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Lenard James Philmore v. State of Florida

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THIS WEDNESDAY, APRIL 3, AT THE FLORIDA SUPREME COURT. THE FIRST CASE THAT WE WILL HEAR THIS MORNING, I BELIEVE, WILL BE PHILMORE VERSUS STATE.

MAY IT PLEASE THE COURT. PATRICK RASTATTER, ASSISTANT PUBLIC DEFENDER ON BEHALF OF LENARD PHILMORE. THIS CASE ARISES OUT OF MARTIN COUNTY -- MR. CHIEF JUSTICE

WOULD YOU RAISE THE MICROPHONE UP.

AND AN UNANIMOUS RECOMMENDATION OF DEATH. I WOULD LIKE TO RAISE POINT NUMBER ONE, IF I COULD, AND THIS IS MR. PHILMORE'S FIVE CUSTODIAL STATEMENTS THAT HE GAVE, ALONG WITH HIS GRAND JURY TESTIMONY. IT IS A LITTLE DIFFERENT PATTERN THAN YOU WOULD NORMALLY HAVE IN A CASE. AFTER MR. PHILMORE WAS ARRESTED, THE POLICE CAME TO HIM AND TRIED TO QUESTION HIM, AND HE TALKED A LITTLE BIT ABOUT THE CIRCUMSTANCES OF HIS ARREST THAT INVOKED HIS RIGHT TO REMAIN SILENT AND HIS RIGHT TO A LAWYER.

NOW, THAT WAS AN ARREST AT THAT POINT, FOR WHICH CRIME?

AT THAT POINT, HE WAS, I GUESS, FORMALLY CHARGED, AT LEAST BY WAY OF PROBABLE CAUSE AFFIDAVIT, WERE ARMED TRESPASSING ON LAND. THAT WOULD BE THE ORANGE GROVE TO WHICH HE FLED AND POSSESSION OF THOSE FIREARMS. THEY WERE QUESTIONING HIM INITIALLY, ABOUT THE INDIAN TOWN BANK ROBBERY WHICH, OBVIOUSLY, HAD OCCURRED AT THAT POINT AND THEY KNEW OF. HE SPOKE TO THEM BRIEFLY ABOUT HIS CAPTURE AND ABOUT THE INDIAN TOWN BANK ROBBERY, BUT WHEN THEY WISHED TO SPEAK TO HIM ABOUT THE ABDUCTION OF MS. PERRON, THAT IS WHEN HE ASKED FOR HIS RIGHT TO COUNSEL AND THEY GRANTED IT TO HIM. I WOULD SAY THAT --

LET ME SEE IF I GOT THAT CORRECTLY. THEY DID QUESTION HIM ABOUT A DISAPPEARANCE AT THAT -- NO? NOT YET.

THEY WANTED TO. THEY STARTED OFF WITH THE INDIAN TOWN BANK ROBBERY, AND WHEN THE SUBJECT MATTER CHANGED FROM THE INDIAN TOWN BANK ROBBERY TO THE DISAPPEARANCE OF MS. PERRON, WHO AT THAT TIME WAS REPORTED MISSING OUT OF PALM BEACH, THAT IS WHEN HE INVOKED HIS RIGHT TO A LAWYER.

WHAT CONNECTED HIM TO THE DISAPPEARANCE? THEY DIDN'T HAVE HER CAR AT THAT POINT, DID THEY?

YES. YES.

AND THEY HAD CONNECTED IT TOM?

YES. THE CHASE ON I-95 HAD ALREADY HAPPENED. IT CRASHED ON I-95 AND HE WAS CHASED ABOUT THE -- INTO THE ORANGE GROVE AND CAPTURED, FLEEING --

I THOUGHT THAT WHEN HE WAS CAPTURED, HE TALKED TO THEM.

THE POLICE TOLD THE PUBLIC DEFENDER WE WANT TO TALK TO HIM ABOUT MS. PERRON'S DISAPPEARANCE. THEY MADE IT REAL CLEAR TO THE LAWYER THIS IS WHERE OUR FOCAL POINT IS, NOT ON THE INDIAN TOWN BANK ROBBERY. WE HAVE OUR WITNESSES FOR THAT.

THEY APPOINTED MR. HEATHERING TON BECAUSE MR. PHILMORE HAD INVOKED HIS RIGHT TO REMAIN SILENT AND THAT HE WASN'T GOING TO TALK ANY FURTHER WITHOUT AN ATTORNEY, OR THEY WERE APPOINTING MR. HEATHERING TON BECAUSE MR. PHILMORE HAD BEEN ARRESTED FOR THE ARMED TRESPASSING?

BOTH, JUSTICE. THE REASON I SAY IT IS BOTH, IS BECAUSE AT THE EVIDENTIARY HEARING, THE LAWYER SAID, MR. HEATHERING TON SAID THE FIRST THING THEY TOLD ME WAS HE IS IN DEEP TROUBLE BECAUSE MS. PERRON IS MISSING. IT WAS CLEAR THAT NOBODY REALLY DISPUTED AT THE EVIDENTIARY HEARING THAT THEIR FOCAL POINT WAS THE ABDUCTION AND DISAPPEARANCE OF MS. PERRON AT THAT POINT, AS OPPOSED TO THE INDIAN TOWN BANK ROBBERY.

ARE YOU FOCUSING, NOW, ON THE PRESERVATION OF THE ISSUE OR THE MERITS OF THE ISSUE? EYE WANTED TO FIRST TALK ABOUT THE PRESERVATION AND BRIEFLY TELL THAT YOU, APPOINTED COUNSEL FILED A MOTION TO SUPPRESS HIS VARIOUS CUSTODIAL STATEMENTS, ALONG WITH HIS GRAND JURY TESTIMONY, ON 244 OF THE RECORD, THERE IS LANGUAGE INDICATING CLEARLY THAT IT SHOULD BE SUPPRESSED TO THE INEFFECTIVENESS OF HIS LAWYER. THE STATE FILED A WRITTEN RESPONSE IN THE TRIAL LEVEL, NOT INDICATING THAT HIS LAWYER WAS INEFFECTIVE BUT INDICATING HE WASN'T EVEN ENTITLED TO A LAWYER BECAUSE YOU ARE ONLY ENTITLED TO A LAWYER, AN EFFECTIVE LAWYER AT TRIAL THAT WAS THEIR PLEADING ARGUMENT.

WOULD YOU GO TO THE MERITS OF THE ISSUE.

CERTAINLY. THIS COURT, THE UNITED STATES SUPREME COURT SAID THAT A CONFESSION IS LIKE NO OTHER EVIDENCE. IT IS PROBABLY THE MOST DAMAGING EVIDENCE THAT ONE PROSECUTOR CAN PUT BEFORE THE JURY. IT IS THE MOST PROBATIVE AND DAMAGING, BECAUSE IT COMES FROM THE ACTOR, HIMSELF. SO OBVIOUSLY THE FIVE CUSTODIAL STATEMENTS, TWO OF WHICH WERE USED AT MR. PHILMORE'S TRIAL, ALONG WITH HIS GRAND JURY TESTIMONY, BEARED GREAT WEIGHT. IN TRYING CASES, A LOT OF TIMES IT IS NOT ONLY THE DEFENDANT'S WORDS IN ADMITTING THE CRIME BUT HIS DESCRIPTION OF HOW HE COMMITTED THE CRIME THAT SOMETIMES HURTS A DEFENSE CASE MORE THAN THE ADMISSION. AND THEN I THINK THAT IS PARTICULARLY TRUE IN THIS CASE, WHERE HE WAS REALLY THE SOLE I WITNESS TO THE -- THE SOLELY WITNESS TO THE OFFENSE. OBVIOUSLY THE VICTIM COULDN'T TESTIFY. HE WAS THE SOLE WITNESS WHO COULD DESCRIBE THE EXECUTION EXECUTION-TYPE SHOOTING OF MS. PERRON. NOT ONLY DID HE ADMIT BEING THE ACTOR IN THE OFFENSE BUT HIS STEP-BY-STEP ANALYSIS OF HOW IT WAS DONE, I THINK, HURT HIM GREATLY, BOTH IN THE GUILT PHASE AND ALSO IN THE PENALTY PHASE.

WOULD YOU ARTICULATE FOR US THE REASONING OF THE TRIAL COURT IN SUPPRESSING THE STATEMENTS THAT WERE SUPPRESSED AND THEN IN DISTINGUISHING THE OTHER STATEMENTS THAT WERE NOT SUPPRESSED.

