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## **Robert R. Gordon v. State of Florida**

CHIEF JUSTICE: THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS GORDON VERSUS STATE. -.

WITH THE COURT'S INDULGENCE I WOULD LIKE TO REVIEW THE BACKGROUND OF SOME OF EVIDENCE OF THIS CASE. 9 DOCTOR WAS GETTING OFF WORK AT THE NIGHT SHIFT AT ST. PETERSBURG AND PRIOR TO LEAVING THE HOSPITAL HE RAN INTO HIS FIANCE, WHO WAS ARRIVING AT WORK THAT DAY AND HE THEN ATTEND ADD BRIEF MEGAN LEFT THE HOSPITAL, AND THAT WAS ULTIMATELY ABOUT NINE O'CLOCK, WHICH APPROACHED PROVED TO BE THE LAST HOUR OF HIS LIFE, AS WE BELIEVE. NOW, AT ABOUT 8:30 IN THE MORNING, ACCORDING TO THE TESTIMONY OF SUSAN SHORE, SHE, MERLE McDONALD AND ROBERT GORDON, THREE OF THE FIVE PEOPLE INDICTED IN THE KILLING OF DR. DAVIDSON, ARRIVED AT THE APARTMENT COMPLEX OF DR. DAVID ONE. MERLE McDONALD INSTRUCTED -- DAVIDSON. MERLE McDONALD INSTRUCTED SUSAN HOW TO BACK THE CAR UP TO THE SPACE, HOW TO PARK THE CAR. HE EXPLAINED THAT THEY WERE THERE TO PICK UP A PIECE OF PAPER FROM A FRIEND. HE GOT OUT OF THE CAR AND DISAPPEARED. ROBERT GORDON, ON THE OTHER HAND, MADE NO AT HE WANTS TO CONCEAL HIMSELF. HE STAYED THERE WITH SUSAN SHORE. THEY WALKED AROUND. THEY TALKED. THEY EVEN GOT A BALL OUTFIT TRUNK OF THE CAR AND PLAYED CATCH. WITH WITH ANYONE WHO WAS THERE TO SEE THEM, AND PEOPLE DID LOOKOUT AND OBSERVE THEM. AFTER A PERIOD OF TIME, THE DOCTOR ARRIVED HOME. MR. GORDON INDICATED THAT, ACCORDING TO THE TESTIMONY OF SUSAN SHORE, AND APPROACHED THE DOCTOR. SUSAN SHORE TESTIFIED SHE SAW ROBERT GORDON APPROACH THE DOCTOR. SAW HIM MAKE SOME KIND OF SIGN AS THOUGH POINTING TO THE CAR, THEN SAW NOTHING ELSE. NEVER SAW WHERE ROBERT GORDON WENT.

SO THE FACTS, I THOUGHT, WERE THAT MR. GORDON WAS THE ONE WHO WAS, HE WAS THE ONE OUT PLAYING BALL?

RIGHT.

HE WASN'T THE ONE WHO WENT JOG SOMETHING.

CORRECT. MERLE McDONALD WAS THE ONE WHO WENT JOGGING, SO WHAT WE HAVE, THEN, --

AND GORDON, WAS GORDON THE LAST ONE SEEN WITH THE DOCTOR, THE VICTIM ALIVE?

BY SUSAN SHORE, TO OUR KNOWLEDGE.

WELL, I MEAN BY ANYBODY.

TESTIMONY IS NOT, TESTIMONY DOES NOT INDICATE ANYTHING OTHER THAN THAT.

WELL, IN OTHER WORDS, AS FAR AS THE EVIDENCE AND THE TESTIMONY IS CONCERNED, THAT SHORTLY BEFORE HIS DEATH, HE WAS SEEN WITH GORDON GOING INTO HIS APARTMENT.

CORRECT. CORRECT. CORRECT. ABOUT 20 MINUTES LATER, MR. GORDON COMES BACK TO THE CAR, GETS IN WITH SUSAN SHORE, AND DOESN'T SHOW ANY SIGNS THAT ANYTHING IS WRONG, THAT ANYTHING UNUSUAL HAS HAPPENED. ABOUT TEN MINUTES AFTER THAT, MERLE McDONALD COMES AND GETS IN THE CAR, AND HE HEADACHES AN INTERESTING STATEMENT. -- AND HE

MAKES AIN'T RESTING STATEMENT. HE SAYS "I HAVE GOT THE PAPER", PATS HIS TUMMY AND SUSAN SHORE HEARS PAPER CRINGE LINK. LATER, HE SAYS -- KRINGLING. LATER HE SAYS, I GOT THE WATCH OF THE DOCTOR. NOW, WHY WOULD HE HAVE TO TELL ROBERT GORDON THAT HE HAD THE PAPER OR THAT HE HAD THE DOCTOR'S WATCH IF ROBERT GORDON HAD BEEN IN THE APARTMENT WITH HIM, BUT WE WILL ADDRESS THAT IN A MOMENT. ABOUT TEN O'CLOCK THAT MORNING, THE FIANCE AT HE WANTS TO CALL THE DOCTOR. DOESN'T GET A RESPONSE ON THE PHONE AND SHE THINKS THAT IS A LITTLE UNUSUAL, SO FOR THE NEXT 20 OR 30 MINUTES THROUGHOUT THE DAY, SHE CONTINUES TO CALL. BY EARLY AFTERNOON, SHE BECOMES SO CONCERNED SHE LEAVES THE HOSPITAL EARLY, GOES TO THE APARTMENT AND FIND HER FIANCE IN THE BATHTUB, FACEDOWN, WITH HIS HANDS AND LEGS BOUND.

NOW, I KNOW YOU ARE GETTING TO, THIS IS NOT THE DIRECT APPEAL.

CORRECT.

SO WHAT IS, WE HAVE REVIEWED THE SUFFICIENCY OF THE EVIDENCE PRESUMABLY, ON DIRECT APPEAL.

YES, YOUR HONOR.

WHICH POINT ARE YOU ABOUT TO ARGUE TO US?

