

>> MAY IT PLEASE THE COURT, MY NAME IS ANDREA NORGARD, AND I'M APPEARING FOR MR. RODGERS THIS MORNING.

I APOLOGIZE IF I HAVE TO SHIFT AROUND A LITTLE BIT, MY BACK DOESN'T SEEM TO BE COOPERATING THIS MORNING.

I'LL TRY TO MAKE ANY DISTRACTION MINIMAL.

WHAT I WOULD LIKE TO DO THIS MORNING IS TO BEGIN TO ADDRESS THE FIRST ISSUE IN THE BRIEF, AND THAT IS THE ISSUE AS TO WHETHER OR NOT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE AND PRESENT EVIDENCE OF ORGANIC BRAIN DAMAGE.

THIS COURT SAW THIS COURT ON DIRECT APPEAL, AND IF THIS COURT CAN RECALL IN THAT OPINION, AT NO TIME WAS ORGANIC BRAIN DAMAGE MENTIONED, NOR WAS ORGANIC BRAIN DAMAGE MENTIONED BY THE TRIAL COURT IN THE ORIGINAL SENTENCING ORDER.

AND WHAT WE KNOW FROM THE FACTS ESTABLISHED AT THE EVIDENTIARY HEARING BELOW WAS THAT FOR WHATEVER REASON -- AND PROBABLY DUE TO THE TIMING OF THIS CASE AND THE RELEASE OF ADKINS -- THAT THE FOCUS ON THE MENTAL HEALTH MITIGATION WAS EXCLUSIVELY DIRECTED AT MENTAL RETARDATION UNTIL AFTER THE PENALTY PHASE HAD CONCLUDED. AND I THINK THE BEST WAY TO CHARACTERIZE THE INTERACTIONS BETWEEN THE TRIAL ATTORNEYS IN THIS CASE IS VERY SPORADIC AND VERY SCATTERED, FOR LACK OF A BETTER WORD.

ALTHOUGH ONLY ONE OF THE LAWYERS ACTUALLY WAS QUALIFIED TO TRY A CAPITAL CASE, THAT LAWYER DID

NOT ENTER THIS CASE UNTIL
SHORTLY, ONE MONTH BEFORE TRIAL,
AND THEN THAT ATTORNEY SOLELY
FOCUSED ON THE PENALTY PHASE.

>> YEAH.

THE PROBLEM I HAVE WITH WHAT
YOU'RE SAYING, AND I CERTAINLY,
YOU KNOW, I THOUGHT THIS
DEFENDANT SHOULD GET, YOU KNOW,
A REDUCED LIFE SENTENCE, BUT THE
DEFENDANT THROUGH QUALIFIED
MENTAL HEALTH EXPERTS RELIED ON
THOSE EXPERTS, AND ACCORDING TO
DR. MINGS OR THE ATTORNEYS WAS
EXPRESSLY ASKED ABOUT THE
POSSIBILITY THAT RODGERS HAD
BRAIN DAMAGE.

AND SO IT WAS SOMETHING, IT'S
NOT LIKE THERE ARE CASES WHERE
DEFENSE LAWYERS GO OFF ON
SOMETHING, AND THERE'S A WHOLE
MISSING PIECE.

BUT WE WERE RIGHT IN THIS
DEFENDANT'S BRAIN LITERALLY WHEN
WE'RE TALKING ABOUT MENTAL
RETARDATION.

AND NOW WHETHER ATTORNEYS -- HOW
CAN YOU SAY -- MAYBE YOU'RE
GOING TO SAY IT -- THAT IT'S NOT
REASONABLE?

YOU HIRE AN EXPERT WHO IS
QUALIFIED AND THAT SOME CASES
THIS EXPERT HAS RECOMMENDED A
NEUROPSYCHOLOGICAL EXAMINATION.
AND IN THIS CASE HE REPORTED
BACK ABOUT MENTAL RETARDATION
WITHOUT RAISING ANY CONCERNS
ABOUT BRAIN DAMAGE.

I JUST HAVE TROUBLE SEEING HOW
THERE CAN BE DEFICIENT
PERFORMANCE AS TO WHAT THESE
ATTORNEYS DID AND THAT WE'D BE
SAYING REALLY THAT THE EXPERTS
WERE NOT QUALIFIED IN ORDER TO
GET TO WHERE YOU'RE GETTING.

SO THAT'S MY CONCERN, THAT IT

JUST SEEMS THAT THEY ACTED REASONABLY, THAT THEY FOCUSED HEAVILY ON MENTAL RETARDATION INCLUDING A WHOLE HEARING ON IT. SO IT WASN'T LIKE THEY JUST GAVE IT, YOU KNOW, A LITTLE BIT OF ATTENTION.

THEY GAVE IT SIGNIFICANT, SERIOUS FOCUS.

AND SO HOW DO WE, HOW DO YOU SAY THERE'S DEFICIENT PERFORMANCE HERE?

>> WELL, I THINK WHAT WE HAVE TO DO IS WE HAVE TO LOOK AT THE FACTS OF WHAT HAPPENED.

AND LET ME CLARIFY ONE POINT AS FAR AS BRAIN DAMAGE.

THE RECORD INDICATES THAT AFTER THIS CRIME OCCURRED THAT MR. RODGERS SELF-INFLICTED A GUNSHOT WOUND TO HIS HEAD.

AND FROM READING THE TESTIMONY OF MR. COUTURE WHO WAS THE ORIGINAL LAWYER WHO CONTACTED DR. MINGS, THE DISCUSSION ABOUT BRAIN DAMAGE WAS NOT ABOUT ORGANIC BRAIN DAMAGE.

IT WAS ABOUT WHETHER OR NOT THE GUNSHOT WOUND HAD CAUSED ISSUES WITH THE BRAIN THAT WOULD POSTDATE THE OFFENSE AND, THEREFORE, NOT NECESSARILY BE APPLICABLE AS A MITIGATING CIRCUMSTANCE.

WHEN MR. COUTURE --

>> AND THAT, BY THE WAY, IS A PRETTY IMPORTANT FACT, BECAUSE WHEN YOU PUT ON DR. WU WHO TALKED ABOUT THE PET SCAN, DR. WU CONCEDED THAT THE GUNSHOT WOUND TO THE HEAD WOULD CAUSE ABNORMALITIES IDENTIFIED BY THE PET SCAN.

>> WELL, WHAT'S INTERESTING, THOUGH, IS THAT THE GUNSHOT WOUND IMPACTED THE LEFT SIDE OF

MR. RODGERS.

IN FACT, AND YOU WILL FIND SOME EVIDENCE OF THAT IN THIS RECORD IN DR. GAMACHE'S REPORT, THAT THE GUNSHOT WOUND WENT FROM THE CHIN AND EXITED TO THE LEFT, WHEREAS WHAT DR. WU FINDS THE ABNORMALITIES IN TERMS OF SIZE AND FUNCTIONING IS ACTUALLY THE RIGHT SIDE OF THE BRAIN WHICH IS NOT THE TRAJECTORY OF THE BULLET.

AND, IN FACT, EVERYBODY AGREED AT THE EVIDENTIARY HEARING THAT THE SELF-INFLICTED GUNSHOT WOUND, ALTHOUGH IT CAUSED EXTENSIVE DAMAGE TO THE ORBITAL SOCKET, IT NEVER PENETRATED THE CRANIUM, NEVER IMPACTED ON THE BRAIN ITSELF.

AND SO I THINK THAT ONE OF THE DISTINCTIONS IS THAT WHEN COUTURE WAS TALKING TO MINGS, THE QUESTIONS RELATED TO BRAIN DAMAGE WEREN'T BASED ON NEUROPSYCHOLOGICAL BRAIN DAMAGE, BUT WOULD BE BASED ON ACTUAL, I WOULD CALL, PHYSICAL BRAIN DAMAGE.

AND THAT'S WHY THEY REVIEWED ONLY THE RADIOGRAPHS OR THE X-RAYS THAT WERE FROM THE HOSPITAL THAT WERE USED IN THE TREATMENT OF THAT INJURY. SO I THINK ALTHOUGH DR. WU SAID A GUNSHOT WOUND COULD CAUSE DAMAGE, WHAT WE'RE SEEING HERE, THOUGH, IS THE DAMAGE THAT DR. WU IDENTIFIED IS NOT TO THE SIDE OF THE BRAIN THAT CARRIED THE BULLET TRAJECTORY.

SO I THINK DR. WU'S TESTIMONY WAS HONEST IN SAYING, YES, THIS COULD HAPPEN, BUT I DON'T THINK IT'S PRESENT IN THIS CASE, SIMPLY BASED ON --

>> WELL, LET'S GO BACK TO DEFICIENCY.

