James D. Ford v. State of Florida

SC04-1611

THANK YOU.
THANK YOU WE WILL MOVE TO THE NEXT CASE ON DOCKET. NEXT CASE FORD VERSUS STATE. PLAY IT PLEASE THE COURT IMRYAN TRUSKOSKI REPRESENTING JAMES FORD THE DEFENDANT. THIS IS A DEATH-PENALTY CASE, TWO ISSUES, ON APPEAL. THE FIRST IS WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A VOLUNTARY INTOXICATION DEFENSE, AND THE SECOND WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO -- FOR WAIVING THE DEFENDANT'S SPEEDY TRIAL RIGHTS.
CAN I ASK JUST AS GENERAL RULE IN TERMS LOOKING AT THIS WE'LL HAVE CASE -- THIS WHOLE CASE NOT THAT ANYTHING IS YET THE NORM BUT LOOKS YOU REVIEWED EVERYTHING THESE LAWYERS DID, AND FOUND NO DEFICIENCY IN THE PENALTY FACE PREPARATION.
THE TRIAL COURT FOUND ON --
NO, NO YOU DIDN'T RAISE ANYTHING SO FAR AS -- MITIGATING EVANS. SEPARATION AS FAR AS WHAT -- EXPERTS -- THAT THEY DID I ASSUME -- TRY CHALLENGE IT THAT IN ALL OTHER AREAS THAT THEY HAD DONE A PERFECT JOB --
PENALTY PHASE.
PENALTY PHASE OTHER THAN -- IN THE -- CASE.
CORRECT.
OKAY SO IN TERMS OF LOOKING AT THE GENERAL PERFORMANCE, DO WE I THINK THAT INTO CONSIDERATION IN OTHER WORDS, I WAS IMPRESSED THAT THEY HAD REALLY CONSULTED WITH A LOT OF EXPERTS, THAT THEY DID A WHOLE LOT PREPARED THIS CASE FOR TRIAL DO, WE LOOK AT THAT AS FAR AS GENERAL FUNCTIONING OF --
NO, IT HAS NO RELEVANCE.
PULL UP THE MICROPHONE, PLEASE.
THANK YOU.
NO. THAT WOULD HAVE NO RELEVANCE, FOR EXAMPLE IN THE TRIAL ATTORNEYS DID 99 THINGS RIGHT, AND NOT ONE THING WRONG, WAS PREJUDICIAL WOULD HAVE CHANGED THE OUTCOME, THEN THAT WOULD BE DISPOSITIVE.
ISN'T THAT CONTRARY TO LANGUAGE OF STRICKLAND VERSUS WASHINGTON WHICH SAYS THAT COUNSEL IS INEFFECTIVE WHEN HE WHEN HE IS CONDUCT IS SO EGREGIOUS THAT THE DEFENDANT IS ESSENTIALLY ACTING WITHOUT ANY COUNSEL?
THERE ARE SOME DECISIONS ON THAT POINT.
AND -- I'M TALKING ABOUT LANGUAGE OF STRICKLAND SPECIFICALLY.
ISN'T THAT A WHAT IT SAYS?
THOSE ARE CASES WHERE I BELIEVE WHERE THERE IS NO IDENTIFIABLE ERROR. THE TOTALITY OF INCOMPETENCE. OR, PERHAPS, RATHER THERE IS NO IDENTIFIABLE PREJUDICE PREJUDICE MUST BE PRESUMED BECAUSE THE -- WAS SO BAD.
-- LOOK HERE I GUESS ON TWO THINGS OF YOU PICKED OUT -- THE -- CREDIBILITY OF WHETHER IT WAS STRATEGIC WHY -- WHY WOULDN'T YOU LOOK AT TOTALITY OF THE REPRESENTATION TO SEE THAT ESPECIALLY ON THE SPEEDY TRIAL ISSUE THAT IF THEY HAD GONE TO TRIAL, IN THE SIX MONTHS, THEN THE ARGUMENT WOULD HAVE BEEN THEY DIDN'T DO ENOUGH TO PREPARE, SO, DON'T WE HAVE TO LOOK AT EVERYTHING THEY DID TO SEE WHETHER THE TRIAL COURT FINDINGS THAT THESE WERE OR CONCLUSION THAT THESE WERE REASONABLE DECISIONS, ARE SUPPORTED BY --
DEPENDING ON THE CLAIM WOULD YOU DO THAT. AND -- YES. WOULD YOU DO THAT.
AND --

