

>> ALL RISE.

>> SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
PLEASE BE SEATED.

>> OKAY.

LAST BUT NOT LEAST,
BAKER V. STATE.
COUNSEL?

>> GOOD MORNING, YOUR HONOR.

ANN MARIE MIRIALAKIS WITH
CAPITAL COLLATERAL REGIONAL
COUNSEL, I REPRESENT CORNELIUS
BAKER.

I'D LIKE TO BEGIN BY ARGUING OUR
STATE PETITION FOR WRIT OF
HABEAS CORPUS.

THE ISSUE IS WHETHER OR NOT AN
INCOMPLETE RECORD ON APPEAL
PRECLUDED THE MEANINGFUL REVIEW
AND CONSIDERATION OF APPELLATE
CLAIMS WHICH, THEREFORE, ALSO
HINDERED THE ABILITY TO DO A
PROPORTIONALITY REVIEW.

SO WE'RE CLAIMING INEFFECTIVE
ASSISTANCE OF APPELLATE COUNSEL
WHO HAD THE DUTY TO INSURE A
COMPLETE RECORD WAS BEFORE THIS
COURT.

THE MISSING RECORDS THAT WE'RE
CONCERNED WITH ARE NUMEROUS
PSYCHOLOGICAL EVALUATIONS
PERFORMED BY DIFFERENT DOCTORS,
PSYCHIATRISTS AND PSYCHOLOGISTS
FROM THE AGES OF 7 TO 15.
AND MR. BAKER WAS 20 AT THE TIME
OF THE OFFENSE.

>> ISN'T IT TRUE THAT THERE'S
TESTIMONY, EXPERT TESTIMONY IN
THE RECORD THAT REALLY COVERS
THE SIGNIFICANT FACTS THAT WOULD
BE REVEALED BY THOSE RECORDS?

>> YOUR HONOR, I ABSOLUTELY
CONCEDE THAT DR. KROP REVIEWED
THESE REPORTS TO COME TO HIS
CONCLUSIONS, THAT HE THEN
TESTIFIED TO HIGHLIGHTS FROM
THESE REPORTS AND THAT HIS
TRANSCRIPT IS PART OF THE RECORD
ON APPEAL.

I WOULD FURTHER CONCEDE THE

STATE'S POINT THAT NO OTHER MEDICAL EXPERT, MENTAL HEALTH EXPERT EVEN TESTIFIED BECAUSE THE STATE DIDN'T PRESENT ANY OPPOSING MENTAL HEALTH TESTIMONY.

WHY I'M ARGUING THAT THIS IS PREJUDICE IS BECAUSE IN THE SENTENCING ORDER THE TRIAL COURT, WHILE ACKNOWLEDGING THAT DR. KROP FOUND SIGNIFICANT BRAIN DAMAGE, THE VERY NEXT SENTENCE THEY GO ON SAY THAT "NO EITHER OF THE NUMEROUS REPORTS EVEN SUGGESTED THE POSSIBILITY OF BRAIN DAMAGE."

AND AT THAT POINT EVEN IF THE TRIAL COURT CONCEDES THE BRAIN DAMAGE AND FINDS BRAIN DAMAGE-- BECAUSE THERE IS NO OPPOSING MENTAL HEALTH EXPERT'S TESTIMONY CONTRADICTING IT-- BUT THAT STATEMENT IN AND OF ITSELF UNDERMINES DR. KROP'S OPINIONS, CHALLENGES HIS FINDINGS.

AND I THINK AT THAT POINT WHEN THIS COURT DOES A REVIEW OF ALL THE FACTS AND CIRCUMSTANCES AND REVIEWS THE CLAIMS ON APPEAL, THAT IT'S IMPORTANT TO LOOK AT THESE REPORTS AND TRY TO UNDERSTAND WHAT COULD HAVE BEEN MEANT BY THIS STATEMENT WHICH, IN ITS OWN WAY, SOMEWHAT IMPEACHES DR. KROP.

NOW, I WOULD ALSO AGREE THAT THE WORDS "BRAIN DAMAGE," THOSE WORDS DO NOT APPEAR IN THOSE REPORTS, OKAY?

BUT I BELIEVE THAT IF YOU REVIEWED THESE REPORTS, YOU WOULD BE PERSUADED TO THE FINDINGS AMOUNT TO BRAIN DAMAGE OR AT THE VERY LEAST A BRAIN THAT'S NOT HEALTHY, WASN'T FORMED PROPERLY IN SOME WAY, ISN'T FUNCTIONING WELL.

OKAY?

AND THESE FINDINGS ESPECIALLY IN THESE REPORTS ARE IMPORTANT

BECAUSE THESE ARE FINDINGS THAT PRECLUDE-- PRECEDE THE MURDER. THEY'RE FINDINGS THAT ARE FROM MENTAL HEALTH EXPERTS THAT WEREN'T HIRED BY A DEFENSE TEAM AFTER THE MURDER.

AND THIS COURT HAS FOUND THAT SORT OF TESTIMONY EVEN MORE COMPELLING.

SO, YOU KNOW, THE SORTS OF THINGS THAT ARE, YOU COULD FIND IN THE REPORT THAT WOULD SUPPORT THE IDEA OF BRAIN DAMAGE-- WHILE NOT USING THOSE TERMS-- DR. UPSON IN THE 1994 REPORT, HE DID A SCREENING FOR ORGANIC IMPAIRMENT, OKAY?

AND IT'S OUR POSITION THAT ORGANIC IMPAIRMENT IS A BRAIN THAT ISN'T HEALTHY, IT'S DAMAGED.

HE FOUND FOUR STANDARD DEVIATIONS BELOW THE MEAN AND THERE WAS LEARNING DISABILITIES. DR. MEHAN IN 1998 FOUND THERE WAS LIMITED INTELLECTUAL FUNCTIONING.

SO, AGAIN, WE'RE NOT TALKING ABOUT PERSONALITY DISORDERS, WE'RE TALKING ABOUT A BRAIN THAT ISN'T FUNCTIONING PROPERLY. THERE WAS CONSISTENTLY FINDINGS OF ADHD.