>> I THINK WHAT WE HAVE TO FOCUS ON IS WHEN DR. MINGS DID HIS INITIAL EVALUATION, HE DID NOT PERFORM THAT FULL BATTERY OF TESTING.

AND LAWYER COUTURE TESTIFIED THAT HIS DIRECTION WAS, YOU KNOW, TO LOOK FOR RETARDATION. I BELIEVE THAT'S BECAUSE THEY HAD INDICATIONS THAT MR. RODGERS HAD PERFORMED POORLY IN SCHOOL. THEY HAD HIS PRISON RECORDS THAT INDICATED A LOW IQ, AND THAT WAS RIGHT AT THE TIME WHEN THE U.S. SUPREME COURT ISSUED ADKINS, AND WE KNEW THAT MENTAL RETARDATION WOULD THEN BE, YOU KNOW, AN EXECUTION BAR.

COUTURE DID NOT RECALL EVER SPEAKING WITH DR. MINGS ABOUT ANYTHING OTHER THAN RETARDATION, BRINGING IT UP OTHER THAN THE PHYSICAL BRAIN DAMAGE.

AND MINGS SIMPLY DID NOT DO THE TESTING THAT WOULD BE REQUIRED TO IDENTIFY AS SUCH.

AND THEN I SEE WHAT HAPPENS IS -- AND WE HAVE TO REMEMBER, YOU KNOW, COUTURE IS NOT A CAPITAL-QUALIFIED DEFENSE ATTORNEY.

HE HAS SOME CAPITAL EXPERIENCE, BUT THIS WAS HIS FIRST CASE THAT HAD EVER GONE TO VERDICT.

THE OTHER CASES THAT HE'D BEEN INVOLVED IN --

>> WHAT WAS, WHAT DOES THE DEFENSE ATTORNEY HAVE IN HIS POSSESSION THAT WOULD HAVE REQUIRED HIM TO HAVE ORGANIC BRAIN THEORY?

I MEAN, WHAT DID HE HAVE BEFORE HIM THAT WOULD SAY, AH, THIS IS -- WE NEED TO HAVE HIM TESTED

TO MAKE SURE HE DOES OR DOES NOT HAVE ORGANIC BRAIN DAMAGE?

>> AT THE OUTSET WHEN THE CASE WAS IN WHAT I WOULD CALL THE EARLY INVESTIGATIVE STAGES, CERTAINLY THE DEFENSE HAD THE PRISON RECORDS THAT INDICATED THE LOW IQ, THEY HAD EVIDENCE OF LEARNING DISABILITIES, THEY HAD EVIDENCE OF SLOW DEVELOPMENT, POOR COGNITION.

THEY UTILIZED DR. MINGS SOLELY FOR RETARDATION BUT DID NOT DO A FULL BATTERY OF TESTING.

IN FACT, DR. KROP SAID THAT THE TESTING THAT WAS DONE WAS BASELINE TESTING FOR RETARDATION, BUT IT WOULD NOT NECESSARILY UNCOVER OR --

>> WHAT ABOUT THE TESTING THAT DR. GAMACHE DID?

>> CORRECT.

DR. GAMACHE'S TESTING WAS NOT DONE UNTIL AFTER THE PENALTY PHASE AND JUST PRIOR TO THE SENTENCING HEARING.

DR. GAMACHE FOUND EVIDENCE OF NEUROCOGNITIVE DISORDER WHICH I THINK, AGAIN, WE NEED TO BE CLEAR.

THE TERM "BRAIN DAMAGE" IS THE TECHNICAL TERM, "NEUROCOGNITIVE DISORDER" WOULD BE THE MEDICAL TERM FOR BRAIN DAMAGE.

WHAT DR. GAMACHE NOTED WAS MR. RODGERS HAD THESE SIGNIFICANT COGNITIVE DISORDERS THAT HE BELIEVED WERE ORGANIC IN NATURE WHICH IS WHAT YOU FIND WHEN YOU HAVE INJURY THAT IS PRENATAL OR PERINATAL AND PROBABLY OR COULD HAVE BEEN CAUSED FROM HEAD INJURY.

DR. GAMACHE ALSO REFERENCED HEAD INJURIES THAT MR. RODGERS HAD REPORTED.

WE CERTAINLY KNOW THAT UP UNTIL THE TIME OF THE PENALTY PHASE, COUNSEL -- EVEN THOUGH HE FORGOT IT AT THE EVIDENTIARY HEARING AND ADMITTED HE DIDN'T READ DR. GAMACHE'S REPORT VERY CAREFULLY AND OVERLOOKED IT THERE -- KNEW AT LEAST MR. RODGERS HAD GROWN UP IN AN ENVIRONMENT WHERE THERE WAS SOME HEAD TRAUMA, WHERE THERE WAS CERTAINLY A LOT OF DEPRIVATION AND THAT TYPE OF THING.

>> BUT DIDN'T HE -- WASN'T HIS BOTTOM LINE CONCLUSION THAT THE DEFICIENCIES WERE HEREDITARY AND GENETIC IN NATURE?

>> YES.

IN OTHER WORDS, THEY HAD EXISTED SINCE BIRTH OR BEFORE BIRTH. BUT THAT WAS, IN HIS BELIEF, THEY WOULD HAVE STEMMED FROM THAT EARLY BACK WHICH, AGAIN, I THINK ALSO WHAT THE COURT HAS TO CONSIDER IS THE RELATIVE WEAKNESSES OF THE MENTAL RETARDATION ISSUE.

WHAT THE DEFENSE HAD WAS ONE DOCTOR WHO BASICALLY SAID BASED ON IQ AND ADAPTIVE FUNCTIONING, I BELIEVE THERE'S MENTAL RETARDATION.

BUT WHAT THE DEFENSE NEVER HAD AND IT STILL DOES NOT EXIST TO THIS DAY, IS THE THIRD CRITERIA FOR MENTAL RETARDATION WHICH IS ONSET BEFORE AGE 18.

>> NOW, YOU JUST SAID THAT THE RECORDS INDICATED THAT HE HAD SOME LOW FUNCTIONING IN ALL OF THIS.

SO WHAT IS IT IN THOSE RECORDS THAT WOULD HAVE SPECIFICALLY SAID, AHA, WE NEED TO GET THIS NEUROLOGICAL TESTING TO DETERMINE WHETHER OR NOT THERE

IS AN ORGANIC BRAIN DAMAGE?
THAT'S THE PART THAT SEEMS TO BE
MISSING.

>> WHEN THE MENTAL RETARDATION
DIDN'T FIT AND WHERE I BELIEVE
THAT IT DIDN'T FIT WAS BECAUSE
YOU COULDN'T SHOW THE EXISTENCE
OF THESE DEFICIENCIES PRIOR TO
AGE 18, IN ESSENCE, THAT WAS
WHAT THE TRIAL COURT FOUND AND
THIS COURT UPHELD IN THE
ORIGINAL OPINION.

AND DEFENSE ATTORNEYS KNEW THAT
ALL ALONG.

THEY KNEW THEY HAD ONE DOCTOR
WHO WOULD SAY MENTAL RETARDATION
DESPITE THE LACK OF THAT
CRITERIA.

>> WHAT WAS IT THAT WOULD HAVE
SAID, OKAY, HE MAY NOT BE
MENTALLY RETARDED, BUT --

>> THAT'S A BIG ISSUE.

>> BUT IT LOOKS LIKE THERE MIGHT
BE SOME ORGANIC BRAIN DAMAGE.

WHAT WAS THE, WHAT WOULD HAVE
TOLD A DEFENSE ATTORNEY THAT?

>> THE DEFENSE ATTORNEY'S
TRAINING, EXPERTISE AND
EXPERIENCE.

ALL THE DEFENSE ATTORNEYS
INDICATED -- BUT ESPECIALLY
COUTURE AND HOPPER -- THAT THEY
WERE FAMILIAR WITH THESE
STANDARDS THAT APPLY TO LAWYERS
IN CAPITAL CASES, THAT THEY KNEW
THEY HAD THE RESPONSIBILITY TO
INVESTIGATE ALL MENTAL HEALTH
MITIGATION, NOT JUST THE ONE
THEY HAPPENED TO FALL UPON
FIRST.

ESPECIALLY WHEN ITS EVIDENT THAT
THEY COULD NOT ESTABLISH THE
MENTAL RETARDATION.

>> SO YOUR ARGUMENT REALLY IS IF
THERE IS ANY OF THOSE LOW
FUNCTIONING, COGNITIVE ISSUES,

THAT ANY DEFENDANT WHO HAS THAT SHOULD HAVE THE NEUROLOGICAL TESTING FOR ORGANIC BRAIN DAMAGE?

