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THE NEXT CASE ON THE COURT'S CALENDAR IS DAVID MILLER VERSUS THE STATE OF FLORIDA.

MR. McLAIN.

HELLO. MAY IT PLEASE THE COURT. MY NAME IS WILLIAM McLAIN, REPRESENTING DAVID MILLER. MR. MILLER WAS CONVICTED OF MURDERING ALBERT FLOYD DURING AN ATTEMPTED ROBBERY. I WILL BRIEFLY RELATE THE FACTS OF THIS CASE, AND THESE FACTS COME FROM THE STATE'S CASE, WHICH INCLUDED TWO EYEWITNESSES AND MR. MILLER'S CONFESSION. THE VICTIM IN THIS CASE, MR. FLOYD, AND MR. MILLER, WERE, BOTH, LIVING ON THE STREETS IN JACKSONVILLE AT THE TIME OF THIS CRIME. MR. MILLER WAS ADDICTED TO ALCOHOL AND A CRACK COCAINE USER, AND THIS PARTICULAR EVENING, HE HAD CONSUMED ALCOHOL AND CRACK COCAINE EARLIER. HE WAS, AT THIS POINT, SEEKING EITHER MORE ALCOHOL OR MONEY, ESSENTIALLY TO FEED HIS ADDICTION. HE CAME UPON MR. FLOYD, WHO WAS SLEEPING IN A COVERED DOORWAY AREA BEHIND THE BUILDING, AND INITIALLY MR. MILLER DID NOT NOTICE THAT MR. FLOYD'S GIRLFRIEND, LINDA FULLWOOD, WAS, ALSO, SLEEPING UNDER THE BLANKETS WITH HIM. INTENDING TO ROB MR. FLOYD, MR. MILLER STRUCK FLOYD WITH A PIPE. MS. FULLWOOD AWOKE, SURPRISED MILLER. HE STRUCK HER. ULTIMATELY SHE WAS INJURED. MR. FLOYD WAS KILLED, DUE TO THREE BLOWS TO THE HEAD.

HOW OLD IS MR. MILLER?

AS I RECALL, HE WAS IN HIS THIRTIES AT THIS POINT.

WAS THE ASSAULT TERMINATED BY THE FACT THAT A THIRD PERSON CAME ON THE SCENE AT THAT POINT?

A THIRD PERSON CAME ON THE SCENE ALMOST IMMEDIATELY AND HEARD THE COMMOTION, AND, ALSO, CONFRONTED MR. MILLER -- CONFRONTED MR. MILLER AT THAT POINT, AND THEN HE FLED.

WAS IT AT THAT POINT THAT MR. MILLER WAS HITTING THE GIRL?

THAT WITNESS INDICATED THAT HE SAW MR. MILLER STRIKING MS. FULLWOOD AND, ALSO, STRUCK ANOTHER BLOW AT MR. FLOYD, ACCORDING TO THAT WITNESS. MR. MILLER'S CONFESSION SAID THAT, WHEN HE WAS SURPRISED BY MS. FULLWOOD, AND THAT MR. HALL'S COMING UPON THE SCENE ACTUALLY CAUSED HIM TO CATCH HIMSELF AND REALIZE WHAT HE WAS DOING.

WOULD IT BE AN ACCURATE STATEMENT TO SAY THAT THE INTERVENTION OF A THIRD PERSON STOPPED THE ASSAULT?

I DON'T KNOW THAT, FROM THE EVIDENCE THAT WE HAVE, WE COULD CONCLUDE. THAT HE CAME UPON THE SCENE ABOUT THE SAME TIME AND CONFRONTED HIM DURING THE ASSAULT, AND HE TURNED TO HIM AND THEN FLED. WHETHER THE ASSAULT WOULD HAVE CONTINUED ANY FURTHER, WE JUST DON'T KNOW.

WELL, DIDN'T HE MAKE A STATEMENT TO THAT EFFECT? THAT HE STOPPED BECAUSE SOMEBODY ELSE CAME?

HE SAID THE FACT THAT THAT MAN CAME UPON THE SCENE CAUSED HIM TO PAUSE AND REALIZE WHAT HE WAS DOING, AND HE FLED.

COULD YOU JUST, THE DEFENDANT'S USE OF ALCOHOL AND DRUGS ON THE NIGHT OF THE MURDER, WHAT IS THE EVIDENCE IN THE RECORD ABOUT HIS MENTAL STATE ON THAT EVENING, AS TO HOW MUCH ALCOHOL AND/OR DRUGS HE HAD CONSUMED?

JUST -- I DON'T SEE THAT -- WAS THERE A CLAIM THAT HE WAS UNDER EXTREME EMOTIONAL DO YOU REMEMBERES -- DURESS OR WHATEVER THAT MITIGATOR IS, AND --

YES, YOUR HONOR. THE STATUTORY MENTAL MITIGATORS WERE NOT PURSUED IN THIS CASE, AND IF I WILL, IN A KEY ARGUMENT, I WOULD LIKE TO ADDRESS THIS MORNING, THE PROPORTIONALITY ARGUMENT, AND MR. MILLER'S MENTAL HEALTH CONDITION IS, CERTAINLY, A KAE PLAYER HERE.

WELL, OKAY, SO YOU DIDN'T -- IT WASN'T PURSUED, BUT WHAT IS THE EXACT EVIDENCE THAT WAS IN THIS RECORD AS TO HIS MENTAL STATE, AS A RESULT OF EITHER DRUGS OR ALCOHOL ON THAT EVENING? YOU SAID THE REASON FOR THE ASSAULT WAS TO GET MONEY TO GET MORE, BUT I DIDN'T -- YOU SORT OF --

THERE WAS --

YOU KIND OF GLOSSED OVER --

THERE WAS TESTIMONY THAT HE WAS INTOXICATED EARLIER IN THE EVENING, BY HIS OWN CONFESSION, HE SAID, IT HAD BEEN A FEW HOURS SINCE HE HAD HAD ALCOHOL AND CRACK COCAINE, AND HE WAS IN THE PHASE, IF YOU WILL, OF AN ADDICT OF SEEKING FURTHER ALCOHOL OR CRACK COCAINE TO, IN ESSENCE, FEED THE ADDICTION. HE WAS, THOSE CRAVINGS WERE DRIVING FORCE AT THAT POINT. I THINK DR. HARRY CROPP TESTIFIED THAT THAT WAS A KEY PLAYER HERE, WAS THAT STRONG MOTIVATIONAL URGE TO OBTAIN MORE ALCOHOL OR COCAINE. DR. CROPP TESTIFIED OR EXAMINED MR. MILLER AND FOUND ESSENTIALLY THREE SEPARATE DIAGNOSIS, WHICH HE SAID THE INTERACTION OF THOSE THREE WOULD HAVE CREATE ADD FAIRLY DISTURBED INDIVIDUAL. THE FIRST ONE WAS A LONG STANDING DIAGNOSIS OF ALCOHOLISM. HE HAD BEEN HOSPITALIZED ON FOUR DIFFERENT OCCASIONS, IN-PATIENT PSYCHIATRIC HOSPITAL FOR ALCOHOLISM AND DEPRESSION, GOING BACK TO 1983. DR. CROPP REVIEWED ALL OF THOSE RECORDS, BOTH MILITARY RECORDS. WE HAVE TESTIMONY FROM HIS FAMILY MEMBERS THAT, WHEN MR. MILLER WENT OFF AND JOINED THE NAVY IS WHEN HE REALLY STARTED DRINKING, AND HE WENT DOWNHILL FROM THERE, ESSENTIALLY. WE HAVE TESTIMONY OF, AGAIN, THREE TO FOUR IN-PATIENT HOSPITALIZATIONS FOR ALCOHOLISM AND DEPRESSION. AT THOSE TIMES, HE WAS, ALSO, DIAGNOSED, AND AS DR. CROPP SAID, THE RECORD WAS THE DIAGNOSIS WAS CONSISTENT THROUGHOUT THESE RECORDS, NOT ONLY WITH THE ALCOHOLISM AND DEPRESSION BUT, ALSO, NIX PERSONALITY DISORDER, WHICH HAS A NUMBER OF CHARACTERISTICS TO IT. AN AVOIDANCE PIECE TO IT. HE TENDED TO AVOID DIFFERENT CONFLICTING SITUATIONS. SCHIZOID PERSONALITY DISORDER, WHICH DR. CRO. P EXPLAINED IS VERY SIMILAR TO SCHIZOPHRENIA BUT NOT TO THE EXTENT THAT A PERSON LOSES CONTACT WITH REALITY, AND, ALSO, PARANOIA, AND, AGAIN, EVEN THROUGH READING MR. MILLER'S CONFESSION, WE CAN SEE THE PARANOIA PIECE AT PLAY HERE. IN FACT THAT MAY HAVE VERY WELL BEEN A REASON WHY HE INITIALLY STRUCK MR. FLOYD WAS HIS PARANOID FEAR THAT HE MAY HAVE HAD A KNIFE OR A GUN OR SOMETHING AND THEREFORE IT WAS A PREEMPTIVE STRIKE. I WILL KNOCK HIM OUT AND TAKE HIS MONEY. UNFORTUNATELY HE STRUCK HIM TOO HARD, AND FINALLY THE TESTING THAT DR. CROPP DID, THE PSYCHOLOGICAL NEUROLOGICAL TESTING, DETERMINED THAT MR. MILLER HAD IMPAIRED FRONTAL LOBE DISORDER. A FRONTAL LOBE DEFICIT. AND THIS IS THE AREA OF THE BRAIN WHICH CONTROLS IMPULSE CONTROL, THE ABILITY TO CONTROL IMPULSES, AS DOCTOR CROPP SAID, THE STOP-START BEHAVIOR, THE INABILITY TO STOP BEHAVIOR, ONCE STARTED. HE MENTIONED, DR. CROPP, MENTIONED THAT THIS IS THE LAST PART OF THE BRAIN TO DEVELOP, AND IT USUALLY DEVELOPS WHEN A PERSON IS ABOUT FIVE OR SIX YEARS OLD, AND IT IS THAT ABILITY TO CONTROL IMPULSIVE BEHAVIOR.