NOW, THAT COUPLED WITH THE FACT THAT AGAIN AND AGAIN THE GRANDMOTHER REPORTED TO THESE EXPERTS THAT THE MOTHER USED ALCOHOL AND DRUGS WHILE SHE WAS PREGNANT, WE KNOW THAT ADHD IS A TRAIT THAT IS OFTEN FOUND IN FETUSES THAT HAVE BEEN EXPOSED TO ALCOHOL.

>> LET ME JUST ASK YOU THIS--

>> OKAY, SURE.

>> IN THE TRIAL JUDGE'S FINDINGS ON MITIGATION, THERE WAS A FINDING, AS I RECALL, ABOUT THE DEFENDANT SUFFERING FROM BRAIN DAMAGE, WASN'T THERE?

AND THAT HE HAD LOW INTELLECTUAL

FUNCTIONING AND OTHER THINGS
THAT HE GAVE SOME WEIGHT TO?
SO ARE YOU ARGUING THAT IF THESE
WERE IN THE RECORD, WE WOULD
HAVE SAID HE SHOULD HAVE GIVEN
THEM MORE WEIGHT?

>> WELL, I'M-- WHAT I'M SAYING
IS IF YOU HAVE ALL THE FACTS
BEFORE YOU ON YOUR
PROPORTIONALITY REVIEW AND LET'S
LOOK AT THE CROOK CASE, OKAY,
WHERE YOU HAVE ALMOST THE SAME
SORT OF MITIGATION.

YOU HAVE ADHD, YOU HAVE SOMEONE
WHO'S HAD-- BEEN PUT ON RITALIN
SINCE CHILDHOOD, AN ABUSIVE
CHILDHOOD, BRAIN DAMAGE, YOU
HAVE AN IQ-- NOW, CROOK'S IQ
WAS FROM 62 TO THE LOW 70s.
MR. BAKER WAS 74 AT CHILDHOOD.
WE HAVE A 20-YEAR-OLD WITH A
PERSONALITY THAT'S IMMATURE.
CROOK, GRANTED, WAS MORE MATURE
IN THE 3-4 YEAR RANGE, BUT
MR. BAKER WAS FOUND TO BE
PERMANENTLY AT A 14, 15-YEAR-OLD
LEVEL.

HE WOULD NEVER GET BETTER THAN
THAT.

WE HAVE MR. CROOK WAS
HOSPITALIZED FOR SUICIDAL
BEHAVIOR.

AND IN ONE OF THESE REPORTS THAT
WAS NOT BEFORE YOU AND THAT
DIDN'T COME OUT IN THE
TESTIMONY, THE 2002 APP REPORT,
WE KNOW THAT THAT WAS A REFERRAL
WHEN HE WAS 15 WHERE HE HAD
ATTEMPTED-- HE HAD TIED SHEETS
AROUND HIS NECK AND WAS
ATTEMPTING-- THE REFERRAL WAS
AN ATTEMPTED SUICIDE.

NOW, ADMITTEDLY, HE DENIED IT
WHEN HE WAS CHALLENGED, BUT I
THINK THAT'S EVEN MORE
CONCERNING BECAUSE IF HE WAS
JUST DOING THE SHEET THING FOR
ATTENTION, THEN HE MIGHT NOT
REALLY-- THEN IT MIGHT NOT BE
AS MUCH OF A RISK, OKAY?

I THINK WITH EMBARRASSMENT HE DENIED IT, AND THEY FOUND THAT HE WAS A LOW TO MODERATE RISK OF SUICIDE.

SO THERE'S ALSO THIS SUBSTANCE ABUSE IN THIS CASE AND CROOK. WE HAVE NO PRIOR VIOLENT HISTORY.

THE DEFENDANT EXPRESSED REMORSE AND CONFESSED.

HE RIGHT AWAY DID BRING THEM TO THE SCENE, AND WAS CRYING.

THERE'S A VIDEO OF HIM AT THE SCENE AT THIS POINT, THE NEWS MEDIA WAS THERE.

ALL THESE THINGS ARE THE SAME. THE CROOK CASE WAS, I WOULD SUBMIT, WAS MORE HEINOUS IN THAT JUST THE STABBING OF THE BAR OWNER, SHE WAS DEFILED WITH THE POOL CUE AND THEN SHE WAS ROBBED.

BUT THE DIFFERENCE BETWEEN THESE TWO CASES, IN CROOK CASE YOU ALL HAD FOUR-- OR MR. CROOK HAD THE BENEFIT OF FOUR MEDICAL EXPERTS COMING FORWARD TO TESTIFY ON HIS BEHALF, TWO IN THE FIRST PENALTY PHASE AND THEN TWO MORE WHEN IT WAS RETRIED.

AND YOU FOUND IT SIGNIFICANT THAT THERE WAS A SUPPORT OF ALL THESE DOCTORS COMING TO THESE SIMILAR CONCLUSIONS.

>> HERE'S MY PROBLEM ON IT, I MEAN, WE'RE-- AT LEAST I'M ONE THAT LIKES TO SEE AND MAKE SURE THAT THERE'S BEEN SCHOOL RECORDS CONSIDERED OR ALL THESE OTHER RECORDS.

BUT FROM A POINT OF VIEW OF WHETHER THE-- THERE IS DEFICIENCY AND THEN PREJUDICE, IF A REPORT SAYS SOMETHING AND THAT REPORT, THERE'S AN EXPERT DOESN'T TESTIFY TO THAT, WE'RE NOT GOING TO SAY, WELL, THAT REPORT SAYS THAT.

WE MIGHT SAY, WELL, YOU WERE DEFICIENT IN NOT HAVING THE

EXPERT SAY IT.
SO I'M TRYING TO SEE UNDER WHAT
THEORY THIS IS I APPELLATE
INEFFECTIVE ASSISTANCE OF
COUNSEL THAT WE WOULD SAY BY NOT
INCLUDING REPORTS THAT HAD BEEN
INTRODUCED IN EVIDENCE WHICH--
AND I GUESS THE APPELLATE, YOU
KNOW, AND THAT WE DIDN'T ORDER
BE SUPPLEMENTED-- THAT THAT IS
SO SERIOUS AS TO AFFECT THE
RELIABILITY OF THE APPEAL?
IS THAT-- THAT HE'S, THAT
YOU'RE ENTITLED TO ANOTHER
APPEAL, AND IF WE LOOK AT THOSE
REPORTS-- LET'S JUST, WE LOOK
AT THEM, AND WE GO STILL
PROPORTIONATE TO US, AND ISN'T
THAT-- BECAUSE NOW WE'RE NOT
REALLY DEALING WITH THE EFFECT
ON THE TRIAL--

>> CORRECT.

