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**State of Florida v. Faunce Levon Pearce**

**SC07-201**

>>> PLEASE RISE, HERE YE, HERE  
YE, HERE YE, THE SUPREME COURT OF  
FLORIDA IS NOW IN SESSION.  
ALL WITH DRAW NEAR, GIVE ATTENTION  
AND YE SHALL BE HEARD.

GOD SAVE  
THE UNITED STATES, THE STATE OF  
FLORIDA, AND THIS HONORABLE  
COURT.

>> GOOD MORNING, GOOD MORNING,  
SIR.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.  
PLEASE BE  
SEATED.

>> GOOD MORNING, FRIENDS,  
WELCOME TO THE FLORIDA SUPREME  
COURT, AND THE ORAL ARGUMENT  
CALENDAR FOR FRIDAY JUNE 13.  
THE FIRST CASE THIS MORNING IS STATE  
OF FLORIDA VERSUS PEARCE,  
MR. BROWNE, READY TO PROCEED.

>> GOOD MORNING.

>> -- SCOTT BROWNE ON BEHALF OF  
THE STATE OF FLORIDA.

WE ARE  
HERE ON A STATE APPEAL OF AN  
ORDER FROM PASCO COUNTY, THE  
HONORABLE JUDGE LYNN TEPPER  
PRESIDING, GRANTING MR. PEARCE A  
NEW TRIAL, A NEW PENALTY PHASE ON  
THE BASIS OF INEFFECTIVE --

>> LET ME ASK YOU THIS QUESTION.  
WE SEE THESE CASES COME TO US  
TIME AFTER TIME, AND VIRTUALLY  
ALL OF THEM HAVE BEEN ENTERED IN  
FAVOR OF THE STATE AND AGAINST  
THE DEFENDANT.

ON THIS FIRST ISSUE, WITH REGARD  
TO THE ADMISSIBILITY OF EVIDENCE  
WHILE ANY ONE OF US MAY, IF  
SITTING AS TRIAL JUDGE MAY HAVE  
OR MAY NOT HAVE OVERRULED  
WHATEVER OBJECTION MAY HAVE BEEN  
MADE, WHAT IS OUR STANDARD ONCE  
THAT JUDGE TEPPER HAS LOOKED AT

THIS, HAS MADE THAT CONCLUSION AT THE TRIAL LEVEL THAT THIS SHOULD HAVE BEEN OBJECTED TO, AND IS THAT A CONCLUSION OF LAW? IS THAT -- HOW DO WE LOOK AT THAT, BECAUSE THE ADMISSION OF EVIDENCE IS DISCRETIONARY, BEING A -- WHILE I MAY AGREE WITH YOU ON THE LAW IF I WAS SITTING THERE I DON'T KNOW NECESSARILY THAT COMES TO THIS COURT WITH THE SAME TYPE OF VIEW, THE PRISM THROUGH WHICH WE LOOK AT THIS.

>> I ATTEMPTED TO MAKE THE DISTINCTION IN MY BRIEF THERE WAS NOT SIMPLY A DISCRETIONARY RULING OF THE TRIAL COURT.

WE ARE ON POSTCONVICTION REVIEW. THE

JUDGE GRANTED RELIEF ON THE BASIS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

>> I MEAN DISCRETIONARY --

>> PART OF THE TRIAL COURT, ORIGINAL TRIAL COURT THAT IS ALLEGED COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT OBJECT OR FILE A MOTION IN LIMINE TO THAT EVENT, THAT WAS PART OF THIS SITUATION.

SO I'M SPEAKING TO THAT DISCRETION, NOT DISCRETION OF THE POSTCONVICTION BUT AS POSTCONVICTION THE COURT IS LOOKING AT WHAT OCCURRED AT TRIAL.

>> YOUR HONOR, THE POSTCONVICTION COURT IS LOOKING AT WHAT OCCURRED AT TRIAL, BUT AT TRIAL, AGAIN, THERE WAS NO OBJECTION TO THE EVIDENCE, THE STATE CONTENDS THERE WAS CLEARLY ADMISSIBLE EVIDENCE, YOU HAVE A DISTINCTION HERE, YOU HAVE A TRIAL COURT, AND HAD THIS BEEN A DIRECT APPEAL ISSUE, IT WOULD BE DISCRETIONARY RULING OF THE COURT COURT.

ON THE BASIS OF THIS RECORD WE WOULD WIN EVEN IF IT WERE SIMPLY A DISCRETIONARY RULING ON ADMISSIBILITY OF EVIDENCE.

WE ARE HERE ON POSTCONVICTION APPEAL ON  
THE BASIS OF INEFFECTIVE  
ASSISTANCE OF COUNSEL, DE NOVO

--

>> I WANT TO ADDRESS, IT SEEMS  
TO ME THAT AT LEAST SHOULD  
HAVE BEEN THE SUBJECT OF AN  
EVIDENTIARY DISCUSSION, THAT IS  
-- YOU KNOW, OF WHETHER THE  
PREJUDICE -- RELEVANCE THE  
PREJUDICE OUTWEIGHS THE PROBATIVE  
VALUE, AND PERHAPS SOME WOULD BE,  
MAYBE WOULD BE LIMITED, AND  
I'M GOING TO ASK, BECAUSE I HAD  
THIS CONCERN, ABOUT THE  
PREJUDICE.

IT SEEMS TO ME THAT,  
ASSUMING, WELL -- THAT THERE  
REALLY IS OVERWHELMING EVIDENCE  
OF HIS GUILT, HE WAS NOT THE  
SHOOTER, BUT HE DIDN'T --  
WASN'T HE IN THE VEHICLE AND  
DIRECTED THE SHOOTING?

>> YES, YOUR HONOR.

>> TO ME, THIS MAKES THIS  
OTHER EVIDENCE KIND OF MORE  
COLLATERAL.

INFLAMMATORY MAY BE  
AN ISSUE TO THE PENALTY  
PHASE, BUT COULD YOU ADDRESS  
WHETHER IN TERMS OF -- LET'S ASSUME  
THAT IT WAS -- LET'S ASSUME THAT  
THE PREJUDICE PRONG, OTHERWISE  
THAT IS WHETHER IT WAS -- HOW WE  
SHOULD EVALUATE THAT.

>> YOUR HONOR, AGAIN, I WILL GET  
BACK TO THE ISSUE OF WHETHER OR  
NOT THERE WAS ANY OBJECTION OF  
LEGAL MERIT THAT COULD HAVE BEEN  
MADE.

