Edward J. Zakrzewski, II v. State of Florida

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS ZAKRZEWSKI VERSUS STATE. BE AT YOUR EASE FOR JUST A MOMENT: ALL RIGHT. YOU MAY PROCEED.

THANK YOU VERY MUCH. IT HAS BEEN A LONG MORNING, SO LET ME GET RIGHT TO THE POINT, CONCENTRATING ON THE CLAIMS RELATED TO THE PENALTY PHASE OF THE DEFENDANT'S TRIAL, NOTING THE ECONOMY THAT IS THE ESSENCE OF OUR APPEAL. ON THE ONE HAND, WE HAVE TO ACKNOWLEDGE UP FRONT THAT THESE WERE HORRIBLE MURDERS. ON THE ONE HAND THEY WERE COMMITTED BY A MAN WHO, UP UNTIL THAT POINT IN TIME, HAD LED AN EX-EMPLATER LIFE AS A FATHER AND AIR FORCE -- {KPEM} LATER LIFE AS A PHAT ---EXEMPLARY LIFE AS A FATHER AND AIR FORCE OFFICER.

YOU DON'T ALLEGE A FAILURE TO PROPERLY INVESTIGATE. THIS SOLELY GOES TO WHETHER THERE WAS INEFFECTIVE ASSISTANCE IN NOT OBJECTING TO CLOSING ARGUMENT?

ABSOLUTELY CORRECT, YOUR HONOR. THE POINT IS THAT, DUE TO THIS DICHOTOMY, THIS WAS GOING TO BE A VERY TOUGH CASE FOR THE JURY, AND THE VOTE WAS OBVIOUSLY GOING TO BE CLOSE, SO UNDER THESE CIRCUMSTANCES, DEFENSE COUNSEL WERE OBLIGATED TO VISIONSLY OBJECT, WHEN THE PROSECUTOR -- VIGOROUSLY OBJECT, WHEN THE PROSECUTOR IN THIS CASE TRIED TO TIP THE BALANCE IN FAVOR OF DEATH, BY LAUNCHING WHAT I CAN ONLY DESCRIBE AS A PRETTY VICIOUS AND INFLAMMATORY ATTACK ON MR. ZAKRZEWSKI WHICH AT THE MOMENT THE JURY RESPONDED ON EMOTIONAL GROUNDS AND EVEN ATTACKING SOME OF HIS RELIGIOUS VIEWS.

WHY WAS IT A FAVORABLE BALANCE BEFORE THIS? YOU ARE ASSUME AGO FAVORABLE BALANCE.

IF YOU LOOK AT THE VOTE.

THAT IS THE -- ASSUME AGO FAVORABLE BALANCE.

IF YOU LOOK AT THE VOTE.

THAT IS THE ULTIMATE VOTE.

CONSIDERING HIS LIFE, THIS WAS GOING TO AND TOUGH CASE FOR THE JURY TO DECIDE, AND IT WAS IMPORTANT FOR THE DEFENSE COUNSEL TO PROTECT HIS INTERESTS. ON PAGES 25 {FLU} 30 OF -- 25-THROUGH-30 OF OUR INITIAL BRIEF, I SET OUT A WHOLE HOST OF COMMENTS MADE BY THE PROSECUTOR DURING HIS CLOSING ARGUMENTS --

YOU WILL HAVE TIME, IF YOU WOULD LIKE TO GO THROUGH WHICH COMMENTS YOU THINK ARE THE MOST EGREGIOUS, BUT IN THIS CASE THE JUDGE ACTUALLY, THE TRIAL COURT IN THE EVIDENTIARY HEARING, ACTUALLY GRANTED AN EVIDENTIARY HEARING ON WHY TRIAL COUNSEL DIDN'T OBJECT, RATHER THAN FIND THIS CLAIM PROCEDURALLY BARRED.

EXACTLY.

AND WHAT WERE THE TRIAL COURT'S FINDINGS AS TO WHETHER, WHAT DEFENSE COUNSEL, WHO WAS EXPERIENCED DEFENSE COUNSEL, DECISIONS THAT THEY MADE CONCERNING THE CLOSING

ARGUMENT?

YES, YOUR HONOR. BASICALLY THAT IT WAS TRIAL STRATEGY, THAT A LAWYER FELT IT WAS JUST BETTER TO TAKE IT EASY AND NOT OBJECT. HE DIDN'T FEEL THE OBJECTIONS WOULD BES IS OBTAINED, SO HE DECIDED -- WOULD BE SUSTAINED, SO HE DECIDED NOT TO.

WAS THAT SOME OF COMMENTS THAT FIRST OF ALL, HE THOUGHT THEY WERE SUPPORTED BY THE EVIDENCE, OR THEY WERE THE KIND OF COMMENTS THAT MIGHT BACKFIRE, IF, YOU KNOW, AND SORT OF LET THE PROSECUTOR HANG HIMSELF ON THEM?

