John C. Marquard v. State of Florida

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR AT THE FLORIDA SUPREME COURT. I WOULD SAY THAT THE GOOD NEWS IS THAT THE MARSHAL SOUNDS BETTER TODAY THAN HE DID YESTERDAY. SO THE FIRST CASE ON THE COURT'S CALENDAR IS MARK WARD VERSUS STATE. -- IS MARQUARD VERSUS STATE. MS. SCALLEY.

MAY IT PLEASE THE COURT. I AM LESLIE SCALLEY ON BEHALF OF JOHN MARQUARD HERE, TODAY, ON HIS WRIT OF HABEAS CORPUS AND HIS APPEAL. UNLESS THE COURT HAS OTHER QUESTIONS, I WOULD LIKE TO FOCUS TODAY, ON THE DISPARATE SENTENCING ISSUES RAISED IN THE SUPPLEMENTAL BRIEF AND THE INEFFECTIVE ASSISTANCE OF COUNSEL AT PENALTY PHASE ISSUES THAT WERE RAISED IN ISSUE THREE OF THE BRIEF. AT JOHN MARQUARD'S TRIAL, HIS CODEFENDANT RECANTED MUCH OF HIS TESTIMONY AT THE TRIAL, AND SPECIFICALLY HE TESTIFIED THAT HE CHOPPED THE VICTIM'S NECK AS HARD AS HE COULD BECAUSE HE THOUGHT SHE WAS ALIVE. THIS DIRECTLY CONFLICTS WITH THE WITNESSES'S TESTIMONY AT THE TRIAL THAT HE STABBED THE VICTIM AND CHOPPED HER NECK ONLY AFTER SHE WAS DEAD, AND IN CONSIDERING THIS RECANTED TESTIMONY, THE CIRCUIT COURT DID NOT MAKE THE ANALYSIS THAT THIS COURT HAS SET FORTH IN CONSIDERING THE CREDIBILITY OF RECANTED TESTIMONY AND IN CONSIDERING WHETHER RECANTED TESTIMONY IS NEWLY-DISCOVERED EVIDENCE. INSTEAD THE CIRCUIT COURT SIMPLY STATED THAT THIS IS NOT NEWLY-DISCOVERED EVIDENCE. THIS IS SIMPLY THE LATEST VERSION OF THE FACTS SURROUNDING THE HOMICIDE, AND IT IS CLEAR THAT, HAD THE COURT CONDUCTED THE CREDIBILITY ANALYSIS THAT THIS COURT IS REQUIRED AND CONSIDERING ALL THE CIRCUMSTANCES IN THE CASE, THE COURT COULD NOT HAVE DISMISSED MICHAEL ABSHIRE'S RECANTED TESTIMONY.

WOULD YOU REVIEW ABSHIRE'S TESTIMONY FOR US, INSOFAR AS THE LATEST TESTIMONY AND WHAT PARTS OF IT WERE CONSISTENT WITH THE TESTIMONY THAT HE HAD GIVEN BEFORE.

MICHAEL ABSHIRE, HIS TESTIMONY WAS CONSISTENT REGARDING HOW THEY DROVE, HOW MR. MARC ARRESTED -- MR. MARQUARD AND THE VICTIM DROVE TO NORTH CAROLINA, HIS PRIOR RELATIONSHIP WITH MR. MARQUARD. HIS TESTIMONY WAS CONSISTENT AS TO THE FIRST DAY THAT THEY WERE IN ST. AUGUSTINE, THE SECOND DAY THAT THREE OF THEM LOOKED FOR JOBS, THE THIRD DAY ONLY TWO OF THEM LOOKED FOR JOBS, AND THEN HIS TESTIMONY STARTED TO DIFFERENTIATE FROM THERE. AT JOHN'S TRIAL, MR. ABSHIRE TESTIFIED THAT ABSHIRE DRANK THREE BEERS THAT NIGHT, JOHN HAD ONE BEER, AND THEY WENT OUT TO KILL THE VICTIM. IN THIS CASE, AT THE EVIDENTIARY HEARING, MICHAEL ABSHIRE TESTIFIED THAT THEY WENT OUT TO BARS, THAT THEY HAD A LOT OF ALCOHOL TO DRINK.

BUT DID HE TESTIFY THAT THERE WAS MORE DRINKING THAN HE HAD SAID BEFORE?

YES. MUCH MORE.

AND DID HE EXPLAIN WHY HE CHANGED THAT OR THAT HE WAS GIVING --

WHEN CROSS-EXAMINED BY THE STATE, MICHAEL ABSHIRE IT SAID IF I TEST -- MICHAEL ABSHIRE SAID IF I TESTIFIED OTHERWISE BEFORE IT WAS A MISTAKE, BECAUSE HE TESTIFIED THAT HE HAD A DATE WITH A GIRL, AND HE MADE THAT DATE DURING THE TIME THAT HE AND JOHN WERE

LOOKING FOR JOBS ALONE WITHOUT THE VICTIM.

HE TESTIFIED THAT THEY HAD BEEN OUT DRINKING. IT IS THE SECOND TIME THAT HE TESTIFIED IN GREATER DETAIL OR AS TO MORE DRINK SOMETHING.

NOBODY ELSE -- NO, I DON'T BELIEVE SO. AT TRIAL HE TESTIFIED THAT THEY WENT TO LOOK FOR WORK AND GOT AN APARTMENT AT A ROOMING HOUSE, THEN THEY CAME BACK TO THE HOTEL SHOWERED AND CHANGED. THERE ABSHIRE DRANK THREE BEERS AND HE SAW JOHN DRANK ONE AND THEY WENT OUT INTO THE WOODS AND KILLED THE VICTIM.

SO THERE WAS NO GOING OUT DRINKING.

NO, THERE WAS NOT.

THE TRIAL COURT OBVIOUSLY PLACED GREAT RELIANCE HERE ON THE TESTIMONY THAT YOUR QLINT WAS THE ONE THAT INITIATED -- THAT YOUR CLIENT WAS THE ONE THAT INITIATED THE KILLING, TALKED ABOUT IT AND PLANNING IT BEFORE AND THEN ADDRESSING THE FIRST BLOWS TO THE VICTIM. ALL OF THAT. NOW, DID ANY CHANGES, WITH REFERENCE TO THAT EVIDENCE?

