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Stephen Smith v. State of Florida

SC06-1903

>> COURT IS BACK IN SESSION.
PLEASE BE SEATED.

>> NEXT CASE ON OUR CALENDAR
THIS MORNING IS SMITH VERSUS
STATE.
COUNSEL.

>> FOR THE RECORD, MAY IT
PLEASE THE COURT, RYAN
TRUSKOSKI, FOR THE DEFENDANT,
STEPHEN SMITH.

THIS IS ALSO A DEATH PENALTY
CASE.

ONE OF OUR PRIME ARGUMENTS
ON APPEAL, ARGUMENT
EIGHT, THE -- SORRY, NOT
ARGUMENT EIGHT, BUT THE ISSUE
IS, THE STATE, IN TRYING THE
CODEFENDANT, ARGUED THAT DWIGHT
EAGLIN WAS THE RINGLEADER AND
MASTERMIND OF THE EVENT.
THAT IN OUR TRIAL THEY ARGUED
THE SAME THING.

THAT WE WERE THE LEADER AND THE
MASTERMIND.

>> LET ME ASK YOU THIS QUESTION
BECAUSE WE'VE CROSSED THAT
BRIDGE I THINK IN FOTOPOULOS.
AND IN FOTOPOULOS, EVEN ON
COLLATERAL REVIEW IN THE
FEDERAL COURT, A FEDERAL JUDGE
GRANTED RELIEF BUT THAT WAS
REVERSED I UNDERSTAND IT AT THE
11th CIRCUIT SAYING THAT WAS
NOT A DUE PROCESS VIOLATION.
ARE YOU FAMILIAR WITH THAT?

>> I'M NOT. I'M NOT.

I KNOW THAT GENESIS OF THIS
COMES FROM THE U.S. SUPREME
COURT IN BRADSHAW v. STUMP.
THE COURT REFERRED TO IT IN MY
CASE, McLAIN.

>> DID THE COURT ALREADY CROSS
IT IN FOTOPOULOS AND SAY THAT
WAS NOT DUE PROCESS VIOLATION?
IN THAT CASE THERE WAS BAY
MARRED AND MR. FOTOPOULOS.

THAT WAS ARGUMENT MADE AND IF I RECALL, MAJORITY HERE ADDRESSED.

AM I MISTAKEN?

>> I DON'T RECALL AS I STAND HERE.

I'M NOT SURE IF THAT WAS CITED BY THE STATE.

WELL, ASSUMING IT WASN'T, IT WOULD BE, ESSENTIALLY A DUE PROCESS VIOLATION TO TAKE THOSE INCONSISTENT POSITIONS, ESPECIALLY IN THE PENALTY PHASE BASICALLY THEY'RE UNFAIRLY POINTING OUT MR. SMITH AND FINGERING HIM FOR DEATH AS THE PRIMARY --

>> EXPLAIN TO ME HOW BRADSHAW HELPS YOUR ARGUMENT.

BECAUSE AS I SEE IT, I THOUGHT BRADSHAW SAYS BASICALLY IF YOU HAVE THE SPECIFIC INTENT WHETHER YOU WERE THE ONE WHO ACTUALLY FIRED THE SHOT OR NOT THAT THAT'S SUFFICIENT.

>> BRADSHAW --

I'M NOT SURE IF I'M RELYING ON THAT PART OF BRADSHAW.

BRADSHAW WAS REMANDED TO SEE IF THE PROSECUTOR HAD INCONSISTENT THEORIES AS TO IDENTITY OF THE SHOOTER IMPLYING THERE WOULD BE RELIEF IF THAT WAS THE CASE.

I GUESS BY ANALOGY, OUR ISSUE IS, THAT, YOU KNOW, IT'S NOT, NECESSARILY THE SHOOTER BUT WHO IS THE RINGLEADER AND MASTERMIND.

WHO MOST DESERVES TO GET KILLED FOR THIS, WHO MOST DESERVES HIGHEST PUNISHMENT POSSIBLE.

>> IT'S NOT JUST THE RING LEADER THAT GETS DEATH PENALTY.

THERE IS ALWAYS A RINGLEADER OR MOST OF THE TIME.

IF THERE ARE SEVERAL DEFENDANT THERE IS ONE WHO CAN BE CALLED THE RINGLEADER BUT THAT'S NOT ONLY ONE WHO IS NECESSARILY SENTENCED TO DEATH.

>> THAT'S CORRECT.

WE'RE NOT SAYING HE IS NOT ELIGIBLE FOR THE DEATH PENALTY BECAUSE HE WASN'T THE SHOOTER,

YOU COULD STILL BE AN ACCOMPLICE AND GET THE DEATH PENALTY.

>> LET'S JUST UNDERSTAND THIS AND HOW IT WAS PRESERVED IN THIS CASE BECAUSE FOTOPOULOS WAS POST CONVICTION SITUATION. MAYBE THERE IS A DIFFERENCE THERE.

HAD EAGLIN ALREADY BEEN TRIED AND SENTENCED TO DEATH?

>> YES.

>> AND AT THE, WHAT POINT, SO WE'RE NOW DEALING NOT WITH A GUILT PHASE ISSUE, WE'RE DEALING WITH A PENALTY PHASE ISSUE?

>> I'M APPLYING IT TO BOTH BUT, IT'S --

>> WELL, AT WHAT POINT WAS IT RAISED TO THE JUDGE, WHICH WOULD ALMOST BE THAT THE STATE IS ESTOPPED HAVING ARGUED THAT EAGLIN WAS THE RINGLEADER AND THE MASTERMIND, FROM NOW SAYING THAT THIS DEFENDANT WAS THE MASTERMIND AND RINGLEADER? THAT THERE WOULD BE JUDICIARY ESTOPPED IF THEY HAVE ALREADY SAID IT?

WHEN WAS THE FIRST TIME IN THIS TRIAL THAT THAT WAS PRESENTED AS AN ISSUE FOR THE JUDGE TO, TO RULE ON?

