Broderick W. Monlyn v. State of Florida

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS THE CASE OF MONLYN VERSUS THE STATE.

COUNSEL, IF YOU'LL JUST BE AT YOUR EASE. WE WILL JUST TAKE A COUPLE OF MINUTES SO YOU'LL HAVE A NICE QUIET ATMOSPHERE TO ARGUE YOUR CASE.

ALL RIGHT, GOOD MORNING.

THANK YOU VERY MUCH. MAY IT PLEASE THE COURT, MR. MILLSAPS, I'M BAYA HARRISON ON BEHALF OF THE APPELLATE BRODERICK MONLYN. I WILL GET RIGHT TO THE HEART OF OUR CLAIM WHY WE CONTEND YOU SHOULD REVERSE THE TRIAL COURT ORDER THAT DENIED MR. MONLYN'S 3.850 MOTION FOR POST CONVICTION RELIEF BASED ON ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL. OUR ESSENTIAL CLAIM IS THAT INITIALLY TRIAL COUNSEL MADE IT VERY SERIOUS, WHAT I WILL CONCEDE WAS A STRATEGIC DECISION TO MORE OR LESS PUT ALL HIS EGGS IN ONE BASKET. TO ASSUME MR. MONLYN WOULD BE CONVICTED EITHER FELONY MURDER OR PREMEDITATED MURDER AND NOT TO DO EVERYTHING HE COULD HAVE DONE TO PREVENT THAT. INSTEAD TO ASSUME THE ONLY WAY TO AVOID THE DEATH PENALTY WAS DURING THE PENALTY PHASE. THIS STRATEGY WAS UNREASONABLE BECAUSE THE OPPOSITE ACTUALLY WAS TRUE. THE STATE --

IS THIS WHAT THE LAWYER TESTIFIED TO? DID THE LAWYER TESTIFY IN THIS POST CONVICTION EVIDENTIARY HEARING?

MR. HUNT INDICATED THAT HE WAS VERY CONCERNED ABOUT THE STATE'S ABILITY TO PROVE HIS CLIENT'S GUILT. AND THAT HE WAS CONCENTRATING PRIMARILY ON THE PENALTY PHASE. BUT I AM NOT SAYING HE DIDN'T TRY THE BEST HE COULD DURING THE GUILT PHASE.

WELL, I'M TRYING TO TAKE THE, SORT OUT THE SOURCE OF YOUR STATEMENT, THAT IS, THAT IF I UNDERSTAND YOUR STATEMENT, IT IS THAT LAWYER HERE MADE THE DECISION NOT TO REALLY CONTEST THE GUILT, EVEN THOUGH HE DIDN'T MAKE AN ADMISSION PERHAPS. AND TO CONCENTRATE SOLELY ON THE PENALTY. NOW IS THAT WHAT HE TESTIFIED TO?

I WOULDN'T SAY THAT HE CONCEDED THAT. I THINK IF YOU LOOK AT HIS ACTION OR MORE IMPORTANTLY INACTION ON CERTAIN VERY IMPORTANT ASPECTS OF THE GUILT PHASE OF THIS, THIS SEEMS TO BE THE CASE.

MAYBE THE WAY TO DO THIS IS SIMPLY FOR YOU TO POINT OUT TO US WHICH ISSUE YOU ARE ADDRESSING. AND THEN GIVE US THE REASONS WHY YOU THINK THAT ISSUE HAS MERIT.

THANK YOU, YOUR HONOR. WE CONTEND THAT MONLYN SUFFERED PREJUDICE BECAUSE THE FIRST DEGREE FELONY MURDER CONVICTION WAS BASED, WHEN YOU REALLY LOOK AT WHAT HAPPENED AT THE TRIAL, UPON RATHER WEAK HABIT OR ROUTINE PRACTICE EVIDENCE THAT WOULD HAVE BEEN EXCLUDED --

TALKING ABOUT THE MONEY IN THE WALLET?

EXACTLY. THE STATE BASED ITS CASE FOR FELONY MURDER PRIMARILY UPON THE ROUTINE PRACTICE OR HABIT TESTIMONY OF THE DECEASED'S WIFE.

FIRST OF ALL ON PREJUDICE. WHAT DID THE DEFENDANT'S OWN CONFESSION STATE ABOUT WHAT HE DID?

HE ADMITTED HAVING THE WALLET IN HIS POSSESSION. I THINK HE ADMITTED LOOKING IN THE WALLET.

DIDN'T HE ADMIT HE ROBBED -- THERE IS MORE THAN THE WALLET, WASN'T THERE?