AND THIS WAS A DEFICIT THAT MR. MILLER HAD. NOW, DR. CROPP'S TESTIMONY, AND, AGAIN, I INVITE THE COURT TO READ THAT TESTIMONY, BUT HE INDICATED THAT, CERTAINLY, WITH THE MIX OF ALL THREE OF THESE, IN PLAY, THAT YOU COULD HAVE A VERY DISTURBED INDIVIDUAL.

IS THERE ANY EVIDENCE THAT THESE TWO, OR THESE THREE INDIVIDUALS KNEW EACH OTHER?

NO.

OR HAD ANY PRIOR CONTACT WITH EACH OTHER?

NO. NO INDICATION OF PRIOR CONTACT.

THEY WERE JUST PEOPLE THAT WERE ON THE STREET, BUT THAT WAS THE --

THAT WAS CORRECT.

-- THE SIMILARITY OR FAMILIARITY.

THAT'S CORRECT. AGAIN, MR. MILLER, AT A LATER POINT, HE FLED. THE POLICE HAD NO SUSPECTS IN THIS CASE WHATSOEVER. MR. MILLER LATER TURNED HIMSELF IN, ABOUT TWO MONTHS LATER, IN LOUISIANA, AND GAVE A COMPLETE CONFESSION AND CAME BACK TO JACKSONVILLE, AND FULLY COOPERATED WITH THE POLICE IN THE INVESTIGATION. HE WAS REMORSEFUL. DOCTOR CROPP SAID HIS EXAMINATION SAID THAT HE WAS REMORSEFUL AND ACCEPTED RESPONSIBILITY FOR HIS CRIME AND DID SO AT THE TRIAL AND DID SO AND ACCEPTED RESPONSIBILITY AND APOLOGIZED TO THE RELATIVES OF THE VICTIMS.

WHAT SIGNIFICANCE DO YOU PLACE UPON HIS ASSERTION OR DO YOU PLACE ANY THAT THE REASON HE TURNED HIMSELF IN, HE THOUGHT THE RELATIVES OF THESE PEOPLE WERE FOLLOWING HIM AROUND, AND ASKING HIM, AND THIS AND AFTER HIM, AND THIS TYPE OF THING. 'SPECIFICALLY SAID TWO REASONS WHY HE TURNED HIMSELF IN. YES, HIS PARANOIA, YES, WAS AT WORK. HE WAS AFRAID THAT SOMEBODY WAS AFTER HIM REGARDING THIS, WHEN, IN FACT, THERE WAS NO FACTUAL SUPPORT FOR THAT AT ALL, BUT HIS CONSCIOUS WAS BOTHERING HIM, AND THAT MAY HAVE BEEN FEEDING THAT BELIEF, TOO, SOMEBODY IS AFTER ME TONIGHT. IT WAS WEIGHING ON HIM.

THE MEDICAL EXPERTS, DID THEY TESTIFY AS TO THIS AT ALL?

-- THIS "FOLLOWING HIM AROUND", HIS FEELING THAT SOMEBODY WAS FOLLOWING HIM AROUND?

NOT PARTICULARLY. THE IDEALIZATIONS, IN HIS OPINION, DR. CROPP FELT THAT HIS REMORSE WAS GENUINE, AND THE TRIAL JUDGE FOUND THAT HIS REMORSE WAS GENUINE AND ESTABLISHED THAT AS A NONMITIGATING FACTOR.

THE BUT THE JUDGE FOUND THAT THE FACT THAT HE TURNED HIMSELF IN, WHEN, MAYBE, HE WOULD NEVER HAVE BEEN CAUGHT, SINCE THERE WAS NO EVIDENCE AT THAT POINT THAT ANYONE WAS ON HIS TRAIL, THE JUDGE DISCOUNTED THAT AND TURNING HIMSELF IN, SAYING, WELL, HE DID IT BECAUSE HE WAS, BECAUSE HE THOUGHT PEOPLE WERE PURSUING HIM. REALLY I GUESS IT GOES AROUND IN A CIRCLE. SINCE NO ONE WAS PURSUING HIM, THAT KIND OF WENT ON CREDENCE TO HIS UNDERLYING PSYCHOLOGICAL DISORDER OF PARANOIA, OF BEING PARANOID.

THE EVIDENCE WE HAVE OF THAT IS MR. MILLER'S OWN STATEMENT THAT THERE WAS REALLY TWO THINGS GOING ON WITH HIM. YES, HE WAS AFRAID SOMEONE WAS FOLLOWING HIM, BUT HIS CONSCIOUS WAS BOTHERING HIM AS WELL, AND CERTAINLY HIS BEHAVIOR OF, IF HE THOUGHT

SOMEONE WAS FOLLOWING HIM AROUND AND HE THOUGHT HE WOULD BE BETTER OFF IN CUSTODY, THAT WOULD NOT NECESSARILY HAVE LED HIM TO, WELL, I HAVE GOT TO GIVE A FULL CONFESSION. I HAVE GOT TO COOPERATE TO THIS EXTENT.

WOULD THE POLICE, I MEAN, WAS THERE ANY, SOMEBODY HAD SEEN HIM, BUT WERE THEY ABLE TO IDENTIFY HIM?

HE IDENTIFIED HIM, AS I RECALL, AT TRIAL, BUT THE POLICE HAD NO SUSPECT.

THERE WAS NO COMPOSITE.

THERE MAY HAVE BEEN, BUT THE POLICE HAD CLEARLY SAID THEY HAD DEVELOPED ABSOLUTELY NO SUSPECTS.

WHAT DOES THE RECORD REFLECT IN RESPECT TO THIS SECOND-DEGREE MURDER CHARGE AND CONVICTION AND PRISON SENTENCE IN NORTH CAROLINA?

THE RECORD REFLECTS THAT HE WAS, AS I RECALL, PURSE UNITE TO A PLEA -- PURSUANT TO A PLEA, WAS CONVICTED OF SECOND-DEGREE MURDER IN 1986. THERE ARE NO FACTS IN THE RECORD REGARDING THE NATURE OF THIS PARTICULAR SECOND-DEGREE MURDER. THE STATE DID NOT PRESENT ANY FACTS. THERE IS INDICATION THAT THE STATE OF NORTH CAROLINA DEEMED HIM ELIGIBLE TO BE RELEASED AFTER SEVEN YEARS AFTER 25-YEAR SENTENCE. IN FACT HE WAS RELEASED IN 1993. AND HE WAS OFF PAROLE BY 1995. AND MR. MILLER HAS NO OTHER VIOLENT CRIMINAL HISTORY, AND, IN FACT, THE ONLY PRIOR CRIMINAL CONVICTION THAT HE HAS, ACCORDING TO THE PRESENTS INVESTIGATION REPORT, WAS IN 1997, A CONVICTION FOR TRESPASS. AND A RECESSING WITHOUT VIOLENCE OF -- A RESISTING WITHOUT VIOLENCE OF A POLICE OFFICER, FOR WHICH HE CONFESSED AND GOT TIME SERVED.

HE MURDERED SOMEONE BEFORE. THAT IS NOT EXACTLY A MINIMAL PRIOR VIOLENT CRIME.

NO. NO. IT IS NOT A MINIMAL PRIOR VIOLENT CRIME.

