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Marbel Mendoza v. State of Florida

SC04-1881 | SC05-2143

GOOD MORNING AGAIN.

GOOD MORNING.

>>> LADIES AND GENTLEMEN,
THE FLORIDA SUPREME COURT.

>>> THE FINAL CASE ON OUR
DOCKET THIS MORNING FOR
JANUARY 8th, IS MENDOZA
VERSUS STATE.

MISS DAY, READY TO PROCEED?

>> YES, THANK YOU, YOUR
HONOR.

MR. CHIEF JUSTICE, MEMBERS
OF THE COURT, MY NAME IS
RACHEL DAY.

I AM HERE ON BEHALF OF
MARBEL MENDOZA WHO APPEALS
DENIAL OF THE MOTION.

THIS IS A MOTION THAT CAME
UP FOR THE COURT IN THE PAST
THIS COURT REMANDED THE
CASE BACK TO THE LOWER COURT
FOR EVIDENTIARY HEARING.

>> IN RESPECT TO THE GUILT
PHASE, TELL ME WHAT YOU
BELIEVE TO BE THE STRONGEST
POSITION THAT MR. MENDOZA
HAS IN RESPECT TO THE GUILT
PHASE?

>> THE GUILT PHASE IN
EFFECT OF THE ASSISTANCE OF
COUNSEL CLAIM.

>> WHAT PORTION?

WHAT PART?

WHAT WAS THE INEFFECTIVE
ASSISTANCE THAT YOU ARE
CLAIMING IS YOUR STRONGEST
POSITION ON WHY THE COUNSEL
WAS INEFFECTIVE IN THE GUILT
PHASE?

>> I BELIEVE IN A NUTSHELL
JUSTICE WELLS, THAT TRIAL
COUNSEL WAS INEFFECTIVE FOR
BOXING HIMSELF INTO A CORNER
IN HIS OPENING STATEMENTS TO
THE JURY.

AND BY VARIOUS REP HE SEN

TATIONS HE MADE TO THE JURY
-- REPRESENTATIONS HE NEED
THE JURY, HE ESSENTIALLY
PROMISED WHAT HE COULD NOT
DELIVER, HE MADE
REPRESENTATIONS HE COULD NOT
FOLLOW UP, HE FLIP-FLOPPED
THE SER THEORY OF THE CASE
THROUGH THE MIDDLE, SO THE
JURY LEFT ALL SENSE OF
CREDIBILITY IN ANY DEFENSE
THAT MR. MENDOZA MIGHT
PRESENT.

I SHOULD EXPOUND BY
EXPLAINING THIS CASE IS A
PURE FELONY MURDER CASE.
ALTHOUGH MR. MENDOZA WAS
INDICTED ON BOTH THE
PREMEDITATION AND THE FELONY
MURDER SERIES OF FIRST-DEGREE
MURDER.

>> NOW AT THE EVIDENTIARY
HEARING, LAZARO DID NOT OF,
CORRECT?

>> NO, DID HE NORTH, NO,
YOUR HONOR.

>> HE WAS NOT CALLED?

>> NO, HE WAS NOT.

>> AND THE, THE CENTRAL PART
AS I READ YOUR ARGUMENT IN
RESPECT TO THIS PROMISES
THAT WERE MADE TO THE JURY
REVOLVES AROUND LAZARO,
CORRECT?

>> THAT IS ONE PORTION OF
IT, YOUR HONOR, CERTAINLY,
THAT IS PORTION OF THE
BRIEF, BUT THE TRIAL COUNSEL
MAY MADE PROMISE TO THE JURY
THAT LAZARO WOULD TESTIFY.
HE REFERRED TO THE
DEPOSITION THAT HE HAD TAKEN
OF LAZARO.

>> HOW CAN WE MAKE A
DETERMINATION THAT THAT WAS
INEFFECTIVE IF HE WAS NOT
CALLED BY THE DEFENDANT HERE
AT THE EVIDENCEARY HEARING
TO CERTAINLY KNOW WHAT THE
TESTIMONY WOULD HAVE BEEN?
I WOULD REFER TO THE COURT
TO THE ARGUMENT MADE IN THE
BRIEFING ABOUT THE DEFENSE
IN WIGENS VERSUS SMITH AND

THE COMMENT IN THE MAJORITY
OPINION IN WIGENS VERSUS
SMITH THAT SAYS THAT THE
FUNCTION OF THE EVIDENTIARY
HEARING IS THE FUNCTION OF
POST CONVICTION PROCEEDINGS
IS NOT NECESSARILY TO
PRODUCE EVIDENCE THAT WOULD
BE IN OF ITSELFED A MISSABLE
AT TRIAL.

YOU HAVE TO LOOK AT THE
RECORD AS A WHOLE AND LAZ
ZAR RE'S DEPOSITION WAS
ENTERED INTO THE COURT FILE
SOMETIME ON THE ORRIN NAL
TRIAL PROCEEDINGS.

IT WAS DUTY OF MR. MEN DOZE
Z'S CONTENTION THAT IT IS
THE DUTY OF TRIAL COUNSEL TO
ENTER THIS TESTIMONY
INADMISSIBLE FORM WHICH
WOULD HAVE BEEN THE
TESTIMONY AT THE TIME OF
TRIAL AS HE HAD DONE
EFFECTIVE JB AND WOULD HAVE
BEEN DEN ON RETRIAL, WE'RE
NOT CONTENDING THE
DEPOSITION WOULD HAVE BEEN
ADMISSIBLE BECAUSE IT
WOULDN'T HAVE BEEN CLEARLY,
BUT FOR WHATEVER REASON HE
DID NOT TESTIFY.

>> HOW DO YOU WE EXPLAIN FOR
WHATEVER REASON.

THERE IS EVIDENCE THAT AT
THE TRIAL THERE WAS A
DISCUSSION WHERE COUNSEL
WENT ON INTO ANOTHER ROOM AN
THEY -- WASN'T IT THIS CASE,
WHERE THEY WERE DISCUSSION
WHETHER THEY WOULD CALL
LAZARO OR NOT, THEY CAME
BACK TO THE COURT AND THEY
SAID THAT WE TALKED ABOUT IT
AND WE HAVE DECIDED NOT TO
CALL IT?

>> THERE WAS EVIDENCE THAT
THIS WAS A DISCUSSION.
THERE IS NO EVIDENCE
ANYWHERE IN EITHER TRIAL
RECORD OR THE
POST-CONVICTION RECORD AS TO
WHAT THE RACIAL FOR THAT
DISCUSSION WAS.