THAT IS TRUE. I HAVE GOT TO DEAL WITH THE TRUCK. I WILL GET TO THAT. FIRST IF I CAN TALK ABOUT THE MONEY SITUATION. THE STATE --

WELL, COME BACK AND ANSWER JUSTICE PARIENTE'S QUESTION, THAT IS, WHAT DID THE DEFENDANT SAY ABOUT WHAT HE DID OR WHAT HE INTENDED TO DO? WE HAVE TO SORT OF TAKE THAT, IF I UNDERSTAND IT, IN AN EVIDENTIARY CONTEXT WHEN IT COMES UP FOR OUR REVIEW, SORT OF IN THE LIGHT MOST FAVORABLE TO THE STATE. SO THE INFERENCES ARE FROM WHAT HE SAID AND THE INFERENCES THAT COULD BE FROM THAT. WHAT DID HE ADMIT TO OR SAY?

HE ADMITTED TO GOING THROUGH THE WALLET, FINDING NO MONEY IN THE WALLET AND DISCARDING IT. I ALSO --

BUT DIDN'T HE ADMIT THAT AFTER HE KILLED THE VICTIM HERE, THAT HE INTENDED TO ROB HIM OF THE TRUCK AND THE WALLET AND WHATEVER?

I DON'T THINK HE ADMITTED THAT HE INTENDED TO ROB THE TRUCK. THERE WAS TESTIMONY FROM TWO JAILHOUSE INMATES THAT HE HAD TOLD THEM THAT THAT WAS HIS INTENTION. BUT THE STATE'S ARGUMENT REALLY WAS THAT THIS HOMICIDE HAD NOTHING TO DO WITH THE ROBBERY, THAT THIS WAS KIND OF A REVENGE THING BECAUSE THE DEFENDANT AND DECEASED HAD A DISPUTE BEFORE HE HAD GONE OFF TO PRISON.

IN OUR EARLIER OPINION, I THINK WE ALLUDED TO THAT TESTIMONY.

YES, YOU DID, YOUR HONOR. BUT TO PROVE FELONY MURDER IN THIS CASE, THE STATE RELIED PRIMARILY UPON HABIT EVIDENCE.

THERE WAS ALSO KIDNAPPING. ANOTHER FELONY LIKE THE FELONY MURDER. HE ADMITTED TO ROBBERY, HE ADMITTED HE TOOK THE WALLET.

HE WENT THROUGH THE WALLET AND DISCARDED IT. I DON'T KNOW IF THAT WOULD BE ROBBERY. I DON'T THINK THAT WOULD NECESSARILY CONSTITUTE ROBBERY. HE HAD IT, DIDN'T SEE ANY MONEY IN IT.

SO IF YOU ROB SOMEBODY OF THEIR PURSE AND THEN YOU LOOK IN THERE LATER AND SAY WELL, THERE IS REALLY NOTHING IN THERE, YOU KNOW, OF VALUE TO ME, THEN THAT NEGATES THE ROBBERY?

WELL, IT DOES IF THE HOMICIDE WAS NOT COMMITTED IN ORDER TO EFFECT THE ROBBERY, YA'LL HAVE SAID THAT IN ONE LEADING CASE THAT, AND AGAIN, THE STATE EMPHASIZED THAT --

WELL, THAT WOULD TURN THE FELONY MURDER RULE ON ITS HEAD, WOULD IT NOT? WHAT YOU JUST SAID. LET'S COME BACK TO, AND LET'S -- WE CAN IGNORE THE TRUCK RIGHT NOW AND JUST TAKE THE WALLET, OR PURSE. SO IF YOU ROBBED SOMEBODY OF THEIR PURSE, OKAY, AND ALL THE ELEMENTS OF ROBBERY ARE THERE WITH REFERENCE TO THAT, IS THAT A COMPLETE ROBBERY? OR DO YOU HAVE TO ADD A POST SCRIPT THAT YOU LOOKED IN THE PURSE AND DIDN'T FIND ANYTHING IN THERE THAT YOU WANTED, AND SO YOU THREW THE PURSE ASIDE? IS

THE ROBBERY COMPLETED ONCE YOU TAKE THE PURSE?

I WOULD SAY NO. AND THE MORE IMPORTANT QUESTION --

SO WHAT HAS TO BE IN ADDITION TO YOU TAKING THE PURSE, WHAT ELSE DO YOU NEED?

TO ESTABLISH FELONY MURDER, THE HOMICIDE, IT MUST BE SHOWN WAS COMMITTED IN ORDER TO EFFECT THE ROBBERY. THERE MUST BE A NEXUS BETWEEN THE ROBBERY AND THE HOMICIDE. YA'LL HAVE SAID IF IT IS AN AFTER-THOUGHT, IF THE ROBBERY WAS AN AFTER-THOUGHT, THEN IT DOESN'T SUPPORT FELONY MURDER.

