THE EVIDENTIARY HEARING WAS
PRESENTED AT THE PENALTY PHASE.

NOW, AS HE SAID, THERE WERE
ADDITIONAL ANECDOTES, THERE WAS
MORE DETAIL, BUT THAT'S NOT THE
STANDARD.

WE KNEW, WE HAD A COMPLETE
PICTURE OF JOHN BUZIA'S LIFE
FROM THE TIME HE WAS BORN, HIS
ALCOHOLIC FATHER, THE ENTIRE --
THIS IS THE PENALTY PHASE.
HIS ENTIRE FAMILY WAS
ALCOHOLICS.

THEY ABUSED DRUGS TOGETHER,
THEY -- EVERYTHING WAS LAID OUT
AT THE PENALTY PHASE.

THE ONLY ADDITIONAL THING WE
HAVE AT THE EVIDENTIARY HEARING
IS MORE DETAILS.

AND AS FAR AS INEFFECTIVE
ASSISTANCE OF COUNSEL, IF YOU
LOOK AT THE AMOUNT OF
INVESTIGATION HE DID IN THE
WINNOWING THROUGH THESE
WITNESSES TO CHOOSE THE BEST
WITNESSES, AND THREE OF THE
WITNESSES, WELL, FOUR OF THEM
THAT TESTIFIED AT THE
EVIDENTIARY HEARING WERE
EXCLUSIVELY EXCLUDED BECAUSE
EITHER THEY HAD INCONSISTENT
INFORMATION -- THE BROTHER,
JACK, HAD DONE A DEPOSITION AND
SAID ALL THESE THINGS THAT WOULD
BE INCONSISTENT WITH THE THEORY
OF DEFENSE, THE STRATEGY, THE
McINTOSHES DID NOT WANT TO
TESTIFY -- AND THIS WAS EXPLORED
AT THE EVIDENTIARY HEARING.

THEY RECALLED SEVEN WITNESSES AT
THE EVIDENTIARY HEARING THAT HAD
TESTIFIED AT THE PENALTY PHASE
WHO HAD TESTIFIED AS TO HIS
CHILDHOOD AND THE ESCALATING --

>> WELL, I GUESS, I THINK THEIR
ARGUMENT ON THAT POINT IS THAT

THESE PEOPLE WERE NOT PROPERLY PREPARED TO GIVE THE INFORMATION THAT THEY HAD AT THE TIME OF THE PENALTY PHASE.

>> AND IF YOU, IF YOU LOOK AT THE DEFENSE ATTORNEY, TIM CAUDILL, HE WAS RECALLED BY THE STATE AT THE END AFTER WE WERE ABLE TO OBTAIN MORE INFORMATION. WENT THROUGH HIS INVESTIGATION AND HE, BASICALLY, CONTRADICTED. BILL BENNETT SAID HE WAS A CAPITAL DEFENSE ATTORNEY. NOW, REMEMBER, HE HAD BEEN SCHEDULED TO TESTIFY IN THE MORNING.

IT'S IN THE RECORD THAT HE COULD NOT COME UNTIL THE MORNING TESTIMONY.

AND THEN HE COMES TO THE EVIDENTIARY HEARING AND SAYS, OH, I WANTED TO MEET WITH THEM ALL DAY AND TESTIFY IN THE AFTERNOON.

THEY WERE IN THE MIDDLE OF A PENALTY PHASE.

THIS GUY IS A SEASONED DEFENSE ATTORNEY, AND HE CAME IN AND WANTED THEM TO TELL HIM HOW TO TESTIFY.

WELL, YOU KNOW, THEY HAD 15 WITNESSES.

THEY HAD TALKED TO THESE PEOPLE, AND MR. CAUDILL SAID, I TALKED TO MR. BENNETT AHEAD OF TIME THREE TO FOUR TIMES, AND THEN MR. BENNETT COMES IN AND SAYS, OH, I WASN'T PREPARED TO TESTIFY.

BUT HE TOLD US THE SAME THING AT THE EVIDENTIARY HEARING.

BASICALLY, ABOUT THE COCAINE USE.

AT THE PENALTY PHASE, HE TOLD US

ABOUT A STINT WHERE THERE HAD BEEN A BAR FIGHT, AND MR. BUZIA BROKE IT UP.

SO, YOU KNOW, AS THE TRIAL JUDGE FOUND THE DEFENSE THEORY WAS, HERE IS A SALVAGEABLE MAN.

HE IS A GOOD PERSON.

HE BREAKS UP BAR FIGHTS, HE HELPED AT THE JAIL AFTER HE WAS INCARCERATED.