>> THEY DIDN'T REMEMBER,
CORRECT?
>> THEY DIDN'T REMEMBER THE
REASON AT THE TIME.
THEN IN THE EVIDENTIARY
HEARING THEY SAID ABSOLUTELY
NO REASON THAT WE WOULD
WOULDN'T HAVE CALLED LAZARO.
>> DID MENDOZA TESTIFY AS TO
THIS DISCUSSION AT ALL?
>> NO, KNOW DID NOT.
>> ASSUMING THAT YOU ARE
CORRECT, HOW IS THE
STATEMENTS AT OPENING
STATEMENTS OUTSIDE SAYING MY
CLIENT DID IT AND WE ADMIT
THAT, EVEN THAT IS SUBJECT
TO NIXON, HOW IS THAT SO
OUTSIDE OF THE BROAD RANGE
OF REASONABLY COME TENT
ASSISTANCE THAT, THAT NOW
REGARDLESS OF WHAT ELSE THE
ATTORNEY DID IN
INVESTIGATING THE CRIME AND
REPRESENTING THE QLIRNTION
PRESENTING WITNESSES,
PUTTING THE STATE TO HIS
TEST REGARDLESS OF ANY OF
THAT SIMPLY BECAUSE HE MAKES
SOME STATEMENTS AT OPENING
ARGUMENTS THAT TURN OUT NOT
TO BE TRUE LATER ON, THAT
NOW THAT IS DEFICIENT
PERFORMANCE?
>> WELL, HIS, HIS RATIONALE,
I IF CAN I PUT IT IN
NUTSHELL.
>> HAVE YOU SAID THAT ANY
OTHER CASE, BASED PURELY ON
OPENING STATEMENT THAT
SOMEBODY INEEFFECTIVE OF
COUNSEL?
>> WELL, I THINK WE HAVE TO
LOOK AT THE OPENING
STATEMENT IN CONJUNCTION
WITH THE CONTENT OF THE
CLOSING ARGUMENT, YOUR
HONOR.
ON THE OPENING STATEMENTS,
TRIAL COUNSEL FAIRLY UNEQIV
KILLEN MAKING THE POINT THAT
MARBEL MEN DOZE SGLAS NOT
THE SHOOTER THAT HUMBERTO
CUELLAR US THE SHOOTER.

HE THEN CONTENTS THAT LAZARO CUELLAR IS THE SHOOTER.

WELL, NO I UNDERSTAND FOR FELONY MURDER, IT DOESN'T MATTER WHO THE SHOOTER IS, BUT FROM THE POINT OF THE VIEW OF THE JURY, YOU GOT SOMEBODY.

MENDOZA IS DOWN THEDLY AT THE CRIME SCENE.

WHAT HIS CONTENTION WAS, THERE IS NO UNDERLYING FELONY.

THEY WENT TO COLLECT A DEBT. GIVEN THE JURY KNEW THAT MR. MENDOZA WAS PRESENT AT THE CRIME SCENE, IT IS VERY CLEAR THAT HE MUST HAVE KNOWN WHO THE SHOOTER WAS, IF HE WASN'T THE SHOOTER, THEN, HE HAD TO KNOW WHICH OF THE TWO OTHER PARTICIPANTS WAS THE SHOOTER.

TRIAL COUNSEL START OFF, THEN FINISH OFF AND SAYING IT IS LAZARO DESTROYS ANY SLED OF CREDIBILITY THAT MR. MENDOZA'S DEFENSE.

>> HAVE WE HELD THAT BEFORE OUTSIDE OF A NIXON TYPE OF CONTEXT TRULY BASED ON STATEMENTS MADE IN OPENING STATEMENT AND EVEN IN CLOSING STATEMENT THAT SOMEBODY CAN ININEFFECTIVE OF COUNSEL.

I CAN'T PUT MY FINGERON ANY CASE LAW.

>> WELL, ONE OF THE ISSUES WHICH IS NOT THE OPENING-CLOSING, WHAT JUSTICE WELLS TOUCHED ON IS THE FAILURE TO CALL LAZARO WHICH WOULD HAVE AND YOU STARTED OUT SAYING IT IS PURELY A FELONY MURDER CASE, SO IF THE JURY ENDED UP BELIEVING THEY WERE NOT THERE FOR ROBBERY, BUT SIMPLY FOR A DEBT COLLECTION.

>> SURE.

>> THAT THEY, THEN THERE WOULD NOT BE AN UNDERLYING FELONY.

>> TRUE.

>> I AM INTERESTED BECAUSE THE ONE THAT CONCERNS ME THE MOST IS HOW THE EXPERT GOT IT WRONG AND THEN WAS TOTALLY DISCREDITED AND THEN THE STATE TOOK ADVANTAGE AND ACTUALLY SAID THAT THE DEFENSE HAD, HAD HID IN THIS INFORMATION ABOUT THE TIME OF THE, THAT THE GUNSHOT RESIDUE SAMPLINGS WERE COLLECTED.

BUT I WANT TO EXPLAIN WHAT THE TESTIMONY WAS AT TRIAL AS TO HOW MUCH IT WAS EXPERT'S FAULT VERSUS THE DEFENSE LAWYER'S FAULT AN HOW THIS THEN TRANSRATES INTO AN INEEFFECTIVE ASSISTANCE OF COUNSEL THAT IS DEFICIENT PERFORMANCE IF YOU JUST DON'T GET THE TIME RIGHT ON A CRITICAL PIECE OF EVIDENCE SO IF YOU COULD ADDRESS THAT ONE, I AM MORE IMPRESSED WITH THAT PROBLEM THAT SEEMS TO HAVE REALLY UNDERCUT THE ISSUE OF WHO THE SHOOTER WAS.

>> RIGHT.

I AM GLAD YOU ASKED ME THAT JUSTICE PARIENTE, I WAS HOPING TO REACH THAT NEXT. THE ONLY WITNESS AT ALL IN FACT DEFENSE PUT ON AT TRIAL WAS THE CRIMINALIST, THE GUNSHOT RESIDUE EXPERT FROM THE MIAMI-DADE POLICE PEOPLE.

AND HE TESTIFIED THAT HE HAD FOUND GUNSHOT RESIDUE ON THE HANDS OF BOTH LAZARO AND HUMBERTO CUELLAR, HE SAID PARTICULARLY THE GUNSHOT RESIDUE ON THE HANDS OF LAZARO CUELLAR WERE CONSISTENT OF HIM NOT ONLY HAND LUNG THE GUN AFTER IT HAD BEEN FIRED, BUT HE HAD FIRED THE GUN.

NOW, HIS, UM, CONCLUSION WAS BASED ON THE ASSUMPTION THAT THE SWABS WERE TAKEN FROM

THE HANDS AROUND 9:00 A.M.
THAT MORNING OF THE CRIME.
THE CRIME ACTUALLY TOOK
PLACE I THINK AT 5:30 OR 5:40
IN THE MORNING, SO WE'RE
TALKING ABOUT JUST OVER
THREE HOURS AFTER THE CRIME.
NOW, TRIAL COUNSEL NEW --
KNEW OR SHOULD HAVE KNOWN
THAT THE SWABS WERE TAKEN AT
7:4 A LITTLE BIT EARLIER.

>> DID TRIAL COUNSEL TESTIFY
ABOUT THAT?

>>> YOU MEAN AT EVIDENTIARY
HEARING?

>> YEAH.

>> YEAH.

HE TESTIFIED AT THE TIME OF
THE CRIME, STILL EVEN NOW,
IF HE THOUGHT THE TIMING WAS
UNIMPORTANT.

THE PROBLEM WAS THAT BOTH OF
THE EXPERTS DID NOT BELIEVE
IT WAS UNIMPORTANT.

THE EXPERT WAS BLINDSIDED ON
CROSS-EXAMINATION BY THE
STATE MAKING A VERY, VERY
BIG DEAL ABOUT THE TIMING OF
THE SWABS BEING TAKEN.

AND SHE GOT ON
CROSS-EXAMINATION THE EXPERT
TO SAY, WELL THE TIMING MAY
HAVE MADE A DIFFERENCE TO
HIS OPINION.

THE STATE WAS ABLE TO HAVE A
FIELD DAY WITH THIS IN
CLOSING ARGUMENT NOT ONLY BY
SORT OF SAYING THE EXPERT'S
OPINION WAS INVALID, BUT
THEY ALSO TRIED TO TURN THIS
INTO A LARGER ACQUISITION ON
THE DEFENSE SAYING DEFENSE
GIVING EVIDENCE, THEY KNEW
THAT THE SWABS WERE TAKEN AT
7:4 A.M.