>> BECAUSE THE JURY SAW THOSE.

>> CORRECT.

>> SO COULD YOU HELP-- AGAIN, I
APPRECIATE MAYBE THOSE SHOULD
HAVE BEEN IN THE RECORD, BUT I
JUST DON'T SEE WHERE THE
PRIVILEGE PART IS UNDER THIS
CIRCUMSTANCE WHERE YOU'RE NOT
SAYING THAT BY NOT HAVING IT OR
BY-- YOU'RE SAYING BY HAVING IT
WE WOULD HAVE HAD A DIFFERENT
TAKE ON PROPORTIONALITY.

AND THE JUDGE HAD IT.

THE JUDGE HAD IT BECAUSE IT WAS
PART OF THE TRIAL COURT RECORD.

>> THAT'S RIGHT.

>> SO HOW IS THERE PREJUDICE?

>> WELL, AS YOU SAID, THIS IS
NOT A CASE WHERE I'M ARGUING IT
WASN'T SUFFICIENT MITIGATION
DONE AND IF ONLY THE JURY HAD
HEARD THIS AND WE CAN ARGUE WHAT
WOULD A JURY HAVE THOUGHT.

I UNDERSTAND THAT.

I'M SAYING TO YOU I DON'T KNOW
WHAT WOULD HAVE AFFECTED --

>> WHAT I JUST SAID, WHICH IS
THAT WE CAN'T BE TAKING A REPORT

THAT IS -- SAYS SOMETHING IN A REPORT THAT SOMEHOW ISN'T TESTIFIED TO BY THE EXPERT. WE'RE EVALUATING WHAT THE TRIAL COURT DID.

THE TRIAL COURT HAD THE REPORTS. SO YOU CAN'T SAY THE TRIAL COURT WOULD HAVE DETERMINED THIS DIFFERENTLY.

SO, YOU KNOW -- AND THIS IS -- AGAIN, IN ALL DUE DEFERENCE, THIS IS WHAT WE'RE SPENDING HALF OF YOUR ARGUMENT ON ABOUT SOMETHING THAT SEEMS IT'S PRETTY MINOR TO THE WHOLE ISSUE OF WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL, TRIAL COUNSEL OR THEN APPELLATE COUNSEL.

SO IF THIS IS YOUR BEST POINT, MAYBE JUST -- I'M JUST HAVING TROUBLE WITH IT, FRANKLY.

>> YOUR HONOR, I THINK WHEN I REVIEW THE TRIAL COURT'S ORDER, WHAT STUCK IN MY MIND THAT CONCERNED ME, YES, LIKE I SAID, HE FOUND THE BRAIN DAMAGE AND GAVE IT SOME WEIGHT, BUT AT THE SAME TIME MAKING A STATEMENT THAT COMPLETELY CONTRADICTS DR. CROP'S FINDINGS.

SO SAY NUMEROUS OTHER REPORTS DON'T REFLECT THIS.

I AM CONCERNED IF YOU LOOKED AT THOSE RECORDS AND YOU CONSIDER, FOR INSTANCE, CCP.

WHEN YOU ANALYZED -- THERE'S A PIVOTAL POINT IN THIS CASE.

THE FACTS ARE AGREED TO, OKAY?

THERE WAS A HOME INVASION.

THEY TAKE ONE PERSON FROM THE HOUSE BECAUSE HE'S NOT SURE ABOUT WHETHER OR NOT THE PEN WILL WORK.

THEY'RE HAVING PROBLEMS WITH THE MACHINES.

THEN HE SAYS, WELL, HE CAN SEE THAT THE COPS MAY HAVE BEEN CALLED.

HE SEES COPS IN THE AREA.

HE'S CONCERNED THAT THEY'RE ALREADY ON TO HIM, AND HE EXPLAINS TO THE VICTIM, WE HAVE IT FROM HIS TESTIMONY AND FROM THE CODEFENDANT WHO WAS CALLED BY THE STATE, THAT HE'S TAKING HER TO A SECLUDED PLACE SO THAT SHE CAN'T GET TO A PHONE RIGHT AWAY.

AND THAT'S AGREED ON.

LETS HER OUT OF THE CAR.

GETS BACK IN THE CAR.

DRIVES 15 FEET, SLAMS ON THE BRAKES, JUMPS OUT AND KILLS HER.

THAT'S AGREED ON.

THERE IS -- RIGHT THERE AT THAT PIVOTAL POINT, WHAT'S IN HIS MIND?

WHAT'S HIS STATE OF MIND WHEN SOME OF THE JUSTICES HAVE FOUND THAT THERE WAS A COLD, CALCULATED, CAREFUL, PREARRANGED PLAN AND HEIGHTENED PREMEDITATION VERSUS A COUPLE JUSTICES HAVE FOUND THAT THOSE FACTS ARE ALSO OPEN TO THE HYPOTHESIS THAT HE CHANGED HIS MIND.

IT'S SPONTANEOUS, IMPULSIVE BEHAVIOR.

AND SO WHEN YOU ANALYZE THE FACTS, USUALLY WE'RE ONLY LOOKING AT THE PSYCH REPORTS AND MITIGATION.

IT'S ENTERED IN AS MITIGATION EVIDENCE.

BUT WHEN YOU LOOK AT THE CCP AND YOU'RE ANALYZING THAT AGGRAVATOR, WHICH HAS AS THE COMPONENT STATE OF MIND, I THINK IT REALLY SUPPORTS THE FINDING THAT THIS WAS A SPONTANEOUS, IMPULSIVE BEHAVIOR.

>> DO YOU THINK I WOULD HAVE HAD A BETTER CHANCE OF CONVINCING MY COLLEAGUES THAT THIS SHOULD HAVE BEEN REDUCED TO LIFE?

THAT'S WHAT IT REALLY BOILS DOWN TO.