AND HE SLID DOWN BECAUSE OF CRACK COCAINE.

AND THAT WAS HIS THEORY.

NOW, THAT -- AS JUDGE LESTER FOUND -- BAD IS GOOD ISN'T ALWAYS A REAL GOOD THING.

NOW WE KNOW, OKAY, HE HAD FIGHTS ALL HIS LIFE, HE WAS STALKING GIRLS, THE HELLERS -- HIS AUNT AND UNCLE -- HE LEFT UNDER SUSPICIOUS CIRCUMSTANCES IN CAPE COD, ALL OF THIS BEFORE 1994, SO 1994 IS NOT SOME KIND OF WATERSHED MOMENT IN HIS LIFE.

>> BUT IT SEEMS HERE THAT REALLY THE OPPOSITION IS SAYING THAT A BRAIN DAMAGE TESTIMONY OF THE BRAIN DAMAGE, THE COGNITIVE IMPAIRMENT -- ALTHOUGH MILD -- PLACES EVEN THE ABUSE IN A DIFFERENT LIGHT.

THE LAY, AVERAGE LAYPERSON LOOKS AT DRUG ABUSE WHETHER CORRECTLY OR INCORRECTLY AS SOMETHING THAT YOU'VE VOLUNTARILY DONE.

YET IF THERE IS SOME KIND OF ORGANIC BRAIN ISSUE THAT'S CAUSING THAT TO HAPPEN, IT SOMEHOW SEEMS THE ARGUMENT SEEMS TO FLOW THAT'S AN EXPLANATION.

>> AND THAT'S EXACTLY WHAT JUDGE LESTER ADDRESSED.

FIRST OF ALL, THE BRAIN DAMAGE IS A RED HERRING.

SECONDLY, WE KNEW THAT HE WAS A SUBSTANCE ABUSER.

THIRDLY, HE DISCREDITED ALL THAT IF THERE'S -- DISCREDITED ANYTHING THAT EVEN IF THERE WAS SOME MILD IMPAIRMENT, YOU HAD TO REALLY STRETCH TO GET THERE. AND MOST IMPORTANTLY, THE FACTS OF THE CRIME SHOW THAT THIS DIDN'T HAVE ANY EFFECT ON HIM.

SO HOW WOULD THAT BE MITIGATED? WHEN HE GOES IN AND HE ASSAULTS TWO SENIOR CITIZENS WITH AN AXE? >> I GUESS, BUT GOING BACK TO SORT OF THE CRUX OF WHAT THEY MADE THEIR ARGUMENT ON, HE -- HORRIBLE MURDERS, THE JURY VOTES 8-4 FOR DEATH.

THE IDEA IS THAT YOU SORT OF SAY THEY'VE ALREADY PRESENTED ALL THIS EVIDENCE THAT CRACK COCAINE CAUSED HIM TO SLIDE.

AND I THOUGHT WHAT JUSTICE LEWIS' QUESTION IS THAT JURIES, IF THERE'S ALSO, WELL, IT'S THAT, BUT HE HAS THIS GENETIC PREDISPOSITION IN HIS FAMILY. THAT IS SOMETHING THAT IT'S NOT, YOU KNOW, ALTHOUGH THERE'S SOME VOLUNTARY NATURE TO IT, IT'S ORGANIC OR GENETIC, AND THEN YOU ADD BRAIN DAMAGE, AND THERE IS IMPAIRMENT EVEN IF IT'S MILD, DOESN'T THAT CHANGE THE PICTURE FOR THE JURY SEEING HIM IN A MORE SYMPATHETIC LIGHT?

>> WE'RE ASSUMING THAT THE PENALTY PHASE IS A ONE-WAY STREET, AND THEY JUST PRESENT THEIR EVIDENCE, AND IT GOES UNCHALLENGED.

IF YOU LOOK AT THE, AT WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING AND -- LET ME BACK OFF.

EVERYBODY DOESN'T AGREE THAT HE HAS A MILD COGNITIVE IMPAIRMENT. IT WAS DR. SESTA SAID THAT.

AND DR. RIEBSAME AND DANZIGER SAID IF THERE WAS ANYTHING, IT'S VERY MILD.

SO LET'S LOOK AT THE STATE'S REBUTTAL.

DR. SESTA'S MANIPULATING FIGURES, DR. WU ISN'T DOING A PROPER PET SCAN, AND THIS HAS NOTHING TO DO WITH THE FACTS OF THE CRIME.