BUT ON THE ISSUE OF  
PREJUDICE THIS COURT FOUND  
PEARCE WAS THE DRIVING FORCE  
BEHIND MURDERS, TOLD THE BOYS  
WHEN THEY LEFT THAT THE MONEY --  
THIS MONEY IS YOUR LIFE, BRING  
BACK THE DRUGS OR THE MONEY, OR  
SUFFER THE CONSEQUENCE.

AT EVERY  
STAGE OR STEP OF THE WAY, PEARCE  
WAS THE DRIVING FORCE, GREETED  
WITH A GUN, ORDERED INTO THE WE  
SHELTER AMERICA OFFICE.  
THE TESTIMONY THAT PEARCE WAS IN

CHARGE, THE TESTIMONY THAT PIERCE DIRECTED SMITH, THE ONE GAVE HIM THE MURDER WEAPON IS UNCONTRADICTED.

YOU HAVE THE TESTIMONY OF, I BELIEVE, FIVE WITNESSES ESTABLISHING PEARCE'S ROLE AS THE PRIMARY ACTOR MOTIVATOR IN AN ATTEMPTED FIRST-DEGREE MURDER OF STEPHEN TUTTLE, THE FIRST-DEGREE MURDER OF ROBERT CRAWFORD.

THERE WAS NO EVIDENCE PRESENTED IN POSTCONVICTION HEARING THAT CAST ANY DOUBT ABOUT THE EVIDENCE WHICH WAS ADMITTED AT TRIAL. >> WAS THAT ARGUMENT MADE TO THE TRIAL COURT?

BECAUSE NOW WE ARE DEALING WITH THIS QUESTION OF -- JUSTICE SAYING HOW WE REALLY LOOK AT IT NOW THAT THE JUDGE HAS RULED AGAINST YOU.

ON THE PREJUDICE PRONG, I DIDN'T SEE THEREAFTER -- SEEMED LIKE THE WHOLE FOCUS WAS ON WHETHER THIS EVIDENCE SHOULD COME IN OR NOT.

ONCE IT WAS DECIDED THAT IT SHOULD HAVE COME IN, CERTAINLY, IF IT SHOULDN'T HAVE COME IT IN PROBABLY COULDN'T HAVE BEEN HARMLESS BEYOND A REASONABLE DOUBT. I WOULD AGREE WITH THAT.

BUT AS FAR AS ON POSTCONVICTION, WE DON'T JUST LOOK AT WHETHER IT WOULD HAVE BEEN REVERSED ON DIRECT APPEAL IF IT CAME IN. WHAT'S ERRONEOUS WITH THAT ARGUMENT WAS IT DISCUSSED WHETHER THE OVERALL CONVICTION WAS NOW LESS RELIABLE IF THIS EVIDENCE DIDN'T COME IN? TO ME THAT IS REALLY WHAT -- THAT WOULD BE MORE OF THE FOCUS THAT I WOULD BE LOOKING AT ON POSTCONVICTION.

>> YES, YOUR HONOR, OF COURSE, THAT ARGUMENT WAS MADE, BUT THE TRIAL COURT'S ORDER DID NOT ADDRESS THE TRIAL FACTS AT ALL. AND, AGAIN, THE POSTCONVICTION COURT WAS -- WAS NOT THE TRIAL

COURT, IN THIS CASE, SHE CITED ABSOLUTELY NO FACTS THAT WERE DEVELOPED DURING TRIAL TO SUPPORT A PREJUDICE ANALYSIS. AND UNDER STRICKLAND WE KNOW THERE HAS TO BE A REASONABLE PROBABILITY OF A DIFFERENT RESULT.

AND ON THE BASIS OF THIS RECORD YOU CAN'T MAKE THAT LEAP. BUT I WOULD LIKE TO GET TO THE ISSUE, THE SIMPLE ISSUE I BELIEVE OF ADMISSIBILITY.

THERE WAS NO AUTHORITY CITED BY THE TRIAL COURT FOR THE PROPOSITION THAT THIS RELEVANT EVIDENCE WOULD HAVE GONE EXCLUDED UPON OBJECTION, NOT A SINGLE CASE. IN FACT, THE STATE CITED A CASE FROM THIS COURT SMITH V STATE, WHICH I CONTEND IS DIRECTLY ON POINT, A SEXUALLY BATTERY NOT CHARGED OCCURRED DURING THE COURSE OF THE KIDNAPPING, WAS -- PROPERLY ADMISSIBLE.

IF THE TRIAL COURT HAD NO OBJECTION OF ANY LEGAL MERIT TO MAKE THIS EVIDENCE -- NATURE OF THIS EVIDENCE HOW CAN YOU FIND -- >> WHAT WAS THE DEFENSE IN THIS CASE?

>> THAT IT WAS AN INDEPENDENT ACT OF MR. SMITH, THAT THERE WAS NO KIDNAPPING.

AND, AGAIN, THAT DOVETAILS.

>> HE ADMITTED BEING IN THE CAR, DIDN'T KNOW THERE WAS GOING TO BE A MURDER?

>> YES, YOUR HONOR, BUT --

>> AND HE DENIED THERE BEING A KIDNAPPING.

>> YES, YOUR HONOR.

THE ARGUMENT DEFENSE COUNSEL MADE IN OPENING STATEMENT THAT TUTTLE AND CRAWFORD VOLUNTARILY ENTERED THE CAR TO GO TO AN ISOLATED AREA WHERE THEY COULD BE KILLED.

THE STATE EVIDENCE DIRECTLY REBUTTED THAT BECAUSE MR. TURTLE WAS TAKEN HOME TO THE WE SHELTER AMERICA OFFICE THREATENED WITH DEATH WITH A GUN BY MR. PEARCE IF HE DID NOT PERFORM ORAL SEX ON HIM.

>> THEY DIDN'T CHARGE  
KIDNAPPING; RIGHT?

>> NO, THEY DID NOT, WE DID NOT.

>> THERE WAS NO KIDNAPPING,  
UNCHARGED KIDNAPPING, UNCHARGED  
SEXUAL BATTERY, AND THE STATE  
DIDN'T PUT -- FILE A NOTICE OF  
INTENT TO RELY ON THIS  
COLLATERAL ACT, THERE WAS --  
CORRECT?

>> YES, YOUR HONOR.

BUT THAT MIS-- YOUR HONOR, I THINK YOU'RE  
GOING DOWN THE ROAD IN THE  
PRIMARY MISTAKE THE TRIAL COURT  
MAKES.

THIS IS NOT A COLLETERAL ACT.  
THIS OCCURRED DURING A SINGLE  
CONTINUOUS CRIMINAL EPISODE.