I AM GOING TO BE ARGUING BASICALLY TWO POINTS, FAILURE TO INVESTIGATE AND FAILURE TO SEEK A SEVERANCE, BUT I THINK SOME OF THESE FACTS ARE KIND OF CRUCIAL TO MY ARGUMENT, AND I WILL TRY TO PROCEED VERY QUICKLY THROUGH THESE. THE POLICE DID AN UNBELIEVABLE GOOD JOB IN THE INVESTIGATION OF THIS. THEY DEVELOPED THE WIFE, DENISE DAVIDSON, AS A SUSPECT IN THE BEGINNING. THEY PUT HER ON SURVEILLANCE AND USED MULTIPLE TEAMS TO DO THAT. A MULTIPLE JURISDICTIONAL CASE INVOLVING STATE AND LOCAL AUTHORITIES AND NOT JUST FROM THE STATE OF FLORIDA BUT AS WELL FROM OTHER COUNTRIES. THROUGH THE INVESTIGATION, THEY BEGAN TO OBSERVE HER DOING SOME VERY UNUSUAL THINGS, SUCH AS WE SAY EARN UNION STOPS, A REMARKABLE NUMBER OF THEM. THEY OBTAINED SEARCH WARRANTS, SEIZED DOCUMENTS, GOT WIRE TAPS, ORAL INTERCEPTIONS. FROM THAT THEY RECEIVED PHONE NUMBERS, NAMES. THEY GOT TELEPHONE RECORDS IN WHICH THEY GOT NAMES AND ADDRESSES. THEY PURSUED THOSE AND DID LENGTHY INTERVIEWS AND FROM THOSE, INTERVIEWS AND NAMES OF OTHER SUSPECTS WERE DEVELOPED AND ALSO DENISE DAVIDSON AND HER FIANCE, LEO CISNEROS, BECAME THE FOURTH AND FIFTH PEOPLE INDICTED IN THIS. AND IN ADDITION TO THIS INVESTIGATION, THEY HAD UNBELIEVABLE GOOD LUCK. SUSAN SHORE IDENTIFIED THE BEST WESTERN OR DAYS IN THAT THEY STAYED -- DAYS INN IN TAMPA THAT THEY STAYED IN THE MORNING THAT THIS INCIDENT OCCURRED. ELEVEN O'CLOCK THEY CHECKED IN. WHEN POLICE GO TO VERIFY THAT, THEY ARE TALKING TO A CLEANING LADY AND SAYS YOU KNOW, I REMEMBER THAT SITUATION. THE PEOPLE LEFT SOME CLOTHES IN A ROOM AND I TOOK THE CLOTHES AND PUT THEM IN A BAG. THE POLICE SEIZED THE CLOTHES AND TOOK THEM TO THE FBI AND ON THE CLOTHING WORN BY MERLE McDONALD IS BLOOD OF THE VICTIM AND THE SHOES LEFT BY MERLE McDONALD LEFT THE SAME TREAD TRACK IN THE APARTMENT AND ALSO CONTAINED BLOOD ON THE BOTTOM OF THE SHOE, ALTHOUGH TOO SMALL TO BE ANALYZED AS THAT OF THE VICTIM. THEY FOUND HAIR OR FOUND CARPET FIBERS ON THE CLOTHES WORN BY MERLE McDONALD. THEY FOUND FINERS FROM A CASHMERE BELT THAT WAS USED TO BIND THE HANDS OF THE VICTIM ON. THAT THE REASON I POINT THIS OUT, AS I SAID THERE WAS THIS MULTIJURISDICTIONAL, INVOLVED STATES, ALL KINDS OF AUTHORITIES. THEY DIDN'T FIND ONE PIECE OF EVIDENCE THAT PLACED ROBERT GORDON IN THE APARTMENT. THERE WAS NOT ONE PIECE OF EVIDENCE INVOLVED IN THIS LENGTHY INVESTIGATION THAT SHOWED HE PARTICIPATED IN THE MURDER H THERE IS NOT ONE PIECE OF EVIDENCE IN THIS INVESTIGATION THAT SHOWED HE WAS AWARE OF A PLAN TO MURDER ROBERT GORDON. NOW, I AM NOT DOWN PLAYING THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE BECAUSE IT WAS QUITE

LENGTHY, BUT FROM THAT POINT THAT IS WHAT IT INVOLVED.

WAIT A MINUTE. NOW, WHEN YOU KEEP SAYING THERE WAS NOT ONE PIECE OF EVIDENCE. ONE PIECE OF EVIDENCE.

DIRECTOR PHYSICAL EVIDENCE. DIRECTOR PHYSICAL EVIDENCE. THANK FOR YOU CORRECTING ME. NOW, LET ME GO ON TO ONE THING THAT WAS NOT BROUGHT OUT.

YOU NEED TO, THE ZERO IN THE ISSUES BECAUSE YOU KEEP SAYING YOU ARE GOING TO AND A RED LIGHT IS GOING TO GO ON OUT THERE IN A MINUTE AND REALIZING WE HAVE THE BRIEFS AND KNOW A LOT OF THIS.

YES, JUDGE. RIGHT NOW.

KNOWING THIS OPPORTUNITY IS GOING TO BE MISSED.

TWO OF THE MOST CRITICAL WITNESSES IN THE STATE, ONE COLLIDE BETHEL AND IF YOU RECALL HE -- ONE WAS CLYDE BETHEL, AND IF YOU RECALL HE WAS ONE OF THE WITNESSNESSES WHO MADE TWO TRIPS TO ST. PETERSBURG. THERE WERE SIX TYPES OF MEETINGS THAT TOOK PLACE INVOLVING NOT ROBERT GORDON. THAT WAS NEVER BROUGHT TO THE ATTENTION OF THE JURY THROUGH CROSS-EXAMINATION OR ORAL ARGUMENTS. SUSAN SHORE TESTIFIED THAT THERE WAS A MEETING THAT TOOK PLACE THE EVENING BEFORE THE HOMICIDE, THAT INVOLVED LEO SENEROS, DENISE DAVIDSON AND MERLE McDONALD BUT NOT ROBERT GORDON. THAT WAS NEVER BROUGHT OUT TO THE JURY AND NEVER ARGUED.

LET'S GO TO THE MOTION TO SEVER. WAS IT CONSIDERED? THAT IS WHAT YOU SAID ONE OF YOUR POINTS IS THAT THE DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE THE SEVER, PRESUMABLY NOW BECAUSE THEY SHOULD HAVE BECAUSE THERE WAS IN WEALTH OF INFORMATION AND EVIDENCE INCULPATEING McDONALD, BUT VERY LITTLE DIRECTLY INCULPATING GORDON, AND THERE MUST BE MUST HAVE BEEN SPILL OVER.

IN DEFERENCE TO CHIEF JUSTICE ANSTEAD, VERY LITTLE PHYSICAL, NO PHYSICAL EVIDENCE, NO DIRECT EVIDENCE.

SO WHAT WAS THE TESTIMONY? YOUR ARGUMENT IS THAT HE WAS INEFFECTIVE, FOR FAILING TO MOVE --

I AM BASICALLY ARGUING THAT HE WAS INEFFECTIVE FOR TWO VERY, VERY IMPORTANT ISSUES IN THIS CASE, AND IF I COULD TAKE THEM, IF I COULD PASS YOUR QUESTION FOR JUST A MOMENT, JUSTICE --

I THOUGHT YOU SAID ONE WAS MOTION TO SEVER.

ONE WAS BUILT ON THE OTHER, IF I COULD ADDRESS THE FIRST ONE FIRST. THE FIRST ONE, HIS COMPLETE FAILURE TO INVESTIGATE THIS CASE. UNDERSTAND HE CAME INTO THIS CASE EIGHT WEEKS PRIOR TO THE TRIAL. PUBLIC DEFENDER HAD REPRESENTED ROBERT GORDON FOR 13 MONTHS PRIOR TO THAT. SCHWARTZBERG HAD BEEN ON THE CASE FOR MERLE McDONALD SINCE JUST ABOUT THE BEGINNING.

