John D. Freeman v. State of Florida

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS FREEMAN VERSUS STATE. GOOD MORNING. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. CHIEF JUSTICE ANSTEAD AND OTHER MEMBERS OF THE COURT, MY NAME IS JEFF HAZE, AND I AM -- IS JEFF HAYES AND I AM HERE WITH MY COME COUNSEL, AND WE REPRESENT APPELLANT IN THIS CASE JOHN FREEMAN. THIS CASE COMES TO THE COURT AFTER DENIAL OF MR. FREEMAN'S CLAIM ON A 3.850 AT AN EVIDENTIARY HEARING. THERE WERE TWO ISSUES BELOW PRESENTED. FIRST BEING WHETHER RACIAL FACTORS ENTERED SENTENCING IN MR. FREEMAN'S CASE AND THE SECOND ISSUE PRESENTED WAS INEFFECTIVE ASSISTANCES OF COUNSEL AT THE PENALTY PHASE OF THE COLLIER TRIAL. I WOULD LIKE TO DEVOTE MY ARGUMENT PRIMARILY TO THE RACE ISSUE IN THE CASE.

NOW, IS THE ISSUE THAT WAS REMANDED ONE OF INEFFECTIVE ASSISTANCE OF COUNSEL OR THAT THE, I NOTICE THAT IT IS GOING -- THAT IT HAS BEEN ARGUED, THE WHOLE DUE PROCESS ISSUE HERE, BUT WASN'T THE REMAND FOR INEFFECTIVE ASSISTANCE OF COUNSEL WHETHER OR NOT THE COUNSEL'S FAILURE TO RAISE THIS ISSUE AT THE TRIAL COURT LEVEL CON-CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNS-- CONSTITUTED INEFFECTIVE AS ANSWER OF COUNSEL?

-- INEFFECTIVE ASSISTANCE OF COUNSEL?

WELL, YOUR HONOR, MY OPINION IS IT ENTERED INTO THE RACIAL FACTORS ENTERING INTO THE SENTENCING, AND IN THE OPINION ON REMAND, THE LANGUAGE WAS THAT THIS CASE, AT THE LOWER COURT, THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING TO DETERMINE WHETHER OR NOT RACIAL FACTORS ENTERED INTO THE SENTENCING. THAT IS MY UNDERSTANDING OF THE REMAND, AND I WOULD POINT OUT THAT THE LOWER COURT DOES NOT ADDRESS THE INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE, IN HIS ORDER, DENYING THE CLAIM, THE CLAIM IS DENIED BASED ON THE CONSTITUTIONAL VIOLATIONS OF, THE COURT ADDRESSES IT AS A DUE PROCESS VIOLATION. IT IS NOT A DUE PROCESS CLAIM BUT THE LOWER COURT ADDRESSES IT AS THAT, SO I THINK IT WAS SENT BACK FOR A FULL DEVELOPMENT OF THE EQUAL PROTECTION AND EIGHTH AMENDMENT CLAIMS. IN ORDER TO ASSESS THE EQUAL PROTECTION AND EIGHTH AMENDMENT VIOLATIONS OF THE CASE, I THINK IT IS IMPORTANT TO LOOK AT THE FACTS THAT WERE PRESENTED AT THE HEARING BELOW. PATRICK McGINNIS, WHO WAS MR. FREEMAN'S TRIAL COUNSEL, TESTIFIED AT THE HEARING BELOW THAT HE REPRESENTED MR. FREEMAN ON TWO MURDER CHARGES. AT SOME POINT DURING THE PRETRIAL PROCESS, HE WENT, HE DETERMINED THAT IT WOULD BE IN MR. FREEMAN'S BEST INTEREST TO AGREE TO PLEAD GUILTY FOR TWO CONSECUTIVE LIFE-25 SENTENCES.

THERE WAS A CLOSE, WAS IT THREE WEEKS OR THE PERIOD OF TIME BETWEEN THE TWO DEATHS?

THAT'S CORRECT, YOUR HONOR. THE FIRST CRIME HAPPENED IN OCTOBER OF 1986, AND THAT WAS THE EPPS MURDER. THE SECOND MURDER HAPPENED IN NOVEMBER OF 1986, AND THAT WAS THE COLLIER MURDER, WHICH IS THE CASE --

ABOUT THREE WEEK'S DIFFERENCE.

THAT'S CORRECT, YOUR HONOR.

GO AHEAD.

AND MR. McGINNIS TESTIFIED AT SOME POINT IN THE PRETRIAL PROCESS, HE BELIEVED IT WOULD BE IN THE BEST INTEREST OF MR. FREEMAN TO PLEAD GUILTY TO THE LIFE-20s. HE WENT TO MR. FREEMAN IN AN ATTEMPT TO MAKE SUCH AN OFFER TO THE PROSECUTOR. AT SOME POINT DURING THE PRETRIAL PROCESS, WHEN DEPOSITIONS WERE BEING TAKEN AT THE PUBLIC DEFENDER'S OFFICE, MR. GUINNESS BROACHED THAT OFFER TO BRAD STETSON, WHO WAS THE PROSECUTOR ON BOTH CASES. MR. STETSON RESPONDED, ACCORDING TO MR. McGINNIS'S TESTIMONY, NORMALLY I WOULD CONSIDER SUCH AN OFFER, BUT I CANNOT IN THIS CASE, BECAUSE I NEED TO GET MY NUMBERS UP ON WHITES KILLING BLACKS.

SO DO YOU DISAGREE THAT MR. STETSON, HOWEVER, HAD SOUGHT A SOMEWHAT DIFFERENT SPIN ON WHAT HE SAID, AND THAT HE BASICALLY SAYS THAT WHAT I SAID TO HIM WAS THAT, IF I ALLOWED YOU TO PLEAD TO THESE TWO CASES, THEN YOU WILL BE USING THESE AGAINST ME THE NEXT TIME AROUND, TO SAY THAT THE OFFICE DOESN'T PROSECUTE CASES WHERE WHITES KILL BLACKS.