NO. MR. ABSHIRE WAS NOT ASKED ABOUT THAT, EITHER BY CCRC MIDDLE REGION OR THE STATE AT THE EVIDENTIARY HEARING.

SO THAT WAS LEFT INTACT, INSOFAR AS YOUR CLIENT BEING THE ORIGINATOR OF THE PLAN TO KILL, AND ADMINISTERING THE FIRST BLOWS TO KILL.

YES. AND THAT IS WHAT THE CIRCUIT COURT HELD, WHEN IT DID NOT CONSIDER THE RECAPITALED TESTIMONY AND HELD THAT MARQUARD'S DEATH SENTENCE WAS NOT A SUBSTITUTION IN LIGHT OF THE ABSHIRE SENTENCE, AND HELD THAT HE WAS THE INSTIGATOR SO THE SENTENCE WAS APPROPRIATE, BUT IT IF YOU LOOK AT THE TRIAL, THE CONCLUSION THAT MARQUARD WAS DOMINANT ARE NOT COMPETENT AND SUBSTANTIAL IF YOU LOOK AT THE RECORD. FOR EXAMPLE THE COURT HELD THAT JOHN MARQUARD WAS DOMINANT IN THE CRIME, BUT THE CIRCUIT COURT DIDN'T CITE ANY REFERENCE CITATIONS AND THE CIRCUIT COURT IGNORED MR. ABSHIRE'S TESTIMONY THAT BOTH HE AND JOHN MARQUARD CONSPIRED TO KILL THE VICTIM. HE TESTIFIED IT WAS A CONSENSUS. HE SAID THE PLAN WAS BASED ON SOMETHING THAT HE LEARNED FROM A FRIEND OF HIS. THE COURT ALSO HELD THAT JOHN WAS THE DOMINANT PERSON IN THIS CRIME BECAUSE JOHN DROVE TO THE WOODS. THIS IGNORES MICHAEL ABSHIRE'S TESTIMONY THAT WHILE JOHN DROVE, MICHAEL GUIDED HIM INTO THE WOODS AND AT ONE POINT GOT OUT OF THE CAR AND PUT ON A RAIN COAT AND USED A FLASHLIGHT TO LEAD THEM IN. AGAIN THE COURT HELD THAT HE WAS DOMINANT BECAUSE HE LED ABSHIRE AND THE VICTIM INTO THE WOODS BUT THIS IS COMPLETELY REFUTED AT JOHN MARQUARD'S TRIAL. HE TESTIFIED THAT WHEN THEY WENT INTO THE WOODS, ABSHIRE WAS IN THE LEAD AND HE CARRIED A FLASHLIGHT.

YOU ARE GOING BACK AND FORTH BETWEEN THE TESTIMONY THAT WAS PRESENTED AT THE TRIAL AND NOW THE TESTIMONY THAT WAS PRESENTED AT THE HEARING.

YES.

BUT DON'T YOU HAVE A BURDEN TO DEMONSTRATE THAT THIS WITNESS FIRST OF ALL, WAS CREDIBLE.

YES.

AND SECONDLY THAT THE WITNESS'S TESTIMONY REALLY WOULD HAVE SIGNIFICANTLY CHANGED THE FACTS OF THE CASE AS ORIGINALLY FOUND, AND IF THERE WAS NO TESTIMONY

HERE FOR INSTANCE, THAT CHANGED WHO ORIGINATED THE IDEA OF THE MURDER AND WHO WAS THE INITIALIATE OR AND THOSE THINGS, AND IF THAT WAS -- THE INITIALIATE OR AND -- THE INITIATE OR AND THOSE THINGS, AND THIS IF THAT WAS THE FOCUS WITH REFERENCE TO WHO WAS MOST CULPABLE, THEN DON'T YOU REALLY FALL SHORT OF REALLY BEING ENTITLED TO A NEW TRIAL?

YOUR HONOR IN THIS CASE, NO, I DON'T BELIEVE SO, BECAUSE, IN FACT, ABSHIRE'S RECANTED TESTIMONY IS CREDIBLE. FIRST, UNLIKE THE TESTIMONY IN ROBINSON, IT WAS SUBJECT TO CROSS-EXAMINE, AND ABSHIRE WAS CONSISTENT ON CROSS-EXAMINATION. ANOTHER CREDIBILITY CALLS OR THE PERSON THAT, THE TRIAL JUDGE THAT IS THERE LISTENING TO THIS, KNOWING WHAT THE TESTIMONY WAS BEFORE AND, REALLY, TRYING TO EVALUATE, IS THIS PERSON CHANGED BECAUSE HE DIDN'T TELL THE TRUTH BEFORE, OR IS THIS JUST SOMEBODY COMING IN NOW, IN A DIFFERENT POSTURE? ABSHIRE GOT A LIFE SENTENCE, IS THAT CORRECT?

YES. IN 1995.

THAT IS OBVIOUSLY SOMEBODY NOW IN DAVE RENT POSTURE, BUT ALL OF THOSE CONSIDERATIONS ARE FOR THE FACT FINDTORY APPLY. IS THAT NOT CORRECT? NOT FOR US, REALLY, UNLESS THERE WAS SOMETHING THAT WAS JUST IRREFUTED OR UNDISPUTED, WE CAN'T REALLY SECOND-GUESS THOSE CALLS, CAN WE?

NO, YOU CAN'T. THIS COURT HAS HELD THAT THE TRIAL COURT'S FINDING OF FACTS WILL BE UPHELD, IF THEY ARE SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE, BUT IN THIS CASE THE EVIDENTIARY HEARING COURT WAS NOT THE TRIAL COURT, AND THE EVIDENTIARY HEARING COURT DID NOT CITE ANY REFERENCES AS TO WHY HE BELIEVED THAT ABSHIRE'S RECANTED TESTIMONY WAS NOT RELIABLE, UNLIKE HIS TRIAL TESTIMONY.

JUSTICE SHAW HAD A QUESTION.

LET'S MOVE, A MOP MOMENT, INTO THE SHACKLING. -- LET'S MOVE, A MOMENT, INTO THE SHACKLING. WOULD YOU TELL US HOW THAT CAME ABOUT AND WHY ISN'T IT HARMLESS ERROR, IN LIGHT OF REMAINING FACTS IN THE CASE?