IF THERE WAS SOMETHING MITIGATING ABOUT THE CRIME, THAT THERE WAS SOMETHING ABOUT IT THAT SHOULD REQUIRE THE COURT NOT TO CONSIDER IT AS HARSHLY, WOULDN'T THAT BE THE DEFENDANT KNOWS THE CIRCUMSTANCES. THE DEFENDANT COULD HAVE PUT THAT IN THE RECORD.

WE HAVE NO FACTS IN THE RECORD AS TO THE NATURE OF THAT CRIME. NONE WAS PRESENTED.

DO YOU HAVE ANY PRISON RECORDS FROM NORTH CAROLINA?

I AM NOT AWARE OF ANY PRISON RECORDS IN THE RECORD. WE DO HAVE AN INDICATION THAT HE WAS RELEASED AFTER SEVEN YEARS AND OFF PAROLE WITHIN TWO YEARS THEREAFTER. HIS ENTIRE CRIMINAL HISTORY, UP TO THAT POINT, AND AFTER THAT POINT, INDICATES THAT HE IS NOT PRONE TO CRIMINAL BEHAVIOR.

FOLLOWING UP ON THAT FOR A MINUTE, DO WE KNOW WHAT THE CHARGE WAS IN THAT CASE? WAS IT AN INTENTIONAL MURDER CHARGE? DO WE KNOW THAT?

DON'T HAVE THAT INFORMATION IN THE RECORD.

DO WE KNOW WHAT THE CRIME WAS? YOU SAY IT WAS SECOND-DEGREE. WHAT IS SECOND-DEGREE MURDER IN NORTH CAROLINA?

AGAIN, YOUR HONOR, THAT IS NOT IN THE RECORD.

IT IS NOT IN THE JUDGMENT OR THE PLEAS THAT WERE INTRODUCED HERE?

NO, YOUR HONOR. WE HAVE AN INDICATION --

THAT WAS IN 1985?

'86, AS I RECALL.

WHAT WERE THE EXACT DATES OF THESE HOSPITALIZATIONS THAT YOU HAVE ALLUDED TO AND WHAT WAS THEIR DURATION?

I DON'T KNOW THE DURATION. THE INDICATION WAS TESTIMONY FROM THE, DOCTOR CROPP, AS TO THE RECORDS HE REVIEWED, AND WHICH DATED BACK TO 1983, INCLUDING, I THINK, MILITARY RECORDS, OR AT LEAST V.A. HOSPITAL RECORDS. WHICH HE INDICATED, SO THERE WAS BACK TO 1983.

YOU GENERALLY INDICATED THAT THEY WERE ALCOHOL-RELATED OR PSYCHIATRIC-RELATED. DO WE KNOW SPECIFICALLY WHAT THEY WERE?

AGAIN, ACCORDING TO DR. CROPP'S TESTIMONY, AS TO HIS REVIEW OF THE RECORDS, HE SAID THE DIAGNOSE HAD BEEN -- THE DIAGNOSIS HAD BEEN CONSISTENT THROUGHOUT THESE HOSPITALIZATIONS. AS I RECALL HIS TESTIMONY OF BOTH ALCOHOLISM AND DEPRESSION AND MIXED PERSONALITY DISORDER, AND HE --

THOSE RECORDS WERE NOT PLACED IN THE RECORD.

DO NOT HAVE THOSE IN THE RECORD.

SO DR. CROPP'S TESTIMONY IS THE BEST SOURCE.

THAT IS THE BEST SOURCE OF THAT INFORMATION.

THE HOSPITALIZATIONS AND THEIR DURATION.

I DO NOT RECALL THOSE RECORDS BEING INTRODUCED AS EXHIBITS IN THE CASE. AGAIN, I WOULD POINT TO THE COURT THAT THIS SIMPLY IS NOT ONE OF THE MOST AGGRAVATED AND LEAST MITIGATED OF CRIMES, EVEN THOUGH THERE WAS A PRIOR CONVICTION FOR SECOND-DEGREE MURDER, I THINK THE INDICATION OF THE WAY NORTH CAROLINA RELEASED HIM AFTER SEVEN YEARS AND OFF PAROLE TWO YEARS THEREAFTER CASE THAT IT WASN'T AN EGREGIOUS SITUATION, AS HOMICIDES GO, WE WILL SAY, AND THAT CERTAINLY, IN THIS CASE, YOU HAVE TO TAKE INTO ACCOUNT THAT THE JURY RECOMMENDED A RECOMMENDATION FOR DEATH, HERE, WAS 7-5.

DID MR. MILLER, WAS MR. MILLER PROSECUTED FOR THE ASSAULT ON, I CAN'T REMEMBER HER NAME?

MISS FULLWOOD?

YES.

YES, HE WAS. HE WAS CONVICTED OF AGGRAVATED BATTERY, SIMULTANEOUSLY WITH THE HOMICIDE CHARGE, AND THOSE TWO, BOTH THE SECOND-DEGREE MURDER AND THE CONTEMPORANEOUS CONVICTION, WERE USED TO SUPPORT THE AGGRAVATING FACTOR.

HOW MUCH DO WE KNOW ABOUT THE RELATIONSHIP OF THE ALCOHOL OR DRUGS AND/OR DRUGS THAT HE HAD CONSUMED THAT NIGHT, WERE CONTEMPORARY WITH THIS EPISODE? WHAT DO WE

KNOW ABOUT THAT? HOW PRECISE IS THE EVIDENCE?

ACCORDING TO MR. MILLER'S OWN CONFESSION IS THAT HE HAD HAD THE AMOUNT OF ALCOHOL ESCAPES ME AT THE MOMENT, BUT HE HAD, ALSO, SMOKED CRACK COCAINE. AS I RECALL, SEVERAL HOURS EARLIER. FIVE, SIX, SEVEN HOURS EARLIER IN THE DAY. DOCTOR CROPP'S TESTIMONY WAS THAT, BASED UPON HIS ALCOHOLISM AND HIS DRUG ABUSE HISTORY, COUPLED WITH HIS PERSONALITY DISORDER, COUPLED WITH HIS FRONTAL LOBE DEFICIT, THAT HE THOUGHT THE DRUG ABUSE BEHAVIOR, ALONG WITH THOSE OTHER TWO DEFICITS, INTERACTED WITH EACH OTHER, AND CREATED THE DISTURBANCE. DR. CROPP DID NOT PLACE ANY SIGNIFICANCE ON WHETHER OR NOT HE WAS ACTUALLY INTOXICATED OR HIGH AT THE MOMENT OF THE KILLING. IT WAS THE WHOLE PIECE. THE WHOLE LIFESTYLE, IF YOU WILL, OF AN ADDICT, IN THE DRUG-SEEKING BEHAVIOR THAT WOULD OCCUR, ONCE THE HIGH IS STARTING TO GO DOWN. THAT WAS THE PRIMARY MOTIVATION. AS FAR AS THE ALCOHOL PIECE, AND DR. CROPP WASN'T WILLING TO SAY EXACTLY WHICH ONE WAS AT PLAY, MORE THAN THE OTHER, OF THE THREE DIAGNOSIS.

HOW MUCH SIGNIFICANCE OR CREDENCE DO WE GIVE TO THE FACT THAT HE HAS, THIS IS A PERSON THAT HAS HAD A LONG STANDING ALCOHOL PROBLEM?

BUT AT THE TIME OF THE MURDER HERE, HE WASN'T, THERE IS NO EVIDENCE THAT HE WAS DRUNK OR ALCOHOL HAD PLAYED ANY PART IN THAT. AND WHAT WAS A VICIOUS AND THOUGHT OUT MURDER. HE SAID I WAS GOING TO, I THOUGHT I COULD ROB THESE HOMELESS PEOPLE, LAYING IN THE DOORWAY, AND I PICKED UP THE BIG PIPE. AND THIS WAS A SUSTAINED BEATING THAT HE RENDERED. THE BLOOD SPLATTERS AND EVERYWHERE, AND I GUESS MY QUESTION IS WHY ISN'T THIS A DEATH-QUALIFIED CASE?

I THINK THERE IS A COUPLE OF REASONS. NUMBER ONE, THE SUSTAINED BEATING ASPECT. HE STRUCK -- HIS CONFESSION WAS HE NEVER WANTED TO KILL HIM BUT HE WANTED TO INCAPACITATE HIM.

THAT IS WHY THE LADY STOPPED THE BEATING. THAT IS WHEN HE STOPPED BEATING THE FIRST TIME WITH THE PIPE, AND THEN HE STOPPED BEATING THE LADY BECAUSE THE THIRD PARTY CAME ON THE SCENE. AM I WRONG IN THAT?