SURE. THE VOLUNTARY INTOXICATION DEFENSE THE TRIAL COURT RULED THAT THIS ISSUE WAS MOOT BECAUSE THE TRIAL OR JUDGE DID NOT ALLOW IT PRESENTED TO THE JURY THIS FINDING IS CLEARLY ERRONEOUS. AS A STATE POINTED OUT IN PAGES 14 TO 15 OF ITS BRIEF, THE VALERIE INTOXICATION INSTRUCTION WAS GIVE TO THE JURY THAT MEANS THE TRIAL DID NOT UNDERTAKE A STRICKLAND ANALYSIS, AND DID NOT MAKE ANY FACTUAL FINDINGS, ON THIS -- LET ME ASK YOU ON THAT, I THINK THE TRIAL COURT WAS WRONG IN MAKING THAT STATEMENT THE INSTRUCTION WAS GIVEN. BUT HOW WAS THE ARGUMENT MADE IN THE EVIDENCE PRESENTED? WAS THERE -- WAS THERE A VOLUNTARY INTOXICATION DEFENSE ARGUED BY COUNSEL? HE ARGUE.
YES.
OR PRESENTED?
YES.
IN WHAT WAY?
THE TRIAL ATTORNEYS ARGUED THAT THEY WERE PRESENTING TO IT SHOW THAT THE DEFENDANT WAS INCAPABLE OF COMMITTING THE CRIME. OUR POINT WAS THAT IT HAS ANOTHER EFFECT ON THE JURY AND THAT IS THE DEFENSE OF I DIDN'T DO IT BUT IF I DID, I WAS TOO DRUNK, LACKS CREDIBILITY DOOMED TO FAIL.
-- DIDN'T THE TRIAL ATTORNEY HERE -- SORT OF MAKE A POINT OF SAYING THAT THIS DEFENDANT DID NOT DO IT -- HE TALKED ABOUT IT IN TERMS OF THE DEFENDANT REALLY DID NOT COMMIT THIS CRIME AND THE DEFENDANT WAS EVEN INCAPABLE OF HAVING COMMITTED THIS CRIME IN THE MANNER THAT THE STATE SAID THIS CRIME WAS COMMITTED. SO ISN'T THAT A DIFFERENT SITUATION FROM SAYING HE COMMITTED THIS CRIME, BUT HE WAS -- TO THAT HE WAS INTOXICATE AND THEREFORE NOT REALLY RESPONSIBLE --
YOU ARE CORRECT, AND THAT IS THE WAY THE TRIAL ATTORNEYS PRESENTED IT. THE PROBLEM IS THAT WHEN THE JURY SEES THE ACTUALLY INSTRUCTION IT IS ALMOST LIKE THE PHRASEOLOGY IT WAS NO THAT THE DEFENDANT WAS GUILTY. SO, OUR PERSPECTIVE IS FROM THE INSTRUCTION -- WRITTEN INSTRUCTION ITSELF RATHER THAN --
SO YOUR ARGUMENT WRITTEN WRITTEN TRUCKION SHOULD NOT HAVE BEEN GIVEN TO THE JURY TO TAKE BACK INTO THE JURY ROOM? I'M HAVING A HARD TIME FOLLOWING EXACTLY -- YES.
-- EXACTLY WHAT THE ARGUMENT BEING PLAYED ABOUT VOLUNTARY --
IT -- IN A NUTSHELL IT SHOULD NOT HAVE BEEN ADMITTED BECAUSE IT IMPLIED GUILTY. SHOULD NOT HAVE BEEN -- SBAENTH TO THE JURY AT ALL. SHOULD NOT HAVE BEEN SENT BACK TO THE JURY AT ALL.
INSTRUCTION?
CORRECT.
YOU ARE NOT TAKING ISSUE WITH THE FACT THEY ACTUALLY ARGUE ABOUT VOLUNTARY INTOXICATION AND THAT INSTRUCTION WAS GIVEN?
I'M NOT TAKING ISSUE WITH THEIR ARGUMENT. CORRECT.
I SAID INSTRUCTION DIDN'T SAY DEFENSE IS TO FIRST FIND THAT HE HAS ADMITTED THAT HE DID IT. IT SEEMED A MODIFIED INSTRUCTION. IN MY UNDERSTANDING OF IT WAS THAT IT WAS TO FOLD, THAT IT WAS TWOFOLD, THAT IT WAS TWOFOLD, IT WAS THIS FIND OF CRIME WOULD REQUIRE A WHOLE LOT OF PLANNING, IN HE WAS THAT DAY TOO DRUNK TO BE THE PERSON THAT WOULD COMMIT THIS KIND OF CRIME BEING INTOXICATED. WASN'T THAT HOW THEY USE IT?
IT WAS I MIGHT HAVE MISSPOKEN WHEN I ANSWERED JUSTICE'S QUESTION -- WE DO TAKE ISSUE WITH THEIR ARGUMENT. BECAUSE WHILE THERE WAS SOME MERIT TO IT. BUT THE FLIP SIDE WAS IT WAS TO PREJUDICIAL, EXCUSE ME BECAUSE IT DOES ASSUME GUILTY, IMPLIES GUILTY. --
SO AS I THE STATE WAS GOING TO BRING OUT THIS EVIDENCE OF INTOXICATION. SO WHAT ARE YOU CLAIMING THE DEFENSE ATTORNEY SHOULD OR SHOULD NOT HAVE DONE ABOUT THAT EVIDENCE
IN A SHY SHOULD HAVE IGNORED IT.
WHAT KIND OF DEFENSE THEN -- ARE YOU -- YOU HAD TO PRETTY VICIOUS SCENE I CAN'T IMAGINE ANYTHING MORE VICIOUS THAN THE EVIDENCE THAT IS GOING TO COME IN.
CORRECT.
WE'VE GOT ALL OF THE FORENSIC EVIDENCE, THE SCIENTIFIC EVIDENCE. AND IF THIS HAD NOT