DID HE TESTIFY AT THE EVIDENTIARY HEARING, THE DEFENSE LAWYER?

YES. YES.

WHAT DID HE TESTIFY ABOUT HIS INVESTIGATION IN HANDLING OF THE CASE?

HIS INVESTIGATION WAS BASICALLY LIMITED TO TRYING TO DISPROVE THE ALIBI THAT ROBERT GORDON WANTED TO PRODUCE, BUT MY PROBLEM WITH THE INVESTIGATION, YOUR HONOR, IS THAT SCHWARTZBERG DEFENSE ITSELF, WHICH BASICALLY SAYS THAT ROBERT GORDON, MERLE McDONALD WENT INTO THE APARTMENT OF THE DOCTOR, RETRIEVED THE PAPER, LEFT, THEN LEO SENEROS CAME INTO THE APARTMENT AND COMMITS THE HOMICIDE AND LEAVES AND GOES TO TAMPA AND MEETS UP WITH MERLE McDONALD AND ROBERT GORDON AND PLANS THE HAIR, THE BLOOD, THE FIBER, THE HAIR SAMPLE AND PUTS IT ON THE CLOTHING OF MERLE McDONALD. THE DEFENSE ILLOGICAL, RIDICULOUS BUT IT IS IMPOSSIBLE. ONE OF THE THINGS THAT YOU WILL RECALL FROM THE EVIDENCE I MENTIONED WAS A SHOE IMPRINT FOUND THAT HAD BLOOD F. LEE HAD COMMITTED THE MURDER, HE WOULD HAVE HAD TO TAKE THE SHOE OFF MERLE McDONALD AND GONE FROM TAMP AND BACK TO WHERE THE SHOE WAS FOUND IN THE BAG BY WHERE THE CLEANING LADY PUT IT AND THAT IS IMPOSSIBLE. THE SECOND THING IS TRIAL COUNSNECESSARILY THIS CASE WAS ASKED DIRECTLY DURTION REVIEW ALL OF THE DEPOSITION TAKEN IN THIS CASE? HE SAID YES. HE WAS ASKED SPECIFICALLY DID YOU REVIEW THE DEPOSITION OF DETECTIVE MICHAEL SALONO, THE LEAD INVESTIGATOR IN THIS CASE, AND HIS ANSWER WAS ABSOLUTELY. AND IN THAT DEPOSITION THE POLICE OFFICER TESTIFIED THAT THEY KNEW THE PRESENCE OF LEO SENEROS AT THE TIME OF THE HOMICIDE AND IT WAS NOT IN ST. PETERSBURG AT THE TIME OF THE CRIME. THEY VERIFIED THAT BY THREE DIFFERENT ASPECTS, BY THE EYEWITNESS WHO SAW LEO SENEROS, ALTHOUGH HE DID NOT IDENTIFY LEO SENEROS BY NAME BUT IDENTIFIED HIM BY DESCRIPTION. LATER, AT TRIAL TESTIMONY, THEY ALSO VERIFIED THAT FROM PHONE WIRE ENTER ACCEPTS, IN WHICH DENISE -- INTERSENTENCE, IN WHICH DENIES -- INTERCEPTS, AND IN WHICH DENISE DAVID ONE WAS TALKING AFTER THE TIME OF, IT WAS CREATED LONG BEFORE LOVE GOT INVOLVED IN THIS BUT IT WAS CREATED BY SCHWARTZBERG BECAUSE HE HAD NO OTHER ALTERNATIVE THAN TO DO THAT FOR McDONALD, BECAUSE McDONALD WAS PLACED IN.

DID THE DEFENSE TESTIFY THAT THE TWO LAWYERS, ONE DEFENDING McDONALD AND THEN HIM DEFENDING YOUR CLIENT THAT, THEY ACTUALLY SORT OF AGREED ON A JOINT DEFENSE?

THAT IS NOT MR. SCHWARTZBERG'S PEST TESTIMONY. MR. SCHWARTZBERG'S TESTIMONY IS THAT THE DEFENSE WAS CREATED BY HIM FOR THE SOLE BENEFIT OF HIS CLIENT MERLE McDONALD. MR. LOVE GETS INTO THIS EIGHT WEEKS BEFORE TRIAL AND IS SOLD THIS DEFENSE BY MR. SCHWARTZBERG, AND SCHWARTZBERG TESTIFIED THAT, WHEN ISSUES WOULD COME UP, HE WOULD EXPLAIN IT TO MR. LOVE AND WHILE HE DIDN'T USE THE TERM SELL IT TO MR. LOVE, THAT HE WOULD CONVINCHE HIM THAT THAT IS THE BEST UNIFIED DEFENSE. OF COURSE IT IS FOR MERLE McDONALD BECAUSE IT KEEPS ROBERT GORDON FROM TESTIFYING AGAINST HIM, AND THAT BRINGS US, JUSTICE PARIENTE, TO YOUR QUESTION ABOUT SEVERANCE. NUMBER ONE, THERE WAS AN ABSOLUTE, UNEQUIVOCCAL DUTY OF OF ROBERT GORDON TO INVESTIGATE THE SCHWARTZBERG DEFENSE, THIS UNIFIED DEFENSE OF TWO HEADS ON ONE BODY. HE REJECTED EVERYTHING ELSE BUT HE DID NOT, AND THE RECORD SHOWS, INVESTIGATE THAT DEFENSE. HE ACCEPTED IT, SIGHT UNSEEN. NOW, WE GET TO SEVERANCE. THE STATE'S THEORY OF THIS CASE, AS I SAID, WAS TWO HEADS ON ONE BODY. THAT WAS ALSO THE DEFENSE THEORY IN THIS CASE, TWO HEADS AND ONE BODY! AND HAD MR. LOVE INVESTIGATED THAT RIDICULOUS DEFENSE, UNPROVABLE DEFENSE, AND INFORMED HIS CLIENT ABOUT THAT, THIS CASE WOULD HAVE TURNED OUT, IB BELIEVE, CONSIDERABLY -- I BELIEVE, CONSIDERABLY DIFFERENT, BUT HAD HE AN OBLIGATION TO SEEK A SEVERANCE. WHEN YOU HAVE THE STATE, IT IS ALWAYS IN THE INTEREST OF THE STATE TO HAVE A JOINT TRIAL IN A SITUATION LIKE THIS, BUT HERE YOU --

WHAT DID THE LAWYER SAY ABOUT THE SEVERANCE ISSUE?

IT WAS NEVER RAISED FORM MR. LOVE -- IT WAS NEVER RAISED. MR. LOVE NEVER HAD A DISCUSSION WITH ROBERT GORDON ABOUT THE BENEFITS OF A SEVERANCE. NEVER! THE ONLY THING MR. LOVE ATTEMPTED TO DO WAS TO KEEP OUT THE ALIBI DEFENSE, BECAUSE THAT WAS NOT CONSISTENT WITH THE SCHWARTZBERG DEFENSE, AND MR. SCHWARTZBERG FILED --

BUT WAS HE QUESTIONED ABOUT WHETHER HE CONSIDERED ASKING FOR A SEVERANCE, AND WHAT HIS REASONS WERE FOR NOT SEEKING A SEVERANCE? IN OTHER WORDS --

HE WAS QUESTIONED WHETHER OR NOT HE EVER HAD A DISCUSSION WITH MR. GORDON. LET ME PHRASE IT THIS WAY, THERE IS NO RECORD EVIDENCE THAT SHOWS THAT HE HAD A DISCUSSION OF THE MERITS. THERE IS RECORD EVIDENCE THAT HE DID NOT HAVE A DISCUSSION OF THE BENEFITS OF A SEVERANCE.

