

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Ricardo Gonzalez v. State of Florida

SC04-225

GOOD MORNING.

LADIES AND GENTLEMEN THE FLORIDA SUPREME COURT.

GOOD MORNING, THE NEXT CASE ON OUR CALENDAR IS GONZALEZ VERSUS STATE OF FLORIDA. GOOD MORNING, MAY IT PLEASE THAT HE COURT TODD ON BEHALF OF THE APALLET, CASE BEFORE THE COURT FROM THE DENIAL OF A RULE 3.851 MOTION, FOLLOWING A VERY LIMITED EVIDENTIARY HEARING ON ONE ISSUE, THE ARGUMENT THAT I'M GOING TO ADDRESS THIS MORNING IN THE BRIEF HE TIME THAT I HAVE ARE -- VERY BRIEFLY!!\$\$!!!!!!!!!!!!!! BRIEFLY, SUBSECTION 2 OF ARGUMENT ONE RELATING TO THE SUMMARY DENIAL, OF THE FAILURE TO BY TRIAL COUNSEL TO PRESENT EXCULPATORY EVIDENCE AT THE GUILT PHASE AND SOME ISSUES IN ARGUMENT TWO, RELATING TO FAILURE TO OBJECT TO VARIOUS ARGUMENTS, EVIDENCE, ADMITTED AT THE RESENTENCING AND IF TIME PERMITS!!\$\$!!!!!!!!!!!!!! PERMITS, VERY BRIEFLY ARGUMENT THREE WHICH IS THE NEWLY DISCOVERED EVIDENCE CLAIM, AT THE OUTSET I WANT TO ONE OF THE CONCERNS THAT WE HAVE IN -- EXPRESSED IN OUR BRIEF THAT THE CASE BECAUSE -- UNDER NEW RULE, WHICH MANDATES EVIDENTIARY HEARING ANY CLAIM LISTED BY THE COAST AS REQUIRING FACT!!\$\$!!!!!! FACTUAL DEVELOPMENT UNFORTUNATELY!!\$\$!!!!!!!!!!!!!! UNFORTUNATELY, THAT DIDN'T HAPPEN HERE, DESPITE THE FACT THAT -- AT THE HEARING, PROMPTED BY THE COURT. I OUTLINED SPECIFICALLY VARIOUS CLAIMS THAT WE WERE CITED AS REQUIRING FACTUAL DEVELOPMENT AND -- IS THERE ONE OF OWE ARGUMENTS!!\$\$!!!!!!!!!!!!!! ARGUMENTS, THAT THE NEW RULES SHOULDN'T APPLY TO THIS CASE? THAT --

WELL THAT IS --

YOU SHOULD HAVE -- REVETERANED BACK TO OLD -- REVERT TO OLD RULE ORIGINALLY FILED BEFORE THIS RULE.

PART OF ONE CLAIM IN TERMS OF -- THAT -- NOT NECESSARILY NEW RULE BUT OLD RULE SHOULD APPLY BUT THAT THE AMENDED MOTION, SHOULD -- THE DATE OF THE FILING AMENDED MOTION TO RELATE BACK TO THE DPAIT -- DATE OF THE FILING OF SO CALLED SHELL MOTION BECAUSE THE SHELL MOTION WAS -- THAT IS WHAT THAT ARGUMENT IS, BUT BY ALL ACCOUNTS, THIS CASE IS PROCEEDING UNDER NEW RULE, AND A HEARING IS MANDATORY!!\$\$!!!!!!!!!!!!!! MANDATORY, BUT WE FIND OURSELVES IN POSITION OF -- THIS COURT -- MANY YEARS AGO EVIDENTIARY HEARING GRANTED OM ON99ONE ISSUE WHEREAS THERE ARE NUMEROUS OTHER CLAIMS WE BELIEVE REQUIRE HEARING SO I THINK THAT VIOLATES THE RULE IN AND OF ITSELF.

WAS THERE ACTUAL DISCUSSION WITH THE TRIAL JUDGE ABOUT ISSUES SHOULD AND SHOULD NOT HAVE EVIDENTIARY HEARING.

YES.

SPECIFICALLY, INDICATED THAT THERE WERE A COUPLE OF OF THEM JUST LEGAL CLAIMS LIKE THE RING CLAIM, INSANITY CLAIM, I THINK THE PUBLIC RECORDS CLAIM I DON'T THINK I INDICATED, ANY MORE FACT!!\$\$!!!!!! FACTUAL, DEVELOPMENT BUT DID LIST SOME OTHER ISSUES INCLUDING THE ONES I'M GOING TO ADDRESS THIS MORNING, ONE OF THE ISSUES, IS THE FAILURE TO PRESENT EXCULPATORY EVIDENCE PAGE 20 OF THE BRIEF, AND WHAT HAPPENED WAS THAT DURING THE GUILT PHASE OF THE TRIAL OF COURSE!!\$\$!!!!!!!!!!!!!! COURSE, CASE HAD RESENTENCING!!\$\$!!!!!!!!!!!!!! RESENTENCING, SO THIS PART OF THE CLAIM, RELATES TO THE - - GUILT PHASE, WHICH WAS AFFIRMED!!\$\$!!!!!!!!!!!!!! AFFIRMED, IN THE -- DURING THE, CROSS-EXAMINATION OF ONE OF THE LAW ENFORCEMENT OFFICERS!!\$\$!!!!!!!!!!!!!! OFFICERS, WERE DEFENSE COUNSEL WAS ATTEMPTING TO CROSS EXAMINE, THE OFFICER ABOUT THE EXISTENCE OF A WEAPON THAT WAS LOCATED WHAT THE WAS CALLED THE THIRD CRIME SCENE WHICH WAS