THE TRIAL JUDGE DID NOT EVEN DEAL WITH THE FIRST STATEMENT REGARDING THE INDIAN TOWN BANK ROBBERY, BECAUSE THAT WAS CLEARLY A WAIVER OF COUNSEL, AND THAT WAS NOT UNDER ATTACK. THE STATEMENTS TO THE POLICE TOOK PLACE ON FIVE OCCASIONS. THE STATE SOUGHT TO USE THOSE, AS WELL AS THE GRAND JURY TESTIMONY. THE TRIAL JUDGE EXCLUDEED STATEMENTS TO THE POLICE THAT WERE PREPOLYGRAPH-TYPE STATEMENTS, SO THOSE ARE REALLY NOT AT ISSUE HERE. IN HER ORDER, WHICH IS AN ORDER THAT JUST MERELY SAYS THE MOTION IS DENIED FOR REASONS ESTABLISHED ON THE RECORD. IN THE RECORD,

AFTER DEFENSE COUNSEL ARGUED THAT MR. HEATHERING TON'S PERFORMANCE WAS INEFFECTIVE, SHE SAID AT ISSUE IS WHETHER OR NOT MR. PHILMORE WAS GRANTED HIS RIGHT TO COUNSEL AND THAT ISSUE IS AT RECORD. SHE FOLLOWED THAT UP AND SAID THE ISSUE OF WHETHER THE DEFENDANT, UPON HIS INVOKEATION OF HIS FIFTH AMENDMENT RIGHT, WAS GIVEN COUNSEL, ACCORDING TO THE CONSTITUTION. SHE FOLLOWED UP SAYING THAT SHE FOUND THAT MR. PHILMORE'S STATEMENTS WERE MADE OF HIS OWN FREE WILL AND, AGAIN, IN THE PRESENCE OF COMPETENT COUNSEL, AS PROVIDED UNDER THE CONSTITUTION. SO I WOULD SUBMIT THAT IT WAS CLEARLY PLED AT THE EVIDENTIARY HEARING AND THAT THE TRIAL JUDGE ADDRESSED IT.

ARE YOU CONTENT THAT THIS COURT WOULD, OBVIOUSLY WE HAVE TO REVIEW THE FIFTH AMENDMENT ISSUE OF WHETHER IT WAS, THE STATEMENT WAS VOLUNTARY, BUT ON THIS UNIQUE CLAIM THAT MR. HEATHERINGTON PERFORMED INEFFECTIVELY, ASSUMING THAT THERE WOULD BE A RIGHT TO HAVE EFFECTIVE COUNSEL AT THIS STAGE OF THE PROCEEDINGS, BUT IS THE RECORD CLEAR ENOUGH, FROM YOUR POINT OF VIEW, TO ESTABLISH THE MERITS OF THIS, AND RATHER THAN BE ABLE TO KNOW EXACTLY WHAT WENT ON BETWEEN MR. HEATHERINGTON AND THE DEFENDANT, AS WOULD NORMALLY HAPPEN IN AN EFFECTIVE -- IN AN INEFFECTIVE ASSISTANCE OF COUNSEL?

I WOULD SAY THAT OBVIOUSLY THE MATTER WAS FULLY LITIGATED. THE DEFENDANT TESTIFIED. MR. HEATHERINGTON TESTIFIED. THE EXAMINATION OF THE POLICE WENT TO ALL THE CONVERSATIONS AND ALL THE LITTLE NUANCES THAT TOOK PLACE BETWEEN LAW ENFORCEMENT AND MR. HEATHERINGTON, IN HIM GIVING --

YOUR ARGUMENT IS THAT IT IS PER SE INEFFECTIVE ASSISTANCE OF COUNSEL, FOR A LAWYER TO ALLOW HIS CLIENT TO SPEAK TO THE POLICE, WITHOUT AN AGREEMENT BEING MADE ABOUT HOW THAT TESTIMONY IS GOING TO BE USED?

THERE CLEARLY WAS NO AGREEMENT HERE, BELIEVING THAT THE TRIAL JUDGE MUST HAVE BEEN LEAD THE TESTIMONY OF THE ASSISTANT STATE ATTORNEY, WHO TESTIFIED AT THE MOTION TO SUPPRESS.

WHAT WOULD YOU HAVE US FIND? THAT HE WAS INEFFECTIVE BECAUSE THE CLIENT WAS WILLING TO SPEAK TO THE POLICE?

I DON'T KNOW THAT HIS CLIENT WAS WILLING TO SPEAK TO THE POLICE. HIS CLIENT ASKED FOR A LAWYER. HE GOT THE LAWYER. IT WAS THE LAWYER, THEN, THAT WENT TO THE POLICE AND SAID THE CLIENT WANTS TO GIVE A STATEMENT STATEMENT. IF A CLIENT CALLS ME AND SAYS --

WHAT DO WE HAVE THAT INDICATES THAT THAT WAS NOT THE STATE OF AFFAIRS, THAT IT WAS NOT THE CLIENT WHO WANTED TO MAKE THE STATEMENT BUT ONLY DID IT -- I THINK YOUR ARGUMENT IS THAT HE DID IT AT THE URGING OF THE ATTORNEY, CORRECT? NO?

NO. I THINK THAT THE CLIENT WANTED TO TRY TO WIGGLE WORM HIS WAY OUT OF THE SITUATION, AND THE LAWYER SAYS THE POLICE TELL ME YOU ARE IN DEEP TROUBLE. THEY ARE LOOKING AT YOU FOR AN ABDUCTION HERE. WHICH TURNED OUT TO BE A SUBSEQUENT KILLING. AND THE LAWYER SAID I KNOW SOMETHING IS WRONG HERE. I HAVE A BAD FEELING ABOUT THIS. BUT GO AHEAD AND DO THE BEST YOU CAN. YOU KNOW, MAYBE YOU CAN TALK YOUR WAY OUT OF IT. AND MR. HEATHERINGTON'S TESTIMONY AT THE EVIDENTIARY HEARING WAS HE HAD A BAD FEELING ABOUT IT. HE FELT THAT MR. PHILMORE WAS INCREMENTALLY, IN EACH OF HIS STATEMENTS, MOVING HIMSELF CLOSER AND CLOSER AND CLOSER TO BEING NOT ONLY INVOLVED IN THE HOMICIDE BUT BEING THE SHOOTER. AND IT IS KIND OF INTERESTING THAT IT WAS THE POLICE THAT KEPT STOPPING THE INQUIRIES AND SAYING, TO MR. HEATHERINGTON, YOU NEED TO TALK TO YOUR CLIENT, BECAUSE YOUR CLIENT IS CONTINUALLY INCRIMINATING HIMSELF. WELL, AT THE EVIDENTIARY HEARING JUSTICE QUINCE, MR. HEATHERINGTON'S

EXPLANATION FOR THIS WAS, WELL, IT IS NOT MY JOB TO KEEP THE DEFENDANT FROM TELLING HIS STORY. WELL, WRONG. IT IS HIS JOB, BECAUSE YOU ALL HAVE RULED, ON MANY OCCASIONS, THAT LAWYERS HAVE AN INDEPENDENT RESPONSIBILITY TO DO THE INVESTIGATION AND TAKE THE ACTS ON BEHALF OF THEIR CLIENT, REGARDLESS OF WHETHER THE CLIENT --

YOU ARE SAYING, THEN, THAT THIS RECORD IS CLEAR THAT THE ATTORNEY NEVER ADVISED THE DEFENDANT, YOU REALLY SHOULD NOT TALK TO THE POLICE, BUT THE ATTORNEY SIMPLY SAID, IF YOU WANT TO, GO AHEAD.

THAT RECORD, THIS RECORD, I THINK, IS VERY CLEAR ON THAT, AND WE ARE WILLING TO STAND ON THIS RECORD. I DON'T THINK THIS RECORD CAN BE ANY BETTER IN THAT REGARD, AS FAR AS HOW MR. HEATHERINGTON FELT. HE JUST FELT IT WAS NOT HIS JOB TO NOT MAKE MR. PHILMORE AVAILABLE TO LAW ENFORCEMENT, IF THIS IS WHAT MR. PHILMORE WANTED TO DO.

HEATHER TON TESTIFIED THAT THE CLIENT CONVINCED HIM OF THE TRUTHFULNESS OF WHAT THE CLIENT WAS SAYING AT THE TIME. AND THAT THAT WAS THE MAJOR MOTIVATING FORCE FOR HIM TO, THEN, GO ALONG WITH THE CLIENT COOPERATING, AND THAT IS THAT YOU MENTIONED THE WORD INCREMENT INCREMENTALLY. THE CLIENT, APPARENTLY, INCREMENTALLY WAS, FIRST, CLAIMING NO KNOWLEDGE WHATSOEVER NO PARTICIPATION WHATSOEVER, AND THEN HE GRADUALLY WENT TO STAGE TWO AND STAGE THREE AND STAGE FOUR AND, OF COURSE, AT THE END HERE, HE HAS INCRIMINATED HIMSELF, OBVIOUSLY, BY WHAT HE HAS DONE, BUT AT ONE POINT, DIDN'T THE ATTORNEY TESTIFY HE WAS CONVINCED THAT HIS CLIENT WAS INNOCENT AND THAT THE BEST THING FOR HIM TO DO, THEN, WAS TO MAKE A CLEAN BREAST OF THAT AND GET THE BEST DEAL HE COULD, AND THAT THE CODEFENDANT, THEN, WOULD BE THE ONE THAT WOULD, YOU KNOW, FACE THE MOST OF YOUR PENALTY. I AM, YOU KNOW, IS THAT, DID THE LAWYER TESTIFY, IN ESSENCE, TO SOMETHING LIKE THAT?

NOT EXACTLY, JUSTICE. I MEAN, HERE IS WHAT, THE ONE THING I WROTE DOWN FOR TODAY WAS COUNSEL TESTIFIED, MR. HEATHERINGTON TESTIFIED, AND I DON'T LIKE TO BE BASHING ANOTHER LAWYER. NO LAWYER WANTS TO STAND IN HERE BASHING ANOTHER LAWYER, BUT MR. HEATHERINGTON TESTIFIED, AT THE MOTION TO SUPPRESS, THAT HE KNEW MR. PHILMORE'S DENIAL WAS PROBABLY FALSE. IT IS, I GUESS JUST FROM PRACTICING LAW SO MANY YEARS, FRANKLY THE CLIENTS DON'T TELL US THE TRUTH. THEY DON'T TELL US THE TRUTH ON MINOR CRIMES. THEY DON'T TELL US THE TRUTH ON MAJOR CRIMES.