>> SO WHEN CONFRONTED WITH
THAT, THE EVIDENTIARY
HEARING, THE TRIAL COUNSEL
CONTINUED STATEMENT WAS THAT
THE REASON THAT HE, THAT HE
DIDN'T HAVE AN DISCUSSION
WITH THE EXPERT ABOUT IT OR
HOW DOES THIS FIT IN TO THE
INEFFECTS OF THE ASSISTANCE

OF COUNSEL AND WHAT WAS
COUNSEL'S EXPLAIN MATION.

>> AT THE TIME OF THE TRIAL,
BELIEVED THE TIMING WAS
UNIMPORTANT.

, YET YOU KNOW, HE DID NOT
CLEARLY LET HIS EXPERT KNOW
THE TRUE TIMES OF THE
SWABBING.

>> DID HE SAY THAT?

>> DID HE SAY THAT?

>> I DON'T THINK THE RECORD
REFLECTS THAT CLEARLY.

THE EXPERT WAS ALWAYS -- ETH
ARE THE EXPERT MISREAD OR IT
TRIAL COUNSEL DIDN'T INFORM
HIM.

ONE OF THE TWO HAPPENED.

>> WELL, THE EXPERT MISREAD
IT, HOW DOES THAT GET
CHARGED TO THE DEFENDANT AND
INEFFECTIVE ASSIST IN AN OF
COUNSEL CLAIM?

>> WELL, I THINK THAT TWO
ASPECTS, ONE IS A HOME
ASPECT WHICH WE ALLUDED TO
IN THE BREEFX BUT I THINK WE
GO BACK TO THE TRIAL AND ONE
OF THE THINGS YOU ARE
SUPPOSED TO DO IS PROPERLY
PREPARE YOUR EXPERT
WITNESSES FOR
CROSS-EXAMINATION.

YOU KNOW?

EVEN IF TRIAL COUNSEL
THOUGHT THAT THE TIMING OF
THE GUNSHOT SWABBING IS
UNIMPORTANT, IT IS CLEAR
THAT NEXT PERT THOUGHT IT
WAS ACTUALLY MORE IMPORTANT.

>> THE STATE -- WAS THERE
EVER A QUESTION THAT THE
STATE WAS ARGUING THAT YOUR
CLIENT WAS THE SHOOTER?

>> WELL, IT IN SDIMENTED
MR. MENDOZA.

>> AS FAR AS THE WHOLE, HOW
THEY TRIED THE CASE?

WE HAVE SEVERAL CASES
INCLUDING MOST RECENTLY DIAZ
WHO WAS JUST EXECUTED WHERE
IT DOESN'T MATTER WHO THE
SHOOTER IS, WE, FELONY
MURDER OR WHATEVER.

WAS THE THEORY, THIS BECOMES
IMPORTANT, DOES IT MATTER TO
THE SHOOTER IS?
WAS THE THEORY THAT MENDOZA
WAS THE SHOOTER, MO
QUESTION.

>> HUMBERTO SAID SO.

WITH THE GUNSHOT RESIDUE, IT
IS CLEAR THAT MAY NOT BE THE
CASE.

>> I MEAN, I AM ASKING ON
THE PREJUDICE PRONG.

>> PREJUDICE PRONG.

>> WAS THE STATE'S SOLE
THEORY THIS MAN SHOULD BE
CONVICTED AND GET THE
PENALTY BECAUSE HE WAS THE
SHOOTER?

>> NO.

THE STATE IN ITS CLOSING
ARGUMENT IS CLEAR IT REALLY
DOESN'T MATTER WHO THE
SHOOTER IS.

THIS IS PURE FELONY MURDER.
BECAUSE OF THAT, MR. MENDOZA
SHOULD BE CONVICTED OF FIRST
DEGREE MURDER.

IN FACT, QUITE A LONG PART
OF THAT CLOSING ARGUMENT
THAT THE STATE MADE WHICH I
THINK HAS CITED IN MY BRIEF
WHERE THE STATE SAYS, YOU
DON'T HAVE TO THINK IT IS
FAIR, YOU KNOW, EVEN IF
MR. MEN DOZE SGLAS NOT THE
SHOOTER, HE IS GUILTY OF
FELONY MURDER, IF YOU THINK
LAZARO IS THE SHOOT HER, IS
STILL GUILTY.

>> WHAT DO YOU BELIEVE IS
THE STRONGEST ARGUMENT IS ON
THE OPINION TY PHASE?

>> AGAIN, I HAVE A NUMBER.
I SAY THE STRONGEST DOCUMENT
IS CUMULATIVE ARGUMENT, YOUR
HONOR, BUY WOULD POINT TO
THE FACT THAT THE JURY
RECOMMENDATION IS 7-5.

THERE ARE ONLY 2 RELATIVELY
WEAK AGGRAVATEING
CIRCUMSTANCE, THE TRIAL
COURT FOUND NO.

>> IS YOUR CLAIM BUILT UPON
INEFFECTIVE ASSISTANCE?

>> SURE.
>> RIGHT?
>> YES.
>> HOW WAS COUNSEL INEFFECT
SNIFF
>> THE TRIAL COUNSEL PUT ON
THE TESTIMONY OF DR. TOOMER,
DR. TOOMER BASED HIS OPINION
ENTIRELY ON THE REPORT OF
MR. MEN DOZE ZA, HE WAS
SHREDDED ON
CROSS-EXAMINATION AN IN
CLOSING ARGUMENTS BY THE
PROSECUTOR WHO WENT AFTER
HIM ABSOLUTELY UNMERCIFULLY.
>> DID COUNSEL HIRE AN
INVESTIGATOR?
>> NO.
>> HE DID NOT.
>> WAS THERE AN EXPLANATION
AS TO THAT?
TRIAL COUNSEL AT THE
EVIDENTIARY HEARING SAID HE
HAD NO IDEA WHY HE DIDN'T
HIRE AN INVESTIGATOR.
HE ROUTINELY HIRES AN
INVESTIGATOR NOW.
HE JUST DIDN'T DO IT.
>> DID HE HIRE AN
INVESTIGATOR FOR THE GUILT
PHASE?
>> HE DID NOT.
>> WAS THERE AN EXPLANATION
ABOUT THAT?
HE JUST DIDN'T DO IT.
HE DOESN'T KNOW WHY HE
DIDN'T DO.
I TRIAL COUNSEL WAS
INEXPERIENCED THIS WAS THE
FIRST TIME HE HAD THROWN
GONE THROUGH A CAPITAL CASE
TO ITS TRIAL AN ON PENALTY
PHASE AND I THINK HE PUT
IMPLICATION THAT HE PUT A
LOT OF THAT DOWN TO HIS
INEXPERIENCE AT THE TIME.
THERE WAS NO INVESTIGATOR
HIRED.
>> JUST ONE QUICK QUESTION.
YOU HAD SIX SEPARATE HEARING
DATES ON THIS?
>> YES.
>> WHY WAS THAT?
>> THE ATTORNEY OF RECORD AT

THE TIME WAS PREGNANT.
SHE WAS EXPECTING TWINS, SHE
WAS HAVING COMPLICATED
PREGNANCY, IT KEPT BEING
CONTINUED.

>> THE TRIAL JUDGE ENTERED,
I SAY THIS RESPECTFULLY AS
POSSIBLE, A BRIEF ORDER, WAS
THERE EVER AN ATTEMPT TO GET
MORE DETAILED AND
APPROPRIATE ORDER?
FOR THE WEIGHING OF THE
CREDIBILITY ISSUES?