FURTHER AND SAY THAT -- IN THIS CASE FOR INSTANCE, 38 RECOLONEL VERO!!\$\$!!!!!!!!!!!!!!!!!!!!!!!!!!!! RE"VOLVER" WAS INVOLVED THE GUN FOUND A BLOCK AWAY A 38 RE"VOLVER", THE GUN INVOLVED IN THIS CRIME WAS NEVER EVER LOCATED!!\$\$!!!!!!!!!!!!!! LOCATED. AND, THEREFORE, THERE IS A -- DISTINCT POSSIBILITY OR PROBABILITY!!\$\$!!!!!!!!!!!!!!!!!!!!!!!!!!!! PROBABILITY, THAT THE JURY WOULD HAVE FOUND OR THE JUDGE, THAT THIS -- GUN FOUND A BLOCK AWAY WAS RELATED TO THIS CRIME AND YET THAT HAD NOTHING TO DO WITH MY CLIENT. NOW, YOU HAVE CONNECTED YOU KNOW SOMETHING, BUT -- SURE.

BUT DOESN'T THE RECORD IN THIS CASE SHOW THE GUNS WERE RECOVERED? AND THAT THEY YOU KNOW, THAT SO WE DON'T HAVE AN OPEN ISSUE, ABOUT, YOU KNOW, THIS GUN FOUND A BLOCK AWAY SOMEHOW BEING CONNECTED TO THIS CRIME, AND SOMEHOW CASTING YOUR CLIENT IN A MORE FAVORABLE LIGHT, THERE IS NOTHING SO -- THAT SEEMS TO BE A MISSING PIECE IN YOUR ALLEGATIONS HERE.

I UNDERSTAND.

MAYBE I'M MAYBE I'M OFF BASE, BUT, HELP US WITH THAT.

PERHAPS IF COULD I, LET ME REFER, YOU TO WHAT THE TRIAL COUNSEL INFORMED THE COURT HE DID MAKE A PROFFER OF THIS IN THE MOTION IN THE BRIEF CERTAINLY BEFORE THE LOWER COURT, WHAT TRIAL COUNSEL SAID THAT HE COULD HAVE EXAMINED THIS PARTICULAR WITNESS WHICH IS THE DETECTIVE THAT WAS ON THE STAND, AS TO THE FACT THAT DURING THE -- THE COURSE OF HIS INVESTIGATION, HIS CRIME SCENE TECHNICIAN, HE CAME ACROSS A PARTICULAR WEAPON THIS WEAPON WAS RECEIVED FROM SEVERAL INDIVIDUALS, WHO WERE FOUND SHORTLY AFTER THIS TO KURD WITHIN BLOCKS I BELIEVE FIVE OR SIX BLOCKS, OF INDIVIDUALS, HAVE IN US THE DETECTIVE SAW EVENTUALLY, NORTH MIAMI P.D. TUMENTZ TAKEN FROM AUTOMOBILE, ITEM TAKEN FROM AUTOMOBILE WAS ABOUT A LATEX GLOVES THAT IS SIGNIFICANT, HE GOES ON TO DISCUSS THE SIGNIFICANCE OF A GLOVES, BECAUSE, CLEAR THAT YOU KNOW, SURGEON USES GLOVES!!\$\$!!!!!!!!!!!!!! GLOVES, PEOPLE COMMITTING ROBBERIES DON'T WANT TO BE CAUGHT USING GLOVES --

-- REALLY STILL A VOID, A BLANK THAT THERE REALLY HAS BEEN NO ALLEGATION THAT THERE WERE SOME CRITICAL CONNECTION!!\$\$!!!!!!!!!!!!!!!!!!!!!! CONNECTION, BETWEEN THIS FOUND WEAPON AND GLOVES, TO THIS CRIME THAT WOULD SOMEHOW BE OF HELP THEN TO YOUR CLIENT -- I MEAN IF THIS CLAIM WERE HERE, AFTER WE HAD A FULL FACTUAL DEVELOPMENT PERHAPS THAT WOULD HAVE A DIFFERENT ANSWER. BUT.

-- I MADE EE.

THE KNOWLEDGE BEFORE YOU AASSERT CLAIM LIKE THIS TO SHOW THAT YOU KNOW THIS IS SOMETHING THAT WAS IMPORTANT TO THE CASE -- AND DEFENSE LAWYER MISS SNAD IT BOORS. HOW WAS NIGHTED HE DIDN'T MISS IT HE TRIED TO RAISE IT ALL IS BEING TELL YOU YOUR HONOR.

WHO WAS DEPOSITORY.

ALL I CAN TELL YOU I'M EXPRESSING WHAT HE INFORMED THE COURT WHAT HE INFORMED THE COURT IN THE RECORD THIS IS A CLAIM UNLIKE OTHER ONES, WHERE THERE IS NOTHING IN THE RECORD, AND COLLATERAL COUNSEL COMES UP WITH SOMETHING THE WASN'T PRESENT!!\$\$!!!!!!!!!!!!!! PRESENTED, HERE WE HAVE A BIT OF A DIFFERENT CLAIM, WHERE PROMISE WAS MADE, AND PROGRESSIVE WERGS MADE TO THE TRIAL COURT, THAT THIS -- PROVEERS, TRIAL OCCURRENCE SAYING IT IS RELEVANT IT IS IMPORTANT, AND THESE ARE THE REASONS, WHY NOW -- WE MAY NOT AGREE WITH YOU THAT MAY NOT AGREE WITH THAT NOW BUT I THINK THE - - BOTTOM LINE IS THAT WE HAVE A RECORD THAT IS DEVOID OF ANY EXPLANATION AS FROM TRIAL COUNSEL HIMSELF, AS TO WHY THIS INFORMATION WASN'T PRESENTED.