WELL, MR. STETSON DIDN'T REMEMBER EXACTLY WHAT HE, WHAT HIS RESPONSE WAS TO MR. McGINNIS, ONLY THAT HE, IT WAS, HE ADDED SOME SARCASM. HE CHARACTERIZED HIS RESPONSE AS SARCASM, AND THAT HE ADDED THAT, IF I AGREED TO THIS, YOU WOULD USE IT AGAINST ME TO MAKE A CLAIM SUCH AS THE CLAIM MADE IN THE McKLUSKIE CASE, THAT PROSECUTIONS WERE SOUGHT MORE OFTEN AGAINST BLACK DEFENDANTS WHO KILLED WHITES THAN WHITES WHO KILL BLACKS. SOES HIS, AND I WOULD POINT OUT IN THE LOWER COURT'S ORDER THE LOWER COURT FINDS MR. McGINNIS AND MS. FENNEL CREDIBLE AS TO WHAT THE CONVERSATIONS WERE AS TO THE RESPONSE TO THE PLEA OFFER. HE FINDS THEM CREDIBLE.

DOES HE FIND THE PROSECUTOR AND HIS, AND MR. AUSTIN CREDIBLE, ALSO?

WELL, HE DOESN'T ADDRESS, I DON'T BELIEVE HE ADD DRESESED THE -- ADDRESSED THE CREDIBILITY OF MR. AUSTIN'S STATE.

BUT HE ACCEPTS HIS TESTIMONY AS BEING TRUE.

I THINK THAT IS CORRECT, YOUR HONOR. WHAT THE LOWER COURT'S ORDER IS SOMEWHAT CONFUSING, BUT I THINK WHAT THE LOWER COURT'S FINDING IS, IS THAT HE ACCEPTS THE, THAT THE TESTIMONY OF MS. FENNEL AND MR. McGINNIS AS TO WHAT THE PROSECUTOR'S RESPONSE WAS. ADDITIONALLY, HE ACCEPTS MR. STETSON'S CHARACTERIZATION OF THE RESPONSE AS SARCASM. I THINK THAT IS THE MOST FAIR READING OF WHAT THE LOWER COURT FOUND.

NOW, DID STETSON GO ON AND TESTIFY THAT RACE PLAYED NO ROLE IN THE PLEA NEGOTIATIONS OR TELL ME WHAT --

NO. NO, YOUR HONOR, AND THAT IS WHAT I BELIEVE THAT THE TRIAL COURT'S ORDER, WHICH IS FOUND, THE FOUNDATION OF THE TRIAL COURT'S FINDING IS THAT THIS RESPONSE WAS MERELY SARCASTIC, AND IF YOU LOOK AT THE, I DON'T BELIEVE THAT THAT FINDING, THE FACTUAL FINDING IS SUPPORTED BY THE TOTALITY OF THE EVIDENCE PRESENTED. IF YOU LOOK AT WHAT MR. STETSON, HIS ENTIRE TESTIMONY, HE SAID THAT HE CONSIDERED RACE A FACTOR IN, WHEN DECIDING WHETHER OR NOT TO SEEK THE DEATH PENALTY, THAT THAT WAS A VALID FACTOR THAT HE CONSIDERED. ADDITIONALLY, HE STATED THAT HE CONSIDERED A COMMUNITY'S PERCEPTION OF THE PROSECUTOR'S OFFICE'S TREATMENT OF RACE AS A FACTOR, WHEN DECIDING TO SEEK THE DEATH PENALTY.

BUT HE PUT A CAVEAT ON THAT. HE SAID SO THE OFFICE WOULD APPEAR TO BE FAIR. ISN'T THAT A FAIR STATEMENT OF WHAT HE -- THAT'S CORRECT, YOUR HONOR. THAT'S CORRECT. HE -- SO -- HE STATED THAT HE, AND I WOULD POINT OUT THAT, IF HE WANTED TO, THE COMMUNITY TO

PERCEIVE THAT THE PROSECUTOR'S OFFICE WAS BEING FAIR, THE PROPER TACT TO TAKE IN THAT SITUATION IS TO -- THE PROPER TACK TO TAKE IN THAT SITUATION IS NOT TO CONSIDER RACE AT ALL. WHEN SEEKING THE DEATH PENALTY IN ORDER TO SEEK THAT THE COMMUNITY THINKS IT IS FAIR, THAT DOES NOT VIOLATE, BECAUSE HE THINKS IT IS RIGHT BECAUSE IT WILL HELP THE PERCEPTION OF THE COMMUNITY AS TO THE PROSECUTORS OFFICE.

DID HE TESTIFY AS TO THIS SPECIFIC CASE? IN OTHER WORDS, DID HE SAY THAT IN THIS PARTICULAR CASE, RACE PLAYED A FACTOR AND IT PLAYED A FACTOR IN THIS REGARD?

HE SAID, HE SAYS, HE TESTIFIED THAT, HIS TESTIMONY WAS THAT HE RESPONDED TO MR. McGINNIS'S OFFER THAT, WITH SOME SARCASM. HE DIDN'T REMEMBER EXACTLY WHAT THE WORDS WERE. THAT HE TOLD MR. McGINNIS YOU WOULD USE THIS AGAINST ME, IF I AGREED TO CONSIDER A PLEA OFFER IN THIS CASE. HE ALSO TESTIFIED THAT HE CONSIDERED THE FACT THAT HE BELIEVES THAT MR. FREEMAN'S CRIMES WERE RACIALLY MOTIVATED. HE CONSIDERED THAT, WHEN DECIDING WHETHER OR NOT TO SEEK THE DEATH PENALTY IN THESE CASES. HE STATED GENERALLY, THAT HE CONSIDERED RACE A FACTOR IN EVERY CASE, IN DECIDING WHETHER OR NOT TO SEEK THE DEATH PENALTY. SO THAT WAS HIS TESTIMONY AT THE HEARING.

YOU ARE RAISING TWO KIND OF RELATED ISSUES ON THIS RACE CLAIM. NUMBER ONE, IT IS A CONSTITUTIONAL VIOLATION. NUMBER TWO, IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT DOING SOMETHING ABOUT IT?

THAT'S CORRECT, YOUR HONOR.

AS TO THE FIRST ARGUMENT, WHY ISN'T THAT SOMETHING THAT SHOULD HAVE AND COULD HAVE BEEN RAISED BELOW AND SOUGHT TO, THE RECUSAL OF EITHER THE ASSISTANT STATE ATTORNEY OR THE ENTIRE OFFICE OR WHATEVER YOU WANT, BUT IT SHOULD HAVE BEEN RAISED AT THE TIME, AND AS TO THE SECOND ONE, WHY DIDN'T YOU PRECLUDE IT BECAUSE YOU CAN'T EXPECT YOUR DEFENSE COUNSEL TO RAISE, TO BE INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT HAS NEVER BEEN RAISED BEFORE? WHICH WAS THE REVERSE McCHRES SKI CLAIM. -- THE REVERSE McCLESKY CLAIM.