I AGREE ON THE MERITS AS TO

JUSTICE PERRY, BUT FIVE JUSTICES FELT LIKE THERE WAS ENOUGH CCP AND HAC, AND THAT'S -- I THINK, AGAIN, YOUR BURDEN ON THIS AS FAR AS SAYING THE REPORTS WOULD HAVE MADE A DIFFERENCE, I JUST DON'T SEE HOW THAT POSSIBLY CAN BE.

>> AND I WON'T BELABOR IT, BUT JUST TO ANSWER YOU, I THINK ONCE YOU CHALLENGE DR. CRAPPS' FINDING ABOUT THAT, WHEN YOU SAY NO OTHER REPORTS EVEN SUGGEST A POSSIBILITY, I DON'T KNOW HOW THAT MAY HAVE WEIGHED ON THE OTHER JUSTICES MIND THAT LOOKED AT THAT MOMENT AND SAID -- AND NOT AGREED WITH YOU THAT THIS IS A SPONTANEOUS, IMPULSIVE ACT, CONSISTENT WITH WHAT YOU SEE TIME AND TIME AGAIN IN ALL THESE REPORTS.

THIS IS -- YOU SEE THESE REPORTS THAT HE'S GOT THE LIMITED INTELLIGENCE, POOR JUDGMENT. WHEN YOU LOOK AT THE PET SCAN, THEY SAY IT'S CONSISTENT WITH DEMENTIA, INFERIOR INTELLECTUAL FUNCTIONING AND EMOTIONAL DISTURBANCE.

SO MAYBE -- I DON'T KNOW. I WISH THAT YOU WOULD LOOK AT THOSE REPORTS AGAIN AND ASK YOURSELF ARE YOU REALLY COMFORTABLE WITH CONCLUDING IT WASN'T A SPONTANEOUS, IMPULSIVE ACT.

JUST TO BRIEFLY MOVE ON TO THE OTHER ISSUE THAT IS IN CLAIM ONE OF THE INITIAL BRIEF, IF YOU ARE SO SATISFIED ALREADY WITH WHAT'S OUT THERE, THAT HE WAS BRAIN DAMAGED AND HAS ALL THESE LEARNING DISABILITIES AND LOW INTELLECTUAL FUNCTIONING, THEN IT WAS TERRIBLE PREJUDICE FOR THE TRIAL COURT NOT TO ALLOW MR. BAKER TO READ HIS LETTER, BECAUSE WE'RE TALKING ABOUT SOMEONE WHO ISN'T GOING TO BE

ABLE TO PRESENT WELL VERBALLY.
>> WASN'T THAT ARGUED ON APPEAL?
>> WHAT HAPPENED ON THE APPEAL
AND WHY IT'S INEFFECTIVE
ASSISTANCE OF COUNSEL IS THAT
THE TRIAL COUNSEL FAILED TO
PROFFER THE LETTER.
SO EVEN THOUGH IT WAS RAISED IN
APPEAL, THEN THIS COURT COULDN'T
REALLY MAKE ANY DETERMINATION
ABOUT --

>> DID MR. BAKER TESTIFY?
>> HE DID TESTIFY.
>> AND DIDN'T TRIAL COUNSEL SAY
AT THE EVIDENTIARY HEARING THAT
HE WANTED MR. BAKER TO MAKE HIS
APOLOGY FROM THE STAND AS
OPPOSED TO READING A LETTER?
>> WELL, WHAT HE SAID WAS -- HE
GOT TO TESTIFY, BUT IF YOU LOOK
AT THAT TESTIMONY, IT IS NOT
REALLY MR. BAKER BEING ASKED AN
OPEN-ENDED QUESTION AND HAVING
AN OPPORTUNITY TO EXPRESS
HIMSELF.

THE TRIAL COUNSEL CONSTANTLY
ASKS HIM, WELL, AREN'T YOU
SORRY?
AREN'T YOU REMORSEFUL?
HE'S KIND OF LEADING HIM.
AND THEN WHEN ASKED AT THE
EVIDENTIARY HEARING, WELL, WHY
DIDN'T YOU PROFFER THE LETTER,
HE SAID, WELL, YOU KNOW, I
THOUGHT HE DID OKAY ON THE
STAND, BUT HE ALSO PUT THE
LETTER BACK IN HIS POCKET AND
THEN I FORGOT ALL ABOUT IT.
NOW, I MEAN --

>> WHAT'S IN THE LETTER THAT WE
DON'T KNOW?
>> WE DON'T KNOW.
>> YOU DON'T HAVE THE LETTER?
>> NO.
NO.
>> SO WE'RE TO SPECULATE WHAT'S
IN THE LETTER?
>> I SUBMIT THAT THE PERFECT
REMEDY WOULD BE TO GIVE HIM A
NEW PENALTY PHASE.

>> BUT WHY WOULDN'T YOU HAVE AT THE EVIDENTIARY HEARING INTRODUCED THE LETTER THROUGH THE -- IT'S NOT THE APPROPRIATE REMEDY IF YOU DIDN'T ESTABLISH IT IN THE EVIDENTIARY HEARING.

>> YOUR HONOR, I WAS NOT LISTED CRC AT THAT TIME AND THIS EVIDENTIARY HEARING WAS HANDLED BY ROBERT STRAIN, WHO ALSO AUTHORED THE INITIAL BRIEF. AND I BELIEVE IN THE INITIAL BRIEF IT INDICATES THAT TRIAL COUNSEL WENT THROUGH HIS ENTIRE FILE AND THERE WAS NO LETTER.

>> SO THEN IT WOULD BE COMPLETELY SPECULATIVE BECAUSE YOU CAN'T ESTABLISH -- WE GOING TO WRITE ANOTHER LETTER? YOU'RE IN YOUR REBUTTAL.

>> OKAY.

IT'S A GOOD TIME TO PAUSE. THANK YOU.

>> MAY IT PLEASE THE COURT, COUNSEL, MY NAME IS JIM RICH FROM THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE RESPONDENTS.

I'D LIKE TO FIRST ADDRESS THE APOLOGY LETTER, SINCE IT'S THE MOST RECENT THING, AND THEN I'LL MOVE INTO THE HABEAS CORPUS ISSUE.