MR. MARQUARD WAS SHACKLED DURING THE PENALTY PHASE OF HIS TRIAL, AFTER THE JURY HAD CONVICTED HIM, AND GIVEN THE CUMULATIVE ANALYSIS OF WHAT HAPPENED IN THIS CASE, MR. MARQUARD WAS SHACKLED, AND THIS WAS DURING THE PENALTY PHASE, SO EASY TELL VERSUS WILLIAMS DOESN'T -- SO ESTELL VERSUS WILLIAMS DOESN'T NECESSARILY APPLY.

HE WAS NOT SHACKLED DURING THE GUILT PHASE.

NO.

THAT IS WHY I AM TRYING TO FIND OUT. WHY THE SHIFT IN SHACKLING DURING THE PENALTY PHASE?

I BELIEVE -- I DON'T KNOW WHY THE COURT SHACKLED HIM DURING THE PENALTY PHASE, WHEN THEY DIDN'T DURING THE GUILT PHASE.

WAS THERE ANY DISCUSSION RELATIVE TO THE SHACKLING?

I CANNOT RECALL ANY DISCUSSION AS TO THE SHACKLING. AND IT WAS NOT, REALLY, ADDRESSED AT THE EVIDENTIARY HEARING, EXCEPT FOR WHY COUNSEL DIDN'T OPPOSE THE SHACKLING, AND I BELIEVE COUNSEL TESTIFIED HE COULDN'T THINK OF A REASON TO DO SO.

WHAT WAS THE NATURE OF IT? WAS HE SHACKLED TO A CHAIR OR WHAT?

I AM NOT SURE. I BELIEVE THE SHACKLES WERE ON HIS HANDS AND FEET BUT I AM NOT SURE. IF YOU WOULD LIKE, I COULD TRY AND FIND THAT ANSWER AND SUBMIT A SUPPLEMENTAL BRIEF.

WHY WASN'T IT HARMLESS ERROR?

I CAN ONLY SAY THAT IT WASN'T HARMLESS IN THIS CASE, BECAUSE EVEN THOUGH THE, MR. MARQUARD'S PRESUMPTION OF INNOCENCE WAS NOT GONE, MR. MARQUARD, AT THIS PHASE, WAS FIGHTING FOR HIS LIFE AND AT THE TIME HE WAS SHACKLED, THAT TENDED TO DEHUMANIZE MR. MARQUARD AND TAKE HIM OUT OF THE PERSPECTIVE TO THE JURY THAT THIS IS A HUMAN BEING THEY ARE SENTENCING, NOT SOMEBODY WHO IS SHACKLED BEFORE THEM.

DID THE ATTORNEY ACKNOWLEDGE THAT HE WAS, IN FACT, SHACKLED?

I BELIEVE HE DID, YES.

WAS THERE ANY QUESTION ABOUT WHETHER OR NOT SOMETHING OCCURRED THAT CAUSED THE TRIAL COURT TO SHACKLE HIM?

NO. I DON'T BELIEVE SO. I THINK IT WAS JUST TRIAL COURT. AND HE DID IT.

WAS THERE A TIMELY OBJECTION MADE TO THE SHACKLING?

I DON'T BELIEVE THERE WAS AN OBJECTION. I AM NOT POSITIVE.

YOU DON'T KNOW WHETHER DEFENSE COUNSEL OBJECTED TO IT OR NOT?

I DON'T BELIEVE COUNSEL DID, BECAUSE IT WAS RAISED AS INEFFECTIVE ASSISTANCE OF COUNSEL FOR COUNSEL NOT TO OBJECT TO THE SHACKLING. IF IT PLEASES THE COURT, I WOULD LIKE TO MOVE ON TO THE SECOND ISSUE I WOULD LIKE TO ADDRESS, THE INEFFECTIVE ASSISTANCE AT PENALTY PHASE, AND FIRST I WOULD LIKE TO ADDRESS THE CONFLICT OF ISSUE -- CONFLICT OF INTEREST ISSUE AS IT WAS RAISED. THE COURT DID NOT DENY IT IN ISSUING ITS OPINION OF RELIEF. THE COUNSEL CONFIRMED THAT HE AND CO-COUNSEL REPRESENTED HOE BART AND HARRISON PRIOR TO THE TIME HE -- HOBART AND HARRISON PRIOR TO THE TIME HE REPRESENTED JOHN MARQUARD AND HOBART HARRISON IS THE PERSON IN 1992 THAT SAID THAT MARQUARD STATED TO HIM THAT THE HEAD CHOP DID NOT KILL HER SO HE KILLED HER BY DECAPITATING HER.

WAS THERE A SENTENCE SOMETHING.

HE ENTERED A PLEA TO THE SECOND-DEGREE MURDER CHARGE TO WHICH HE PLED AND HE WAS SENTENCED IN 1992, AND THEY BEGAN REPRESENTATION OF JOHN MARQUARD, THE RECORD REFLECTS, IN 1991. AND COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING THAT EVEN THOUGH ABSHIRE'S CONFESSION TO HOBART AND HARRISON WAS MORE DIRECT EVIDENCE OF THE CRIME BECAUSE HE DECAPITATED WHEN THE DEFENDANT COULDN'T, AND THAT THE IMPEACHMENT EVIDENCE WAS AS TO THE ENTIRE VERSION OF HOW THIS OCCURRED. MICHAEL ABSHIRE TESTIFIED DURING JOHN MARQUARD'S GUILT PHASE THAT JOHN 346789 ARQUARD STABBED THE VICTIM IN THE SIDE AND THREW HER IN THE WATER AND DRIED TO DROWN HER AND ONLY AFTER SHE WAS NOT DEAD, THAT HE STABBED THE VICTIM AND TRIED TO CHOP OFF HER HEAD, AFTER JOHN MARQUARD TOLD HIM TO, BUT THIS REFUTES THE TESTIMONY AND WOULD HAVE BEEN EXCELLENT IMPEACHMENT MATERIAL, BUT COUNSEL DID NOT PRESENT IT, AND IN RESPONSE TO THE STATE'S QUESTIONING AT THE EVIDENCIARY HEARING, COUNSEL TESTIFIED THAT HE DID NOT PRESENT THIS EVIDENCE IN MITIGATION, BECAUSE BASED ON HIS PRIOR REPRESENTATION OF MR. HARRISON, HE DID NOT BELIEVE MR. HARRISON WAS CREDIBLE, AND HE BELIEVED MR. HARRISON WOULD BE UNCONTROLLABLE ON THE STAND BECAUSE HARRISON WAS UPSET WITH THE SENTENCE HE RECEIVED ON THE CHARGES FOR WHICH COUNSEL REPRESENTED HIM. THIS PROVES