SURE, YOUR HONOR. THERE WAS THE INEFFECTIVE ASSISTANCE COMPONENT TO, IT BECAUSE NO MATTER WHETHER IT IS THE FULL COMPONENT OF EQUAL PROTECTION AMENDMENT VIOLATION OR THE INEFFECTIVE ASSISTANCE OF COUNSEL, I THINK THE RESULT IS THE SAME, BECAUSE MR. McGINNIS TESTIFIED AT THE HEARING BELOW THAT HE WAS AWARE OF THE McKLUSKIE TYPE CLAIMS AND AWARE THAT WHAT MR. STETSON WAS SAYING WAS INAPPROPRIATE AND HE FOUND IT IRONIC, GIVEN THE CLAIMS MADE IN McKLUSKIE. HE SIMPLY TESTIFIED, MY ASSESSMENT OF WHAT HE SAID WAS BASICALLY I WAS IN A STATE OF LEGAL PARALYSIS. I DIDN'T KNOW WHAT TO DO. I DIDN'T KNOW WHAT LEGAL MECHANISM TO UTILIZE, TO ADDRESS THE CLAIM.

AND THE REASON HE SAID THAT WAS BECAUSE IT WAS SOMETHING THAT HAD NEVER BEEN RAISED BEFORE, SO HOW WAS HE INEFFECTIVE FOR FAILING TO BE CREATIVE?

THAT IS NOT WHAT HE SAID, YOUR HONOR. HE DID NOT SAY THAT HE DIDN'T RAISE IT BECAUSE IT HAD NEVER BEEN RAISED BEFORE. HE SIMPLY SAID I DIDN'T KNOW WHAT TO DO.

WELL, IF IT HAD BEEN RAISED BEFORE, FOR EXAMPLE IF THIS WAS A McKLUSKIE CLAIM, HE WOULD HAVE BEEN ABLE TO GO TO THE McINCLUDES SKI CASE AND SAY, WELL, THIS IS THE KIND OF STUFF I HAVE TO PROVE TO SHOW A CLAIM AND NOW I KNOW WHAT TO DO.

I THINK, YOUR HONOR, HE WAS AWARE OF THE CLAIM BECAUSE HE HAD MADE THE CLAIMS, HIMSELF, ONLY HE HAD MADE THE CLAIMS THAT THE PROSECUTOR'S OFFICE SOUGHT THE DEATH PENALTY AGAINST BLACKS, BLACK DEFENDANTS BECAUSE OF THEIR RACE, SO HE WAS OBVIOUSLY AWARE OF WHAT THE EQUAL PROTECTION CLAUSE, THE RIGHT THAT IT PROVIDES TO

THE DEFENDANT, AND COULD HAVE RAISED A CLAIM. I THINK HE, I THINK THAT THE FAIR READING OF HIS TESTIMONY IS THAT HE KNEW THAT THERE WAS A CONSTITUTIONAL VIOLATION, BUT HE SIMPLY DIDN'T, COULDN'T THINK WHAT TO DO, AND SO, AND SO IF THERE WAS, IN FACT, AN EQUAL PROTECTION VIOLATION, WHICH I THINK IN THIS CASE THERE IS CLEAR EVIDENCE THERE, THAT AN EQUAL PROTECTION VIOLATION OCCURRED, THAT MR. McGINNIS SHOULD HAVE RAISED THAT, AND THAT IT WOULD, THAT THE TRIAL, THAT THERE WOULD HAVE BEEN RELIEF GRANTED, SO I THINK UNDER EITHER STANDARD, EITHER THE STRICKLAND STANDARD OR UNDER THE EQUAL PROTECTION STANDARD, RELIEF SHOULD HAVE RESULTED.

WELL, UNDER STRICKLAND, THERE IS ACTUALLY TWO PRONGS. HOW DO YOU SHOW, UNDER THE PREJUDICE PRONG THAT, IF HE HAD RAISED IT AND IF HE HAD OBTAINED THE RECUSAL OR THE DISQUALIFICATION OF THE STATE ATTORNEY, THAT ANOTHER PROSECUTOR CONFRONTED WITH A CASE WHERE TWO WEEKS PREVIOUSLY THERE HAD BEEN ANOTHER MURDER, WOULD NOT ALSO SEEK THE DEATH PENALTY.

MY ARGUMENT, YOUR HONOR, WOULD BE THAT THE APPROPRIATE MOTION WOULD HAVE BEEN A MOTION TO INCLUDE THE DEATH PENALTY.

WHAT BASIS WOULD THERE BE FOR THAT KIND AFTER DRASTIC REMEDY?

IT WOULD DEPEND, AND THE STATE'S ARGUMENT IS THAT HE SHOULD HAVE MOVED TO SEND THE CASE TO ANOTHER PROSECUTOR AND MY QUESTION WOULD BE IF YOU ARE TALKING ABOUT SENDING TO A PROSECUTOR IN THE SAME OFFICE, I THINK THE RISK --

LET'S SAY A PROSECUTOR IN ANOTHER CIRCUIT. YOU, WHAT IS THE EVIDENCE OR WHAT IS THE ARGUMENT THAT A PROSECUTOR IN ANOTHER CIRCUIT CONFRONTED WITH THESE SAME FACTS, WOULD HAVE CHOSEN NOT TO SEEK THE DEATH PENALTY?

WELL, I THINK THAT THE NATURE OF THE VIOLATION AND THE RISK THAT ANOTHER PROSECUTOR WOULD BE SEEKING TO VINDICATE EXACTLY WHAT THE PROSECUTOR BEFORE DID, THAT THAT WOULD BE, UNDER THE EQUAL PROTECTION CLAUSE, I THINK THAT WOULD BE THE RISK OF THAT CARRYING OVER TO THE OTHER PROSECUTOR, SO GREAT THAT THE APPROPRIATE REMEDY WOULD BE TO PRECLUDE THE DEATH PENALTY, BECAUSE THAT, I MEAN, TO USE SORT OF A TIRED AND CLICHEED MET FORE, IT IS DIFFICULT TO UNRING A BELL, ONCE YOU HAVE THAT VIOLATION OCCUR, THE RISK THAT IT WOULD CONTINUE OVER IS SO GREAT THAT I THINK THAT THAT WOULD HAVE BEEN THE APPROPRIATE REMEDY.