BEEN ATTEMPTED THEN WOULD YOU BE STANDING HERE SAYING WELL THEY HAD THIS AND THEY DIDN'T USE IT SO JUST A VERY DIFFICULT TO HAVE A FULL APPRECIATION FOR THAT KIND OF ARGUMENT AND WHAT DEFENSE I MEAN IF YOU WANT HIM DEFENDED AT ALL, WHAT ELSE WAS THERE?
WELL, THE HERE TOY DEFENSE THEORY WAS THAT HE DIDN'T DO IT. THEY ATTACKED HUMAN ERROR -- DNA -- THE FACTS, JUST CREATING REASON DOUBT BY TRYING --
THAT ALCOHOL RENDERED HIM INCAPABLE PLANNING ALL THIS OUT CARRYING THIS OUT ISN'T THAT HOW THIS WAS USED.
THAT WAS THE TRIAL ATTORNEY'S.
WELL, I MEAN -- ISN'T THAT WHAT THE RECORD SHOWS AS WE LOOK AT THE HAS BEEN HERE ONCE BEFORE.
YES.
AS LEE AS WE LOOK THAT'S PICTURE ISN'T THAT WHAT A HAPPENED YES.
NOW HE DOESN'T -- FIRST OF ALL, HE DOESN'T HE DIDN'T -- THE RECORD SEEMS TO REVEAL THAT -- UNDER NIXON, HE DOESN'T HAVE TO AFFIRMATIVE CONSENT TO STRATEGY THAT -- WHATEVER STRATEGY WAS CONCERNING INTOXICANTS DO YOU AGREE WITH THAT.
YEE THAT IS RIGHT.
ALL HE REALLY NEEDS TO LOOK AT IS THE WAY THEY PRESENTED IT, BEGIN THAT IT WAS COMING OUT ANYWAY. WAS IT REASONABLE --; IS THAT CORRECT?
CORRECT. THE SECOND THING IS TO LOOK AT IS WOULD IT UNDERMINE, DOES IT UNDERMINE CONFIDENCE IN THE OUTCOME SO I GUESS IT GOES BACK TO THAT I DON'T SEE THAT IN ANY PART THEY SAY YEAH WE KNOW THIS GUY DID IT HE WAS DRUNK, THEY SEEM TO REALLY TAKE PAIN, AS SHOWN IN THAT CONFIDENTIAL LEGAL STRATEGY MEMORANDUM, IN THIS CASE, TO MAKE SURE THAT THEY DID "WALK THE LINE" RESPECTING HIS -- PROTESTATIONS OF INNOCENCE, TRYING TO USE THAT EVIDENCE IN THE WAY THAT WOULD MOST LIKELY PRODUCE A -- OF A LESSER -- A RECOMMENDATION FOR LIFE.
IT DOES APPEAR THAT WAY. I WANT TO CAUTION THE COURT, IF TO ADDRESS THIS ON ITS MERITS ON THIS ISSUE IS PREMATURE. BECAUSE THE TRIAL COURT DIDN'T MAKE ANY FACTUAL FINDINGS ON IT. AND DIDN'T UNDERTAKE EITHER, STRICKLAND ANALYSIS ON IT. THEREFORE --
WE HAVE THE EVIDENCE WHY CAN'T WE LOOK AT ALL I MEAN THERE WAS NO EVIDENCE THAT THE DEFENSE DIDN'T GET TO PREVENT; -- DIDN'T GET TO PRESENT CORRECT.
CORRECT.
SO WE DO A MIXED QUESTION OF MIX RED VIEW OF -- LAW IN FACT WHY CAN'T WE DETERMINE AS MATTER OF LAW THAT THERE WAS NO PREJUDICE?
BECAUSE THERE IS A CHANCE THAT THE TRIAL COURT WOULD HAVE FOUND THE TRIAL ATTORNEY'S TESTIMONY NOT TO BE CREDIBLE IN SOME OR ALL OF THESE ISSUES, THAT IS WHAT IT COMES DOWN TO. IF THE THERE ARE ANY FURTHER QUESTIONS.
-- HAVE YOU ALREADY THE INEFFECTIVE ASSISTANCE BASED ON SPEEDY TRIAL?
I WILL. THE FACTS ON THIS ISSUED A LOOK BAD FOR US. I GUESS I WANT TO CAUTION THE COURT IN THIS SENSE, THAT THE RIGHT TO SPEEDY TRIAL MEANS LITTLE TO THE DEFENDANT IF HIS ATTORNEY CAN WAIVE IT WITHOUT EVEN CONSULTING HIM. AND I THINK THAT IF THERE IS GOING TO BE A TEST ON --
THERE IS LAW ON THAT ISSUE HAS THAT ALREADY BEEN DECIDED THAT AN ATTORNEY CAN DO THAT?
--
I BELIEVE IN THE FEDERAL SYSTEM THAT THE CLIENT INFORMS CONSENT, IS PART OF THE INQUIRY AND I'M NOT SO SURE IT IS IN FLORIDA.
WAS THAT RAISED ON APPEAL OR --
I KNOW IT IS -- ON DIRECT APPEAL OR --
WELL, NO SPEEDY TRIAL ISSUE WASN'T RAISED ON DIRECT APPEAL AT ALL, I BELIEVE IT IS IN MY WELL IT IS IN INITIAL BRIEF AND REPLY BRIEF HERE.
WELL I THINK THAT THEN WE'VE GOT TO ASSUME THE LAW IN THIS STATE, AND WASN'T RAISED ON APPEAL IS THAT THERE WAS VALID WAIVER, OF HIS RIGHTS TO -- NOT GOING TO -- ON POSTCONVICTION MAKE A DECISION -- ON THAT ISSUE.