A CONFLICT OF INTEREST. COUNSEL'S PRIOR REPRESENTATION OF HOBART HARRISON LIMITED THE REPRESENTATION OF JOHN MARQUARD, FORCED COUNSEL TO CHOOSE BETWEEN ALTERNATIVE COURSES OF ACTION, PREVENTED PRESENTATION OF IMPEACHMENT MATERIAL OR NOT, AND CONFLICT FREE COUNSEL WAS ELIMINATED FOR THE DEFENSE. HAD MR. MARQUARD HAD THE BENEFIT OF COUNSEL WHO HAD NOT ALREADY REPRESENTED HOBART HARRISON, THE STATE WOULD PRESENT CREDIBILITY BECAUSE HOBART HARRISON'S TESTIMONY COULD HAVE BEEN --

THERE IS NO QUESTION OF HARRISON BEING INVOLVED IN THIS CASE AND THEREFORE YOU ARE FAVORING A CLIENT THAT YOU MIGHT REPRESENT, YOU KNOW, IN THE SAME CASE. YOU ARE SAYING THAT THERE WAS SOME RELATIONSHIP HERE THAT WORKED TO THE DISADVANTAGE OF YOUR CLIENT.

YES.

BECAUSE OF, NOW, AND I AM NOT SURE I UNDERSTAND THAT, BECAUSE IF I UNDERSTAND THE LAWYER'S TESTIMONY, THEY ARE SAYING THAT THEIR RELATIONSHIP WORKED TO THE ADVANTAGE OF YOUR CLIENT, BECAUSE THEY KNEW HOW UNRELIABLE THIS WITNESS WAS, AND THAT HE WAS CAPABLE OF BLOWING UP THE WHOLE CASE IN THEIR FACE, IF THEY PUT HIM ON THE STAND, AND, REALLY, THE FACT THAT THEY HAD REPRESENTED HIM AND KNEW HIM WORKED TO THE ADVANTAGE OF YOUR CLIENT, BECAUSE A BLOW-UP DIDN'T OCCUR.

FIRST, I DON'T BELIEVE THAT COUNSEL EVER TESTIFIED THAT THEY THOUGHT IT WAS TO THEIR ADVANTAGE. COUNSEL DID NOT, THAT THEY HAD PRIORLY REPRESENTED MR. HARRISON AND SECOND, EVEN IF HE, IT COULD EVEN BE ARGUED THAT IT WAS TO THEIR ADVANTAGE THAT THEY CHOSE NOT TO PRESENT THIS TREMENDOUS MITIGATION AND IMPEACHMENT EVIDENCE, BASED.

THAT PRIOR REPRESENTATION, THAT MUST BE REASONABLE STRATEGY UNDER STRICKLAND, DURING THE PENALTY PHASE OF JOHN MARQUARD'S TRIAL. AT THIS POINT HE WAS CONVICTED OF A FIRST-DEGREE MURDER THAT INVOLVED A DECAPITATION THAT WAS ESSENTIALLY BASED ON MICHAEL ABSHRIRE'S TESTIMONY. MR. CHIEF JUSTICE

YOU ARE INTO YOUR REBUTTAL TIME.

I WOULD LIKE TO FINISH THIS STATEMENT QUICKLY. BUT HAD COUNSEL PRESENTED THIS IMPEACHMENT EVIDENCE AND EVIDENCE THAT JOHN WAS, IN FACT, LESS CULPABLE, THERE IS A REASONABLE PROBABILITY THAT THE JURY WOULD HAVE DISCOUNTED ALL OF ABSHIRE'S TESTIMONY AND THAT THE OUTCOME WOULD HAVE BEEN DIFFERENT. THIS IS NOT A REASONABLE STRATEGY. AT THE PENALTY PHASE, COUNSEL HAD ABSOLUTELY NOTHING TO LOSE, AND I WOULD LIKE TO SAVE MY REMAINING TIME FOR REBUTTAL. MR. CHIEF JUSTICE

THANK YOU. MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY REPRESENTING THE STATE OF FLORIDA. WITH RESPECT TO THE CONFLICT OF INTEREST CLAIM AS RELATED TO HARRISON, IT IS DIFFICULT, AS JUSTICE ANSTEAD SAID, TO SEE HOW THIS ACT HAD IN DETRIMENT TO MR. MARQUARD. COUNSEL KNEW WHO MR. HARRISON WAS, AND PERHAPS WE COULD SKRAUBL OVER THE PRECISE COURSE -- SQUABBLE OVER THE PRECISE SOURCE OF THAT KNOWLEDGE, BUT BE THAT AS IT MAY, THEY KNEW WHO HOBART HB %M=9 WAS. THEY KNEW HE=n WAS LIKE TO BE AN UNCONTROLLABLE WITNESS.

BUT WHAT WAS THE DOWN SIDE OF CALLING HIM IN THE PENALTY PHASE IF, IN FACT, THAT MR. HARRISON WAS GOING TO SAY THAT THE CODEFENDANT WAS THE MORE CULPABLE PERSON. I MEAN, AT THAT POINT THE DEFENDANT HAD ALREADY BEEN CONVICTED OF FIRST-DEGREE MURDER AND HE WAS TRYING TO GET A SENTENCE LESS THAN DEATH. SO WHAT WOULD HAVE

BEEN THE DOWN SIDE TO CALLING MR. HARRISON?

JUSTICE QUINCE, LET ME ANSWER THAT QUESTION IN THIS WAY. IF THEY HAD CALLED HOBART HARRISON AS A WITNESS, AND IF HOBART HARRISON HAD BLOWN-UP ON THE WITNESS STAND, AS COUNSEL --

WHAT DOES THAT MEAN EXACTLY? WHAT DOES "BLOW UP ON THE WITNESS STAND" MEAN?

WE DON'T KNOW WHAT HE WOULD HAVE SAID. WE KNOW THAT COUNSEL BELIEVED THAT MR. HARRISON WOULD BE AN UNCONTROLLABLE WITNESS THAT, THEY DID NOT KNOW WHAT HE WAS LIABLE TO SAY FOR SURE, THAT THEY WERE NOT WILLING TO VOUCH FOR HIS CREDIBILITY.