THAT IS, I THINK, A FAIR READING OF THE EVIDENCE. HOWEVER, WHAT TIES IN HERE IS HIS MENTAL CONDITION. THIS TIES DIRECTLY INTO HIS FRONTAL LOBE DEFICIT. NOT THE DECISION, PERHAPS, TO TAKE ACTION, BUT HIS ABILITY TO STOP ACTIONS. HIS ABILITY TO CONTROL HIS IMPULSES, ONCE BEHAVIOR HAS BEGUN. DR. CROPP LIKE ENDED THIS -- LIKENED THIS FRONTAL LOBE DEFICIT, TO, AGAIN, A SMALL CHILD WHO HASN'T HAD A FULLY-DEVELOPED FRONTAL LOBE AT FIVE OR SIX YEARS OLD BUT A SMALL CHILD WHO STARTS INTO BEHAVIOR AND CONTINUES INTO BEHAVIOR AND HIS PARENTS CAN'T GET HIM TO STOP AND IT GETS OBNOXIOUS AND YOU CAN'T HAVE MUCH, A GREAT DEAL OF DIFFICULTY GETTING THE CHILD TO STOP THE BEHAVIOR.

HE HAS HAD THIS FRONTAL LOBE DEFICIT IN HIS WHOLE LIFE.

YES.

HE IS IN HIS THIRTIES.

YES.

AND WE HAVE NO EVIDENCE OF SOMEONE WHO HAS BEEN EXHIBITED OTHER VIOLENT BEHAVIOR OTHER THAN IN 1986. IT SORT OF SEEMS LIKE IT WORKS AGAINST YOUR ARGUMENT, SINCE THIS ISN'T SOMEBODY THAT YOU HAVE SHOWN APPARENT OF HAVING IMPULSE TYPES OF INCIDENTS, DURING THE COURSE OF HIS LIFE, SO I MEAN, JUST IN TRYING TO PUT A PICTURE TOGETHER OF

WHAT WAS RESPONSIBLE FOR THIS MURDER AND WHETHER HE SHOULD BE, QUOTE, EXCUSED, MITIGATED, IF THE MITIGATING EVIDENCE IS THERE, I HAVE SOME PROBLEMS WITH THIS FRONTAL LOBE DISORDER AND PLAYING A PART IN THIS MURDER, BECAUSE I DON'T SEE WHERE IT FITS INTO ANYTHING ELSE THAT OCCURRED DURING THIS MAN'S LIFETIME.

WELL, WE DON'T KNOW HOW IT PLAYED OUT. WE DON'T HAVE ANY EVIDENCE, OF COURSE, OF A PRIOR CRIMINAL HISTORY OR THE IMPULSE CONTROL PLAYING OUT IN A VIOLENT MANNER, BUT WE DON'T KNOW HOW IT PLAYED OUT IN OTHER AREAS OF HIS LIFE. OBVIOUSLY THE ADDICTION WAS A PIECE.

WE TALK ABOUT ALCOHOL, AND, WAS, HE WAS INTOXICATED AT THE TIME. THEN YOU SAY HE WAS LOOKING FOR DRUGS. IS THERE EVIDENCE THAT THIS MAN WAS ADDICTED TO -- ADDICTED TO CRACK COCAINE AT OR AROUND THE TIME OF THIS MURDER?

WE HAD TESTIMONY HE WAS USING CRACK COCAINE THAT NIGHT, EARLIER, WITH ALCOHOL.

HAD HE BEEN USING IT FOR A PERIOD OF TIME BEFORE, AND DID HE CONTINUE TO USE IT AFTER? BECAUSE THERE IS, YOU KNOW, FROM TESTIMONY IN OTHER CASES, THERE ARE CERTAIN THING THAT IS PEOPLE THAT ARE ON CRACK COCAINE AND THEN GET OFF EXHIBIT THAT ARE, WOULD BE SIMILAR TO WHAT YOU MIGHT DESCRIBE AS THIS IMPULSE SITUATION. DID YOU, WAS THERE ANY ATTEMPT TO LINK THAT UP? THAT THE CRACK COCAINE ADDICTION AND WHAT HAPPENS WHEN YOU GET OFF OF A CRACK COCAINE HIGH?

THE ONLY INDICATION WE HAVE IN THE RECORD THAT HE WAS USING CRACK COCAINE WAS THAT HE HAD USED IT, AS WELL AS DRINKS ALCOHOL, AGAIN, A FEW HOURS BEFORE THE HOMICIDE.

LET ME ASK YOU THIS. IF THE JIM'S FAILURE TO FIND THAT THE PELL BE -- IF THE JUDGE'S FAILURE TO FIND THAT THE APPELLANT HAD A LONG-TERM ALCOHOL AND DRUG ABUSE PROBLEM, THE JUDGE'S FAILURE TO FIND ON THAT, IF IT IS ERROR, IS IT SUBJECT TO A HARMLESS ERROR ANALYSIS?

I DON'T THINK IT IS, YOUR HONOR. BECAUSE, AGAIN, THE JUDGE DIDN'T DISPUTE THAT HE HAD A HISTORY OF ALCOHOLISM. THE JUDGE JUST SAID I DON'T THINK BEING ADDICTED TO ALCOHOL IS MITIGATING. AND HE GAVE IT NO MITIGATING FORCE AT ALL. WHICH IS CONTRARY TO THE LINE OF AUTHORITY FROM THIS COURT THAT YOU CAN WEIGH IT BUT YOU CAN'T GIVE IT NO MITIGATING IMPACT. I MEAN, A LONG-TERM, IN THIS CASE, DOCUMENTED ALCOHOLISM AND, HAS AFFECTED HIS LIFE.

I AM CONCEDED THAT, PERHAPS, IT IS ERROR, BUT I AM SAYING WHY ISN'T IT SUBJECT TO A HARMLESS ERROR ANALYSIS, AND WHY ISN'T IT NOT HARMLESS ERROR IN THIS INSTANCE?

WELL, CERTAINLY IN THIS INSTANCE, WHERE THE MITIGATION WE HAVE PRESENT THROUGHOUT THIS CASE, NOT ONLY WITH THE MENTAL HEALTH HISTORY, NOT ONLY THE, MR. MILLER'S OWN ACTIONS IN TURNING HIMSELF IN AND HIS EXPRESSED REMORSE FOR THE CRIMES, THE JURY RECOMMENDATION OF 7 TO 5. ALL OF THOSE THINGS, I THINK, COME INTO PLAY HERE THAT IT IS NOT HARMLESS. THIS IS ERNL -- THIS WAS A -- THIS IS CERTAINLY -- THIS WAS A SIGNIFICANT PART OF THIS MAN'S LIFE. AND IT JUST CAN'T BE IGNORED IN THE SENTENCING EQUATION.

YOU SAY HIS FAMILY TESTIFIED?

HIS FAMILY DID TESTIFY.

WHERE WAS HE FROM?

HE WAS FROM THE NORTH CAROLINA AREA.

HOW DID THEY DESCRIBE HIM, AS FAR AS SUPPORTING HIMSELF OR WHAT HE HAD BEEN DOING IN THE LAST FIVE OR TEN YEARS?

THEY -- HE HAD BEEN LIVING ON THE STREETS. THERE HAD BEEN A PERIOD OF TIME, AS THEY SAID, UP UNTIL ABOUT HIGH SCHOOL AGE, ONE THING THE MAN'S BACKGROUND. HIS FATHER WAS AN ABUSIVE ALCOHOLIC. NOW HIS MOTHER DID SEPARATE FROM HIM WHEN HE WAS ABOUT 13 YEARS OLD, AND THEN HE WENT TO LIVE WITH GRANDPARENTS, WHICH WAS A MUCH MORE SUPPORTIVE ENVIRONMENT, BUT AT LEAST FOR HIS FIRST 13 YEARS, HE WAS IN THE ENVIRONMENT WITH AN ABUSIVE ALCOHOLIC FATHER. HAD -- HE HAD, ACCORDING TO THE FAMILY MEMBERS, KIND OF A RURAL ENVIRONMENT, ISOLATED ENVIRONMENT, I SURMISED, FROM WHERE HE WAS LIVING.

HE GRADUATED FROM HIGH SCHOOL?

HE GRADUATED FROM HIGH SCHOOL. HE WENT TO THE NAVY. WHEN HE WENT TO THE NAVY IS REALLY WHEN HIS DRINKING PROBLEMS BEGAN.

HOW LONG WAS HE IN THE NAVY?

I DON'T RECALL WHETHER HE SERVED MORE THAN A TERM IN THE NAVY OR EVEN IF HE COMPLETED THAT. I DON'T KNOW THAT.

HONORABLY DISCHARGED?

I DON'T -- I AM NOT SURE IN THE RECORD, IF THERE IS ANY EVIDENCE IN THE RECORD.

