Oba Chandler v. State of Florida

CHIEF JUSTICE: CHANDLER VERSUS STATE. YOU MAY PROCEED, IF COUNSEL IS READY.

MAY IT PLEASE THE COURT. I AM BAYA HARRISON, HERE ON BEHALF OF OBA CHANDLER. THIS IS AN APPEAL OF AN ORDER DENYING A POSTCONVICTION MOTION IN THE CASE. THE ESSENCE OF THIS APPEAL IS THAT THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THREE SPECIFIC AREAS OF DEFENSE COUNSEL INEFFECTIVENESS, EACH OF WHICH PERHAPS STANDING ALONE WOULD NOT WARRANT A NEW TRIAL, BUT WHEN CONSIDERED CUMULATIVELY, CERTAINLY DO. FIRST OF ALL, I WOULD LIKE TO COMMENT ON THE FIRST ISSUE OF PROSECUTORIAL MISCONDUCT AND THE DEFENSE COUNSEL'S ATTEMPT TO PROTECT THE DEFENDANT. THE PROSECUTOR MADE A RATHER VICIOUS ATTACK ON DEFENSE COUNSEL AND HIS CLIENT. IT WAS THOUGHTLESS AND PETTY. HOWEVER, DEFENSE COUNSEL DID NOT OBJECT AND I WOULD LIKE TO NOTE A FEW THING THAT IS THE PROSECUTOR SAID.

WAS IT CLAIMED AS A FUNDAMENTAL ERROR ON APPEAL?

YES, SIR, AND YOU DETERMINED IT WAS NOT. STILL, HOWEVER, IT MAY BE FRAMED IN THE CONTEXT OF AN INEFFECTIVE CLAIM. CUMULATIVELY, WE SAY, SUPPORTING OUR POSITION, THAT A NEW TRIAL SHOULD BE GRANTED.

BUT THE DEFENSE ATTORNEY DID OBJECT. WE HAVE CASES SOMETIMES WHERE THERE IS NO OBJECTION TO CLOSING ARGUMENT. YOU WONDER IF THE DEFENSE ATTORNEY ACTUALLY WAS SITTING THERE. THIS DEFENSE ATTORNEY ACTUALLY DID OBJECT TO CERTAIN PORTIONS, DID HE NOT?

YOUR HONOR, HE CERTAINLY DID.

CAN YOU EXPLAIN WHY HE DIDN'T OBJECT TO OTHER PARTS OF THE CLOSING ARGUMENT?

YES. HE SAID THAT THE BODY LANGUAGE, THE CHEMISTRY THAT HE FELT BETWEEN THE JURORS AND HIMSELF WAS SUCH THAT HE DIDN'T THINK THE PROSECUTOR WAS MAKING ANY POINTS, AND THEREFORE HE DID NOT OBJECT. BUT THIS IS MORE AFFECTION CUES. HE WAS OBLIGATED TO ZEALOUSLY DEFEND MR. CHANDLER AND TO SIT THERE AND TAKE THE KIND OF ABUSE THAT HE TOOK, CERTAINLY WAS NOT EFFECTIVE ASSISTANCE OF COUNSEL.

ISN'T IT TRUE THAT TRIAL COUNSEL MAKE TACTICAL DECISIONS DURING A TRIAL, NOT TO STAND UP AND OBJECT EVERY SINGLE TIME, BECAUSE THEY RISK GETTING ON THE JURY'S BAD SIDE, IF THEY START OBJECTING EVERY TIME THE STATE SAYS SOMETHING, AND SO IT IS A DECISION I AM GOING TO OBJECT TO SOME BUT I AM NOT GOING TO OBJECT TO ALL OF THEM, AND IF I FEEL THAT HE SOUGHT NOT CAUSING MY CLIENT ANY DAMAGE AND MAY BE CAUSING HIMSELF SOME DAMAGE IN HIS ARGUMENT, I AM NOT GOING TO STAND UP AND OBJECT.

THAT, AGAIN, YOUR HONOR, IN THIS PARTICULAR CASE IS MORE OF AN EXCUSE. THE COMMENTS THAT THE PROSECUTOR MADE WERE REALLY ROUGH, AND AT SOME POINT IN TIME, DEFENSE COUNSEL NEEDED TO STAND UP AND FIGHT FOR HIS CLIENT NOT JUST SIT THERE LIKE A PUNCHING BAG AND TAKE THESE KINDS OF COMMENTS.

HE DID TESTIFY, THOUGH, THAT MANY OF THE COMMENTS IN THIS CASE WOULD ACTUALLY WORK

AGAINST THE PROSECUTOR AND THAT THE JURY WOULD ACTUALLY HOLD IT AGAINST THE PROSECUTOR FOR GOING OVERBOARD.