TRIAL COUNSEL'S TESTIMONY WITH RESPECT TO -- I WANT TO CLARIFY SOMETHING -- WITH RESPECT TO WHY HE NEVER PROFFERED THE LETTER. HE DIDN'T SAY HE FORGOT ALL ABOUT IT.

HE SAID I DIDN'T THINK TO PROFFER IT.

AND I THINK THAT DISTINCTION'S IMPORTANT BECAUSE OF THE BACKGROUND WITH RESPECT TO THE LETTER.

TRIAL COUNSEL TESTIFIED THAT HE BELIEVED MR. BAKER WAS REMORSEFUL FROM THE FIRST MINUTE HE MET HIM.

IT WAS SOMETHING HE HAD BEEN

TALKING ABOUT OVER THE MANY MONTHS THAT HE PREPARED HIS DEFENDANT.

HE MET WITH HIM THE DAY BEFORE THE PENALTY PHASE HEARING BEGAN AND TOLD HIM SPECIFICALLY I DON'T WANT YOU TO WRITE A LETTER.

I WANT TO LOOK THE JURY IN THE EYE AND TELL THEM ABOUT THE REMORSE YOU'VE BEEN TELLING ME ABOUT ALL THESE MONTHS.

WHEN HE BEGAN TO QUESTION HIS CLIENT, MR. BAKER, ABOUT THE REMORSE, MR. BAKER PULLED OUT THE LETTER.

AND THIS WAS A SURPRISE TO TRIAL COUNSEL.

HE THEN -- AND THAT PUT COUNSEL IN A VERY DIFFICULT SITUATION. HE DIDN'T WANT HIM TO DO IT, DIDN'T KNOW WHAT WAS WRITTEN IN IT AND FORTUNATELY I THINK FOR TRIAL COUNSEL THE TRIAL COURT SAID I DON'T THINK IT'S RELEVANT RIGHT NOW.

I'LL LET YOU PROFFER IT LATER. TRIAL COUNSEL THEN HAD MR. BAKER TESTIFY TO HIS REMORSE.

THERE WAS EXTENSIVE TESTIMONY AND EVIDENCE PRESENTED REGARDING MR. BAKER'S REMORSE AND THE TRIAL COURT ULTIMATELY FOUND THAT HE WAS REMORSEFUL.

AND THEN AT THE EVIDENTIARY HEARING WITH RESPECT TO --

>> SO IT WAS MR. BAKER WHO PUT THE LETTER BACK IN HIS POCKET?

>> THAT IS CORRECT.

>> I GOT THE IMPRESSION SHE MEANT TRIAL COUNSEL PUT IT BACK --

>> NO.

NO.

THEY SAID PUT IT AWAY.

MR. BAKER PUT IT IN HIS COAT POCKET.

HE ULTIMATELY WENT BACK INTO THE JAIL AND NOBODY KNOWS WHERE IT WENT FROM THERE.

I SUBMIT THERE'S A DIFFERENCE BETWEEN SAYING I FORGOT ALL ABOUT IT AND HIM SAYING I DIDN'T THINK TO DO IT.

HE TESTIFIED WHEN MR. BAKER WAS DONE TESTIFYING REGARDING HIS REMORSE, HE DID A GOOD JOB. NOW, THERE'S ANOTHER ASPECT HERE.

I DON'T KNOW AN ATTORNEY WHO WOULD BE COMFORTABLE HAVING A CLIENT WRITE A LETTER AND WITHOUT THEM REVIEWING IT PROFFERING IT.

HE PROBABLY WAS VERY UNCOMFORTABLE WITH DOING ANYTHING WITH THAT LETTER. HE COULD HAVE SAID SOMETHING INSENSITIVE IN THAT THAT COULD HAVE RUBBED THE JUDGE THE WRONG WAY.

>> FROM WHAT YOU'RE SAYING, NO ONE OTHER THAN THE DEFENDANT HAS EVER READ THE LETTER.

>> THAT IS CORRECT.

>> REALLY, IT'S JUST -- I MEAN, NOT THAT -- WHETHER HE FORGOT OR HE SHOULD HAVE PROFFERED IT OR HE HAD A REASON, THERE'S NO WAY THEY CAN ESTABLISH PREJUDICE.

>> I AGREE.

>> IT'S A FRIENDLY QUESTION. BUT, REALLY, SPENDING A LOT OF TIME ON SOMETHING THAT'S LIKE A NOTHING ISSUE.

NOW, ON THIS ISSUE OF WHY THE RECORD WASN'T COMPLETE --

>> YES.

>> -- WHICH IS -- SOMETIMES WE -- BOTH SIDES HAVE AN OBLIGATION TO ENSURE A COMPLETE RECORD.

WAS THIS A SITUATION WHERE NO ONE REALIZED THAT EXHIBITS THAT WERE INTRODUCED INTO EVIDENCE WERE --

>> MY UNDERSTANDING WAS THAT IT MUST HAVE BEEN A CLERK ERROR IN NOT SUBMITTING THE DEFENSE EXHIBITS.

ALL OF THE DEFENSE'S COMPOSITE

EXHIBITS WAS NOT PRESENTED TO THIS COURT ON DIRECT APPEAL.
>> IS IT JUST -- I MEAN, BUT THERE ARE -- IT WAS PART OF A LOT OF THINGS THAT WEREN'T SUBMITTED AND THIS IS JUST THE ONLY ONE THAT THEY THINK IS SIGNIFICANT OR WHAT'S THE -- WHAT WAS THE STATE OF THE RECORD?

>> ALL OF THE DOCUMENTS THAT THE DEFENSE SUBMITTED AS EXHIBITS DURING THE PENALTY PHASE WERE NOT INCLUDED ON THE RECORD OF APPEAL, ON APPEAL.

>> AND NOBODY NOTICED IT?

>> WELL, I'D LIKE TO ADDRESS THAT.

I UNDERSTAND.

AND THIS BRINGS ME TO OPPOSING COUNSEL'S POINT WITH RESPECT TO MR. BAKER'S OBJECTION TO THE TRIAL COURT'S FINDING THAT NO OTHER REPORT EVEN SUGGESTED THE POSSIBILITY OF BRAIN DAMAGE. I BRING US TO THAT BECAUSE THAT WAS NOT AN ISSUE THAT WAS RAISED ON DIRECT APPEAL.