>> IT WAS AT THE SPENCER HEARING, AFTER THE JURY RETURNED ITS RECOMMENDATION OF DEATH, THE DEFENDANT HIMSELF RAISED THIS.

IT WASN'T EVEN COUNSEL.

>> WELL, IT SEEMS TO ME THAT THEREFORE WE GET BACK TO THE SAME ISSUE, WHICH IS, THAT IT MIGHT, TO ME, BE A DIFFERENT ISSUE IF IT WERE RAISED AT THE BEGINNING OF THE TRIAL, THAT THEY, HAVE ALREADY SAID, YOU KNOW, THIS.

ABOUT WHO THE RINGLEADER AND MASTERMIND IS.

THEY CANNOT NOW, TAKE AN INCONSISTENT POSITION.

THERE WOULD BE AN ARGUMENT, THE JUDGE WOULD MAKE A RULING.

BUT HERE, NOW WE'RE TALKING ABOUT IT, BEING BROUGHT UP FOR THE FIRST TIME AND YOU'RE SAYING BY THE DEFENDANT HIMSELF, IN THE SPENCER HEARING.

I DON'T SEE HOW IT WAS PRESERVED, HOW THE, YOU KNOW, USING, SOMETHING JUSTICE WELLS, POINTS OUT MANY TIMES, WHERE DID THE JUDGE ERR IN THIS CASE IF IT WASN'T RAISED AND THE JUDGE DIDN'T HAVE AN OPPORTUNITY TO RULE ON IT?

>> I DON'T THINK THAT THE CONTEMPORANEOUS OBJECTION RULE SHOULD APPLY TO THIS ISSUE. FOR INSTANCE, WHAT IF SMITH WAS TRIED FIRST, THERE WOULD BE NOTHING TO OBJECT TO. YOU KNOW, WE WOULDN'T KNOW WHAT THE STATE WAS GOING TO DO WITH EAGLIN.

MANY TIMES, YOU KNOW, DEFENSE COUNSEL IS NOT GOING TO KNOW ABOUT THIS UNTIL THE CASE, THE COMPANION CASE IS ALREADY OVER AND BRIEFS ARE FILED IN THIS COURT AND THE RECORD'S DONE. THERE IS JUST KNOW WAY OF REALLY KNOWING.

>> WHAT IS IT EXACTLY? CAN YOU POINT TO BOTH TRANSCRIPTS AND SHOW THAT WHAT THE STATE DID IN THIS CASE WAS DIAMETRICALLY INCONSISTENT? IN OTHER WORDS, UNLIKE THE SITUATION THAT, THE RINGLEADER, YOU KNOW, DOESN'T, IT'S JUST NOT THE RINGLEADER THAT GETS DEATH.

THAT THE STATE ACTUALLY SAID TO, TWO IRRECONCILABLE POSITIONS ABOUT THIS MURDER -->> I CITE --

>> -- THAT YOU HAVE BEFORE US?>> I CITE NUMEROUS EXAMPLES IN OUR CASE IN THE PENALTY PHASE AND GUILT PHASE WHERE THE PROSECUTOR SAID, THIS WAS ALL OUR GUY.

THIS WAS HIS DEAL. NOW, I DO NOT HAVE THE RECORD ON APPEAL IN EAGLIN, SO I CAN'T

GIVE YOU PINPOINT CITES ON THAT.

BUT NOTICEABLY THE STATE DOESN'T DISPUTE WHAT WE HAVE CLAIMED.

MEANING THAT --

>> THAT'S WHAT SHE IS ASKING. EACH INSTANCE TELL HER, THAT'S WHAT SHE WANTS TO KNOW.

CORRECT?

>> HOW DO WE KNOW THAT THEY TOOK INCONSISTENT POSITIONS UNLESS WE KNOW WHAT THEY SAID IN THE EAGLIN TRIAL?

>> THAT'S THE ONLY WAY TO KNOW.

>> BUT, SO HOW CAN WE, IF YOU HAVEN'T ASKED US JUDICIARY NOTICE THAT RECORD, THEN IT SEEMS TO ME THIS IS A, WE'RE JUST, WE HAVE NO WAY TO DETERMINE THAT THAT'S THE CASE?

>> I MIGHT HAVE DONE A NOTICE OF SUPPLEMENTAL AUTHORITY ADDRESSING THAT, SAYING THAT THIS COULD BE JUDICIARY NOTICED.

>> BUT YOU'RE SAYING YOU DON'T KNOW WHAT WAS SAID IN THE EAGLIN TRIAL?

>> NOT WITH PINPOINT CITES, OTHER THAN, I DO NOT HAVE SPECIFIC QUOTES OR ANYTHING LIKE THAT BECAUSE I DO NOT HAVE THE RECORD, THAT IS CORRECT.

>> LET ME GO BACK TO THE PRESERVATION ISSUE, ONE THING YOU DON'T HAVE IT NOW, BUT SHOULDN'T THE DEFENSE HAVE IT AT THE TIME THAT THE DEFENDANT IS ARGUING THAT THE STATE IS NOW TAKING INCONSISTENT POSITIONS AND IN ORDER TO PRESERVE THE RECORD, AND, POSSIBLY AVOID A MISTRIAL, OR A RETRIAL, ISN'T IT INCUMBENT UPON THE DEFENDANT AT THAT TIME TO SAY, JUDGE, IN EAGLIN'S TRIAL THEY SAID X AND Y AND Z. THEY CANNOT NOW COME AND SAY NO X, NO Y, NO Z?

IF THEY DON'T DO THAT, IF THE ONLY THING YOU HAVE IS THE DEFENDANT'S OWN ONE PARAGRAPH PARAGRAPH STATEMENT AFTER THE

SPENCER HEARING, EVEN AFTER GUILT WAS DETERMINED ISN'T THAT ALL YOU HAVE? HAVEN'T YOU FAILED TO PRESERVE THIS ISSUE FOR APPEAL BECAUSE WE DON'T HAVE ANYTHING TO REVIEW TO DETERMINE IF YOU'RE CORRECT?