SO HE DID TESTIFY TO THAT EXPLICITLY?

ABSOLUTELY. IF A CLIENT WAS TO CALL ME AND SAY THE POLICE ARE AT MY DOOR, PAT, AND THEY ASKED TO SEARCH MY HOUSE. I WOULD TELL HIM IF THEY DON'T HAVE A WARRANT, TELL THEM TO COME BACK, AND THE CLIENT SAYS I DON'T HAVE ANYTHING TO HIDE. YOU STILL TELL THE CLIENT NOT TO LET THE POLICE SEARCH THEIR HOUSE. THERE WOULD BE NOTHING TO GAIN. WHY WOULD A CLIENT LET THE POLICE SEARCH THEIR HOUSE, EVEN IF THEY HAVE NOTHING TO HIDE?

YOU SEEM TO BE URGING A PER SE RULE THEN.

EVERY TIME JUSTICES SAY YOU ARE TRYING TO ADOPT A PER SE RULE, IT IS SCARY.

THAT IS ESSENTIALLY WHAT YOU ARE SAYING. THERE IS A LINE, AND THIS IS THE LINE, AND IF YOU COME UP TO THE LINE AND GO BEYOND IT AND LET THE LAW ENFORCEMENT GO BEYOND THAT LINE, THAT IS INEFFECTIVE. YOUR JOB IS TO STOP THEM THERE RIGHT THERE.

SURELY THAT CAN'T BE. IF YOU REALLY HAVE CODEFENDANTS AND WE KNOW, ESPECIALLY IN A SITUATION WHERE WE ARE TALKING ABOUT A VERY BAD KILLING, AND THE HIGH-RISK OF THE

DEATH PENALTY, THAT THE FOCUS OF THE LAWYERS LAWYER IS GOING TO BE ON TRY -- ON THE LAWYER IS GOING TO BE ON TRYING TO SAVE THE LIFE OF A CLIENT, AND MANY TIMES, THAT STRATEGY OF TRYING TO SAVE A LIFE IS, WELL, IF THERE IS A CODEFENDANT, AND IT APPEARS THE CODEFENDANT IS, REALLY, THE WORST PERSON IN THE SCENARIO, THEN, SO, THERE IS GOING TO BE SOMETHING LIKE THIS, SO, FOR INSTANCE, IF THE FACTS WERE CLEAR THAT THE CLIENT TOOK THE POSITION HE WASN'T THE ACTUAL ONE AND THERE WAS CORROBORATING PROOF OF THAT, AND SO NOW WE HAVE GOT THE LAWYER IN THE POSITION OF TAKING THAT TO THE PROSECUTION, THAT WOULDN'T NECESSARILY BE UNLIKELY. I AM HAVING DIFFICULTY WITH SOME KIND OF A PER SE.

JUSTICE ANSTEAD, LET ME SAY THIS. IF THIS, IF MR. HEATHERINGTON HAD GONE TO THE PROSECUTOR AND HAD ANY AGREEMENT WHETHER EXPLICIT OR IMPLICIT, AS TO THERE WOULD BE SOME FAVORABLE RESOLUTION FOR MR. PHILMORE, WE WOULDN'T BE STANDING HERE, HAVING THIS CONVERSATION, BUT AS THE TESTIMONY UNFOLDED AT THE EVIDENTIARY HEARING, THE PROSECUTOR SAID THERE WAS NO AGREEMENT. I TOLD MR. HEATHERINGTON THAT HIS CLIENT WAS ON HIS OWN THAT, WE --

THAT IS WHY I ASKED, SO LET'S GO BACK. SO IT IS THE FACT THAT THE LAWYER THAT WE WOULD BE SAYING, AS A MATTER OF LAW, IS BECAUSE THE LAWYER DID NOT PREVENT HIS CLIENT FROM SPEAKING TO THE POLICE, WITHOUT AN AGREEMENT WITH THE PROSECUTOR, THAT HE IS PER SE INEFFECTIVE. NOW, WHETHER -- BECAUSE THERE IS NOTHING ELSE THAT COULD BE DERIVED FROM THAT, TO SAY, WELL, WHAT IS AN INNUENDO OF THIS CASE THAT WOULD MAKE AN I HAVERENCE FROM ANOTHER -- THALS MAKE A DIFFERENCE FROM ANOTHER CASE -- THAT WOULD MAKE A DIFFERENCE FROM ANOTHER CASE?

I UNDERSTAND WHAT YOU ARE SAYING, AND A LAWYER IS AFRAID OF ASKING FOR A PER SE RULE, BECAUSE THEY ARE AFRAID OF ASKING TOO MUCH. I WOULD SAY IN A MURDER CASE, IN A CAPITAL CASE, WHERE THE LAWYER HAS A BAD FEELING AND KNOWS HIS CLIENT IS PROBABLY NOT TELLING THE TRUTH, AND LAW ENFORCEMENT HAS TOLD HIM FIVE TIMES, YOUR CLIENT IS NOT TELLING THE TRUTH. YOUR CLIENT IS INCHING HIMSELF CLOSER TO DAMAGING ADMISSIONS, THAT IF AT SOME POINT ALONG THAT TIME CONTINUUM, THE LAWYER HAS AN INDEPENDENT RESPONSIBILITY TO ACT AS A LAWYER AND SAY TO HIS CLIENT, LOOK, YOU NEED TO SIT DOWN, SON, AND SHUT UP, BECAUSE YOU ARE DOING YOURSELF NO GOOD.

WHAT WAS THE BEST DEFENSE THAT THE LAWYER OFFERED AN EXPLANATION OF WHY HE WAS SO INVOLVED IN THIS THING OF ENGAGING HIS CLIENT WITH THE POLICE AND GREG THAT -- AND AGREEING THAT THE CLIENT WENT TO THE GRAND JURY, RIGHT?

WENT TO -- I MEAN --

THEY WERE ALL.

WHAT WAS THE LAWYER'S BEST EXPLANATION OF WHY HE WAS SORT OF QUARTERBACKING THAT SCENARIO? WAS IT THAT THE CLIENT OVERWHELMED HIM?

NO. HE CLEARLY MANUFACTURE NEVER TESTIFIED THAT THE CLIENT, AND THIS CLIENT IS NO ROCKET SCIENTIST. OKAY. THIS CLIENT DIDN'T HAVE THE INTELLECTUAL CAPACITY TO OVERWHELM A LAWYER IN ANY RESPECT. HE JUST SAID THAT IT IS NOT NECESSARILY HIS DUTY TO PREVENT A CLIENT FROM SPEAKING TO THE POLICE, IF THE CLIENT SHOWS AN INCLINATION TO DO SO. AND THAT MAY BE THE RULE. IT MAY NOT.

JUST S THIS AN EXPERIENCEED CRIMINAL -- IS THIS AN EXPERIENCED CRIMINAL DEFENSE LAWYER?

TEN YEARS. THE LAWYER, THE RECORD DOESN'T REFLECT WHETHER, WHAT THE TEN YEARS

INVOLVES. ALL WE KNOW IS IT INVOLVES CAPITAL CASES OR NOT. ALL WE KNOW IS THAT WHEN WHEN LENARD PHILMORE IS ARRESTED, HE COMMITS A CAPITAL CRIME AND HAS INVOKED HIS RIGHT TO SILENCE, TO A LAWYER, AND IS NOT ADMITTING TO A HOMICIDE, AND IT IS ONLY AFTER HE GETS A LAWYER THAT HE CONFESSES.

WHAT ABOUT THE SECOND ASPECT OF THIS, WHICH IS THAT HE MADE THESE STATEMENTS, WHICH ARE INVOLUNTARY, BECAUSE HE BELIEVED THAT, IF HE COOPERATED WITH THE POLICE, THAT HE WOULD NOT RECEIVE A DEATH PENALTY?

OBVIOUSLY THAT WAS THE SECOND PRONG THAT WAS PLED, AND WAS ARGUED. IT IS KIND OF INTERESTING. THE LAWYER'S WORDS ARE, IN MARTIN COUNTY, THE USUAL PROTOCOL IS, IF YOU PLEAD GUILTY AND COOPERATE, YOU GET SOMETHING IN RETURN, AND THEREFORE I TOLD MR. PHILMORE, MEANING MR. HEATHERINGTON, I TOLD MR. PHILMORE THAT HIS COOPERATION WOULD BE HIS MITIGATION THAT WOULD SAVE HIM FROM THE DEATH PENALTY. THE WORDS ARE KIND OF --

WAS THAT, I MEAN, WOULD HE ACTUALLY SAY "SAVE YOU FROM THE DEATH PENALTY", OR WAS IT MORE WOULD BE SOMETHING THAT WOULD BE TAKEN INTO CONSIDERATION?