SINCE THERE WAS NO HEARING, TOUGH TAKE THE FACTS IN LIGHT MOST FAVORABLE TO YOU. CORRECT SO THAT ACCEPT YOUR PROFFER AS TRUE.

CORRECT.

BUT WE STILL HAVE TO CONCLUDE, WERE WHETHER YOUR PROVERBER AS TRUE, STATES -- PROFFER AS TRUE STATES VALID CLAIM IF THAT EVIDENCE YOU STATE IS NOT RELEVANT TO THE TRIAL, AND DOESN'T TEND TO EXONERATE YOUR CLIENT, AND CERTAINLY CAN SHOW NO

PREJUDICE FROM NOT PRESENTING IT THEN WE STILL AFFIRM THE TRIAL COURT DESPITE THE FACT THAT THERE WAS NO EVIDENTIARY HEARING HELD.

THAT IS OBVIOUSLY SOMETHING THAT THE COURT -- DOES ALL THE TIME AND CAN DO. BUT I SUBMIT THAT WE HAVE THIS CONUNDRUM ALLOWED TO HAVE A HEARING REQUIRED TO HAVE A HEARING, AND WE DON'T, AND I'M IN A POSITION OF TRIBETO TRYING TO EXPLAIN TO THE COURT WHY COUNSEL DIDN'T DO THIS WHAT RELEVANCE WAS.

YOU ARE NOT ALLOWED TO -- USED HALF YOUR TIME.

SORRY.

JUSTICE QUINCE HAD A QUESTION.

-- YOU CAN MOVE ON FROM THIS.

ALL RIGHT.

I DO WANT TO TURN TO SOME OF THE ALLEGATIONS, IN ARGUMENT TWO. THE PARTICULAR RESPECT TO THE FAILURE TO OBJECT TO A NUMBER OF MATTERS, AND THE BRIEF SETS OUT, THREE MAIN AREAS OF ARGUMENT THAT WERE RAISED ON DIRECT APPEAL FUNDAMENTAL ERROR THIS COURT NOTED THAT THOSE THREE AREAS WERE -- NO OBJECT NOT ADEQUATELY PRESERVED THOSE AREAS ISSUE RAISED AS SNOOEF COUNSEL -- NOOEF COUNCIL -- INEFFECTIVE COUNSEL.

DO WE HAVE TO FIND FUNDAMENTAL ERROR TO HOLD IN YOUR FAVOR.

DO WE HAVE TO FIND FUNDAMENTAL ERROR NOD TO HOLD IN YOUR FAVOR.

I'M NOT -- NOT EXCITE --

THERE WERE CERTAIN OBJECTS NOT MADE AT TRIAL TO EVIDENCE.

CORRECT.

DO WE HAVE TO FIND THAT AN APPELLATE COURT WOULD HAVE FOUND FUNDAMENTAL ERROR ON PALE DESPITE!!\$\$!!!!!!!!!!!!!!!!!!ON APPEAL DESPITE LACK OF OBJECTS REVERSED NORRED TO BE EFFECTIVE ASSISTANCE OF COUNCIL ON POSTCONVICTION!!\$\$!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! POSTCONVICTION. I'M NOT QUITE INSURE I UNDERSTAND THE QUESTION, THE WAY I AND WHAT YOU ARE ASKING ME IS -- -- LET ME SET IT BACK, THESE ALLEGATIONS WERE MADE THEY WEREN'T OBJECTED TO WERE RAISED ON APPEAL COURT SAID IT WAS DON'T GO TO BEING REACH MERITS BECAUSE THEY WEREN'T PRESERVED, THE COURT ALSO INDICATES BY THE WAIT WE DON'T THINK FUNDAMENTAL ERROR.

WHAT I'M ASKING IS IN ORDER TO FIND THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNCIL.

OKAY --

-- DO WE HAVE TO FIND THAT ANY LACK OF OBJECTION WAS IRRELEVANT BECAUSE IT WAS FUNDAMENTAL ERROR.

NO, BECAUSE YOU HAVELER NO I MEAN WELL YOU SAID IT WASN'T

IS YOUR CLIMB PRECLUDED THEN, BECAUSE -- IS YOUR CLAIM PRECLUDED WE FOUND IEN PALE WOULD NOT CONSTITUTE IF OU MEAN ERROR NO NOT PRE-- NOT PRECLUDED FOR SEVERAL RBZ ONE I CITED A NUMBER OF CASES IN THE BRIEF TALK ABOUT FACT EVEN THOUGH FOUND TO BE FUNDAMENTAL ERROR ON APPEAL DOES NOT PRECLUDE THE POSTCONVICTION DEFENDANTS FROM WAVING THE CLAIM INEFFECTIVE ASSISTANCE OF COUNCIL CLAIM THE FUNDAMENTAL ERROR ANALYSIS IS SO HIGH, AS HE AS OPPOSED TO AS TO CLAIM OF INEFFECT!!\$\$!!!!!!!!!!!!!!!!!!