SO THAT HAS NOTHING TO DO WITH THE HABIT EVIDENCE. NOW, BECAUSE THE LINE OF CASES THAT TALK ABOUT ROBBERY -- AFTER-THOUGHT DID NOT SUPPORT FELONY MURDER IS A WHOLE DIFFERENT THING. I THOUGHT YOUR POINT WAS THAT DEFENSE COUNSEL INEFFECTIVE BECAUSE HE SORT OF GAVE UP IN THE GUILT PHASE AND HE SHOULD HAVE OBJECTED TO THIS HABIT EVIDENCE. NOW THE JUDGE FOUND THAT THE HABIT EVIDENCE WAS ACTUALLY ADMISSIBLE. AND SO THAT WOULD BE ANOTHER WAY TO NEGATE PREJUDICE IF IN FACT THIS TESTIMONY, EVEN IF IT HAD BEEN OBJECTED TO, WAS ADMISSIBLE.

YOU'RE CORRECT, YOUR HONOR. DEFENSE COUNSEL NEVER OBJECTED TO THE HABIT EVIDENCE COMING IN. WHAT THE -- WHAT HAPPENED WAS --

WELL, HE SAID HE DIDN'T BECAUSE HE THOUGHT IT WAS ADMISSIBLE. SO HE'S RIGHT, THERE IS CERTAINLY NO INEFFECTIVE ASSISTANCE COUNT.

I AM SAYING HE WAS WRONG. HE WAS WRONG BECAUSE HABIT EVIDENCE UNDER FLORIDA STATUTES ONLY APPLIES TO ORGANIZATIONS, NOT INDIVIDUALS. THAT'S RIGHT THERE, I THINK THAT IS 90.604 FLORIDA STATUTES. IT DOESN'T SAY INDIVIDUALS. NOW I WILL CONCEDE, YOUR HONOR, THAT THIS COURT HAS SAID THERE ARE CERTAIN CIRCUMSTANCES WHERE HABIT EVIDENCE CAN COME IN. BUT IT CAN ONLY COME IN IN A CRIMINAL CASE TO CORROBORATE SOME DIRECT EVIDENCE OF A CRIMINAL ACT. SUCH AS IN A DUI, WHERE THERE IS SOME EVIDENCE OF THE DUI, SOMEBODY SAW THE PERSON DRIVING ERRATICALLY, BUT THEN THE STATE HAS BEEN ALLOWED TO CORROBORATE THAT BY SAYING WELL, HE ALWAYS GOES TO THIS BAR, HAS FOUR OR FIVE BEERS AND HE LEAVES. THAT IS THE SITUATION WHERE HABIT EVIDENCE HAS BEEN DEEMED IN CRIMINAL CASES TO BE ADMISSIBLE.

WELL, IT IS NOT VERY CLEARCUT. AGAIN, EVEN ASSUMING IT WAS AN ERROR, HOW CAN WE SAY IT WOULD RISE TO THE LEVEL OF A COUNSEL NOT PERFORMING IN A WAY THAT UNDERMINES THIS DEFENDANT'S RIGHT, SIXTH AMENDMENT RIGHTS TO HAVE COUNSEL? IT IS JUST NOT AN ERROR THAT WHICH CAUSES, EVEN IF IT WERE, WHICH I AM.

IF YOU REMEMBER FROM THE RECORD, ACTUALLY ALL OF THESE FOLKS WERE WRONG. THERE WAS ONE HUNDRED DOLLARS ACTUALLY FOUND IN THIS WALLET LATER ON. DEFENSE COUNSEL KNEW ABOUT THIS PRIOR TO TRIAL. NEVER EVEN BROUGHT IT UP. NEVER THOUGHT TO CROSS-EXAMINE IT.

DOES THE PROSECUTOR KNOW ABOUT IT?

YES, YOUR HONOR. THE PROSECUTOR KNEW ABOUT IT. THE DEFENSE --

DID YOU RAISE A DIGUILIO CLAIM AS TO THAT?

IN ALL CANDOR, IF I DID, I MAY HAVE BEEN IN ERROR.

THAT WOULD BE PRETTY MUCH MORE SUBSTANTIAL CLAIM. IF THE PROSECUTOR KNEW ABOUT IT

AND AFFIRMATIVELY MISLED, THEN EVEN THE PREJUDICE STANDARDS ARE DIFFERENT. I AM CONCERNED BECAUSE THAT SEEMS TO ME TO BE THE MUCH STRONGER ARGUMENT.