THOSE WERE HIS WORDS, THE BEST I CAN PARAPHRASE, AND THEY ARE NOT WORDS THAT CAN LEND THEMSELVES TO AN ABSOLUTE. YOUR COOPERATION IN DOING THE RIGHT THING, BY LEADING THE AUTHORITIES TO MS. PERRON'S BODY IS YOUR MITIGATION. THAT WOULD PREVENT OR THAT COULD SERVE AS YOUR MITIGATION, TO AVOID THE DEATH PENALTY. FINE. IF THERE WAS AN AGREEMENT, GOD BLESS THEM MUCH. LET HIM DO WHAT HE DID AND SAVE HIS OWN LIFE, BUT THERE WASN'T EVEN AN IMPLICIT AGREEMENT WITH THE PROSECUTOR, AND TO THE CONTRARY, THE PROSECUTOR IS TELLING HIM EVERY TIME, YOUR CLIENT IS ON HIS OWN ON THIS. MR. CHIEF JUSTICE

MR. RASTATTER, YOUR TIME IS FLEETING HERE. YOU MAY HAVE SOME OTHER POINTS YOU WANTED TO MAKE.

ACTUALLY I JUST WANTED TO ARGUE OL THAT POINT.

ON -- ARGUE ON THAT POINT.

WHAT WOULD BE THE REMEDY, THEN, THAT A LAWYER COMES IN, AND HIS CLIENT, AFTER THE LAWYER GOES AHEAD AND TALKS TO THE AUTHORITIES AND THEN THE CLAIM WOULD BE THAT THE LAWYER WAS INEFFECTIVE, BECAUSE THE CLIENT TALKED TO THE AUTHORITIES. WHAT WOULD BE THE REMEDY THERE? WOULD YOU STRIKE? WOULD THERE BE AN EXCLUSIONARY RULE?

EXCLUDE HIS STATEMENTS TO LAW ENFORCEMENT.

THAT WOULD END UP BEING A PRETTY GOOD WAY TO DEFEND YOUR CLIENT, WOULDN'T IT?

AND WHAT HE IS SUPPOSED TO DO IS TO KEEP, IF THE CLIENT IS TOO IGNORANT TO MAKE HIS OWN --

BUT IF YOU CAN GET IT EXCLUDED BY LETTING HIM TALK AND THEN PLEADING INEFFECTIVE ASSISTANCE OF COUNSEL, HOW IS THE SYSTEM GOING TO WITHSTAND THAT TYPE OF RULE?

THE LANGUAGE IN THAT SUPREME COURT CASE, WHERE IT SAYS THAT NO, THAT THE INVOCATION OF THE RIGHT TO REMAIN SILENT IS IRRETRIEVABLY LOST, AND SURE THERE ARE GOING TO BE CASES LOST AND CAN'T BE PROSECUTED, BECAUSE A CONFESSION FROM THE DEFENDANT WAS OBTAINED, BUT THAT IS THE WAY THE SYSTEM WORKS. THERE IS THAT OLD LANGUAGE, I

FORGET, FROM THE UNITED STATES SUPREME COURT, THAT SAID NO LAWYER WORTH HIS SALT IS GOING TO ADVISE A CLIENT TO SPEAK TO THE POLICE.

YEAH, BUT IF WE ESTABLISH THIS AS A RULE, THE ATTORNEY WILL BE INEFFECTIVE FOR NOT TELLING HIS CLIENT TO GO AHEAD AND TALK TO THE POLICE.

I AM SORRY, JUSTICE HARDING.

IF WE ESTABLISH, IF WE FOLLOW THAT THESE STATEMENTS WILL BE EXCLUDED, THEN THE LAWYER WOULD BE RENDERED INEFFECTIVE FOR NOT ADVISING HIS CLIENT TO TALK TO THE POLICE.

IN THIS PARTICULAR FACTUAL SCENARIO, JUSTICE HARDING, I DON'T KNOW WHAT OTHER CONCLUSION CAN BE REACHED IN THIS ADVISEMENT, THAT THE LAWYER GAVE HIS CLIENT UNDER THESE CIRCUMSTANCES.

AND, AGAIN, THE ADVICE BEING THE LACK OF A DIRECTION THAT HE SHOULDN'T TALK. THE ADVICE WAS NONADVICE. IS THAT WHAT YOU ARE --

RIGHT, JUSTICE.

I WANTED TO MAKE SURE, BECAUSE WHAT I AM STILL, AND IS THIS GOING BACK TO YOU WANTING TO PUT ALL YOUR EGGS IN THE SIXTH AMENDMENT -- IN THE FIFTH AMENDMENT BASKET IN THIS CASE AT THIS POINT. THE JUDGE, AT THE BEGINNING OF THE EVIDENTIARY HEARING, SPECIFICALLY STATED THAT THE PURPOSE WAS NOT TO DETERMINE WHETHER HEATHERINGTON PERFORMED EFFECTIVELY AS COUNSEL UNDER THE FIFTH AMENDMENT. NOW, GRANTED SHE WENT ON TO MAKE STATEMENTS IN HER ORDER, IN HER RULING, BUT AS FAR AS REALLY UNDERSTANDING THE ESSENCE OF THE CONVERSATIONS THAT WERE GOING ON BETWEEN HEATHERINGTON AND PHILMORE, AND I JUST THINK THAT, ON THIS ERROR, YOU HAVE, YOU KNOW, ALMOST A -- ON THIS RECORD YOU HAVE, YOU KNOW, ALMOST AN IMPOSSIBLE BURDEN OF SHOWING HOW MR. HEATHERINGTON PERFORMED IN EFFECTIVELY. THERE IS NO STATEMENT THAT HE MAKES THAT HE SAID THAT HE MISLED MR. PHILMORE. HE SAYS, AND THE JUDGE FOUND, THAT PHILMORE'S STATEMENTS WERE VOLUNTARY, THAT HE HAD ALREADY SIGNED MULTIPLE WAIVERS OF HIS RIGHT TO REMAIN SILENT, AND SO WE ARE, AGAIN, NOT TALKING ABOUT THE FIFTH AMENDMENT, WHERE YOU DON'T, YOU SEEM TO BE ABANDONING THE FIFTH AMENDMENT ARGUMENT HERE. ARE YOU?

WELL, I AM CERTAINLY SAYING THAT THE SIXTH AMENDMENT HAS MUCH GREATER PLAY HERE THAN THE FIFTH AMENDMENT. AND I MEAN, HE WOULD, MR. PHILMORE WOULD BE HARD PRESSED TO MAKE A FIFTH AMENDMENT CLAIM, HAVING A LAWYER. I MEAN, THEY ARE INTERTWINED TO A DEGREE, BUT IT IS MORE OF A SIXTH AMENDMENT ISSUE. WHEN THE LAWYER SAYS I KNOW THAT MOST CRIMINAL CLIENTS ARE UNTRUTHFUL WITH THEIR LAWYERS, AND YOU DON'T HAVE TO PRACTICE LAW FOR VERY LONG, BEFORE THAT BECOMES APPARENT. AND YOU HAVE A BAD FEELING THAT THE CLIENT IS MISLEADING YOU IN THIS CASE --

ORIGINALLY, THOUGH, HE SAID THAT, ACTUALLY WHAT JUSTICE ANSTEAD SAID, WAS THAT HE BELIEVED PHILMORE, THAT HE WAS NOT INVOLVED WITH THE DISAPPEARANCE. HE DID STATE THAT, RIGHT? SO STATEMENTS WERE MADE, AND THEN IT WAS ONLY AFTER HE FAILED THE POLYGRAPH, THAT HE, THEN, ENDS UP SAYING, WELL, SINCE IT IS ALREADY, PHILMORE IS ALREADY IN PRETTY DEEP, THAT NOW HIS CONCERNS ARE THAT MAYBE HIS CLIENT WASN'T BEING TRUTHFUL.

I JUST WROTE DOWN A COUPLE OF COMMENTS. THESE ARE COMMENTS THAT POLICE MADE TO THE LAWYER. IT IS KIND OF ODD. I HAVE NEVER BEEN IN A CASE THAT THIS HAPPENED. ON SUPPLEMENT RECORD PAGE 37, THE DETECTIVE SAYS TO MR. HEATHERINGTON. MR. PHILMORE IS

IN A LOT OF TROUBLE AND NEEDS A LAWYER. WELL, HE NEEDS A LAWYER TO SHUT HIM UP NOT A LAWYER TO HAVE HIM CONFESS TO CAPITAL MURDER. ON PAGE 52-TO-56 OF THE SUPPLEMENTAL RECORD, THE DETECTIVE SPEAKING TO MR. HEATHERINGTON. MR. PHILMORE HAS HAD A CHANGE IN STORY, SO YOU NEED COUNSEL HIM. ON PAGE 67, 68, MR. PHILMORE HAS TOLD A DIFFERENT VERSION OF EVENTS, THIS NEXT STORY, YOU NEED TO TALK TO HIM, AND FINALLY THE DETECTIVE SAYS TO MR. HEATHERINGTON, COUNSEL, YOU NEED TO GO TALK TO MR. PHILMORE, BECAUSE HE HAS GOT A LOT MORE INVOLVEMENT THAN WHAT YOU THINK OR WHAT HE HAS TOLD YOU. I DON'T KNOW WHAT MORE --. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL TIME.

-- WHAT MORE A LAWYER NEEDS TO KNOW, BEFORE HE NEEDS TO KNOW THAT HE NEEDS TO TAKE HIS CLIENT AWAY FROM LAW ENFORCEMENT AND NOT MAKE HIM AVAILABLE. THANK YOU. MR. CHIEF JUSTICE

MS. DALE.