THAT IS WHAT HE SAID, BUT YOU KNOW, YOUR HONOR, WHEN THE PROSECUTOR GETS UP AND SAYS, OF DEFENSE COUNSEL, THAT HE HAS BEEN, AND I QUOTE, COMPLETELY DISHONEST TO YOU, HE CALLED, AT ONE POINT HE CALLED THE DEFENSE LAWYER COWARDLY. ANOTHER TIME HE CALLED THE DEFENSE LAWYER OR AT LEAST SAID THAT WHAT THE DEFENSE COUNSEL DID WAS DISPICABLE. HE REFERRED TO THE ENTIRE CASE OF THE DEFENDANT AS, IN EFFECT, A SMOKE SCREEN. HE EVEN, THE PROSECUTOR GAVE HIS OPINIONS, WHICH HE IS NOT ALLOWED TO DO, AS TO THE EVIDENCE ON THE TRUTHFULNESS OF THAT EVIDENCE. AT ONE POINT IN TIME, HE SAID THE SUGGESTION WAS MADE WITH REGARD TO A FUEL TANK ISSUE, THAT THE GAS DIDN'T LEAK OUT. HE SAYS I FIND THAT HARD TO BELIEVE. I FIND --

COUNSEL, DO WE HAVE THE JURISPRUDENCE OF THIS COURT, AFTER WE HAVE LOOKED AT A PROBLEM AREA, AND WE HAVE, THE COURT HAS COME TO DETERMINE NATION SOME YEARS AGO, THAT IT IS NOT FUNDAMENTAL ERROR. IT IS NOT SOMETHING UPON WHICH RELIEF CAN BE GRANTED. HOW DOES THAT FACTOR IN? IS IT JURISPRUDENCE THAT WE CAN COME BACK ON AN INEFFECTIVE ASSISTANCE CLAIM, AND EVEN THOUGH THE COURT HAS ALREADY LOOKED AT THE SAME, IDENTICAL SUBJECT MATTER THAT, IT THEN CAN BE CHANGED THROUGH THE INEFFECTIVE ASSISTANCE ROUTE?

YES, YOUR HONOR, BECAUSE WE ARE NOT RELYING SOLELY ON THIS AS OUR ONLY ISSUE. I THINK, IF THAT IS THE ONLY ISSUE THAT WE HAD, YOU MIGHT SAY THAT YOU HAD ALREADY CONSIDERED IT AND WERE PROCEDURALLY-BARRED, BUT YOU KNOW, WHEN A PROSECUTOR GETS UP AND REFERS TO THE DEFENDANT AS MALEVOLENT, AS CHAMELEON LIKE, AS A BRUTAL RAPIST OR CONSCIOUS LESS MURDERER, NOW, THE LAWYER, THE DEFENSE COUNSEL HAS GOT NOT TO BE A POTTED PLANT. HE HAS GOT TO STAND UP AND RESIST THAT KIND OF THING AND OBJECT AND ASK THE COURT TO ASK THE JURY TO DISREGARD IT.

SO DON'T WE HAVE TO, THEN, IF I ACCEPT YOUR PREMISE THAT YOU CAN LOOK AT THE DEFENSE LAWYER'S CONDUCT, NOT ONLY IN THE CLOSING ARGUMENT, BUT YOU HAVE GOT TO BE TAKING IT IN CONTEXT, DID THIS DEFENSE LAWYER FUNCTION AS A REASONABLY-COMPETENT DEFENSE LAWYER, AS REQUIRED IN THE SIXTH AMENDMENT, THEN HOW DO WE GET AROUND OR HOW DO YOU GET AROUND THE DETAILED ORDER OF THE TRIAL COURT, WHICH REALLY GOES THROUGH THE ENTIRE WAY THAT THIS DEFENSE LAWYER PREPARED THIS CASE AND PRESENTED THIS CASE, TO SAY THAT NOT ONLY WAS THIS DEFENSE LAWYER NOT INEFFECTIVE, BUT THAT GIVEN THE CIRCUMSTANCES OF THIS CASE, THAT THIS WAS AN EXTREMELY EFFECTIVE DEFENSE LAWYER? AND ISN'T THAT, ALTHOUGH WE HAVE TO REVIEW THESE QUESTIONS, MIXED QUESTIONS OF LAW AND FACT, WE ARE NOT THERE, WOULDN'T WE JUST BE SECOND-GUESSING ALL OF THIS TO SAY, WELL, YEAH, WE THINK PROBABLY IN HINDSIGHT HE SHOULD HAVE OBJECTED TO A COUPLE OF THESE COMMENTS?

WELL, I HAVE THE GREATEST REGARD FOR JUDGE SHAFER, BUT I HAVE READ CASES WRITTEN BY THIS COURT, IN WHICH YOU MAKE IT ABSOLUTELY CLEAR THAT THESE PROSECUTORS MUST STOP THIS PERSONAL ATTACK ON COUNSEL AND PERSONAL ATTACK ON THE DEFENDANTS AND RESPECTFULLY, SINCE THIS IS HER OPINION, I JUST THINK THAT JUDGE SHAFER WAS WRONG.