INEFFECTIVE COUNSEL MORE IMPORTANT THERE WERE OTHER ALLEGATIONS MADE THAT IN 3850 WHICH I THINK ARE EVEN MORE EGREGIOUS, XFLS MISCONDOUK, AT THE CLOSING KRTH ARGUMENT IN I THINK THAT WEREN'T RAISED ON DIRECT APPEAL CERTAINLY WHEN YOU CONSIDER THE CUMULATIVE EFFECT OF THOSE I THINK OF YOU TO GO BACK AND LOOK -- O HE? WHERE ARE -- WHAT ARE SEES SERIES!!\$\$!!!!!!!!!!!!!! SERIES.

OF ALL THE ONES THAT WE --

IS COMMENTS.

OF ALL THE ONES THAT ARE MENTIONED IN THE BRIEF, BECAUSE SO I HAVE LITTLE TIME THINK GOING TO FOCUS.

THE FOUR THAT WERE NOT -- ONE OF THE FOUR THAT WAS NOT -- PRESENTED ON DIRECT APPEAL; CORRECT?

THERE WERE THREE, PRESENTED ON DIRECT APPEAL.

SO, THOSE THREE ASIDE WHAT ARE THE ONES THAT YOU ALLEGING SO ARE EGREGIOUS NOW? THEY BEGIN ON PAGE 53 OF THE BRIEF, AND THERE IS A SERIES OF -- DISCUSSIONS ABOUT!!!\$!!!!!!THE MOTIONAL PLAY ON \$\$JUROR'S SENSIBILITIES WITH RESPECT TO THE FACT THE VIEM WAS POLICE OFFICER THEY ARE SENTENCES\$\$!!!!IIVE GO ON A NUMBER OF PAGES IN TRANSCRIPT THERE ARE O NUMBER --

BADGE, THAT KIND OF THING.

DIRECT, THIN BLUE LINE I THINK WHAT IS EVEN MORE, IMPORTANT, HERE MUCH MORE PREJUDICIAL ARE MESSAGE TO THE COMMUNITY, STATEMENTS THAT WERE MADE BY THE PROS CUTEDOR THAT WEREN'T OBJECT TO DO, FOR EXAMPLE, THE -- THE PROSECUTOR, SAYS IT IS YOUR RESPONSIBILITY AS CITIZENS YOUR RESPONSIBILITY BASED ON THE EVIDENCE TO RETURN THE DEATH RECOMMENDATION YOUR RESPONSIBILITY!!!\$!!!!!!RESPONSIBILITY, THE PROSECUTOR TALKING ABOUT A KILLING POLICE, IS DIFFERENT THEY PROTECT OUR HOMES, THEY PROTECT PARENTS AND CHIRP, WHO WERE SLEEPING SOUNDLY IN THEIR BEDS, THINGS OF THAT NATURE, AND THIS COURT HAS ROUNDLY CONDEMNED THESE VERY TYPES OF ARGUMENTS IN CASES BEGIN WITH BERLOTTIS, GARREN CAMPBELL ET CETERA A NUMBER OF THOSE CASES THE COURT REVERSED OF COURSE, HERE, WE DON'T HAVE ANY OBJECTION ON THE RECORD AND SO, WE HAVE NO IDEA WERE WHY COUNSEL PERHAPS WASN'T AWARE THIGHS WERE IMPROPER, AT WE CERTAINLY DON'T KNOW, THE LOWER COURT SIMPLY FOUND THEY WEREN'T --

THESE CATEGORIES OF CASES THAT IF WE ACCEPT THAT IT WAS INEFFECTIVE ASSISTANCE THEY FELL BELOW THE STANDARD, WITH REGARD TO THE FAILING TO OBJECT TO THOSE STATEMENTS, IF WE LOOK AT THE STATEMENTS, AND CONCLUDE THAT THOSE ARE NOT SUFFICIENT, FOR A REVERSAL IN THE CASE, THEN, THE EVIDENTIARY HEARING I ARE RELEVANT IF WE SAY WE ARE GOING -- IRRELEVANT IF WE SAY WE ASSUME THAT WAS BELOW STANDARD; CORRECT?

I CAN'T TELL YOU WHAT -- THE --

-- BUILT I SUBMIT THAT WE ARE GETTING BACK INTO POST HOCK ARGUMENTS ABOUT POST HOC INTO SUMMARY DENIAL.

THE QUESTION WHY DO YOU NEED A HEARING IF WE ASSUME THAT FELL BELOW THE STANDARD THE HEARING WAS JUST IS THERE A REASON IN A WE KNOW THERE WAS NO OBJECTION WE KNOW WHAT YOU HAVE SAID IT IS SO THE QUESTION THEN BECOMES IF WE ACCEPT THAT THAT IS BELOW IN THE STANDARD, TO NOT OBJECT, IS NOT THE QUESTION THEN A LEGAL ONE NOT A FACTUAL ONE AS TO WHEN THAT IS BRIDGE DISH!!!\$!!!!!! DISHAL.

CERTAINLY THAT IS CORRECT.