>> UM, AGAIN, I, I CAME ON
THIS CASE WELL AFTER THE
NOTE OF APPEAL WAS FILED.
THERE IS NOTHING IN THE
RECORD THAT SUGGESTS THAT.
I WILL LEAVE MY TIME FOR
REBUTTAL, THANK YOU.

>>> MAY IT PLEASE THE COURT
ASSIST AN ATTORNEY GENERAL
ON BEHALF OF THE STATE.
WIGENS DOES NOT HOLD YOU DO
NOT HAVE TO PROVE --

>> BEFORE WE GET TO THAT, IT
SEEMS TO ME THAT THIS TRIAL
COURT ORDER IS AN ISSUE
WHICH WE NEED TO DISCUSS
BECAUSE AS I READ THE ORDER,
THERE ARE NO FINDINGS IN
FACT IN THE ORDER, EITHER AS
TO THE GUILT PHASE OR THE
OPINION TY PHASE AND THERE
WAS A TIME -- PENALTY PHASE
AND THERE WAS A TIME WHEN
THIS COURT REALLY DID NOT
REQUIRE THAT; HOWEVER, THAT
ALWAYS RUNS INTO PROBLEM
WHERE THERE ARE NO FINDINGS
OF FACT.

WOULD YOU SPEAK TO THE FACT
THAT DO YOU BELIEVE THERE
ARE FINDINGS OF FACT?

>> WELL, THE TRIAL COURT DID
FIND A FAILURE OF PROOF.

>> RIGHT.

AS TO WHAT COUNSEL DID AND
COUNSEL'S EXPLANATION.

>> WELL, WE HAD A COUNT LER
WHO TESTIFIED HE DIDN'T
RECALL ANYTHING AND THE
STATEMENTS ABOUT, YOU KNOW,
I WOULD HAVE HIRED AN

INVESTIGATOR NOW, ALL OF THE STATEMENTS WERE ABOUT PLAYED, HE DIDN'T REMEMBER ANYTHING ABOUT ANYTHING AT THIS EVIDENTIARY HEARING. YOU DON'T HAVE LAZARO TESTIFY, YOU DON'T HAVE HUMBERTO'S EVIDENCE PUT FORWARD, YOU HAVE CLAIMS THE COUNSEL WAS INEFFECTIVE DOING THIS.

YOU HAVE COUNSEL SAYING THERE ARE REASONS WHY, SOMETIMES DURING A TRIAL, THINGS HAPPEN, BUT I DON'T RECALL WHAT HAPPENED IN THE TRIAL, PERHAPS, SOMETHING DID.

YOU REALLY DO HAVE A FAILURE OF PROOF BECAUSE COUNSEL IS PRESUMIVELY MAKING STRATEGIC DECISION AN UP TO THE DEFENSE TO REBUT THAT PRESUMPTION, WOULD I REFER A BETTER ORDER, CERTAINLY? I DON'T GET TO WRITE THE ORDERS FOR THEM.

YOU PREFER I NOT DO THAT.

>> COUNSEL RAISES MANY ISSUES AS TO ANY OF THOSE ISSUES WAS THERE CONTRADICTORY EVIDENCE PRESENTED AT TRIAL?

>> AS TO ANY OF THE ISSUE, AS TO THE HUMBERTO TESTIFIED THAT HE WAS, THAT THE VICTIM MR. CALDERON WAS INVOLVED. THERE WAS NO OTHER EVIDENCE BECAUSE THE ONLY EVIDENCE THE DEFENSE HAD AT THE TIME OF TRIAL WAS AN OLD FEDERAL WITHHOLD OF EJUDDCATION AN WHILE THEY SAID THEY HAD WITNESSES WHO HAD PERSONAL KNOWLEDGE HE WAS INVOLVED WHEN IT CAME DOWN TO CALL THOSE WITNESSES, IT TURNED OUT THAT ALL OF THE WITNESS KNEW ABOUT WAS THE OLD FEDERAL WITHHOLD SO THERE HAS BEEN NO EVIDENCE OR THAN WHAT WAS PREVENTED AT THE TRIAL.

>> SO IT SEEMS AS TO

EVIDENCE ON WHICH THERE WAS CONFLICTING TESTIMONY IN ORDER TO AFFIRM BECAUSE WE HAVE NO FINDINGS ABOUT TRIAL COURT WE WOULD HAVE TO TAKE, IT SEEMS TO ME, THE EVIDENCE IN LIGHT MOST FAVORABLE TO THE DEFENDANT AND IF WE ARE GOING TO AFFIRM WITHOUT REMANDING FOR ANOTHER EVIDENTIARY HEARING.

>> WELL, YOU HAVE TO TAKE THE EVIDENCE FAVORABLE TO THE STATE BECAUSE WE ARE THE PREVAILING PARTY.

WELL, I AM SAYING, USUALLY YOU ASSUME THE TRIAL COURT HAS MADE CREDIBILITY, DETERMINATION.

>> AND WHEN YOU HAVE AN UNEXPLAINED ORDER, YOU ARE SUPPOSED TO ASSUME THE TRIAL COURT REACTED PROPERLY TO THE EVIDENCE.

HE DON'T HAVE EVIDENCE, THERE WAS NOTHING PRESENTED ABOUT ANY AT THIS EVIDENTIARY HEARING.

NOTHING.

DIDN'T HAVE A SINGLE WITNESS.

WE HAVE COUNSEL WHO IS TESTIFYING.

THAT WAS AT THE TIME OF THE TRIAL.

>> WELL, AT THE EVIDENCEARY HEARING, THERE IS NO EVIDENCE WHATSOEVER.

AT THE EVIDENTIARY HEARING, THERE WAS NOT AN ATTEMPT TO ADMIT THIS DEPOSITION OF LAZARO MUCH LESS CALL LAZARO, AND THE STATEMENT THAT LAZARO MAKES IN THE DEPOSITION, THE DEP IS IS NOT ADMISSIBLE, THE STATEMENT THAT LAZARO MAKES THE DEPOSITION THAT IS THE DEFENDANT TOLD THEM THEY WERE GOING THERE TO COLLECT THE DEBT.

WELL, THAT IS HEARSAY, THAT IS NOT ADMISSIBLE, EVEN IF YOU CALL LAZARO, YOU DON'T

GET THAT STATEMENT IN.
I WANT TO GO TO THE ISSUE OF
THE GUNSHOT RESIDUE.
FIRST OF ALL, WHAT IS THE
EVIDENCE AT TRIAL AS TO WHO
THE SHOOTER WAS?

>> THE STATE'S POSITION WAS
THE DEFENDANT WAS THE
SHOOTER.

>> BASED ON?

>> BASED ON HUMBERTO'S
TESTIMONY AND THAT THE FACT
THAT THE DEFENDANT'S HAND IS
-- HIS PRINT IS FOUND ON THE
CALL WHERE WE WOULD HAVE
BRACED HIMSELF AS HE LEANED
DOWN TO FIRE GUNSHOTS WHICH
WERE FIRED AT CLOSE RANGE
WHILE THE VICTIM WAS IN
CONTACT WITH THE GROUND.

>> ALL RIGHT.

AS FAR AS THE BULLETS WITH
WHICH THE VICTIM WAS SHOT,
IT CAME FROM, THERE WERE 30
CALIBER.

>> THERE WERE THREE GUNS
INVOLVED.

THE GUN THAT HUMBERTO SAYS
HE HAD AN USED TO HIT.

>> THAT WAS THE 9 MILLIMETER.

>> THE VICTIM OVER THE HEAD
WITH.

THAT GUN HAS NO BULLETS
FIRED OUT OF IT.