>> I CANNOT SPEAK FOR ANY DEFENDANT, BUT I WOULD SAY THAT IN THIS CASE THE FACTS WOULD SUPPORT THAT.

MY PERSONAL FEELING AS A CAPITAL-QUALIFIED DEFENSE ATTORNEY WHO HAS REPRESENTED NOW OVER 30 DIFFERENT INDIVIDUALS WHO HAVE BEEN SENTENCED TO DEATH THAT IF I SAW INDICATIONS OF THIS TYPE OF COGNITIVE FUNCTIONING BASED ON THE INTERACTIONS WITH THE CLIENT WHERE THERE IS CERTAINLY OBSERVABLE DEFICITS, THEN, YES, NOT ONLY WOULD I HAVE EXPLORED MENTAL --

>> DID THE ATTORNEYS SAY THAT THEY OBSERVED DEFICITS?

>> YES, YOUR HONOR, THEY DID. THEY ALL BELIEVED THAT HE WAS MENTALLY RETARDED.

IN FACT, MR. HOPPER INDICATED THAT HE WOULD -- BUT THAT WAS NOT BASED ON, YOU KNOW, BECAUSE MENTAL RETARDATION, THERE WAS ALMOST A MYOPIC FOCUS ON THAT DESPITE ITS OBVIOUS DEFICIENCIES.

>> WELL, WE'VE GOT A, YOU KNOW, THIS HAS BEEN PRESENTED AS THOUGH THERE'S NO OTHER EVIDENCE.

IT'S MY UNDERSTANDING THAT DR. MINGS WAS REQUESTED TO DO A FULL BATTERY OF NEUROPSYCHOLOGICAL TESTING.

DO YOU DISPUTE THAT?

>> NO, SIR.

HE WAS NOT REQUESTED TO DO THAT.

>> WELL, MY NOTES INDICATE THAT HE WAS, AND THERE'S A RECORD

REFERENCE FOR IT.

SO YOU'RE DISPUTING THAT THAT WAS NEVER REQUESTED AND THAT MY NOTES ALSO WOULD INDICATE TO ME THAT DR. MINGS EXPLAINED THAT HE DID NOT GO FURTHER BECAUSE HE FOUND THE DEFICITS AND THE PROBLEMS AND THAT YOU CAN'T USE THE NEUROPSYCHOLOGICAL TESTING IF YOU DON'T HAVE AN ASSUMED BASELINE FROM WHICH YOU CAN WORK.

IS THAT, IS THAT INCORRECT?

>> YOUR HONOR, I CAN'T ADDRESS -- I HAVEN'T SEEN YOUR NOTES.

MY UNDERSTANDING --

>> WELL, HOW ABOUT HE SAID HE DIDN'T DO MORE TESTS BECAUSE AFTER HE DID THE INITIAL INTERVIEW, SPOKE WITH HIM AND DID INTELLECTUAL TESTS AND PUT TOGETHER AN IQ SCORE AND SOCIAL HISTORY, I KNEW IT, AND THE IQ SCORE, I WAS CONCERNED ABOUT THE MENTAL RETARDATION.

THAT'S FROM THE RECORD.

>> I BELIEVE DR. MINGS WAS CONCERNED ABOUT THE ISSUE OF RETARDATION.

COUTURE TESTIFIED HE DID NOT RECALL DR. MINGS TO DO A FULL BATTERY, BUT IF HE DID NOT LIKE ONE, HE WOULD -- HOPPER TESTIFIED HE DIDN'T TALK TO --

>> BUT DIDN'T DR. MINGS SAY THAT HE WAS ASKED TO DO A FULL BATTERY WHEN HE WAS ORIGINALLY RETAINED?

THAT'S WHAT I THINK JUSTICE LEWIS WAS ASKING.

>> RIGHT.

I CAN HONESTLY TESTIFY THAT DR. MINGS DID NOT TESTIFY AT THE EVIDENTIARY HEARING.

IF HE TESTIFIED TO THAT IN HIS

ORIGINAL HEARING, I CAN'T DISPUTE THAT HE WAS ASKED TO DO ONE, BUT THE EVIDENCE IN THIS PROCEEDING WAS CLEAR HE DID NOT DO ONE.

>> WELL, THAT'S NOT THE POINT. THE POINT WHEN YOU'RE EVALUATING WHAT THE LAWYER DID OR DID NOT DO, I MEAN, A LAWYER ASKED AN EXPERT.

NO ONE HAS SAID THAT THIS DOCTOR IS INCOMPETENT, NOT QUALIFIED. BUT THERE IS EVIDENCE, IT SEEMS TO ME, THAT THIS LAWYER DID WHAT YOU JUST SAID HE SHOULD DO, IS ASK FOR A FULL BATTERY OF TESTS. AND HE DID DO THAT ACCORDING TO THE DOCTOR, THE EXPERT, AND HE GAVE AN EXPLANATION AS TO WHY HE DID NOT.

NOW, THAT MAY BE SUBJECT TO CHALLENGE, BUT THAT'S NOT THE DECISION OF THE LAWYER WHEN THE EXPERT DECIDES THE EVIDENCE DOESN'T SUPPORT THIS TESTING. THAT'S WHAT I'M TRYING TO UNDERSTAND.

>> THE BEST THAT I COULD TELL THE COURT IS I BELIEVE THERE'S MORE PROBABLY A CONFLICT IN THE EVIDENCE, YOU KNOW, AT THE EVIDENTIARY HEARING WHERE THE LAWYERS WERE ASKED ABOUT THEIR INTERACTIONS WITH DR. MINGS. DR. HOPPER TESTIFIED THAT HE WOULD NEVER ASK A DOCTOR TO PERFORM OR NOT PERFORM CERTAIN TESTS, BECAUSE HE LEAVES THAT COMPLETELY UP TO THE DOCTOR AND, THEREFORE, HE WOULD NEVER INTERJECT, AND HE TALKED AT LENGTH ABOUT HOW THAT'S ARROGANCE ON THE PART OF THE LAWYER TO TRY TO DIRECT OR IN ANY MANNER SUGGEST CERTAIN THINGS BE DONE.

MR. COUTURE, ON THE OTHER HAND, WHO WAS THE ONE WHO INITIALLY CONTACTED DR. MINGS TESTIFIED THAT HE DIDN'T KNOW IF HE HAD ASKED FOR THAT OR NOT, THAT IF IT HADN'T BEEN DONE, HE WOULD HAVE WANTED ONE WHICH WOULD SEEM TO BE IN CONFLICT WITH DR. MINGS' TESTIMONY, YOU KNOW, THAT THE COURT HAS REFERENCED THAT HE WAS ASKED TO DO IT -- >> BUT HERE IS THE, BUT YOU'RE GETTING OUT OF TIME.

LET'S -- I'M NOT SURE YOU'VE ESTABLISHED ANY BASIS FOR DEFICIENT PERFORMANCE. BUT ASSUMING THAT YOU DO, WHERE IS THE PREJUDICE IN THAT IN THIS CASE THE ISSUE OF HIS IMPULSIVITY OR ALL OF THE THINGS THAT GO WITH LOW INTELLECTUAL FUNCTIONING WAS PRESENTED TO THE JURY AND THEN TO SOME EXTENT LATER TO THE JUDGE?

SO I THINK THE QUESTION OF WHERE THERE IS PREJUDICE, DR. KROP DIDN'T TESTIFY THAT THERE WOULD BE STATUTORY MITIGATION. SO COULD YOU JUST BRIEFLY ADDRESS THE ISSUE OF WHERE IS THE PREJUDICE?

>> SURE.

I THINK WHAT'S IMPORTANT TO NOTE IS THAT DURING THE ACTUAL PENALTY PHASE PROCEEDINGS IN FRONT OF THE JURY, DR. MINGS CAME IN AND TESTIFIED EXCLUSIVELY TO RETARDATION, AND THAT WAS REBUTTED BY DR. PRITCHARD.

THEN AT THE SPENCER HEARING TWO ADDITIONAL DOCTORS CAME IN -- >> WELL, WHAT MINGS TESTIFIED TO IS THAT HE WAS LIKELY TO BECOME CONFUSED AND OVERWHELMED IN EMOTIONALLY-CHARGED

CIRCUMSTANCES, LIKELY TO HAVE DIFFICULTY SEEING OTHER WAYS TO RESOLVE CONFLICTS.

I MEAN, THESE ARE ALL THINGS THAT FOR INDIVIDUALS WITH COMMON COPING MECHANISM HAS BECOME DEFENSIVE, AND HE'S SEEN RODGERS ACT DEFENSIVELY WHEN CONFUSED.