BUT DON'T YOU, IN FAIRNESS TO THE STATEMENT, THERE WERE TWO MURDERS HERE, IS THIS CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND IN A SHORT SPAN OF TIME, AND IS THIS AN UNREASONABLE SPIN ON WHAT THE PROSECUTOR SAID? IF I DON'T PROSECUTE THIS PERSON FOR MURDER, HE MURDERED TWO PEOPLE WITHIN A SHORT SPAN OF TIME, THE COMMUNITY IS GOING TO THINK THAT I AM BIASED THIS WAY, SO, AND I AM NOT. THAT IS HOW THE RACE THING CAME UP, WASN'T IT?

NO, YOUR HONOR. I DON'T THINK THAT WAS, I DON'T THINK THAT WAS THE TESTIMONY. I THINK THAT THE, AND THIS GOES, SORT OF GOES TO THE McKLUSKIE --

YOU ARE REALLY SAYING HOW CAN I NOT PROSECUTE THIS FOR MURDER? HE HAS MURDERED TWO PEOPLE.

UNDER McKLUSKIE, THE EQUAL PROTECTION STANDARD, ONCE THE PRIMA FACIE METHOD OF PROOF IS UTILIZED IN THE EQUAL PROTECTION CASES, AND MR. FREEMAN PUT FORTH AN

ABUNDANCE OF EVIDENCE THAT THE PROSECUTOR CONSIDERED RACE IN THE CASE, AND AT THAT POINT, I THINK THAT MR. FREEMAN MADE OUT THE PRIMA FACIE CASE. AT THAT POINT THE STATE IS REQUIRED TO BRING FORTH PROOF THAT THE DECISION TO SEEK THE DEATH PENALTY AND TO REFUSE TO NEGOTIATE IN THE PLEA OFFER IN THIS CASE WAS RACE NEUTRAL FREE OF ANY RACIAL CONSIDERATIONS COMPLETELY.

CHIEF JUSTICE: THE MARCH HALL HAS PUT ON THE WARNING LIGHT TO BE SURE THAT YOU RESERVE SOME TIME FOR REBUTTAL. IT IS YOUR CHOICE.

IF I COULD FINISH ADDRESSING THAT POINT AS TO THE STANDARD. IT SORT OF GOES TO WHAT JUSTICE SHAW, THE ONLY TESTIMONY THAT THE STATE PUT ON AT THE HEARING WAS ESSENTIALLY FROM MR. STETSON SAYING THIS IS A CASE WHERE THERE ARE TWO MURDERS. THAT IS THE ONLY EVIDENCE THAT THEY PRESENTED THAT, OF A RACE NEUTRAL EXPLANATION FOR WHY MR. FREEMAN --

DID HE TESTIFY THAT THAT REALLY WAS AT THE CORE OF HIS DECISION TO SEEK THE DEATH PENALTY?

HE TESTIFIED THAT THAT WAS A PART OF HIS DECISION, BUT HE ALSO TESTIFIED THAT MR., THAT MR. FREEMAN'S RACIAL HATRED WAS ALSO A PART OF HIS DECISION-MAKING, AND THAT RACE GENERALLY WAS A PART OF HIS DECISION-MAKING, AND IN ADDITION TO HIS TESTIMONY ABOUT THE COMMUNITY PERCEPTION, SO I WILL SAVE MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING.

GOOD MORNING, CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE, AND I WOULD LIKE TO QUOTE SOME OF THE PROSECUTOR'S TESTIMONY AT THE EVIDENTIARY HEARING DIRECTLY. A LOT OF THIS IS IN MY BRIEF WITH THE RECORD CITE, BUT I WOULD LIKE TO DO THAT. THE PROSECUTOR TESTIFIED THIS WAS OBVIOUSLY A DEATH-PENALTY CASE, REGARDLESS OF RACE. THAT IS AT PAGE 19. THAT UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE FACT THAT THE EPPS, THE FREEMAN HAD KILLED TWO PEOPLE, THE FIRST ONE, AND THEY WERE VERY SIMILAR FACTUALLY, HE HAD BROKEN INTO THESE PEOPLE'S HOMES. THE FIRST ONE HE HAD STABBED SIX TIMES, IN THIS CASE, THIS IS THE COLLIER MURDER IN FRONT OF YOU, HE HAD BEATEN THE MAN, THE HOMEOWNER WHO HAD COME HOME, WITH HIS GUN, TWELVE TIMES IN THE HEAD, AND WE HAD AN EYEWITNESS TESTIMONY. THE PROSECUTOR SAID, UNDER THE TOTALITY OF THE CIRCUMSTANCES, THE DECISION TO SEEK DEATH WAS A NO-BRAINER. THAT IS AT PAGE 21. HE, ALSO, EXPLAINED HOW STRONG THE STATE'S EVIDENCE WAS. WE HAD AN EYEWITNESS TO THIS CRIME, AND THEN WE FOUND THE DEFENDANT A VERY SHORT DISTANCE UNDER A, NEAR THE RIVER, WITH BLOOD ON HIM, SO HE WAS FOUND --

IN OTHER WORDS WHAT YOU ARE SAYING IS THERE REALLY WAS NO REASON TO ENTER A PLEA TO, TO ENTERTAIN A PLEA.

RIGHT. AND THAT WAS HIS TESTIMONY. HE TESTIFIED AS TO THE STRENGTH OF HIS CASE. THESE WERE ALL THE RACE NEUTRAL REASONS THAT HE GAVE FOR THIS, AND HE WAS GIVING THIS TESTIMONY AS PART OF --

HE ADMITTED THAT HE HAD MADE SOME INAPPROPRIATE OR SARCASTIC REMARK IN THE CONVERSATION DURING THE PLEA NEGOTIATIONS, IS THAT CORRECT?

YES, YOUR HONOR. HE DID.

DID THE TRIAL COURT ULTIMATELY CONCLUDE THAT, IN TERMS OF THE SEEKING THE DEATH

PENALTY, THAT IT WAS BASED ON THESE OTHER CIRCUMSTANCES?

YES, YES, YOUR HONOR. THE TRIAL COURT RULED.