IN ALL CANDOR, IT APPEARS THAT DEFENSE COUNSEL ONE WAY OR THE OTHER LEARNED ABOUT THIS. BUT HE DID ABSOLUTELY NOTHING ABOUT IT. SO, WHAT THE STATE --

WHERE IS THE PREJUDICE -- GETTING BACK I THINK IN ORDER TO SHOW PREJUDICE, YOU'D HAVE TO SHOW THAT THAT WAS THE ONLY EVIDENCE OF ROBBERY, THE TWO HUNDRED, THREE HUNDRED DOLLARS IN THE WALLET. BUT THERE WAS OTHER EVIDENCE OF ROBBERY AS CHIEF JUSTICE ANSTEAD SAID BEFORE, THE MERE FACT OF TAKING THE WALLET IS EVIDENCE OF ROBBERY. LET'S GET TO THE TRUCK, BECAUSE YOU HAVEN'T SPOKEN ABOUT THAT YET. IN YOUR BRIEF, YOU LOOK AT CASES THAT SAY WELL, A TRUCK CAN'T BE USED TO SUPPORT A ROBBERY WHERE IT IS AN AFTER-THOUGHT. CORRECT?

YES.

AND IN FACT ON PAGE 35 OF YOUR BRIEF, YOU SAY THAT MONLYN ONLY USED THE TRUCK TO FLEE FROM MR. WATSON'S PROPERTY, DROVE A SHORT DISTANCE AND ABANDONED IT. AND THEREFORE THIS CASE IS SIMILAR TO OTHER CASES WHERE THE DEFENDANT DROVE A SHORT DISTANCE WITH THE TRUCK. ISN'T IT A FACT, HOWEVER, THAT THE DEFENDANT DROVE FROM MADISON TO LAKE CITY WITH THE TRUCK, AND HOW CAN YOU DEFINE THAT AS A SHORT DISTANCE?

I WOULD DEFINE IT A LITTLE DIFFERENTLY. MY ARGUMENT IS PRIMARILY THAT IT APPEARS TO HAVE BEEN AN AFTER-THOUGHT. THIS ROBBERY OF THE TRUCK --

WELL, CAN YOU ANSWER MY QUESTION FIRST? HOW CAN YOU DEFINE DRIVING FROM MADISON TO LAKE CITY AS A SHORT DISTANCE?

WELL, DEPENDS ON HOW FAR YOU NORMALLY DRIVE. I WILL CONCEDE THAT THAT WAS NOT JUST A TEMPORARY TAKING. I WILL CONCEDE THAT.

AND IN ALL THE CASES WHICH WE TALK ABOUT THE DEFENDANT'S DRIVING A SHORT DISTANCE, THEY ARE TALKING ABOUT A MILE OR TWO, ISN'T THAT RIGHT?

I WILL CONCEDE THAT. BUT WHERE THE THEFT OR THE ROBBERY OR THE TAKING IN THIS CASE OF THE TRUCK IS AN AFTER-THOUGHT, IT IS NOT THE PRIMARY REASON FOR WHY THE PERSON COMMITTED THIS HOMICIDE.

WELL, DIDN'T HE --

I THINK --

DIDN'T HE IN FACT TELL SOMEBODY AT THE JAIL THAT HE WAS GOING TO THE VICTIM'S PROPERTY TO STEAL HIS MONEY AND HIS TRUCK?

YOUR HONOR, I HAVE TO CONCEDE THAT.

ISN'T THAT THEN EVIDENCE IN ITSELF THAT WOULD SUPPORT A FINDING THAT THIS WAS NOT AN AFTER-THOUGHT?

I WILL AGREE THERE WAS SOME TESTIMONY FROM TWO CONVICTED FELONS ESSENTIALLY TO THAT EFFECT. BUT VERY, VERY SHAKY. AND WHEN YOU'RE DEALING --

WHETHER IT IS SHAKY OR NOT IS FOR THE JURY TO DECIDE, RIGHT? WE CAN'T SAY THAT

COUNSEL WAS NOW INEFFECTIVE IN FAILING TO OBJECT TO THE HABIT EVIDENCE WHERE THERE IS OTHER EVIDENCE SUPPORTING THE ROBBERY, WHICH INCLUDES TAKING OF THE TRUCK AND EVIDENCE THAT IT WASN'T AN AFTER-THOUGHT.

IN A CAPITAL CASE, I WOULD HOPE THIS COURT WOULD VIEW SKEPTICALLY EVIDENCE OR TESTIMONY FROM PEOPLE IN PRISON OR JAIL WHO HAVE A LOT TO GAIN BY LYING ABOUT SOMETHING.

WHAT CASE FROM OUR COURT SAYS IN A CAPITAL CASE ON POST CONVICTION, NOT EVEN ON DIRECT APPEAL, WE CAN SECOND-GUESS THE EVIDENCE PRESENTED FOR THE JURY IN THE JURY'S FINDING?

I DON'T THINK THERE IS, YOUR HONOR. BUT I DO THINK THIS COURT CERTAINLY, AS I SAID, HAS THE AUTHORITY AND THE OBLIGATION TO REVIEW THAT KIND OF TESTIMONY VERY, VERY CAREFULLY. IF I MAY, I'LL RESERVE THE FINAL.