YES. I THINK, AND COUNSEL SAID THAT HE FELT THAT THE PROSECUTOR WASN'T MAKING POINTS THAT WAY, BUT --

NOW WHAT DO WE DO? SEE, I AGREE THAT THERE CAN BE AN IN EFFECTIVE ASSISTANCE OF COUNSEL CLAIM MADE AND FOR FAILURE TO OBJECT AND I UNDERSTAND IT IS NOT PROCEDURALLY BARRED, BUT WHAT DO WE DO WITH THE FINDINGS OF THE TRIAL COURT, AFTER LISTENING TO THE TESTIMONY OF THE DEFENSE ATTORNEY, THAT THIS ISN'T A CASE WHERE A DEFENSE ATTORNEY WAS ASLEEP AT THE WHEEL, THAT WAS JUST SLEEPING AND JUST THOUGHT I AM GOING TO SIT THROUGH THE TRIAL. THIS WAS, AS YOU SAY, A LOT OF MITIGATING EVIDENCE PRESENTED. THAT WAS THE WHOLE CASE, REALLY, AND YOU ARE NOT ALLEGING THAT COUNSEL WAS INEFFECTIVE, AND SO WHAT WE WOULD HAVE TO SAY IS THAT AFTER AN EXPERIENCED DEFENSE ATTORNEY SPENDS ALL THIS ENERGY AND ALL OF THIS TIME ON PRESENTING A PRETTY GOOD CASE OF MITIGATION, THAT THEY JUST BLEW IT, TO THE EXTENT THAT THEY ARE FUNCTIONING BELOW WHAT THE SIXTH AMENDMENT REQUIRES, BY NOT OBJECTING TO THE SEVERAL COMMENTS.

YOUR HONOR, WHEN DEFENSE COUNSEL JUST SIT ON THEIR HANDS AND ALLOW THE PROSECUTOR FIVE TIMES, TO REFER TO THESE CHILDREN WHO WERE KILLED AS BABIES, TO SAY HE CHOSE TO MURDER HIS OWN BABIES, THESE BABIES SHOULD HAVE GONE TO DISNEY WORLD NOT FORM. ZAKREWSKI. HE DID NOT TAKE THESE BABIES TO DISNEY WORLD.

HOW OLD WERE THE CHILDREN?

I ADMIT THEY WERE YOUNG, BUT THIS IS VERY PROVOCATIVE LANGUAGE. THREE TIMES, THREE TIMES, YOUR HONORS, HE REFERRED TO HIM AS A MASS MURDERER.

THEY KNOW HOW, IF THE DEFENSE ATTORNEY SAID YOUR HONOR, I OBJECT, THESE WEREN'T BABIES THAT HE KILLED. THESE WERE HIS OWN CHILDREN. WOULD THAT BE A GOOD --

I THINK A {TRT} FROM OR -- I THINK A PROSECUTOR HAS GOT TO STAY UNDER CONTROL IN THESE CASES. HE CAN'T MAKE ALLEGATIONS LIKE THAT THAT ARE VERY, VERY INFLAMMATORY, AND THAT IS EXACTLY WHAT HE DID.

WHAT IS THE DIFFERENCE BETWEEN SAYING, FOR INSTANCE, BABIES, AND SAYING THESE HELPLESS CHILDREN?

I THINK TO ACCUSE --

AREN'T THERE SOME CASES WHERE THE FACTS AND CIRCUMSTANCES ARE SUCH THAT A PROSECUTOR COULD HARDLY AVOID A VERY EMOTIONAL APPEAL IN JUST NEAR RATING THE FACTS AND CIRCUMSTANCES -- IN JUST FAR RATING THE FACTS AND -- IN JUST NEAR RATING THE FACTS AND -- IN JUST NARRATING THE FACTS AND CIRCUMSTANCES? ADD THAT LAYER ON TO THE CASE TO BEGIN WITH. IT IS VERY DIFFICULT TO ARGUE THIS CASE TO THE JURY, WHEN YOU ARE SEEKING THE ULTIMATE PUNISHMENT, WITHOUT, BECAUSE OF THE FACTS OF THE CASE, THAT THAT PROVIDES SUCH SUBSTANTIAL EMOTIONAL RHETORIC HERE, JUST BECAUSE OF THE FACTS,

WOULD YOU AGREE WITH THAT?

TO SOME EXTENT, YES, SIR, BUT TO CALL THE DEFENDANT A BABY KILLER, THINGS LIKE THAT, THAT IS NOT HELPFUL. THAT IS NOT HELPING THE JURY MAKE A REASONED DECISION. TO EQUATE ZAKREWSKI TO ATED BUNDY TYPE OF KILLER -- TO A TED BUNDY TYPE OF KILLER, THAT TAKES AWAY FROM THE CAREFUL --

GIVE US AN EXAMPLE. I AM SURE THAT YOU HAVE DONE THIS, THAT HERE, AS OPPOSED TO OUTLINING IN YOUR BRIEF, PICK OUT THE THREE MOST EGREGIOUS STATEMENTS BY THE PROSECUTOR THAT YOU FEEL THAT THE DEFENSE LAWYER SHOULD HAVE BEEN LEAPING OUT OF HIS CHAIR AT THOSE STATEMENTS.