>> RIGHT.

>> IT DOES HAVE HAIR AND
STUFF IN THE GUN WHERE IT
WOULD HAVE BEEN USED TO HIT
THE VICTIM OVER THE HEAD.

YOU HAVE THE GUN THAT I
DON'T BELIEVE WE RECOVERED
WHICH WAS THE GUN THAT
EVERYONE TESTIFIED THAT
MR. MENDOZA HAD.

THAT IS THE GUN THAT IS
FIRING THE SHOTS.

WE HAVE MR. CALDERON'S GUN
THAT IS FIRING BACK.

>> WHAT BULLET CALIBER WAS
RECOVERED FROM THE VICTIM?

>> I BELIEVE IT IS A 38, BUT
I AM NOT SURE, YOUR HONOR.

>> WAS THERE TESTIMONY THAT
IT CAME FROM HIS OWN GUN?

>> NO, IT WAS NOT FROM HIS OWN GUN.

>> WELL, THERE WERE FOUR BULLETCATIONS FOUND AT THE SCENE IF I REMEMBER THE RECORD CORRECTLY.

MR. CALDERON HAD A 38 WHICH WAS UNDER HIM WHEN HE WAS FOUND.

AND HUMBERTO TESTIFIED THAT THE DEFENDANT HAD A 38.

>> AND A NUMBER OF THESE GUNSHOTS WERE ACTUALLY INFLICTED AS THE VICTIM IS LYING ON THE GROUND AT CLOSE RANGE, SO NOT THE GUN THAT IS UNDERNEATH HIM AT THAT POINT THAT IS BEING USED.

>> WELL, BUT THERE WERE, THERE WERE SOME OF THE .38 CALIBER BULLETS THAT COULD HAVE BEEN IN THAT IN THE DEFENDANT'S GUN HAD BEEN FIRED?

>> YES.

BECAUSE HE HAD FIRED THE WEAPON OR SOMEBODY HAD FIRED HIS WEAPON.

>> YES, THE THIRD WEAPON HAD BEEN FIRED.

MR. CALDERON'S WEAPON HAD BEEN FIRED.

>> MR. MENDOZA WAS NOT FOUND UNTIL TWO DAYS AFTER.

>> CORRECT.

>> SO IN WAS NO GUN SHOT RESIDUE.

>> CORRECT.

>> FOUND ON HIM?

BUY STILL GO BACK TO THE FACT THAT MY TERN CONCERN IS THAT THERE WAS NEITHER IN TESTIMONY BY COUNSEL AS TO VARIOUS ASPECTS OF THE GUILT AND THE OPINION TY PHASE ON IN EFFECTIVE ASSISTANCE OF COUNSEL AND THIS COURT HAS BEEN INCREASINGLY CLEAR THAT THERE HAS TO BE AN EVIDENTIARY HEARING AND IF THERE IS EVIDENTIARY HEARING, THERE HAS TO BE FINDINGS OF FACT ON ISSUES OF INEFFECTIVE ASSISTANCE OF

COUNSEL.

>> I WOULD CERTAINLY PREFER FORAL FINDING OF FACT THAN NO EVIDENCE.

WHAT YOU HAVE COUNSEL TESTIFYING, TO THAT IS NOT WHAT THEY WOULD DO TODAY. THEY DON'T EVER SAY, OH, I MADE A HUGE MISTAKE, HERE IS WHY I MADE A HUGE MISTAKE.

>> LET ME GO.

WE GOT A LITTLE SIDE TRACKED ABOUT THIS ISSUE.

TO ME, FRIDAY A JUROR IN THE GUILT TR OR PENALTY PHASE, SINCE THIS WAS NOT A PREPLANNED MURDER AND IT IS JUSTICE SAID IN HIS DEFENSE, EVEN WITH THE DEFENDANT MAYBE BEING THE SHOOTER, IT WOULD MAKE A HUGE DIFFERENCE IN THE CASE WHO THE SHOOTER WAS.

IT WOULD -- OBVIOUSLY, THE A DEFENSE THOUGHT THAT THE GUNSHOT RESIDUE ON THE HANDS OF LAZARO AND HUMBERTO WAS REALLY SIGNIFICANT BECAUSE THEY STAKE THEIR NOT BEING, YOU KNOW, NOT HAVING THE LAST ARGUMENT, THEY PUT ON A WITNESS ON THAT SOLE ISSUE.

AS A, AS A TRIAL LAWYER, WHETHER YOU, IT IS THE FIRST DEATH CASE OR THE 100th, TO NOT HAVE YOUR EXPERT PREPARED ON THE CRITICAL FACT AS TO WHEN THESE WERE COLLECTED, WHETHER THAT WOULD MAKE A DIFFERENCE AND FOR THIS TO NOT ONLY UNDERMINE THE CREDIBILITY OF THE EXPERT BUT OF THE DEFENDANT, I DON'T SEE AGAIN SHORT OF EITHER SENDING THIS BACK FROM EVIDENTIARY HEARING HOW THIS COULD BE EFFECTIVE ASSISTANCE OF COUNSEL, THAT IS THE SOLE DEFENSE WHICH IS THAT YOU PUT ON EVIDENCE TO SHOW THAT SOMEONE ELSE WAS THE SHOOTER IS COMPLETELY, COME PLOTLY UNDERMINED BY A SIMPLE FACT,

NOTHING SOPHISTICATED, WHAT TIME WERE THESE GUN RESIDUE SAMPLES COLLECTED?

NOW TELL ME HOW THAT CAN BE EFFECTIVE ASSISTANCE OF COUNSEL WHEN YOUR SOLE WITNESS IS PREDICATING HER FINDINGS ON SOMETHING THAT IS, WAS NOT EITHER EXPLAINED OR DISCUSSED BETWEEN THE EXPERT AND THE, AND THE LAWYER.

THE TIMING ISSUE COMES UP BECAUSE THERE IS A LABELING FROM THE STATE'S WITNESS. THERE IS TWO INCONSISTENT FINDS.

COUNSEL WAS AWARE OF THE TWO TIMES.

THEY HAD DEPOSED THE TECHNICIAN WHO ACTUALLY TOOK THEM AND LEARNED WHICH ONE WAS THE RIGHT TIME, WHICH ONE WAS THE WRONG TIME, THEY FULLY KNEW THE FACTS OF THIS CASE, COUNSEL'S EXPLANATION WAS, IT DIDN'T MATTER TO HIM WHAT THE TIMING WAS BECAUSE THE STATE'S CASE WAS LAZARO REMAINED ON THE CAR, HAD GUNSHOT RESIDUE ON HIS HANDS WHICH HE IS IN THE OUT OF THIS HE CAR WHERE THE GUN IS BEING FIRED AN HE --

>> WAS THE EXPERT UNDERMINED BY THE STATE VERY EFFECTIVELY BY THE REVELATION ON CROSS THAT THE TIME OF THE COLLECTION WAS AT 7:45?

>> WELL, THE REBUTTAL. THE REVELATION ON REBUTAL.

>> WOULD YOU AGREE IT WAS DEVASTATING TO THIS EXPERT'S CREDIBILITY?

>> WELL, I DON'T BECAUSE THE EXPERT'S TESTIMONY WAS MORE, THERE ARE NUMEROUS WAYS YOU CAN GET GUNSHOT RES DID YOU ON YOUR HAND.

HAVE LAZARO WITH GUNSHOT RESIDUE ON HIS HAND.

>> YOU KNOW AT ONE TIME, IT WOULD BE NICE JUST TO SAY,

YOU KNOW WHAT?