HOW EXPLICIT WAS THE TRIAL COURT IN THAT FINDING? WHAT DID THE TRIAL COURT --

THAT WAS THE TRIAL COURT'S FINDING. AND HE EVEN ADDRESSED IT IN THE ALTERNATIVE. YOUR HONOR, I DO THINK IS FAIR TO SAY THAT THE TRIAL COURT FOUND ALMOST ALL THE PARTIES BEFORE HIM CREDIBLE. HE, BRAD STETSON, JUDGE STETSON, NOW JUDGE STETSON COULD NOT REMEMBER HIS EXACT WORDS, BUT HE DID EXPLAIN WHAT HE WAS THINKING, WHY HE COULDN'T REMEMBER WHAT CAME OUT OF HIS MOUTH. HE DID REMEMBER WHAT HE WAS THINKING. McINCLUDES SKI VERSUS CLINT, WAS PENDING IN THE UNITED STATES SUPREME COURT DURING THIS PERIOD OF TIME, AND IN THAT CASE THERE HAD BEEN AN ARGUMENT THE PROSECUTOR, ESPECIALLY WHEN THE DEFENDANT WAS WHITE AND THE VICTIMS WERE BLACK, WERE IMPROPERLY NOT SEEKING DEATH, AND SO WHAT THE JUDGE STETSON WAS RESPONDING TO THAT ARGUMENT, THAT DEFENSE COUNSEL, HIMSELF, HAD ADMITTED HE HAD MADE, THAT THIS WAS A WIDESPREAD ARGUMENT. PROSECUTORS WERE UNDER ATTACK FOR NOT SEEKING DEATH IN THESE TYPES OF CASES.

SO WE CAN'T, I MEAN, THE REALITY IS THAT THE RACE OF THE VICTIM WAS SOMETHING THAT, I MEAN, NOT IN A NEGATIVE WAY, BUT WAS SOMETHING THAT, IN THE PROSECUTOR'S MIND, WHICH IS TO BE MORE SENSITIVE THAT, TO NOT DO SOMETHING THAT MIGHT BE, REALLY, PERCEIVED AS BEING RACIALLY BIASED BY NOT SEEKING THE DEATH PENALTY. IN OTHER WORDS, I GUESS, THE FACT THAT THERE, RACE MAY HAVE BEEN A, IN HIS THOUGHT PROCESS, NOT MAKE THIS STILL RACE NEUTRAL? IN OTHER WORDS CAN YOU HAVE BOTH HAPPEN?

I THINK YOU CAN, AND I THINK THIS CASE PRETTY MUCH, HE, THAT WAS HIS, RACE NEUTRALLY WAS HIS BOTTOM LINE. THIS WAS A DEATH CASE. OKAY. AND THEN HE SAID, AND IF I CAME OFF OF THAT, IF I CAME OFF THIS VERY MUCH A DEATH CASE, THE CONSEQUENCES WOULD BE THAT I WOULD BE ACCUSED, IT WAS MORE A DEFENSE MECHANISM. I WOULD BE ACCUSED OF DOING EXACTLY WHAT THEY SAID WE WERE DOING IN McKLUSKIE. YOUR HONOR, THIS IS REALLY A STATEMENT OF AN INTENT NOT TO DISCRIMINATE. HE IS SAYING WE ARE NOT GOING TO HAVE THE McKLUSKIE CLAIM AROUND HERE, AND THE WAY I AM NOT GOING TO HAVE THE McKLUSKIE CLAIM IS I AM GOING SEEK DEATH WHEN CASES ARE THIS EGREGIOUS. SO THAT WAS REALLY IT, AND, YOUR HONOR, THE TRIAL COURT DID DO IT IN THE ALTERNATIVE. HE DID FIND THAT THIS WAS NOT EVIDENCE OF RACIAL --

YOU HAVE A PROSECUTOR GOING INTO STATEMENTS LIKE THIS, HOW DO YOU DRAW THE LINE BETWEEN WHETHER IT IS AN EXPLANATION, AS OPPOSED TO A DRIVING PART OF WHAT PARTIALLY DRIVES THE PROSECUTOR FOR HIS DECISION TO PROSECUTE FOR MURDER?

OKAY. NOW, I DO WANT TO, ALSO, SEPARATE. THERE ARE SOME PROSECUTORIAL USES OF RACE THAT WOULD BE PERFECTLY PROPER UNDER THIS COURT'S JURISPRUDENCE AND EVERYBODY ELSE'S. FOR INSTANCE WHEN A PROSECUTOR PROSECUTES A HATE CRIME, THAT, I MEAN, HE IS RECOGNIZING THAT THE VICTIMS WERE OF A RACE. HE HAS TO, BY DEFINITION, TO PROSECUTE A HATE CRIME. SO REMEMBER YOU ARE GOING TO HAVE TO BE CAREFUL THAT YOU ARE NOT DEALING WITH A CASE LIKE THAT. THIS CASE PRESENTS BOTH THESE PROBLEMS, BECAUSE THE DEFENDANT HERE HAD A RACIAL MOTIVE, AND THAT, THE PROSECUTOR RECOGNIZING THAT AND PUTTING --

THAT WAS NOT ACTUALLY EXPLORED, AS I UNDERSTOOD IT, THE PROSECUTOR STAYED AWAY FROM THAT IN THE ARE PROSECUTION OF THIS CASE.

YES, HE DID.

THERE WAS ANY KIND OF RACIAL MOTIVE.

YES, HE DID. I WAS JUST RESPONDING THAT IN GENERAL, ALL USES OF RACE BY A PROSECUTOR ARE NOT NECESSARILY IMPROPER, AND I AM GIVING AN EXAMPLE OF A HATE CRIME, FOR INSTANCE, AND IN THIS ONE WE DID TRY TO STAY AWAY FROM THAT. WE DID NOT DO THAT. BUT THE PROSECUTOR WAS TALKING, HERE, MORE ABOUT WHAT I REFERRED TO AS A REVERSE McINCLUDES SKI CLAIM.

DO YOU AGREE THAT, AT THIS POINT IN THE PROCEEDINGS, THE ONLY WAY WE CAN LOOK -- McKLUSKIE CLAIM.

DO YOU AGREE THAT, AT THIS POINT IN THE PROCEEDINGS, THE ONLY WAY WE CAN LOOK AT THIS IS THROUGH A STRICKLAND ANALYSIS?

YES, YOUR HONOR. THIS IS SUPPOSED TO BE THAT THE STATE MADE AN ARGUMENT THAT THE STRAIGHT EQUAL PROTECTION CLAIM, INCIDENTALLY THE TRIAL COURT DID PROBABLY IMPROPERLY ANALYZE IT AS DUE PROCESS. IT IS AN EQUAL PROTECTION CLAIM THAT IS PROCEDURALLY BARRED. THAT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL. THERE IS NO REASON TO LITIGATE IT HERE. YOU REMANDED FOR INEFFECTIVE ASSISTANCE OF COUNSEL. UNFORTUNATELY, YOUR HONOR, IT IS TRUE THAT THE TRIAL COURT DID DO THIS MUCH MORE AS A STRAIGHT DUE PROCESS CLAIM.