THE ISSUES THAT WERE RAISED ON DIRECT APPEAL WAS A QUESTION WITH RESPECT TO THE MOTION TO SUPPRESS THAT WAS DENIED, THE DENIAL OF THE APOLOGY LETTER, VICTIM IMPACT, CCP, HAC, PROPORTIONALITY, RING AND SUFFICIENCY.

THOSE WERE THE ISSUES RAISED. IF THERE HAD BEEN AN ISSUE RAISED WITH RESPECT TO THAT SPECIFIC FINDING, THAT WOULD HAVE TRIGGERED APPELLATE COUNSEL TO SAY I NEED TO GO TO THESE DOCUMENTS AND SEE WHAT'S GOING ON.

>> OF COURSE, WE DON'T KNOW, BECAUSE THERE ARE NO EVIDENTIARY HEARINGS HERE, BUT ARE WE TO ASSUME THAT MAYBE APPELLATE COUNSEL DIDN'T -- THEY READ THE TRANSCRIPTS, SO THEY KNEW THERE

WERE REPORTS.

WOULDN'T A REASONABLY COMPETENT APPELLATE COUNSEL HAVE SAID WHERE ARE THE REPORTS?

YOU KNOW, THIS IS A KEY FINDING. AGAIN, YOU'VE GOT A -- YOU GOT THESE -- THE QUESTION OF HIS MENTAL STATUS AND I NEED TO SEE WHETHER DR. CROP'S -- AGAIN, THE RECORDS ARE OFTENTIMES MORE SIGNIFICANT THAN THE REPORT. SO WE DON'T KNOW WHY THE APPELLATE LAWYER DIDN'T REALIZE THAT THERE WEREN'T ANY OF THE DEFENDANT'S EXHIBITS, BUT THAT SEEMS LIKE AT LEAST A DEFICIENCY, THAT YOU HAVE AN OBLIGATION, BOTH SIDES, TO ENSURE A COMPLETE RECORD, ESPECIALLY ON PROPORTIONALITY WHEN WE REVIEW THAT.

SO DON'T WE HAVE TO -- UNLESS WE HAVE AN EVIDENTIARY HEARING THAT THE LAWYER JUST DIDN'T DO WHAT A LAWYER SHOULD DO, WHICH IS ENSURE THERE'S A COMPLETE RECORD ON APPEAL.

>> I UNDERSTAND THAT POINT.

>> I MEAN, WE GET ALL THE TIME MOTIONS TO SUPPLEMENT BECAUSE THIS IS MISSING.

>> CERTAINLY.

>> OR TO GET THE REST OF THE RECORD UP.

I MEAN, THIS IS NOT AN UNUSUAL -- WHAT'S UNUSUAL HERE IS THAT NOBODY CAUGHT IT OR SOMETHING OR DIDN'T THINK IT WAS IMPORTANT.

>> I AGREE IT'S UNUSUAL AND I AGREE IT'S NOT PREFERRED.

BUT WITH RESPECT TO WHETHER OR NOT IT'S A DEFICIENCY, THE STATE WOULD CONTEND RESPECTFULLY THAT IF THERE WAS AN ISSUE, A MERITORIOUS ISSUE THAT WAS RELATED TO THESE DOCUMENTS, THEN IT WOULD CERTAINLY BE DEFICIENCY --

>> WELL, DO YOU THINK IT DOES HAVE ANY IMPACT ON HAC AND CCP?

>> THESE DOCUMENTS?
NO, NOT IN LIGHT OF THE EXPERT
TESTIMONY.
ONE THING -- AND I WANT TO GO
BACK TO TRIAL COUNSEL.
TRIAL COUNSEL DID A FANTASTIC
JOB DURING PENALTY PHASE IN
HAVING DR. CROP'S SUMMARIZE ALL
OF THE RELEVANT AND GERMANE
DOCUMENTS IN REGARD TO
MR. BAKER'S CHILDHOOD AND
EVERYTHING.
AND AT FIRST WHEN I REVIEWED THE
BRIEF AND STARTED TO DO MY
REVIEW, I HAD A LOT OF CONCERN
OF HOW THESE DOCUMENTS MISSING,
OF COURSE.
BUT AS I READ THE PENALTY PHASE
TESTIMONY AND COMPARED THEM TO
THE DOCUMENTS, MY CONCERN
VANISHED.
HE DID AN EXTREMELY THOROUGH
JOB.
I WOULD HAVE TO ASSUME THAT
APPELLATE COUNSEL SORT OF DID
THE SAME THING.
THE APPELLATE COUNSEL DIDN'T SEE
AN ISSUE WITH RESPECT TO THE
PENALTY PHASE --
>> BUT IS THERE SOMETHING IN THE
JUDGE'S ORDER THAT IS
CONTRADICTED BY WHAT WAS IN
EVIDENCE?
>> I BELIEVE THERE IS NO
CONTRADICTION WITH RESPECT --
YOU CAN SPLIT HAIRS --
>> SO WHAT YOU WOULD SAY IS --
OR AT LEAST I WOULD SAY LET'S
NOT WORRY ABOUT DEFICIENCY.
THERE'S REALLY NO WAY TO
ESTABLISH PREJUDICE.
AND IF THERE'S ANY PREJUDICE, IT
WOULD BE WHETHER THIS COURT
MIGHT HAVE DETERMINED ISSUES OF
HAC, CCP OR PROPORTIONALITY
DIFFERENT IF WE LOOKED AT THE
RECORDS THEN THAT WE HAVE NOW.
>> CORRECT.
BUT I WOULD POINT OUT THAT THE
BRIEFS FILED SPECIFICALLY ARGUE

THAT THE PROPORTIONALITY ANALYSIS WAS WHAT WAS PREJUDICED BY THE LACK OF RECORDS.

I DON'T BELIEVE, FROM MY MEMORY OF THE BRIEF, THAT THEY ARGUE THAT HAC OR CCP.

THEY RAISED THAT TODAY IN ORAL ARGUMENT, BUT I DON'T THINK THE BRIEFS MENTION THAT.