WHAT WAS HIS EXPLOIT HISTORY?

-- HIS I AM EMPLOYMENT HISTORY?

VERY -- WHAT WAS HIS EMPLOYMENT HISTORY?

VERY LITTLE, REALLY, BECAUSE HE ESSENTIALLY STARTED LIVING ON THE STREETS AFTER HE CAME OUT OFF THE NAVY. IT WAS A VERY SPORADIC HISTORY. HE LIVED IN AND OUT OF THE HOUSE.

WAS HE EVER GAINFULLY EMPLOYED?

NEVER GAINFULLY EMPLOYED. AGAIN, THERE WAS INDICATIONS THAT HE WOULD WORK IN LABOR POOLS AND SUPPORT HIMSELF IF THAT FASHION. WITH DAY LABOR.

DID HE HAVE SOME DISCIPLINE PROBLEMS WHEN HE WAS IN THE NAVY AND WAS TAKEN --

I AM SORRY YOUR HONOR. I WOULD HAVE TO REVIEW THE RECORD ON. THAT THERE WAS INDICATION, AGAIN, FROM VA RECORDS, ABOUT HIS HOSPITALIZATIONS IN THE RECORD. HIS DRINKING, HE MAY HAVE HAD SOME DRINKING PROBLEMS IN THE NAVY AND DISCIPLINE.

DID YOU SAY EARLIER THERE WAS A PSI?

THERE IS A PRESENTS INVESTIGATION IN THE RECORD. -- THERE IS A PRESENTS INVESTIGATION IN THE RECORD.

-- THERE IS A PRESENTENCE INVESTIGATION IN THE RECORD.

IF YOU WISH TO SAVE SOME OF YOUR TIME, YOU MAY.



YES, SIR.

MAY IT PLEASE THE COURT. MY NAME IS CURTIS FRENCH, REPRESENTING THE STATE OF FLORIDA IN THIS CASE.

MR. FRENCH, COULD YOU, PERHAPS, FILL IN SOME OF THESE BLANKS FOR US?

CONCERNING?

DO YOU HAVE, IN YOUR INDMIND, SORT OF A CHRONOLOGICAL LINE, AS WAS KOVED DELVED IN THE -- AS WAS DEVELOPED IN THE RECORD AND INCLUDING THE PSI, SORT OF A HISTORY ON THIS MAN? YOU KNOW, FROM CHILDHOOD UP UNTIL THE TIME OF THIS EVENT?

I MEAN -- I MEAN, CAN YOU TELL US THAT HE COMPLETED HIGH SCHOOL?

THERE WAS EVIDENCE PRESENTED FROM HIS FAMILY MEMBERS, CONCERNING HIS CHILDHOOD. HIS MOTHER, BROTHER AND SISTER, TESTIFIED. HIS FATHER WAS DESCRIBED AS A PERSON WHO DRANK. NOW, HOW MUCH HE DRANK, THE RECORD REALLY DOESN'T SAY. AND I WOULD DISPUTE THAT THERE IS ANY TESTIMONY THAT, IN FACT, HE WAS AN ALCOHOLIC. THAT IS AN INFERENCE, POSSIBLY, WHICH COULD BE DRAWN FROM THE FACT THAT THERE WAS SOME EVIDENCE THAT HE DRANK BUT NO ACTUAL TESTIMONY THAT HE WAS AN ALCOHOLIC. AS FAR AS THE ALLEGATION OF CHILD ABUSE IS CONCERNED, THE ONLY EVIDENCE WE HAVE AS TO THAT IS THAT HIS FATHER, EVERY SIX TO EIGHT MONTHS, WOULD WHIP HIS, ONE OR MORE OF HIS CHILDREN WITH AN ELECTRICAL CORD, SOMETIMES WITH GOOD REASON, SOMETIMES WITH NOT. THERE WAS NO EVIDENCE THAT ANY INJURES WERE ACTUALLY INFLICTED OR THAT HE WAS EVER REQUIRED TO BE HOSPITALIZED, NO EVIDENCE OF ANY OTHER KIND OF ABUSE. THE FATHER DIVORCED MR. MILLER'S MOTHER, WHEN HE WAS 13. THEN HE WENT TO LIVE WITH THE MOTHER'S PARENTS. FROM THAT TIME ON, HE HAD A WARM, LOVING ENVIRONMENT. HE WENT TO SCHOOL. HIS BROTHERS AND SISTERS WENT TO SCHOOL. HIS BROTHER IS AN ENGINEER. HIS SISTER IS A POLICE OFFICER. THERE IS NO EVIDENCE THAT THE DEFENDANT HAD ANY ALCOHOL OR DRUG PROBLEMS OF ANY KIND, UNTIL HE WENT TO THE NAVY, AFTER HE GRADUATED FROM HIGH SCHOOL.

HE WENT RIGHT INTO THE NAVY OUT OF HIGH SCHOOL?

WELL, MORE OR LESS. I AM NOT SURE EXACTLY WHAT, IF ANY, TIME ELAPSED.

AND HE GRADUATED FROM HIGH SCHOOL?

I BE -- I BELIEVE THAT IS CORRECT.

WAS THERE ANY EMOTIONAL OR MENTAL PROBLEMS, UP UNTIL THAT POINT, IN THIS RECORD, THE PSI?

NOT THAT ARE IN THE RECORD.

WHAT HAPPENED TO HIM THEN?

WELL, THE FAMILY MEMBERS TESTIFIED, AND I AM NOT SURE THAT WE ACTUALLY HAVE ANY RECORDS FROM THE NAVY, BUT THE FAMILY MEMBERS TESTIFIED THAT HE STARTED DRINKING WHEN HE WAS IN THE NAVY. AND HE CONTINUED TO AFTER HE HAD GOT OUT, AND THERE WAS APPARENTLY SOME ATTEMPTS AT TREATMENT, WHICH HE REJECTED. WHEN HE GOT OUT OF THE NAVY, HE LIVED WITH HIS MOTHER FOR A WHILE.

BEFORE YOU GET HIM OUT OF THE NAVY, MAYBE YOU CAN ANSWER THE QUESTIONS I ASKED. DID HE HAVE SOME DISCIPLINE PROBLEMS WHILE HE WAS IN THE NAVY?

I DON'T KNOW THAT THE RECORD SHOWS ONE WAY OR THE OTHER, AS TO THAT. I DON'T THINK SO. AT ANY RATE, HE LIVED WITH HIS MOTHER FOR A WHILE. HER RULES, HOWEVER, WERE THAT HE COULD NOT STAY WITH HER AND DRINK. HE CHOSE, HE DECIDED, ACCORDING TO HER, THAT, IF THOSE WERE THE RULES, HE WASN'T GOING TO STAY THERE, SO HE LEFT. SOMETIME AFTER THAT, HE COMMITTED A MURDER. HE WAS CONVICTED OF SECOND-DEGREE MURDER.

DO YOU KNOW ANY OF THE CIRCUMSTANCES OF HIS 1986 --

NOTHING OTHER THAN WHAT SHOWS IN THE CHARGE THAT WAS ADMITTED INTO EVIDENCE.

SO YOU AGREED WITH THE APPELLANT THAT THERE IS A VERY LIMITED RECORD ABOUT THE CIRCUMSTANCES.

THAT'S CORRECT. AS I POINTED OUT IN MY BRIEF, OF COURSE, THE STATE RUNS A RISK WHEN IT STARTS PRESENTING DETAILS OF PRIOR VIOLENT FELONIES.

WHAT WE KNOW IS THAT --

WHAT WE KNOW IS THAT HE IS GUILTY OF SECOND-DEGREE MURDER. HE WENT INTO PRISON IN 1986. HE WAS RELEASED IN 1993. THIS CRIME OCCURRED IN 1997. WE, ALSO, KNOW THAT HE APOLOGIZED TO THE FAMILY OF THAT FIRST MURDER VICTIM, ALSO.

THAERD -- THAT PERIOD OF TIME THAT HE WAS RELEASED FROM THE NORTH CAROLINA PRISON UNTIL THE DATE OF THIS CRIME, CAN WE FILL THAT?

WE DON'T KNOW BECAUSE WE KNOW THAT HE HAD VERY LITTLE CONTACT WITH HIS FAMILY. WHEN HE WAS RELEASED FROM PRISON, ONCE AGAIN HE WENT TO LIVE WITH HIS MOTHER. ONCE AGAIN HER RULES WERE THAT HE COULD NOT DRINK. ONCE AGAIN HE DECIDED THAT, IF THOSE WERE THE RULES, HE WAS GOING TO LEAVE AND HE DID. APPARENTLY LIVED ON THE STREET AND TOOK ODD JOBS, DAY WORK KINDS OF THINGS THAT WE DON'T KNOW A WHOLE LOT ABOUT.