I MEAN, THAT WOULD SOUND LIKE THAT'S ALSO EARMARKS OF SOMEBODY WITH BRAIN DAMAGE.

>> BUT I THINK THAT HAVING A CORRECT DIAGNOSIS IS CRITICAL TO THE CREDIBILITY OF THE WITNESSES AND BELIEVING THAT.

AND THE JURY COULD HAVE SIMPLY REJECTED THAT ANY OF THOSE BEHAVIORS ON MR. RODGERS' PART WERE SOMETHING OUT OF HIS CONTROL, IN ESSENCE, BY VIRTUE OF MENTAL RETARDATION BY RELYING ON DR. PRITCHARD WHO SAID, NO, HE'S NOT --

>> YOU ARE IN YOUR REBUTTAL TIME.

>> -- THEREFORE, HE DID NOT HAVE ANY OF THOSE DISABILITIES THAT AFFECTED HIS ABILITY TO CONTROL HIS BEHAVIOR, WHICH WAS ESSENTIALLY PRITCHARD'S TESTIMONY.

WHAT I THINK THEN IS IMPORTANT TO NOTE IS THAT IN THIS CASE DR. PRITCHARD ALSO EVALUATED MR. RODGERS FOR BRAIN DAMAGE. THE STATE UTILIZED HIM, AND THEN THE STATE DIDN'T CALL HIM WHICH, OBVIOUSLY --

>> WELL, DID YOU CALL HIM IN THE EVIDENTIARY HEARING?

>> WE DID NOT BECAUSE HE WAS A STATE WITNESS.

I MEAN, HE WAS THEIR WITNESS, HE WAS THEIR EXPERT --

>> I KNOW.

BUT IF YOU'RE SAYING THE STATE

WOULDN'T HAVE BEEN ABLE TO REBUT
BRAIN DAMAGE, ARE YOU SAYING
THAT?

>> WELL, THEY CERTAINLY DID NOT.
I MEAN, THEY DID NOT PRESENT ANY
EVIDENCE --

>> WELL, THEY WOULDN'T HAVE HAD
TO DO IT AT TRIAL, BECAUSE IT
WASN'T RAISED.

>> CORRECT.

>> ARE YOU SAYING IT'S NOT IN
THE RECORD THAT HE ACTUALLY
DOESN'T HAVE BRAIN DAMAGE?

>> THERE IS NO EVIDENCE TO REBUT
DR. KROP, IN MY OPINION'S
ASSERTION IN THIS RECORD, ABOUT
THE EXISTENCE OF ORGANIC BRAIN
DAMAGE.

>> BUT YOU AGREE KROP DOESN'T
RISE, GIVE THIS EVIDENCE
EQUIVALENT TO A STATUTORY
MITIGATION.

>> HE DID NOT.

BUT HE DID TESTIFY EXTENSIVELY
ABOUT AN ELEMENT OUTSIDE
MR. RODGERS' CONTROL TO EXPLAIN
THE BEHAVIOR BEYOND WHAT THE
STATE ARGUED TO SUPPORT THE
DEATH SENTENCE WHICH WAS,
BASICALLY, HE GOT MAD BECAUSE HE
CAUGHT HIS WIFE CHEATING AND
SHOT HER.

>> IS THAT REALLY WHAT HAPPENED?

>> FACTUALLY, YES, THAT'S WHAT
HAPPENED.

BUT I THINK WHEN WE LOOK AT
PENALTY PHASE AND WHEN WE LOOK
AT MITIGATIONS, WE EXPLORE THE
REASONS BEHIND THAT, SIMPLY NOT
JUST THE ACT OCCURRED, BUT THE
ATTEMPTS --

>> SO IT IS LIKELY THE ACT
OCCURRED SIMULTANEOUSLY.

I MEAN, HE FOUND HER ALLEGEDLY
WITH THIS GUY --

[INAUDIBLE]

OR SOMETHING.
HE GOES AWAY.
HE COMES BACK LATER, YOU KNOW,
AND HAS THE WHEREWITHAL TO GO
INTO WHAT LOOKS LIKE ANOTHER
ROOM AND GET THE GUN, AND THAT'S
HOW THIS WHOLE THING TOOK PLACE.
SO IT'S NOT LIKE HE FOUND THEM
AND IMPULSIVELY COMMITTED THIS
MURDER.

>> WELL, I BELIEVE THAT THE
EVIDENCE FROM THE TRIAL RECORD
INDICATED, THOUGH, THAT
THROUGHOUT THE DAY THERE WAS
COMMUNICATION BACK AND FORTH.
IT WAS NOT JUST, YOU KNOW, A
VACUUM WITH HOURS PASSING WITH
NOTHING OCCURRING.
IN FACT, THE EVIDENCE AT TRIAL
WAS ALSO HE'D GONE OUT AND
BOUGHT CANDY AND FLOWERS --
BECAUSE IT WAS VALENTINE'S
DAY -- FOR HER AND LEFT IT AT
THE HOME AND ONLY WENT BACK
BECAUSE SHE HAD BEEN CALLING HIM
ALL DAY TO COME BACK.
AND EVEN THE CHILDREN TESTIFIED
THAT, YOU KNOW, THERE WAS AN
ARGUMENT THAT ESCALATED.
BUT I BELIEVE THAT THE PURPOSE
OF THE PENALTY PHASE IS TO LOOK
AT THE FACTORS BEHIND, YOU KNOW,
THE BARE FACTS OF THE ACTUAL
HOMICIDE TO TRY TO DETERMINE
WHETHER OR NOT DEATH IS AN
APPROPRIATE PUNISHMENT.
AND I DO BELIEVE THAT THE
EXISTENCE OF THE ORGANIC BRAIN
DAMAGE CERTAINLY WOULD HAVE
MITIGATED IN FAVOR OF A LIFE
SENTENCE.
THIS IS AN 8-4 JURY AND NOT A
UNANIMOUS DECISION ON DIRECT
APPEAL WHERE, CLEARLY, THERE
WERE ISSUES RELATED TO THE
ESTABLISHMENT OF MENTAL

RETARDATION.

I DO NOT BELIEVE THE SAME ISSUES
EXIST RELATED TO THE PROOF AND
ESTABLISHMENT OF ORGANIC BRAIN
DAMAGE.

>> WELL, WAIT A MINUTE.

I THOUGHT THE TESTIMONY AT THIS
HEARING WAS THAT THE WORK AND
METHODS OF DR. WU WERE NOT EVEN
RECOGNIZED.

ISN'T THERE EVIDENCE OF THAT?

>> THERE WAS EVIDENCE FROM --
I'M SORRY, DR. HOLDER WHO IS A--
DIAGNOSTIC CLINICIAN WHO DOES
NOT UTILIZE PET SCANS OR WORK IN
THE SAME AREA THAT THIS TYPE OF
TESTING WOULD NOT BE APPROVED IN
A CLINICAL SETTING.

BUT THIS WAS NOT A CLINICAL
SETTING.

THIS WAS A DIFFERENT
ENVIRONMENT, YOU KNOW, THIS WAS
A DIFFERENT TYPE OF FORENSIC
TESTING.

>> AND ISN'T THERE ALSO EVIDENCE
THAT THE PET SCAN WAS NORMAL?

>> DR. HOLDER'S TESTIMONY WAS
THAT HE DID NOT SEE THE
ABNORMALITIES, BUT HE WAS
STRICTLY LOOKING AT THE BRAIN
STRUCTURE, THE UPTAKE OF THE
SUGAR WHICH MENTIONED THE ACTUAL
FUNCTIONING OF THE BRAIN.

SO, AGAIN, I THINK THAT WE'RE
TALKING MY POSITION WOULD BE
THAT DR. HOLDER'S BACKGROUND AND
EXPERIENCE IN TESTIMONY IS
SIMPLY APPLES TO ORANGES IN
TERMS OF WE'RE TALKING TWO
DIFFERENT TYPES OF TESTING WITH
TWO DIFFERENT CONCLUSIONS AND
TWO DIFFERENT METHODOLOGIES --

>> ALL RELATING TO A PET SCAN?

>> RELATING TO A PET SCAN --

>> AND ITS USE.

>> -- AT A SPECIFIC TIME.

>> RIGHT.

AND ITS SPECIFIED USE.

>> AND THE DOCTOR DID TESTIFY THAT --

>> HE ALWAYS TESTIFIES TO THAT. THIS IS NOT THE FIRST CASE WITH DR. WU, I PROMISE YOU.

>> I UNDERSTAND THAT. AND I AM NOT AWARE OF ANY DECISION OF THIS COURT FINDING THAT DR. WU'S TESTING OR METHODOLOGY LIES OUTSIDE THE BOUNDARIES OF A SCIENTIFIC RELIABILITY.