YOU PRESENT THAT TO A JURY IF WE'RE GOING TO SPECULATE ON HOW THIS WOULD AFFECT THE JURY, THIS THING OF MAYBE HE HAD A MILD COGNITIVE IMPAIRMENT, BUT TO GET THERE WE'RE HAVING TO MANIPULATE DATA AND READ PET SCANS IN AN ODD WAY.

SO WHAT DOES THAT DO TO THE JURY?

WELL, IT MAKES YOU DISTRUST ALL OF THE DEFENSE.

>> BUT THAT COULDN'T BE A STRATEGIC REASON BECAUSE THEY DIDN'T UNCOVER IT, SO YOU'RE GOING TO PREJUDICE HERE.

>> THERE'S NOTHING TO UNCOVER. IT DOESN'T EXIST.

>> WELL, I MEAN, I THOUGHT THE ARGUMENT WAS WHEN YOU SEE THIS AND THEN YOU HAVE THE RED FLAG, YOU WOULD PURSUE IT FURTHER IN TERMS OF GETTING PET SCANS.

IF, LET'S ASSUME THAT SHOULD HAVE BEEN PURSUED FURTHER, AND THEY ENDED UP WHERE THEY WERE AT THE EVIDENTIARY HEARING, YOUR ARGUMENT PROPERLY -- THE QUESTION OF PREJUDICE.

AND I THINK YOU MAKE A STRONG POINT.

CAN YOU DISTINGUISH THEN AN ORDER FROM THE U.S. SUPREME COURT WHICH WAS THIS COURT'S CASE OR OPINION THAT WAS REVERSED, WHAT IS, HOW IS PORTER DISTINGUISHABLE?

>> WELL, PORTER THEY SAID THAT THE TRIAL JUDGE DID NOT MAKE A PROPER PREJUDICE ANALYSIS. THEY DIDN'T CHANGE THE PREJUDICE ANALYSIS, THEY --

>> SO WHAT DID THEY SAY ABOUT THAT YOU CAN'T JUST DISCOUNT ANOTHER EXPERT IN TERMS OF LOOKING AT PREJUDICE?

>> THEY, BASICALLY, THEY SAID THE JUDGE DID NOT CONSIDER ALL THE EVIDENCE THAT COULD HAVE BEEN PRESENTED.

SO IN THE EVIDENTIARY HEARING THEY CAME IN, AND HE WAS A KOREAN WAR HERO, AND HE HAD ALL THESE EFFECTS AFTER THE WAR, AND THE JUDGE IN A PREJUDICE ANALYSIS DID NOT CONSIDER THE CUMULATIVE FACTS OF ALL THAT INFORMATION.

SO THAT'S WHAT PORTER -- PORTER HAD A BUNCH OF THINGS THAT WOULD BE MITIGATING.

IN THIS CASE WE DON'T.

WE DON'T HAVE ANYTHING THAT WOULD BE MITIGATING.

AND AS FAR AS I'M NOT CONCEDED DEFICIENCY AT ALL BECAUSE TRIAL COUNSEL HAD THREE EXPERTS, DR. HALL, DR. BERNSTEIN AND DR. RIEBSAME, AND HE PURSUED TWO MRIs AND DID NOT PURSUE THE PET SCAN BECAUSE DR. RIEBSAME SAID, REALLY, THE PET SCAN IS NOT GOING TO GET YOU ANYTHING. HE WAS RIGHT.

IT DIDN'T GET US ANYTHING.

>> DID HE HAVE
NEUROPSYCHOLOGICAL TESTING DONE?
THE ORIGINAL DEFENSE LAWYER?

>> NOW, THERE'S, THERE'S A WHOLE
ISSUE IN HERE ABOUT FORENSIC
PSYCHOLOGISTS AND THE TESTING
THEY DO AND NEUROPSYCHOLOGISTS,
THE TESTING THEY DO.

DR. RIEBSAME'S TESTING IS THE
ONE THAT SHOWED THIS DISPARITY
BETWEEN VERBAL AND PERFORMANCE
WHICH IS VERY INTERESTING
BECAUSE MR. BUZIA WAS A
CARPENTER AND A HANDYMAN AND A
LANDSCAPER, AND YET HIS
PERFORMANCE WAS WAY DOWN.

NO SIGNS --

>> IT WASN'T, THE PERFORMANCE
WAS NOT SUBNORMAL.

>> NO.

>> IT WAS THAT THE ANOMALY HERE
COMES FROM THE DISCREPANCY
BETWEEN THE VERBAL AND
PERFORMANCE.

>> YES.

>> AND THAT SHOWS THAT'S VERY
UNUSUAL TO HAVE THAT SORT OF
DISCREPANCY.