THAT IS -- THE TRIAL COURT -- IN ORDER OF ISSUE DOES MAKE FINDINGS THAT CONFORM TO THAT.
YOU ARE REBUTTAL IF YOU WOULD LIKE TO SAVE TIME I WOULD, THANK YOU.
MISS DITMAR.
GOOD MORNING YOUR HONOR MAY IT PLEASE THE COURT I'M CAROL DITMAR ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE OF FLORIDA WITH REGARD TO FIRST ISSUE ABOUT PRESENTATION OF THE VOLUNTARY INTOXICATION DEFENSE, I THINK IT IS APPROPRIATE TO LOOK AT TOTALITY OF THE CIRCUMSTANCES, IN EVERYTHING THESE ATTORNEYS WERE DOING AT THE TIME AND DEFENSE OF FORD --
HOW ABOUT --
HESITATE TO USE --
--
-- INAUDIBLE, BESIDE THE POINT. -- DOES --, SO -- THE EVIDENCE, OR IS IT -- TRIAL JUDGE WHAT THIS -- TO HIM -- INSTRUCT, ABOUT THE --
STARTING WITH THAT PROCESS.
CERTAINLY YOU DON'T NEED TO SEND FOR ANY REASON. THE RECORD IS CLEAR AS TO EVERYTHING THAT HAPPENED MORE IMPORTANTLY THE FACTUAL DISPUTE THAT IS HERE IS PRESENT AND THE JUDGE DOES MAKE FINDINGS, IN HER ORDER. I THINK YOU HAVE TO READ HER COMMENT ABOUT THINGS THIS IS MOOT THERE ISN'T INSTRUCTION YOU HAVE TO READ IT IN CONTEXT WITH WHAT DEFENSE' CLAIM WAS, AND SHE WAS DIRECTING THAT, I BELIEVE TO MR. FORD'S TESTIMONY, WHERE HE IS SAYING I DIDN'T LIKE THEM MY ATTORNEYS DOING THIS I ASKED THEM NOT TO DO THIS BECAUSE I DIDN'T WANT THE JURY TO THINK I WAS A ADMITTING ANYTHING, AND IT WAS NOT USED IN THAT SENSE, THE INSTRUCTION HAVE A THAT WAS GIVEN, AT GUILT PHASE WAS MODIFIED INSTRUCTION FOCUSED ON DEFENDANT'S STATE OF MIND DID NOT ADMIT GUILT TO THE CRIMES AND I THINK THAT IS WHAT SHE IS REFERRING TO, IN THE CHARGE -- THERE WAS IS A GREAT DEAL OF DISCUSSION ABOUT LOW THE JURY INSTRUCTION WOULD BE GIVEN ON VOLUNTARY INTOXICATION BECAUSE THE DEFENSE ATTORNEYS WARRANTS TO BE SURE THAT THEY DID NOT INTRUDE ON MR. FORD'S DECISION THAT HE DID NOT WANT TO MITT ANYTHING WITH RELATING TO THE ACTUAL CRIME SO SHE DOES MAKE FINDINGS WHEN SHE TALKS ABOUT ACTUALLY IN HER OUTLINE OF THE EVIDENCE THAT WAS PRESENTED, ON THIS ISSUE, SHE TALKS ABOUT MR. FORD'S TESTIMONY, ABOUT THE VOLUNTARY INTOXICATION SHE TALKS ABOUT THE FACT THAT THE ISSUE HAS BEEN DISCUSSED, AT THE CHARGE CONFERENCES, THAT THE DEFENDANT WAS EVENT.
CHARGES THIS IS IN HER ORDER DENYING POSTCONVICTION ON PAGES 5 AND 6 SHE IS TALKING ABOUT HIS TESTIMONY. SHE NOTES SPECIFICALLY HE WAS GIVEN THE OPPORTUNITY AT THE CHARGE KS TO OB-- CONFERENCE TO OBJECT TO INSTRUCTION HAVE QIN PUTT TO INSTRUCTION HE DID NOT OBJECT AT THAT TIME SHE CLEARLY IS MAKE FINDINGS RELEVANT TO THIS ISSUE I DON'T THINK IT FIRES SAY THE JUDGE DIDN'T ADDRESS THE ISSUE AT ALL.
--
TESTIFIED HE AGREES TO --
THAT IS THE ONLY.
REALLY NO ISSUE HERE JUDGE -- DENIED WHETHER OR NOT SUFFICIENT EVIDENCE IN THERE. -- DENIAL --
OF YOU TO LOOK AT THE ACTUAL --
YOU HAVE TO LOOK AT THE ACTUAL WHAT THE DISPUTE IS THE ONLY DISPUTE IN THE TESTIMONY HERE WAS THERE FORD TESTIFIED THAT HE TOLD HIS LAWYERS NOT TO USE THIS DEFENSE, AND THEY TESTIFIED THAT HE NEVER HAD A PROBLEM WITH IT. THAT IS THE ONLY FACTUAL DISPUTE THERE IS NO DISPUTE AS TO WAY DEFEND WAS ACTUALLY USED BY HIS ATTORNEYS AT TRIAL THERE IS DISPUTE THAT IT WAS NOT HIS FIRST AND FOREMOST DEFENSE, THAT HE WAS INTOXICATED, AND THAT IS THE THAT IS THE DEFENDS THAT HE IS LOOKING FOR, SO THE ONLY DISPUTE IS HIS CONSENTING TO WHETHER HE WENT LINING WITH IT HIS ATTORNEYS TESTIFIED HE DID CONSENT HE TESTIFIED THAT HE DIDN'T. AND THAT -- THAT POINT IS TOTALLY IRRELEVANT, TO INEFFECTIVE ASSISTANCE OF COUNSEL IT IS NOT HIS DECISION. IT IS HE ATTORNEY'S DECISION