LET ME ASK YOU THIS. HOW DO WE KNOW THAT HARRISON WAS GOING TO SAY WHATEVER HE WAS GOING TO SAY? AT SOME POINT, THE DEFENSE ATTORNEYS KNEW THAT HE WAS GOING TO MAKE SOME STATEMENT THAT, REALLY, INCULPATEED THE CODEFENDANT MORE THAN THIS DEFENDANT, CORRECT

I AM NOT SURE IF WE CAN SAY THAT IT WOULD HAVE INCULPATEED MR. ABSHIRE MORE THAN MR. MARQUARD.

BUT THEY KNEW, PRIOR TO THE PENALTY PHASE THAT, THAT IS WHAT MR. HARRISON WAS GOING TO SAY, CORRECT?

YES, MA'AM. THAT IS WHAT THEY SAID, BUT THEY MADE A DETERMINATION, BASED UPON THEIR KNOWLEDGE OF THIS WITNESS, THIS WITNESS'S PROPENSITY, AND THEIR LACK OF WILLINGNESS TO VOUCH FOR THIS WITNESS, WHICH IS THE SORT OF THING THAT LAWYERS DO, AND DECIDED NOT CALL HIM AS A WITNESS.

WAS MR. HARRISON'S, WAS THERE KNOWLEDGE OF MR. HARRISON'S POSSIBLE TESTIMONY IN THE FORM OF A DEPOSITION OR SOME PRIOR TESTIMONY OR WHAT?

FORM OF DEPOSITION.

OKAY. AND SO WHETHER THEY PUT HIM ON THE STAND OR NOT AND WHETHER E DECIDED TO SAY SOMETHING DIFFERENT, THEY WOULD HAVE HAD THE DEPOSITION TESTIMONY TO IMPEACH HIM WITH, CORRECT?

YES, MA'AM. AND THEN THEY WOULD HAVE BEEN IN THE POSITION OF IMPEACHING THEIR OWN WITNESS IN FRONT OF THE JURY THAT THEY WERE TRYING TO ASK NOT TO KILL JOHN MARQUARD. SO, AGAIN, WHAT I AM SAYING IS, IF THEY HAD PUT HOBART HARRISON ON THE WITNESS STAND, IT WOULD HAVE BEEN A REASONABLE CHOICE. WE WOULD HAVE BEEN HERE ARGUING THAT IT WAS NOT A REASONABLE CHOICE, I WAGER, BUT NONETHELESS A REASONABLE CHOICE. AT THE SAME TIME NOT PUTTING MR. HARRISON ON THE WITNESS STAND IS, ALSO, A REASONABLE CHOICE, BASED ON THESE LAWYER'S KNOWLEDGE, THE FACTS AND CIRCUMSTANCES OF THE CASE, WHAT THE EVIDENCE WAS AND WHAT THE EVIDENCE WOULD HAVE SHOWN AND THE INCONSISTENCY BETWEEN MR. HARRISON'S STATEMENT OR OTHER EVIDENCE AT TRIAL AS WELL AS THE FACT THAT THIS COURT HAS CONSISTENTLY REFUSED TO DEFINE A CHECKLIST OF MITIGATION. THIS COURT DOESN'T SECOND-GUESS TRIAL LAWYER'S DECISIONS. THIS WAS AN INFORMED DECISION THAT THEY MADE, AND NOW THEY ARE BEING CRITICIZED FOR IT, BUT IT IS NOT A DECISION THAT THEY MADE WITHOUT KNOWING THE FACTS. THEY KNEW THE FACTS. IN THIS CIRCUMSTANCE, THEY KNEW FAR MORE ABOUT THE POTENTIAL BACK LACK THAT THIS WITNESS COULD HAVE HAD THAN, PERHAPS, IS THE COMMONPLACE OR THE TYPICAL STATE OF AFFAIRS, BUT NONETHELESS, THEY MADE AN INFORMED DECISION. THE STANDARD IS NOT HOW PRESENT COUNSEL WOULD TRY THE CASE. IT IS NOT HOW THE BEST LAWYER WOULD TRY THE CASE. IT IS WHETHER A REASONABLE LAWYER COULD HAVE DONE

WHAT THEY DID, AND I WOULD SUBMIT THAT THAT STANDARD IS CLEARLY MET WITH RESPECT TO MR. HARRISON.

DON'T WE NEED MORE, THOUGH, THAN JUST A SPECULATIVE OUT OF CONTROL WITNESS OR BLOWN-UP? THAT IS I AM CONCERNED, HERE, WITH WHAT IT WAS THAT THEY REASONABLY COULD HAVE PROJECTED THE WITNESS WOULD HAVE SAID. THAT IS THAT, IF THEY HAD KNOWLEDGE, FOR INSTANCE, THAT AT SOME OTHER TIME, THE WITNESS HAD TOLD THEM A COMPLETELY DIFFERENT VERSION, AND IT SAID THAT THEIR CLIENT WAS CLEARLY THE REAL BAD GUY OR HOWEVER WE WANT TO DESCRIBE IT HERE, BUT I AM CONCERNED, HERE, THAT THEY APPARENTLY IT WAS JUST THIS, THAT HE WAS A STRANGE GUY, AND, BUT AS OPPOSED TO HIM SAYING SOMETHING DETRIMENTAL TO THEIR CLIENT, AND THE ANALOGY THAT COMES TO MY MIND WOULD BE THAT, IF THEY HAVE GOT AN EYEWITNESS TO THE CRIME, WHO SAID IT WAS SOMEBODY ELSE THAT DID IT, THEN IT SEEMS TO ME THEY WOULD BE HARD PRESSED NOT TO HAVE TO PUT THAT KIND OF WITNESS ON THE WITNESS STAND, WITHOUT A VERY GOOD REASON, ORDINARILY, SO WHAT IS THE VERY GOOD REASON, HERE, OTHER THAN THIS THING ABOUT UNCONTROLLABLE OR BLOWING UP?