>> I DID SAY, IN MY REPLY BRIEF, I DIDN'T USE THE TERM JUDICIAL NOTICE --

>> FORGET THE JUDICIAL NOTICE.

>> TALKING ABOUT THE PRESERVATION.

>> DID THE DEFENDANT HAVE TO DO IT AT TRIAL?

KNOW MUCH EARLIER THAN THIS?

>> NO IS MY ARGUMENT.

I DON'T THINK THE RECORD ON APPEAL WAS DONE THEN.

THERE IS JUST NO WAY FOR DEFENSE COUNSEL TO KNOW WHAT HAPPENED.

>> BUT THAT IS THE PROMISE?

>> I KNOW.

>> GOES BACK TO THE CASES YOU'RE NOT AWARE OF.

IF IT'S NOT A DUE PROCESS VIOLATION IF, IT'S BEEN HELD NOT TO BE A DUE PROCESS VIOLATION, THEN IT GOES BACK TO, AN ERROR THAT NEEDS TO BE PRESERVED, AND, POINTED OUT TO THE TRIAL JUDGE, THAT, THE STATE CANNOT, IN ONE TRIAL, SAY, THIS IS THE RINGLEADER, AND THIS IS THE MASTERMIND. AND THEN, TURN AROUND AND, GET THE CONVICTION BASED ON THAT AND THEN TURNAROUND IN THE, IN THE NEXT CASE, SAY THAT'S THE RINGLEADER AND THAT'S THE MASTERMIND.

THEY CAN'T, BUT IT'S GOT TO BE POINTED OUT EITHER, NOT EITHER. STARTING WITH THE TRIAL JUDGE AND THEN CERTAINLY ON APPEAL TO US TO EVEN KNOW THAT IT HAPPENED?

IT WOULD BE LIKE WE'RE IN A PIE-IN-THE-SKY.

WELL, MAYBE IT DIDN'T HAPPEN.

>> I FULLY UNDERSTAND THE POINT, BUT THROUGH MY STATEMENTS OF INCORPORATION OF

REFERENCE AND NOTICE OF SUPPLEMENTAL AUTHORITY I DID ASK THE COURT TO TAKE JUDICIAL NOTICE OF THE CASE.

>> YOU'RE ASKING US, YOU WOULD ASK US, TO GO, IS THIS ON, IS THE EAGLIN CASE ON APPEAL TO THIS COURT?

>> YES.

>> SO YOU WOULD ASK US TO TAKE A ENTIRE TRANSCRIPT AND HAVE THIS COURT REVIEW THE ENTIRE TRANSCRIPT TO SEE IF THE STATE SAID SOMETHING DIFFERENT THERE?

>> I, IT'S JUST A DIFFICULT ISSUE, JUDGE.

I MEAN THERE IS NO OTHER WAY I COULD DO IT.

>> LET ME SAY HOW EASY IT IS.

>> EAGLIN WAS TRIED FIRST BY THE SAME TRIAL JUDGE, CORRECT?

>> YES.

>> AND IT WAS SENTENCED AND THAT TRIAL OCCURRED BEFORE THIS TRIAL AND SENTENCING?

>> YES.

>> AND DEFENSE COUNSEL WASN'T AWARE WHAT THE STATE ARGUED IN THE OTHER CASE AT THE TIME OF THE, TRIAL OF THE CASE OF MR. SMITH.

>> APPARENTLY HE WAS NOT. HE WOULD NO REASON TO BE AT THAT TRIAL OR HAVE TRANSCRIPTS FROM THAT TRIAL.

>> DID YOU LOOK UP THE RECORD IN THAT CASE?

>> NO.

I HAVE CERTAIN PLEADINGS FROM THAT CASE.

I DO NOT HAVE THE TRANSCRIPTS.

>> SO YOU DON'T KNOW WHAT THE PROSECUTOR ARGUED IN THE OTHER CASE?

>> NO. I'M RELYING ON MY CLIENT'S STATEMENT, AND THE FACT THAT THE STATE HAS NOT DISPUTED OUR ALLEGATIONS IN THIS CASE.

>> WHY WOULD YOU ASK US TO TAKE JUDICIAL NOTICE OF THE RECORD IN THAT OTHER CASE IF YOU DON'T KNOW WHAT THE RECORD IN THE OTHER CASE SAYS?

>> WELL, BECAUSE, I'M JUST
TAKING THE POSITION OF MY
CLIENT.

AND THE INFERENCES THEREFROM.

>> BUT YOU HAVE TO UNDERSTAND,
THAT WHEN YOU ARE BRINGING
ISSUES TO THIS COURT, IN ORDER
FOR TO US FIND SOME REVERSIBLE
ERROR YOU HAVE TO DEMONSTRATE
THAT THERE WAS SOME ERROR.
AND TO JUST SAY I'M TAKING MY
CLIENT'S POSITION, AND THERE
IT IS, TAKE IT FOR WHAT IT'S
WORTH, THAT HELPS US, THAT
DOESN'T DO ANY GOOD TO US.
THAT DOESN'T HELP US IN ANY
WAY.

>> I UNDERSTAND, JUDGE.

I MEAN THAT'S, THIS IS NOT THE
NORMAL ISSUE.

I MEAN IT'S JUST, HOW DO YOU --

>> WE'VE SEEN THIS ISSUE OTHER
TIMES.

SO IT IS A NORMAL ISSUE.

THERE IS A WAY TO BRING IT.

>> OKAY.

WELL PERHAPS, IT'S BEST DONE ON
3.850.

I DON'T WANT TO CONCEDE THAT
BUT, --

>> NO, IT REALLY WOULDN'T BE
BEST DONE IN 3.850.

BECAUSE AS JUSTICE LEWIS
ADVISED WE ALREADY REJECTED
THAT PRECISE POINT.