TUTTLE

WAS DEPOSED, TESTIFIED AT  
TRIAL THE SEXUAL BATTERY AT  
GUNPOINT CLEARLY IN THE  
DEPOSITION TRIAL COUNSEL KNEW  
ABOUT THIS.

YOU ONLY FILE A

NOTICE OF COLLATERAL OR WILLIAMS  
RULE EVIDENCE IF NOT PART OF THE  
-- CHARGE BECAUSE THE DEFENSE  
WOULD NOT BE ON NOTICE OF IT.  
THIS OCCURRED, REMEMBER, YOUR  
HONOR, FROM THE TIME ALL THIS  
EVIDENCE CAME IN, ON THE EVENING  
OF SEPTEMBER 13TH, WHEN PEARCE  
GAVE THE KIDS DRUGS THERE WAS NO  
NOTICE OF -- WELL, IF THE STATE  
IS GOING TO INTRODUCE EVIDENCE  
YOU COMMITTED SOLICITATIONS  
YOU --

>> LET'S GO BACK TO THE -- THOUGH,  
AGAIN YOU AND I -- I MAY SIDE  
WITH THE TRIAL COURT THAT I FIND  
THAT THIS EVIDENCE WAS HIGHLY  
PREJUDICIAL IN A LIMITED  
PROBATIVE VALUE AS FAR AS TO  
EXPLAIN THE WHOLE COURSE, WHAT  
HAPPENED AS OPPOSED TO  
KIDNAPPING, JUST THAT ARGUMENT.  
AND THIS GOES BACK AGAIN, TO  
I'M A JUDGE, I AT LEAST  
LISTENED TO THAT, YOU'RE NOW  
TELLING ME THAT IF A JUDGE  
DECIDED HEARING IT THE  
PREJUDICIAL VALUE WOULD EXCEED  
THE PROBATIVE VALUE, THAT THAT

WOULD HAVE BEEN, THAT IS A CLEAR REVERSAL.

IS THAT WHAT YOU ARE SAYING?

YOU ARE SAYING THIS IS A RULE OF LAW THAT IT WOULD HAVE TO COME IN UNDER EVERY CIRCUMSTANCE?

>> ON THIS RECORD, I WOULD SAY, YES.

>> THIS RECORD, THOUGH THAT IS THE PROBLEM, IN THIS RECORD THERE WASN'T EVIDENCE TO THE CONTRARY WHAT THE WEIGHING FACTOR SHOULD BE, THAT IS THE WHOLE SUFFICIENCY OF NOT CHALLENGING IT --

>> YOUR HONOR, AND AGAIN, UNDER 9402, THE DANGER OF UNFAIR PREJUDICE HAS TO SUBSTANTIALLY OUTWEIGH THE --

>> I'M GIVING YOU AN OUT, I AM PROBABLY WITH YOU, AND ON THIS PREJUDICE PRONG, I THINK THAT -- BUT I'M NOT NECESSARILY WITH YOU ON THIS FIRST ONE, SO WHY DON'T WE GET TO, WHY DON'T WE -- MAYBE THE REST OF MY COLLEAGUES WITH YOU ON BOTH. YOU STARTED TO TELL US ABOUT OVERWHELMING EVIDENCE OF GUILT WHERE JUSTICE BELL WAS THEN ASKING YOU IS IT CLEAR THAT HE WAS THE DRIVING FORCE AND WANTED TO JUST --

>> YOUR HONOR, AGAIN, IT IS ABUNDANTLY CLEAR, I CAN'T EMPHASIZE ENOUGH, THERE WAS NO CONTRARY EVIDENCE DEVELOPED IN POSTCONVICTION HEARING, PEARCE'S ROLE IN AT THE PRIMARY ACTOR, THE ONE RESPONSIBLE FOR THE BOYS' FATE, THE ONE RESPONSIBLE FOR THE ATTEMPTED MURDER, FIRST-DEGREE MURDER, WAS CORROBORATED IN EVERY SIGNIFICANT RESPECT BY THE TESTIMONY OF KEN SHOOKS -- AMANDA HAVNER, SURVIVING VICTIM, TUTTLE, I BELIEVE I'M LEAVING OUT A WITNESS. YOU HAVE FIVE WITNESSES EXPLAINING PEARCE'S ROLE IN CRIMES AND NO CONTRARY TESTIMONY, HOW DO YOU

MAKE -- LEAP TO A REASONABLE  
POSSIBILITY OF A -- A DIFFERENT  
OUTCOME?  
YOU BEGAN A FEW MINUTES AGO TO  
GIVE THE TIME LINE OF THIS  
WHOLE EVENT.  
GIVE AS A TIME  
LINE.

>> YES, YOUR HONOR, THIS ALL  
OCCURRED IN THE EARLY AFTERNOON  
SEPTEMBER 13TH, WHEN PEARCE  
WANTED TO OBTAIN DRUGS SO YOU  
HAVE EVERYTHING THAT HAPPENS  
FROM THAT TIME ON, TO PEARCE AND  
TO THE VICTIMS, CAME IN, AND THAT  
INCLUDED AN AGGRAVATED ASSAULT  
ON AMANDA HAVNER, THE UNCHARGED  
CRIME OF SOLICITATION  
TO PROCURE DRUGS, ALL INDIVIDUAL  
ACTION THAT YOU MIGHT CONSIDER  
COLLATERAL CRIMES, IF YOU ARE A  
TRIAL COURT POSTCONVICTION COURT  
OR NOT, THEY ARE PART OF THE  
SINGLE CONTINUOUS CRIMINAL  
EPISODE.

SO THEY LEFT FOR THREE  
HOURS,AFTER --

>> WENT TO THE APARTMENT.  
>> THEY WENT TO THE APARTMENT.  
THERE WAS THE DRUG RIP-OFF, SO  
YOU HAVE THAT TIME LINE HERE,  
THEY COME BACK, AND PEARCE  
GREETES THEM, AND THIS IS LATER  
ON IN THE EVENING ON  
SEPTEMBER 13TH, GREETES THEM AT  
GUNPOINT.

AND ORDERS THEM INTO THE WE  
SHELTER AMERICA OFFICE.  
THERE IS A FENCE AROUND THAT  
BARBED WIRE.

AT THAT POINT THE  
VICTIM, ANYTHING THAT HAPPENS  
FROM THAT POINT ON, IT IS A  
CONTINUOUS KIDNAPPING, THEIR  
FREEDOM NEVER RESTORED PRIOR TO  
THE TIME THAT PEARCE TOOK THEM  
ON THE DEATH RIDE TO GET RID OF  
THEM.