HOW DID MODIFIED INSTRUCTION COME ABOUT? WAS IT AT REQUEST OF DEFENSE COUNCIL. WAS REQUEST OF DEFENSE COUNSEL MODIFIED INSTRUCTION STATE WANTED TO MAKE IT CLEAR THE INSTRUCTION GET ALONG WITH THE INSTRUCTION THE JURY WAS TOLD IT WAS NOT IN ANY SENSE A DEFENDS TO FELONY MURDER TO SEXUAL BATTER IT WAS ONLY DEFENSE TO PREMEDITATION FOR PREMEDITATED MURDER AND INTENT NECESSARY TO COMMIT THE CHILD. WAS THE DEFENDANT PRESENT DURING THAT JURY THAT CHARGE CONFERENCE.
YES YOUR HONOR THAT HAS BEEN IN THE RECORD, THAT AT THE VERY END OF VOLUME 42 THEY TALKED ABOUT IT VERY BRIEFLY, THEY PICK THE NEXT MORNING, WHICH STARTS VOLUME 43 IN THE RECORD THEY HAVE AN EXTENSIVE, CHARGE CONFERENCE, AND VOLUNTARY INSTRUCTION WAS ALL PART OF, THAT AND THE DEFENDANT WAS PRESENT THAT IS WHAT THE JUDGE IS TALKING ABOUT IN HER ORDER. THAT INSTRUCTION WAS BROUGHT ABOUT BY AGREEMENT WITH ALL THE PARTIES, AS TO HOW THEY WOULD ATTACK IT. AND THE DEFENSE, AND THE CONCERN THAT IT NOT BE USED AS ADMISSION TO THE CRIME, WAS SOMETHING THAT WAS THAT WAS BEFORE THE COURT AT THAT TIME, THAT IS WHAT THE DEFENSE ATTORNEYS WERE COMING FROM THAT IS WHY THEY DID NOT GET UP IN CLOSING ARGUMENT, AND ARGUE VOLUNTARY INTOXICATION FROM THE BEGINNING OF THE ARGUMENT, THEY DO THROW IT IN AT THE VERY END IT IS A VERY LENGTHY CLOSING ARGUMENT, SHORTLY BEFORE THEY GET TO THE END THEY TALK ABOUT HOW WHOEVER COMMITTED THESE CRIMES, HAD TO BE CLEAR THINK AND IT WAS ESTABLISHED THAT MR. FORD HAD HAD A LOT TO DRINK AND HE WOULDN'T HAVE BEEN ABLE TO DO IT KIND OF THING, BUT THEY CLEARLY FELT IN THEIR STRATEGIC MEMO, WAS ADMITTED INTO THE RECORD, SO THAT THIS COURT COULD FOLLOW THEIR THINK AND THEIR REASONING, AND PUT IT IN THE CONTEXT OF THE ENTIRE TRIAL THAT THEY ARE DOING, AND IT IS CLEAR THAT IT IS A REASONABLE DECISION, THAT IT IS -- THIS COURT SPECIFICALLY UPLEGALIZED.
DO YOU AGREE THAT TRIAL JUDGE -- DID SO IN -- THAT -- I DIDN'T --