YOU ARE ASKING ME A TWO-PART QUESTION. LET ME START BY SAYING WHAT MR. HARRISON WOULD HAVE SAID JOHN MARQUARD TOLD HIM ABOUT THE CRIME. MARQUARD HAD TOLD HARRISON THAT HE, MARQUARD DIDN'T KNOW THE VICTIM AND DIDN'T KNOW ANYTHING ABOUT IT. THIS IS DIRECTLY CONTRARY TO MARQUARD'S OWN CONFESSION TO LAW ENFORCEMENT. SO, I MEAN, FROM THE VERY BEGINNING, IF THEY HAD PUT HOBART HARRISON ON THE WITNESS STAND, THEY WOULD HAVE PROVED THEIR OWN CLIENT TO BE A LIAR. THAT IS THE STARTING POINT. THE SECOND STARTING POINT IS THIS, OR THE SECOND COMPONENT TO YOUR QUESTION, JUSTICE ANSTEAD, IS THIS. LAWYERS HAVE TO MAKE GUT-CALL DECISIONS ABOUT WITNESSES. THIS COURT HAS ALWAYS HELD THAT. EVERY COURT HAS ALWAYS HELD THAT AND IT IS WHAT STRICKLAND VERSUS WASHINGTON STANDS FOR. WE DO NOT SECOND-GUESS LAWYER'S DECISIONS. THESE TWO TRIAL LAWYERS WERE EXTREMELY EXPERIENCED CAPITAL DEFENSE ATTORNEYS. LEAD COUNSEL WAS HOURDZ PEARL WHO IS -- WAS HOWARD PEARL WHO IS, OF COURSE, NOW DECEASED, LEAD COUNSEL. HE HAS BEEN AROUND, A BUNCH OF CAPITAL CASES. MR. WARD WAS ALSO AN EXTREMELY EXPERIENCED ATTORNEY WHO WAS KNOWLEDGEABLE IN THE AREA, ST. JOHNS COUNTY. BOTH OF THESE MEN WERE. LAWYERS HAVE TO BE ABLE TO MAKE DECISIONS ABOUT WHAT WITNESSES TO CALL AND WHAT WITNESSES NOT TO CALL, AND IF WE TAKE THAT AWAY FROM THEM, THE WHOLE PREMISE OF STRICKLAND COLLAPSES IN ON IT SELF. LAWYERS HAVE TO BE ABLE TO DO WHAT LAWYERS DO. THERE IS NO, AGAIN, AND I AM COMING BACK TO USING THE WORD "CHECKLIST".

CLEARLY IT IS NOT A BLANK CHECK OR HAVING COMPETENT COUNSNECESSARILY STRICKLAND WOULD MEAN NOTHING AT ALL, BUT YOU ARE SAYING, NOW, THAT THERE WAS A SPECIFIC NEGATIVE DOWN SIDE, THAN IS THAT THIS WITNESS WOULD HAVE SAID THAT, WELL, MARQUARD DENIED ANY INVOLVEMENT IN THIS, AND DENIED THAT HE PARTICIPATED AT ALL. IS THAT CORRECT?

YES, YOUR HONOR. THAT'S CORRECT. OF COURSE MARQUARD HAD CONFESSED TO LAW ENFORCEMENT.

MOVE, IF YOU WOULD MOVE TO THE HANDCUFFING ISSUE.

AND YOU TOOK MY LINE, JUSTICE WELLS. MR. MARQUARD WAS NOT SHACKLED. HE WAS HANDCUFFED. IT WAS ARTFULLY STYLED. THE CLAIM IS THAT HE WAS HANDCUFFED. THERE HAS BEEN NO EVIDENCE PRESENTED AS TO WHETHER HE WAS HANDCUFFED AND, AS JUSTICE SHAW POINTED OUT, AT WORST, IT IS HARMLESS ERROR. A DEFENDANT DOES NOT ENTER THE PENALTY PHASE WITH A CLEAN SLATE AND IN ANY EVENT, THERE HAS BEEN NO SHOWING THAT THE JURY EVER SAW MR. MARQUARD HANDCUFFED IN THE 3.850 MOTION, ITSELF, IT IS ONE PHRASE WITHIN

A HEADING TO A CLAIM.

BUT WHY WAS HE HANDCUFFED AT THAT STAGE IN THE TRIAL?

I DON'T KNOW THAT HE WAS.

WAS THERE ANY DISCUSSION OF THIS BY THE LAWYERS OR ANYTHING?

NO, YOUR HONOR. THE RECORD DOES NOT REVEAL THAT MR. MARQUARD WAS, IN FACT, HANDCUFFED. IT DOESN'T SHOW, ONE WAY OR THE OTHER.

WAS THERE A TIMELY OBJECTION TO IT?