THE REASON WE ARE ASKING FOR A HEARING BECAUSE NOBODY -- CONCEDED THAT THERE WAS A TACTICAL!!!\$!!!!!! UNREASONABLE DECISION NOT TO OBJECT, SO I CERTAINLY THINK WHEN YOU LOOK AT THE -- THE LENGTH OF THE ARGUMENTS HERE THE NATURE OF THE ARGUMENTS HERE, AND THE -- THE -- UNEQUIVOCAL PLAY ON THE FEAR OF THE JURORS WE HAVE 8 TO 4 RECOMMENDATION HERE, WHEN YOU COMBINE THAT ALSO WITH THE FACT THAT THE JURY WAS NOT -- DID NOT KNOW THAT FERNANDO FERNANDEZ RECEIVED A LIFE SENTENCE THE GIST OF ARGUMENT THREE YOU COMBINE ALL OF THAT GLAD TO!!!\$!!!!!!IN ADDITION TO ARGUMENTS RAISED ON --

THE ARGUMENT ABOUT FERNANDEZ -- I KNOW THAT BOTH MR. FRANQUI AND MR. GONZALEZ HAVE BEEN, DESIGNATED AS THE SHOOTERS IN THIS CASE CORRECT.

CORRECT.

AND THEN MR. -- FERNANDEZ WAS IN THE CAR?

CORRECT.

SO DON'T WE HAVE A -- SITUATION WHERE WE DON'T HAVE EQUALLY CULPABLE CODEFENDANTS? FIRST OF ALL, THERE ARE TWO PARTS TO MY ANSWER TO THAT QUESTION NUMBER ONE, IS I MADE ALLEGATIONS, THAT IT WAS \$\$\$STATE'S POSITION THAT FERNANDEZ WAS IN FACT THE MASTERMIND!!!\$!!!!!! MASTERMIND, SECOND OF ALL, WHETHER OR NOT THEY WERE EQUALLY CULPABLE OR NOT THE FACT THAT ANOTHER DEFENDANT RECEIVED A LIFE SENTENCE, IS ITSELF VALID MITIGATION I ARE RESPECTIVE WHETHER OR NOT THAT PARTICULAR PERSON WAS EQUALLY CULPABLE OR NOT, AND SO I DON'T THINK -- THE ISSUE OF EQUAL CULPABILITY RELATES MORE TO PERSONALITY!!!\$!!!!!! PERSONALITY --

THIS IS ADDITIONAL MITIGATION AS OPPOSED TO TO A REASON TO REDUCE HIS SENTENCE TO

LIFE.

CORRECT, CORRECT, ADDITIONAL MITT -- MITIGATION LIKE THE JURY WAS INFORMED, THAT SAN MARTINE HAD GOTTEN A LIFE SENTENCED, SO IT IS ADDITIONAL CLEARLY THE LOW OR COURT FOUND WE MET FIRST TWO PRONGS OF THE JONES TEST WHAT IT COMES DOWN TO IS THE THIRD PRONG, AND THAT IS -- I SUBMIT THAT WE HAD PROFFERED THAT WE WOULD PRESENT EVIDENCE TESTIMONY OF -- ATTORNEY, WHO IN THE BLEEDING INDICATED THAT FERNANDEZ WAS THE MASTERMIND, BUT AGAIN I AM RESPECTIVE WHETHER HE WAS MASTERMIND, I THINK YET MORE MITIGATION THAT SHOULD HAVE BEEN PRESENTED, SO --

I'M A LITTLE I DON'T KNOW IF WE HAVE DONE THIS BEFORE I'M A LITTLE SKEPTICAL CALLING THIS NEWLY DISCOVERED EVIDENCE WHEN YOU THINK NEWLY DISCOVERED EVIDENCE YOU THINK OF FACTS RELATED TO THE CRIME.

CORRECT.

RELATED TO THE DEFENDANT'S BACKGROUND, THAT WOULD -- CHANGE THE TRIAL IN SOME WAY, ET CETERA FOR GUILT OR FOR SENTENCING THIS DOESN'T SEEM ONE OF THOSE FACTS RELATED THE CRIME OR THE DEFENDANT'S BACKGROUND, THIS IS JUST SOMETHING THAT IS MORE OF A DUE PROCESS ARGUMENT REALLY THAN A NEWLY DISCOVERED EVIDENCE --

THAT IS WHY IN THE DPOURT MEMORY SERVESES THAT BEEN A WHILE I THINK THAT IS HOW THE COURT ADDRESSED SCOTT VERSUS DUGGER, SIMILAR SITUATION CAME UP SUBSEQUENT NVRGS ABOUT REDUCTION OF CO-DEFENDANT!!\$\$!!!!!!!!!!!!!!!!!!!!!! CO-DEFENDANT'S SENTENCE MOW THE COURT CAST THE CLAIM AS ONE OF -- NEWLY DISCOVERED EVIDENCE HOW IT HAS BEEN RAISED!!\$\$!!!!!!!!!!!! RAISED -- HISTORICALLY OVER THE COURSE OF TIME WHEN THE SITUATIONS ARISE THAT IS WHY IT WAS CAST THAT FASHION WOULD I SUBMIT GLOBALLY WHEN YOU CONSIDER, THE -- UNOBJECT TO DO ARGUMENTS, THE LACK OF KNOWLEDGE, ON BEHALF OF THE JURY THAT FERNANDEZ GOT LIFE SENTENCE, IN ADDITION TO ARGUMENT I DIDN'T ADDRESS WHICH IS THE INCONSISTENT POSITIONS TAKEN BY COUNSEL -- WITH RESPECT TO MITIGATION, THE -- METHODS OPERATED IN TERMS OF PREYTATION OF COHESIVE CASE OF MITIGATION, GAVE THE STATE, AN OPPORTUNITY TO -- DIDN'T NEED TO CALL EXPERT ON THERE, IN THE CASE, BECAUSE DEFENSE PROVIDED ALL OF THE INCONSISTENCIES IN MENTAL HOUSE CASE YOU CONSIDER ALL THESE ERRORS, 8 TO FOUR JURY RECOMMENDATION I THINK WE MORE THAN SURPASS!!\$\$!!!!!!!!!!!!!! SURPASSED THE LEGAL PROBABILITY STANDARD.