GOOD MORNING. MELANIE DALE ON BEHALF THE ATTORNEY GENERAL'S -- MELANIE DALE ON BEHALF OF THE ATTORNEY GENERAL'S OFFICE. TO CLARIFY ON THIS CLAIM, THEIRS WAS A SPECIFIC CLAIM MADE BELOW, THAT THE DEFENDANT'S CONFESSION WAS NOT VOLUNTARY. WHEN WE GOT TO THE MOTION TO SUPPRESS HEARING, THE TRIAL JUDGE SPECIFICALLY FOUND SHE WAS GOING TO ADDRESS THE VOLUNTARINESS. SHE, THEN, WENT ON IN HER ORAL PRONOUNCEMENT TO SAY SHE WAS GOING TO ADDRESS THE FIFTH AMENDMENT VOLUNTARINESS OF THIS DEFENDANT'S CONFESSION. IN THIS CASE, THE RECORD HERE DOES NOT EVEN PASS ON A SIXTH AMENDMENT VIOLATION. WE NEVER GET TO A STRICKLAND ANALYSIS. THE MERE STATEMENT REGARDING COMPETENT COUNSEL DOES NOT ANALYZE THE EFFECTIVENESS OF COUNSEL.

SO YOU ARE SAYING THE TRIAL COURT, TO PUT A TOPPING ON IT, EXPLICITLY SAID THAT SHE WAS NOT GOING TO RULE ON WHETHER COUNSEL WAS EFFECTIVE OR NOT EFFECTIVE. WHATEVER. SHE WAS STRICTLY GOING TO RULE ON THE FIFTH AMENDMENT.

THAT IS EXACTLY WHAT I AM SAYING. IF YOU LOOK AT PAGE 952, AS WAS CITED BY DEFENSE COUNSEL, JUDGE ANGELIS SPECIFICALLY STATED SHE WAS GOING TO DETERMINE WHETHER OR NOT THE STATEMENTS WERE FREE AND VOLUNTARILY GIVEN, UPON APPOINTMENT OF COUNSEL, WITH RESPECT TO THE FIFTH AMENDMENT. SO THERE IS ABSOLUTELY NOTHING IN THIS RECORD THAT WOULD PASS ON A SIXTH AMENDMENT ANALYSIS. THIS RECORD DOESN'T FLUSH OUT CONVERSATIONS THAT DEFENSE COUNSEL HAD WITH HIS CLIENT.

WELL, BUT, BASED ON THIS RECORD, IT BEING THAT THEY ARE WILLING TO SAY THAT THIS RECORD, ALONE, IS ENOUGH TO SHOW A SIXTH AMENDMENT VIOLATION, AND HE DID PLEAD IN HIS MOTION THAT HE WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE COUNSEL, UNDER THE SIXTH AMENDMENT, AND JUDGE ANGELO DOES MAKE CERTAIN STATEMENTS THAT WOULD INDICATE THAT, ALTHOUGH SHE STARTED OUT SAYING SHE WASN'T RULE O'CLOCK, SHE, IN FACT, FOUND THAT COUNSEL WAS EFFECTIVE. WHAT WOULD BE YOUR ARGUMENT TO OR YOUR REBUTTAL TO THE FACT THAT, ASSUMING THERE IS A RIGHT TO HAVE EFFECTIVE COUNSEL DURING THIS PERIOD OF QUESTIONING, WHY WAS MR. HEATHERINGTON PERFORMING -- WHY WASN'T MR. HEATHERINGTON PERFORMING EFFECTIVELY, BASED ON THE RECORD WE HAVE?

JUDGE ANGELO DID NOT GO INTO THE REASONABLENESS OF MR. HEATHERINGTON'S CONDUCTOR GET TO THE PREJUDICE. SHE RULED ON THE -- SHE DID NOT RULE ON THE SIXTH AMENDMENT ANALYSIS.

YOU WOULD ASK THAT WE RULE ON THE SIXTH AMENDMENT ISSUE AND HAVE THAT BE SOMETHING IN POSTCONVICTION?

EXACTLY. THIS IS BETTER SERVED IN 3.850, WHERE YOU WOULD HAVE AN EVIDENTIARY HEARING TO HAVE A COMPLETE RECORD. IN THIS CASE, WE DON'T HAVE THAT RECORD. THERE IS ABSOLUTELY NOTHING WITH RESPECT TO MR. HEATHERINGTON'S TESTIMONY THAT ACTUALLY GOES INTO THE SUBSTANCE OF THE CONVERSATIONS HE HAD WITH THE DEFENDANT, BETWEEN STATEMENTS. ALL WE KNOW IS THAT THE DEFENDANT WANTED TO TALK TO THE POLICE. THE DEFENDANT --

WOULD YOU GO, THEN, TO THE VOLUNTARINESS ISSUE. NOT SURE, I KNOW YOUR OPPONENT WAS TREATING THAT, BUT WE OBVIOUSLY HAVE AN ISSUE RAISED, AND WE HAVE A TRIAL COURT THAT DID SUPPRESS THE EARLIER STATEMENTS MADE, INVOLVED WITH TAKING A LIE DETECTOR TEST AND THE INTERVIEWS THERE. TELL ME WHAT THE THEORY OR BASIS WAS FOR THE TRIAL COURT SUPPRESSING THE STATEMENTS THAT WERE MADE AND THEN WHY THE SAME BASIS WOULDN'T APPLY TO THE LATER STATEMENTS THAT WERE GIVEN.

WELL, IN THIS CASE, DURING THE POLYGRAPH, MR. HEATHERINGTON WAS NOT PRESENT. WHILE THE STATE'S POSITION THAT THE DEFENDANT IN THIS CASE KNEW THAT JOHN HEATHERINGTON COULDN'T BE PRESENT AND KNEW THAT HE WAS GOING TO HAVE TO TAKE A POLYGRAPH WITH HIMSELF AND AN OFFICER IN THE ROOM --

THIS WAS A POLICY THING ABOUT DON'T ALLOW ANOTHER PERSON, YOU HAVE TO DO THIS THING WITH JUST CLIENTANT OPERATOR. IS THAT IT?

EXACTLY. SO SUBSEQUENTLY THE TRIAL COURT FOUND THAT THOSE STATEMENTS MADE ONLY DURING THE POLYGRAPH WERE INADMISSIBLE. THE JUDGE WENT ON TO FIND THAT THE STATEMENTS MADE IN THE PRESENCE OF THE OFFICER, LAW ENFORCEMENT AND JOHN HEATHERINGTON, WERE FREE AND VOLUNTARILY GIVEN. DEFENDANT WAS CONSISTENTLY REQUESTING TO TALK TO LAW ENFORCEMENT. HE WAIVED HIS RIGHTS. SIGNED A RIGHTS WAIVERS FORM, A AND THESE RIGHTS WERE EXPLAINED TO HIM EACH TIME, SO THOSE STATEMENTS THAT WERE MADE OUTSIDE OF THE POLYGRAPH WERE VOLUNTARY.

ALL THOSE STATEMENTS WERE ACTUALLY STATEMENTS THAT WERE GIVEN, IN A SENSE, WITH THE ASSISTANCE OF COUNSEL.

EXACTLY.

IS THAT RIGHT?

EACH STATEMENT WAS GIVEN, YES. EXACTLY. COUNSEL WAS THERE FOR EACH STATEMENT, AND THERE WAS TESTIMONY THAT COUNSEL DISCUSSED SOMETHING WITH THE DEFENDANT, PRIOR TO GIVING THE STATEMENTS.

HOW LONG BEFORE HEATHERINGTON GOT OUT OF THE CASE? THAT IS WAS THIS AFTER THE HOMICIDE CHARGES WERE BROUGHT OR WHAT, THIS IS A STRANGE RECORD, WITH REFERENCE TO THE INVOLVEMENT OF THE LAWYER, NO MATTER WHAT, BUT WHAT, THIS LAWYER WAS APPOINTED INITIALLY FOR WHAT REASON, AND THEN HOW LONG DID THE LAWYER STAY IN THE CASE?

INITIALLY THE LAWYER WAS APPOINTED, BECAUSE ON NOVEMBER 15, THE FIRST TIME THE DEFENDANT SPOKE WITH DETECTIVE BOBBS, HE STARTED TO TALK ABOUT THE BANK ROBBERY, AND WHEN THEY STARTED TO GET INTO QUESTIONING REGARDING THE ABDUCTION, THE DEFENDANT SAID I WANT A LAWYER NOW. SO THE LAWYER WAS THEN APPOINTED ON THE 15th, AND THE FIRST STATEMENT WENT AND CAME ON NOVEMBER 18.

WAS THE APPOINTMENT JUST FOR THE BANK ROBBERY CHARGES OR THE TRESPASS OR WHAT?

WELL, THE APPOINTMENT WAS HYBRID. IT WAS BASED ON THE FACT THAT THERE WERE CHARGES BEING FILED AGAINST THE DEFENDANT AND THE DEFENDANT, WHEN GETTING TO QUESTIONINGS REGARDING ABDUCTION SAID HE DIDN'T WANT TO TALK. HE WANTED A LAWYER, WITH RESPECT TO THAT ISSUE.

USUALLY THERE IS A CASE NUMBER AND INFORMATION AND WHATEVER, AND THE LAWYER IS APPOINTED IN THAT. DID THAT HAPPEN HERE?