I AM NOT TALKING, NOW, ABOUT HIS DISCUSSION WITH HIS CLIENT. I AM TALKING ABOUT HIM AS A LAWYER, SAYING I HAVE GOT THIS DEFENDANT THAT I AM REPRESENTING. THE STATE IS GOING TO TRY HIM TOGETHER. MAYBE I SHOULD SEEK A SEVERANCE AND SAY HAVE A STRONGER CASE AGAINST THE CODEFENDANT, WHICH IS WHERE, WAS HE QUESTIONED ABOUT THAT?

HE NEVER MOVED FOR A SEVERANCE, BECAUSE --

WAS HE QUESTIONED ABOUT IT?

I BELIEVE SO. SCHWARTZBERG HAD MOVED FOR THE SEVERANCE, BASED UPON AN ALIBI DEFENSE, THAT HE BELIEVED ROBERT GORDON WAS GOING TO GO FORWARD WITH. HE DID NOT BELIEVE THERE WAS ANY MERIT IN THE ALIBI DEFENSE OF ROBERT GORDON, AND THEREFORE THE PREJUDICIAL SPILL OVER EFFECT WOULD HAVE BIASED OR PREJUDICED HIS CLIENT.

WHAT HAPPENED TO HIS MOTION FOR SEVERANCE?

HIS MOTION, HE WITHDREW HIS MOTION BECAUSE MR. LOVE WITHDREW THE ALIBI DEFENSE FROM ROBERT GORDON.

WAS THIS CLAIM SUMMARILY DENIED?

NO. THERE WAS AN EVIDENTIARY HEARING ON THE MATTER OF INVESTIGATION, AND OF THE MATTER OF SEVERANCE.

SO WHAT, ON THIS WHOLE ISSUE OF SEVERANCE, WHAT EVIDENCE DO YOU, IS THERE SOME EVIDENCE THAT CAME IN AT THIS TRIAL, THAT YOU MAINTAINED WOULD NOT HAVE BEEN ADMISSIBLE AGAINST MR. GORDON? BUT THAT WOULD HAVE MADE THE DIFFERENCE?

NO. MY POSITION IS, JUSTICE QUINCE, THAT I BELIEVE THAT, IN A CASE LIKE THIS, THAT AN ATTORNEY HAS A DUTY TO MOVE TO SEVER, WHEN YOU HAVE ALL THE PHYSICAL EVIDENCE AGAINST ONE CLIENT, BECAUSE IF YOU DON'T, IT IS GOING TO PIGGYBACK IN AGAINST THE OTHER CLIENT, AND THAT IS EXACTLY WHAT HAPPENED.

WHAT WAS THE LEGAL BASIS TO FIND THE SEVERANCE? JUDGE SHAFER SAID THERE WAS NO LEGAL BASIS, AND IF IT HAD BEEN PRESENTED, THERE WAS NO LEGAL BASIS TO DO SO AND SHE WOULD HAVE NOT HAVE GRANTED.

THANK, JUSTICE BELL, FOR POINTING THAT OUT, BECAUSE JUDGE SHAFER WITH ALL DUE RESPECT, WAS WRONG, AND I WILL TELL YOU WHY I BELIEVE SHE WAS WRONG. MR. SCHWARTZBERG MADE AN ARGUMENT TO THE COURT OF WHY A SEVERANCE SHOULD BE GRANTED. BECAUSE THE, AND YOU CAN USE LOVE'S TERMINOLOGY, THE JUDGE'S TERMINOLOGY, OR SCHWARTZBERG'S TERMINOLOGY. IT IS ALL THE SAME. THE ALIBI DEFENSE IS RIDICULOUS. THAT IS THE POSITION THEY TOOK, AND THAT WAS THE REASON THAT JUDGE SHAFER WAS GOING TO GRANT THE SEVERANCE. WE NOW LOOK AT THE SCHWARTZBERG DEFENSE. THAT WAS WORSE THAN THE ALIBI DEFENSE, BECAUSE IT WAS IMPOSSIBLE! AT LEAST IN THE THE ALIBI DEFENSE, THERE WERE SOME THING THAT IS MIGHT HAVE GIVEN IT SOME CREDENCE, BUT THERE WAS NOTHING THAT GAVE CREDENCE TO THE SCHWARTZBERG DEFENSE, AND THEREFORE THE JUDGE WAS INCORRECT

IN THAT RULING, BECAUSE THE ARGUMENT WOULD HAVE BEEN IDENTICAL. BOTH DEFENSES MR. CHIEF JUSTICE

THE MARSHAL HAS REMINDED US THAT YOU ARE INTO YOUR REBUTTAL TIME.

THANK, JUDGE. I GMING TO SIT DOWN NOW. THANK YOU -- I AM GOING TO SIT DOWN NOW. THANK YOU.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. KIMBERLY HOPKINS KINS FOR THE STATE OF FLORIDA. -- KIMBERLY HOPKINS FOR THE STATE OF FLORIDA. BASICALLY WHAT IS ON REVIEW IS THE COLLATERAL DEFENSE ATTORNEY THAT WAS ADOPTED BY THE ATTORNEYS BELOW AND ANY STRATEGY, EITHER THEORETICAL OR ONE TAKEN BY THE DEFENSE WAS HAMPERED BY TAKING THE STAND AND TESTIFYING NOT TO BEING IN TAMPA ON THE DAY OF THE MURDER. THAT WAS INVESTIGATED BY ATTORNEY LOVE PRIOR TO TRIAL, SO IT WAS NOT NEW NEW AT THE EVIDENTIARY HEARING. BOTH THE PUBLIC DEFENDER AND MR. LOVE HIRED SEPARATE INVESTIGATORS TO PURSUE THIS ALIBI AND FOUND IT TO BE INCREDIBLE.

WHAT ABOUT THIS DEFENSE THAT WAS, IN FACT, PRESENTED THAT OPPOSING COUNSEL SAYS WAS JUST TRULY INCREDIBLE. IF WE HAVE ALL THIS FOOTPRINT EVIDENCE, SORT OF EVIDENCE THAT LINKED MR. McDONALD TO HAVING BEEN THERE AT SOME POINT WHEN THE BLOOD, WHEN THE VICTIM'S BLOOD WAS ON THE FLOOR, DOESN'T THAT REALLY MAKE THIS WHOLE DEFENSE THAT THEY MOUNTED, PRETTY INCREDIBLE?