>> YEAH.

AND NOR IS IT APPROPRIATE FOR A LAWYER TO STATE WHAT THE STATUS OF THE RECORD IS WHEN THERE'S EVIDENCE TO THE CONTRARY.

>> IF I HAVE DONE THAT, YOUR HONOR, I APOLOGIZE.

I WOULD WELCOME THE OPPORTUNITY TO, YOU KNOW, DIRECT IN WRITING IF THE COURT FEELS THAT I HAVE DONE THAT.

THAT WOULD CERTAINLY NOT HAVE BEEN MY INTENT AND IN 25 YEARS WOULD NEVER BE MY INTENT.

>> MR. CHIEF JUSTICE AND MAY IT PLEASE THE COURT, MY NAME IS MITCH BISHOP, AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE.

IF I COULD TURN TO A QUESTION THAT JUSTICE QUINCE HAD EARLIER, AND IT WAS WHAT WAS IN THE EVIDENCE THAT WOULD SUGGEST THAT THERE WAS BRAIN DAMAGE, THAT THERE WAS SOME TYPE OF SOMETHING THAT SHOULD HAVE JUMPED OFF THE PAGE TO THE DEFENSE ATTORNEYS. INSTEAD, THEY NEED TO DO TESTING FOR BRAIN DAMAGE, AND THE ANSWER TO THAT IS THERE WAS NOTHING. DR. MINGS WAS SPECIFICALLY ASKED THOSE QUESTIONS, AND THEY WERE

CONCERNED WITH THAT BECAUSE OF THE GUNSHOT WOUND TO THE HEAD, BUT DR. MINGS WAS ASKED THAT QUESTION MULTIPLE TIMES BOTH IN DIRECT EXAMINATION AND IN CROSS-EXAMINATION WHEN HE TESTIFIED AT THE PENALTY PHASE.

>> WAIT.

ASKED WHAT QUESTION?

>> AS TO WHETHER THERE WAS BRAIN DAMAGE.

DID THIS DEFENDANT SUFFER ANY TYPE OF BRAIN DAMAGE?

AND THEY WERE TALKING ABOUT IT MAINLY IN THE CONTEXT OF THE GUNSHOT --

>> WELL, I DON'T UNDERSTAND. HOW, IF HE DIDN'T DO ANY TESTING FOR BRAIN DAMAGE, COULD HE HAVE BEEN PREPARED TO ANSWER WHETHER THERE WAS BRAIN DAMAGE?

>> HE DIDN'T DO ANY TESTING, BECAUSE HE DIDN'T FIND THERE WAS REASON TO DO ANY TESTING FOR IT. HE LOOKED AT THE PT SCANS --

>> SO YOU'RE SAYING IN THE DIRECT CASE HE WAS ASKED BY DEFENSE LAWYERS DID YOU FIND ANY EVIDENCE OF BRAIN DAMAGE?

>> HE WAS ASKED, HE WAS ASKED WHETHER OR NOT THERE WAS ANY EVIDENCE OF THE BRAIN DAMAGE --

>> BY THE DEFENSE LAWYERS?

>> BY THE DEFENSE LAWYERS, AND IT WAS CONCERNING THE GUNSHOT WOUND TO THE HEAD.

THEY WERE GEARED TOWARD THAT PARTICULAR ISSUE --

>> WELL, THEY WERE TRYING TO RULE OUT THAT THE GUNSHOT WOUND, WHICH EXISTED AFTERWARDS, AFFECTED THE FINDING OF MENTAL RETARDATION, I WOULD ASSUME.

>> THEY WERE TRYING TO -- THEY WERE TRYING TO ESSENTIALLY BOLSTER THEIR MENTAL

RETARDATION --

>> BUT HE WASN'T ASKED THE QUESTION BEFORE THE GUNSHOT WOUND YOU FIND APART FROM THAT EVIDENCE OF BRAIN DAMAGE, BECAUSE HE HAD NEVER TESTED FOR THAT.

>> OF COURSE HE WOULDN'T HAVE TESTED PRIOR TO THE GUNSHOT WOUND BECAUSE --

>> BUT YOU NOW MAKE IT SOUND LIKE THE FOCUS OF THE DEFENSE --
>> IT WAS NOT.

IT WAS NOT, YOUR HONOR.

BUT THERE WAS AN INTROSPECTION INTO THIS.

THEY WERE LOOKING INTO THIS, THEY WERE ASKING THESE TYPES OF QUESTIONS, AND THERE WAS NOTHING TO INDICATE THAT THEY NEEDED TO DO ANY FURTHER TESTING.

AND THAT'S WHAT DR. MINGS, HE WAS ASKED TO DO, JUSTICE LEWIS, A FULL BATTERY, AND HE STOPPED WHERE HE FELT BASED ON HIS EXPERT OPINION WAS APPROPRIATE TO STOP, AND HE STOPPED WHERE HE FELT HE WAS DOING THE MOST GOOD. HE DIDN'T DO A FULL NEUROLOGICAL BATTERY BECAUSE OF THE FACT THAT HE DIDN'T THINK IT WAS GOING TO TELL HIM ANYTHING.

AND THAT'S REALLY WHERE I'M TRYING TO TIE IN THOSE TWO POINTS THERE, JUSTICE PARIENTE, IS THAT, NO, BRAIN DAMAGE WAS NOT THE FOCUS OF THE PENALTY PHASE IN THE ORIGINAL TRIAL, AND I WOULDN'T SUGGEST THAT.

BUT WHAT -- THEY WERE ASKING THOSE QUESTIONS.

THEY ASKED DR. MINGS THOSE QUESTIONS CONCERNING THE GUNSHOT WOUNDS.

BUT ALSO HE DIDN'T DO ANY FURTHER TESTING BECAUSE HE

DIDN'T FEEL THERE WAS A REASON TO.

THEY WERE LOOKING TOWARD MENTAL RETARDATION IN THIS CASE.

HE'S NOT MENTALLY RETARDED, HE'S A BORDERLINE

INTELLECTUALLY-FUNCTIONING INDIVIDUAL BECAUSE HE'S POORLY EDUCATED, OSTENSIBLY BECAUSE OF HIS BACKGROUND, WHERE HE CAME FROM, AND THAT'S WHY HE'S NOT VERY ARTICULATE --

>> WAIT A SECOND.

A LOW INTELLECTUALLY-FUNCTIONING PERSON, IQ, DOESN'T NECESSARILY RELATE TO SOMEONE BEING NOT -- POORLY EDUCATED.

>> SURE.

THAT -- SURE, JUSTICE PARIENTE, THAT'S CORRECT.

>> SO HE HAD MORE, HE HAD IMPAIRED INTELLECTUAL FUNCTIONING WHICH I THINK HELPS IN TERMS OF THE PREJUDICE ISSUE WHICH IS THAT EVEN IF THERE IS SOME BRAIN DAMAGE, TO ME, THE SAME -- THIS IS A FRIENDLY QUESTION, SOME PEOPLE DON'T WANT FRIENDLY QUESTIONS -- IT'S THE SAME KIND OF DIFFICULTY IN COPING WITH COMPLICATED SITUATIONS WHY SOMEBODY HAS LOW INTELLECTUAL FUNCTIONING AS MIGHT HAVE WITH SOMEBODY WITH BRAIN DAMAGE.

>> AND THEY COULD BE, THE CHARACTERISTICS COULD BE THE SAME.

AND THOSE TYPES OF ISSUES WERE PRESENTED AT THE ORIGINAL PENALTY PHASE.

AND THAT KIND OF TIES INTO A PREVIOUS QUESTION YOU ASKED ABOUT PREJUDICE.

AND IF YOU WENT TO THAT POINT, THERE WOULD BE NO PREJUDICE,

BECAUSE THE THING ABOUT THE BRAIN DAMAGE IS, FIRST AND FOREMOST, DR. WU CAN'T PUT A TIME STAMP ON IT, HE CAN'T SAY WHEN THIS BRAIN ABNORMALITY THAT HE BELIEVES HE'S DISCOVERED HAS DEVELOPED, AND HE CAN'T SAY WHETHER OR NOT IT'S SOMETHING THAT DIDN'T JUST HAPPEN AS A RESULT OF NORMAL AGING OVER THE YEARS.

AND HE CAN'T SAY WHETHER OR NOT IT WAS SOMETHING THAT WAS ONSET OR ORGANIC FOR A LONG PERIOD OF TIME.

>> BUT HE DID RULE OUT -- GIVE ME WHAT HE SAID ABOUT THE GUNSHOT WOUND VERSUS WHERE HE FOUND ABNORMALITY.