YES. THERE WAS A CASE NUMBER, AND THE LAWYER WAS APPOINTED, WITH RESPECT TO AT THE POINT HE WAS APPOINTED, IT WAS WITH RESPECT TO TRESPASS, AND I BELIEVE, THE ROBBERY CHARGES WERE, LITTLE, PART OF THAT DOCUMENT -- WERE, ALSO, PART OF THAT DOCUMENT. SO --

HOW LONG, THEN, DID HE STAY IN THE CASE AND WHAT HAPPENED AFTER THAT?

SOMETIME BETWEEN THE CONFESSION, AND IT IS NOT BORNE OUT CLEARLY BY THE RECORD, BUT SOMETIME BETWEEN THE CONFESSION, LENARD NIL MORE DID NOT WANT THE -- LENARD PHILMORE DID NOT WANT THE LAWYER AND THE LAWYER CAME OFF THE CASE AND THE SUPPRESSION WAS FILED. IT IS NOT BORNE OUT BY THE RECORD EXACTLY HOW HE CAME OFF THE CASE. I BELIEVE THERE WAS ALSO AN ISSUE WITH REGARD TO CONFLICT.

PRIVATE COUNSEL FOR PRIVATE COUNSEL FROM THE LOCAL COMMUNITY WAS APPOINTED.

EXACTLY.

AT THE POINT THAT HE WAS APPOINTED, PHILMORE HAD BEEN ARRESTED FOR THE ARMED TRESPASS. THAT WAS ON THE 14th THAT HE WAS ARRESTED FOR THAT, THEN ON THE 15th ARRESTED FOR THE BANK ROBBERY, BUT IT WAS A SPECIFIC QUESTIONING ABOUT THE DISAPPEARANCE OF THE VICTIM THAT LED THIS DEFENDANT TO, DID HE INVOKE HIS RIGHT TO REMAINCILEENT?

YES. AND ASKED FOR COUNSEL.

AND ASKED FOR COUNSEL. SO NORMALLY, IF THEY, THEY WOULDN'T HAVE HAD TO, AT THAT POINT, YET APPOINT COUNSEL FOR THE BANK ROBBERY OR THE ARMED TRESPASS, BECAUSE ARRAIGNMENT HADN'T BEEN --

EXACTLY.

AND THERE IS NOTHING UNDER MIRANDA OR ANY U.S. SUPREME COURT CASES THAT WOULD SAY THAT SOMEONE CAN INVOKE THEIR RIGHT TO REMAIN SILENT BUT THERE IS NOT AN AUTOMATIC RIGHT TO HAVE COUNSEL APPOINTED FOR THE QUESTIONING, CORRECT?

EXACTLY.

BUT IN THIS CASE --

THE DEFENDANT ASKED FOR COUNSEL.

AND THERE WAS COMPLIANCE WITH THAT REQUEST.

AND THEN THE PUBLIC DEFENDER'S OFFICE WAS APPOINTED AND MR. HET ERRING -- AND MR. HEATHERINGTON CAME IN.

WHAT WAS DISCUSSED BETWEEN MR MR. PHILMORE AND MR. HEATHERINGTON, AS TO WHY HE

THEN DECIDED TO TALK, THERE IS A POINT. YOU ARE SAYING THAT WE REALLY DON'T HAVE THAT COMPLETE CONVERSATION THAT OCCURRED TO LEAD MR. PHILMORE TO DECIDE THAT HE WAS GOING TO TALK ABOUT THE DISAPPEARANCE OF PERRON?

THAT IS EXACTLY.

BUT I THOUGHT IT WAS THAT HEATHERINGTON SAID, FINALLY CONVINCED HIM THAT HE WASN'T INVOLVED IN THE DISAPPEARING, AND THAT IT WAS HIS CLIENT'S IDEA, ONCE HE WAS APPOINTED, TO THEN GO AHEAD AND SPEAK AGAIN.

THAT IS RELEVANT TO THE VOLUNTARINESS OF THE CONFESSION. THAT IS RELATIVE TO SHOW THAT THE DEFENDANT HAD CONVERSATIONS WITH COUNSEL AND DEFENDANT WANTED TO MAKE STATEMENTS. COUNSEL, THERE IS SOME RECORD REGARDING COUNSEL SAYING I TOLD HIM IF HE DIDN'T WANT TO TALK, HE DIDN'T HAVE TO, BUT MR. PHILMORE WANTED TO TALK. HE WANTED TO GO TO THE POLICE. WELL, IT IS BORNE OUT THAT THERE WERE CONVERSATIONS AND THERE WAS ADVISEMENT GOING ON THERE. THERE IS ABSOLUTELY NO RECORD TO SHOW THAT MR. HEATHERINGTON CONVINCED LENARD PHILMORE TO TALK. ALL WE KNOW IS THERE WERE CONVERSATIONS. LENARD PHILMORE WANTED TO TALK AND HE CONFESSED!

I AM HAVING DIFFICULTY, FROM THE RECORD, EVEN UNDERSTANDING WHETHER THE LAWYER KNEW THAT HE WAS ACTUALLY REPRESENTING THIS DEFENDANT ON THE MURDER CHARGES. THAT IS IF, IS IT CLEAR THAT, IN OTHER WORDS, THAT --

I THINK IT IS CLEAR FROM THIS RECORD. THERE IS SOME TESTIMONY --

WHAT IS THE STRONGEST INDICATION THAT THE LAWYER UNDERSTOOD THAT HE NOW HAD A RESPONSIBILITY TO THIS CLIENT, WITH REFERENCE TO THE MURDER CASE?

THE STRONGEST INDICATION IS DURING HIS TESTIMONY, MR. HEATHERINGTON STATED, ON A NUMBER OF TIMES, HE KNEW THAT THERE WAS A BIGGER ISSUE IN THIS CASE, AND AT TIMES, EACH TIME THE STORY CHANGED, I BELIEVE IT WAS DURING CROSS-EXAMINATION, THERE WAS A STATEMENT MADE THAT HE HAD TO MITIGATE SOME OF THE DAMAGE THAT WAS GOING ON HERE, BUT IT WASN'T UNTIL ABOUT NOVEMBER 23 THAT ANY OF THIS REALLY CAME OUT THAT THERE WOULD BE A PROBLEM WITH THE MURDER CHARGE, BECAUSE THE DEFENDANT HAD CONSISTENTLY TOLD HIS LAWYER "I WASN'T INVOLVED." I BELIEVE IT WAS, I AM SORRY, NOVEMBER 21, WHEN THE DEFENDANT DECIDED HE WANTED TO SHOW THE POLICE WHERE THE BODY WAS, WHEN HEATHERINGTON REALIZED PHILMORE KNEW ABOUT THE MURDER. FROM NOVEMBER 18 TO NOVEMBER 21, THIS DEFENDANT HAD SAID I DON'T KNOW ANYTHING ABOUT AN ABDUCTION OR MURDER. ALL I KNOW ABOUT IS A BANK ROBBERY IN INDIAN TOWN. HOWEVER, ON NOVEMBER 20, WHICH WAS THE FIRST POLYGRAPH, THE DEFENDANT BEGAN TO CHANGE HIS STORY. THE POLICE STOPPED THE POLYGRAPH. DEFENSE COUNSEL SAID WE ARE NOT DOING THIS ANYMORE. HAD A CONVERSATION WITH HIS CLIENT. WE DON'T KNOW THE CONTENTS OF THAT CONVERSATION. ALL WE KNOW IS HIS CLIENT WANTED TO SHOW LAW ENFORCEMENT WHERE THE BODY WAS.

WHEN DID THE CONVERSATION OCCUR, WHERE REERRING TON SAID THAT HE TOLD HIS CLIENT THAT, ALTHOUGH THERE WASN'T ANY DEAL, THAT THE PROTOCOL IN MARTIN COUNTY WAS THAT, IF YOU COOPERATED, YOU COULD, MISSOURI MORE -- YOU COULD, MORE LIKELY THAN NOT, AVOID THE DEATH PENALTY. THOSE CONVERSATIONS ABOUT WHETHER YOU SHOULD TALK TO THE POLICE, BECAUSE IF YOU COOPERATE YOU KNOW, YOU WILL GET THE DEAL AND THE CODEFENDANT WON'T, MUST HAVE OCCURRED AT SOME POINT IN THIS FIVE-DAY OR SIX-DAY SITUATION.

IT IS NOT CLEAR FROM THE RECORD THAT THAT IS THE CONVERSATION THAT WAS HAD. ALL THAT IS CLEAR FROM THE RECORD IS THAT DEFENSE COUNSEL KNOWS THAT PROTOCOL IN

MARTIN COUNTY IS THAT THERE IS NO DEAL. THERE IS NO EVIDENCE IN THIS RECORD THAT DEFENSE COUNSEL HAD THAT CONVERSATION WITH LENARD PHILMORE.

NEFERDZ THAT HE -- IN OTHER WORDS THAT HE TOLD THAT TO PHILMORE.

WE DON'T KNOW. ALL WE KNOW IS THERE WERE CONVERSATIONS, AND THAT HE TOLD HIS CLIENT YOU DON'T HAVE TO TALK, IF YOU DON'T WANT TO, AND I BELIEVE HE, ALSO, TOLD HIS CLIENT, UNDER THE BELIEF THAT HE WAS NOT THE SHOOTER, LENARD PHILMORE HAD CONSISTENTLY DENIED TO MR. HEATHERINGTON I AM NOT THE SHOOTER.