HOWEVER IT POSSIBLY IS A GOOD
POINT BUT YOU'RE NOT ONE OF THE
TRIAL LAWYERS, SO WE CAN'T
VISIT THE SINS OF THE TRIAL
LAWYER, ASSUMING I DON'T WANT
TO USE THAT WORD, THE ABSENCE
OF IT BEING PRESERVED BELOW,
FOR YOU, BUT WHEN YOU'RE I
ABOUT IT TO US, YOU KNOW, WE
HAVE UNFORTUNATELY, DEFENDANTS
WANT MANY POINTS TO BE RAISED
ON APPEAL, AND ETHICAL
APPELLATE ATTORNEY OR TRIAL
ATTORNEY, ONLY PRESENTS THOSE
POINTS THAT ARE MERITORIOUS.
YOU COULD NOT POSSIBLY EXPECT
US TO REVERSE ON THIS POINT
WITHOUT KNOWING THAT THERE IS A
CIRCUMSTANCE WHERE THEY IN

FACT, DID, TAKE THE
DIAMETRICALLY OPPOSITE POINT OF
VIEW.

>> I DID THAT BECAUSE THE STATE
DIDN'T DISPUTE IT IN THE TRIAL
COURT.

AND THEY DIDN'T DISPUTE IT
AFTER THE FACT IN THIS CASE.

>> WHAT IS THERE TO DISPUTE IF
YOU HAVE NO EVIDENCE IN YOUR --

>> WELL, MR. SMITH RAISED THAT
HIMSELF THE ARGUMENT BELOW, THE
STATE COULD HAVE SAID NO, NO,
WE DIDN'T DO THAT THAT'S ALL.

>> WHY DON'T YOU DISCUSS, I'D
LIKE TO HEAR YOUR DISCUSSION OF
THE MOTION TO SUPPRESS ISSUE
BECAUSE IT SEEMS TO ME THAT YOU
ARE ARGUING HERE THIS MAN WAS
DEPRIVED OF NOURISHMENT AND
DIFFERENT THINGS AND THAT IS
WHAT MADE HIS STATEMENTS TO THE
POLICE INVOLUNTARY.

SO IF YOU WOULD, SHED SOME
LIGHT ON THAT ISSUE.

>> YEAH.

ON THE TRANSCRIPTS THAT WERE
PRESENTED OF HIS STATEMENTS YOU
KNOW, IT SHOWS, LAW ENFORCEMENT
CAREFULLY GOING THROUGH MIRANDA
AND THINGS LIKE THAT.

AND THERE IS NO EVIDENCE OF
COERCION ON THOSE TAPES.

HOWEVER, THERE WAS TESTIMONY
THAT BEFORE WE GOT TO THAT
STAGE, THEY WERE QUOTE,
SOFTENING UP THE DEFENDANT BY
DEPRIVING HIM OF THE BASIC
NECESSITIES OF LIFE.

THEREBY WEARING HIM DOWN, YOU
KNOW, THREATENING HIM,
PRESSURING HIM.

>> THIS IS SUPPORTED BY WHAT
EVIDENCE?

>> THERE WAS A, THERE WAS A
TAPED JAILHOUSE CONVERSATION OF
THE TWO DEFENDANTS, I THINK
EAGLIN AND SMITH DISCUSSING
THEIR CONDITIONS.

AND THERE WAS A CORRECTIONS
OFFICIAL, I CAN'T REMEMBER HIS
NAME, MAYBE LYKINS.

WHO THOUGHT THAT WAS SERIOUS
ENOUGH TO REPORT IT SO IT COULD

BE INVESTIGATED.

>> WHAT WAS THE RESULT OF THE INVESTIGATION?

>> THAT'S NOT IN THE RECORD. I DON'T KNOW.

>> WELL, YOU'RE OBVIOUSLY, THERE IS A BASIS FOR STATEMENT TO BE SUPPRESSED IF UNDER THE TOTALITY OF THE CIRCUMSTANCES THE STATEMENT IS INVOLUNTARY, EVEN IF A MIRANDA WARNING IS GIVEN.

BUT WE HAVE TO HAVE EVIDENCE IN THE RECORD OF THIS.

AND WHAT YOU'RE SAYING IS THAT THERE IS REALLY NOT EVIDENCE IN THE RECORD?

>> NO, THERE IS EVIDENCE IN THE RECORD.

THAT'S WHAT I WAS SAYING BUT, THEY HAVE A RECORDED PHONE CALL, THEM DISCUSSING THEIR CONDITION.

>> WHAT WAS DISCUSSED IN THAT PHONE CALL?

I MEAN DID YOU HAVE THE TWO DEFENDANTS, SORT OF TALKING TO, EACH OTHER AND SAYING WHAT?

>> WELL, BASICALLY I HAVEN'T HAD A TOOTHBRUSH FOR 34 DAYS. MY CELL HAS A PAIR OF BOXER SHORTS IN IT AND NOTHING ELSE. I MEAN, --

>> WELL, NOW, WHEN WERE THESE STATEMENTS TAKEN?

I DIDN'T RECALL THAT IT WAS A 34-DAY PERIOD BETWEEN THESE STATEMENTS.

>> SAYING ONE GUY DIDN'T HAVE A TOOTHBRUSH FOR 34 DAYS. THERE WAS SOME TESTIMONY LIKE THAT.

BUT THEY RECORDED CONVERSATIONS BETWEEN INMATES AND THAT WAS, THE EVIDENCE OF THEIR CONDITIONS.

AND THERE WAS A, I THINK IT'S LYKINS, WHO TESTIFIED HE KNEW ABOUT THIS AND HE REPORTED --

>> SO HE DIDN'T HAVE A TOOTHBRUSH, ONE OF THESE PEOPLE DIDN'T HAVE A TOOTHBRUSH FOR 34 DAYS AND WHAT ELSE?

>> THERE'S MORE TO IT THAN

THAT.
JUST BEING MALNOURISHED.
BARELY BEING FED.
>> THAT WAS DEMONSTRATED BY
WHAT?