IF YOU LOOK AT THE FACT THAT MR. McDONALD LATER, AT HIS OWN EVIDENTIARY HEARING, ADMITTED TO BEING AT THE SCENE OR IT CAME OUT THROUGH ATTORNEY SCHWARTZBERG'S TESTIMONY, A THAT MR. McDONALD HAD ADMITTED BEING AT THE SCENE.

BUT MR. GORDON DID NOT.

NO. BUT MR. GORDON DENIED COMPLETELY BEING IN TAMPA, AND AS AN EXPLANATION FOR WHY THERE WERE MULTIPLE EYEWITNESSES WITH NO BIAS WHATSOEVER, PLACING HIM AT THE APARTMENT, SAID EACH AND EVERY ONE OF THEM WERE LYING.

IS COUNSEL CORRECT?

SO WHAT IS LEFT FOR THEM BUT TO PURSUE THIS INDICATION THAT THEY WERE THERE, AND I THINK THE EVIDENCE THAT THEY HAD THAT SUPPORTED THAT DEFENSE THIR WAS THE FACT THAT THEY -- DEFENSE THEORY WAS THE FACT THAT THEY CAME BACK TO THE CAR AND THEY LOOKED, THEY WERE NOT WET, WERE NOT SWEATY, WERE NOT COVERED IN BLOOD AND THE CRIME SCENE WAS HORRIFIC. IT WAS AN INCREDIBLE STRUGGLE WITH THE VICTIM WHICH TOOK PLACE IN HIS BATHROOM, SPLAT --

WAS COUNSEL CORRECT THAT HE SAYS THERE WAS NO PHYSICAL EVIDENCE LINKING GORDON TO THE CRIME.

THAT'S CORRECT.

THERE WAS NO PHYSICAL EVIDENCE. THERE WAS NO BLOOD OR HAIR FIBERS OR ANYTHING LIKE THAT.

CORRECT.

THAT GORDON'S LINKAGE WAS THROUGH ALL OF THESE COMMUNICATION ANSWER THEN

O'CLOCK THE LAST ONE SEEN.

CAME -- COMMUNICATIONS AND THEN BEING THE LAST ONE SEEN?

YES. THE SURVEILLANCE THAT TOOK PLACE PRIOR TO THE MURDER WHEN THEY ARE WAITING FOR DR. DAVIDSON IN THE APARTMENT COMPLEX AND THEY SEE HIM PULL UP, HE TELLS MS. STONE MY FRIEND IS HERE. YOU CAN GO WAIT IN THE CAR NOW. HE IS SEEN WALKING WITH HIM TOWARDS THE APARTMENT. DISAPPEARS UNDER THE STAIRWELL.

IS THERE ALSO, WE HAVE HEARD THE McDONALD DIRECT APPEAL?

YES.

THIS SOUNDS VERY FAMILIAR IN THIS CASE.

YES.

WAS THERE EVIDENCE THAT WHAT HAPPENED IN THAT, THE BATHTUB, THAT THERE WAS EVIDENCE THAT TWO PEOPLE WERE IN THAT APARTMENT AND PARTICIPATED IN THE MURDER? OR NOT.

YES. I THINK BASED ON THE STRUGGLE, ITSELF, AND ACTUALLY ON GORDON'S DIRECT APPEAL, THIS COURT REVIEWED THE MOTION FOR JUDGMENT OF ACQUITTAL ON THE VERY QUESTION OF WHETHER THERE WAS EVIDENCE OF HIM BEING IN THE APARTMENT, AND THIS COURT FOUND THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THAT AND THAT THE MOTION FOR JOA WAS PROPERLY DENIED ON THAT POINT, IN GORDON'S DIRECT APPEAL.

BUT THAT STRONGEST EVIDENCE OF THAT WAS HIM BEING SEEN.

YES.

THE LAST PERSON SEEN WITH THE DOCTOR, HEADING IN THE DIRECTION OF THE DOCTOR'S APARTMENT. IS THAT CORRECT?

YES, YOUR HONOR.

WHAT WAS THE LAWYER'S TESTIMONY BELOW, AS TO GIVEN THAT THERE WAS NO PHYSICAL EVIDENCE CONNECTING HIS CLIENT, INSIDE THE THING, THAT, OF WHY HE DIDN'T SEEK SEVERANCE TO TRY TO GET HIS CLIENT OUT FROM UNDERNEATH ALL OF THE EVIDENCE THAT WOULD BE BROUGHT ON AGAINST McDONALD? IN OTHER WORDS, I ASSUME HE WAS QUESTIONED ABOUT THIS, WAS HE NOT?

WELL, YOUR HONOR, HE WAS QUESTIONED. IT REALLY CAME MORE IN THE FORM OF QUESTIONING HIM ABOUT WHY HE DIDN'T PURSUE THE ALIBI DEFENSE, BECAUSE IT WAS TIED TOGETHER, REALLY, MORE WITH HIM, AND IN REALITY, HE DID, FROM THE TIME HE WAS APPOINTED INITIALLY, PURSUE THE ALIBI DEFENSE. HE FILED A NOTICE OF INTENT TO SEEK ALIBI. HE FILED WITNESS LIST FOR THE ALIBI WITNESSES. HE HIRED A SEPARATE INVESTIGATOR TO RECHECK THE ALIBI THAT THE DEFENDANT HAD PROVIDED.

GORDON ACTUALLY GOT ON THE STAND AT THIS EVIDENTIARY HEARING AND SAID HE WAS SOMEPLACE ELSE CONSISTENT WITH THIS ALIBI DEFENSE.

CORRECT. HE ACTUALLY PROVIDED THREE ALIBIS AT DIFFERENT TIMES, ALL SAYING HE WAS IN MIAMI WE HIS GIRLFRIEND, EITHER AT THE RACETRACK, AT THE BEACH OR GETTING HER TIRES CHANGED ATTIRE KINGDOM, AND ALL OF THOSE WERE INVESTIGATED AT THE TIME OF THE TRIAL

PREPARATION, BY -- WAS THERE QUESTIONING OF THE DEFENSE LAWYER, MR. LOVE, THAT HIS NAME?

YES. FOR GORDON.

ABOUT WHETHER HE CONSIDERED SEVERANCE OR?

I DON'T RECALL QUESTIONING HIM SPECIFICALLY ABOUT HE HAVERENCE, BECAUSE THE -- ABOUT SEVERANCE, BECAUSE THE FACTUAL BASIS AT THE TIME WHAT WAS HAPPENING IS THAT SCHWARTZBERG WAS PURSUING A MOTION TO SEVER, BECAUSE IN HIS OPINION IF THEY WERE GOING TO PURSUE THIS INCREDIBLE ALIBI, HE DIDN'T WANT TO GO TO TRIAL WITH GORDON AND SO HE DIDN'T NEED TO PURSUE THIS MOTION BECAUSE IT WAS OUT THERE, AND WHAT ENDS UP HAPING IS THEY GO TO COURT AND AFTER MULTIPLE STRATEGY SESSIONS INDEPENDENTLY WITH THEIR ATTORNEYS AND WITH BOTH DEFENDANTS AND BOTH ATTORNEYS TOGETHER, THEY FINALLY ARE ABLE TO CONVINCHE MR. GORDON THAT THIS IS AN ABSOLUTELY INCREDIBLE ALIBI THAT HAS NO CHANCE OF SUCCESS.