BUT OF COURSE, YOU CAN'T EVEN GET TO WHETHER IT IS STRICKLAND, UNLESS THERE IS A CLAIM, AN EQUAL PROTECTION CLAIM THAT CAN BE MADE. I MEAN THAT IS THE THRESHOLD. YOU FIRST HAVE TO GET THERE. IF IT IS NOT ONE, IF IT IS NOT A VIOLATION, THEN THERE CAN'T EVEN BE THE BEGINNING OF INEFFECTIVENESS, IF --

YES, ABSOLUTELY, YOUR HONOR. PRO TOE TYPICALLY, -- PRO TOE TYPECALLY, THE IN HE HAVE EFFECTIVE ASSISTANCE CLAIM DOES HAVE TO GET AT THAT, BUT IN DEFICIENT PERFORMANCE, YOU FIRST HAVE TO APPLY STRICKLAND, AND I DID A NATIONWIDE SEARCH AND FOUND A GRAND TOTAL OF ONE CASE AND IT WAS DECIDED YEARS LATER THAN WHAT THIS CASE WAS, ABOUT WHAT I CALLED A REVERSE McKLUSKIE CLAIM.

THAT IS THE WAY THIS CASE WAS SENT BACK THIS TO THIS COURT, AND THAT IS TO SAY TO THE TRIAL COURT JUDGE UNDER THE UMBRELLA OF INEFFECTIVE ASSISTANCE OF COUNSEL, LOOK AND SEE WHETHER OR NOT, FIRST OF ALL, COUNSEL WAS DEFICIENT IN NOT DOING SOMETHING ABOUT THIS, AFTER ALLEGEDLY HEARING SOMETHING THAT INDICATED THAT THERE WAS A RACIAL BASIS FOR THE SEEKING THE DEATH PENALTY.

YES, YOUR HONOR.

AND DETERMINE WHETHER OR NOT HE WAS INEFFECTIVE, AND THAT PREJUDICED THE DEFENDANT. AND THAT WAS, IS THAT AWAY OUR OPINION INSTRUCTED THE TRIAL COURT TO PROCEED?

YES, YOUR HONOR.

OKAY. THE TRIAL COURT ENDED UP, DID THE TRIAL COURT DIRECTLY ADDRESS THIS AS AN INEFFECTIVENESS CLAIM?

NO, YOUR HONOR.

OKAY. SO DO WE HAVE THE IN EFFECT, THE TRIAL COURT SAYING THERE REALLY WAS NO CLAIM FOR TRIAL COUNSEL TO RAISE?

YES.

IS THAT HOW WE END UP, THEN? SO YOU WOULD SAY THE TRIAL COURT'S FAILURE TO ADDRESS THE INEFFECTIVENESS IS REALLY SORT OF HARMLESS ERROR IN THE PROCEDURAL WAY THAT THIS, IS THAT, COME BACK --

YES.

-- TO JUSTICE SHAW'S, THE YOU YOU KNOW, THE QUESTION THAT HE ASKED ABOUT LET'S TAKE A HYPOTHETICAL TO EXPLORE WHERE WE ARE AND LET'S SUPPOSE THAT, INDEED, A PROSECUTION OFFICE, MAYBE WEILL THAT CASE WAS PENDING -- MAYBE WHILE THAT CASE WAS PENDING, THE McKLUSKIE CASE. PROSECUTOR, NOW, THE NEXT SIX CASES THAT COME IN WITH A BLACK VICTIM AND A WHITE DEFENDANT, WITHOUT CONSIDERING ANYTHING ELSE, I WANT THE DEATH PENALTY SOUGHT. THAT IS I WANT THIS COMMUNITY TO SEE THAT WE ARE PROSECUTING THESE AS SERIOUS CASES MERITING THE DEATH PENALTY, AND SO THE NEXT SIX, YOU KNOW, WHAT WOULD BE THE CONSEQUENCES OF THAT?

IF THOSE, IF HE HAD TESTIMONY ABOUT THAT, I COULD CERTAINLY SEE A PERSON BEING ABLE TO, THAT STRIKES ME AS MUCH CLOSER TO A TRUE PRIMA FACIE CASE.

BEING SINGLED OUT.

NOW, YOUR HONOR, TO DO SELECTIVE PROSECUTION, WHICH IS WHAT THIS IS REALLY ABOUT, YOU HAVE TO MEET TWO PRONGS. FIRST IS THAT SIMILARLY-SITUATED GROUPS ARE TREATED DIFFERENTLY, AND THEN IT WAS RACIALLY MOTIVATED. NOW, I WOULD POINT OUT, YOUR HONOR, AT THE ORAL ARGUMENT IN THE McKLUSKIE CASE, JUSTICE O'CONNOR POINTED OUT THAT THE REAL SOLUTION IS, IF WE THOUGHT THERE WAS RACIAL DISCRIMINATION GOING ON, ONE OF THE THINGS THAT THEY SHOULD DO IS TO HAVE THE DEATH PENALTY SOUGHT MORE WHEN THERE ARE BLACK VICTIMS. BUT, YOUR HONOR, I DO NOT THINK A PROSECUTOR CAN LITERALLY TAKE THE NEXT SIX CASES IN HIS DOOR. I THINK THAT WOULD ESTABLISH --

THAT WOULD CROSS THE LINE OF BEING A VERY SPECIFIC SHOWING OF INTENTIONAL.

YES. I THINK THAT WOULD MEET THE TWO PRONGS.

ALL RIGHT.

GETTING TO THE SIMILARLY-SITUATED ISSUE YOU JUST MENTIONED, WAS THERE EVIDENCE IN THIS CASE THAT IN THIS COUNTY OR THIS CIRCUIT, THERE HAD BEEP A BLACK DEFENDANT -- THERE HAD BEEN A BLACK DEFENDANT ON A WHITE VICTIM WHO HAD RECENTLY KILLED, AND THEY HAD NOT SOUGHT THE DEATH PENALTY?