ARE YOU SAYING THERE IS
EVIDENCE IN THIS RECORD THAT
THE PRISON OFFICIALS
DELIBERATELY DID NOT MEET
MR.^SMITH AND MR.^EAGLIN, IS
THAT CORRECT?

>> YES.
>> DID NOT FEED THEM TO GET
THEM IN WEAKENED CONDITION?
>> THE EVIDENCE IS THE TAPED
RECORDINGS.

SO IT WOULD BE THE DEFENDANT'S
STATEMENTS.

>> AND ANY OFFICERS TESTIFY TO
THE CONTRARY?

>> NO.
I DON'T --

>> THERE WAS NO HEARING ON THE
MOTION TO SUPPRESS?

>> THERE WAS A HEARING BUT I
DON'T, I THINK THAT THE STATE'S
CASE FOCUSED ON, YOU KNOW, WHAT
HAPPENED RIGHT PRIOR TO THE
RECORDINGS.

>> THAT IS PROBABLY BECAUSE THE
DEFENDANT MUST NOT HAVE RAISED
IT.

DID THE DEFENDANT TAKE THE
STAND TO TALK ABOUT THE
CONDITIONS LEADING UP TO THE
STATEMENT?

>> I DON'T THINK DEFENDANT
TESTIFIED IN THE HEARING.

>> AND SO, THERE WERE NO, SO
THE JUDGE DID NOT, SO THIS WAS
JUST NOT PRESERVED AS AN ISSUE?

>> WELL, I THOUGHT IT WAS HE
PRESERVED, BUT IT WAS PRESENTED
TO THE JUDGE IN FORM OF
RECORDED --

>> -- HE COMPLAINED, YOU HAVE
AN ISSUE THAT COUNSEL WAS
INEFFECTIVE THAT HE DIDN'T
PRESENT IT, DON'T YOU?

>> THAT HE DIDN'T OBJECT TO THE
EVIDENCE, THE STATEMENTS AT
TRIAL ON THAT RECORD.

I'LL RESERVE THE REST OF MY
TIME, THANK YOU.

>> MAY IT PLEASE THE COURT.
ASSISTANT ATTORNEY GENERAL
STEPHEN AKE ON BEHALF OF THE
STATE OF FLORIDA.
I LIKE TO BEGIN WITH THE
INCONSISTENT THEORY ALLEGATIONS
THAT WERE MADE AND COUNSEL
MENTIONED NUMEROUS TIMES THE
STATE NEVER REFUTED IT.
THERE WAS NOTHING TO REFUTE BUT
THERE IS NOTHING CITED IN THE
BRIEF TO ACTUALLY REFUTE THAT.
THE WHOLE GENESIS OF THIS
CLAIM --

>> WAS ANYTHING SAID, IF I
UNDERSTAND THIS, THE DEFENDANT
BROUGHT THIS UP AT THE SPENCER
HEARING AND SAYS, YOU KNOW,
THEY CLAIMED MR. EAGLIN WAS THE
RINGLEADER, NOW THEY'RE
CLAIMING THAT; I AM THE
RINGLEADER?

>> CORRECT.

>> IS THERE ANYTHING ELSE SAID
AT THAT POINT?

>> NOTHING WAS SAID THE TIME OF
THE SPENCER HEARING BESIDE THE
DEFENDANT'S OWN STATEMENT TO
THAT EFFECT.

BUT I WOULD POINT THE COURT TO
EARLIER IN THE TRIAL.

THE DEFENSE ATTORNEY IN THIS
CASE WAS THE EAGLIN TRIAL.
HE KNEW EVERYTHING ABOUT THE
EAGLIN TRIAL.

IT CAME UP NUMEROUS TIMES
THROUGHOUT SMITH'S TRIAL THAT
DEFENSE COUNCIL AWARE OF WHAT
THE STATE'S POSITION WAS IN
EAGLIN'S EARLIER TRIAL.

EAGLIN WAS TRIED IN JANUARY OF
THAT YEAR AND SMITH WAS IN JUNE
OR JULY I BELIEVE.

AND DURING THE CHARGE
CONFERENCE, THERE'S A LENGHTY
DIALOGUE, I BELIEVE IT'S PAGES
100, TO 1310 OR SOMETHING IN,
THAT NATURE, BUT THERE IS A
LENGHTY DISCUSSION, PROPOSED
JURY INSTRUCTIONS AND DEFENSE
COUNSEL MAKE AS POINT, DEFENSE
COUNSEL REQUESTED A SPECIAL
INSTRUCTION THAT SAID THE STATE
TOOK THE POSITION THAT EAGLIN

WAS ONE DELIVERED THE FATAL
BLOWS IN EAGLIN'S TRIAL.
THAT'S TRUE.
THE STATE'S POSITION ALL ALONG
EAGLIN WAS THE ONE WITH THE
HAMMER THAT ACTUALLY STRUCK THE
FATAL BLOWS.
HE WANTED A SPECIFIC JURY
INSTRUCTION WITH THAT REGARD.
>> THAT WAS THEIR POSITION IN
THIS CASE?

>> CORRECT. CORRECT.
IT'S ALWAYS BEEN THE STATE'S
POSITION THAT EAGLIN WAS ONE
ACTUALLY ADMINISTERED THE BLOWS
WITH THE MA'AM HAMMER.
THE STATE'S POSITION IN BOTH
TRIALS WAS THAT THEY ALL
PLANNED THIS ESCAPE ATTEMPT AND
THEY ALL PLANNED TO KILL THE
GUARD THAT WAS SUPERVISING THEM
TO GET AWAY.

>> THERE WASN'T ONE BEING A
RINGLEADER OR --
>> NO.

THERE WAS NEVER ANY, THERE WAS
NEVER ANY ALLEGATIONS THAT
STATE A ONE WAS RINGLEADER OR
ONE WAS A FOLLOWER OR ANYTHING
OF THAT NATURE.
IN FACT THE ONLY EVIDENCE AS TO
WHAT YOU CAN CONSIDER QUOTE,
UNQUOTE, RINGLEADER WERE TWO
INMATES THAT TESTIFIED FOR
THE STATE.