WE ARE NOT -- BY SAYING THAT HE WASN'T IN EFFECTIVE AS, IN THE GUILT PHASE, WE ARE NOT APPROVING A PROSECUTOR MAKING THESE STATEMENTS. IT IS JUST THAT GOING BACK TO WHAT JUSTICE CANTERO SAYS, THE PROBLEM I THINK YOU HAVE IS THAT THERE COULD BE CASES WHERE A DEFENSE LAWYER HAS NOT OBJECTED AT ALL, AND IF THAT DEFENSE LAWYER HAD OBJECTED TO THAT ONE ARGUMENT, THERE WOULD HAVE BEEN A HARMLESS-ERROR ANALYSIS, AND THERE COULD HAVE BEEN A REVERSAL, AND I THINK THAT THAT IS A INTERESTING PROPOSITION, WHEN THAT DOESN'T HAPPEN, BUT TO TRY TO SAY THAT A DEFENSE LAWYER IS

GOING TO BE IN EFFECTIVE-BECAUSE THEY DON'T OBJECT TO ALL OF THE OBJECTIONABLE ARGUMENTS, I THINK, WOULD PUT US IN A VERY IMPOSSIBLE TASK, AND YOU, TOO, AS A DEFENSE LAWYER, IN DECIDING WHAT, IT IS YOUR DECISION WHAT YOU OBJECT TO.

I CERTAINLY UNDERSTAND THAT, YOUR HONOR, AND ALL I AM ASKING YOU IS TO CONSIDER IT IN TOTALITY OF THE OTHER CLAIMS, AND LET ME JUST -- BEFORE YOU MOVE ON TO THE SECOND CLAIM, HAVEN'T YOU SAID THAT THESE REMARKS WERE NOT SUFFICIENT TO EVISCERATE THIS TRIAL? SO WHAT IS YOUR PREJUDICE PRONG OF AN INEFFECTIVE-ASSISTANCE-OF-COUNSEL CLAIM, SO TESTIMONY -- SO EVEN IF WE SAID THAT THE DEFENSE ATTORNEY SHOULD HAVE OBJECTED TO THESE REMARKS?

I THINK, WHEN CONSIDERED IN THE TOTALITY OF THE CLAIMS, THERE IS A LIKELIHOOD, BASED UPON THE CIRCUMSTANTIAL EVIDENCE CASE THAT THE STATE HAD, REGARDING THE ROGERS HOMICIDES, THAT MR. CHANDLER MIGHT WE WILL HAVE BEEN FOUND NOT GUILTY, HAD HIS LAWYER --

WHAT ELSE ARE WE CONSIDERING, BEYOND HIS FAILURE TO OBJECT TO CERTAIN OF THE PROSECUTOR COMMENTS? CONSIDER IT WITH WHAT, TO GET TO A NEW TRIAL?

ABSOLUTELY, YOUR HONOR, AND THAT WOULD BE MY SECOND CLAIM. AS YOU KNOW, ABOUT THREE WEEKS BEFORE THE ROGERS HOMICIDES, A CANADIAN TOURIST, A YOUNG WOMAN WENT OUT WITH MR. CHANDLER ON HIS BOAT, SHE CLAIMS -- AT WHICH TIME SHE CLAIMED THAT HE RAPED HER. THE TRIAL COURT ALLOWED THIS IN EVIDENCE, AS LEGITIMATE WILLIAMS' RULE. WE ARE NOT COMPLAINING ABOUT THAT. IN FACT, DEFENSE COUNSEL DID A VERY GOOD JOB IN TRYING TO KEEP THAT EVIDENCE OUT. THE SECOND IN EFFECTIVE CLAIM IS BASED UPON DEFENSE COUNSEL'S DECISION, WHICH APPARENTLY WAS A SURPRISE TO MR. CHANDLER, TO ADMIT TO THE JURY, IN HIS OPENING STATEMENT, THAT HIS CLIENT WAS GUILTY OF RAPING THIS CANADIAN TOURIST. NOW, THIS WAS DISASTROUS.

WAS IT ADMISSION OR WAS IT STATEMENT THAT WE ARE NOT GOING TO CONTEST IT IN THIS PROCEEDING BECAUSE THIS IS A MURDER PROCEEDING AND NOT A RAPE PROCEEDING?

NO. THAT IS SPLITTING HAIRS. WHAT HE BASICALLY SAID WAS, WELL, WE ARE NOT GOING TO CONTEST THE FACT THAT THE STATE CAN PROBABLY PROVE THAT HE RAPED THIS WOMAN. I MEAN, THAT IS REALLY SPLITTING HAIRS. HE WAS SAYING, AS CHANDLER'S LAWYER, MY CLIENT RAPED THIS WOMAN, AND OUR POSITION IS THAT, ONCE THE TRIAL COURT MADE IT CLEAR THAT THIS COLLATERAL CLIMATE EVIDENCE WOULD BE PRESENTED TO THE JURY, DEFENSE COUNSEL WAS BOUND TO DO EVERYTHING WITHIN REASON TO DISPROVE THIS LADY'S ALLEGATIONS, CERTAINLY NOT TO ADMIT THEM. CERTAINLY CHANDLER HAD NOT BEEN CONVICTED FOR THE RAPE. HE WASN'T EVER EVEN TRIED FOR THE RAPE. SHE HAD NO PHYSICAL ABRASIONS. HER CLOTHES WEREN'T TORN. SHE DID NOT REPORT THIS INCIDENT, IMMEDIATELY UPON GETTING BACK TO THE DOCK.