NO, YOUR HONOR. THEY SORT OF DID IT THE WRONG WAY AT THE EVIDENTIARY HEARING. UNFORTUNATELY, YOUR HONOR, I HAVE TO BACK UP AND CONFESS I CANNOT EVEN TELL YOU WHO I CONSIDER THE SIMILARLY-SITUATED PEOPLE IN THIS AREA, BECAUSE OF THE EQUAL PROTECTION ANALYSIS. THIS IS SUCH AN UNUSUAL CLAIM, I REALLY, BUT, GETTING TO WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING, THEY TALKED ABOUT, AND BY THEY, BOTH THE PROSECUTOR AND THE ELECTED STATE ATTORNEY, ED AUSTIN, WHO WAS THE ELECTED STATE ATTORNEY, TESTIFIED AT THIS EVIDENTIARY HEARING, AND HE EXPLICITLY TESTIFIED MY DECISIONS ARE NOT BASED ON RACE, AND I GET IT FROM BOTH SIDES, BE I TAKE IT, YOU KNOW, HE SAID NEWSPAPERS COMPLAIN TO ME ALL THE TIME. THE ONLY EVIDENCE PRESENTED WERE REGARDING THIS, AND THIS COURT IS FAMILIAR WITH THESE CASES. ASAY AND ELLIS, AND IN BOTH THOSE CASES, IN FACT A WHITE DEFENDANT WAS PROSECUTED AND THE DEATH PENALTY SOUGHT, SO THE ONLY ARGUABLY SIMILARLY-SITUATED TESTIMONY WAS THAT THIS OFFICE SOUGHT THE DEATH PENALTY IN SIMILAR CASES, WHEN YOU HAD A WHITE DEFENDANT KILLING

MULTIPLE BLACK VICTIMS FOR RACIAL PURPOSES. THANK YOU. THE STATE ASKS YOU TO AFFIRM THE JUDGMENT AND SENTENCE.

CHIEF JUSTICE: COUNSEL. HOW MUCH TIME DOES COUNSEL HAVE?

YOUR HONOR, IF I COULD JUST SORT OF ADDRESS SOME OF THE, SHE HAS RAISED BY THE -- SOME OF THE ISSUES RAISED BY THE STATE, SORT OF IN THE REVERSE ORDER. THE LAST STATEMENT THAT MY OPPONENT MADE THAT SORT OF CITES CITES ED AUSTIN'S TESTIMONY THAT HE NEVER SOUGHT FOR RACE AND THE NATURE OF THE HOMICIDE COMMUNITY. I WOULD POINT OUT, UNDER THE EQUAL PROTECTION PRECEDENT, THESE TYPES OF GENERAL ASSERTIONS ABOUT WHAT THE OFFICE POLICY GENERALLY WAS, ARE INSUFFICIENT TO OVERCOME AN EQUAL PROTECTION VIOLATION, AND I THINK THAT ALEXANDER V La ALEXANDER V LOUISIANA AND BALDWIN V KENTUCKY STAND FOR THOSE SAME PROPOSITIONS.

WHO WAS THE SIMILARLY-SITUATED DEFENDANT?

MY RESPONSE TO THAT, YOUR HONOR, IS THE STATE RAISED IN THEIR ANSWER BRIEF THE CASE OF ARMSTRONG, A 1986 CASE WHICH INVOLVED THE FEDERAL PROSECUTION IN CRACK COCAINE CASES. THE UNITED STATES SUPREME COURT SPECIFICALLY STATED, IN ARMSTRONG, AND ADDRESSES DRESING THE CLAIMS THERE -- IN ADDRESSING THE CLAIMS THERE, WHERE THE DEFENDANT IS MAINTAINING THAT THE EQUAL PROTECTION WAS VIOLATED ON THE BASIS OF DIRECT ADMISSIONS BY THE PROSECUTOR THAT SIMILARLY-SITUATED REQUIREMENT IS NOT, THERE IS NO REQUIREMENT.

SO THEN WE GO BACK TO THE FACT THAT THE TRIAL COURT MADE FINDINGS THAT A CREDIBILITY CONCERNING THE MOTIVATION AND THE ACTUAL STATEMENTS MADE BY THE PROSECUTOR AND THE HEAD PROSECUTOR, AND SO IT SEEMS THAT THAT THRESHOLD FACTUAL FINDING IS, REALLY, DIFFICULT FOR YOU TO OVERCOME.

WELL, I, I THINK I HAVE RAISED THIS ON DIRECT. MY ARGUMENT IS THAT THE TRIAL COURT'S FINDING THAT MR., HIS CHARACTERIZATION OF MR. STETSON'S STATEMENT AS AN ILL-CONSIDERED RECEIPTORITY IS NOT SUPPORTED BY THE COMPETENT SUBSTANTIAL EVIDENCE IN THE CASE, AND IF YOU LOOK AT MR. McGINNIS'S TESTIMONY, HE TESTIFIED THAT HE UNDERSTOOD THE IMPORT OF WHAT MR. STETSON WAS SAYING AND HE FOUND IT IRONIC, BEGIN THE CLAIMS HE MADE IN McKLUSKIE. MS. FENNEL TESTIFIED AND SHE TALKED TO MR. McGINNIS THE SAME DAY THAT THE PLEA OFFER WAS MADE, AND HE TOLD HER THE CASE COULD NOT BE PLED OUT BECAUSE OF A RACE FACTOR.

SO YOU ARE SAYING, THEN, THAT THE TRIAL COURT COULD NOT HAVE ACCEPTED MR. STETSON'S TESTIMONY THAT I WAS BEING SOMEWHAT SARCASTIC WITH THEM, BECAUSE I KNEW THAT THEY HAD BEEN RAISING THESE McKLUSKIE, HE DIDN'T USE THE TERM, BUT TYPE CLAIMS WITH ME, AND HE COULD NOT, THE TRIAL COURT COULD NOT BASE HIS FINDING ON THAT TESTIMONY BY MR. STETSON?

YOUR HONOR, I AM SAYING THAT THE TRIAL COURT'S FACTUAL FINDING IN THAT REGARD IS NOT CREDIBLE, IN LIGHT OF THE TOTALITY OF THE EVIDENCE. THE ONLY EVIDENCE THAT SUPPORTS THAT FINDING IS JUST PROSECUTOR'S STATEMENT HIMSELF. EVERY OTHER PIECE OF EVIDENCE SUPPORTS THE FACT THAT HE WAS COMPLETELY SERIOUS ABOUT WHAT HE WAS SAYING.