THE BABY KILLER COMMENTS, THE MASS MURDERER COMMENTS, THE GOLDEN RULE ARGUMENT THAT HE USED WHEN HE ASKED THE JURY TO, WHEN THEY HAD AN OPPORTUNITY, TO PICK UP THIS CROWBAR AND IMAGINE HOW THEY WOULD FEEL IF THEY HAD BEEN STRUCK WITH THIS INSTRUMENT, AND WORST OF ALL, AND I COMMENT ON THE COMMENTS REGARDING ZACH ARE YOU SKI'S SUPPOSE -- ZAKREWSKI'S SUPPOSED CHRISTIAN BELIEFS, THIS ONE --

THAT IN A VACUUM, COULD BE PRETTY INFLAMMATORY. DIDN'T THE DEFENDANT, HIMSELF, IN MITIGATION, SEEK TO PUT ON THAT HE HAD FOUND RELIGION, THAT HE WAS BORN AGAIN OR A FUNDAMENTAL CHRISTIAN AND PRESENTED THAT AS ONE OF THE MITIGATING FACTORS THAT WERE SOUGHT AND THAT IN THE ACTUAL PENALTY PHASE, WHICH THERE HAS BEEN NO OBJECTION, THAT THERE WERE, THERE WAS TESTIMONY ABOUT HIS PRIOR IDLIZATION OF NIETSCHE AND THE SPOUTING OF THOSE VIEWS?

YOUR HONOR, ADMITTEDLY THAT WAS THE POINT, BUT THE PROSECUTOR WENT FAR BEYOND WHAT HE SHOULD HAVE DONE. HE TALKED ABOUT FREDERICK NIECHE. HE EQUATED ZAKRZEWSKI IDOLIZES NIECHE AND HE SAYS HE DISPIESED CHRISTIANITY, AND ONE OF THE LAWYERS ACKNOWLEDGED THAT, IN THIS PART OF STATE, THAT WHEN YOU GET UP THERE AND SAY THAT A MAN DESPISES CHRISTIANITY AND WHAT THE DEFENSE LAWYER DESCRIBES AS A FUNDAMENTAL CHRISTIAN PART OF THE STATE, YOU ARE REALLY PERSONALLY ATTACKING THAT DEFENDANT FAR MORE THAN WAS OPENED UP WHEN THOSE COMMENTS WERE MADE DURING THE DEFENSE'S CASE.

BUT ISN'T THAT THE EXACT REASON THAT THE DEFENDANT SOUGHT TO PUT ON THIS TYPE OF EVIDENCE IN THE PENALTY PHASE, TO SHOW THAT HE WAS A CHRISTIAN TO GAIN THAT AS A MITIGATING? SO IN TERMS OF, I AM HAVING A HARD TIME, AND I GUESS THE DEFENSE ATTORNEY ALSO SAID HE DIDN'T OBJECT, BECAUSE HE THOUGHT THAT THERE WAS EVIDENCE ON THAT, AND YOU KNOW, I GUESS AS TO EACH OF THESE, YOU KNOW, I AM PRETTY IMPRESSED WITH THE FACT THAT THERE WAS AN EVIDENTIARY HEARING, AND THAT THE DEFENSE ATTORNEY, IN TERMS OF THE LIGHT OF THE WHOLE CASE, YOU KNOW, MADE SOME REASONABLE CHOICES ABOUT THE PROSECUTOR'S CLOSING ARGUMENT. I GUESS YOU KNOW, THAT WOULD JUST HAVE TO LOOK AT IT AND DECIDE WHETHER THESE WOULD HAVE BEEN OBJECTIONABLE CLOSING ARGUMENTS AND WHETHER THEY WOULD BE FUNDAMENTAL ERROR AND THAT NO REASONABLE DEFENSE ATTORNEY COULD HAVE EVER, EVER SAT BACK AND ALLOWED THESE ARGUMENTS TO BE MADE.

YOUR HONOR, THERE IS MERIT IN THAT WHEN YOU SINGLE OUT EACH INCIDENT, WHEN THESE COMMENTS ARE CONSIDERED CUMULATIVELY, IT IS VERY DAMAGING, AND REALLY, WHAT YOU HAVE GOT IS A SOLID PATTERN THIS THIS CASE, OF DEFENSE COUNSEL JUST SITTING THERE IN THE CHAIR AND LETTING THIS PROSECUTOR JUST BEAT --

DID THE LAWYER OBJECT TO ANY --

AT ONE POINT IN TIME, HE FINALLY OBJECTED, BUT IT APPEALED IN COMPARISON TO THE INSTANCES WHERE COUNSEL JUST REALLY SAT THERE.

THERE WAS JUST THAT SINGLE OBJECTION?

I WANT TO MAKE SURE I AM ACCURATE. I BELIEVE SO, YOUR HONOR. I DON'T BELIEVE THERE WAS MORE THAN ON -- MORE THAN ONE.