VERY INTERESTING THAT WE ARE HERE ARGUING ABOUT THE FACT THAT YOU KNOW, TWO OR THREE MENTAL HEALTH EXPERTS, WERE PRESENT NORMALLY, IT IS THE OTHER WAY AROUSHED DOESN'T PRESENT ENOUGH MENTAL HEALTH EXPERTS IF YOU HAD ONE BUT TWO OTHERS YOU COULD HAVE PRESENDED!!\$\$!!!!!!TED.

I UNDERSTAND A DIFFERENT TAKE ON A CLAIM, BUT, I MEAN WOULD I NEVER MAKE A CLAIM THAT THE DEFENSE COUNSEL SHOULD HAVE PRESENTED THREE EXPERTS WHO COMPLETELY CONTRADICTED EACH OTHER THAT IS WHAT HAPPENED HERE, THEY DID PRESENT THREE EXPERTS CONTRADICTED EACH OTHER I THINK THE LOWER COURT SORT OF LOST THE CONTEXT OF THE CLAIM SO FAR AS SAYING WELL, YOU KNOW DR. ICE STEIN WAS FOUND -- EYES STEIN INCREDIBLE BY THE TRIAL COURT THE LOWER COURT FAILED TO CONSIDER IN ADDITION TO ARGUMENTS THE IMPROPER ARGUMENT MADE TO THIS JURY THE FACT THAT THE STATE WENT TO TOWN, TO TEAR TOO SHREDS MITIGATION CASE IN FRONT OF HIS JURY, CALLING DEFENSE EXPERTS HIRED GUNS -- ET CETERA, ET CETERA WENT ON AND ON, YET, STILL, FOUR PEOPLE WERE -- SO I SUBMIT WHEN YOU LOOK AT THIS GLOBALLY!!\$\$!!!!!!!!!!!!!! GLOBALLY, THERE IS MORE THAN RONABLE PROBABILITY LEAST TWO JURORS WOULD HAVE VOTED FOR LIFE, IS THE MINIMUM RESENTENCING IS REQUIRED, OR A EVIDENTIARY HEARING THANK YOU.

WITH OUR ASSISTANCE YOU HAVE USED UP YOUR TIME.

MAY IT PLEASE THE COURT SANDRA JAGGARD ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE WITH REGARD TO THE CLAIM ABOUT SUMMARY DENIAL ON THE GUN, NOT ONLY WAS THERE NO PLEADING OF PREJUDICE OTHER THAN -- TRIAL COUNSEL SAID IT WAS PREJUDICIAL!!\$\$!!!!!!!!!!!!!! PREJUDICIAL, BUT AT THE HEARING WHEN COUNSEL ASKED FOR THE EVIDENTIARY HEARING HE ONLY WANTED TO PROVE DEFICIENCY WHY TRIAL ASKED WHAT FACTS NEEDED TO BE DEVELOPED HE SAID I WANT TO DEVELOP DEFICIENCY, YOU CAN JUDGE PREJUDICE ON THE RECORD, YOU CAN JUDGE PREJUDICE ON THE RECORD THERE ISN'T ANY. THE

GUN WAS ENTIRELY IRRELEVANT, THAT WAS THE WAY THIS WENT FOR ALMOSTOE ALL INEFFECTIVE ASSISTANCE COUNCIL TIMES EXCEPT ONE FOR COUNSEL NOT ABOUT COUNSEL BEING INEFFECTIVE WERE DEFENDANT WAVING TESTIMONY THAT ONE HE ONLY WANTED TO APPROVE PREJUDICE DIDN'T WANT TO PROGRESSIVE DEFICIENCY HADN'T ALLEGED ANY DEFICIENCY, ON THE ONE ABOUT NEWLY DISCOVERED EVIDENCE THAT IS THE STATE THEORY THE STATE THEORY THAT IS FERNANDEZ WAS THE MASTERMIND!!\$\$!!!!!!!!!!!!!!!!!!!!!! MASTERMIND. WE LOST -- YOU RULED AGAINST US SAID HE WAS GETAWAY DRIVER A JUROR -- NOTING OUR ARGUMENT -- THEREFORE HE IS GETAWAY DRIVER SIMILARLY SIT WAITE TO DO SAN MARTIN YOU FOUND ON DIRECT APPEAL THE JURY CAME BACK 8 TO 5.

HOW ABOUT WITH REGARD TO THE -- THE ARGUMENTS, THAT WERE MADE WITH REGARD TO APPEALING TO FASHION, AND THOSE KINDS, WHAT IS THE STATE'S ANALYSIS OF THOSE ARGUMENTS!!\$\$!!!!!!!!!!!!!!!!!!!!!! ARGUMENTS, ARE THOSE PROPER ARGUMENTS!!\$\$!!!!!!!!!!!!!!!!!!!!!! ARGUMENTS?