KENNETH LYKINS AND JESSIE
BAKER.

I BELIEVE LYKINS WAS MORE
DETAILED OF THE TWO INMATES.
HE TESTIFIED, SMITH AND JONES,
THE OTHER CODEFENDANT IN THIS
CASE THEY HAD STARTED PLANNING
ESCAPE ATTEMPTS IN JANUARY OF
'03.

THIS MURDER TOOK PLACE IN JUNE,
THE ESCAPE ATTEMPT IN JUNE.
THEY HAD BEEN PLANNING NUMEROUS
ESCAPE ATTEMPTS.
THEY HAD BEEN THWARTED IN THEIR
PLANS BY OTHER INMATES.
THAT'S ONE OF THE REASONS THEY
WANTED TO KILL BEASTON AND
FUSTON BECAUSE THEY APPARENTLY
DESTROYED SOME MECHANISM THEY

WERE GOING TO ESCAPE WITH.
ANYWAY, SMITH AND JONES STARTED
PLANNING IN JANUARY '03 AND
THEY BROUGHT IN EAGLIN SOMETIME
AROUND MAY OF '03.

AND THAT'S, THE ONLY EVIDENCE
AS TO, BASICALLY WHO WAS, WHO
WAS BEGINNING THE PLANNING OF
THIS ESCAPE.

AND THE TESTIMONY FROM LYKINS
WAS THEY BROUGHT IN EAGLIN
PAUSE HE WAS YOUNGER AND
STRONGER AND HE WOULD BE ABLE
TO SCALE THIS LADDER BRIDGE
THAT THEY HAD NOW
CONCOCTED.

THIS WAS THEIR SECOND OR THIRD
ESCAPE ATTEMPT.

THERE WAS NO EVIDENCE ONE OF
THEM WAS A RINGLEADER OR
ANYTHING OF THAT NATURE.

AND THAT IS, ALSO THE,
INSTANCE, IN EAGLIN'S CASE.

I JUST GOT DONE WRITING BRIEF
IN EAGLIN.

THAT WILL BE UP HERE SHORTLY.
I'M SURE I WILL BE ARGUING THAT
CASE BEFORE THIS COURT.

>> I WANT TO CLARIFY WHEN
YOU'RE TALKING ABOUT WHEN YOU
ARGUED IN THE EAGLIN CASE AND
WHAT YOU ARGUED HERE.

ARE YOU ARGUING THINGS NOT IN
THIS RECORD?

>> I HAVEN'T MENTIONED EAGLIN
WHATSOEVER, AS FAR AS THAT
GOES, YOUR HONOR.

EVERYTHING I'M SAYING IS WHAT
IS APPLICABLE TO SMITH'S CASE.
THE STATE HAS ALWAYS ARGUED IN
SMITH'S CASE AND AS AN ASIDE,
THEY DID ARGUE IN EAGLIN TO
THAT EXTENT I AM SUGGESTING
THAT BECAUSE --

>> BECAUSE I WANT TO CLARIFY
WHAT WE HAVE IN THIS RECORD AS
TO WHAT THE STATE'S POSITION
WAS IN THE EAGLIN CASE.

DO WE HAVE ANYTHING?

>> AS I WAS TELLING YOU DURING
THE CHARGE CONFERENCE WE HAVE A
DETAILED DISCUSSION WHERE THE
DEFENSE ATTORNEY IS
ACKNOWLEDGING WHAT THE STATE'S

POSITION WAS IN EAGLIN.
AND THE TRIAL COURT
ACKNOWLEDGED IT.
IN FACT, ON PAGE, I HAD IT
PULLED OUT, ON PAGE 1305 OF THE
RECORD TRIAL COURT SPECIFICALLY
SAYS, IN RESPONSE TO THE
DEFENSE ATTORNEY SAYS, I'LL
TELL YOU THIS IF THE STATE GOT
UP HERE AND ARGUED TO THIS
JURY, YOUR CLIENT, SMITH, IF HE
HAD WIELDED THE HAMMER I WOULD
SUSTAINED YOUR OBJECTION NOT
BASED ON ANY EVIDENCE THAT THE
JURY HEARD.

THE TRIAL COURT TOLD THE
DEFENSE ATTORNEY I'M NOT GOING
TO LET THE STATE GET UP HERE
TAKE INCONSISTENT POSITION.
HE, THE TRIAL JUDGE TRIED
EAGLIN.

HE OBVIOUSLY KNEW WHAT THE
STATE ARGUED THERE AND DEFENSE
COUNSEL WAS PRESENT.

>> SO WHAT YOU'RE SAYING THAT,
IF WE LOOKED AT EAGLIN --

>> IF YOU DID --

>> WE WOULD NOT BE
INCONSISTENT POSITIONS.

>> RIGHT.

>> MOREOVER THE JUDGE WAS SAME
JUDGE.

>> RIGHT.

>> THE DEFENSE LAWYER AWARE
WHAT HAD GONE ON AND THAT THE
JUDGE WAS, ACTUALLY TELLING THE
STATE NOT TO BE INCONSISTENT
SOUNDS TO ME?

>> TO THAT EXTENT THAT'S
EXACTLY WHAT THE JUDGE SAID.
I WOULD ARGUE THIS ISSUE WOULD
BE DENIED FOR NUMEROUS OTHER
REASONS.

I WAS BRINGING OUT FACTUAL
ISSUES AS TO THAT.

>> THAT IS MORE ASSURING
BECAUSE.

>> RIGHT.

>> AT LEAST WHETHER OR NOT IT
RISES TO CONSTITUTIONAL
VIOLATION, YOU KNOW, YOU CAN'T
HAVE THE STATE SAYING ONE
PERSON IS THE SHOOTER IN ONE
CASE AND THEN THE OTHER SAY THE

OTHER ONE IS THE SHOOTER.
MAYBE YOU CAN BUT I WOULD HOPE
IT WOULDN'T HAPPEN.