HOW WAS, THIS I GUESS I AM BEING CAUGHT UP IN THE ISSUES BEING PRESENT THE HERE BEFORE US -- BEING PRESENTED HERE BEFORE US ORALLY TODAY, IF THE CLAIM WAS MADE THAT THE LAWYER PERFORMED DEFICIENTLY BECAUSE HE DIDN'T SEEK A SEVERANCE, THEN HOW WAS THAT ATTEMPTED TO BE PROVEN AT THIS EVIDENTIARY HEARING BELOW? OR --.

ACTUALLY IT WASN'T IN THE NATURE THAT YOU ARE ASKING, YOUR HONOR, BECAUSE THEY DON'T SPECIFICALLY SAY TO MR. LOVE, WHY DID YOU NOT FILE A MOTION TO SEVER, BUT I THINK IT IS CLEAR FROM THE RECORD THEY WERE GOING FORWARD TOGETHER AS A TEAM, AND MR. SCHWARTZBERG, ATTORNEY SCHWARTZBERG HAD AN OUTSTANDING MOTION TO SEVER, AND THEY COME TO COURT, AND IN A SINGLE INSTANCE WHERE THEY ARE ALL IN COURT TOGETHER, THE DEFENDANT GORDON WITHDRAWS HIS MOTION, WITHDRAWS HIS ALIBI DEFENSE, AND AT THAT TIME, IS WHEN SCHWARTZBERG WITHDRAWS HIS MOTION TO SEVER.

SO THIS BROADLY, UNDER THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

YES, FOR FAILING TO MOVE TO SEVER.

WHAT ABOUT THIS? WHAT ABOUT HITCHING OF THIS DEFENDANT'S STAR TO THE OTHER DEFENDANT, WHERE THE STATE HAD A MUCH STRONGER CASE AGAINST THE OTHER DEFENDANT, WITH ALL OF THIS PHYSICAL EVIDENCE? WHY WASN'T THAT INADEQUATE PERFORMANCE OF COUNSEL, TO --

BECAUSE ALL OF THEIR PERFORMANCE HAS TO BE JUDGED, BASED UPON THE ALIBI THAT WAS BEING PRESENTED BY THE DEFENDANT, AND ALSO, WITH WHAT COLLATERAL COUNSEL IS OFFERING TO THIS COURT AS PREJUDICE. THEY ARE SAYING TO YOU NOW, IS THAT WHAT SHOULD HAVE BEEN DONE IS EITHER FOLLOWING A DEFENSE THEORY OF EITHER MERE PRESENCE, A LESSER OFFENSE OR LESSER PARTICIPATION. THAT IS WHAT THEY ARE SUGGESTING THE PREJUDICE HERE IS, AND IN FACT, THAT CANNOT, COULD NOT HAVE BEEN, FIRST OF ALL, IT WAS THE DEFENSE THAT WAS PURSUED. IT WAS THAT THEY JUST WENT TO THE APARTMENT AND STOLE THIS PIECE OF PAPER AND THEN THE MURDER OCCURRED AFTER THEY WERE LONG GONE, AND I THINK THAT THE PHYSICAL EVIDENCE OF THEIR APPEARANCE COMING BACK TO THE CAR WITH MS. SHORE, SUPPORTED THIS AND IT WAS REALLY ALL THEY HAD TO WORK WITH, ESPECIALLY GIVEN THE FACT THAT YOU HAVE A DEFENDANT THAT IS TELLING THEM THAT I WAS IN MIAMI AT ONE OF THESE THREE PLACES WITH MY --

WHAT ABOUT THE TESTIMONY OF SEI -- CISNEROS?

IN OTHER WORDS YOUR OPPOSING COUNSEL --

I DON'TS DID I DISAGREE IN TERMS OF WHAT COUNS-- I DON'T DISAGREE WITH WHAT, IN TERMS OF WHAT COUNSEL SAID AT THE TIME. WHAT DO YOU DO WHEN YOUR CLIENT SAID I WAS IN MIAMI AND I EVERYTHING IS NOT PANNING OUT.

IF YOU DON'T HAVE AN ALIBI DEFENSE YOU, DON'T PUT IT ON, BUT LET'S ASSUME THAT THE DEFENSE LAWYER LOOSE AND SAYS ALIBI DEFENSE, PREPOSTEROUS BUT THIS CISNEROS DEFENSE MORE IMPOSSIBLE, MORE EASILY DISPROVEABLE. YOU HAVE GOT McDONALD. THE STATE HAS ALL OF THE GOODS ON McDONALD AND NOW WE GO AND SAY I AM GOING TO MOVE TO SEVER BECAUSE YOU ARE GOING TO BE BETTER OFF BY YOURSELF.

RIGHT.

THE STATE, YOU SAY THAT ALL OF THE EVIDENCE ANYWAY THAT CAME IN IN THE JOINT TRIAL, WOULD COME IN IN A TRIAL AGAINST GORDON?

YES, YOUR HONOR, AND ACTUALLY THE TRIAL JUDGE, JUDGE SHAFER NOTES THAT IN HER POSTCONVICTION ORDER, AND I THINK --

SO THE PRONG IS REALLY NOT FULFILLED, EVEN IF HE SHOULD HAVE MOVED FOR A SEVERANCE.

AND IT IS ACTUALLY BORNE OUT BY THE FACT THAT THE THIRD CODEFENDANT, DENISE DAVIDSON, HAD SOUGHT A MOTION TO SEVER AND IT WAS DENIED BY THIS JUDGE AND SHE SAYS BY THIS ORDER IF THEY HAD TRIED TO GO FORWARD WITH THE MOTION TO SEVER WITHOUT THE ALIBI DEFENSE, THAT SHE WOULD NOT HAVE GRANTED IT, AS EVIDENCED BY THE FACT THAT SHE DID NOT GRANT IT TO DENISE DAVIDSON. LATER HER TRIAL WAS ACTUALLY SEVERED BECAUSE HER ATTORNEY FELL ILL AND SO SHE DID HAVE A SEPARATE TRIAL AND AS NOTED BY JUDGE SHAFER, THE EVIDENCE AGAINST McDONALD CAME IN IN HER TRIAL, SO YOU ARE CORRECT. THERE WOULD BE NO PREJUDICE AS TO WHETHER OR NOT THE PERFORMANCE WAS DEFICIENT. BUT I THINK --

MAINLY THERE WAS A CONSPIRACY INVOLVED HERE, CORRECT?

CORRECT. CORRECT.

WAS MR. CISNEROS PROSECUTED IN THIS CASE?

HE HAS NEVER BEEN FOUND. HE ABSCONDED AND TO THIS DAY HE IS AT LARGE, WHICH IS ANOTHER ACTUAL GOOD POINT TO WHY THEY WOULD TRY TO POINT TO HIM, BECAUSE HE IS NOT THERE.