WHEN YOU SAY DEFENSE COUNSEL, DON'T ISOLATE THEM, BECAUSE HE SAID BABIES AND THAT IS THE VERNACULAR AND THAT PART OF THE STATE, AS FAR AS CALLING CHILDREN BABIES, WE DON'T WE, HAVE TO IN LOOKING AT DEFENSE ATTORNEYS PERFORMANCE AND WHETHER IT UNDERMINES OUR CONFIDENCE IN THE RESULT, REALLY LOOK AT THE WHOLE PICTURE? I SEE I HAVE A LITTLE HARDER TIME, FINDING THAT THIS DEFENSE ATTORNEY WAS JUST REALLY, NOW, THIS IS AN EXCUSE THAT WAS A STRATEGY, AND WHEN YOU LOOK AT THE VERY THOROUGH JOB THAT DEFENSE ATTORNEY DID AND VERY VIGOROUS JOB IN REPRESENTING THIS DEFENDANT THROUGHOUT THE ENTIRE PENALTY PHASE, AND SO DO WE SIMPLY ISOLATE THE CLOSING ARGUMENT, OR DON'T WE HAVE AN OBLIGATION TO LOOK AT THE ENTIRE PENALTY PHASE? YOU KNOW, WE HAVE HAD PENALTY PHASE CASES WHERE YOU KNOW, THE DEFENSE ATTORNEY GETS UP AND THERE IS ONE PARAGRAPH CLOSING ARGUMENT. DID THAT OCCUR IN THIS CASE, OR HE MADE A PRETTY GOOD CLOSING ARGUMENT?

I ADMIT HE MADE A GOOD CLOSING ARGUMENT. BUT REMEMBER, LOOK AT THE RESULT, HOW CLOSE THE VOTE WAS, DESPITE THE SERIOUSNESS OF THESE CRIMES. LOOK AT HOW CLOSE IT WAS. IT WAS A 6-6 VOTE FOR ONE OF THE VICTIMS, AND IT WAS A NARROW 7-TO-5 FOR THE OTHER.

GIVEN THE FACT THAT HE KILLED HIS {HIDZ} KIDS, ISN'T THE FACT THAT IT WAS A -- KILLED HIS KIDS, ISN'T THE FACT THAT IT WAS A 7-TO-5 VOTE THAT COUNSEL WAS EXTREMELY EFFECTIVE, THAT HE HAD EXCELLENT COUNSEL NOT INEFFECTIVE COUNSEL?

NO, NOT REALLY, BECAUSE WHEN YOU LOOK AT IT, IT WAS SO CLOSE THAT, HAD COUNSEL NOT SAT ON HIS HANDS ESSENTIALLY, THIS VOTE COULD HAVE BEEN MARKEDLY DIFFERENT, AND HAD IT BEEN MARKEDLY DIFFERENT, IT MIGHT NOT HAVE BEEN POSSIBLE FOR THE TRIAL COURT TO OVERRIDE A SIGNIFICANT RECOMMENDATION FOR LIFE.

WHAT KIND OF EXPERIENCE DID HIS COUNSEL HAVE?

ADMITTEDLY VERY EXPERIENCED, YOUR HONOR. CAN'T CONTEST THAT AT ALL.

HOW MUCH EXPERIENCE DID HE HAVE?

BOTH. THERE WERE TWO LAWYERS. BOTH WERE EXPERIENCED PUBLIC DEFENDERS. THEY HAD BEEN DOING THIS KIND OF WORK FOR MORE THAN A DECADE, SO I DON'T QUESTION THEIR EXPERIENCE OR ETHICS BY ANY STRETCH OF THE IMAGINATION.

DOESN'T THAT EXPERIENCE, DON'T WE HAVE TO CONSIDER THAT? DOESN'T THE TRIAL COURT HAVE TO CONSIDER THAT, IN WHETHER HE MADE A REASONABLE STRATEGIC DECISION NOT TO OBJECT?

YOU DO, BUT ACTIONS SPEAK LOUDER THAN WORDS, YOUR HONOR, AND YOU HAVE GOT TO LOOK AT THE IN ACTION HERE. IN A CLOSE CASE, JUST SITTING THERE AND LETTING THIS PROSECUTOR TURN ZAKREWSKI ALMOST INTO A DEMON, INTO THE ANTI-CHRIST, THIS IS JUST NOT ACCEPTABLE.

IN THIS CASE, MR. ELMORE HAS BEEN A PROSECUTOR IN OKALOOSA COUNTY FOR HOW LONG?

MANY YEARS.

MANY YEARS. AND BOTH OF THE DEFENSE COUNSEL HAVE BEEN CAPITAL DEFENDANTS IN THE PUBLIC DEFENDERS OFFICE FOR MANY YEARS.

MANY, MANY YEARS, YOUR HONOR.

SO THEY KNOW NOT ONLY THE COMMUNITY. THEY KNOW EACH OTHER VERY WELL AND HOW THEY TRY CASES. WOULD THAT BE A FAIR ASSUMPTION?

CERTAINLY. CERTAINLY.