YES, SHE MAKES THE STATEMENT THAT THE JURY INSTRUCTION WAS ONLY GIVE AT PENALTY PHASE AND THERE WAS INSTRUCTION GIVE AT THE END OF THE GUILT PHASE I THINK LA SHE IS THINK BEING OF IS THE TRADITIONAL JURY INSTRUCTION, THAT ACCEPTS GUILTY -- GUILT FOR THE CRIME THINKING THAT INSTRUCTION WASN'T GIVEN. IT IS DIFFICULT THE ORDER IS HARD TO RECONCILE WITH THE FACT WHEN YOU LOOK AT TRANSCRIPT THERE IS A MODIFIED JURY INSTRUCTION GIVEN BUT I THINK SHE IS LOOKING AGAIN AT THE CONTEXT OF HIS OBJECTION OTHERS TO DEFENSE AND SHE IS SAYING WHAT O HAD A PROBLEM WITH DEFENSE DOESN'T HAPPEN IN THIS TRIAL. SO I THINK THAT IS WHERE I THINK THAT IS LA SHE IS DIRECTING HER COMMENTS TO SHE IS DIRECTING COMMENTS SPECIFICALLY TO HIS COMPLAINT ABOUT THE USE OF THAT DEFENSE SAYING LA HE I WAS AFRAID OF WHAT HE WAS NOT WANTING TO HAPPEN DID NOT HAPPEN I THINK WHY HE SHOO USES TERM MOOT DOESN'T SEE HIS COMPLAINT AS ANYTHING THAT REALLY CAME FORTH IN THE ACTUALLY TRIAL. SO, I THINK IT IS YOU KNOW, ON THE JURY I DON'T KNOW INSTRUCTION I DON'T KNOW WHY THAT HOW HER REASONING IN PUTTING THAT IN THE ORDER BUT IT IS TRUE THAT THEY WERE GIVEN A MODIFIED INSTRUCTION AT THE REQUEST OF DEFENSE COUNSEL -- AFTER THIS ORDER,.
NO YOUR HONOR.
--
-- TAKING THAT ORDER, CAUSED A LOT OF TROUBLE, APPEAL WHATEVER, YOU KNOW THERE IS -- NO YOUR HONOR. NO. WE DO HAVE A CLEAR RECORD IN REALLY THE TESTIMONY IS ALL VERY CONSISTENT OF COURSE WE HAVE THE DIRECT APPEAL WHICH REFLECTS THE WAY THAT THE DEFENSE WAS PRESENTED THE WAY IT WAS USED THE WAY IT WAS ARGUED BY THE DEFENSE AND IT IS CONSISTENT WITH THE WAY FORD SAYS YOU KNOW THIS IS THE DEFENSE THAT HE WANT AND OF COURSE BOTH OF HIS ATTORNEYS TESTIFIED AT EVIDENTIARY HEARING THAT HE NEVER EXPRESSED ANY PROBLEM WITH HIM THEY WERE VERY CANDID ABOUT THE DIFFICULTIES HE HAD ABOUT WAIVING SPEEDY TRIAL THEY SAID THAT WAS POINT OF CONTENTION BETWEEN THEM AND THE DEFENDANT. THEY NEVER FELT LIKE THEY HAD ANY NEVER GOT ANY NEGATIVE VIBES IF YOU WILL, FROM THIS DEFENDANT ON RAISING THIS DEFENSE, THEY FELT LIKE HE WAS FULLY SUPPORTIVE OF THEIR EFFORTS IN TRYING TO --
AGREES TO THEIR STRATEGY.
YES THEY BOTH DID. THE IT WAS A CLEAR STRATEGIC DECISION I THINK A COUPLE POINTS THAT