SO THIS ACT, YOUR HONOR,  
HAPPENED TO PEARCE OR TUTTLE OUT  
OF THE OFFICE -- AT THAT POINT.

>> JUST STOP RIGHT THERE.  
WHO ACTUALLY COMES BACK, BECAUSE  
AS I UNDERSTAND IT THERE WERE

LIKELY TWO TEENAGED YOUNG MEN,  
AND A COUPLE OF OTHER PEOPLE,  
WHO WENT TO THIS APARTMENT TO  
GET THE DRUGS.

WHO ACTUALLY CAME BACK TO THE  
OFFICE?

>> YES, YOUR HONOR, THERE WERE  
FOUR INDIVIDUALS AS I UNDERSTAND  
IT, AMANDA HAVNER, KEN SHOOK,  
TEENAGER, A 15-YEAR-OLD,  
CRAWFORD, 15-YEAR-OLD --

>> WHO WAS THE OTHER PERSON.

>> -- TANYA BARCOMB?

SHE WAS THE ONE THAT WAS GOING  
PROCURE THE DRUGS, SHE WAS  
BROUGHT IN, SHE FAKED THE  
DRUG DEAL.

BUT AMANDA HAVNER NEVER CAME  
BACK TO THE WE SHELTER AMERICA  
OFFICE.

>> OKAY.

SO IT WAS JUST TUTTLE,  
CAMPBELL CAME BACK TO THE  
OFFICE.

>> CRAWFORD.

>> I MEAN CRAWFORD.

>> HAVNER CAME BACK, DIDN'T SHE,  
AND THAT IS WHERE THE ASSAULT  
OCCURRED ON HER, AND SHE WAS --  
RELEASED?

>> YES, YOUR HONOR, ASSAULTED, A  
GUN POINTED AT HER HEAD,  
THREATENED WITH DEATH, NO  
NOTICE OF THAT COLLATERAL  
CRIME WAS GIVEN, AGAIN, IT IS  
INTO THE COLLATERAL CRIME, IT IS  
A SINGLE CONTINUOUS EPISODE.  
AND JUSTICE WELLS, BACK TO YOUR POINT  
ABOUT THE TIME LINE, SO HE TAKES  
TUTTLE OUT AND THREATENS HIS  
LIFE, THIS ATTEMPTED MURDER  
VICTIM, NOT UNCHARGED ACTOR, AND  
THAT THREAT SHOWS -- AND, AGAIN, THE  
STATE HAS TO PROVE  
PREMEDITATION FOR ATTEMPTED  
FIRST-DEGREE MURDER -- THAT THREAT  
SHOWS HIS ANIMOSITY, HIS HATRED,  
HIS ILL-WILL AND SPITE TOWARDS  
MR. TUTTLE.

IT IS DIRECTLY  
RELEVANT TO THE ISSUE OF  
PREMEDITATION.

>> THE MURDER OF CRAWFORD, AND  
THE ATTEMPTED MURDER ON TUTTLE,

THEN OCCURRED WITHIN WHAT LENGTH OF TIME?

>> WITHIN -- I DON'T HAVE EXACT BREAKDOWN, WITHIN MINUTES, NOT HOURS, NOT DAYS. SO HE COMES BACK IN THE OFFICE, SMITH AND BRITTINGHAM COME BACK, SMITH SAYS WE ARE HERE TO DO BUSINESS, AND THEY GO FORCE THE BOYS INTO THE CAR, WHICH THE DEFENSE CONTENDS --

>> THIS ALL HAPPENED DURING THE SAME EVENING.

>> THE SAME EVENING, YOUR HONOR.

>> LET ME MOVE YOU TO THE OTHER POINT THAT YOU RAISED, WHAT INVESTIGATION DID THE LAWYERS DO OF MITIGATION?

>> YOUR HONOR, AGAIN, ON ISSUE TWO, THE TRIAL COURT FOUND THE DEFENSE LAWYER WAS INEFFECTIVE FOR FAILING TO INVESTIGATE POTENTIAL MITIGATION, THEREFORE, FIVE THEY DID NOT THINK A FAMILY MEMBERS DID A MINIMAL -- IF ANY INVESTIGATION, BUT, THE TRIAL COURT IN ITS ORDER IGNORED WHY THAT FACT IS, BECAUSE PEARCE TOLD THEM YOU CAN ONLY CONTACT MY GIRLFRIEND, AT THAT LOGISTICAL MATTERS -- MR. WARE AND, AGAIN, THEY TRIED TO HAVE HIM EXAMINED BY A MENTAL HEALTH EXPERT.

>> THERE IS ALSO EVIDENCE, IS THERE NOT, THAT THERE WAS NOT AN INFORMED DECISION ABOUT THAT WHETHER WE AGREE OR NOT AGAIN IS THERE EVIDENCE THAT --

>> THAT MR. PEARCE THAT HE DIDN'T REALLY KNOW WHY --

>> THAT KIND OF THING.

>> YES.

>> THAT IS THE PROBLEM, THAT IS THE RUB YOU GET INTO, IS THAT YOU KNOW, IS THERE COMPETENT SUBSTANTIAL EVIDENCE TO GO INTO THAT.

>> NO, YOUR HONOR.

>> BECAUSE THE COLLOQUY AT THE TIME OF TRIAL MAKES IT VERY CLEAR, WARE AND PEARCE MAKE IT CLEAR HE DIDN'T WANT TO BE EXAMINED BY A MENTAL HEALTH PROFESSIONAL.

YOU HAVE PEARCE GOING I WASN'T FULLY INFORMED, LOOKING AT THE RECORD I CITED THE COLLOQUY PEARCE DIDN'T WANT TO BE EXAMINED SO --

>> THAT IS NOT IN DISPUTE.

WE KNOW WHAT IS IN THAT RECORD IT REALLY COMES DOWN TO AGAIN THIS IS WHY TO ME THE DIFFICULTY OF THE PROCEDURAL NATURE THAT YOU ARE INTO.

AGAIN, DO WE DECIDE THIS AS IF WE WERE LISTENING TO A JUDGE TEPPER'S POSITION OR DECIDE BASED ON WHAT JUDGE TEPPER DECIDED?

>> YOU HAVE TO DECIDE BASED ON WHAT SHE DECIDED.

THE PROBLEM IS

THERE IS NOT REAL -- THERE IS A GLARING CHOICE TO BE MADE HERE BETWEEN CREDIBILITY -- THE JUDGE DIDN'T MAKE IT IN HER ORDER, YOU KNOW, PEARCE HAD BEEN CONVICTED OF SIX FELONIES, INCLUDING PERJURY GOING TO -- HIS WORD OVER MR. WARE MET WITH HIM A DOZEN TIMES SAID, USED STRONGEST WORDS POSSIBLE, YOU ARE LOOKING AT DEATH I NEED YOU WE NEED TO CONTACT YOUR FAMILY.