SO IF HIS ATTORNEY DENIED THE RAPE ALLEGATION, THE DEFENDANT TOOK THE STAND AT THE TRIAL, CORRECT?

THAT'S CORRECT.

AND WOULD HE SUBJECT HIMSELF, THEN, TO CROSS-EXAMINATION REGARDING HIS DENIAL THAT A RAPE OCCURRED? IS THAT TRUE?

HE WOULD HAVE CERTAINLY BEEN SUBJECTED TO CROSS-EXAMINE.

AND ACCORDING TO HIS ATTORNEY, HIS EXPLANATION FOR WHAT HAPPENED ON THE BOAT WAS SO ILLOGICAL AND SO UNBELIEVABLE, THAT HE THOUGHT HE WAS GOING TO DESTROY ANY

CREDIBILITY HE HAD, NUMBER ONE, AND NUMBER TWO, CHARACTERIZE HIMSELF AS A MASOGENIST, REALLY, BECAUSE OF WHAT HE SAID THE VICTIM DID IN THAT CASE AND HOW HE TREATED HER, THAT IT WAS PERFECTLY APPROPRIATE THAT, IT WAS GOING TO EXPLODE IN HIS FACE, IF HE DENIED THAT THE RAPE OCCURRED AND ALLOWED HIS CLIENT TO TESTIFY ABOUT IT.

THAT IS A STRETCH. REMEMBER HE HADN'T BEEN CONVICTED. THERE WAS NO PHYSICAL EVIDENCE TO CORROBORATE WHAT THIS LADY SO. NO CONTUSIONS, NO BRUISES, NO TORN CLOTHES. HE SHOULD HAVE VIGOROUSLY RECESSED THAT ALLEGATION AND NOT ADMITTED IT.

BUT HIS CLIENT WASN'T GOING TO SAY WE HAD CONSENSUAL SEX. HIS CLIENT WAS GOING TO SAY MUCH MORE THAN THAT, AND HIS STORY ABOUT HOW IT WASN'T RAPE IS SO MUCH MORE UNBELIEVABLE THAN HIS, AND WASN'T THAT ANOTHER TRIAL STRATEGY?

THAT IS USING STRATEGY AND TACTICS AS AN EXCUSE FOR INEFFECTIVENESS, AND HERE IS HOW WE KNOW THIS. IT WAS AT THIS POINT THE DEFENSE COUNSEL WENT OFF THE DEEPENED, BECAUSE HE DIDN'T SAY TO CHANDLER, NOW, LOOK, I AM GOING TO ADMIT THAT YOU RAPED THIS WOMAN, AND SO WHEN YOU GET UP THERE, TO BE CONSISTENT, I WANT YOU TO SAY, YES, OKAY, I RAPED HER. HE TOLD HIS CLIENT TO ASSERT HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION, REGARDING THE BLAIR INCIDENT. NOW, YOUR HONOR, I ASK THAT YOU REMEMBER YOUR DAYS IN PRIVATE PRACTICE, BEFORE YOU WERE ELEVATED TO THE BENCH. CAN YOU IMAGINE HOW YOU WOULD HAVE FELT, TO SIT THERE WHILE YOUR CLIENT GETS UP ON THE WITNESS STAND AND TAKES THE FIFTH AMENDMENT OVER TWENTY TIMES? THIS WAS LEGAL SUICIDE. THIS WAS INEFFECTIVE ASSISTANCE OF COUNSEL. THIS, NO LAWYER, NO LAWYER USING REASONABLE JUDGMENT WOULD HAVE CONCOCTED THIS KIND OF --

DID HE WANT HIS CLIENT TO TESTIFY, OR DID HIS CLIENT WANT TO TESTIFY, OVER HIS OBJECTION?

-- OR HIS ADVICE?

IT IS MY UNDERSTANDING THAT BOTH DEFENSE COUNSEL AND THE DEFENDANT WANTED TO TESTIFY.

WHAT ABOUT THIS ISSUE OF THE SPILL OVER EFFECT, THOUGH, THAT IS COUNSEL'S BELIEF THAT, IF THE JURY REJECTED HIS CLIENT'S TESTIMONY ABOUT THE RAPE, THAT THEY WOULD, ALSO, REJECT HIS TESTIMONY WITH REFERENCE TO THE MURDER CHARGES?

I THINK THAT IS A POSSIBILITY, BUT CERTAINLY THE BETTER STRATEGY WOULD HAVE BEEN TO VIGOROUSLY PROTEST THIS ALLEGATION. A LOT OF LAWYERS JUST THINK THAT, ONCE A JUDGE SAYS I AM GOING ALLOW SOME WILLIAMS RULE IN, THE LAWYER JUST KIND OF GIVES UP AT THAT POINT. THAT DOESN'T MEAN THE LAWYER CAN'T VIGOROUSLY --

THE ISSUE IS NOT THE BETTER STRATEGY, ISN'T IT, AND THEN THE ISSUE IS THIS, OBVIOUSLY WHAT THE U.S. SUPREME COURT HAS SAID IS THAT YOU GIVE A GREAT DEAL OF LATITUDE TO THE LAWYERS MAKING THE DECISION ON THE GROUND AT THE TIME.