LET'S ACTUALLY LOOK AT THE COMMENTS. LET'S TAKE THE ONE ABOUT THE BABIES. CALLING, WHAT IS IT, A FOUR-YEAR-OLD AND SEVEN-YEAR-OLD?

FIVE AND SEVEN.

CALLING FIVE AND SEVEN YEAR OLD BABIES, SOMETIMES I CALL MY 20 SOME-YEAR-OLD A BABY, BUT WHAT IS THE LIKELIHOOD, DO WE LOOK AT WHETHER OR NOT THERE IS A LIKELIHOOD THAT THE TRIAL JUDGE WOULD HAVE SAID DON'T CALL THESE YOUNG CHILDREN BABIES?

THEY WEREN'T BABIES. THEY WEREN'T INFANTS, AND I THINK, HAD THERE BEEN --

HE DIDN'T SAY INFANT. HE SAID BABIES.

HE SAID BABIES FIVE TIMES. ACCUSED HIM OF BEING A BABY KILLER. THEY SHOULD HAVE GONE TO DISNEYLAND AND NOT ZAKREWSKI.

SO WOULD IT HAVE BEEN REVERSIBLE ERROR, IF THE TRIAL JUDGE HAD SAID OBJECTION OVERRULED?

I THINK SO ABSOLUTELY. THIS COURT HAS SAID AND THE DISTRICT COURTS HAVE SAID MANY TIMES, PROSECUTORS HAVE GOT TO STAY UNDER CONTROL. ESPECIALLY IN THESE CAPITAL CASES, AND WHEN THEY GET UP THERE AND GET SO INFLAMMATORY --

SO YOU ARE REPRESENTING TO US THAT A TRIAL JUDGE WOULD HAVE SAID YOU ARE OUT OF CONTROL BECAUSE YOU ARE CALLING YOUNG CHILDREN BABIES.

I BELIEVE THE TOTALITY OF THE COMMENTS WOULD HAVE JUSTIFIED --

BUT AS THE COMMENTS ARE MADE, YOU MAKE YOUR OBJECTION THEN.

ABSOLUTELY.

AND THE TRIAL JUDGE HAS TO RULE ON THEM.

RIGHT.

SO ASSUMING JUST BABY COMMENTS ARE THE FIRST COMMENT THAT HAS TO BE MADE, THAT IS OBJECTED TO, YOU BELIEVE A TRIAL JUDGE WOULD HAVE SAID DON'T DO THIS?

I CERTAINLY DO. I HAVE SEEN, AND I HAVE CITED IN MY BRIEF, SO MANY CASES WHERE THE COURTS HAVE CONDEMNED THIS. I AM NOT QUESTIONING ANYBODY'S ETHICS OR ANYTHING LIKE THAT, BUT PROSECUTORS MUST STAY UNDER CONTROL IN THESE CASES, AND THE KIND OF COMMENTS THAT WERE MADE THIS VERY, VERY CLOSE CASE, TIPPED THE BALANCE AND CAUSED AT LEAST IN TWO CASES, A RECOMMENDATION OF DEATH. I ONLY HAVE A FEW MOMENTS LEFT. MY YELLOW LIGHT IS ON, SO I WILL RESERVE THE REST OF MY TIME, IF I MIGHT.

CHIEF JUSTICE: THANKS.

GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS CASSANDRA DOLGIN, ASSISTANT ATTORNEY GENERAL OF THE STATE OF FLORIDA. I AM SUGGESTING THAT WHAT THE COURT NEEDS TO DO IS CHANGE THE STANDARD AND ALLOW THE PRESENT VIEWS OF CONSOLE TO SUBSTITUTE FOR THE STRATEGIC STRATEGY -- COUNSEL TO SUBSTITUTE FOR THE STRATEGIC STRATEGY OF DEFENSE COUNSEL. EACH OF THE DEFENSE COUNSEL HAD MORE THAN TWO DECADES OF EXPERIENCE BETWEEN THEM.

COULD YOU ADDRESS THE ONE ABOUT GOING TO ORLANDO. WAS THERE EVIDENCE ABOUT THAT, HOW DID DISNEY WORLD COME INTO IT?

YOUR HONOR, THE ARGUMENT AROSE, THE PROSECUTOR WAS ADDRESSING THE ISSUE THAT MR. ZAKRZEWSKI HAD LEFT HIS HOME AND DRIVEN TO ORLANDO, TO THEN CATCH A PLANE TO FLEE TO HAWAII, AND THE PROSECUTOR SAID WHEN I THINK OF ORLANDO, I THINK OF DISNEY WORLD. IT WAS A VERY BRIEF COMMENT, AND THEN HE WENT ON TO SAY THE CHILDREN SHOULD HAVE BEEN TAKEN TO DISNEY WORLD. THE DEFENSE, THE DEFENDANT HAD TESTIFIED THAT THESE WERE MERCY KILLINGS, AND I WOULD SUGGEST TO THE COURT THAT, EVEN IF THIS ISOLATED REFERENCE TO DISNEY WORLD COULD EVEN BE CONSIDERED, SOME TYPE OF IMPROPER ARGUMENT, FIRST 06 OFF, COUNSEL -- FIRST OFF, COUNSEL DIDN'T OBJECT BECAUSE HE HEARD THE ARGUMENT, HIMSELF. THE WAY THAT COUNSEL TESTIFIED AT THE 3.850 HEARING, WAS THAT COUNSEL, HIS ARGUMENT WAS OVER THE TOP AND DIDN'T FEEL THAT IT WAS WORTH OBJECTING TO, THAT HE WASN'T MAKING ANY POINTS WITH THE JURY. IN ADDITION, EVEN IF THE COURT WERE TO CONSIDER IT IMPROPER, IT WAS AN ISOLATED COMMENT, AND I SUGGEST IT WAS A RESPONSE TO THE DEFENDANT'S TESTIMONY THAT WHAT HE HAD DONE TO HIS CHILDREN WAS MERCIFUL.