BUT YOU SAID AGAIN THAT THERE IS CLEAR CUT EVIDENCE THAT HE WAS SOMEPLACE ELSE.

THERE WAS CONFLICTING EVIDENCE. I BELIEVE THE JURY WOULD HAVE BELIEVED THAT VERSUS THE DEFENSE THEORY.

WHY WOULDN'T YOU HAVE GIVEN -- WHY WOULDN'T IT HAVE GIVEN TROOIS THE DEFENSE THEORY, THE DIFFERENCE THAT GORDON WAS MERELY PRESENT AND IT WAS McDONALD THAT DID THE KILLING.

CORRECT. THERE IS NOTHING WRONG WITH THAT, BUT FOR THE FACT THAT THE DEFENDANT HAS NOW TAKEN THE STAND AND SAID HE WAS IN MIAMI ON THAT DAY, AND ANY NUMBER OF THE FIVE, WELL, THERE WERE FIVE PEOPLE THAT TESTIFIED AT THE EVIDENTIARY HEARING TO HIS WHEREABOUTS BEING SEEN IN TAMPA, AND THERE WERE ADDITIONAL PEOPLE THAT WERE NOT NAMED IN THE ORDER THAT THE TRIAL JUDGE, THAT JUDGE SHAFER POINTED OUT THAT COULD HAVE KEPT BRINGING FORT MORE PEOPLE THAT WOULD HAVE DONE THIS.

I DON'T HEAR THEM SAYING THAT THEY SHOULD HAVE PURSUED, TODAY AT LEAST, SAYING THAT THEY SHOULD HAVE PURSUED, I GUESS IT GOES BACK THAT EVEN IF THE SEVERANCE SHOULD HAVE BEEN GRANTED BECAUSE THESE WERE ANTAGONISTIC DEFENSES, THE STATE'S POINT IS THAT ALL OF THE EVIDENCE WOULD HAVE STILL COME IN, IN A SEVERED TRIAL. THAT IS THE EVIDENCE --

YES. YES. AND JUDGE SHAFER NOTED THAT IN HER ORDER, AND ACTUALLY, I MEAN, EVEN IF CISNEROS'S WHEREABOUTS, THERE COULD BE CONTRADICTORY EVIDENCE ABOUT THAT, YOU COULD STILL HAVE THE ARGUMENT THAT THEY SIMPLY WENT THERE TO TAKE THE PAPER AND SOMEONE ELSE KILLED HIM. IT IS CRUCIAL TO THIS THAT YOU HAVE NOT ONE BUT THREE SEPARATE STORIES FROM THE DEFENDANT ABOUT WHERE HE WAS IN MIAMI AND NOT ONE OF THEM PAN OUT. HE SAYS HE WAS ATTIRE KINGDOM. THERE WERE RECEIPTS SHOW IT WAS THE DAY AFTER THE MURDER. HE SAYS HE WAS AT THE RACETRACK AND BET ON A PARTICULAR HORSE. THE INVESTIGATOR WENT DOWN THERE AND THE HORSE DIDN'T RACE THAT DAY. HE SAID HE WAS WITH HIS GIRLFRIEND AT THE BEACH, AND WHETHER SHE IS INITIALLY QUESTIONED BY POLICE A MERE MONTH AFT MURDER, SHE CAN'T EVEN REMEMBER THE LAST TIME SHE SAW HIM, SO THERE IS NO CREDIBLE TESTIMONY TO SUPPORT ANY KIND OF ALTERNATIVE THEORY THAT HAS BEEN PRESENTED IN POSTCONVICTION OR TO THIS COURT NOW, AND IT IS REALLY NO DIFFERENT THAN WHAT WAS PRESENTED. I MEAN, THEY DID PRESENT THAT HE JUST WENT THERE TO STEAL THE PAPER, AND SO IT IS JUST TYPE OF DISAGREEMENT WITH TRIAL STRATEGY THAT DOES NOT PROVIDE A BASIS FOR POST-CONVICTION RELIEF. AND I THINK, WITH RESPECT TO THE INVESTIGATION, I WOULD SIMPLY POINT OUT THAT, WHILE ATTORNEY LOVE DID HAVE ONLY TWO MONTHS IN BETWEEN HIS APPOINTMENT AND THE ACTUAL TRIAL DATE, HE, 23 DEPOSITIONS HAD BEEN DONE BY THE PUBLIC DEFENDERS OFFICE. HE DID ANOTHER 15, AND HE DID HIRE HIS OWN INVESTIGATOR TO RECHECK THE ALIBIS PROVIDED BY THE DEFENDANT. HE ALSO TESTIFIED THAT HE WAS PLANING TO PURSUE THIS ALIBI, REGARDLESS OF HOW BAD IT WAS, UP UNTIL THE TIME A THAT THE DEFENDANT AGREED TO WITHDRAW THE ALIBI. IF THE DEFENDANT DID NOT AGREE TO DO SO, HE TESTIFIED AT THE EVIDENTIARY HEARING, HE WOULD HAVE CONTINUED TO PURSUE THE ALIBI.

WHAT ABOUT, WHAT WAS OFFERED IN THE PENALTY PHASE? WAS IT A JOINT PENALTY PHASE FOR BOTH DEFENDANTS?

YES. UM-HUM.

WHAT WAS PRESENTED BY THE DEFENSE LAWYER ABOUT RELATIVE CULPABILITY?

YOUR HONOR, I AM AFRAID I DON'T RECALL WHAT WAS PRESENTED ON THAT PARTICULAR TOPIC. I KNOW THAT IT WAS VERY LIMITED. I THINK THERE WAS ONLY ONE OR TWO WITNESSES CALLED FOR EACH OF THE DEFENDANTS, AND THERE WAS ONLY, THE ONLY MITIGATION THAT WAS FOUND WAS NONSTATUTORY, DEALING WITH FAMILY BACKGROUND, RELIGIOUS DEVOTION AND THE CODEFENDANT'S LIFE SENTENCE.

IS THERE ANYTHING IN THE SENTENCING ORDER ABOUT WHO THE KILLER WAS?

NOT THAT I RECALL, YOUR HONOR. IT MAY BE, BUT I JUST DON'T RECALL THE ANSWER. GOING BACK TO WHAT ATTORNEY LOVE DID INVESTIGATING THIS CASE, ALL THEY HAVE REALLY PROVIDED TO YOU IN ARGUMENT OF PREJUDICE IS, AGAIN, THIS CONTRADICTORY DEFENSE THAT, REALLY, JUST IS NOT SUPPORTED BY THE TESTIMONY OF THE DEFENDANT, AND THE TESTIMONY OF THE ATTORNEY SHOWS THAT THAT IS WHAT HE WAS TELLING HIM AT THE TIME, SO THAT IS WHAT THEY WERE DEALING WITH. THEY DID THE BEST WITH WHAT THEY HAD, AND I BELIEVE THAT THEY HAD, THEY DID A GOOD JOB AND THE TRIAL JUDGE NOTES IN HER ORDER THAT THEY DID A GOOD JOB OF TRYING TO ARGUE THAT TO THE JURY. ON THAT NOTE, WE JUST ASK THAT YOU AFFIRM.