IT'S NOT THAT HIS PERFORMANCE
WAS LOW.

>> NO.

NO.

>> BUT ISN'T A DISCREPANCY IN
BETWEEN PERFORMANCE AND VERBAL
THAT IS UNUSUAL, ISN'T THAT --

BECAUSE I ASKED YOU ABOUT
NEUROPSYCHOLOGICAL TESTING.

ISN'T THAT ONE OF THE WAYS THAT
IN NEUROPSYCHOLOGICAL TESTING
THEY DECIDE WHETHER THERE IS
BRAIN DAMAGE BASED ON THINGS
LIKE A SIGNIFICANT GAP BETWEEN
VERBAL AND PERFORMANCE IQ?

>> AND THAT CAN LEAD YOU TO DO

FURTHER TESTING.

>> SO WHAT I'M ASKING YOU, WAS THAT DONE AT THE INITIAL, BY THE INITIAL EXPERTS BEFORE THIS PENALTY PHASE?

>> AND I DON'T, I DON'T KNOW. I, QUITE HONESTLY, I DON'T -- THERE'S ALL THESE DIFFERENT TESTS THAT THEY DO.

DR. RIEBSAME --

>> BUT YOU'RE AN EXPERIENCED LAWYER.

YOU KNOW, THOSE ARE -- THE ISSUE OF NEUROPSYCHOLOGICAL TESTING, IQ TESTING, YOU'RE TELLING ME YOU DON'T KNOW THE DIFFERENCES BETWEEN THEM?

>> I KNOW THEY'RE PSYCHOLOGICAL TESTS, AND IF THEY'RE LABELED NEUROPSYCHOLOGICAL TESTS, I'M NOT SURE WHAT'S LABELED --

>> I'M ASKING YOU.

SO THEY WERE DONE, AND SOMEBODY SAID SHOULD IT BE PURSUED FURTHER?

THAT'S THE QUESTION I HAVE.

>> NO.

NO.

DR. RIEBSAME, AFTER HE DID TESTING, HE SAID, I DON'T THINK THERE'S EVIDENCE OF BRAIN DAMAGE.

AT THE EVIDENTIARY HEARING HE SAID, I WOULD STAND BY THAT.

DR. DANZIGER REPRESENTED, EVALUATED HIM FOR THE STATE, SAID THERE IS REALLY NO EVIDENCE OF BRAIN DAMAGE THAT HE CAN SEE AS A PSYCHIATRIST, AND NOW WE KNOW THERE IS NO EVIDENCE OF BRAIN DAMAGE.

>> WELL, WHAT WAS THE POINT OF THE MRI THEN?

WAS THERE TWO MRIs DONE AFTER

THEY GOT THESE REPORTS?

>> YES.

>> SO WHAT WAS THE POINT OF THOSE?

>> DR. BERNSTEIN SAID, I WOULD LIKE TO HAVE HIM SCREENED BECAUSE HE'S SHOWING SIGNS THAT COULD BE OBJECTIVE, THAT COULD BE PHYSIOLOGICAL.

AND THAT'S WHEN THEY DID THE MRI, THE TWO MRIs, AND THEY SHOWED UP.

>> AND WHAT KIND OF -- I'M SORRY.

>> AND THAT WAS SUPPOSED TO SHOW WHAT, THE MRIs?

>> THE MRI WOULD SHOW BRAIN LESION, BRAIN DAMAGE, IF THERE WERE ANY.

SAME THING AS A CAT SCAN.

WHEN HE DID GO INTO THE HOSPITAL, THEY DID A CAT SCAN TO SEE IF THERE WAS ANY ABNORMALITIES, INJURIES TO THE BRAIN.

SO THE TWO MRIs, IT'S LIKE A SCREENING THING.

REMEMBER, IT'S NOT REALLY USED TO BE DIAGNOSED PSYCHOLOGICAL DISORDER.

IT IS VERY, VERY PHYSIOLOGICAL DISORDERS SUCH AS EPILEPSY, DEMENTIA, ETC.

SO, I MEAN, IF, YOU KNOW, MAYBE THERE'S A MILD IMPAIRMENT, BUT HOW WOULD THAT MITIGATE THIS CRIME WHEN YOU LOOK AT THE FACTS OF THIS CRIME?

AND THAT'S WHAT THE JUDGE FOUND.

>> WE THANK YOU.

YOUR TIME IS UP.

>> THANK YOU.

OH, WAY OVER.

SORRY.

[LAUGHTER]

>> I WANT TO BE VERY CLEAR THAT
THE CLAIM IS NOT TRIAL COUNSEL
WAS INEFFECTIVE FOR FAILURE TO
GET A PET SCAN.