>> THIS ISSUE -- AS TO HE CREDIBILITY DIFFERS FROM THE FIRST ISSUE

>> THAT IS CORRECT, YOUR HONOR.

>> FIRST ISSUE SHE WAS DOING IT TOTALLY ON THE BASIS OF A WRITTEN RECORD.

>> THAT IS CORRECT, YOUR HONOR. IN FACT WE SUBMIT THERE SHOULDN'T HAVE BEEN AN EVIDENCIARY HEARING ON THIS ISSUE BUT THAT IS ANOTHER AREA IN POSTCONVICTION COURT'S ORDER IT WASN'T A SURPRISE.

IT WAS IN THE DEPOSITION, TRIAL COURT KNEW WHAT MR. TUTTLE WOULD STATE, AND HE USED THAT DEPO TO FORMULATE HIS ARGUMENT THAT THERE WAS NO KIDNAPPING, BUT AGAIN THIS COURT HAS ALREADY IN A SENSE DETERMINED BACK TO THE FIRST ISSUE, YOUR HONOR, THAT THAT

SEXUAL ACT AND THE THREAT TO KILL WAS RELEVANT, IN REJECTING A CHALLENGE TO APPOINT MURDER, THEORY OF KIDNAPPING THIS COURT RECITED THOSE VERY FACTS TO SUPPORT THE DECISION SAYING THERE IS ENOUGH HERE FOR FELONY MURDER, SO THIS COURT IN A WAY -- SEE, I'M IN REBUTTAL.

>> JUST TO BE AWARE, USE YOUR TIME AS YOU WISH, BUT --

>> THANK YOU, YOUR HONOR.

I WILL SAVE MY REMAINING TWO MINUTES.

>> THANK YOU.

>> MAY IT PLEASE THE COURT.

MY NAME IS RICHARD KILEY.

I REPRESENT

FAUNCE PEARCE IN THIS ACTION TODAY IN REBUTTAL.

FIRST I WOULD

LIKE TO ADDRESS JUSTICE PARIENTE'S CONCERN ABOUT PREJUDICE REGARDING CLAIM ONE, COMPLETE DISCUSSION OF PREJUDICE IS GIVEN BY JUDGE TEPPER IN HER TRANSCRIPT OF THE HUFF HEARING I WILL PROVIDE TO THIS COURT.

HOWEVER, BRIEFLY, THE PREJUDICE IS THAT BECAUSE THIS DISGUSTING INFLAMMATORY ACT USED SOLELY TO INFLAME THE --

>> LET ME ASK A QUESTION HERE.

>> YES, SIR.

>> IT WAS MENTIONED BRIEFLY IN OPENING, THERE WAS BRIEF REFERENCE BY THE DEFENDANT TO THE ACT AND WAS IT EVER MADE A FEATURE, YOU ARE SAYING USED TO INFLAME THE JURY.

IS THERE ANY EVIDENCE EITHER IN OPENING OR IN THE QUESTIONING OF MR. TUTTLE IN THIS CASE OR IN CLOSING THAT THIS WAS HIGHLIGHTED, FOCUSED UPON, AND MADE A FEATURE OF THE TRIAL?

>> I WOULD SUBMIT TO THE COURT THAT IT WAS -- IT WAS MENTIONED IN OPENING STATEMENT, IT WAS MENTIONED DURING THE DIRECT EXAMINATION OF TUTTLE, AND IT WAS MENTIONED IN CLOSING.

>> THERE IS ONLY ONE LINE, THAT IS WHERE JUSTICE

BELL IS GOING, ONE LINE IN THE OPENING, ONE LINE IN QUESTION TO MR. TUTTLE, ONE LINE IN THE CLOSING ARGUMENT.

>> YES, AND I WOULD SUBMIT TO THE COURT THAT THIS ONE LINE VITIATED MR. PEARCE'S CHANCES AT BEING CONVICTED OF LEASEER CHARGE.

>> LET ME TEST THAT, YOU KNOW, I READ THIS RECORD, FROM STEM TO STERN, AND IT SEEMS TO ME THAT THIS WHOLE STORY IS ABOUT THE INTIMIDATION OF THESE YOUNG PEOPLE AND BY PEARCE.

THAT PEARCE WAS RUNNING THIS OPERATION, THAT PEARCE HAD THE DRUGS, THAT PEARCE WHEN HE DIDN'T GET THE MONEY WAS GOING TO DEMONSTRATE TO THESE YOUNG PEOPLE THAT HE WAS NOT TO BE MESSED AROUND WITH, THAT THAT WENT ON THE ENTIRE -- FOR THIS ENTIRE EPISODE.

AND I DON'T KNOW HOW YOU CAN TAKE OUT OF THIS ENTIRE EPISODE ANY PIECE OF THE INTIMIDATION, AND NOT -- AND IT NOT BE RELEVANT TO THE WHOLE THEORY OF THE STATE'S CASE.

>> JUDGE, FIRST OF ALL, I WOULD PRESUME TO CORRECT THE COURT, PEARCE DIDN'T HAVE THE DRUGS. HE WAS BUYING THE DRUGS FROM -- THESE WEREN'T KIDS, THESE WERE HIGH SCHOOL DROPOUTS, DRUG DEALERS, VERY EXPERIENCED IN THE DRUG TRADE.

>> PEARCE HAD THE MONEY.

>> SIR?

>> I MEAN THIS WHOLE THING WAS SET UP BY PEARCE.

>> AND KEN SHOOK.

>> WELL, BUT PEARCE WAS DEFINITELY THE CAPTAIN OF THE SHIP.

>> YES.

HOWEVER, THE INTRODUCTION, JUDGE TEPPEER FOUND THAT THIS WAS A COLLATERAL CRIME, THIS DID NOTHING --

>> BUT -- I HAVE A VERY HARD TIME WITH HOW THIS MEETS THE DEFINITION OF WHAT THIS COURT

HAS HELD FROM THE TIME IT'S BEEN DEALING WITH COLLATERAL CRIMES ISSUES, A COLLATERAL TIME, THIS IS PART OF THE EPISODE.

>> NO, IT IS NOT, JUDGE, I WOULD SUBMIT TO THE COURT THE EPISODE WAS WHEN JOEY SMITH, BUTTERWORTH AND BRITTINGHAM ARRIVED AT WE SHELTER AMERICA AND TOOK THE OTHER DRUG DEALERS OUT TO THE KILLING ZONE.