WELL, IF YOU SAY THAT THIS RECORD DOES NOT INDICATE THAT MR MR. HEATHERINGTON EVER TOLD MR. PHILMORE ABOUT THIS PROTOCOL IN MARTIN COUNTY, THEN WHERE DID MR MR. PHILMORE GET THE IDEA THAT, IF HE COOPERATED WITH THE POLICE HE WOULD NOT GET THE DEATH PENALTY? WHAT DO WE HAVE IN THE RECORD THAT WOULD SUPPORT MR. PHILMORE PHILMORE'S BELIEF OF THIS, OTHER THAN MR. PHILMORE'S STATEMENT?

NOTHING. DEFENSE COUNSEL, HEATHERINGTON, AND THE PROSECUTOR, ALL, TESTIFIED NO PROMISES WERE MADE. DETECTIVE FRITCHEY, WHEN YOU LISTEN TO THE TAPED STATEMENT, THE FINAL CONFESSION SAID THIS IS UNDER THE ASSUMPTION THAT NO PROMISES HAVE BEEN MADE WITH RESPECT TO THE MURDER CHARGE.

SO AS IS CLEAR THAT PHILMORE GOES FROM NOT TELLING HIM HE IS NOT INVOLVED, TO AT LEAST THE POLICE TELLING HEATHERINGTON THAT, HEY, YOUR CLIENT IS INVOLVED IN THIS, EVEN IF HE IS NOT THE SHOOTER, OBVIOUSLY HEATHERINGTON KNOWS HE IS BEING EMPLOYED OR THE -- PLOYED OR THE SCOPE OF REPRESENTATION IS THE MURDER CHARGE, WHAT ADVICE DOES HE GIVE HIM, CONCERNING TALKING ABOUT THIS MURDER, IF HE IS NOT THE SHOOTER? I MEAN, DO WE, YOU ARE SAYING THAT IS NOT IN THE RECORD?

IT IS NOT BRORN OUT BY THIS RECORD. -- IT IS NOT BORNE OUT BY THIS RECORD. THERE IS SOME TESTIMONY FROM MR. HEATHERINGTON TALKING ABOUT I TOLD HIM HE DID NOT HAVE TO TALK TO LAW ENFORCEMENT, IF HE DIDN'T WANT TO, AND PRIOR TO THE DEFENDANT SHOWING LAW ENFORCEMENT WHERE THE BODY WAS. AFTER HE FIRST CHANGED HIS STORY. THAT WAS FROM THE 18th TO THE 20th, WHICH WAS THE FIRST SIGN THAT THERE WAS GOING TO BE A CHANGE IN THIS DEFENDANT'S STORY. MR. HEATHERINGTON TESTIFIED THAT HE IS SURE HE TOLD HIS CLIENT, IF YOU WERE THE SHOOTER, YOU CAN'T COOPERATE. SO THIS IS IN THE MIDDLE OF THE FIVE STATEMENTS SWRRX AND MR. PHILMORE -- FIVE STATEMENTS SOMEWHERE, AND MR. PHILMORE HAD SAID --

SO ASSUMING HIS CLIENT HAD NOTHING TO DO WITH THIS, TO MAYBE HIS CLIENT WASN'T THE SHOOTER AND HE MIGHT AS WE WILL GO AHEAD AND TALK TO THEM, AND AS I AM UNDERSTANDING THE POSITION OF MR. RASTATTER TODAY, IS TO SAY THAT, ONCE A COMPETENT DEFENSE LAWYER REALIZES THAT YOUR CLIENT IS NOW INVOLVED IN SOME WAY, WITH A CAPITAL MURDER, TO NOT, AT THAT POINT, SAY, WELL LISTEN, NOW I HAVE GOT TO TALK TO YOU ABOUT THE REAL WORLD HERE ABOUT, MY ADVICE TO YOU IS YOU REALLY ON THE NOT TO SPEAK ANY FURTHER, BECAUSE THIS IS GOING TO BE USED AGAINST YOU, AND WE WILL HAVE TO SEE IF WE CAN WORK SOMETHINGS OUT -- SOMETHING OUT. IF YOU ARE INVOLVED NOT AS THE SHOOTER, MAYBE WE CAN WORK OUT A DEAL WHERE YOU CAN PLEAD TO, YOU KNOW, IN EXCHANGE FOR COOPERATION.

WELL, THAT IS THE ISSUE IS ASKING FOR A PER SE RULING THAT A DEFENSE COUNSEL HAS TO STOP HIS CLIENT FROM TALKING. THE PROBLEM IS IN THIS RECORD, WE DON'T KNOW WHAT THE CONVERSATION WAS BETWEEN MR. HEATHERINGTON AND HIS CLIENT. MR. HEATHERINGTON COULD HAVE SAID DON'T TALK. WE DON'T KNOW, BECAUSE THE RECORD DOESN'T REFLECT THAT CONVERSATION. SO THIS ISSUE CAN'T BE PASSED ON. BECAUSE THERE IS NOTHING IN THIS RECORD TO SHOW THAT THERE WAS INEFFECTIVENESS.

YOUR BOTTOM LINE IS THAT THERE IS PLENTY OF EVIDENCE TO SUSTAIN THE TRIAL COURT'S RULING ON THE VOLUNTARINESS ISSUE. IS THAT IT?

EXACTLY.

THERE IS ONE THING I SEEM TO MISS IN THIS WHOLE DISCUSSION. ALL MORNING WE HAVE BEEN TALKING ABOUT THE MURDER CASE AS THOUGH IT IS SOMETHING FAR REMOVED FROM EVERYTHING ELSE, BUT IT IS MY UNDERSTANDING THAT THE VEHICLE FOR THE MISSING DECEDENT WAS INVOLVED IN ALL OF THESE THINGS, SO THERE WAS A NEXUS BETWEEN THIS PERSON, THIS DEFENDANT, AND THE MISSING PERSON OR THE ULTIMATE DECEASED, FROM THE OUTSET, WAS THERE NOT?

EXACTLY.

HOW WAS THAT EXPLAINED OR ADDRESSED? IT IS NOT AS THOUGH ALL OF A SUDDEN THIS CAME OUT OF THE BLUE. IT IS PART OF AN UNRAVELING KIND OF SCENARIO, WAS IT NOT?

EXACTLY TRUE. THIS CASE HINGES UPON A LOT OF EVIDENCE NOT JUST A CONFESSION. WE HAD THE VICTIM'S LEXUS WITH A BLOWN OUT TIRE ON THE SIDE OF THE ROAD. WE HAD THE VICTIM'S BLOOD IN THE CAR AND THE VICTIM'S T-SHIRT WITH BLOOD ON IT. WE HAD AN EYEWITNESS PLACE THE VICTIM WHERE THE VICTIM WAS ABDUCTED. WE HAD AN EYEWITNESS TO THE BANK ROBBERY. SO THERE WAS A LOT OF OTHER EVIDENCE THAT SHOWS THAT THIS DEFENDANT WAS INVOLVED WITH THIS CRIME AND THAT HE WAS INVOLVED IN DRIVING THE CAR.

GIVEN THAT IS THE CASE, THAT WHEN MR. HEATHERINGTON, THEN, IS EMPLOYED TO HIS COUNSEL, TO PHILMORE, MR. HEATHERINGTON KNOWS THAT THE DEFENDANT HAS BEEN LINKED UP WITH THE LEXUS, CORRECT?

WELL, YES AND NO, BECAUSE THE INVESTIGATION BEGAN ON THE 15th AND CONTINUED THROUGHOUT THE TIME THAT THE DEFENDANT WAS CHANGING HIS STORY. THIS EVIDENCE WAS BEING GATHERED AND IT SEEMS AS THOUGH THE STORY CONTINUED TO CHANGE, AS THERE WAS THE DETERMINATION THAT MORE EVIDENCE WAS BEING GATHERED, SO THE POLICE DIDN'T HAVE ALL THIS EVIDENCE ON DAY ONE. THE EVIDENCE WAS TAKEN AND FOUND OVER A PERIOD OF A FEW DAYS. I MEAN, IT TOOK NINE DAYS BEFORE THE POLICE KNEW WHERE THE BODY WAS, BECAUSE THE DEFENDANT TOOK THEM THERE, SO OVER THAT TIME PERIOD, THEY WERE GATHERING THE EVIDENCE, AND EACH TIME MORE EVIDENCE SEEMED TO BE GATHERED, YET AGAIN WE DON'T KNOW WHAT MR. HEATHERINGTON TALKED ABOUT WITH HIS CLIENT, WITH RESPECT TO ANY EVIDENCE THAT THE POLICE ADVISED MR. HEATHERINGTON THAT THEY HAD, SO WE DON'T KNOW EXACTLY HOW ALL OF THAT COMES INTO PLAY WITH THE CONVERSATIONS THAT MR. HEATHERINGTON HAD WITH THE DEFENDANT. SO, AGAIN, IT TAKES ME BACK TO YOU CAN'T PASS ON THE ISSUE OF INEFFECTIVENESS, IF YOU DON'T HAVE A RECORD TO SUPPORT IT.

THE VEHICLE. THEY WERE AWARE OF THE VEHICLE FROM DAY ONE, WERE THEY NOT?