NOT ONLY WAS IT, DID IT
IMPEACH THAT EXPERT TO THE
POINT OF THAT THERE WAS NO
CREDIBILITY ON WHAT THAT
EXPERT SAID, BUT THE STATE,
AS I WOULD DO, IF I WERE THE
STATE, JUMPED OINT, SAID IT
WAS WHOLE, THIS IS BUILT ON
A SHAM, SO WHY?

>> THE STATE CERTAINLY
JUMPED ON ISSUE.

>> SO THE ONLY THING THAT
THEY DO IS THEY, THEY SCREW
IT UP AND THEN ISSUE, SINCE
THEY THOUGHT IT WAS
IMPORTANT ABOUT WHO THE
SHOOTER WAS THEY JUST FLIP
FLOP ON THAT.

I MEAN WITHOUT FINALINGS
FROM THE TRIAL COURT THAT
WAS REASONABLE TRIAL
STRATEGY HOW DO WE AFFIRM
THAT ORDER?

>> WELL, YOU DO HAVE THE
TRIAL COURT DISCUSSING THE
FACT THERE IS TRAGEDY AND IT
IS STRATEGIC, THEN THE TRIAL
COURT FINDING THERE WAS NO
EVIDENCE TO MEET EITHER
STRICKLAND SO I BELIEVE DO
YOU HAVE A FINDING.

>> WHAT IS STRATEGIC TO
CHANGE WHO THE SHOOTER WAS?
THAT WAS NOT STRATEGIC WAS
IT?

>> THE STATE'S POSITION IS
IT WAS.

AND YOU HAVE TO READ IT IN
THE CONTEXT OF THE ENTIRE
OPENING BECAUSE IT WAS NOT
REALLY WHO WAS THE SHOOTER.
THE OPENING WAS MORE THE
CUELLAR BROTHERS ARE
STANDING HERE LINE, THEY DID
IT.

THEN THERE IS BRIEFLY
HUMBERTO WAS THE SHOOTER AND
IN CLOSING AFTER YOU HAVE
DECIDED NOT TO CALL LAZARO
BECAUSE YOU HAD HUMBERTO
EVIDENCE KEPT OUT AND THERE
IS A PROBLEM.

>> THEY PROMISED THEY WOULD

CALL LAZARO.

WHAT IS EXPLANATION WHY THEY
DON'T?

THEY DIDN'T HAVE
EXPLANATION?

>> THEY DID NOT RECALL.

THEY SAID AT THE TIME OF
TRIAL, IT WAS STRATEGIC
DECISION, DECISION
STRATEGIC, WHERE YOU HAVE A
THOROUGH INVESTIGATION,
THERE HAS BEEN NOTHING SHOWN
HERE THEY DID ANYTHING, BUT
A THOROUGH INVESTIGATION OF
THIS CRIME.

THEY DID NOT TESTIFY TO
BEING UNAWARE OF ANY FACTS
AND THEY SIMPLY COULDN'T
EXPLAIN WHAT THE STRATEGY
WAS WELL THAT IS THE
DEFENSE'S PROBLEM WITH ALL
DUE RESPECT BECAUSE IT IS UP
TO THEM TO OVERCOME THE
PRESUMPTION IT IS STRATEGIC
PARTICULARLY WHEN YOU HAVE
COUNSEL SITTING THERE SAY ON
THE RECORD FROM THE TIME OF
TRIAL.

WE MADE STRATEGIC DECISION
NOT TO CALL HIM.

AND WHEN YOU HAVE THE MOST
IMPORTANT PART OF LA ZAR
RE'S TESTIMONY IS HEARSAY
THAT YOU ARE NEVER GETTING
IN.

>> THERE IS A PROBLEM IN
THIS CASE WITH IF MENDOZA
WAS NOT THE SHOOTER WITH THE
FACT THERE IS NO ANALYSIS?

>> WELL, THERE WOULD BE, BUT
FOR THE FACT AGAIN, YOU HAVE
THE HAND PRINT RIGHT THERE
ON WHERE THEY ARE LEANING
DOWN SHOOTING INTO THE
VICTIM AND DELIVERING THESE
GUNSHOT WOUNDS SO THE
PHYSICAL EVIDENCE SHOWS.

>> SO THE CASE DOES DEPEND
UPON MENDOZA BEING THE
SHOOTER?

IT HAS TO.

>> I BELIEVE THERE WOULD BE
A PROBLEM IF MENDOZA WAS NOT
THE SHOOTER.

WITH THE HAND PRINT WHERE THE PERSON IS PRAISE BRACING THEMSELF TO LEAN DOWN TO SHOOT TO THE VICTIM WHERE YOU HAVE CONTACT WOUNDS WHERE THE BODIES ON THE GROUND, YOU KNOW WHO THE SHOOTER IS FROM THE HAND PRINT, THE GUNSHOT RESIDUE IS NOT THAT IMPORTANT. AND WITH REGARD TO THE PENALTY PHASE, WE HAD COUNSEL WHO HAD THE DEFENDANT EVALUATED BY THREE MENTAL HEALTH EXPERTS WHO SPENT ACCORDING TO COUNSEL THEY HAD A WONDERFUL RAPPORT WITH THE FAMILY, THEY SPOKE TO THEM CONSTANTLY, THEY KNEW WHAT WAS GOING ON IN THE DEFENDANT'S LIFE, YOU BASICALLY HAVE POST-CONVICTION EVIDENTIARY HEARING CUMULATIVE EVIDENCE.

>> MY CONCERN IS, THERE WAS A LOT OF TESTIMONY IN THE PENALTY ABOUT THE DEFENSE LAWYERS ASSUMED THAT THIS WAS NOT GOING TO BE A DEATH PENALTY CASE AT THE MOST THIS WAS GOING TO BE A MURDER CASE AND HE WOULD RECEIVE LIFE IN PRISON, THAT COLORED THE WAY THEY APPROACHED THIS CASE.

>> BUT YOU HAVE THEM TESTIFYING THAT, YES, OUR APPROACH TOP THIS CASE WAS THIS WAS JUST FELONY MURDER, IT DOESN'T DESERVICE THE DEATH OPINIONTY, BUT ALSO HAVE HIM EVALUATED BY THREE MENTAL HEALTH EXPERT, YOU HAVE HIM SITTING THERE DISCUSSING WITH THE FAMILY, GETTING RECORDS FROM CUBA TO PRESENT ABOUT MENTAL HEALTH PROBLEM, SCHOOL PERFORMANCE FROM CUBA WHICH IS YES EP TSES UP IN MENTAL HEALTH TREATMENT IN CUBE ABOUT AND THE POST CONVICTION EVIDENTIARY HEARING IS LARGELY CUMULATIVE TO WHAT

WAS TESTIFIED TO.
YOU HAVE THE ONLY
NON-HEARSAY SUPPORT BECAUSE
THE MOTHER TESTIFIED I
ASSUMED HE WAS USING DRUGS
BECAUSE OF THIS, THAT AND
THE OTHER.

THE ONLY WITNESS WHO
TESTIFIED ABOUT DRUG USE AT
THE EVIDENTIARY HEARING WAS
HIS FRIEND WHO SAY, YEAH, WE
USED MARIJUANA TOGETHER IN
HIGH SCHOOL, I HADN'T BEEN
AROUND HIM.

I SAW HIM, FROM HIS
APPEARANCE, I ASSUMED HE WAS
USING DRUGS.

>> SO DO YOU THINK THAT EVEN
SEEING ALL OF THAT PENALTY
PHASE EVIDENCE ON THE LIGHT
MOST FAVORABLE TO THE
DEFENDANT THAT WE COULD FIND
UNDER STRICKLAND IT DOES NOT
UNDERMINE CONFIDENCE THE
OUTCOME?