IN TERMS OF LOOKING AT THE VOTE, CAN WE JUST, THE FACT IS THERE WAS A JURY VOTE FOR THE DEATH OF THE YOUNGEST, OF LIFE, SO THAT IF THIS WAS, IT WOULD APPEAR TO ME THAT RATHER THAN THE JURY BECOMING EMOTIONALLY CARRIED AWAY WITH THE PROSECUTOR'S ARGUMENT, THAT THEY ACTUALLY LOOKED AT THE FACTS OF HOW EACH OF THE VICTIMS WERE KILLED, AN AND IN TERMS OF TRYING TO -- KILLED, IN TERMS OF TRYING TO MAKE A DECISION AS TO WHETHER HE SHOULD GET DEATH OR LIFE FOR EACH ONE OF THEM.

ABSOLUTELY, AND I THINK THAT, JUSTICE CANTERO, YOUR COMMENT REGARDING THAT I THINK THE CLOSE VOTE DOES DEMONSTRATE JUST HOW EFFECTIVE COUNSEL WAS. I DON'T THINK GOING INTO THE PENALTY PHASE, JUST WITHOUT ANY EVIDENCE BEING PRESENTED, THAT IT WAS A {CHRES}ED CASE AT ALL. I MEAN -- A CLOSED CASE AT ALL. I MEAN, THE COURT IS VERY AWARE OF HOW BRUTAL AND HEINOUS THE MURDERS OF THE WIFE AND THE TWO CHILDREN WERE.

WERE THERE ANY OBJECTIONS IN CLOSING ARGUMENT?

I DON'T RECALL HOW MANY. I DO REMEMBER SEEING AN OBJECTION AT LEAST ONE, BUT I DIDN'T SIT AND COUNT. TRIAL COUNSEL HAD TESTIFIED, THOUGH, THAT IT GENERALLY WAS NOT THE PRACTICE TO OBJECT TO ARGUMENTS THAT THEY THOUGHT WERE NONOBJECTIONABLE, AND IN THE SAME VEIN, BECAUSE OF HOW HORRIBLE THESE MURDERS WERE, COUNSEL DID NOT WANT TO ANTAGONIZE, AGGRAVATOR ANGER THE JURY IN JUMPING UP AND DOWN AND MAKING OBJECTIONS.

APPARENTLY THERE WAS ONE POINT WHERE THE PROSECUTOR ASKED THE JURY TO IMAGINE THE TERROR AND HORROR THAT ANNA FELT WHEN SHE WAS FORCED DOWN INTO THE BATHTUB WITH HER BROTHER'S MUTILATED BODY, AND COUNSEL OBJECTED AT THAT POINT AND MOVED FOR A MISTRIAL?

I BELIEVE SO. COUNSEL RECOGNIZED WHERE THE ARGUMENTS, WHERE HE FELT THAT THEY WERE OBJECTIONABLE, AND THAT IT WAS WORTHWHILE, MAKING THE OBJECTION. YOU KNOW, TURNING TO THE SPECIFIC ARGUMENTS AS TO THE COMMENT REGARDING THE BABIES, WELL, FIRST OFF, THE PROSECUTOR NEVER REFERRED TO THE DEFENDANT AS A BABY KILLER OR AT LEAST MY RECOLLECTION OF THE RECORD. THERE WERE REFERENCES TO, THAT THE DEFENDANT KILLED HIS CHILDREN, HIS BABIES, AND TRIAL COUNSEL HAD TESTIFIED THAT THAT WAS THE VERNACULAR IN THE AREA THAT THEY DO REFER TO YOUNG CHILDREN AS BABIES. AND FOR COUNSEL TO HAVE MADE THAT OBJECTION, YOU KNOW, TRIAL COUNSEL, THE COURT WOULD, YOU KNOW, THESE WERE HIS CHILDREN, SO I AM NOT SURE WHAT IS OBJECTIONABLE, OTHER THAN REMINDING THE JURY THAT THESE WERE HIS CHILDREN AND THAT THEY WERE YOUNG.

HOW ABOUT THE MASS MURDERER COMMENT?