THE VEHICLE FROM DAY ONE. ANOTHER VEHICLE ITSELF. SO THAT WAS A NEXUS FROM THE OUTSET.

YES.

OF THE DECEASED, TO WHAT HAD HAPPENED WITH THIS INDIVIDUAL, JUST CAR. THE REST OF THE STUFF MAY HAVE BEEN DEVELOPED LATER.

YES.

SO FROM THE VERY, FROM THE OUTSET OF THIS INVOLVEMENT.

YES. AGAIN, WITH RESPECT TO THIS ISSUE, IT IS THE STATE'S POSITION THAT THE ISSUE OF VOLUNTARINESS IS SUPPORTED BY THE RECORD, AND IT IS CLEAR THAT THE DEFENDANT VOLUNTARILY CONFESSED TO THIS CRIME.

I DON'T WANT TO BEAT A DEAD HORSE, BUT WHY, THEN, IF THE JUDGE WAS NOT RULING ON THE ISSUE OF THE SIXTH AMENDMENT ISSUE, THEN THE JUDGE MAKES A STATEMENT THAT HE FINDS HIS ACTIONS, HEATHERINGTON'S ACTIONS WAS SUBSTANTIALLY INFLUENCED BY THE DEFENDANT'S OWN STATEMENTS AND WERE BASED ON INFORMED STRATEGIC CHOICES MADE BY INFORMATION THAT HE HAD AND SUPPLEMENTED BY THE DEFENDANT'S STATES TO HIM, AND THEN GOES ON THAT THIS COURT SPECIFICALLY FINDS THAT, IN LIGHT OF THE CIRCUMSTANCES, COUNSEL'S ACTS, BASED ON THE TESTIMONY OF LAW ENFORCEMENT, MR. HEATHERINGTON, AS WELL AS THE DEFENDANT, HIS ACTS FELL WITHIN THE RANGE OF PROFESSIONALLY-COMPETENT ASSISTANCE.

OKAY. IF YOU TAKE THAT ENTIRE FINDING IN CONTEXT, WE ARE LOOKING AT A FIFTH AMENDMENT VIOLATION. THERE WAS SOME ALLUSION TO A CLAIM OF STATE ACTION, BASED ON THE FACT THAT HEATHERINGTON WAS A PUBLIC DEFENDER. STATE PROPERLY ARGUED THAT YOU CAN'T MAKE THAT ARGUMENT. JUST BECAUSE HE IS A PUBLIC DEFENDER DOESN'T MEAN HE COERCED THIS DEFENDANT INTO CONFESSING AND THEREFORE IT IS STATE ACTION. THAT WAS PART OF THE FIFTH AMENDMENT ANALYSIS. IF YOU WANT TO ANALYZE THAT EVEN MORE, IT IS TO SAY THE REASON WHY HE MADE ANY CONVERSATION WITH THE DEFENDANT IS BECAUSE HIS STORY CONTINUED TO CHANGE, AND HE HAD TO FIGURE OUT WHAT IS THIS DEFENDANT GOING TO SAY, BUT AGAIN, THERE IS NO ANALYSIS BY THE TRIAL COURT, WITH RESPECT TO THE REASONABLENESS AND THE PREJUDICE. IT IS JUST A BLATANT STATEMENT THAT THERE WAS COMPETENT COUNSEL THERE. IS NOTHING THIS RECORD TO SUPPORT A STRICKLAND ANALYSIS. IT ONLY SUPPORTS THE VOLUNTARINESS ANALYSIS. SO, AGAIN, THE STATE WOULD ASK THAT, BASED ON THE FACT THAT THIS WAS A VOLUNTARY CONFESSION UNDER THE FIFTH AMENDMENT AND THE TRIAL COURT DID NOT PASS ON THE STRICKLAND ANALYSIS, AND IT IS NOT PROPERLY BEFORE THIS COURT, I WOULD REST ON MY BRIEF FOR THE REST OF THE ISSUES AND REQUEST THAT, RESPECTFULLY REQUEST THAT THE COURT AFFIRM THE CONVICTION AND SENTENCE. THANK YOU. MR. CHIEF JUSTICE

REBUTTAL.

JUST ONE THING OR TWO THINGS. IT IS A STRANGE RECORD, JUSTICE ANSTEAD. I MEAN, I DON'T KNOW OF ANY OTHER SITUATION LIKE THIS. THE ONLY CASES --

ISN'T IT A STRANGE RECORD, THOUGH, THAT, IN VIEW OF THE TRIAL COURT'S EXPLICIT STATEMENT THAT SHE WASN'T GOING TO TREAT THIS ISSUE ABOUT COMPETENCY OF COUNSEL, THAT, REALLY, SHOULD BE THOROUGHLY EXPLORED IN A POSTCONVICTION PROCEEDING, WHERE ALL OF THIS, BECAUSE IT TRULY IS DIFFICULT FOR THIS COURT ON A RECORD THAT IS DEVELOPED ON THE FACE OF THE TRIAL COURT, SAYING THAT SHE NOT GOING TO ADDRESS THAT ISSUE, THAT WE ARE, THEN, LEFT WITH SORT OF AN INCOMPLETE PICTURE? WHO KNOWS, OBVIOUSLY MAYBE IT WILL GET WORSE FOR THE LAWYER, BECAUSE THE, AS YOU POINTED OUT, THERE IS ALL KINDS OF THINGS HERE, THE RED FLAGS WAIVED WAVED BY THE -- THE RED FLAGS WAVED BY THE POLICE TO THE LAWYER OR WHATEVER, BUT WITHOUT A COMPLETE RECORD AND HEARING THAT IS FOCUSED DIRECTLY ON THAT ISSUE, I JUST QUESTION WHETHER OR NOT THAT WE CAN TAKE THIS RECORD AND SAFELY RULE ON THAT ISSUE, AND I KNOW YOU ARE NOT CONCEDING ISSUES HERE, BUT WOULDN'T YOU HAVE TO AGREE THAT, AS TO THE VOLUNTARINESS ISSUE, THAT AT LEAST THERE IS EVIDENCE TO SUPPORT THE TRIAL COURT'S RULING RULING?

EXCEPT MR. HEATHERINGTON TOLD HIS CLIENT, YOUR COOPERATION WILL BE YOUR MITIGATION. IT CAN SAVE BUT FROM THE DEATH PENALTY.

THAT IS A DIFFERENT THING FROM SAYING THAT HERE, IN MARTIN COUNTY, IF YOU DO THIS, THEY WILL NEVER SEEK THE DEATH PENALTY FROM YOU, BECAUSE SURE, THAT CAN BE ON THE LIST OF MITIGATION, WHERE THE TRIAL COURT SAYS IT HAS BEEN ADVANCED THAT HE COOPERATED WITH THE AUTHORITIES, WE SEE THAT UNDER, YOU KNOW, NONSTATUTORY MITIGATION ALL THE TIME. THAT IS A DIFFERENT THING. MITIGATION. BUT THE EFFECT OF IT MAY NOT BE ENOUGH TO OVERCOME THE OTHER EGREGIOUS CIRCUMSTANCES SURROUNDING THE KILLING.

JUST REMEMBER THAT AT THIS HEARING, THOUGH, THE DEFENDANT TESTIFIED, MR. HEATHERINGTON TESTIFIED, AND THE ASSISTANT STATE ATTORNEY TESTIFIED. I AM TRYING TO THINK BACK, IF WE HAD ANOTHER EVIDENTIARY HEARING OPPOSE THE CONVICTION, WHAT MORE COULD BE --

IT IS LIKE YOU BRING INEXPERIENCED LAWYERS. YOU EXPLORE THE ACTUAL BACKGROUND OF THIS PARTICULAR LAWYER, YOU KNOW, WAS THIS A LAWYER THAT WAS APPOINTED IN A MISDEMEANOR CASE AND ENDED UP DEFENDING A MURDER CASE? OR WAS THIS THE BEST LAWYER IN THE PUBLIC DEFENDERS OFFICE, AND HE HAD FOLLOWED THIS STRATEGY BEFORE IN OTHER CASES AND HAD BEEN SUCCESSFUL? IT IS JUST ALL KINDS OF QUESTIONS THAT WE DON'T HAVE ANSWERS FOR ON THIS RECORD.

IT MAY BE THAT I AM SO GUN-SHY IN DOING MY POSTCONVICTION WORK AND HAVING THE GOVERNMENT COME BACK AND SAY THIS IS SOMETHING YOU LITIGATED ON DIRECT APPEAL OR THIS IS SOMETHING THAT YOU SHOULD HAVE LITIGATED ON DIRECT APPEAL IF WE DON'T LITIGATE IT HERE ON THIS DIRECT APPEAL, IT --

WELL, THE ADVERSARY SYSTEM IS FULL OF THOSE KINDS OF THINGS.

THEY WOULD COME BACK OPPOSE THE CONVICTION AND SAY --

YOU HAVE A PRETTY EXPLICIT RECORD HERE OF THE POSITION TAKEN BY THE STATE.

IN ANY EVENT, BESIDES THE STRANGE RECORD, ONE THING I JUST ASK YOU TO REMEMBER IS THIS CONFESSION, BESIDES THE GUILT PHASE, IT DID GO A LONG WAY, I THINK, IN THE PENALTY PHASE, AS FAR AS THE JUDGE FINDING THE TWO AGGRAVATORS OF CCP.

AS FAR AS THE DETAILS. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.