>> WELL, THE PROBLEM IS, YOU
HAVE THE EVIDENCE PRESENTED.
THE TRIAL COURT MAY NOT HAVE
ACCEPTED THE EVIDENCE AT THE
TRIAL, BUT IT WAS PRESENTED
IT IS NOT COUNSEL'S FAULT.

>> WELL, HOW DID, I GUESS,
SHORT OF THE TRIAL JUDGE IN
THE CASE EVALUATING WHAT WE
SAY IN TERMS OF CUMULATIVE
TESTIMONY IS THE QUALITY AND
THE QUANTITY OF THE
MITIGATION, AND MY CONCERN
IS, AS YOU POINT OUT,
WITHOUT THE ORIGINAL TRIAL
JUDGE FINDING ANY MITIGATION
THAT WE HAVE GOT TO AT LEAST
AT POINT INDULGE IN THE AYOU
SUMTION WAS IT WAS NOT
COMPELLING WE CAN'T TELL ON
THE RECORD WITHOUT SOME
EVALUATION AS TO WHETHER IT
WAS MUCH MORE COMPELLING
PRESENTATION OF MITIGATION
AND AGAIN WITH THE 75 AND
FELONY MURDER AN AND A
QUESTION ON THE DEATH
PENALTY THIS BECOMES PRETTY
CRITICAL.

>> WELL, THE PROBLEM IS, YOU ARE STILL NOT, SOMEBODY IS GOING TO HAVE TO ERAL WAIT IT ON THE RECORD BECAUSE THE ORIGINAL TRIAL JUDGE HAS BEEN RECUSED HE IS NOT EVEN ON THE BAEFERN! BECHB ANYMORE.

>> THE ORIGINAL TRIAL JUDGE >> HE IS NOT ON THE BENCH ANYMORE SO YOU ARE GOING HAVE TO HAVE SOMEONE EVALUATING IT IS ABOUTED ON THE RECORD TO BEGIN WITH.

>> UNLESS WE HAD AN ORDER A NEW EVIDENTIARY HEARING. WELL, BUT THAT NEW JUDGE IS STILL, HE IS NOT GOING TO HAVE THE OPINION TY PHASE PRESENTATION. HE IS STILL GOING TO HAVE TO BE EVALUATING IT BASED ON THE RECORDS FROM THE PENALTY PHASE.

>> ABOUT THE ORIGINAL TRIAL. YES.

>> AND WHAT WAS IT?

>> YOU CAN LOOK AT THAT RECORD AS WELL AS A NEW TRIAL JUDGE.

>> THE PART THAT WE ARE MISSING IS WHETHER A TRIAL JUDGE HEARING THE TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING WOULD HAVE CONCLUDED THAT THIS WAS QUALITATIVELY COMPELLING MITIGATION, WE DON'T HAVE THAT HERE.

>> WELL, DO YOU HAVE THE TRIAL JUDGE SAYING IT IS NOT BECAUSE HE DID NOT CONSIDER EITHER STRICKLAND MET AND IF HE HAD CONSIDERED SUCH COMPELLING MITGATION, HE WOULD HAVE FOUND STRICKLAND MET.

>> SO THE RULE THAT SAYS THERE HAS TO BE DETAILED FINDINGS OF FACT IS --

>> WELL, I BELIEVE THAT THIS IS AN OLD RULE CASE. THIS IS BEFORE 2001 MOTION SO THAT IS NOT THE RULE THAT APPLIES.

>> THAT IS WHAT YOUR POSITION WAS WHEN THE TRIAL JUDGE ENTERED THIS ORDER THAT THERE WAS NO REASON TO ASK FOR MORE DETAILED FINDINGS OF FACT?

>> MY POSITION WAS THAT I HAD HADER, PERIENCE WITH THIS TRIAL COURT, I HAD DIFFICULTY GETTING HIM TO MAKE DETAILED FINDINGS OF FACT.

BY NOT PARTICULARLY CONSIDERING THAT THE CASE WAS UP ON APPEAL.

>> UNFORTUNATELY THIS TRIAL JUDGE WAS VERY ILL WHILE THIS WAS GOING ON.

>> HE BECAME ILL LATER. COURSE OF IT.

--

>> WELL --

>> JUST -- I WANTED TO CERTAINLY WOULD PREFER A BETTER ORDER ONE THING.

>> AND I'M STUCK WITH WHAT I HAVE.

>> ONE THING YOU SAID, AND I WANT TO MAKE SURE THAT THERE IS NOT A MISAPPREHENSION THIS COURT SAID NUMEROUS TIMES OF COURSE THAT THE STATE CAN NOT PREPARE A SENTENCING ORDER BUT I DON'T RECALL WHEN IT COMES TO POSTCONVICTION ORDERS THAT WE HAVE SAID THAT CAN'T BE SOME ASSISTANCE FROM EITHER SIDE, AND SUBMITTING FINDINGS OF FACT DO YOU THINK WE HAVE SAID THAT.

>> IF YOU SAID THAT YOU WOULD PREFER WE NOT DO IT. AND SINCE OF YOU TOLD ME THAT YOU WOULD PREFER I NOT DO IT.

-- USUALLY DON'T DO IT.

>> THERE IS A CASE THAT SAYS THAT WE DON'T WANT --

>> I BELIEVE IN PATTON YOU SAID WOULD YOU PREFER TRIAL COURT WRITE THEIR OWN ORDER THE STATE --

>> I -- STILL A PRECOMMON

PRACTICE TO BOTH SIDES --
SUBMITTED AT LEAST,
POSTHEARING MEMORANDA.
>> THERE ARE POSTHEARING
MEMORANDA IN THIS CASE.
>> AND PROPOSED FINDINGS.
>> THERE IS NO PROPOSED
FINDINGS OF FACT THERE ARE
CERTAINLY ARGUMENTS ABOUT
WHAT FACTS SHOULD BE FOUND
IN POSTHEARING MEMORANDA.
>> HAVE WE DISCOURAGED THE
SUBMITIGATION OF PROPOSED
FINDINGS AS OPPOSED TO --
>> IN PATTON DID SUGGEST
THAT YOU WOULD PREFER THE
STATES NOT DRAFT THE ORDER.
YES.

>> I'M NOT SAYING DRAFT THE
ORDER I'M SAYING, SUBMIT
PROPOSED FINDINGS OF FACT.
>> I'M JUST CAUTIOUS WHEN
YOU HAVE TOLL ME YOU DON'T
WANT ME DOING SOMETHING TO
NOT DO IT.

THAT IS ALL.

>> -- YOU ARE PASSED YOUR
TIME OF.

>> THANK YOU.

>> STATE REBUTTAL.

>> THANK YOU YOUR HONOR I
WOULD LIKE TO RETURN TO THE
GUNSHOTS!!\$\$!!!!!!!!!!!!!!!
GUNSHOTS, RESIDUE, EXPERT
TESTIMONY.