THERE WERE THREE REFERENCES TO THE MASS MURDERER, AND I THINK THE FACT THAT THE DEFENDANT KILLED HIS THREE FAMILY MEMBERS, IT IS NOT AN INAPPROPRIATE COMMENT. THERE WAS NO REFERENCE TOTED BUNDY OR ANY OTHER MASS MURDERER, AND -- TO TED BUNDY OR ANY OTHER MASS MURDERER, AND TRIAL COUNSEL TESTIFIED THAT IN HIS OPINION, THEY BELIEVED THAT THERE WAS SOME LEEWAY IN MAKING THEIR ARGUMENTS.

HOW ABOUT THE ARGUMENTS ABOUT NIECHE AND THE, YOU KNOW, ANTI-CHRISTIAN BELIEFS?

DURING THE PENALTY PHASE, ONE OF THE NONSTATUTORY AGGRAVATING CIRCUMSTANCES THAT THE DEFENDANT HAD SUBMITTED WAS THAT HE HAD EMBRACED THE CHRISTIAN FAITH SINCE THE OFFENSE. THERE WAS EVIDENCE THAT HE HAD WRITTEN TWO LETTERS WHILE HE WAS IN JAIL, AWAITING TRIAL, WHERE HE INVOKES THIS NIECHE PHILOSOPHY, AND I THINK THAT THE STATE WAS WELL WITHIN ITS RIGHTS TO PUT ON THAT EVIDENCE, WHERE THE DEFENDANT IS TRYING TO INVOKE, AS MITIGATING CIRCUMSTANCE, THAT HE HAS, IN FACT HE PUT ON THREE OR FOUR WITNESSES TO TESTIFY AS TO HIS PRACTICES WHILE HE WAS IN HAWAII THAT HE WAS FOUND IN THE CHURCH PRAYING AND THAT HE HAD TAKEN ON THIS RELIGION AND WAS DOING THINGS THAT YOU KNOW, HE HAD, THAT ONE WOULD ESTABLISH WITH LIVING A RELIGIOUS LIFE. AND THE STATE WAS ENTITLED TO PUT ON EVIDENCE TO CONTRADICT THAT. REGARDING THE DEFENDANT'S COMMENT THAT THE STATE HAS DEMONIZED HIM, I WOULD SUGGEST THAT WHAT THE DEFENDANT IS DOING IS HE IS SUBSTITUTING HIS OWN JUDGMENT AS TO HOW HE WOULD HAVE TRIED THE CASE AND HAS MADE NO ATTEMPT TO DEMONSTRATE PREJUDICE.

WHAT WAS THE, GIVE ME AN OVERALL FLAVOR OF WHAT, IN THEIR OPENING IN REBUTTAL, THE THE ARGUMENT OF DEFENSE COUNSEL, HOW THEY WERE TRYING TO PORTRAY THE DEFENDANT AND THE JUSTIFICATION, IF ANY, FOR THE MURDERS?

ACTUALLY THE DEFENSE TRIED TO DEMONIZE THE WIFE AND TO ESTABLISH THAT SHE DROVE HIM THAT, SHE WAS CONSTANTLY ON HIM, SHE WASN'T HAPPY WITH THEIR FINANCIAL SITUATION, THAT SHE WASN'T HAPPY WITH THE CHILDREN THEY HAD. THERE WAS TESTIMONY THAT SHE HAD HAD, HAD WANTED TO HAVE A CHILD THAT WAS 100 PERCENT KOREAN, SO DURING THE CLOSING ARGUMENT, IF I REMEMBER COLLECTLY, IT -- CORRECTLY, IT FOCUSED UPON ALL OF THE STRESS THAT THE DEFENDANT HAD BEEN UNDER, HOW HE, IN EVERY AREA OF HIS LIFE HAD BEEN AN EXEMPLARY FATHER, FROM THE TIME HE GOT UP IN THE MORNING TO THE TIME LATE AT NIGHT, HE WAS EITHER AT WORK OR AT SCHOOL, TAKING CARE OF THE CHILDREN, AND THAT THE WIFE DID ABSOLUTELY NOTHING. VERY BRIEFLY, I AM GOING TO ADDRESS A FEW OF THE OTHER CLAIMS. THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM PERTAINING TO THE FAILURE TO RAISE THE FOURTH AMENDMENT ISSUE, IT IS THE STATE'S POSITION THAT THAT CLAIM WAS WAIVED BECAUSE OF THE VALID GUILTY PLEA. CLEARLY THERE WERE EX-GENT CIRCUMSTANCES. THERE -- EXIGENT CIRCUMSTANCES. THERE WASN'T A BASIS FOR OBJECTING.

DO YOU REALLY WAIVE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, JUST BECAUSE THE

GUY PLED GUILTY? I MEAN, WHAT THEY ARE REALLY SAYING IS THAT, IT MAY HAVE AFFECTED WHETHER OR NOT HE WOULD HAVE, IN FACT, ENTERED A GUILTY PLEA, HAD COUNSEL ADVISED HIM ABOUT THIS POSSIBLE MOTION TO SUPPRESS. IS THAT RIGHT? IS THAT HIS ARGUMENT?