HOWEVER, WHEN YOU REVIEW THE TESTIMONY, WHAT ULTIMATELY IS MISSING FROM THE RECORD, AFTER YOU LOOK AT DR. CROP'S TESTIMONY, IS WHAT THE STATE CONTENDS RESPECTFULLY IS MINUTIA.

WE DON'T HAVE THE SCHOOL RECORDS.

WE MIGHT NOT KNOW THE GRADE MR. BAKER GOT IN MATH CLASS IN 6TH GRADE, BUT WE CERTAINLY KNOW THAT HE STAYED BEHIND IN KINDERGARTEN, THAT HE HAD DIFFICULTY BEHAVING HIMSELF IN CLASS, THAT HE WASN'T PERFORMING WELL IN SCHOOL.

WE KNOW HIS IQ SCORES WHEN HE WAS YOUNGER AND OLDER.

WE HAVE ALL THE IMPORTANT DETAILS THAT THIS COURT WOULD NEED IN ORDER TO DO A PROPORTIONALITY REVIEW.

AND WITH RESPECT TO THE CROOK CASE THAT IS RAISED BY OPPOSING COUNSEL IN THEIR BRIEFS, THAT CASE IS DISTINGUISHABLE BASED ON THE FACT THAT MR. CROOK WAS BEATEN WITH A METAL PIPE AS A CHILD AND WAS FOUND TO HAVE ORGANIC BRAIN DAMAGE.

THERE WAS NO QUESTION WITH RESPECT TO THERE BEING ORGANIC BRAIN DAMAGE.

AND A STEP FURTHER THAN THAT, THE COURT FOUND AND THE EXPERTS OPINED THAT THAT BRAIN DAMAGE DIRECTLY RELATED TO THE CRIME OR WAS A CAUSATIONAL FACTOR IN THE CRIME.

THE HAIRS WE'RE SPLITTING

BETWEEN THE STATE AND DEFENSE IN THIS CASE ARE THAT THERE WERE DISORDERS OF THE BRAIN THAT MR. BAKER SUFFERED, ADHD DISORDER AND SOME OTHER DISORDERS, BUT THERE WAS NO ORGANIC BRAIN DAMAGE.

AND THE STATE'S BRIEF SPLITS HAIRS, AND I WON'T BURY EVERYBODY DOWN WITH THAT UNLESS ANYBODY WOULD LIKE ME TO, BUT WITH RESPECT TO THE DEMENTIA, IT ISN'T ONLY CAUSED BY ORGANIC BRAIN DISEASE.

DEMENTIA CAN BE CAUSED BY BRAIN DISORDERS.

WELL, THERE WAS A FINDING THAT MR. BAKER SUFFERED FROM BRAIN DISORDERS.

SO THERE'S NOTHING NEW BEING BROUGHT TO THIS COURT OR TO THE TRIAL COURT BASED ON THE DOCUMENTS THAT WERE INCLUDED ON THE RECORD OF APPEAL.

I WOULD ALSO ADDRESS THE 2002 AFT REPORT.

THE CIRCUMSTANCES OF THAT DOCUMENT, IT WAS INTERESTING. IT CAME -- THE DEFENSE APPARENTLY DID NOT WANT THAT DOCUMENT INTRODUCED INTO EVIDENCE.

IT WOULD HAVE BEEN ONE THEY PROBABLY WOULD HAVE PULLED OUT OF THE COMPOSITE EXHIBIT. THEY HAD PROVIDED IT TO THE STATE SOMETIME PRIOR TO THE PENALTY PHASE AND THE STATE USED IT DURING CROSS-EXAMINATION OF DR. CROP'S TO ESTABLISH THAT THAT REPORT INDICATED THAT MR. BAKER HAD A STRONG STREET SENSE AND ALSO INDICATED THAT HE HAD A SPEECH IMPEDIMENT, BUT IT DIDN'T AFFECT HIS SOCIALIZATION. HE ENJOYED LISTENING TO MUSIC. SO THAT REPORT CUT WAYS. IT HAD THE SUICIDAL ALLEGATION IN IT, BUT IT ALSO HAD INFORMATION IN THERE THAT CUT

AGAINST THE DEFENDANT'S EXTREME EMOTIONAL DISTRESS CLAIM.

SO WHEN IT WAS ACTUALLY ENTERED INTO EVIDENCE -- AND THE OBJECTION WITH RESPECT TO THE COURT REFERRING TO THAT DOCUMENT, THAT DOCUMENT, IT APPEARS, WAS INTRODUCED INTO EVIDENCE ERRONEOUSLY.

BUT I WOULD POINT OUT THAT WHEN THE DEFENSE SUBMITTED THEIR EXHIBITS, THEY IDENTIFIED THE COMPOSITE EXHIBITS AS ALL OF THE DOCUMENTS THAT DR. CROP'S REVIEWED IN COMING TO HIS OPINION.

WELL, DR. CROP'S TESTIFIED THAT THAT WAS ONE OF THE DOCUMENTS THAT HE HAD REVIEWED IN COMING TO HIS OPINION.

AND HE TESTIFIED WHEN HE WAS CROSS-EXAMINED ABOUT THAT NOTATION WITH RESPECT TO A STRONG STREET SENSE, DR. CROP'S TESTIFIED, WELL, THAT PARTICULAR EVALUATOR DIDN'T HAVE HIS HISTORY, SO I DON'T PUT A LOT OF WEIGHT ON THAT OPINION.

BUT HE DID RECOGNIZE BASED ON THE WAY THAT THE DEFENSE CATEGORIZED THE COMPOSITE EXHIBIT , IT WAS REASONABLE FOR THE JUDGE-- IT WAS MOST LIKELY SUBMITTED BY THE DEFENSE WHEN THAT HAPPENED.

SO THERE IS NO PREJUDICE WITH RESPECT TO THE REPORT.

AND ALSO THEY NEVER ARGUED THAT HE WAS SUICIDAL.

THEY NEVER SOUGHT THAT.

THERE WAS NOT ANY OTHER TESTIMONY WHATSOEVER THROUGHOUT THE COURSE OF TRIAL THAT MR. BAKER WAS SUICIDAL. THAT WAS JUST ONE, SINGLE NOTATION IN A DOCUMENT.