THAT IS THE CLASSIC CREDIBILITY DETERMINATION, PLUS THE FACT THAT THIS IS SO CLEARLY A DEATH CASE. I MEAN, IT IS NOT, THE ONLY --

YOUR HONOR --

-- REASONABLE THING SOMEONE WOULD LOOK AT IF YOU DIDN'T SEEK THE DEATH PENALTY,

WOULD BE THAT THERE HAD TO BE SOME RACIAL REASON WHICH WAS TO, BECAUSE IT WAS A BLACK VICTIM, THAT WASN'T BEING SOUGHT, SO I MEAN, IT JUST SEEMS TO ME THAT THAT IS NOT THAT THE, I MEAN I THINK THAT CREDIBILITY FINDING, THE MOST THAT WAS THE STATEMENT OF INTENT NOT TO DISCRIMINATE, IT SEEMS REASONABLE.

YOUR HONOR, IT SORT OF GOES TO YOUR QUESTION THAT WHAT I THINK THE STATE IS INVITING THIS COURT TO DO ISWHEN YOU TALK ABOUT THIS IS AN OBVIOUS DEATH-PENALTY CASE, THE STATE IS INVITING THE COURT TO ENGAGE IN A HARMLESS ERROR ANALYSIS IN THIS CASE AND SAY THIS WAS AN AUTOMATIC DEATH CASE. THERE IS NO WAY THAT IT COULD BE BASED ON RACE BECAUSE IT WAS SO OBVIOUS IT WAS A DEATH CASE, AND IF YOU LOOK AT THE McKLUSKIE OPINION AND JUSTICE BLACKWOOD'S DISSENT, HE CRITICIZES FOR ENGAGING IN THE SAME TYPE OF ANALYSIS THAT THIS COURT IS ATTEMPTING TO DO IS SAYING IT IS OBVIOUS IT IS A DEATH-PENALTY CASE. IN THE MAJORITY OPINION IN McKLUSKIE --

ISN'T THAT A LITTLE, THE PROSECUTOR DID, IN FACT, SAY THAT WHEN THESE PEOPLE, WHEN HE AND THE OTHERS ON THIS TEAM, BASICALLY, WERE LOOKING AT THIS CASE, THAT THEY LOOKED AT THE FACTS OF THE CASE, WHICH IN FACT INCLUDED --

YOUR HONOR --

-- WAIT A MINUTE. LET ME FINISH THE QUESTION, WHICH, IN FACT, INCLUDED THAT THERE WERE TWO MURDERS COMMITTED WITHIN A SHORT PERIOD OF TIME, AND THAT THEY, ALSO, EVALUATED WHAT MIGHT BE THE AGGRAVATING CIRCUMSTANCES THAT COULD BE PRESENTED IN THIS CASE, AND SO I, WASN'T THAT A PART OF THE TESTIMONY THAT THE TRIAL JUDGE HEARD?

I THINK WHAT YOUR HONOR'S CHARACTERIZATION OF HIS TEST TONE MOAN IS A LITTLE MORE THAN WHAT -- TESTIMONY IS A LITTLE MORE THAN WHAT HE SAID. MR. STETSON AND MR. AUSTIN TESTIFIED GENERALLY TO WHAT THE HOMICIDE COMMITTEE, HOW IT FUNCTIONED. THEY PROVIDE NOD TESTIMONY AS TO THE TREATMENT OF THE FREEMAN CASE BY THE HOMICIDE COMMITTEE. MR. STETSON'S TESTIMONY WAS ESSENTIALLY THAT THIS WAS A CASE WHERE THERE WERE TWO MURDERS AND I HAD NO OTHER CHOICE. THAT IS THE ONLY RACE NEUTRAL EXPLANATION, BUT AS I ARGUED ON DIRECT, THE STATE HAS NOT, THEY HAVE NOT MET THEIR BURDEN OF MOVING THAT THE DECISION TO SEEK DEATH -- OF PROVING THAT THE DECISION TO SEEK DEATH AND THE REFUSAL TO SEEK LIFE WAS RACE NEUTRAL, FREE OF ANY CONSIDERATION. I WOULD LIKE TO INVITE THE COURT TO LOOK AT THE STATEMENT OF THE PROSECUTOR. HE WAS ASKED WAS THE RAVES THE DEFENDANT OR OF A VICTIM EVER A FACTOR IN THE DECISION TO SEEK THE DEATH PENALTY AGAINST AN INDIVIDUAL? HIS ANSWER WAS, AT PAGE 37 OF THE TRANSCRIPT, WELL, WHEN YOU SAY A FACTOR, IT CERTAINLY IS A FACTOR. IT IS SOMETHING THAT YOU CONSIDER, AND I THINK, ALSO, MR. AUSTIN WOULD PROBABLY TELL YOU THIS, BUT YOU DO CONSIDER THE WAY THAT THE COMMUNITY PERCEIVES THE PROSECUTOR DOING THEIR JOB, AND THAT WAS THE WHOLE POINT I WAS TRYING TO MAKE TO PAT. I TOOK GREAT OFFENSE BY THE COMMENT MADE BY PAT AND A LOT OF OTHERS THAT THE DEATH PENALTY IS UNFAIR BECAUSE THE STATE ONLY TENDS TO SEEK IT WHEN THE DEFENDANT IS BLACK AS OPPOSED TO WHITE AND I THOUGHT IT WAS VERY IMPORTANT TO THE PUBLIC TO BE PERCEIVED DOING OUR JOB FAIRLY. I REQUEST THAT THE COURT GRANT RELIEF IN THE FORM OF A LIFE SENTENCE AS TO THE EQUAL PROTECTION CLAIM AND A NEW SENTENCING PROCEEDING AS TO THE INEFFECTIVE ASSISTANCE CLAIM.

CHIEF JUSTICE: THANK YOU. ALL OF YOU HAPPEN TO BE HERE AT A BITTERSWEET TIME FOR THE COURT. WE CAN'T LEAVE THE BENCH, WITHOUT ACKNOWLEDGING THAT THIS IS THE LAST REGULAR ORAL ARGUMENT SESSION IN WHICH JUSTICE SHAW WILL BE SITTING WITH US. I KNOW I EXPRESS THE FEELINGS OF YOUR COLLEAGUES THAT INDEED THIS IS A BITTERSWEET MOMENT AND HOW MUCH WE HAVE ENJOYED YOUR COMPANIONSHIP AND YOUR GUIDEENS OVER THE YEARS. WE THANK YOU FOR THAT AND WISH YOU GODSPEED IN YOUR RETIREMENT.

IT HAS BEEN A MUTUAL PLEASURE.

CHIEF JUSTICE: THE COURT WILL STAND IN RECESS UNTIL NEXT MONTH.

MARSHAL: PLEASE RISE.