>> THE GUNSHOT WOUND CAME OUT OF -- AND I DON'T REMEMBER WHICH ONE OF THE EYE SOCKETS, AND HE'S HAD SOME RECONSTRUCTIVE SURGERY --

>> SO IT DIDN'T PENETRATE INTO THE BRAIN.

>> IT'S CLEAR THAT IT DID NOT PENETRATE INTO THE CRANIUM, INTO THE BRAIN AREA.

BUT HE CAN'T RULE OUT THAT IT DIDN'T HAVE ANY EFFECT WHATSOEVER ON THE ABNORMALITY THAT HE WOULD HAVE FOUND, THE FRONTAL LOBE ABNORMALITY, THE LACK OF ACTIVITY, BASICALLY, IN THE FRONTAL LOBE.

>> WELL, HOW WOULD THAT POSSIBLY BE?

>> I DON'T THINK DR. WU CAN NECESSARILY ANSWER THAT EITHER. I DON'T THINK THE EXPERTS CAN ANSWER THAT.

THEY WERE TRYING TO ANSWER THOSE QUESTIONS AT THE EVIDENTIARY HEARING, AND THEY DIDN'T REALLY GET ANYWHERE WITH THAT.

>> WELL, THE STATE DIDN'T PUT ON SOMEONE TO SAY THAT WHATEVER DR. WU FOUND WOULD HAVE BEEN THE RESULT OF THE GUNSHOT WOUND.

>> THAT'S CORRECT.

>> DID THE STATE PUT ON, THERE WAS A DR. PRITCHARD? DID DR. PRITCHARD, DID HE PUT ON IN THE EVIDENTIARY HEARING BY THE STATE?

>> DR. PRITCHARD WAS PUT ON AT THE PENALTY PHASE OF THE TRIAL. DR. LAWRENCE HOLDER WAS THE STATE'S EXPERT AT THE EVIDENTIARY HEARING, AND HE DID DISAGREE WITH DR. WU.

>> I THOUGHT THERE WAS SOMEBODY THAT WAS HIRED FOR TESTING FOR BRAIN DAMAGE THAT WASN'T CALLED.

>> I'M NOT AWARE OF SOMEBODY THAT'S --

>> DR. GAMACHE?

>> DR. GAMACHE WAS SOMEONE WHO WAS HIRED, WHO WAS CONSULTED BY THE DEFENSE BEFORE THE PENALTY PHASE --

>> NO.

I THOUGHT THAT YOU SAID SOMETHING ABOUT SOMEONE BY THE STATE THAT HAD BEEN.

WAS IT DR. PRITCHARD?

I JUST WONDERED, DID YOU SAY --

>> YES, YOUR HONOR.

[INAUDIBLE]

DURING TRIAL, AND THEN DURING THE EVIDENTIARY HEARING --

[INAUDIBLE]

THE MOTION'S FILED, THEY AGAIN SOUGHT DR. PRITCHARD'S --

[INAUDIBLE]

RODGERS AND THEN DID NOT UTILIZE HIM.

>> AT THE EVIDENTIARY HEARING?

>> AT THE EVIDENTIARY HEARING FOR ANY PURPOSES.

>> AND HIS, HIS REPORT, BASED ON

MY UNDERSTANDING, WAS VERY SIMILAR TO WHAT THEY PRESENTED WITH DR. HOLDER.

AND DR. HOLDER DISAGREED WITH DR. WU.

AND DR. HOLDER DOES ACTUALLY HAVE EXPERIENCE WITH PET SCANS. HE USES IT IN ONCOLOGY WHICH IS TYPICALLY WHERE PET SCANS ARE USED, AND THAT'S WHAT HE TESTIFIED THROUGH THE EVIDENTIARY HEARING.

AND HE SAID THAT, FIRST AND FOREMOST, WHAT DR. WU IS DOING WITH PET SCANS IS IN THE RESEARCH FIELD.

IT'S NOT GENERALLY ACCEPTED IN THE CLINICAL SETTING WHICH WOULD BE WHAT THIS COURT COULD USE IF IT WERE ACCEPTED IN THE CLINICAL SETTING.

BUT DR. HOLDER SAID THAT THERE'S SOME ASYMMETRY IN HIS BRAIN, BUT THAT'S NO DIFFERENT.

ONE BRAIN DOESN'T LOOK THE SAME AS THE NEXT BRAIN, NO DIFFERENT THAN ONE FACE DOESN'T LOOK DIFFERENT THAN THE NEXT FACE.

>> DID ANYBODY, DID DR. KROP, DID HE DO THE NEUROPSYCHOLOGICAL TESTING?

>> HE DID.

>> AND IS THAT WHAT HE RELIED ON IN FINDING BRAIN DAMAGE?

>> HE FOUND WHAT HE DESCRIBED AS A COGNITIVE DISORDER NOT OTHERWISE SPECIFIED, AND I THINK WHAT HE WAS TRYING TO FIT IN THE EVIDENTIARY HEARING THAT IS A PSYCHOLOGICAL TERM FOR BRAIN DAMAGE, WHEREAS DR. WU WOULD BE USING THE MEDICAL TERMINOLOGY AS A MEDICAL DOCTOR.

BUT, AGAIN, DR. HOLDER WAS TESTIFYING THAT THERE IS SOME ASYMMETRY, BUT IT'S NORMAL, AND

IT'S ALSO NORMAL TO SEE A CHANGE IN ACTIVITY IN SOMEBODY'S BRAIN OVER A PERIOD OF TIME AS THEY TEND TO AGE, AND SOME PEOPLE WILL EITHER BE -- YOU'LL SEE ACTIVITY OVER THE ENTIRE BRAIN, OR IT'LL SHIFT FROM THE FRONT TOWARD THE BACK OF THE BRAIN. AND HE SAID THAT HE DISAGREED WITH DR. WU AS TO WHETHER OR NOT THERE WAS BRAIN DAMAGE. SO WE HAVE COMPETING EXPERTS HERE.

>> AND WHO DISAGREES, DR. KROP?
>> DR. HOLDER, THE STATE'S EXPERT --

>> ON THE PET SCAN.

>> ON THE PET SCAN.

>> BUT USUALLY ON SOMETHING LIKE THIS, AND YOU'RE RIGHT, THE PET SCANS ARE GENERALLY USED FOR CANCER DIAGNOSES IN THE OVERALL WORLD --

>> YES, YOUR HONOR.

>> -- FOR MEDICAL USE, THAT THE NEUROPSYCHOLOGICAL TESTING THAT DR. KROP DID, DOES THE STATE HAVE AN EXPERT TO JUST VIEW DR. KROP'S FINDINGS ABOUT HIS NEUROPSYCHOLOGICAL TESTING.

>> DID NOT PRESENT AN EXPERT AT EVIDENTIARY HEARING.

>> SO WE HAVE SOMETHING, AND IT DOES SEEM IT'S A LITTLE MUDDLED, YOU HAVE DEFENSE ATTORNEYS THAT REALLY WANTED TO LOOK AT THE WHOLE BRAIN ISSUE REALIZING THAT THIS WAS, YOU KNOW, SOMEWHAT OF A UNIQUE CASE, AND THEY FOCUS ON THE MENTAL RETARDATION.

BUT A LOT OF THE TESTIMONY THAT CAME OUT WOULD BE TESTIMONY THAT COULD BE INDICATIVE OF SOMEBODY WITH BRAIN DAMAGE WHICH, AGAIN, MENTAL RETARDATION AND BRAIN DAMAGE, IT'S NOT LIKE THE TWO

ARE UNRELATED.

>> THEY COULD COEXIST, YOUR HONOR, YES.

>> SO I'M TRYING TO STILL UNDERSTAND WHY IS IT FROM YOUR UNDERSTANDING THAT THE NEUROPSYCHOLOGICAL TESTING WAS NOT DONE BY DR. MINGS? APPARENTLY, THERE'S SOMETHING THAT HE SAID HE COULDN'T DO IT? WHAT WAS THAT ABOUT?

>> DR. MINGS TESTIFIED THAT BASICALLY BECAUSE OF THE LOW IQ SCORES THAT HE DIDN'T BELIEVE THAT FURTHER NEUROLOGICAL TESTING WAS GOING TO NECESSARILY SHOW HIM ANYTHING. HE DIDN'T FIND THAT IT WAS BASED ON HIS EXPERTISE THAT IT WAS SOMETHING THAT HE WAS GOING TO --

>> HE DIDN'T THINK THAT YOU FIND SOMEONE MENTALLY RETARDED, IT'S ALSO HELPFUL TO FIND OUT IF THEY'RE BRAIN DAMAGED?

>> HE DIDN'T SAY IT THAT WAY, JUSTICE PARIENTE.

HE DIDN'T SAY I THINK IT'S HELPFUL IF THEY HAVE BRAIN DAMAGE.