WHAT ABOUT THE HOSPITALIZATIONS? WHEN WERE THEY IN CHRONOLOGICAL --

I BELIEVE THE ONLY THING WE KNOW ABOUT THE HOSPITALIZATIONS THERE WAS SOME REFERENCE TO THOSE IN DR. CROPP'S TESTIMONY, PERHAPS WHILE HE WAS IN THE NAVY. I DON'T KNOW WHAT KIND OF TREATMENT HE GOT WHILE HE WAS IN PRISON.

DO YOU CONTRADICT DR. CROPP'S TESTIMONY THAT THIS MAN SUFFERS FROM A MENTAL ILLNESS?

HE DESCRIBED A FRONTAL LOBE DISORDER, WHICH AFFECTS HIS IMPULSE.

HE WOULD BE BRAIN DAMAGED WITH -- ISLAND NOT CHARACTERIZE IT AS BRAIN DAMAGE, AND DR. CROPP DID NOT. DR. CROPP TESTIFIED THAT HE DID NOT SUFFER ANY MAJOR MENTAL ILLNESSES. THE TRIAL JUDGE DID, THOUGH, GIVE SOME MITIGATING WEIGHT TO THE FRONTAL, THE TESTIMONY ABOUT THE FRONTAL LOBE DISORDER.

IF WE WERE TO LOOK AT A FAMILY, YOU JUST SAID THAT YOU HAVE A BROTHER WHO IS AN ENGINEER. YOU HAVE GOT A SISTER WHO IS A POLICE OFFICER. THIS IS A MAN WHO IS, HAS BEEN LIVING, PROBABLY, ON THE STREETS, AS OF THE TIME OF HIS CRIME, FOR THREE OR FOUR YEARS, WITH AT LEAST A DOCUMENTED HISTORY OF ALCOHOL ABUSE. IT IS PRETTY FAIR TO ASSUME THIS IS A MENTALLY ILL DEFENDANT, WOULD YOU AGREE WITH THAT?

WHETHER THAT -- WHETHER THAT PLAYS OUT ANYWHERE, THAT SEEMS TO BE THE PICTURE WE HAVE OF THIS PARTICULAR DEFENDANT. DO YOU THINK THAT IS INACCURATE?

I THINK WE HAVE A PICTURE THAT HE IS A PERSON THAT DOES ABUSE ALCOHOL, BUT, AGAIN, I WOULD RELY ON DR. CROPP'S TESTIMONY THAT HE DOES NOT HAVE A SERIOUS MAJOR MENTAL ILLNESS, SO THEREFORE I WOULD NOT CHARACTERIZE HIM AS MENTALLY ILL. NOW, HE MAY HAVE SOME PROBLEMS AND THERE WAS SOME MITIGATING EFFECT GIVEN TO THOSE PROBLEMS.

WAS DR. CROPP ASKED ANY QUESTIONS, LIKE, WE HAVE THREE CHILDREN AND HERE IS ONE THAT BECAME AN ENGINEER?

NO.

AND HERE IS ONE -- WHAT HAPPENED?

DR. CROPP, THERE WAS NO TESTIMONY WHATEVER, TYING ANY ALLEGATION OF AN ALLEGEDLY ABUSED CHILDHOOD TO THIS CRIME.

HOW ABOUT THE ALCOHOLISM OR THE MENTAL ILLNESS?

WELL, DR. CROPP INITIALLY FOUND THAT, AS A COMBINATION OF ALCOHOLIC INTOXICATION IN THE FRONTAL LOBE DISORDER AND THE IMPULSE CONTROL, THAT HE WAS DISTURBED AT THE TIME AND WOULD HAVE DID THINGS THAT MANY OTHERWISE WOULD HAVE NOT DONE. HIS ORIGINAL DIAGNOSIS OR OPINION CONCERNING THAT, AND BY THE WAY, HE DID NOT SAY THAT ANY OF THIS ROSE TO THE LEVEL OF A STATUTORY MITIGATING CIRCUMSTANCE, ONLY NONSTATUTORY. BUT AT ANY RATE, HIS OPINION WAS BASED ON AN ASSUMPTION THAT MILLER WAS INTOXICATED AT THE TIME OF THE CRIME. THE FACT IS HE DIDN'T KNOW HOW MUCH MR. MILLER HAD HAD TO DRINK OR WHEN HE HAD DRUNK IT. AS WAS BROUGHT OUT ON CROSS-EXAMINATION. AND THE FACT IS THAT, ACCORDING TO MILLER'S TESTIMONY, HE DRUNK, I BELIEVE, 40 OUNCES OF BEER OVER A 3 TO 5 HOUR PERIOD THAT ENDED AT LEAST FIVE TO SEVEN HOURS BEFORE THE MURDER. AND IF YOU THINK ABOUT HOW QUICKLY ALCOHOL IS METABOLIZED AND SO FORTH, AND THE AMOUNT --

HAD HE GONE TO SLEEP, THEN, AND THEN WOKEN UP AND DONE, THIS OR WAS HE DOING SOMETHING ELSE, OR DO WE KNOW?

I DON'T BELIEVE HE WENT TO SLEEP. I THINK HE WAS JUST WONDERING AROUND. I DON'T KNOW THAT WE HAVE ANY SPECIFICS ON WHAT HE WAS DOING IN HIS FIVE-TO-SEVEN-HOUR PERIOD, BUT AT SOME POINT HE DECIDED TO ROB SOMEBODY, AND HE SAW ALBERT FLOYD SLEEPING, HE THOUGHT, BY HIMSELF ON A PORCH BEHIND, I BELIEVE, A CHURCH, AND THOUGH THAT HE WAS SOMEBODY HE COULD QUICKLY DISPATCH AND TAKE HIS MONEY.

THIS IS IN THE MIDDLE OF THE NIGHT?

IT IN THE MIDDLE OF THE NIGHT. AND WHAT MR. MILLER DID, WHAT WE KNOW HE DID, FROM DIRECT TESTIMONY, IS HE TOOK AN IRON PIPE, AND HE TOOK THAT IRON PIPE AND HELD IT WITH BOTH OF HIS HANDS, SWUNG WITH FULL FORCE ON ALBERT FLOYD. WE KNOW HE SWUNG WITH FULL FORCE, BECAUSE JIMMY HALL DESCRIBED THAT AND TESTIFIED THAT HE SWUNG WITH FULL FORCE, AND BESIDES THAT, WHEN DAVID MILLER DEMONSTRATED TO THE POLICE HOW HE SWUNG THE PIPE, THAT IS HOW HE DEMONSTRATED, PULLING OVER HIS HEAD AND SWINGING DOWN WITH FULL FORCE. WE KNOW THAT MILLER HIT ALBERT FLOYD AT LEAST THREE TIMES, SKULL CRUSHING BLOWS. CRUSHED THE SKULL. DROVE THE BONE INTO THE BRAIN, WHERE YOU COULD SEE THE BRAIN. HIS LEFT EYE BALL EXPLODED. JIMMY HALL TESTIFIED THAT, WITH EVERY SWING, THE IRON PIPE WAS ON -- WAS SO COVERED WITH BLOOD THAT BLOOD WAS SWUNG ON TO THE WALL AND UP ON TO THE CEILING. LINDA FULLWOOD TESTIFIED THAT SHE WAS SLEEPING NEXT TO ALBERT FLOYD AND WOKE UP AND STARTED SCREAMING, AND AT THAT POINT HE ATTACKED HER, AND OF COURSE SHE WAS AWAKE, UNLIKE ALBERT FLID AND COULD USE HER

ARMS TO DEFEND HERSELF, SHE STILL SUFFERED A CONCUSSION, TWO BROKEN FINGERS, SEVERAL FRACTURED RIBS AND HER ARM WAS INJURED SO SEVERELY THAT SHE HAS HAD SEVERAL SURGERIES AND IT IS STILL NOT RIGHT. IT IS A VERY SERIOUS ATTACK THAT ENDED ONLY WHEN JIMMY HALL SHOWED UP, BECAUSE HE HAD BEEN DRAWN OUT BY THE SCREAMS AND RAN AROUND BEHIND THERE TO SEE WHAT WAS GOING ON -- GOING ON, AND CONFRONTED THE DEFENDANT AND THE DEFENDANT TURNED AND CONSIDERED WHETHER TO ATTACK HIM AND THEN THOUGHT BETTER OF IT AND LEFT, AND ALBERT FLOYD WAS SOBER ENOUGH TO IMMEDIATELY GO BACK TO WHERE HE HAD BEEN STAYING AND TO IMMEDIATELY CHANGE CLOTHES AND TO LAY LOW. HE DIDN'T GO TO WORK THE NEXT DAY, AND THEN HE HEARD SOME OTHER PEOPLE TALKING ABOUT THE MURDER, SO HE LEFT TOWN.