NO, YOUR HONOR, THERE WAS NOT. THERE WAS NO OBJECTION TO IT, WHICH WOULD LEAD ME TO BELIEVE THAT THERE WAS NO, IT MAY NOT EVEN BE THE TRUE STATE OF AFFAIRS. I DON'T KNOW. IT WAS NOT DEVELOPED, AT THE EVIDENTIARY HEARING, TO THE BEST OF MY RECOLLECTION, BUT I WOULD REFER TO THE RECORD, ITSELF, AS FAR AS THAT IS CONCERNED. WITH RESPECT TO THE PROPORTIONAL PROPORTIONALITY, NEW-EVIDENCE ISSUE, I AM NOT SURE, I GUESS THAT IS THE BEST WAY TO DESCRIBE IT, MICHAEL ABSHIRE NEVER AND SOLVED JOHN MARQUARD OF INVOLVEMENT IN THIS MURDER. MICHAEL ABSHIRE NEVER SAID THAT JOHN MARQUARD DID NOT CUT THE DEFENDANT, THE VICTIM'S THROAT, BEFORE MR. ABSHIRE DID ANYTHING AT ALL. IN FACT, HE SAID THAT MR. MARQUARD DID CUT THE VICTIM'S THROAT. MR. MARQUARD -- EXCUSE ME, MR. ABSHIRE NEVER SAID THAT HE KILLED THE VICTIM. MR. ABSHIRE SAID HE THOUGHT SHE MIGHT STILL BE ALIVE, AND HE DIDN'T WANT TO HEAR HER HURT ANYMORE, TO QUOTE HIM IN THIS PROCEEDING. BUT THE BOTTOM LINE STILL REMAINS THAT MR. MARQUARD IS THE MORE CUPABLE OF THE TWO. MR. MARQUARD IS THE ONE WHO BEGAN DISCUSSIONS OF KILLING THE VICTIM IN THIS CASE, AS THIS COURT POINTED OUT ON DIRECT APPEAL, IN SOUTH CAROLINA, ON THEIR JOURNEY FROM NORTH CAROLINA TO ST. JOHNS COUNTY. MR. MARQUARD WAS THE ONE WHO STRUCK THE FATAL BLOW. MR. MARQUARD IS THE ONE WHO STABBED THE VICTIM FIRST. MR. MARQUARD WAS DRIVING THE NIGHT OF THE MURDER, AND THIS KIND OF DOVETAILS INTO THE DISCUSSION WITH RESPECT TO INTOXICATION, AND THE REASON MR. MARQUARD WAS DRIVING, ACCORDING TO MR. ABSHIRE, I BELIEVE, BOTH, AT THE 3.850 PROCEEDING AND AT THE ORIGINAL TRIAL, WAS THAT MR. MARQUARD DROVE BETTER WHEN HE WAS DRINKING THAN MR. ABSHIRE DID WHEN HE WAS. THERE HAS NEVER BEEN ANY DISPUTE THAT THESE TWO MEN WERE DRINKING ON THE NIGHT OF THE MURDER. MR. ABSHIRE, I DON'T BELIEVE, CAN BE FAIRLY SAID TO HAVE GUIDED MR. MARQUARD INTO THE WOODS. I THINK IT IS MORE OF A, OR AT LEAST MY READING OF IT, AND I AM NOT TRYING TO SPIN THIS, BUT IT SOUNDS MORE, TO ME, LIKE YOU HAD TWO GUYS THAT WERE TRYING TO GET A CAR INTO THE WOODS ON A DIRT ROAD IN THE RAIN, AND THE PASSENGER GOT OUT TO TRY TO KEEP THEM FROM GETTING STUCK, WHAT IT READS MORE, TO ME, LIKE. THE RECORD SPEAKS FOR ITSELF, AND LIKE I SAID, I AM NOT TRYING TO SPIN THAT, ONE WAY OR THE OTHER, BUT IT CERTAINLY DOESN'T LOOK LIKE MR. ABSHIRE, BY PUTTING ON A CAMOUFLAGE PORCH-AND GET OUT OF THE CAR WITH -- PONCHO AND GETING OUT OF THE CAR WITH A FLASHLIGHT, WAS DIRECTING HIM INTO THE WOODS.

WAS THERE ANY REFERENCE TO WHAT THE VICTIM WAS DOING DURING THIS RIDE TO THE WOODS?

MY MEMORY OF THE RECORD, JUSTICE QUINCE, IS THAT SHE HAD BEEN TOLD THEY WERE GOING TO ATTEND A PARTY AT SOMEBODY'S HOUSE OUT IN THE WOODS, AND AS, I DON'T REMEMBER THERE BEING ANY DISCUSSION OR ANY INDICATION THAT THE VICTIM WAS, DURING THIS RIDE OUT THERE, IN SOME KIND OF FEAR FOR HER LIFE OR ANYTHING LIKE. THAT APPARENTLY IT WAS, I SUPPOSE, WHAT WOULD BE DESCRIBED AS NORMAL CONVERSATION BETWEEN THREE. THERE WAS NO, THERE HAS NEVER BEEN ANY INDICATION OR SUGGESTION THAT THEY WERE TELLING HER THEY WERE GOING TO KILL HER, ONCE THEY GOT HER OUT IN THE WOODS OR ANYTHING LIKE THAT. THEY JUST HAD THIS PARTY THEY WERE GOING TO. YOU KNOW, I DON'T KNOW WHAT

THE CONVERSATION WAS, BUT NOTHING OF NOTHING OF CONSEQUENCE OR SIGNIFICANCE HAS EVER BEEN PROPOSED, AT LEAST THE BEST OF MY MEMORY. WITH RESPECT TO CREDIBILITY DETERMINATIONS MADE BY THE TRIAL COURT, THE LAW IN THIS STATE IS VERY CLEAR THAT CREDIBILITY DETERMINATIONS ARE THE PROVINCE OF THE FINDER OF FACT. THEY ARE NOT THE PROVINCE OF THIS COURT. THIS COURT HAS SAID THAT REPEATEDLY. I CITED THE CASES IN THE STATE'S BRIEFS, MILLS, HUGGINS AND SPAZIANO AND MY NAMES ON EVERY ONE OF THEM, BECAUSE I KEEP LOSING ON THAT ISSUE. THE TRIALCOURT IN THIS CASE, MADE A CREDIBILITY DETERMINATION WITH RESPECT TO MICHAEL ABSHIRE'S TESTIMONY AT THE 3.850 HEARING T DOESN'T MATTER WHETHER OR NOT THE TRIAL JUDGE THAT HEARD THE 3.850 MOTION WAS THE SAME JUDGE WHO HEARD THE TRIAL FEST MONEY. WHAT MATTERS -- THE TRIAL TESTIMONY. WHAT MATTERS IS WHAT HE SAW AND OBSERVED WITH RESPECT TO MR. ABSHIRE'S CREDIBILITY ON THE WITNESS STAND. HE MADE THOSE DETERMINATIONS, AS THE LAW STATES THAT HE MUST DO IN THIS STATE AND AS HE HAS TO DO AS THE TRIAL JUDGE, IN ORDER TO RESOLVE CONFLICTING TESTIMONY. THAT IS SUPPORTED BY THE RECORD AND SHOULD NOT BE DISTURBED BY THIS COURT. WITH FORCE ANY OTHER CLAIMS CONTAINED WITHIN THE BRIEF, WELL ONE FINAL COMMENT. MR. ABSHIRE WAS QUITE CLEAR, IN HIS EVIDENTIARY HEARING TESTIMONY THAT, THE VICTIM'S THROAT WAS CUT BEFORE MR. ABSHIRE DID ANYTHING. MR. ABSHIRE IS NOT THE MOST CULPABLE, AND, IN FACT, IN THIS COURT'S ORIGINAL OPINION, IN THE ABSHIRE CASE THAT REVERSED THAT CONVICTION AND SENTENCE, ONE OF THE MITIGATORS THAT WAS FOUND WITH RESPECT TO MR. ABSHIRE WAS THAT HE ACTED UNDER THE POSSIBLE DOINATION OF MR. MARQUARD. IT WAS FOUND AS A NONSTATUTORY MITIGATOR. THE BOTTOM LINE IS THAT JOHN MARQUARD WAS THE MORE CULPABLE OF THE TWO, AND BECAUSE THAT IS THE CASE THERE, IS NO DISPROPORTIONATE SENTENCE. MR. MARQUARD'S DEATH SENTENCE SHOULD BE AFFIRMED. UNLESS THE COURT HAS QUESTIONS, I WILL STAND ON THE BRIEF WITH RESPECT TO THE 3.850 APPEAL AND THE STATE'S RESPONSE TOTHE HABEAS. MR. CHIEF JUSTICE

REBUTTAL.