WELL, THE STATE WOULD START OUT WITH, NUMBER ONE, THE ISSUE IS BARRED, BECAUSE ISSUED ABOUT COMMON -- COMMENTS CLOSING RAISED ON DIRECT APPEAL RELITIGATING THE ISSUE --

WERE EVERYONE OF THE STATEMENTS

NO, THERE WERE A FEW WEREN'T THAT IS SIMPLY RELITIGATING AN ISSUE RAISED ON DIRECT APPEAL ON OTHER GROUNDS.

ONES NOT RAISEDED ON DIRECT APPEAL HAD NOT BEEN PRESENTED ANYWHERE THE QUESTION IS THOSE STATEMENTS, THEY DID NOT OBJECT, AND DIDN'T PRESENT THOSE EVEN THE ONES RAISED WERE NOT BE CONSIDERED BECAUSE IS THERE IS NOT A PROPER OBJECTION, THOSE ARE NOT BARRED BECAUSE THE QUESTION ASSIST THEY HAVE OBJECTED!!\$\$!!!!!!!!!!!!!!!!!!!!!! OBJECTED.

WELL, YOU DID IN FACT -- NOT ONLY ADDRESS THE FACT THEY WERE BARRED YOU SAID THEY ARE NOT FUNDAMENTAL ERROR, ON THE --

HOLD ON, THAT IS A DIFFERENT ISSUE, IT SEEMS TO ME, THAT IF A LAWYER, FAILS TO OBJECT, TO SOMETHING, AND HE GOES ON APPEAL AND APPELLATE LAWYER STILL TRIES TO RAISE IT HIS ONLY HOPE IS FUNDAMENTAL ERROR, THAT DOES NOT, SIMPLY BECAUSE SOMETHING IS NOT FUNDAMENTAL ERROR, DOES NOT ELIMINATE THE POSSIBILITY, THAT WHAT HAPPENED, WAS BRIDGE DISH!!\$\$!!!!!! DISHSHAL DOES IT.

-- PETITIONER DISHSHAL.

IT DOES WHEN YOU SAY FUNDAMENTAL ERROR YOU SAY.

SAME STANDARD, THAT WE ARE LOOKING AT UNDER STRICKLAND IS THAT WHAT YOU ARE SAYING SO THAT YOU ARE SAYING UNDERMINES COMPETENCE IN THE FACT THE DEFENDANT HAD A FAIR TRIAL WELL WE ARE LOOKING AT THE SAME STANDARD CHANDLER YOU DID EXACTLY THAT ANALYSIS, YOU DIRECTLY STATED THIS COURT HAS REJECTED A CLAIM FUNDAMENTAL ERROR ON APPEAL THE DEFENDANT CANNOT SHOW -- POSTCONVICTION YOU HAVE ALREADY SAID IT

THAT IS THE LAW IN THAT AREA!!\$\$!!!!!! AREA.

YES.

STILL, DO I AGREE THAT WE HAVE EQUATED THE TWO, IN CHANDLER!!\$\$!!!!!!!!!!!!!!!!!!!!!! CHANDLER, THAT IS -- PREJUDICE, AND FINDING OF NO FUNDAMENTAL ERROR BUT THAT STILL DOESN'T ANSWER THE QUESTION, AS TO WHETHER IF THE THREE ADDITIONAL ARGUMENTS!!\$\$!!!!!!!!!!!!!!!!!!!!!! ARGUMENTS, THAT ARE NOW BEING CHALLENGED HAD BEEN RAISED IN WHAT WE WOULD HAVE TO DO UNDER A CHANDLER SITUATION IS DECIDE WOULD WE HAVE DETERMINED THAT ALL OF THOSE, AT COLLECTIVELY, WOULD HAVE AT LEAST -- CONSTITUTED FUND -- FUNDAMENTAL ERROR I DON'T THINK THAT YOU CAN SAY THAT THAT HAS BEEN PROCEDURALLY BARRED BECAUSE, APPELLEE COUNSEL -- APPELLATE COUNSEL DIDN'T RAISE IT UNLESS WE SAY THIS GOES TO HABEAS SHOULD HE OR SHE SHOULD SHOULD RAISED IT COULD YOU ADDRESS WHAT HES JUSTICE LIST YOU!!\$\$!!!!!!!!!!!!!!!!!!!!!! JUSTICE LEWIS ASKED THE TOTALITY WHETHER THOSE ARGUMENTS ARE PROPER, IMPROPER!!\$\$!!!!!!!!!!!!!!!!!!!!!! IMPROPER, BUT STILL NOT FUNDAMENTAL ERROR HOW DO YOU LOOK AT IT.

AS FAR AS COMMENTS ABOUT THE BADGE, AND WHY WE HAVE AGGREGATORS RELATED TO LAW ENFORCEMENT WHAT THE BADGE WAS USED TO SYMBOLIZE WE IN FACT HAVE NOT ONE NOT TWO

BUT THERE ARE AGGRAVATORS YOU KILL A LAW ENFORCEMENT THEY ARE EXPEDITION LIVES UNDER THE STATUTE -- THEY ARE SPECIAL LIVES UNDER STATUTE THE STATE WAS MERELY EXPLAINING TO THE JURY THIS BADGE THREE LAW ENFORCEMENT AGGRAVATORS THIS COURT SAID ARE VERY WHITEY OUTWEIGH WHAT HE PRESENT MD MITIGATION THE REASON THEY DO THAT THE REASON WE HAVE AGGRAVATORS IS BECAUSE WE HAVE THESE PEOPLE, WHO ARE PROTECT US, LETTING US SLEEP IN BED AT NIGHT, WHILE THEY ARE OUT GOING TOWARDS THE GUNSHOP!!\$\$!!!!!!!!!!!!!! GUNSHOP.