HAD MEN BEEN O MENTIONED ABOUT WANTING TO RESPECT HIS THEORY OF INNOCENCE ANOTHER IMPORTANT FACTOR HIS ATTORNEYS POINTED OUT WANTED TO GET THIS TO LAY FOUNDATION FOR THE PENALTY PHASE, BECAUSE THEY FELT LIKE THIS WAS IMPORTANT MITIGATION THEY FELT LIKE BRING IT ON HEADS-UP AT GUILT PHASE WOULD HELP IN PENALTY PHASE SO THEY DID HAVE THEY WERE ABLE EXPRESS AT THE HEARING NUMEROUS REASONS WHY THEY ADOPTED THE DEFENSE THAT THEY ADOPTED, AND AGAIN THEY HAVE PEOPLE HAVE WHERE THEY I KIND OF GO THROUGH DIFFERENT THEORIES AND TRYING TO FIGURE OUT THE BEST DEFENSE TO GO FORWARD WITH THE TRIAL, SO, I DON'T THINK THERE IS ANY QUESTION IN THIS COURT HAS SPECIFICALLY UPHELD, THIS TYPE OF DEFENSE EXACTLY AS BEING REASONABLE. OF YOU VERY EXPERIENCED TRIAL ATTORNEYS, ONE OF THEM LITIGATED A NUMBER OF CAPITALS BEFORE THE ONE SPENT MANY YEARS WITH STATE ATTORNEY'S OFFICE HAD NOT DONE CASES BUT CERTAINLY WAS AWARE MANY OF THE ISSUES, AND THEY DID AN OUTSTANDING JOB, IN THIS RECORD IS CLEAR BOTH ON GUILT AND PENALTY FACE. WITH THE -- PHASE, WITH TREMENDOUS EFFORT ATTORNEYS PUTTING FORTH I KNOW MAKES POSTCONVICTION MORE DIFFICULT FOR THE DEFENSE BUT SHE HAD FABULOUS LEGAL REPRESENTATION AND THAT IS CLEAR ALL THROUGH THE RECORD. THE ISSUE ABOUT THE SPEEDY TRIAL I THINK IS VERY -- VERY CLEAR IN THE TESTIMONY AGAIN WAS VERY CONSISTENT THERE REALLY WASN'T A LOT OF DISPUTE IN THE TESTIMONY THAT WAS PRESENTED AT THE EVIDENTIARY HEARING IN FACT THE DEFENDANT HIMSELF CAME AROUND TO ADMITTING THAT YES, HE DID GL -- GO IN WAVE SPEEDY TRIAL RIGHTS WHEN IT CAME DOWN TO IT AND THAT IS AGAIN SUPPORTED BY DIRECT APPEAL RECORD.