YOUR HONOR, I CONCEDE THAT. IF YOU --

ISN'T THAT BOLSTERED IN THIS CASE, BY THIS EXHAUSTIVE TESTIMONY OF THE LAWYER THAT HE JUST SPENT A HUGE AMOUNT OF TIME AND, REALLY, LIVED THIS CASE DURING THE TIME THAT HE REPRESENTED THE DEFENDANT? THAT EVERY ASPECT OF IT, THAT HE THOUGHT IT OUT AND DEBATED WITH HIMSELF, AND YOU KNOW, BEFORE HE ENDED UP, SO HELP ME WITH THAT PROPOSITION, THAT IS THAT THIS IS A LAWYER THAT OBVIOUSLY WAS HEAVILY INVESTED IN THIS CASE AND THOUGHT OUT AND MADE THESE DECISIONS, AND SO HOW CAN WE END UP, THEN, CHARACTERIZING A LAWYER THAT KNEW WHAT THE CHOICES WERE AND THEN MADE THOSE AS

NOT BEING EFFECTIVE?

THE BOTTOM LINE, IT IS NOT SO HOW MUCH YOU CARE ABOUT YOUR CLIENT. LET ME SAY THAT THIS PARTICULAR LAWYER IS A OUTSTANDING LAWYER, NO QUESTION ABOUT IT. NO ONE QUESTIONS HIS INTENTIONS. BUT YOU HAVE TO LOOK AT THE BOTTOM LINE. TO ADMIT THAT HE, HIS CLIENT COMMITTED THIS RAPE, WHEN THE CLIENT HAD NOT EVEN BEEN CONVICTED OF IT, AND THE CONTEXT OF THIS PARTICULAR CASE, AND THEN --

WHAT ABOUT WHAT HE WAS FACED WITH HERE? I MEAN, THIS IS ALMOST LIKE HAVING A VICTIM, THE WAY THE DEFENSE LAWYER DESCRIBED THIS VICTIM IS THAT THIS IS JUST CLASSIC, MOST CREDIBLE PERSON THAT HE HAD EVER SEEN IN A SITUATION LIKE THIS, AND THAT HE JUST THOUGHT THAT HIS CLIENT WAS GOING TO BE KILLED, IN COMPARISON TO, AND THEN WE HAVE ADDED TO THAT, IF I UNDERSTAND IT CORRECTLY, THE JUDGE HERE, THEN, HAD AN OPPORTUNITY TO ACTUALLY LISTEN TO YOUR CLIENT TESTIFY, AND THEN DESCRIBE THIS UNUSUAL SCENE THAT HE CALLED CONSENSUAL SEX, WHICH HE VIRTUALLY DESCRIBED HIMSELF, THAT ALL THE TIME THAT SHE WAS SAYING NO AND RESISTING, AND WAS ANGRY AND MAD, THAT HE THOUGHT IT WAS ALL RIGHT, YOU KNOW, THAT HE WAS GOING ON, AND SO WHEN YOU PLUG THAT IN, TOO, DOESN'T THAT JUST BOLSTER THE DEFENSE LAWYER'S CHOICE HERE TO END UP IN THAT KIND OF A CREDIBILITY BATTLE BETWEEN THIS CREDIBLE, A WHAT HE BELIEVED TO BE A VERY, VERY CREDIBLE VICTIM WITNESS, AGAINST HIS CLIENT, WHO HE HAD HEARD THE EXPLANATION OR STORY, AND WHO HE BELIEVED WOULD NOT COME ACROSS AS CREDIBLE, AND THEN THERE WOULD BE THIS CARRY OVER TO THE MURDER CHARGES?

WELL, MUCH WAS MADE OF THE FACT THAT THE YOUNG CANADIAN LADY WAS VERY ATTRACT I HAVE, AND THAT, ACCORDING TO JUDGE SHAFER AND MR. CHANDLER'S DEFENSE COUNSEL, HE WAS IN HIS 40s, AND HE WASN'T AS ATTRACTIVE AS SHE WAS AND ALL OF THAT, BUT REMEMBER SHE WENT OUT IN O THAT BOAT WITH MR. CHANDLER NOT ONCE BUT TWICE. I SEE THAT I AM INTO MY TIME, SO THANK YOU.