THESE -- STATEMENTS WERE ALL THE EXCLUSIVELY LIMIT TO DO THE PENALTY PHASE. YES! THIS IS -- SENTENCING THIS IS THE AGGRAVATORS, AND, THEY ARE PROPER COMMENTS ON THE AGGRAVATORS IN THE WEIGHTS OF AGGRAVATORS THERE IS NOTHING WRONG WITH THEM, THE \$\$\$STATE'S CONCLUDING CONSISTENT THAT IT COMMENT ASKING JURY TO IMPOSE DEATH SENTENCE A CONCLUDING COMMENT COMMENT WE BELIEVE WE PRESENTED HEAD OF THE SHOWS THIS DEFENDANT DESERVES TO DIE WHAT THE HAVE THE STATE WAS ARGUE\$\$!!ING A PROPER COMMENT THERE IS A CLAIM THAT WE WERE COMMENTING ASKING, THE DEFENSE!!\$\$!!!!!!!!!!!!!! DEFENSE, THE JURY TO BE SYMPATHETIC!!\$\$!!!!!!!!!!!!!! SYMPATHETIC, TO -- TO MRS. BAUER AND HER CHILDREN WHEN YOU READ IN CONTEXT WHAT THE STATE STARTS OUT WITH IS YOU SAW THE \$\$DEFENDANT'S FAMILY MEMBERS, CRY -- AND YOU SHOULDN'T HAVE SYMPATHY FOR THEM!!\$\$!!!!!! THEM, AND THEN THEY SAY, AND YOU SAW THAT THE -- \$\$\$STATE'S FAMILY LOST TO THAT IS BECAUSE OF HIM YOU SHOULDN'T SHOULD SYMPATHY FOR ANYONE, SO WHEN YOU PUT IT BACK IN CONTEXT THE STATE WASN'T ASKING THE JURY TO HAVE SYMPATHY FOR THE VICTIM' FAMILY THEY WERE ASKING FOR SYMPATHY FOR NO WON.

YOU ARE ACTUALLY SAYING THE REASON THAT THE ARGUMENTS WEREN'T RAISED ON APPEAL IS THAT THERE WERE A WAS NOTHING IMPROPER ABOUT THEM AS OPPOSED TO TO THEY WERE IMPROPER BUT THEY STILL WOULDN'T CONSTITUTE FUNDAMENTAL ERROR.

I'M SAYING THE THREE ADDITIONAL ONES ARE IMPROPER!!\$\$!!!!!!!!!!!!!! IMPROPER.

NOT IMPROPER --

THE ONES ALREADY RAISED THIS COURT ALREADY CONSIDERED, AND, RULED UPON MY ARGUMENT THERE, AND FOUND THAT THEY WEREN'T PRESERVED THEY DID NOT RISE TO LEVEL OF FUNDAMENTAL ERROR THEREFORE!!\$\$!!!!!!!!!!!!!! THEREFORE, UNDER CHANDLER, THEY ARE NOT -- AND UNDER, WITH REGARD TO FERNANDEZ' SENTENCED NUMBER OF ONE ISSUE MITIGATION WAS NOT RAISED SO FLOPTERLY BEFORE YOU THE ISSUE RAISED BELOW IS MERELY PROPORTIONALITY, AND, IT IS NOT DISPROPORTIONATE UNDER CHER VERSUS MOORE ONCE A COURT OR JURY RULES WE ACCEPT WHAT COURT OR JURY RESULTS NOT WHAT STATE ARTHD ARGUMENTED THIS COURT RULED FERNANDEZ WAS THE GETAWAY DRIVER, IT IS OUR POSITION, THAT HE WAS A MASTERMIND AND WE LOST THE THEY SHOULD LOSE ON THAT POSITION, TOO, SINCE WE DID.

COURT HAS NO FURTHER QUESTIONS.

STATE RESPECTFULLY REQUESTS YOU TO AFFIRM.

-- I WILL GIVE YOU A COUPLE OF MINUTES. THE STATE GRACIOUSLY ALLOWED A FEW MOMENTS FOR YOU TO --

ONE WE HAVE COMMENT AS TO THE LAST ASSERTION, IN TERMS OF THAT THE CLAIM THAT FERNANDEZ IS I LIKE -- WAS MITIGATION NEVER RAISED BELOW THAT IS FALSE, LOOK PAGE 697 OF THE RECORD PAGE 28 OF THE HUFF HEARING I SPECIFICALLY SAY FROM OUR PERSPECTIVE IT IS MITIGATION!!\$\$!!!!!!!!!!!!!! MITIGATION, THE FACT THAT ANOTHER CO-DEFENDANT GOT A SENTENCE LESS THAN THAT. AND SO THIS ARGUMENT THAT SO MANY HOW DID YOU, THEY ARE TRYING TO CONSTRUE THAT THERE IS SOME SORT OF A WAIVER OF THE ARGUMENT OF APPEAL IS SIMPLY NOT BORNE OUT BY THE RECORD, OTHER THAN THAT I WOULD RELY ON -- THE BRIEFS THE END ARGUMENTS AND ASK THE COURT TO REVERSE FOR HEARING, OR FOR ANY OTHER -- THE COURT DEEMS PROPER THANK YOU VERY MUCH.

THANK YOU VERY MUCH WE'LL TAKE THE CASE UNDER ADVISEMENT