BASED ON HIS INITIAL FINDINGS AS HE BEGAN HIS INVESTIGATION OF THE DEFENDANT, HE FELT IT WAS NOT GOING TO BEAR ANY FRUIT --

>> BUT THERE WAS REALLY NOTHING HE WAS RESTRICTED IN DOING, YOU KNOW, WE HAVE SOME TIMES WHERE SOMEONE SAYS I WANT TO DO MORE TESTING.

NONE OF THAT EXISTED?

>> NO ONE TIED HIS HANDS, AND BOTH OF THE DEFENSE ATTORNEYS TESTIFIED THAT IF DR. MINGS HAD ASKED FOR MORE TESTING OR RECOMMENDED MORE TESTING OR ANYTHING ELSE HE WOULD HAVE

RECOMMENDED, THEY WOULD HAVE GONE FROM WITH THAT RECOMMENDATION.

AND THAT'S ESSENTIALLY WHAT WE HAVE WITH REGARD TO THE BRAIN DAMAGE.

ANOTHER THING REGARDING THE PREJUDICE IS THAT EVEN IF THE DEFENDANT WERE TO HAVE PRESENTED BRAIN DAMAGE EVIDENCE, THE THING THAT DR. WU SAYS AND THAT MOST OF THE EXPERTS WOULD AGREE THAT THE FRONTAL LOBE ABNORMALITIES, THE BRAIN DAMAGE THAT DR. WU SAYS HE HAS DISCOVERED, IT WOULD HAVE CAUSED HIM TO BE IMPULSIVE AND HAVE EMOTIONAL ANGER PROBLEMS.

BUT THE DEFENDANT CAN'T TIE THAT TYPE OF A SYMPTOM OF THE BRAIN DAMAGE TO HIS ACTIONS ON THE DAY IN QUESTION.

>> WELL, THAT GOES RIGHT BACK TO MY QUESTION WITH I'M CONCERNED ABOUT WHY A LAWYER WOULDN'T KNOW HOW TO GET INTO EVIDENCE OWNERSHIP OF A GUN.

>> THAT --

>> AND THAT, TO ME, SEEMS, THAT WAS THE IMPULSE, IS THAT THEY WERE INVOLVED IN SOME TUSSELE OVER THE GUN, YET -- AND THEN SO WE COME UP AT TRIAL, AND THERE'S NO EVIDENCE THAT SOMEONE ELSE OWNS THIS GUN.

THEY'RE LEFT WITH THE IMPRESSION, WERE THEY NOT, THAT THIS MAN BRINGS THIS GUN IN TO KILL THIS WOMAN?

>> I DON'T BELIEVE SO, JUSTICE LEWIS.

THEY WERE NOT LEFT WITH THE IMPRESSION THAT HE BROUGHT THE GUN OR THAT HE OWNED THE GUN --

>> THEY CERTAINLY DIDN'T KNOW THAT SOMEONE ELSE OWNED THE GUN.

>> THE JURY DID NOT KNOW THAT SOMEONE ELSE OWNED IT, BUT IT WASN'T A DISPUTED OR MATERIAL FACT THAT HE OWNED IT.

>> I MEAN, WHY WOULD -- HELP ME UNDERSTAND THAT.

IF I'M DEFENDING THIS CASE AND I WANT TO DEFEND IT ON THE BASIS THAT SHE HOLDS THE GUN ON HIM, THEN TO ME IT'S OF CRITICAL IMPORTANCE THAT THE GUN IS NOT IN THE POSSESSION OF THIS DEFENDANT, THAT IT'S THERE AT THE HOUSE, THAT IT BELONGS TO THIS LOVER OF HERS, AND SHE PULLS IT OUT AND IS GOING TO USE IT ON HIM.

THAT, TO ME, SOUNDS LIKE STUFF THE JURY, I MEAN, COULD REALLY FOLLOW AND UNDERSTAND THAT.

>> EXCEPT FOR THE FACT THAT THERE'S OTHER EVIDENCE THAT COMPLETELY CONTRADICTS THAT, NOT JUST THE EVIDENCE OF THE TESTIMONY FROM THE CHILDREN, BUT ALSO THE MEDICAL EXAMINER.

THE DEFENDANT TESTIFIED THIS WAS SOME TYPE OF AN ACCIDENT, SOME STRUGGLE AND THAT SHE HAD COME AT HIM WITH A GUN.

HOWEVER, SHE WAS SHOT IN THE BACK OF THE HEAD AND THE BACK OF HER TORSO WHICH THAT BLATANTLY NEGATES ANY IDEA THAT THEY -- SHE WAS SHOT IN SOME TYPE OF AGGRESSIVE STRUGGLE OVER THE WEAPON.

AND THE CHILDREN ALL TESTIFIED CONSISTENTLY TO THE FACT THAT THE DEFENDANT CAME IN THE HOUSE -- THEY CALLED HIM MR. TED -- AND THAT THEY GOT INTO A, THEY GOT INTO AN ARGUMENT, AND HE WAS A LITTLE BIT PHYSICAL WITH HER, SOME PUSHING AND KICKING.

AND THEN THEY ALL SAID THAT HE WENT BACK TO A ROOM, CAME BACK WITH THE GUN AND THEN SHOT HER. THERE WAS NEVER ANY SUGGESTION FROM ANY OF THE STATE'S WITNESSES THAT THE DEFENDANT OWNED THE GUN OR THAT HE, HE BROUGHT THE GUN TO THE SCENE, AND NOBODY EVER SUGGESTED THAT. IN FACT, IN THE CLOSING ARGUMENT OF THE PROSECUTOR THE PROSECUTOR ARGUED JUST WHAT THE CHILDREN TESTIFIED TO, THAT HE WENT TO A BACK ROOM, CAME BACK WITH A GUN OSTENSIBLY BECAUSE HE KNEW WHERE IT WAS, AND HE DIDN'T GO RUMMAGING AROUND THE HOUSE --

>> THAT SORT OF IMPLIES THAT IT'S HIS WEAPON.

>> IT IMPLIES THAT HE KNEW WHERE A GUN WAS IN THE HOUSE, YOUR HONOR.

I DON'T KNOW THAT --

>> WELL, WHOSE HOUSE WAS THIS?

>> IT WAS THE VICTIM'S HOUSE. IT WAS A DAYCARE CENTER THAT SHE --

>> WEREN'T THEY MARRIED?

>> THEY WERE.

BUT IT WASN'T WHERE THEY RESIDED.

IT WAS WHERE SHE RAN THIS DAYCARE BUSINESS.

>> OKAY.

ALL RIGHT.

BUT IT STILL, I THINK WHAT JUSTICE LEWIS SAID, THERE'S SOMETHING IRONIC THAT IT WAS THE GUN OF WHO?

>> IT WAS --

>> THE GUN OF THE PERSON THAT WAS THERE THAT MORNING THAT WAS --

>> THE EX-HUSBAND WHO WAS THE NEW LOVER, JUSTICE PARIENTE, THAT'S CORRECT.

>> SO THERE ISN'T SOME IRONY IN TERMS OF THAT FACT GETTING BEFORE THE JURY?

>> WHAT THAT FACT, IF IT WOULD HAVE PROVEN ANYTHING, IT WOULD HAVE ONLY PROVEN THAT JUST WHAT WAS ALREADY KNOWN; THAT HE DIDN'T BRING THE GUN AND THAT HE GOT THE GUN THERE AT THE HOUSE. BUT IT WAS -- THAT GUN REALLY HAD TURNED INTO BECOMING THE VICTIM'S GUN BECAUSE IN THE ONLY EVIDENCE THAT WE HAVE IN THE RECORD THERE WAS A PRETRIAL DEPOSITION OF MR. ODOM.

>> BUT SHE KEPT A LOADED GUN WITH THE CHILDREN RUNNING A DAYCARE?

>> YES, YOUR HONOR. BUT ODOM TESTIFIED AT A DEPOSITION PRIOR TO TRIAL THAT THE GUN DID BELONG TO HIM, BUT IT WENT MISSING SOMETIME WAY BACK WHEN HE HAD BEEN MARRIED TO THE VICTIM.

SHE HAD THE GUN AT THE HOUSE, AND THIS IS AT HER PLACE OF BUSINESS, AND SHE'S AT THE TIME MARRIED TO RODGERS.

AND SO THE IMPRESSION IS ACTUALLY THAT IT'S HER GUN, OR IT'S -- BUT IT'S NOT NECESSARILY RODGERS' GUN OR THAT HE BROUGHT THE GUN.

>> BUT I THINK THAT GOING -- AND I KNOW JUSTICE LEWIS ASKED YOU ABOUT THAT QUESTION.