>> JUDGE LEWIS REFERENCED WITH
FOTOPOULOS OUT OF THE 11th
CIRCUIT.

THEY CAME OUT WITH THAT OPINION
IN FEBRUARY THIS YEAR.

THEY RECOGNIZED THAT BRADSHAW
AND STUMP.

U.S. SUPREME COURT NEVER SAID
THERE IS A CONSTITUTIONAL
VIOLATION.

>> WHETHER IT WAS PRESERVED OR
NOT.

>> RIGHT.

>> ALSO BY THE WAY, THERE WERE
SPECIAL VERDICT FORMS IN CASE,
RIGHT?

>> CORRECT.

>> THEY FOUND THIS DEFENDANT
LIABLE UNDER PREMEDITATED
MURDER AS WELL AS FELONY
MURDER?

>> YES, YOUR HONOR.

UNDER BOTH TWO INSTANCES FELONY
MURDER.

DURING THE ESCAPE AND RESISTING
AN OFFICER WITH VIOLENCE.

SO THEY FOUND UNDER BOTH OF
THOSE.

THE OTHER ISSUE THAT WAS RAISED
WAS, DEALT WITH THE MOTION TO
SUPPRESS IN THE TRIAL COURT'S
FINDINGS.

TO CLARIFY SOME OF THE FACTUAL
BACKGROUND ON THAT, THE STATE
AT SMITH'S TRIAL INTRODUCED,

ONE STATEMENT FROM THE
DEFENDANT WHICH WAS A 1 1/2
HOUR VIDEOTAPE OF HIS

WALK-THROUGH OF THE CRIME SCENE
AT CHARLOTTE CORRECTIONAL
INSTITUTE.

THAT WAS THE ONLY EVIDENCE THAT
CAME IN.

THE TRIAL COURT, WHEN THAT WAS
INTRODUCED MADE FACTUAL
FINDINGS AS TO WHY HE WAS

DENYING THE MOTION TO SUPPRESS.
PRETRIAL THEY HAD A SUPPRESSION
HEARING.

A NUMBER OF WITNESSES
TESTIFIED.

STEPHEN SMITH DID NOT TESTIFY
HOWEVER, WHAT THE BASIS FOR
THIS ALLEGATION IS FROM DWIGHT
EAGLIN'S TESTIMONY, THE
CODEFENDANT AT THE SUPPRESSION
HEARING.

HE TESTIFIED AT SUPPRESSION
HEARING, AS TO HIS CONDITIONS
WHEN HE WAS -- THE MURDER
OCCURRED ON JUNE 11th.

ON JUNE 12th ALL THESE THREE
CODEFENDANTS WERE TRANSPORTED
TO FLORIDA STATE PRISON.

ORDER ACCORDING TO EAGLIN'S
TESTIMONY AT SUPPRESSION
HEARING HE WAS DENIED TOILET
PAPER.

HE ONLY HAD BOXER SHORTS OR
DIDN'T HAVE A MATTRESS FOR 34
DAYS.

THAT WAS PRESUMABLY, THAT
STARTED ON JUNE 12th.

THE STATEMENT THAT THE STATE
INTRODUCED AT TRIAL OCCURRED ON
JULY 31st WHICH WAS SOME, YOU
KNOW, MONTH AND A HALF LATER.
AND BASICALLY THE TRIAL COURT
FOUND THAT, I LISTENED TO ALL
THIS EVIDENCE.

I VIEWED THE TAPE AND THERE IS
NOTHING INVOLUNTARY.

HE WASN'T COERCED.

NOTHING OF THAT NATURE AND HE
DENIED THE MOTION AND FOUND THE
STATEMENTS WERE VOLUNTARY
GIVEN.

>> YOU'RE TELLING US MR.^SMITH
DID NOT MAKE THE ALLEGATIONS
THAT HE WAS DEPRIVED IN THE
SAME MANNER?

>> HE DID NOT TESTIFY TO THAT.
THEY DID INTRODUCE STATEMENTS
THAT THEY WERE RECORDED, WHILE
IN HOLDING CELLS WHERE SMITH
AND EAGLIN WERE TALKING TO EACH
OTHER ABOUT VARIOUS THINGS.
TO THAT EXTENT IT DID COME OUT.
THERE WAS TESTIMONY THAT THE
FDLE AGENT THAT HAD TAKEN
SMITH'S STATEMENT.

AGENT UBELACKER, HE HAD HEARD
THESE CONVERSATIONS REPORTED TO
THE INSPECTOR GENERAL'S OFFICE
SO THEY COULD INSPECT THE

ALLEGATIONS. WAS I BELIEVE ALLUDED TO AT THE SUPPRESSION HEARING THAT THE INSPECTOR GENERAL'S OFFICE LOOKED IT INTO THE ALLEGATIONS AND THE DEFENDANT DENIED IT. MORE IMPORTANTLY EAGLIN TESTIFIED AT THE SUPPRESSION HEARING THAT THIS WAS ALL, THE CONDITIONS AS OPPOSED ON HIM. HE SAID HE DID NOT HAVE ANY KNOWLEDGE WHAT WAS HAPPENING WITH SMITH. AND FURTHERMORE, EAGLIN ALSO TESTIFIED THAT EVEN WITH THAT IN MIND, IT WOULD NOT HAVE AFFECTED HIM HAD HE DESIRED TO GIVE A STATEMENT. IT WOULDN'T HAVE AFFECTED HIS DECISION TO GIVE A STATEMENT. SO, HE DIDN'T THINK THAT IT ROSE TO THE LEVEL OF COERCING HIM.

>> NOW YOU'RE JUST TALKING ABOUT WHAT HAPPENED IN THE EAGLIN'S MOTION TO SUPPRESS?

>> NO. SMITH'S MOTION TO SUPPRESS BUT EAGLIN TESTIFIED AT IT. SMITH DID NOT TESTIFY.