SO IT WASN'T SUBSTANTIATED.

SO THAT WOULD HAVE BROUGHT NO ADDITIONAL INFORMATION TO THIS COURT.

UNLESS THERE ARE ANY OTHER
QUESTIONS, AT THIS POINT THE
DEFENSE WOULD -- EXCUSE ME.
AT THIS POINT THE STATE WOULD --
OLD HABITS DIE HARD.
AT THIS POINT THE STATE WOULD
ASK THAT THIS COURT AFFIRM THE
TRIAL COURT'S DENIAL OF THE
3.851 AND DENY THE CLAIMS SOUGHT
IN THE PETITION FOR HABEAS
CORPUS.
THANK YOU.

>> WHOSE EXPERT WAS DR. CROP'S?
>> THE DEFENSE EXPERT.

SO WHEN THE TRIAL COURT SAYS
THAT NO OTHER OF THE OTHER
NUMEROUS REPORTS IN THE RECORD
ARE SUPPORTING HIS FINDING, I'M
SAYING THAT THAT COULD WORK AS
AN IMPEACHMENT.

>> WHICH ONE OF THE DOCUMENTS
HAD BRAIN DAMAGE?

CERTAINLY WE NOTED THAT DR.
CROP'S IS A NEUROPSYCHOLOGIST
AND THAT IS THE CATEGORY OF
EXPERTS THAT NORMALLY DO TESTING
FOR BRAIN DAMAGE AND MOST OF THE
-- AS LISTED IN THE ARGUMENTS,
OF THE DOCUMENTS EXCLUDED, WERE
PSYCHOLOGISTS RATHER THAN
NEUROPSYCHOLOGICAL TESTING.

>> WELL --

>> AND HE ALSO NOTED THAT HE
RELIED ON, I BELIEVE, ONE OF THE
IMAGING TESTING OR SOMETHING FOR
THAT, MAYBE A PET SCAN OR
SOMETHING.

WHICH DOCUMENT SUPPORTS THE
BRAIN DAMAGE CLAIM THAT'S GOING
TO MAKE ALL THE DIFFERENCE AND
TURN OUR DECISION AROUND?

>> FIRST OF ALL, DR. UPSON, HE
SCREENED MR. BAKER FOR ORGANIC
IMPAIRMENT.

>> WELL, THAT'S A -- IS HE A
NEUROPSYCHOLOGIST?

>> I'M NOT SURE.

>> SEE, THESE BECOME IMPORTANT.
TESTIMONY FROM A TELEPHONE
REPAIRMAN THAT SOMEBODY HAS

BRAIN DAMAGE DOESN'T CARRY --
WE'RE HERE TO SEE WHAT IS
LEGITIMATE BRAIN DAMAGE
TESTIMONY THAT YOU'RE TRYING TO
ENCOURAGE US IS THE BASIS TO
OVERTURN THIS CASE.

>> WELL, THE OTHER WAY YOU CAN
LOOK AT THAT STATEMENT THAT
COULD BE MISLEADING IS IF -- IT
IMPLIES THAT THE OTHER EXPERTS
WERE IN A POSITION TO LOOK FOR
BRAIN DAMAGE AND YET THEY DIDN'T
FIND IT.

SO IT COULD BE MISLEADING IF --
>> YOU'RE NOT ANSWERING MY
QUESTION.

I'M TRYING TO UNDERSTAND, MA'AM,
WHICH ONE OF THESE BY A
QUALIFIED PERSON ADDRESSES BRAIN
DAMAGE THAT WE HAVE NOT -- THAT
WE'VE NOT SEEN?

>> AS I STATED ORIGINALLY, THE
WORDS BRAIN DAMAGE ARE NOT FOUND
IN ANY OF THE REPORTS.

THAT'S TECHNICALLY CORRECT.
BUT I'M SAYING THAT THE
FINDINGS --

>> WHAT ABOUT ORGANIC BRAIN
INJURY?

>> WELL, WHEN YOU'RE TESTING FOR
ORGANIC IMPAIRMENT AND
INTELLECTUAL FUNCTIONING AND
YOU'RE FINDING DEMENTIA AND
YOU'RE RUNNING THE PET SCAN
WHICH THE REPORT HAD MORE
INFORMATION THAN WHAT WAS
TESTIFIED TO, I'M SUGGESTING
SUPPORTS WHAT DR. CROP'S SAID.
IF THE JUSTICES THAT SOUND CCP
WERE CONCERNED ABOUT WHETHER OR
NOT THE BRAIN DAMAGE WAS
SIGNIFICANT, I'M SUGGESTING THAT
IF YOU REVIEWED THE REPORTS, YOU
MIGHT SEE THAT EVERYTHING IN IT
CONSTANTLY TALKING ABOUT HIS
LIMITED INTELLECTUAL FUNCTIONING
AND IMPULSIVITY AND POOR IMPULSE
CONTROL AND EMOTIONAL
DISTURBANCES MIGHT HAVE
CONVINCED YOU THAT THE FACTS,

WHICH YOU ALL DO AGREE ON, THAT THIS WAS AN IMPULSIVE, SPONTANEOUS DECISION AND DOESN'T AMOUNT TO CCP.

FROM THERE YOU CAN HAVE A PROBLEM WITH --

>> BUT YOU DIDN'T ARGUE -- YOU ONLY SAID PROPORTIONALITY. COUNSEL IS CORRECT THAT YOU'RE NOW TRYING TO AMEND YOUR HABEAS, WHICH MAYBE YOU CAN DO, BUT YOU HAVEN'T --

>> WELL, I CONCEDE THAT I DID NOT DEVELOP THAT POINT. I LAID THE FOUNDATION INITIALLY IN THE PETITION SAYING THAT FAILURE TO HAVE THESE REPORTS BEFORE YOU PREVENTED A MEANINGFUL REVIEW OF THE CLAIMS ON APPEAL, WHICH WAS CCP, HAC AND THE PROPORTIONALITY. AND THAT'S WHAT I'VE ATTEMPTED TO DEVELOP FURTHER TODAY.

>> THANK YOU, COUNSEL.

COURT'S IN RECESS.

>> ALL RISE.