FAILURE TO USE
NEUROPSYCHOLOGICAL TESTING WAS
THE CLAIM.

THERE WAS NO NEUROPSYCHOLOGICAL
TESTING DONE.

>> THERE WAS SOME DONE FOR THE
EVIDENTIARY HEARING?

>> IT WAS ALL DONE IN
POSTCONVICTION.

DR. RIEBSAME --

>> AND WHAT'S DIFFERENT ABOUT A
NEUROPSYCHOLOGICAL EXAM VERSUS
WHAT WAS ACTUALLY DONE?

>> ALL THAT A PSYCHOLOGIST IS
AUTHORIZED UNDER THEIR CODE OF
ETHICS TO DO IS A SCREENING FOR
BRAIN DAMAGE.

>> NO, I SAID WHAT IS THE
DIFFERENCE?

>> THE TESTING IS A LOT MORE
SPECIFIC.

THE TESTING THAT DR. SESTA
CONDUCTED WAS HOURS AND HOURS OF
HUNDREDS OF DIFFERENT TESTS.

DR. RIEBSAME'S TESTING WAS 30
MINUTES.

IT WAS TWO TESTS.

HE MADE THIS FINDING ON A TEST
THAT TOOK LESS THAN 90 SECONDS.

>> DR. RIEBSAME, WHO IS A
PSYCHOLOGIST WHO FIRST SAW THERE
WAS THIS DISCREPANCY, DOES HE
RECOMMEND FURTHER
NEUROPSYCHOLOGICAL TESTING?

>> DR. RIEBSAME NEVER KNEW ABOUT
THE DISCREPANCY.

THAT'S NOT ACCURATE, AND I WANT
THAT TO BE CLEAR.

IT WAS DR. SESTA THAT DISCOVERED

THE DISCREPANCY.

DR. RIEBSAME DIDN'T KNOW ABOUT IT.

THE TRIAL COUNSEL DID NOT KNOW ABOUT IT BECAUSE IT WAS DR. BERNSTEIN WHO HAD SUGGESTED THE FURTHER TEST, AND JUST TO POINT OUT THE MRI, IT WAS ABNORMAL.

I UNDERSTAND THAT MR. BUZIA DIDN'T HAVE THE SEIZURES, AND SO IT'S NOT LIKE YOU GET THIS PERSON WHERE THEY SAY, LET'S DO MORE TESTING, AND THE NEXT TEST YOU DO IS ABNORMAL.

>> BUT, I MEAN, THAT'S NOT CONNECTED, AS I YOU SAID IT, TO ANYTHING INVOLVED IN THIS CASE.

>> THE MRI --

>> THAT'S RIGHT.

SO YOUR BETTER ARGUMENT IS THIS TESTING.

WHAT KIND OF DOCTOR WAS THE INDIVIDUAL WHO HAD RECOMMENDED ADDITIONAL TESTING?

>> DR. BERNSTEIN WAS A PSYCHOLOGIST.

>> PSYCHOLOGIST, OKAY.

>> AND THAT'S BECAUSE IT'S NOT PROPER FOR A PSYCHOLOGIST --

>> I UNDERSTAND.

>> YES.

>> AND THE OTHER WAS A PSYCHIATRIST, SO YOU DIDN'T HAVE ANYBODY ON THE DEFENSE TEAM THAT WAS AUTHORIZED TO DO OR DOES COMPETENT TESTING --

>> NO --

>> NEUROPSYCHOLOGIST.

>> THAT IS NOT CORRECT.

>> IN THE ORIGINAL.

>> OH, I'M SORRY, YOU'RE TALKING ORIGINAL.

>> SO THAT'S YOUR ARGUMENT.

>> I KNOW I'M OUT OF TIME.
IN THIS CASE, THE JURY HEARD A
FALSE PICTURE OF MR. BUZIA, THAT
HE WAS NOT DAMAGED AND THAT HE
HAD A NORMAL, STABLE
MIDDLE-CLASS LIFE.
HE DIDN'T.
HIS FAMILY WAS DEEPLY DEVASTATED
BY SUBSTANCE ABUSE, HIS OWN
SUBSTANCE ABUSE COUPLED WITH
BRAIN DAMAGE LED TO THIS CRIME,
AND I ASK THAT THIS CASE BE
REVERSED.
>> WE THANK BOTH SIDES FOR YOUR
ARGUMENT.
THAT CONCLUDES TODAY'S DOCKET.
>> PLEASE RISE.
>> COURT IS NOW IN RECESS.