THAT IS HIS ARGUMENT IN HIS BRIEF, BUT WHEN YOU GO BACK AND LOOK AT THE 3.850 EVIDENTIARY HEARING, AT NO TIME DID THE DEFENDANT TESTIFY "I WOULD NOT HAVE PLED GUILTY IF I HAD BEEN TOLD." WAIT A MINUTE. WE RAISED THE SUPPRESSION ISSUE. THE ONLY THING HE TESTIFIED WAS THE ONLY REASON HE PLED GUILTY WAS BECAUSE THE PHOTOGRAPHS WERE BROUGHT IN, SO IT WAS NOT VALID AT ALL AND RELEVANT TO HIM ENTERING THE PLEA {PLAE}. THE ALLEGATION THAT THE GUILTY PLEA IS INVOLUNTARY, COUNSEL TESTIFIED UNEQUIVOCALLY THAT AT NO TIME DID THEY ADVISE THE DEFENDANT THAT THESE PHOTOGRAPHS WOULD NOT COME IN, EXPRESSLY OR IMPLICITLY. THE COURT, THE TRIAL COUNSEL, THE COURT SAW NO REASON TO AVOID THE FINDINGS. IF THE COURT HAS NO FURTHER QUESTIONS, THE STATE ASKS THAT YOU AFFIRM THE JUDGMENT BELOW.

CHIEF JUSTICE: COUNSEL.

JUST VERY BRIEFLY, YOUR HONOR, ON THE ILLEGAL SEARCH ISSUE. WE WOULD RELY ON OUR BRIEFS WITH REGARD TO THAT ISSUE AND THE OTHERS, BUT THERE WERE NO EXIGENT CIRCUMSTANCES THAT JUSTIFIED OR WARRANTED A SEARCH IN THIS CASE AND THAT SHOULD HAVE BEEN ATTACKED BY DEFENSE COUNSEL. THERE WAS NO SHOWING THAT A CRIME WAS BEING COMMITTED OR HAD BEEN COMMITTED. THE OFFICER --

WOULDN'T YOU HAVE TO CONNECT THAT UP TO THE GUILTY PLEA, AND THAT IS THAT SOME CLAIM HERE, AND THEN BACKED UP BY EVIDENCE THAT I WOULD NOT HAVE PLED GUILTY, IF THERE HAD BEEN A CONTRARY RULING ON A MOTION TO SUPPRESS THIS EVIDENCE. AND THERE WAS NO CONNECTION AT THIS EVIDENTIARY HEARING, WAS THERE SOME.

WELL, I THINK THERE WAS, IN THAT ZAKRZEWSKI RAISED THAT HIS COUNSEL HAD NEVER RAISED WITH HIM TO SUPPRESS THE EVIDENCE THAT THEY SEIZED FROM THE HOUSE. IT WAS NEVER DISCUSSED WITH HIM, AND OUR POINT IS THAT HAD THEY DONE THAT, THEN HE COULD HAVE INSISTED THAT THEY GO FORWARD WITH THIS OR AT LEAST REASONABLE COUNSEL SHOULD HAVE, AND HAD THEY DONE THAT AND THIS EVIDENCE BEEN SUPPRESSED, THERE WOULD HAVE BEEN NO CASE AGAINST ZAKRZEWSKI AT ALL.

WHAT WOULD HAVE BEEN SUPPRESSED?

THE BLOODY BODIES, THE CRIME SCENE, THE WHOLE THING, SO IT WOULD ALMOST HAVE BEEN A JUDGMENT OF ACQUITTAL.

WAS THERE EXIGENT CIRCUMSTANCES, HAD THE DEFENDANT NOT BEEN MISSING FROM WORK AND WHEN THE OFFICERS ARRIVED THERE THE WINDOW WAS BROKEN INTO THE HOME AND THERE WAS MAIL ACCUMULATED, EITHER?

YOUR HONOR, UNDER THE CASE LAW THOSE DO NOT CONSTITUTE EXIGENT CIRCUMSTANCES. THE OFFICER WAS SO LAID BACK, HE DIDN'T CALL FOR BACK UP. NO DANGER TO THE OFFICER. NO INDICATION THAT THERE WAS ANYBODY INSIDE THERE FOR NO ONE {DACK} REDUCE AND NO INDICATION -- THERE FOR NO ONE TRYING TO FLEE.

HE HAD NOT SHOWN UP AT WORK OR SOMETHING, CORRECT?

CORRECT, YOUR HONOR, AND WHEN THE OFFICER GOT HERE, IT APPEARED THAT THE PLACE HAD BEEN ABANDONED. THERE WASN'T ANYBODY THERE. THERE IS NO REASON THAT THE OFFICER COULDN'T HAVE DONE WHAT THEY EVENTUALLY DID AND GET A SEARCH WARRANT, BUT THAT WAS AFTER THE ILLEGAL ENTRY. BASED ON THE ABOVE, YOUR HONOR, WE WOULD ASK THE

THAT THE JUDGMENTS AND CONVICTIONS BE REVERSED IN THIS CASE. THANK YOU VERY MUCH.

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

MARSHAL: PLEASE RISE.