SOMETHING OVER A HUNDRED WITNESSES LISTED, HOW MANY DEPOSITIONS WERE TAKEN? THERE WERE DOZENS AND DOZENS TO BE VAGUE I DON'T KNOW EXACTLY HOW MANY BUT THERE WERE A NUMBER OF THE SCIENTIFIC WITNESSES A NUMBER OF LAY WITNESSES THERE WERE MANY, MANY DEPOSITIONS.

VIRTUALLY IMPOSSIBLE. TO HAVE PREPARED THIS CASE WITHIN THE SPEEDY TRIAL TIME. ABSOLUTELY, PLUS OF YOU DEFENDANT TELLING HIS ATTORNEYS HE THOUGHT THE DNA WAS GOING TO EXONERATE HIM SO HE WAS WILLING TO WAIT FOR THE DNA EVIDENCE, THAT HAS BEEN HIS BIG ARGUMENT NOW, IN BEHIND CITY MAYBE IF WE HAD GONE TO TRIAL SOONER WE COULD HAVE CUT THIS OFF AND THE STATE WOULD NOT HAVE BEEN ABLE TO PRESENT ALL DNA EVIDENCE, BUT HIS DEFENSE ATTORNEYS, WHO AGAIN HAD EXPERIENCE WORKING WITH THE STATE ATTORNEY'S OFFICE DIDN'T EVEN FEEL THAT WAS THEY SAID THAT THEY WERE FAIRLY CONFIDENT THAT IF THEY TRIED TO GET QUICKER TRIAL STATE COULD HAVE EXHIBITED DNA GOTTEN THAT EVIDENCE THERE REALLY HASN'T BEEN ANY REASON OR ALLEGATION OF PREJUDICE WITH THAT ISSUE EITHER. BUT, THE RECORD REFLECTS THAT ONLY REASONABLE ATTORNEYS I THINK ALL THEY COULD DO WAS TO WAIVE WAS TO WAIVE THE SPEEDY TRIAL GOOD AND FORWARD NOT ONLY WITH GUILT PHASE BUT STILL INVESTIGATING MITIGATION AT THAT POINT. SO --

ALL OF THOSE REASONS I WOULD ASK THE COURT TO AFFIRM DENIAL OF POSTCONVICTION RELIEF, THANK YOU.

REBUTTAL?

NO FURTHER ARGUMENT.

COUNSEL -- COULD WE -- RECORD MOVE THE PANEL -- ACTUALLY THAT -- ON THIS ISSUES, BASED ON WHAT THE RECORD -- REQUESTS THAT -- TESTIMONY OF A LAWYER -- STRATEGIES -- THE JUDGE OUTLINED -- CHARGE CONFERENCE, WAY THIS IS -- AND SO DON'T WE END UP REALLY VIRTUALLY AS MATTER OF LAW WITH THIS HAVING BEEN A STRATEGY DECISION AS FAR AS ORDER THAT IF -- WOULD HAVE BEEN -- MATTER OF LAW, RULED THE OTHER WAY -- THAT IS -- WHY CAN'T WE DO THAT IN EVEN THE FACE OF THE JUDGE MAKING THIS --

IN A NUTSHELL TOO MANY ES TOPPLES -- IT VIOLATES STATUTE REQUIRES SPECIFIC FINDINGS OF FACT OF LAW, TO ENSURE CONCLUSIONS OF LAW TO ENSURE MEANINGFUL APPELLATE REVIEW. SECOND QUESTION, DOESN'T DEFENSE HAVE POSSIBLY -- ONCE THIS -- TRIAL JUDGE -- STATES HERE IS THE INSTRUCTION, AND -- TRIAL JUDGE OPPORTUNITY AS OPPOSED TO -- WHERE HE -- I DON'T --

A LONG --

YEAH.
HERE WE ARE TODAY.
I BELIEVE THAT -- DEFENSE COUNSEL AND THE PROSECUTOR WOULD HAVE EQUAL -- POSSIBLE -- MIGHT BE EQUAL -- DEFENSE LAWYER.
OKAY.
EQUAL -- POSSIBILITY, DUTY OF STANDARDS TRIBUNAL BUT AS FAR AS ANY -- REQUIREMENT THAT WE DIDN'T PRESERVE -- OR SOMETHING LIKE THAT I WOULD ARGUE THAT WOULDN'T HAPPEN. IS THE TRIAL JUDGE IN THIS CASE, IN ADDITION TO -- NOW -- -- FOR THIS TRIAL JUDGE SAY.
AS I STAND HERE, I CANNOT RECALL.
THANK YOUR HONOR
THANK YOU THE COURT WILL AND? RECESS UNTIL 9:00 TOMORROW MORNING.
THE CLERK: PLEASE RISE.