>> EAGLIN TESTIFIED AT SMITH AS TO WHAT HAPPENED TO HIM.

>> RIGHT, CORRECT. THEY DID NOT CALL SMITH AT THE MOTION TO SUPPRESS HEARING. THEIR EVIDENCE WAS FROM EAGLIN. YES, IT'S CONFUSING, YOUR HONOR, SORRY TO ADD TO THAT CONFUSION.

>> NO. WE DON'T HAVE IN THIS CASE EVIDENCE THAT FROM JUNE 11th THROUGH JULY 30th THAT MR. SMITH WAS HELD IN BOXER SHORTS WITHOUT FOOD, WATER, BASIC NECESSITIES OF LIFE, CORRECT?

>> NOTHING LIKE THAT. YOU HAVE THE, OVER, THE TAPED STATEMENTS WHERE, SMITH AND EAGLIN ARE TALKING AND, SMITH IS AGREEING WITH HIM. TO THAT EXTENT SOMETHING ABOUT THE HANDCUFFS.

WAY THEY DID THEIR HANDCUFFS
BEHIND THEIR BACK.

>> IT WASN'T A TELEPHONE
CONVERSATION.

>> NO IS IT.

>> I WAS WONDERING HOW THEY
WOULD HAVE BEEN ALLOWED TO HAVE
TELEPHONE CONVERSATIONS.

>> IT WAS IN HOLDING CELLS.
THAT OCCURRED VERY EARLY, JUNE
11th, JUNE 12th.

STATE PRESENTED SOME OFFICERS
TO TESTIFY ABOUT THAT AS TO
THEIR OBSERVATIONS HOW THEY WEREN'T
MISTREATED.

>> EVIDENCE PRESENTED AFFIRMATIVELY
BY THE STATE --

>> RIGHT.

>> THE CONDITIONS WERE
APPROPRIATE?

THEY WERE NOT, THEY WERE NOT,
CONDITIONS THAT MIGHT LEAD
SOMEBODY TO FEEL COERCED INTO
MAKING A STATEMENT?

>> I BELIEVE YOU HAD ABOUT FOUR
OFFICERS TESTIFY AS TO THEIR
INITIAL OBSERVATIONS OF HIM
SOON AFTER HE WAS APPREHENDED.
THEN YOU HAD AGENT UBELACKER,
WHO TOOK THIS, 1 1/2 HOUR
WALK-THROUGH WITH HIM AND HE
TESTIFIED ABOUT HOW HE DIDN'T
COERCE HIM OR ANYTHING LIKE
THAT.

NO PROMISE OR, NOTHING OF THAT
NATURE.

AND I WOULD URGE THIS COURT TO
REALLY WATCH THE DVD WE
SUPPLEMENTED THE RECORD WITH. IT'S
VERY INDICATIVE OF THE LACK OF
COERCION THAT IS GOING ON IN
THIS CASE WITH MR. SMITH
WALKING THROUGH THE, DETAILING
IT IN GREAT DETAIL AS TO ALL
THE EVENTS THAT TRANSPIRED IN
THIS CASE.

>> IS HE UNDERSHORTS IN
THAT?

>> NO, YOUR HONOR.
FULL SCRUBS.

>> BECAUSE, IF YOU HAVE A CRIME
THAT OCCURS JUNE 11th, YOU
DON'T HAVE A STATEMENT UNTIL
JULY 31st.

>> RIGHT.

>> SOMETIMES WE HAVE SITUATIONS WHERE THEY FINALLY GET THE STATEMENT THEY HAVE BEEN TRYING TO GET IT.

IS THERE ANYTHING IN THE RECORD ABOUT WHAT HAPPENED FROM JUNE 12th UNTIL JULY 30th IN TERMS OF TRYING TO GET THEM TO MAKE STATEMENTS?

>> THERE WERE, AGENT UBELACKER, TESTIFIED THAT HE TOOK FOUR TOTAL STATEMENTS.

FOURTH ONE BEING WALK-THROUGH. THE FIRST THREE, ONE OCCURRED MORNING RIGHT AFTER THE MURDER. TWO I WENT UP TO FLORIDA STATE PRISON AND SPOKE TO HIM IN JUNE COUPLE TIMES.

BASICALLY THE ONLY EVIDENCE WE REALLY HAVE ON THAT HE SAID, WELL, I KEPT GETTING MORE QUESTIONS TO ASK HIM AFTER WE SPOKE.

AND THERE REALLY WAS NOT MUCH DEVELOPMENT AS TO THOSE OTHER THREE STATEMENTS.

>> NO, BUT THEY WEREN'T TRYING TO PROVE THOSE STATEMENTS?

>> NO. THE STATE ONLY INTRODUCED THE WALK-THROUGH. THE VIDEOTAPE THAT WAS ONLY STATEMENT INTRODUCED AT TRIAL.

>> THEY'RE NOT SAYING ANYTHING HAPPENED DURING THE FIRST THREE LIKE HE REFUSED TO SPEAK ANYMORE?

>> I THINK THEIR MOTION ENCOMPASSED ALL FOUR STATEMENTS BUT ONLY ONE ADMITTED INTO TRIAL WAS WALK-THROUGH ONE.

>> THERE WAS NO ARGUMENT HE INVOKED HIS RIGHT TO SILENCE EARLIER ON?

>> NO.

>> THOSE CASES WHERE SOMETHING HAS BEEN SAID NOW THERE IS REPROACHING OF THE DEFENDANT?

>> NO. HE WAIVED HIS MIRANDA IN ALL FOUR STATEMENTS AND EVERYTHING.

IF THIS COURT HAS NO FURTHER QUESTIONS I ASK THAT YOU

AFFIRM.

>> REBUTTAL.

>> I HAVE NOTHING ELSE UNLESS
THERE IS ANY QUESTIONS?

>> THANK YOU.

>> TAKE THE CASE UNDER
ADVISEMENT.