REALIZE THAT WE HAVE THE WRITTEN BRIEFS FOR DETAILS.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA, REPRESENTING THE STATE OF FLORIDA. AS WE RECOGNIZE WHAT WE ARE ACTUALLY HERE WITH IS MR. CHANDLER'S DISCONTENT WITH THE STRATEGIC DECISIONS MADE BY HIS COUNSEL. THE COUNSEL HAD A HIGH LEVEL OF EXPERIENCE AND I WOULD LIKE TO QUICKLY GO OVER WHAT THAT EXPERIENCE WAS. DE NOVO TESTIFIED THAT HE WAS EDITOR OF LAW REVIEW, AV RATED, AS DEFENSE LAWYER HAVING HANDLED 14 FIRST-DEGREE MURDER TRIALS. ONE OF THOSE PLED TO A THIRD-DEGREE AND OF THE REMAINING 13, ONLY SIX WERE CONVICTED. HE WAS AN ASSISTANT STATE ATTORNEY FOR FOUR YEARS, AND DURING THE COURSE OF HIS PREPARATION FOR THIS CASE, HE WOULD COME UP WITH STRATEGIES AND THEN HE WOULD NOT ONLY RUN IT BY CHANDLER BUT RUN IT BY HIS PARTNERS, TO SEE WHAT THEY THOUGHT OF IT. HE MADE EXTENSIVE MEMOS TO THE FILE, SUBSTANTIATING HIS REASONING AND WHY HE HAD DONE WHAT HE HAD DONE AND THAT HE HAD DISCUSSED IT WITH CHANDLER AND THAT CHANDLER AGREED. HE, ALSO, INITIALLY, WHEN HE GOT THE CASE, REALIZED EARLY ON, THERE WAS GOING TO BE THIS COLLATERAL RAPE EVIDENCE PROBABLY, ALTHOUGH HE KNEW HE WAS GOING TO FILE A MOTION IN LIMINE, SO HE IMMEDIATELY WENT TO DEPOSE JUDY BLAIR, TO GET A FEEL FOR EXACTLY WHAT THEY WERE FACING. HE FILED NOTICES, MOTIONS IN LIMINE. HE FILED HIS CHANGE OF VENUE, AND ULTIMATELY JUDGE SHAFER CHARACTERIZED HIM IN HER WRITTEN ORDER, WHICH YOU HAVE NOTED IT AS EXTENSIVE, VERY EFFECTIVE AND INGENIOUS. IN FACT THIS COURT, REGARD TO THE STRATEGY OF CONCEDING THE BLAIR RAPE AND THAT THE STATE COULD PROVE THE BLAIR RAPE, NOTED THAT THIS WAS A CLASSIC CASE OF TAKING THE WIND OUT OF YOUR OPPONENT'S SAILS, AND BY DOING THIS, HE COULD PREEMPT THE STATE FROM COMING IN WITH THIS HARMFUL EVIDENCE AND HE COULD BE THE FIRST ONE OUT OF THE DOOR, BUT BY NARROWLY AGREEING TO IT INITIALLY, HE WAS HOPING THAT HE WOULD BE ABLE TO NOT HAVE TO ADDRESS IT ON HIS

DIRECT WITH CHANDLER, BECAUSE HE HAS ADMITTED IT UP FRONT AND NOW WE DON'T HAVE TO ADDRESS IT AND THEREBY LIMITING CROSS-EXAMINATION. THIS WAS HIS STRATEGY. THIS COURT RECOGNIZED IT WAS A STRATEGY, AND JUDGE SHAFER FOUND THAT STRATEGY INGENIOUS. COUNSEL KEEPS POINTING TO AND SAYING, WELL, YOU HAVE GOT TO LOOK AT THE BOTTOM LINE. BASICALLY WHAT HE IS DOING IS LOOKING AT THE OUTCOME, AND CLEARLY STRICKLAND SAYS THAT YOU CAN'T USE 20/20 HINDSIGHT, THAT YOU HAVE TO LOOK AT IT AS COUNSEL DID AT THE TIME, AND COUNSEL AT THE TIME WAS LOOKING AT THE MODEL RAPE VICTIM, SOMEBODY THAT, WHEN HE SAID HE FIRST SAW HER, HE SAID PLEASE DEAR GOD, DO NOT LET THAT BE JUDY BLAIR.

LET ME ASK YOU THIS. WHY DID DEFENSE COUNSEL FEEL IT WAS NECESSARY FOR CHANDLER TO TAKE THE STAND AT ALL? KNOWING THAT THE STATE WAS GOING TO QUESTION HIM ABOUT THIS WILLIAMS RULE EVIDENCE THAT THE TRIAL JUDGE SAID WAS ADMISSIBLE, THEN WHY PUT CHANDLER ON THE STAND AT ALL?