THE WORK THE NEXT DAY WAS A LABOR POOL?

SOME SORT OF LABOR POOL.

HE HAD BEEN INVOLVED WITH A LABOR POOL, LIKE DAY WORK OR WHATEVER?

THAT'S CORRECT.

AND HOW DID HE GETS TO LOUISIANA? DO WE KNOW THAT?

DON'T KNOW. HE RODE A BUS OR HITCHHIKED OR SOMETHING. HE MAY HAVE SAID. I JUST DON'T RECALL.

DID HE KNOW HE HAD KILLED THE VICTIM?

WELL, HE CLAIMED THAT WHEN HE LEFT, HE DIDN'T KNOW FOR SURE THAT THE VICTIM WAS DEAD AND THAT WHEN HE HEARD OTHER PEOPLE TALKING ABOUT IT, THAT THAT IS WHEN HE LEFT TOWN.

AT THE LABOR POOL THE NEXT DAY.

I DON'T THINK -- HE WAS NOT AT THE LABOR POOL, BUT HE WAS IN AN AREA WHERE APPARENTLY OTHER HOMELESS PEOPLE WERE CAMPING OUT AND OVERHEARD THEM TALKING.

WAS THERE ANY FINGERPRINTS ON THIS? I BELIEVE THEY FOUND THE PIPE THAT HAD -- HE SLUNG THE IRON PIPE ON THE ROOF OF A BUILDING AS HE WAS LEAVING.

WERE THERE ANY FINGERPRINTS OR ANYTHING ON IT?

I DON'T BELIEVE SO. HE WAS IDENTIFIED BY JIMMY HALL AND, OF COURSE, HE ADMITTED THAT HE WAS THE ONE THAT HIT FLOYD WITH THE IRON PIPE, TOO.

NONE OF THAT WAS CONTESTED?

NO. THE ONLY REAL CONTEST WAS HIS INTENT AT THE TIME HE WAS SWINGING AND, OF COURSE, THE DEFENSE HYPOTHESIS WAS THAT HE ONLY HIT TO KNOCK HIM OUT AND THAT HE HIT TOO HARD TO KILL HIM, AND OF COURSE OUR POSITION INDICATES THAT HE DID INTEND TO KILL HIM AND YOU NOT ONLY DO IT ONCE BUT THREE TIMES AND NOT ONLY THAT BUT YOU ATTACK HIS COMPANION AND SERIOUSLY INJURY HER, THAT YOU ARE NOT JUST TRYING TO KNOCK SOMEBODY OUT.

HOW DO YOU DISTINGUISH THIS CASE FROM KRAMER?

FROM WHO?

FROM KRAMER?

IN KRAMER SAYS WHAT?

KRAMER WAS THE CASE WHERE THERE, THE, TWO HOMELESS PEOPLE WERE UNDER THE INTERSTATE ON I-4, DOWN IN ORLANDO, AND ONE HIT THE OTHER WITH A ROCK.

OKAY. WELL, ACTUALLY RIGHT OFF THE TOP OF MY HEAD, I DON'T REALLY REMEMBER THE FACTS OF THAT CASE.

THEY WERE BOTH DRINKING.

IN THIS CASE, BELL WELL, I THINK THAT IS THE CASE WHERE -- WELL, IN THIS CASE I THINK THAT IS THE CASE WHERE THEY GOT IN AN ARGUMENT AND ONE HIT THE OTHER. IN THIS CASE THERE WAS NO ARGUMENT. THE DEFENDANT DIDN'T KNOW THE VICTIM. HE SIMPLY WENT THERE TO ROB HIM. AS FAR AS THE OTHER CASES, THAT HE RELIES THAT MR. , THE CLAIM RELIES ON AS TO PROPORTIONALITY, MOST OF THOSE CASES, IN MOST OF THOSE CASES, STATUTORY MITIGATING CIRCUMSTANCES WERE FOUND IN THIS CASE. THERE WERE NO STATUTORY MITIGATORS EVEN PROFFERED, MUCH LESS FOUND, SO ALL WE HAVE IS SOME NONSTATUTORY MITIGATING CIRCUMSTANCES FOR THE MOST PART, PRETTY UNREMARKABLE.

WOULD YOU SAY THE RECORD WAS UNREFUTED THAT HE WAS NOT INTOXICATED AT THE TIME?

IT IS AS CLOSE TO BEING UNREFUTED AS IT CAN BE. IF HE HASN'T HAD ANYTHING --

DID DR. CROPP POINT OUT ANYTHING ON THAT AT ALL?

WHEN IT WAS POINTED OUT TO DR. CROPP THAT HE HAD HAD THIS ALCOHOL WITHIN THREE TO FIVE HOURS AND HE HAD NOT HAD ANYTHING TO DRINK IN THREE TO FIVE HOURS, THAT HE WAS SOBER, AND BY THE WAY HE CLAIMED TO POLICE THAT HE KNEW WHAT HE WAS DOING AT THE TIME AND DID NOT APPEAR TO BE INTOXICATED. IT SEEMS TO ME THAT IT IS QUITE CLEAR AT THE TIME OF THE CRIME THAT HE WAS SOBER.

WHAT ABOUT THE CRACK COCAINE EVIDENCE THAT WAS, I GUESS, SELF SUPPORTING ABOUT THE CRACK COCAINE?

HE SMOKED A ROCK OF CRACK COCAINE. THE EVIDENCE IS UNDISPUTED THAT THAT WORRY OFF IN 10 TO 15 MINUTES. MILLER SAID THAT. AS A MATTER OF FACT THE VICTIMS HAD, EARLIER THAT EVENING, SMOKED CRACK COCAINE, THEMSELVES, AND LINDA FULLWOOD TESTIFIED THAT THAT WORRY OFF IN 10 TO 15 MINUTES, AND DR. CROPP TESTIFIED THAT THAT WOULD WEAR OFF IN 10 TO 15 MINUTES.

IF SOMEONE IS ADDICTED TO CRACK COCAINE --

HE DID NOT, AS FAR AS I KNOW, TESTIFY THAT HE WAS ADDICTED TO CRACK COCAINE. HIS TESTIMONY WAS THAT HE HAD AN ALCOHOL ABUSE PROBLEM.

SO THE STATEMENT THAT HE WAS IN THE PHASE OF SEEKING MORE ALCOHOL AND COCAINE, THERE WAS NOT TESTIMONY FROM DR. CROPP ABOUT WHEN AN ADDICT IS IN THAT STAGE ABOUT WHAT MIGHT HAPPEN?

IT WAS ALL RELATED TO ALCOHOL, I BELIEVE. THE DEFENDANT, HIMSELF, TOLD SOMEBODY IN HIS STATEMENTS AND PROFFERED IN HIS TESTIMONY, TOO, THAT HE COMMITTED THE ROBBERY TO GET MORE, SOMETHING ELSE TO GET INTOXICATED WITH, AND I DON'T THINK IT WAS RESTRICTED TO OL CHOL AND POSSIBLY DRUGS, TAKE -- TO ALCOHOL, AND POSSIBLY DRUGS,

TOO, BUT THERE IS NO TESTIMONY FROM DR. CROPP THAT HE IS ADDICTED TO CRACK COCAINE, THAT I AM AWARE OF.

WHAT IS THE FAILURE OF THE JUDGE TO FIND THAT THE APPELLANT HAD LONG-TERM ALCOHOL AND DRUG ABUSE PROBLEMS, WHEN THIS TESTIMONY, AS I GATHER, WAS UNCONTESTED, WASN'T IT?

THERE WAS NO REAL DISPUTE THAT HE HAS BEEN ABUSING ALCOHOL SINCE HE HAS BEEN AN ADULT. THAT'S CORRECT. THE QUESTION IS WHETHER THAT IS MITIGATING, AND MR. McLAIN ARGUES THAT IS MITIGATING PER SE. OUR POSITION IS THAT IT IS NOT. IT MAY OR MAY NOT BE MITIGATING, DEPENDING ON ALL OF THE CIRCUMSTANCES OF THIS CASE, AND WE WOULD RELY ON THIS COURT'S OPINION IN JOHNSON, WHERE THE DEFENDANT HAD, OVER A PERIOD OF TIME, ABUSED ALCOHOL AND HAD DRUNK SOME AND POSSIBLY USED DRUGS EARLIER THAT DAY, COMMITTED THE CRIME THAT HE COMMITTED IN JOHNSON AND THE JUDGE EVALUATED ALL OF THAT AND NOTED THAT HE WAS SOBER AT THE TIME OF THE CRIME, THAT THERE WAS A LOT OF PURPOSEFUL CONDUCT THERE AND JUST DECIDED THAT IT DID NOT MITIGATE THAT CRIME.