WE ESTABLISHED THAT PEARCE TOOK SMITH ASIDE AND SAID SOMETHING, WE DON'T KNOW.

BUT IT APPEARED PEARCE WAS RUNNING THE SHOW SO --

>> SO IF WE ACCEPT YOUR ARGUMENT THEN THE FACTS, IT WAS NOT CHARGED AS A CRIME, IF WE ACCEPT YOUR ARGUMENT THEN NONE OF THAT THAT OCCURRED BEFOREHAND WOULD HAVE BEEN ADMISSIBLE TO THIS JURY, THAT THE ONLY THING THE STATE COULD DO IS START OUT WITH PEARCE DIRECTING THEM OUT OF THE STORE INTO THE CAR, AND THAT IS ALL THAT COULD BE PRESENTED TO THE JURY WITHOUT THERE BEING SOME NOTICE AND SEPARATE HEARING BY THE TRIAL COURT TO FIND THAT THIS IS SOMEHOW RELEVANT --

>> YES -- I WOULD SAY --

>> THAT IS WHAT YOU WANT THE LAW IN THIS STATE TO BE?

IS WHAT YOU ARE ASKING US?

>> JUDGE, I WANT THE COURT TO FOLLOW THE COLLATERAL CRIME WILLIAMS RULE EVIDENCE, THIS CRIME WAS NOT USED TO -- THIS ACT WAS NOT -- FIRST OF ALL, WAS NOT INEXTRICABLY INTERTWINED, THE CRIME DIDN'T HAPPEN UNTIL THE ACTUAL MURDERER ARRIVED AT THE SCENE.

SECOND OF ALL, IN REGARDS TO INTIMIDATION OR DOMINANCE SMITH DIDN'T SEE THIS ACT, THE MURDER VICTIM WHOSE CONVICTION WE ARE SEEKING TO OVERTURN TODAY DIDN'T SEE THIS ACT.

THIS WAS INTRODUCED SOLELY TO INFLAME THE PASSIONS OF THE JURY AND THE TRIAL COURT, AND IN A DISCUSSION OF PREJUDICE

SAID THIS WAS SUCH A  
REPREHENSIBLE ACT THAT ANY JUROR  
WOULD BE OFFENDED BY IT, AND IT  
WOULD SPILL OVER AND CONTAMINATE  
THE REST OF THE TRIAL.

>> IT SEEMS TO ME TO ME -- WE  
HAVE A LOT OF CRIMINAL ACTS THAT  
TOOK PLACE IN THIS PARTICULAR  
EPISODE WHETHER YOU WANT TO  
START IT AT A PARTICULAR POINT,  
OR WHEN HE FIRST GOT TO THE  
PLACE OF BUSINESS, SO WE HAVE  
HIM GETTING THERE, WANTING TO  
PURCHASE DRUGS, SENDING PEOPLE OUT  
TO PURCHASE DRUGS, THERE ARE  
SEVERAL ASSAULTS THAT ARE  
INVOLVED IN THIS CASE, THERE ARE  
SEVERAL KIDNAPPINGS IN THIS CASE.

SO IT SEEMS TO ME THAT TO PICK  
OUT ONE CRIME OUT OF THE  
MULTIPLE CRIMES THAT ARE  
COMMITTED HERE IS JUST -- I  
JUST DON'T QUITE BUY YOUR  
ARGUMENT THAT WE'RE GOING TO  
PICK THIS ONE CRIME OUT AND SAY  
THAT IS REPREHENSIBLE, BUT NOT  
THESE OTHER CRIMES, I MEAN --

>> THIS CRIME FOR A REASON.  
IT WAS A GHASTLY CRIME, USED SOLELY  
TO INFLAME THE PASSIONS OF THE  
JURY.

>> HOW ABOUT PUTTING A GUN TO  
PEOPLE'S HEAD?

THAT IS NOT A GHASTLY CRIME?

>> PUTTING A GUN --

>> TAKING PEOPLE OUT TO A REMOTE  
AREA AT GUNPOINT IS NOT A  
GHASTLY CRIME?

>> THAT IS A GHASTLY CRIME, BUT  
IT IS LESS GHASTLY THAN PUTTING A  
GUN TO SOMEONE'S HEAD, FORCING  
THEM TO COMMIT A SEXUAL ACT.

>> DO YOU THINK WE OUGHT TO BE  
IN THE BUSINESS OF TRYING TO  
PARSE THIS OUT WHEN WE HAVE --  
WHETHER YOU WANT TO AGREE OR  
NOT -- WHEN WE HAVE ONE EPISODE  
WHERE WE HAVE THESE DEFENDANTS  
COMMITTING MULTIPLE CRIMES, AT  
LEAST MR. PEARCE COMMITTING  
MULTIPLE CRIMES?

I MEAN, YOU ARE ASKING US  
REALLY, TO PARSE OUT, LOOK AT  
ONE SECTION, OF A MULTIHOUR

EPISODE THAT WAS GOING ON, AND I JUST DON'T SEE THAT OUR CASE LAW REQUIRES US TO DO THAT.

>> WELL, JUDGE, THE COURT MUST LOOK AT THE PREJUDICIAL EFFECT OF ONE GHASTLY CRIME.

>> ISN'T THE ISSUE, THOUGH, AND THIS IS WHERE I HAVE PROBLEMS, I MIGHT -- IF THIS IS ON DIRECT APPEAL AND IT HAD BEEN OBJECTED TO, I MIGHT SAY THIS IS DIFFERENT IN NATURE BECAUSE IT IS, YOU KNOW, TALKING ABOUT A SEXUAL, A SEXUAL ACT, AND MALE AGAINST MALE, THE WHOLE THING.

>> THE COURT MUST LOOK AT THE PREJUDICIAL EFFECT OF THE ONE GHASTLY CRIME.

>> THIS IS THE ISSUE AND WHERE I HAVE PROBLEMS, IF THIS IS ON DIRECT APPEAL AND HAD BEEN OBJECTED TO, I MIGHT -- SAY, THIS IS DIFFERENT IN NATURE BECAUSE IT IS -- YOU KNOW, TALKING ABOUT A SEXUAL ACT AND MALE AGAINST MALE AND JUST THE WHOLE THING.