CHIEF JUSTICE: THANK YOU. COUNSEL. MR. MARSHAL, HOW MUCH TIME? OKAY.

BE VERY QUICK. STRICKLAND REQUIRES THAT MR. LOVE INVESTIGATE THIS CASE, AND THAT HE DO SO WITHIN THE PROFESSIONAL NORMS OF OUR PROFESSION. MR. LOVE FAILED HORRIBLY, MISERABLY, IN HIS EFFECT TO DO THAT BECAUSE HE CONDUCTED NO INVESTIGATION INTO THE SCHWARTZBERG DEFENSE. HE INVESTIGATED EVERYTHING ELSE BUT HE DIDN'T INVESTIGATE THE MOST CENTRAL, CRUCIAL ISSUE IN THIS CASE. WHERE WAS LEO CISNEROS? BECAUSE IF THE POLICE OR SOMEBODY COULD EXPLAIN WHERE LEO CISNEROS WAS AT THE TIME OF THE HOMICIDE, HE COULD NOT HAVE GONE BACK AND COMMITTED THE HOMICIDE, WHICH WAS THE THRUST OF THE SCHWARTZBERG DEFENSE! THE POLICE KNEW WHERE HE WAS. THE PROSECUTOR, FRED SCHOTT KNEW WHERE HE WAS, BUT MR. LOVE DID NOT.

DO YOU AGREE THAT THE ALIBI DEFENSE WOULD HAVE BEEN EQUALLY BAD DEFENSE?

I BELIEVE THERE WAS SIGNIFICANT PROBLEMS WITH THE ALIBI DEFENSE AS WITH ANY ALIBI DEFENSE.

SO WHAT DEFENSE WOULD YOU POSIT NOW SHOULD HAVE BEEN PRESENTED?

I AM SIMPLY SAYING, JUSTICE PARIENTE, THAT MR. GORDON WAS NEVER GIVEN THE OPPORTUNITY TO --

WHAT WOULD THE DEFENSE HAVE BEEN?

ONE OF THE DEFENSES COULD HAVE BEEN LESSER PARTICIPATION. WE HAVE THE TESTIMONY FROM SUSAN SHORE.

WASN'T THAT DEFENSE PRESENTED?

NO. IT WAS NEVER ARGUED BECAUSE THE SWERTSBERG DEFENSE -- THE SCHWARTZBERG DEFENSE, IT WOULD HAVE BEEN CONTRADICTORY TO THAT, AND THAT IS MY POINT, BECAUSE IF WE WOULD HAVE ARGUED, WE WOULD HAVE PLACED MR. GORDON IN MUCH THE SAME LIGHT AS WE DID DENISE DAVIDSON AND MUCH OF THE THE INCULPATORY EVIDENCE WOULD HAVE BEEN WIRE TRANSFERS.

BUT YOU STILL HAVE THE EVIDENCE OF THE LAST ONE SEEN COMING OUT, ALL BLOOD --

NOT COMING OUT. NO. HE IS SEEN WHEN DR. DAVIDSON ARRIVES AT HIS APARTMENT COMPLEX. HE IS SEEN MAKING A MOTION TO THE CAR AND MAYBE THE TESTIMONY MIGHT HAVE INDICATED HE WAS WALKING TOWARD THE APARTMENT BUT THAT IS IT. THERE IS NOTHING ELSE, AND THERE IS NO EVIDENCE TO PROVE THERE WERE TWO PEOPLE IN THAT APARTMENT. THE ARGUMENT --

I THOUGHT HE SAID HERE COMES MY FRIEND AND YOU GO BACK TO THE CAR.

I AM SORE I.

DID HE NOT SAY "HERE COMES MY FRIEND", REFERRING TO THE DOCTOR, AND YOU GO BACK TO THE CAR.

HE TOLD SUSAN SHORE THAT, YES, AND APPROACHED THE DOCTOR IN THE PARKING LOT AND MADE SOME MOTION TO HIS CAR LIKE MAYBE THEY WERE TALKING ABOUT THE CAR. WE DON'T KNOW WHAT MR. GORDON DID AFTER THAT, BECAUSE THERE WAS NO PHYSICAL EVIDENCE TO PUT HIM IN SIDE AND THE AND THE HOMICIDE COULD HAVE BEEN PERFORMED BY ONE PERSON

BECAUSE THE DOCTOR COULD HAVE BEEN RENDERED UNCONSCIOUS.

SO THE IDEA IN THE PENALTY PHASE WHY, COULDN'T THAT HAVE BEEN ARGUED OR RELATIVE CULPABILITY WAS NEVER RAISED?

THE PENALTY PHASE WAS CONDUCTED TOGETHER, AND I THINK ALL THE, TO BE QUITE HONEST WITH YOU, MR. LOVE DID NOT PICK UP THE FACT THAT LEO CISNEROS WAS SOMEPLACE ELSE AT THE TIME OF THE HOMICIDE, AND I DRAW THE ANALOGY OF A DOCTOR WHO REVIEWS MEDICAL HISTORY BEFORE SURGERY AND OVERLOOKS THE FACT THAT THERE IS A DRUG THAT IS GOING TO CAUSE ADVERSE REACTION. HE ADMINISTERS THAT DRUG. THE PATIENT DIES. THAT IS EXACTLY WHAT HAPPENED HERE WITH MR. LOVE. HE HAD THE DEPOSITION IN FRONT OF HIM. HE REVIEWED IT, BUT HE DID NOT PICK UP ON THE FACT THAT POLICE KNEW WHERE LEO CISNEROS WAS, SO HE PURSUES THIS PREPOSTEROUS DEFENSE BECAUSE HE IS BEING AIDED ON BY SCHWARTZBERG WHO, HAS NO OTHER ALTERNATIVE BUT TO DO THAT BECAUSE THEY WERE MERLE McDONALD IN THERE, SO THEREFORE LOVE NEVER, EVER HAD A MEANINGFUL CONVERSATION ABOUT STRATEGIES OR OTHER ALTERNATIVES AS THIS COURT JUST REFERRED TO, I THINK FIVE OR SIX WEEKS AGO, IN I THINK IT WAS THE JONES CASE, WHEN YOU SAID THAT, WHEN IT TALKS ABOUT STRATEGIES, IT CAN'T BE INEFFECTIVE, UNLESS YOU HAVE NOT DISCUSSED OTHER ALTERNATIVES AND THE LAWYER CONDUCTED HIMSELF WITHIN THE NORMAL BOUNDS OF HIS PROFESSION. MR. LOVE DID NOT DO THAT IN THIS CASE. HE DID NOT GIVE MR. GORDON THE OPPORTUNITY TO CONSIDER ANYTHING ELSE, BECAUSE THEY WERE SO LOCKED IN ON THIS, IN THE SCHWARTZBERG DEFENSE, WHICH WAS UNBELIEVABLE. AND IMPOSSIBLE. THANK YOU VERY MUCH.

CHIEF JUSTICE: ON THAT NOTE, THANK YOU BOTH VERY MUCH. WE WILL BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.