THANK YOU.

GOOD MORNING.

GOOD MORNING, CHIEF JUSTICE ANSTEAD; CHARMAINE MILLSAPS REPRESENTING THE STATE. MAY IT PLEASE THE COURT. ON THE HABIT TESTIMONY. FIRST I'D LIKE TO GET STRAIGHT. THERE WAS A LITTLE BIT OF A HINT OF A NIXON CLAIM. WE DID NOT LITIGATE ANYTHING HAVING TO DO WITH NIXON. WE DID NOT BRIEF IT. WE DID NOT HOLD AN EVIDENTIARY HEARING ON IT. SO THERE IS NO --

THERE WAS NO CLAIM HERE THAT THE DEFENSE LAWYER THREW UP HIS HANDS AND SAID MY CLIENT IS GUILTY OF FIRST DEGREE MURDER, I'M JUST TRYING TO SAVE HIS LIFE.

THERE WAS NO NIXON CLAIM. I HAVE NOT BRIEFED THE ISSUE. IT IS NOT IN THIS CASE.

IS THERE A SERIOUS ISSUE IN THIS CASE THAT WAS THE STATE HAVING SAID THERE WAS NO MONEY IN THIS WALLET WHEN IN FACT THE STATE DID KNOW THAT A HUNDRED DOLLARS HAD BEEN FOUND IN THE WALLET?

OKAY, NOW THAT WAS RAISED AS AN INEFFECTIVENESS CLAIM. UNDERSTAND, THERE WAS A HIDDEN COMPARTMENT TO THE WALLET. HE KEPT, WHAT HIS WIFE WHO TESTIFIED, MAD MONEY. A LOT OF PEOPLE DO THAT. THEY KEEP MONEY IN THE NORMAL PLACE IN THEIR WALLET AND THEN THEY'LL KEEP $20 OR A HUNDRED DOLLARS IN THIS CASE IN A SEPARATE PLACE. REMEMBER, THAT DOES NOT STOP THE STATE FROM ARGUING THAT THERE WAS TWO HUNDRED DOLLARS IN THE NORMAL PART OF THE WALLET.

I THOUGHT THE STATE ARGUED THERE WAS NO MONEY FOUND IN THE WALLET?

THERE WAS NO MONEY FOUND, YES, THE STATE ARGUED THAT.

THAT WASN'T TRUE? AND THE STATE KNEW THAT WASN'T TRUE?

BUT EVERYBODY KNEW THAT THEY MEANT IN THE NORMAL PART OF THE WALLET.

THE JURY KNEW THAT IT WAS, THAT A HUNDRED DOLLARS WAS FOUND IN THE COMPARTMENT?

NO, THAT DID NOT COME OUT AT THE TRIAL. THIS RAISED AS INEFFECTIVENESS. COUNSEL DIDN'T SEE ANY POINT IN HIGHLIGHTING THERE COULD HAVE BEEN MONEY IN TWO PARTS OF THE WALLET AND THAT HE JUST MISSED THE HUNDRED DOLLARS. OKAY? THAT DOESN'T HELP HIM A

BIT. REMEMBER, WE HAVE INDEPENDENT CORROBORATION THAT THERE WAS MONEY IN THIS WALLET. MONLYN TESTIFIED HE HAD FOUR DOLLARS IN QUARTERS WHEN HE ESCAPED FROM JAIL. YET HE BOUGHT A BIKE FOR $35 AND WAS ARRESTED WITH 25 ON HIM. AND SO NOT ONLY DO WE HAVE THE FACT THAT THERE WAS MORE CASH INVOLVED HERE. BUT ALSO BRENDA WEST, HIS GIRLFRIEND, WHO HE MET OVER IN LAKE CITY, TESTIFIED THAT HE HAD TOLD HER HE HAD TWO HUNDRED DOLLARS IN CASH ON HIM. THAT HE HAD TWO HUNDRED DOLLARS. SO THERE WAS MORE MONEY INVOLVED HERE. SO THE JURY STILL COULD HAVE, AND REGARDLESS OF ANYTHING, THE WAY THE ROBBERY WAS CHARGED WITH MOTOR VEHICLE AND/OR U.S. CURRENCY. THE AMOUNT OF MONEY DOESN'T MATTER. THE MERE TAKING OF THE WALLET IS ROBBERY. THE MERE TAKING. HE PICKED IT UP FROM THE GROUND ACCORDING TO HIS OWN TESTIMONY, LOOKED THROUGH IT. RIGHT THERE WE HAVE ROBBERY.

SO YOU SAID IT WAS CHARGED WITH MOTOR VEHICLE OR U.S. CURRENCY?

AND/OR U.S. CURRENCY.

DOESN'T SAY ANYTHING ABOUT JUST THE WALLET?