I THINK THE POINT THAT I
PERHAPS DIDN'T BRING OUT
FULLY ON MY CASE IN CHIEF
WAS THAT THE REASON THAT
THIS WAS SO DEVASTATING WHAS
WAS NOT JUST THE IMPEACHMENT!!\$\$!!!!!!!!!!!!!!!
IMPEACHMENTS OF THE EXPERT
HIMSELF BUT THE IMPEACHMENTS
OF THE POTENTIAL IMPEACHMENT
OF HUMBERTO\$\$'S TESTIMONY
NEVER GOT OUT OF THE CAR --
THEREFORE COULDN'T HAVE BEEN
THE SHOOTER, THIS VERY MUCH
GOES TO ADDITIONAL
IMPEACHMENT AND ADDITION TO
THAT WHICH WAS BROUGHT OUT
ON CROSS-EXAMINATION OF
UMBERTO THAT LASRO WAS VERY
MUCH INVOLVED IN THE

SHOOTING AND THAT HIS GUNSHOT RESIDUE FOUND ON HIS HAND WAS CONSISTENT NOT ONLY WITH HAVING HANDLED THE GUN BUT HAVING FIRED THE GUN, SO IT DOESN'T ONLY GO TO THE IDEA THAT IT WASN'T THAT IT WASN'T -- WHO WAS SHOOTER IT GOES TO THE IDEA THAT IT WAS POSSIBLY LASRA POSSIBLY HUMBERTO HUMBERTO'S TESTIMONY TO BE DISCREDITED FOR FURTHER GROUNDS THAT WAS AN OPPORTUNITY A GOLDEN OPPORTUNITY FOR TRIAL COUNSEL HAD THEY ONLY USED THEIR EXPERT PROPERLY PREPARED THEM PROPERLY AND MADE SURE THEY WERE AWARE OF THE FAILURE OF FACTS WHICH THE EXPERT WOULD BE RELYING ON.

I THINK THAT IS VERY IMPORTANT.

AS TO THE PENALTY PHASE.

>> LET ME ASK YOU A QUESTION WHATS WERE THE STATUS OF LAZARO AT THE TIME OF THE TRIAL IF THIS CASE WAS HE A STATE WITNESS WHAT WAS GOING ON.

>> HE PLED ABOUT YEAR BEFORE YOUR HONOR.

>> BEFORE THIS TRIAL.

>> YES, HE PLED IN I THINK IT WAS -- I HAVE IT WRITTEN DOWN, IN -- 19 -- 93.

>> SHOW HE WOULD HAVE BEEN AVAILABLE FOR EITHER DEFENDANT OR THE STATE TO CALL AS A WITNESSES IN.

>> EXACTLY, HE HAD -- ENTERED A PLEA AGREEMENT IN MAY OF 93 THIS TRIAL WAS IN FEBRUARY OF 94.

I -- HE PLED TO -- O CONSPIRACY AND ATTEMPTED ARMED ROBBERY -- AND AS PART OF HIS PLEA AGREEMENT HE HAD AGREED TO TESTIFY TO THE STATE IF THEY SO WISHED. AGAINST MR. MENDOZA ABOUT THE HE DIDN'T HAVE TO TESTIFY AGAINST HIS BROTHER

SHOULD HIS BROTHER REACH TRIAL.

LAZARO WAS DEPOSED LATER AFTER THAT, BY TRIAL COUNSEL, AND ONE CAN ONLY ASSUME AS A RESULT OF HIS DEPOSITION THE STATE DECIDED NOT USE HIM IN MR. MEN DOEDA'S TRIAL.

>> IF WE FIND THE FINDINGS OF FACT, ARE -- DID NOT ARE SINCE NONEXISTENT, WHAT WOULD BE THE REMEDY IN YOUR VIEW?

>> REMEDY WOULD BE A NEW TRIAL.

NOT WHY NOT NEW EVIDENCE EVERY DAY?

THAT IS SEVERAL -- NOT REBELIEF MENDOZA ASKED FOR MR. MENDOZA SUBMITS HE IS ENTITLED TO NEW TRIAL AND/OR NEW PENT INDICATION IN ALTERNATIVE IF THE COURT FELT THE NEED FOR FIRLT EVIDENTIARY DEVELOPMENT THAT WOULD BE IF YOU LIKE THE SECOND BEST.

>> THIS GUN -- POWDER RESIDUE JUST LOOKING AT OUR 1997 OPINION, WE DON'T MENTION ANY.

I I MEAN THAT WASN'T A FACTOR WHEN IT WAS HERE BEFORE.

AS FAR AS GUNFIRE RESIDUE. BEING -- SIGNIFICANT PIECE OF EVERY DAY.

>> I DON'T KNOW IF IT WAS RAISED ON APPEAL, YOUR HONOR.

I DON'T KNOW, I I MEAN, I WOULD DRAW THE \$COURT'S ATTENTION TO THE MATTERS RAISED IN THE STATE HABEAS PETITION MR. MENDOZA SIMULTANEOUSLY FILED IN WHICH THERE WERE SEVERAL ISSUES WHICH HE RAISED REGARDING THE -- LOWER COURT THE TRIAL COURT KEEPING OUT -- THE EVERY DAY, AND I WOULD ASK EE THE EVIDENCE I WOULD ASK THE COURT TO LOOK

AT HABEAS ARGUMENTS FOR
INEFFECTIVE ASSISTANCE OF
APPELLATE COUNSEL IN
CONJUNCTION WITH THE
ARGUMENTS!!\$\$!!!!!!!!!!!!!!!
ARGUMENTS, FOR INEFFECTIVE
-- OF TRIAL COUNSEL ON THE
SUBJECT OF THIS PARTICULAR
BRIEFING, AND THE
EVIDENTIARY HEARING.
IT SEEMS WE MUST HAVE
ASSUMED FOR THE PURPOSE OF
THE DIRECT APPEAL THAT --
THAT MENDOZA WAS THE
SHOOTER, BECAUSE AS WAS
REFERENCED THERE IS NO -- AN
ALS AS IS.

>> RIGHT.

BUT AGAIN IT IS NOT
SOMETHING THAT I "I DON'T
HAVE BRIEF OF THE DIRECT
APPEAL IN HAND, BUT, I -- I
BELIEVE IT WOULD NOT PUT --
CERTAINLY, THE PENALTY PHASE
ISSUE WAS VERY MUCH --
AROUND THE LACK OF
MITIGATION!!\$\$!!!!!!!!!!!!!!!
MITIGATION.

>> UP TO THE MITIGATION I
THINK WE NEED -- ESPECIALLY,
TESTIMONY RELATING TO
MR. MENDOZA'S POST TRA
MATTERIC STRESS DISORDER
THIS IS SOMETHING THAT
SHOULD HAVE BEEN
INVESTIGATED WASN'T
INVESTIGATED AT THE TIME OF
TRIAL.

MR. MENDOZA HAD A FAIRLY
HORRIFIC SOCIAL HISTORY BOTH
IN CUBA AND IN PERU.

AND THIS IS SOMETHING THAT
REALLY TRIAL COUNSEL SHOULD
HAVE INVESTIGATED.
WITH A LOT MORE DETAIL.

O.

>> ONE BRIEF MOMENT THERE.
WAS MEANTAL HEALTH
EVALUATION KNOWN OF THE
MENTAL HALT EVALUATORS
DIAGNOSED PTSD.

>> SURE BECAUSE THEY DIDN'T
HAVE A -- HISTORY.
-- DR. TUMOR RELIED ENTIRELY

ON MR. MENDOZA'S SELF-REPORT!!\$\$!!!!!!!!!!!!!!!!!!!!!!
SELF-REPORTING HE WAS THE
ONLY ONE WHO TESTIFIED.
>> BUT WITH OUR ASSISTANCE
OF YOU EXHAUSTED ALL OF YOUR
TIME WE THANK YOU VERY MUCH.
>> -- THE NATURE OF THE
ORDER WE'LL TAKE THIS CASE
UNDER --
>> THANK YOU VERY MUCH.
>> THANK YOU
THE CLERK: PLEASE RISE.