YOUR HONOR, HE TESTIFIED THAT, IN HIS EXPERIENCE, HE LIKED HIS CLIENTS, WHEN THEY WERE DENYING CULPABILITY, TO TESTIFY, AND YOU HAVE GOT TO REMEMBER THAT IN HIS EXPERIENCE, HE HAS WON HALF OF HIS CLIENTS' TRIALS, SO HIS EXPERIENCE IS VERY GOOD EXPERIENCE. CHANDLER WANTED TO TESTIFY, AND HE ALSO THOUGHT THAT THE STATE WAS NOT GOING TO BE ABLE TO QUESTION HIM REGARDING THIS COLLATERAL RAPE, BECAUSE HE HAD NARROWLY FOCUSED HIS DIRECT. HE HAD NARROWLY FOCUSED HIS OPENING STATEMENTS, AND HE STATED THAT HE INTENTIONALLY WITHHELD FROM THE STATE AND THE COURT, HIS INTENT TO HAVE CHANDLER INVOKE THE FIFTH, AND THAT THE NIGHT BEFORE HIS TESTIMONY, THEY, IN CHAMBERS THEY HAD A DISCUSSION ABOUT THE FACT THAT HIS CLIENT WAS GOING TO INVOKE THE FIFTH, AND THERE WAS A DEBATE BACK AND FORTH AS TO WHETHER HE SHOULD BE ALLOWED TO DO THAT, BECAUSE THE STATE'S POSITION IS HE SHOULDN'T HAVE BEEN ALLOWED TO TAKE THE FIFTH AT ALL, THAT BECAUSE THE BLAIR RAPE WAS RELEVANT TO THE MURDER, AND IT WAS SUBJECT TO CROSS-EXAMINE. THE COURT AGREED WITH DEFENSE COUNSEL THAT HE COULD TAKE THE FIFTH, BUT THAT THE STATE WAS ALLOWED TO QUESTION HIM EACH TIME. ZINOVER THEN FELT AND STILL FEELS TO THIS DAY THAT HE HAS AN EXCELLENT APPELLATE ISSUE, AND HE STILL FEELS THAT IN FEDERAL COURT HE IS GOING TO HAVE AN EXCELLENT APPELLATE ISSUE.

THAT HE SHOULDN'T HAVE BEEN, THAT THE JURY SHOULDN'T HAVE BEEN ABLE TO HEAR HIM TAKING THE FIFTH?

THAT THE STATE SHOULD NOT HAVE BEEN ALLOWED TO CONTINUE TO QUESTION HIM. AND HAVE HIM TAKE THE FIFTH. WITH REGARD TO THE COMMENTS, CHANDLER, ZINOVER TESTIFIED THAT HIS INTENT, WHEN HE WENT INTO THIS TRIAL, WAS TO WIN, AND HE THOUGHT HE WAS GOING TO WIN, AND EVERYTHING HE DID WAS FOCUSED ON WINNING THIS CASE. HE THOUGHT THAT CHANDLER HAD A REASONABLE EXPLANATION FOR HOW HE MET THE VICTIMS, WHAT HE WAS DOING THE NIGHT OF THE CRIME, AND HE COULD SORT OF EXPLAIN HIS TIME LINE. HE FELT THAT IT WAS TO THEIR BENEFIT THAT CHANDLER TESTIFY, AND THAT THE ONLY WAY THEY WERE GOING TO WIN WAS IF CHANDLER GOT UP AND TESTIFIED AND THAT HE WAS ABLE TO CONVINCE THE JURY AS TO HIS STORY. BECAUSE OF THAT, AND BECAUSE OF HIS EXPERIENCE WITH JURIES, DURING CLOSING ARGUMENTS, HE SAID HE DID HIS CLOSING ARGUMENT, HE FELT HE HAD ESTABLISHED A GOOD RAPPORT WITH THE JURY, AND THAT WHEN THE STATE GOT UP AND STARTED MAKING COMMENTS THAT HE THOUGHT WERE INAPPROPRIATE, HE SAID, IN HIS EXPERIENCE, JURIES DON'T LIKE IT WHEN THE STATE STARTS ATTACKING THE DEFENSE, AND THEREFORE HE DID NOT WANT TO GET IN BETWEEN THE STATE AND THE JURY. HE WANTED THEM TO DISLIKE THE STATE, AND THAT IT WAS HIS STRATEGIC DECISION TO GO AHEAD AND LET THE STATE HANG THEMSELVES, THAT HE WATCHED THEIR BODY LANGUAGE, AND FROM THEIR BODY LANGUAGE, HE FELT LIKE THEY WERE NOT WILLINGLY ACCEPTING WHAT THE STATE WAS SAYING AND THAT THEY DIDN'T LIKE IT, AND BECAUSE OF THAT, HE WITHHELD HIS OBJECTIONS, BUT WHEN THE STATE GOT TO POINTS THAT HE FELT WERE TOTALLY INAPPROPRIATE, HE DID OBJECT

AND MAKE MOTIONS FOR MISTRIAL. COUNSEL DID NOT TOUCH ON THE VENUE ISSUE, BUT HIS INITIAL CLAIM IN THE BRIEF IS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO OBTAIN A CHANGE OF VENUE. IN FACT, COUNSEL DID MOVE FOR A CHANGE OF VENUE AND A CHANGE OF VENUE WAS GRANTED. JUDGE SHAFER NOTED THAT, IN HER 20 YEARS ON THE BENCH, THIS IS THE ONLY TIME SHE HAS GRANTED A MOTION FOR CHANGE OF VENUE. THEY ACCEPTED ORANGE COUNTY. THERE WAS A STIPULATION BY CHANDLER AND BY DEFENSE COUNSEL AND THE STATE THAT THEY WOULD BRING A JURY FROM ORANGE COUNTY. THEY HAD NO TROUBLE WHATSOEVER SELECTING A JURY, THAT OF THE TWELVE PEOPLE WHO SAT, ONLY FOUR PEOPLE KNEW ANYTHING ABOUT THE CASE AND NONE OF THEM HAD ANY OPINIONS, AND OF THE 15 THAT WERE EXCUSED FOR CAUSE, NONE OF THEM WERE EXCUSED BECAUSE OF THEIR OPINIONS AND ANYTHING THEY MIGHT DEVELOP. THIS COURT SAID, IN RAWLINGS, THAT THERE ARE TWO PRONGS THAT YOU MUST OBSERVE, AND ONE OF THE TWO PRONGS IS THAT YOU HAVE DIFFICULTY SEATING A JURY. WE DIDN'T HAVE THAT PROBLEM AND COUNSEL, HAVING A MOTION FOR CHANGE OF VENUE, WAS NOT INEFFECTIVE.