NO. AND THE WAY IT WAS ARGUED, AND I HIGHLIGHT ON MY BRIEF EXACTLY WHO ARGUED WHAT. FOR INSTANCE, BECAUSE OF CONCERN FROM THE COURT ABOUT IMPROPER, HE RELIED ON THE KIDNAPPING SOLELY TO ESTABLISH THE FELONY MURDER AGGRAVATOR. YOUR HONOR, THERE ARE WHOLE LEVELS THIS DOESN'T COUNT. THE WALLET ITSELF IS ROBBERY. WE HAD TESTIMONY THERE WAS ADDITIONAL EVIDENCE. HE TOOK THE TRUCK. AND MOREOVER IT WAS KIDNAPPING.

WHAT WAS THE KIDNAPPING?

AFTER THE FIGHT, THE DEFENDANT ESCAPED FROM JAIL, STAYED IN THE VICTIM'S BARN FOR TWO NIGHTS. THE SECOND MORNING, THE VICTIM COMES INTO THE BARN. THERE IS A GUN. THE DEFENDANT HAS STOLEN A SHOTGUN FROM THE TRUCK. THERE IS A SHOTGUN, AN OVER-UNDER SHOTGUN HE BRINGS INTO THIS BARN WITH HIM. WHEN THE VICTIM COMES IN, THEY GET IN A FIGHT. HE BEATS HIM TO DEATH WITH THIS OVER-UNDER SHOTGUN. BUT THE FIGHT GOES OUT OF THE BARN. THEY'RE STRUGGLING. THE VICTIM HAS OVER 20 --

SO, THE KIDNAPPING REALLY IS MOVEMENT THAT WAS A PART OF THE FIGHT THAT WAS GOING ON BETWEEN THE PARTIES?

YES. AND WHEN THE PERSON, WHEN THE VICTIM BECOMES -- THE KIDNAPPING IS EVEN MORE THAN THAT. WHEN THE VICTIM OUTSIDE BECOMES, HE NO LONGER STRUGGLING, HE IS HIT SO BADLY. THIS IS FROM THE DEFENDANT'S OWN TESTIMONY THAT I'M TELLING YOU THIS. WHEN HE -- THAT HE COULD NO LONGER FIGHT, THE DEFENDANT TIES -- GOES BACK IN THE BARN, GETS A BELT, TIES THE VICTIM'S HANDS TOGETHER. HE THEN TIES THE VICTIM'S SHOES, BOOTS LACES TOGETHER, AND HE DRAGS THE VICTIM BACK IN THE BARN. HE THEN GAGS HIM WITH A TOWEL.

YOUR ARGUMENT WHETHER KIDNAPPING HAD BEEN DEMONSTRATED OR NOT? WAS THERE ANY ARGUMENTS WHETHER THOSE ACTIONS ACTUALLY CONTEMPLATE OR DEMONSTRATE KIDNAPPING?

NO, YOUR HONOR. THERE WAS NO CLAIM HERE AT THE EVIDENTIARY HEARING THAT THAT DIDN'T AMOUNT TO KIDNAPPING.

HE WAS CONVICTED OF KIDNAPPING, RIGHT?

YES, YOUR HONOR.

THAT WAS ONE OF THE COUNTS HE WAS CONVICTED FOR?

YES, YOUR HONOR, ROBBERY WAS A FREESTANDING COUNT AND KIDNAPPING WAS A FREESTANDING COUNT, WAS MURDER, ARMED ROBBERY, ARMED KIDNAPPING.

THE DEFENSE LAWYER CONCEDED HE PROBABLY KNEW ABOUT THE HUNDRED DOLLARS, IS THAT CORRECT?

YES, BECAUSE, AND YOUR HONOR, LET ME EXPLAIN WHY THE HUNDRED DOLLARS SORT OF GOT LOST. THE WALLET WAS DISCOVERED IN A TROUGH. AND THE FDLE AGENT WHO PICKS UP THE WALLET OR THE INVESTIGATOR WHO TESTIFIED, IS LOOKING THROUGH IT BUT THEN BECOMES CONCERNED ABOUT FINGERPRINTS BEING ON IT. SO HE DIDN'T SEE THE HUNDRED DOLLARS EITHER. IT IS ONLY WHEN IT GETS TO FDLE THAT THE FDLE REALLY CAREFULLY LOOKING THROUGH IT, PROBABLY WITH GLOVES, NOT TO RUIN THE FINGERPRINTS, THAT THEY THEN FIND THE HUNDRED DOLLARS.

BUT THE STATE RELIED ON HIM HAVING MORE MONEY THAN HE HAD WHEN HE LEFT PRISON, AND HIS STATEMENTS ABOUT HOW MUCH MONEY HE HAD AND HIM SPENDING MONEY IN TERMS OF THE TWO PLUS TWO EQUALS FOUR ARGUMENT OF THE STATE? IS THAT CORRECT.