IT IS -- I'M NOT SURE IT IS DIRECTLY AS RELEVANT AND MAY BE IT IS -- DIRECTLY AS RELEVANT AND MAY BE PART OF THE CRIMINAL ACT BUT WE'D BE LOOKING AT, IF IT WAS PRESERVED AS A HARMLESS ERROR BEYOND A REASONABLE DOUBTED AND I THINK YOU WOULD HAVE, IF SOME OF US AGREED IT MIGHT NOT -- SHOULDN'T HAVE BEEN ADMISSIBLE IT MAY HAVE BEEN MET THAT TEST, BUT I WANT TO GET BACK TO MY CONCERN, WHICH IS, THE PREJUDICE IS NOT HARMLESS ERROR BEYOND A REASONABLE DOUBT. IT IS THAT YOU AGREE THAT ALL OF THE OTHER -- THESE OTHER CRIMES, COLLATERAL CRIMES ARE A PART OF THE EPISODE WOULD COME IN HOLDING THE GUN, THE -- JUSTICE QUINCE WAS OUTLINING WOULD COME IN, AND THEN, UP TO THE MURDER SO WHAT I AM HAVING PROBLEMS WITH IS TRYING TO UNDERSTAND HOW

IT MEETS THE PREJUDICE PRONG OF STRICT LAND, THAT IS, THAT IT UNDERMINES OUR CONFIDENCE IN THE OUTCOME OF THIS, AND THAT THERE IS -- THAT THERE WOULD BE A DIFFERENT RESULT.

I MEAN, WHERE IS IT, SO MAKE THAT ARGUMENT AND ESPECIALLY IN LIGHT OF WHAT JUSTICE BELL POINTED OUT, THAT EVEN THOUGH IT MAY HAVE STUCK IN THE JURORS' MINDS IT WASN'T REPEATEDLY EMPHASIZED BY THE PROSECUTION, IT WAS -- THERE WAS AMPLE OTHER EVIDENCE OF THIS MAN'S GUILT AND WE ARE NOT LOOKING AT THIS FROM A HARMLESS ERROR BEYOND A REASONABLE DOUBT STANDARD. BECAUSE IT IS A POST-CONVICTION.

>> JUDGE, ONCE THE JURY HEARD ABOUT OF THIS SEXUAL ACT IT VITIATED ANY CHANCE MR. PEARCE HAD OF BEING CONVICTED OF A LESSER CRIME.

IT ALSO ACTED AS A NONSTATUTORY AGGRAVATOR.

>> NOW, YOU MAY HAVE -- IN TERMS OF THE PENALTY PHASE, A DIFFERENT ISSUE AS TO WHETHER THE PENALTY PHASE SHOULD AND SHOULD NOT HAVE COME IN, BUT, WE ARE STILL JUST HERE AT THE -- TALKING ABOUT WHETHER THIS ALONE CAUSES SUFFICIENT PREJUDICE TO REVERSE.

AND I GUESS WE'RE ALL GOING TO HAVE TO WRESTLE WITH THAT. BUT YOU WOULD AGREE AT THIS POINT THAT WE HAVE TO LOOK AT THIS AS A -- IF THERE IS DEFICIENCY, WE INDEPENDENTLY EVALUATE PREJUDICE.

WE DON'T DEFER AT THIS POINT TO JUDGE HEPBURN'S ULTIMATE DETERMINATION THAT IT WAS PREJUDICIAL AND WE HAVE TO INDEPENDENTLY VALLEY IT.

>> I AGREE YOU HAVE TO INDEPENDENTLY EVALUATE IF IT WAS PREJUDICIAL OR NOT.

AND I WOULD SUBMIT TO THE COURT THAT IT WAS PREJUDICIAL.

>> AGAIN YOU ARE USING PREJUDICIAL, OF COURSE IT IS

LUKE ALL -- EVIDENCE IS  
PREJUDICIAL, THAT IS NOT THE WAY  
STRICKLAND IS DEFINING  
PREJUDICE.

IN ORDER TO GET RELIEF ON  
POSTCONVICTION.

IT HAS TO MEET A GREATER BURDEN  
BUT I THINK YOU NEED TO MOVE ON  
TO YOUR SECOND -- THE SECOND  
POINT, I'M CONCERNED ON THE  
PENALTY PHASE WITH WHAT  
MR. BROWN WAS SAYING, WHICH IS  
THAT YOU HAVE REALLY GOT A  
SITUATION WHERE IT APPEARS THAT  
HE REFUSED TO COOPERATE.

>> WELL,, JUDGE, THAT IS NOT  
FACTUALLY CORRECT.

FIRST OF ALL, MR. WARE DIDN'T  
KNOW WHAT HE WAS ASKING AND CAME  
OUT AT THE EVIDENTIARY --

>> WHAT DID THIS DEFENDANT TELL  
THE JUDGE?

JUDGE MAYNARD ABOUT THE --  
PUTTING ON ANY EVIDENCE OF  
MITIGATION --

>> MITIGATION.

>> ALL OF THAT BUSINESS, WASN'T  
THERE A QUESTIONING BY JUDGE  
MAYNARD?

>> YES.

JUDGE SWANSON, SIR.

>> JUDGE SWANSON.

>> MAYNARD SWANSON.

>> WHEN HE INDICATED THE  
MITIGATION HE WOULD PUT ON,  
WHICH WAS ONLY MITIGATION  
GLEANED FROM IF HE GUILT PHASE.  
THE FACT THAT -- PEARCE WAS  
USING COCAINE ON THE NIGHT OF  
THE OFFENSE.

>> THEY HAD A -- APPARENTLY  
A VERY EXTENSIVE  
PRE-SENTENCE INVESTIGATION.

>> WHICH HE DID NOT LOOK AT.

>> BUT, THE JUDGE DID.

THE JUDGE TALKED ABOUT IT.

>> NO, THE JUDGE ASKED  
MR. PEARCE UPON MOTION BY THE  
STATE IF HE WANTED TO BE  
EXAMINED BY A PSYCHIATRIST.

>> THE JUDGE SAID IN HIS ORDER,  
THERE WAS AN EXTENSIVE  
PRE-SENTENCE INVESTIGATION.

>> AFTER PRETRIAL, A

PRE-SENTENCE INVESTIGATION WAS PREPARED HOWEVER THE COURT ASKED MR. PEARCE DO YOU WANT TO BE EXAMINED BY A PSYCHIATRIST, HE SAID, NOT PARTICULARLY, BECAUSE HE THOUGHT AS IT CAME OUT IN THE EVIDENTIARY HEARING MR. WARE WANTED A PSYCHIATRIST FOR MR. PEARCE TO GET HIM THROUGH THIS STRAIN OF IN CARS NATION AND HE THOUGHT AS HE TOLD THE JUDGE, WARE SAID YOU WANT YOUR FAMILY MEMBERS DOWN HIGHER?