CHIEF JUSTICE: THANK YOU. COUNSEL.

JUST TO CONCLUDE, IF YOU CAN SEE THINGS FROM MY PERSPECTIVE AS POSTCONVICTION COUNSEL, IN THIS CASE AND THE ROLLING CASE AND OTHERS, THE DEFENSE COUNSEL ARE NOT THROWING IN THE TOWEL AT ALL, AND WHEN DECISIONS ARE BASED, ACCORDING TO DEFENSE COUNSEL, ON THINGS LIKE BODY LANGUAGE WHICH ARE NOT A PART OF THE RECORD WHICH WE CAN'T GET AT, I HAVE GOT TO TELL YOU IT MAKES THINGS VERY, VERY DIFFICULT.

BUT IS THAT PART OF THE STRATEGY OF THE ART OF BEING A GOOD TRIAL LAWYER? IS THAT NOT PART OF WHAT GOOD TRIAL LAWYERS ARE EXPECTED TO DO IS TO READ JURIES AND TO MAKE THOSE EDUCATED JUDGMENTS? WHY WOULD THAT NOT BE PART OF STRATEGY, WHEN THEY READ THOSE KINDS OF THINGS?

MAKING DECISIONS BASED UPON BODY LANGUAGE, YOUR HONOR, I SUGGEST IS NEITHER ART NOR SCIENCE. IN THIS PARTICULAR CASE, RESPECTFULLY IT IS A WAY TO JUSTIFY TAKING SOME RATHER BIZARRE STEPS IN TERMS OF DEFENDING.

BUT HOW DO WE KNOW THAT? IF THE DEFENSE LAWYER IS SITING THERE AND THE PROSECUTOR IS NOW GETTING INTO NAME-CALLING, FOR INSTANCE, THE DEFENSE LAWYER, NOW, AND AGAIN BASED ON HIS EXPERIENCE, LOOKS OVER AT THE JURY BOX AND SEES THE JURORS JUST SQUIRMING AND REALLY TURNING THEIR BACKS ON THE PROSECUTOR, NOW THAT THE PROSECUTOR IS USING ABUSIVE LANGUAGE OR WHATEVER, AND ISN'T THERE A, ROOM HERE FOR THE DEFENSE LAWYER TO CONCLUDE THIS PROSECUTOR IS REALLY DOING ME A FAVOR BY BEING ABUSIVE LIKE THIS, AND I CAN SEE THE JURY IS VERY UNCOMFORTABLE, AND I HAVE HAD PREVIOUS CASES WHERE THE JURY HAS ENDED UP VIRTUALLY PUNISHING THE PROSECUTOR, BECAUSE THE PROSECUTOR GOT SO ABUSIVE. ISN'T THAT PART OF THE ART OF TRIAL PRACTICE?

THAT CERTAINLY IS, YOUR HONOR, BUT IF YOU ACCEPT THAT, IF YOU DON'T LOOK FOR MORE OBJECTIVE REASONS FOR WHAT COUNSEL DID, WE ARE NEVER GOING TO WIN A POSTCONVICTION CLAIM.

IT DEPENDS, IN THESE CLOSING ARGUMENT CASES, AND I HAVE BEEN THINKING ABOUT THAT, WHEN IT WOULD EVER BE, REALLY, A MERITORIOUS CLAIM, IF YOU HAD A SITUATION WHERE A CASE HAD JUST COME OUT REVERSING, BASED ON AN OBJECTION, ON SOMETHING ABOUT "SEND A MESSAGE BACK TO THE CITIZENS", AND THERE WAS, AND THAT CASE HAD OVERTURNED THE JURY VERDICT, AND THEN YOU HAD A DEFENSE LAWYER WHO SAT THERE DURING THE WHOLE CLOSING ARGUMENT AND EVERY TERRIBLE ARGUMENT IN THE BOOK WAS MADE, INCLUDING THAT ONE, AND THE DEFENSE LAWYER SAID, WELL, I JUST DID THAT AS A MATTER OF STRATEGY, I THINK THERE WOULD BE, BUT THAT IS NOT WHAT WE HAVE HERE.

NO, IT IS NOT. IT IS ALL PART AND PARCEL OF THE ENTIRE, OF THE THREE CLAIMS. THANK YOU VERY MUCH, YOUR HONORS.

CHIEF JUSTICE: THANK YOU VERY MUCH, BOTH OF YOU. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.