YES.

ABOUT THERE BEING ADDITIONAL MONEY IN THE WALLET?

YES.

IN ADDITION TO THE HABIT TESTIMONY?

RIGHT. I WOULD SAY THERE WERE TWO SOURCES FOR ADDITIONAL MONEY. BRENDA WEST'S TESTIMONY THAT MONLYN TOLD HER THAT HE HAD TWO HUNDRED DOLLARS ON HIM. AND ALSO --

WHAT DID THE DEFENSE LAWYER SAY AT THE EVIDENTIARY HEARING WITH REFERENCE TO HIS KNOWLEDGE OF THE HUNDRED DOLLARS IN THE SECRET COMPARTMENT?

HE SAID THAT WAS DISCLOSED, THAT THE PROSECUTOR HAD DISCLOSED THAT ON, I FORGET WHAT THEY CALL IT. PIECE OF PAPER OR DOCUMENT DID DISCLOSE THAT THE HUNDRED DOLLARS WAS THERE. COUNSEL SAID HE WAS PROBABLY AWARE OF THAT. BUT HE JUST DIDN'T -- THE HUNDRED DOLLARS, HE KNEW THE HUNDRED DOLLARS WASN'T GOING TO HELP HIM. HE WAS STILL GOING TO GET ROBBERY, ALL THESE DIFFERENT WAYS.

WHAT ABOUT HIS TESTIMONY WITH REFERENCE TO THE HABIT EVIDENCE? AND ITS ADMISSIBILITY? WHAT DID THE DEFENSE LAWYER SAY ABOUT THAT?

IT WAS HIS OPINION AND THE STATE'S POSITION THAT THAT IS ADMISSIBLE IN THE STATE OF FLORIDA. HE DIDN'T SEE ANY REASON TO OBJECT WHEN HABIT TESTIMONY IS ADMISSIBLE. HABIT TESTIMONY IS ADMISSIBLE ACCORDING TO PROFESSOR EHRHARDT, AND I CITED NUMEROUS CASED GRANTED FROM OUTSIDE THE STATE OF FLORIDA, SAYING THAT WHEN YOU TAKE A WALLET, THAT IS -- HABIT, THE WIFE CAN TESTIFY. I SPECIFICALLY CITED CASES THAT SAID THE WIFE MAY TESTIFY AS TO THE HABIT, MONETARY HABITS OF THEIR SIGNIFICANT OTHERS, THEIR HUSBAND.

THE BOTTOM LINE IN THE STATE'S VIEW IS THAT THERE WAS AN EVIDENTIARY BASIS AND A REASONABLE BASIS FOR THE COURT TO RULE IN THE WAY THAT IT DID AND FINDING THAT COUNSEL WAS NOT INEFFECTIVE?

I THINK IF COUNSEL HAD OBJECTED, HIS EXPLANATION FOR WHY HE DID NOT IS HE BELIEVED HABIT TESTIMONY WAS ADMISSIBLE. STATE'S POSITION IS HE'S RIGHT. BUT EVEN IF YOU -- BUT ALSO ON THE PREJUDICE ON THAT, EVEN -- ONCE AGAIN, GOING THROUGH ALL THE LABORS, THE REASON WE USE THE HABIT TESTIMONY WAS TO ESTABLISH PART OF THE ROBBERY. WE ESTABLISHED THE ROBBERY ALTERNATIVE WAYS. THE SHEER TAKING OF THE WALLET WITHOUT ANY MONEY IN IT. THE TAKING OF THE TRUCK 50 MILES FROM MADISON TO LAKE CITY. AND THEN WE ALSO HAD THE KIDNAPPING. THERE'S JUST NO TESTIMONY. THIS WAS ALL MONLYN'S OWN TESTIMONY AT TRIAL. MOST OF WHAT I'M TELLING YOU, MONLYN SAID DIRECTLY TO THE JURY HIMSELF. HE ADMITTED ALL THIS.

WHAT DO WE DO ABOUT THE TWO CLAIMS THAT THE TRIAL COURT DID NOT RULE ON?

YOU FIND THEM TO BE ABANDONED BECAUSE HE DID NOT ASK THE TRIAL COURT. HE SHOULD HAVE POINTED OUT THAT OVERSIGHT TO THE TRIAL COURT.

SHOULDN'T THOSE BE REMANDED TO THE TRIAL COURT TO TIE UP THOSE LOOSE ENDS?

YOUR HONOR, THEY'RE PROCEDURALLY BARRED. THERE IS NO USE FOR THAT. I WOULD AGREE IF MAYBE HE HADN'T GOT A RULING ON SOMETHING THAT YOU HELD AN EVIDENTIARY HEARING ON OR SOMETHING LIKE THAT, THAT MIGHT BE DIFFERENT.