BUT YOU WERE SAYING THAT THE NATURE OF THIS KILLING, THAT BRAIN DAMAGE WOULDN'T HAVE HELPED TO MITIGATE IN THE PENALTY PHASE.

I WOULD RESPECTFULLY SAY THAT SOMEBODY HAS, HE'S 60 YEARS OLD, HE HAS LIMITED INTELLIGENCE.

HE SEES THIS -- IS IT

VALENTINE'S DAY THAT THIS HAPPENED?

>> IT IS, IN FACT.

IT'S FEBRUARY 14, 2001.

>> SO HE COMES TO SEE HIS WIFE, AND HE SEES EVIDENCE THAT SHE IS HAVING AN AFFAIR WITH HER EX-HUSBAND.

HE LEAVES, BUT IS IT TRUE THAT DURING THE DAY HE ACTUALLY SENDS HER FLOWERS OR BRINGS FLOWERS AND CANDY TO THE HOUSE?

>> I DON'T KNOW FOR SURE WHETHER OR NOT THAT'S THE CASE.

I DO KNOW THERE WAS A PHONE CONVERSATION --

>> WELL, AGAIN, I JUST HEARD IT FROM MS.-- I ASSUME IT'S IN THE RECORD.

THERE ISN'T CCP IN THIS CASE, SO THE QUESTION IS THAT THE EVIDENCE REALLY WAS HE CAME THERE MAYBE TO WANT TO GET THIS RESOLVED AND AN ARGUMENT ENSUED. SO HOW DOESN'T THE IMPULSIVITY THAT FOLLOWS FROM BRAIN DAMAGE NOT BE HELPFUL IN UNDERSTANDING THAT WHAT HE'S DOING IS NOT WHAT SOMEBODY THAT HAS ALL THEIR, A NORMAL INTELLIGENCE AND DOESN'T HAVE BRAIN DAMAGE?

HOW DOESN'T THAT HELP IN THE CALCULUS OF WHY HE MIGHT BE MORE IMPULSIVE THAN SOMEBODY THAT DOESN'T HAVE THESE DEFICITS?

>> YOUR HONOR, THE BRAIN DAMAGE EVIDENCE WOULD BE MORE PERSUASIVE IF HE HAD GONE TO THE HOUSE THAT MORNING, CAUGHT HIS WIFE WITH THIS ESTRANGED EX-HUSBAND-NOW-LOVER AND THEN HAD THAT IMPULSIVE REACTION AND EMOTIONAL OUTBURST --

>> BUT YOU'RE ACTING AS IF THE WHOLE DAY HE'S -- AND WE DON'T KNOW WHAT THE ARGUMENT IS -- HE

SEES THIS, IT'S UPSETTING TO HIM.

HE STILL THINKS THAT I DON'T WANT TO, YOU KNOW, SHE'S STILL MY WIFE, I'M GOING TO GET HER FLOWERS AND CANDY AND THEN COMES AND, AGAIN, IT'S NOT CLEAR EXACTLY WHAT HAPPENED.

BUT THEN THAT ACT IS IMPULSIVE.

I MEAN, THAT'S THE -- LISTEN, THIS IS 8-4, RIGHT?

THERE WAS AN 8-4 JURY.

WE'RE JUST TALKING ABOUT WHETHER IT COULD HAVE, WHETHER IT UNDERMINES CONFIDENCE.

AND YOU'RE SAYING IT WOULD HAVE NOTHING TO DO WITH THIS ACT.

AND I'M JUST DISAGREEING THAT IT WOULD HAVE NOTHING TO DO WITH IT IF THE JURY WAS CONVINCED THAT BRAIN DAMAGE PLAYED A PART IN HIS REASONING SKILLS.

>> EXCEPT, YOUR HONOR, THAT THE REST OF THE TIMELINE AND SOME OF THE OTHER ACTIONS THAT HAPPENED THROUGHOUT THAT DAY WOULD NEGATE THAT AND WOULD NEGATE THAT IMPULSIVITY OR THAT EMOTIONAL RESPONSE BECAUSE HE GOES TO WORK, AND HE WORKS THROUGHOUT THE REST OF THE DAY, AND HE DOESN'T HAVE THIS EMOTION, YOU KNOW, WHERE HE'S AIRING IT AROUND.

HE'S NOT ANGRY AND WALKING AROUND IN SORT OF A STEAMING RAGE WHILE HE'S AT WORK.

HIS WORK PARTNER TESTIFIED TO THAT AT THE TRIAL.

AND THEN HE ALSO ADMITTED TO MR. CORBETT, HIS WORK PARTNER, THAT HE WAS GOING TO KILL HIS WIFE.

>> SO NOW YOU'RE REALLY SAYING THAT THE JURY SHOULD HAVE FOUND CCP, AND THE JUDGE SHOULD HAVE

FOUND CCP, BUT CCP WASN'T FOUND IN THIS CASE.

>> IT WASN'T, IT WASN'T PURSUED BY THE STATE IN THE ORIGINAL TRIAL.

>> BUT THAT'S A PRETTY -- SO, THEREFORE --

>> THE EVIDENCE IS THERE.

>> -- ALL YOU'RE SAYING SOUNDS LIKE THE STATE WASN'T SO CLEAR THAT THAT WAS REALLY HOW THIS HAPPENED, THAT, IN FACT, WHAT HAPPENED IS THERE WAS A FINAL IMPULSIVE ACT TRIGGERED BY WHAT HAD HAPPENED THAT MORNING.

>> EXCEPT FOR THE, AGAIN, THE ADMISSION THAT HE WAS GOING TO KILL HIS WIFE.

>> BUT, AGAIN, THE STATE, THOUGH, DIDN'T USE THAT TO PROVE THERE WAS HEIGHTENED PREMEDITATION.

SO THEY DIDN'T ARGUE THAT THIS WAS, YOU KNOW, JUST WE'VE GOT TO GO WITH WHAT WE HAD.

>> YES, YOUR HONOR.

>> AND I STILL THINK THERE'S PROBABLY NOT SUFFICIENT PERFORMANCE ON THAT ISSUE, SO I DON'T KNOW THAT WE GET TO PREJUDICE, BUT IT'S HARD TO THINK THAT BRAIN DAMAGE, IF IT EXISTED, WOULDN'T HAVE HELPED IN THE PENALTY PHASE.

>> AND, AGAIN, I WOULD JUST KEEP REFERRING TO THAT TIMELINE THAT HE WENT WITH HOW HE ADMITTED, THEN HE WENT OVER TO THE HOUSE, AND IT WASN'T, AGAIN, DURING -- WHEN HE PUNCHED HER AND KICKED HER AND PUSHED HER TO THE GROUND.

WHEN HE SHOT HER, HER BACK WAS TO HIM, AND SHE WAS, YOU KNOW, TRYING TO KIND OF OPEN THE DOOR. AND SHE --

>> BUT DIDN'T HE TELL HER -- SHE SAID I'LL SEE YOU AT HOME. HE SAID I'M NOT COMING HOME, THEN HE SAID I'M LEAVING YOU? I'M GOING TO -- THAT MORNING WHEN HE FIRST ENCOUNTERED THEM --

>> YES, SIR.

>> AND HE WENT TO SOME LADY AND SAID CAN I MOVE IN WITH YOU. SHE SAID, NO, THAT'S NOT POSSIBLE, AND THEN HE WENT TO WORK AND WORKED ALL DAY AND BROUGHT THE FLOWERS, TOLD HIS PARTNER THAT HE WAS GOING TO KILL HIS WIFE, AND THEY SAID THAT HE WAS ACTING NORMALLY.

>> THAT IS CORRECT, JUSTICE PERRY.

THE TESTIMONY FROM THE WITNESSES WHO SAW HIM THAT DAY WAS THAT HE WAS NOT EMOTIONAL OR IMPULSIVE. HE SEEMED ANGERED AND PERTURBED, ESSENTIALLY, BUT HE WASN'T HAVING TROUBLE CONTROLLING HIMSELF.

AND WHEN HE WENT BACK TO THE HOUSE AGAIN, HE SHOT HER IN THE BACK AND THE BACK OF THE HEAD. HE WASN'T IN THE MIDDLE OF A CONFRONTATION OR A PHYSICAL STRUGGLE WITH HER, AND IT WASN'T A SITUATION WHERE IT WAS SOME TYPE OF AN ACCIDENTAL DISCHARGE. AND I SEE THAT I'VE GONE THROUGH MY TIME.

THANK YOU, YOUR HONOR.

>> THANK YOU FOR YOUR ARGUMENTS. THE COURT WILL NOW TAKE A RECESS FOR TEN MINUTES.

>> ALL RISE.