THANK YOU. FIRST, REGARDING COUNSEL'S FAILURE TO PRESENT ABSHIRE'S CONFESSIONTO HOBBYART HARRIS ONE. COUNSEL REPEATEDLY TESTIFID, IN RESPNSE TO THE STATE, THAT THEY FELT MR. HARRISON WOULD BE UNCONTROLLABLE, BECAUSE HE WAS ESSENTIALLY UPSET WITH THE SENTENCE HE RECEIVED ON THE CHARGES FOR WHICH THEY REPRESENTED HIM. COUNSEL, WHO HAD NOT REPRESENTED MR. HARRISON, WOULD HAVE NO SUCH BELIEF. SECOND, WE DID PRESENT MR. HARRISON AT THE EVIDENTIARY HEARING, AND HE CONFIRMED HIS TESTIMONY, EVEN THOUGH HE WAS ANGRY AT CCRC FOR TAKING HIM OUT OF HIS PRISON AND BRINGING HIM TO TESTIFY.

WAS THERE SOME OBJECTIVE BEHAVIOR DURING THIS EVIDENTIARY HEARING, THAT WOULD DEMONSTRATE THE DIFFICULTIES WITH THIS WITNESS? OR HIS ADVERSITY TO THE LEGAL SYSTEM? ANYTHNG LIKE THAT?

I DON'T BELIEVE SO. MR. -- HE WAS NOT AS COOPERATIVE WITH US, BUT HE WAS ANGRY WITH US. BUT MR. ABSHIRE --

WHAT DOES THAT MEAN? WHEN YOU SAY -- DID ANYTHING OCCUR? COULD YOU HELP US.

HE MENTIONED THAT, WHEN HE SPOKE TO THE LEAD ATTORNEY, HE SAID HE DIDN'T WANT TO COME HERE AND HE WOULD APPRECIATE US JUST LEAVING HIM OUT OF THIS, BUT HE, ALSO, TESTIFIED THAT, WHIE HE WAS THERE, HE MIGHT AS WELL TELL THE TRUTH, AND TE TRUTH IS THAT ABSHIRE DID TELL HIM THAT HE CHOPPED OFF THE VICTIM'S HEAD, BECAUSE JOHN CULD NOT KILL HER. AND SECONDLY, THIS WOULD BE VERY POWERFUL IMPEACHMENT, BECAUSE, FIRST, MICHAEL ABSHIRE, ALSO, INITIALLY LIED TO THE POLICE. THIS IS NOT REALLY ALL THAT RELEVANT. SECOND, ABSHIRE DENIED ALL INVOLVEMENT IN THE CRIME, AND THIS IS INCREDIBLY POWERFUL MITIGATION AND IMPEACHMENT EVIDENCE THAT COUNSEL SHOULD HAVE

PRESENTED.

BUT WOULDN'T HAVE PUTING HARRISON ON HAVE PAINTED THE DEFENDANT AS A LIAR? REALLY.

IT MIGHT HAVE, BUT IT, ALSO, WOULD HAVE PAINTED MICHAEL ABSHIRE, BASICALLY, THE SOLE WITNESS AGAINST JOHN MARQUARD, AS LIAR AS WELL. AND IN FACT --.

ISN'T THAT A REASONABLE CHOICE THAT COUNSEL WOULD HAVE NOT TO PUT A WITNESS ON, IF IT IS GOING TO SHOW THAT THE DEFENDANT, WHO IS FIGHTING FOR HIS LIFE, IS A LIAR?

I DON'T BELIEVE IT WAS REASONABLE IN THIS CASE, BECAUSE THE SOLE REASON FOR HIS CONVICTION WAS ESSENTIALLY THE TESTIMONY OF MICHAEL ABSHIRE. IF THEY COULD PROVE THAT MICHAEL ABSHIRE WAS, IN FACT, A LIAR, AND IT IS CONSISTENT WITH COUNSEL'S CROSS-EXAMINATION THAT ABSHIRE DID LIE WHEN HE WAS FIRST ARRESTED, THIS WOULD HAVE TILTED THE BALANCE. THIS WOULD HAVE PROBABLY AFFECTED THE OUTCOME.

DID YOUR CLIENT CONFESS TO THE MURDER?

MY CLIENT CONFESSED TO LAW ENFORCEMENT THAT HE AND ABSHIRE, TOGETHER, PLANNED TO DO THIS, AS ABSHIRE TESTIFIED. THEY CAME UP WITH THEIR PLANS. HE REMEMBERED NOTHING, AND THEN THE NEXT THING HE REMEMBERED, HE WAS STANDING OVER THE VICTIM IN THE WOODS, WITH A KNIFE, AND HIS FINGER WAS CUT. THIS IS NOT INCONSISTENT WITH HOBART HARRISON'S TESTMONY NOR IS IT CONSISTENT WITH THE FACTS OF THE CRIME. HOBART HARRISON TOLD HIM THAT HE WASKo TOLD THE VICTIM WAS STABBED IN THE SIDE. AND ALSO THAT ABSHIRE ATTEMPTED TO DECAPITATE THE VICTIM. THERE WERE WOUNDS ON THE VERTEBRAE. THIS IS CONSISTENT WITH THE TESTIMONY AT TRIAL AND IT ONLY CONFLICTED WITH ABSHIRE'S OWN TESTIMONY, WHO WAS THE TESTIMONY OF AN ACCOMPLICE, WHO WAS TESTIFYING WHILE AWAITING SENTENCING ON HIS OWN CASE, THAN COURT HAS HELD -- MR. CHIEF JUSTICE

YOUR TIME IS UP. THANK YOU VERY MUCH. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.