EVEN THOUGH THAT WOULD BE UNCHALLENGED, THAT WOULD NOT BE, COULD NOT BE USED AS A MITIGATING CIRCUMSTANCE?

WELL, IT COULD BE. AGAIN, IT WOULD DEPEND ON ANALYSIS OF ALL OF THE CIRCUMSTANCES OF CASE ARE AND OUR POSITION IS --

CIRCUMSTANCE IN THIS CASE THAT WE ARE DEALING WITH, WHY WASN'T IT MITIGATING IN THIS CASE?

WELL, I AM NOT SURE WHY THE FACT THAT YOU HAVE HAD AN ALCOHOL PROBLEM OVER A PERIOD OF TIME, I AM NOT SURE HOW IT WOULD MITIGATE KIND OF BRUTAL MURDER THAT OCCURRED IN THIS CASE.

ISN'T IT A DIFFERENT TO -- ISN'T IT DIFFERENT TO SAY WHETHER IT MIGHT STILL WARRANT THE DEATH PENALTY VERSUS WHETHER THE TRIAL COURT ERRED IN NOT FINDING IT AS A MITIGATING FACTOR? ISN'T THAT TWO DIFFERENT QUESTIONS?

THERE ARE OBVIOUSLY TWO STEPS. ONE IS THAT YOU COULD DECIDE IT IS NOT MITIGATING AT ALL, AND THE OTHER IS THAT YOU COULD DECIDE IT IS MITIGATING BUT INSUFFICIENT MITIGATING TO WARRANT A LIFE SENTENCE.

IN OTHER WORDS YOU COULD STILL GIVE IT VALUE, SAYING I WOULD GIVE IT SLIGHT WEIGHT OR GREAT WEIGHT, BECAUSE OF THESE FACTORS?

YOU CAN, BUT JOHNSON VERSUS THE STATE, IN WHICH THE TRIAL JUDGE HAS THE DISCRETION AND LOOKS AT THAT AND DETERMINES WHETHER OR NOT IT IS MITIGATING CIRCUMSTANCES IN THIS CASE.

THAT IS ONE OF THE THINGS THAT CONTINUES TO SORT OF CONFOUND ME. I CAN UNDERSTAND, I GUESS IT IS A QUESTION, IT MAY NOT HAVE PLAYED A ROLE IN THE CRIME, AND THAT IS WHERE THE STATUTORY MITIGATORS COME, IF SOMEBODY IS UNDER THE INFLUENCE AT THE TIME, THEN THAT IS GOING TO GO TO ONE OF THOSE MITIGATORS ABOUT WHAT THEIR MENTAL STATE IS AT THE TIME OF THE CRIME. YOU HAVE ALREADY SAID, WELL, THAT WASN'T FOUND IN THIS CASE, BUT THIS ISN'T A SITUATION WHERE SOMEBODY 20 YEARS AGO HAD AN ISOLATED ALCOHOL PROBLEM AND THEN YOU KNOW, REHABILITATED THEMSELVES. THIS IS SOMEBODY THAT HAS HAD A DOCUMENTED LIFELONG HISTORY, ADULT HISTORY, OF ALCOHOL USE AND ABUSE, AND YOU KNOW, IF HERE HE IS, LIVING ON THE STREETS, NOT ABLE TO KEEP A JOB DOWN, WITH A BROTHER AND SISTER THAT ARE GAINFULLY EMPLOYED, THIS ISN'T THE MOST LOGICAL THING, IS

IT? THAT THIS IS A PERSON THAT WAS ADDICTED TO DRUGS AND ALCOHOL. NOW, WHETHER THAT, THEN, EXCUSES ANYTHING, I STILL DON'T SEE HOW IT CAN'T BE FOUND AS A MITIGATING CIRCUMSTANCES, TO BE EVALUATED BY THE TRIAL JUDGE.

IT SEEMS TO ME THAT THERE WOULD HAVE TO BE SOME NEXUS BETWEEN THAT ALCOHOL ABUSE PROBLEM AND THIS MURDER, SOME BASIS THAT YOU COULD SAY THAT SOMEHOW IT CONTRIBUTED THAT IN A WAY THAT MINIMIZES CULPABILITY. I THINK THE JUDGE WAS WARRANTED IN THIS CASE IN SAYING IT WAS NOT, BUT EVEN IF THE JUDGE ERRED, OUR -- THE JUDGE ERRED, OUR POSITION WOULD BE THAT THAT IS HARMLESS AT THAT CASE AND THAT WOULD BE, AT BEST, SLIGHT MITIGATION.

WHAT WAS THE THROUGH OF THE ARGUMENT OF THE DEFENSE -- WHAT WAS THE THRUST OF THE ARGUMENT OF THE DEFENSE AT THE PENALTY STAGE, IN TRYING TO ARGUE AGAINST DEATH? DO YOU RECALL? I DON'T RECALL. I WOULD ASSUME THAT -- I KNOW. I READ THE CLOSING ARGUMENT. I JUST DON'T RECALL EXACTLY WHAT HE ARGUED.

IF THE COURT HAS NO FURTHER QUESTIONS, I WOULD JUST RELY --

IS THERE ANYTHING IN THE PSI THAT YOU ARE AWARE OF THAT WE HAVEN'T DISCUSSED DURING THE COURSE OF THIS EXCHANGE?

NOTHING SIGNIFICANT, YOUR HONOR.

MR. McLAIN.

JUST A COUPLE OF POINTS. I WOULD TAKE ISSUE WITH THE ATTORNEY GENERAL'S CHARACTERIZATION OF WHAT DR. CROPP SAID ABOUT BASING HIS EVALUATION ON MR. MILLER BEING INTOXICATED AT THE TIME. THAT IS NOT A FAIR READING OF HIS TESTIMONY. HE TESTIFIED THAT THE ALCOHOL USE WOULD HAVE INFLUENCED A DECISION OR THE -- WOULD HAVE BEEN A FACTOR IN MR. MILLER'S MENTAL CONDITION AT THE TIME. THE INTERACTION OF ALL THREE OF THOSE THINGS WOULD HAVE BEEN A FACTOR. IN FACT, HE ACKNOWLEDGED THAT NO, MR. MILLER INDICATED TO ME THAT HE WASN'T THAT INTOXICATED, AND HE WASN'T RELYING ON BEING COMPLETELY INTOXICATED AT THE TIME.

DID DR. CROPP KNOW THAT HE HAD KILLED BEFORE? -- DID DR. CROPP KNOW THAT HE HAD KILLED BEFORE?

HE WAS AWARE -- HE WAS AWARE, I BELIEVE, OF ALL OF THE RECORDS.

DID HE DISCUSS IT?

I DON'T RECALL ANY DISCUSSION IN HIS TESTIMONY ABOUT THAT, BUT, AGAIN, ON THE QUESTION OF INTOXICATION, DR. CROPP'S EVALUATION AND OPINIONS WERE NOT PREMISED ON MR. MILLER BEING SO INTOXICATED AT THE TIME. IN FACT HE SAID THAT THE INFLUENCE ON IT WAS A MOTIVATIONAL LEVEL TO SEEK FURTHER DRUGS OR ALCOHOL AT THE TIME. COUPLED WITH THE OTHER MENTAL HEALTH CONDITIONS THAT HE HAD DIAGNOSED.

COULD YOU CLARIFY WHETHER THERE -- COULD YOU CLARIFY WHETHER THERE IS OR NEEDS TO BE A NEXUS REQUIREMENT BETWEEN WHAT HAPPENED WITH THE CRIME AND THE MITIGATING CIRCUMSTANCE, IN ORDER FOR THAT MITIGATING CIRCUMSTANCE TO BE FOUND?

I DON'T THINK THERE HAS TO NECESSARILY BE A NEXUS BETWEEN THE MITIGATING FACTOR AND WHAT, EXACTLY, HAPPENED IN THE CRIME. WE ARE SUPPOSED, THE MITIGATION IS TO LOOK AT THE ENTIRE BACKGROUND OF THE INDIVIDUAL. IN THIS CASE, HOWEVER, CERTAINLY THAT HIS MENTAL HEALTH CONDITION, INCLUDING DRUG USE, WAS DIRECTLY RELATED TO THE CRIME. IT

WAS COMPLETE DIRECT NEXUS. IN THIS CASE. AND DR. CROPP'S TESTIMONY SUPPORTS THAT NEXUS. THAT'S ALL. THANK YOU.

THANK YOU, MR. McLAIN. THANK YOU, FROM FRENCH. WE WILL BE IN RECESS. BAILIFF: PLEASE RISE.