ONE CLAIM WAS RAISED ON APPEAL AND WE RULED ON IT. AND THE OTHER ONE WAS A CLAIM THAT HE SHOULD HAVE BEEN RAISED ON DIRECT APPEAL?

EXACTLY. YOUR HONOR, LET'S TAKE THE ONE YOU ALREADY RULED ON. WHAT IS THE TRIAL COURT GOING TO DO? DECIDE YOU WERE WRONG?

YOUR POSITION THAT THAT APPEARS SO CLEARLY ON THE FACE OF THE RECORD, THAT THERE DOESN'T NEED TO BE A REMAND?

THE REMAND WOULD SERVE NO PURPOSE UNDER THOSE. YOUR HONORS KNOW THAT YOUR HONORS DECIDED THIS. THIS IS LAW IN THE CASE ON ISSUE, ISSUE NUMBER EIGHT. AND NUMBER SEVEN WAS CLEARLY SOMETHING IT WAS A JURY INSTRUCTION. THEY'RE ARGUING ABOUT THE PECUNIARY GAIN AGGRAVATOR. THAT IS PROCEDURALLY BARRED. THERE IS NO PURPOSE IN REMANDING THIS. ASK YOU TO AFFIRM THE TRIAL COURT'S DENIAL OF 3.850 FOLLOWING AN EVIDENTIARY HEARING AND TO DENY THE PETITION FOR HABEAS CORPUS AS WELL. THANK YOU VERY MUCH.

COUNSEL?

THANK YOU, I WON'T NEED ALL THAT TIME. JUST VERY BRIEFLY, YOUR HONOR, WITH REGARD TO THE KIDNAPPING CONVICTION. WE WOULD RELY ON FITZPATRICK VERSUS STATE, CASE THAT THIS COURT HAS WROTE AND VERY FAMILIAR WITH. AND BASICALLY IF YOU ACCEPT MY ARGUMENT ABOUT THE ROBBERY, IF I, HOPEFULLY, IF WE HAVE BEEN ABLE TO CONVINCE YOU THAT THE EVIDENCE WAS LEGALLY INSUFFICIENT, OR TO ESTABLISH ROBBERY AND TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO POINT THAT OUT, THEN THE KIDNAPPING CONVICTION COULD NOT BE AN UNDERLYING BASIS FOR THE --

WHY IS THAT? WHAT ARE YOU RELYING ON? FITZPATRICK?

FITZPATRICK VERSUS STATE. IN THAT CASE, YOU ALL HELD, A SOMEWHAT SIMILAR CASE WHERE THE STATE CHARGED THE DEFENDANT WITH PREMEDITATED MURDER AND FELONY MURDER USING A GENERAL VERDICT FORM. THEN IF ONE OF THE -- YOU CAN'T TELL IN THAT SITUATION WHAT THE JURY USED TO DECIDE THE FELONY MURDER. AND IN THOSE CASES IF YOU HAVE GOT A SITUATION LIKE THAT, THEN THERE HAS TO BE A NEW TRIAL.

DOESN'T FITZPATRICK REALLY TALK ABOUT ONE BEING A LEGAL IMPOSSIBILITY AS OPPOSED TO A FACTUAL INSUFFICIENCY? SO HERE, EVEN IF IT IS FACTUALLY SUFFICIENT FOR A ROBBERY, YOU HAVE MADE NO ARGUMENT THAT THE KIDNAPPING WAS NOT SUFFICIENT, THERE WASN'T SUFFICIENT EVIDENCE FOR THAT?

NO, I AM NOT MAKING THAT ARGUMENT. BUT IF YOU FIND THAT THE ROBBERY CONVICTION WAS LEGALLY AND FACTUALLY INSUFFICIENT, THEN UNDER FITZPATRICK A NEW TRIAL IS MANDATED BECAUSE YOU WOULDN'T -- THE JURY OR ANYONE, THIS COURT WOULD NOT HAVE BEEN ABLE TO TELL WHAT THEORY OF THE CASE --

BUT THAT ONLY APPLIES IF THE ONE THEORY IS THROWN OUT ON A LEGAL INSUFFICIENCY, NOT A FACTUAL INSUFFICIENCY?

EXACTLY. YOU WOULD HAVE TO FIND I AM RIGHT ABOUT MY ROBBERY ISSUE.

TO REACH THAT ISSUE, WE'D HAVE TO FIND NOT ONLY WAS THE ROBBERY OF THE WALLET INSUFFICIENT, BUT THE ROBBERY OF THE TRUCK AS WELL.

I CONCEDE THAT, YOUR HONOR.

THANK YOU VERY MUCH. COURT WILL NOW STAND IN RECESS UNTIL 9:00 TOMORROW MORNING.