>> DO WE LAUGH' ANALYSIS IN JUDGE TEPPER'S ORDER?

I DON'T SEE AN ANALYSIS BETWEEN HER WEIGHING THE CREDIBILITY OF THIS DEFENDANT VERSUS WARE, BECAUSE, WARE TESTIFIED THAT HE ASKED -- TALKED ABOUT MENTAL HEALTH AND MITIGATION AND GETTING HIM EVALUATED, DID HE NOT.

>> YES.

>> AND HE TALKED ABOUT THIS COULD GET HIM A -- FAMILY MENTION AND THE DEFENDANT TOLD HIM, NO, DON'T TALK TO ANY OF MY FAMILY MEMBERS EXCEPT CHRIS.

>> THAT IS -- HE SAID DO YOU WANT YOUR FAMILY MEMBERS DOWN HERE, AND HE SAID NO.

THEY WERE TALKING AT CROSS PURPOSE AND MR. WARE --

>> I UNDERSTAND THE ARGUMENT. DID JUDGE TEPPER MAKE THE DETERMINATION AND ANNOUNCE -- SEEMS ALL SHE TALKS ABOUT IS BASICALLY A WIGGINS TYPE ARGUMENT, THIS GUY HAD NO EXPERIENCE, DIDN'T LOOK AT THE ABC GUIDELINES, DIDN'T DO ANY INVESTIGATIONS, SO, THEREFORE IT IS MORE LIKE A WIGGINS CASE INSTEAD OF DISCUSSING IT A RUTHERFORD-TYPE CONTEXT AND THAT THIS IS A CASE WHERE THE DEFENDANT REFUSED TO COOPERATE AND REFUSED TO ALLOW THE DEFENSE COUNSEL TO DO THAT AND SO, WE DON'T REALLY HAVE THE RUTHERFORD DEFENDANT LIMITING VERSUS WHAT APPEARS TO BE JUST A PURE WIGGINS ANALYSIS.

>> JUDGE, HE DIDN'T REFUSE ANYTHING. HE SIMPLY WAS ASKED THE RIGHT QUESTION AND WAS NOT EXPLAINED TO HIM -- WASN'T ASKED THE RIGHT QUESTIONS HOW HIS FAMILY MEMBERS COULD HELP HIM AND THEY NEVER CONTACTED THE FAMILY MENTION THEM.

STATE DID A BETTER JOB IN INVESTIGATING AND PRESENTING MITIGATION, HAND THE DEFENSE DID.

MR. WARE SAID HE ASKED HIM, WANT TO BE EXAMINED BY A PSYCHIATRIST AND DIDN'T ASK WHAT FOR AND HE SAID, NO, I'M ALL RIGHT.

AND YOU WANTED THE FAMILY MEMBERS HERE -- I DON'T WANT MY FAMILY MEMBERS TO SEE THIS.

>> THAT IS MR. PEARCE'S VERSION AND YOU ARE MAKING THE CREDIBILITY DETERMINATION YOURSELF AND MY QUESTION IS DID JUDGE TEPPER DO THAT IN HER ORDER.

>> YES.

>> HE WEIGHED THE CREDIBILITY IN THE CONFLICTING TESTIMONY BETWEEN THE TWO IN HER ORDER, BECAUSE AGAIN, MY QUESTION IS, THE WAY I READ IT SHE MAKES A WIGGINS ANALYSIS, AND DOESN'T REALLY ADDRESS IN HER ORDER WEIGHING THAT CONFLICTING WARE'S TESTIMONY HE DIDN'T WANT US TO DO ANYTHING, I WANTED TO ABIDE BY THE WISHES OF MY CLIENTS VERSUS PIERS SAYING, KNEE NEVER REALLY FULLY EXPLAINED TO IT ME.

>> IT'S NOT IN THE ORDER --

>> THAT'S MY QUESTION.

>> THE JUDGE'S ORAL PRONOUNCEMENT OF THE ORDER AND IT IS REPRODUCED, IN COLLOQUY AND THE QUESTIONS SHE ASKED MR. WARE AND MR. PEARCE HAVE BEEN TAKEN VERBATIM FROM THE TRANSCRIPT AND SENT OFF, IN OUR BRIEF.

YES, SHE DID MAKE A CREDIBILITY DETERMINATION.

AND, ALSO, I WOULD SUBMIT TO THIS CORE, THAT THE

POSTCONVICTION COURT ASKED EVERY WITNESS, LAY WITNESSES, DOCTORS, LAWYERS, EVERY WITNESS, A SET OF QUESTIONS, DETAILED QUESTIONS, TO CLARIFY ANY POINTS.

AND I MIGHT ADD, JUDGE, THIS IS A SMALL COUNTY, THIS COURT HAS -- HAD KNOWN MR. IVY FOR -- COURT HAD KNOWN MR. IVY FOR 20 YEARS.

I HAVE BEEN -- I HAVE KNOWN MR. IVY.

MR. IVY FRANKLY ADMITTED HE DID NOTHING AND THE COURT SAW -- THERE WAS LITTLE PREPARATION, BECAUSE THERE WAS NO PREPARATION FOR PENALTY PHASE.

>> AND WHAT WAS THE REASON FOR NOT DOING IN A INVESTIGATION PROFFERED BY COUNSEL?

>> MR. WARE --

>> THEY DIDN'T KNOW, DIDN'T KNOW ABOUT --

>> MR. WARE DIDN'T KNOW HOW TO DO THAT.

AND SECONDLY, MR. WARE WAS TOLD BY MR. IVY THAT THIS PROBABLY WILL NOT GET TO A PENALTY PHASE BECAUSE MR. PEARCE WAS -- PEARCE WAS NOT H SHOOTER.

>> AND IT HAD NOTHING DO WITH THE DEFENDANT SAYING, DON'T INVESTIGATED, I DON'T WANT TO PRESENT A MITIGATION CASE.

>> THE RECORD EVIDENCE AT POSTCONVICTION --

>> YES.

>> HAD NOTHING DO WITH MR. PEARCE, AND HE SAID IF I WOULD HAVE KNOWN THEY WERE GOING DO THIS, PRODUCE, PRODUCE PSYCHIATRIC EVIDENCE OF HIS BRAIN DAMAGE AND SUBSTANCE ABUSE AND FAMILY, HE WOULD HAVE ACQUIESCED TO THE PRESENTATION. BUT, THE PENALTY ISSUES THAT HE RAISED WERE THE FACT THAT HE LET AMANDA GO, THAT HE WAS USING COCAINE ON THE NIGHT OF THE MURDER, AND HE VOLUNTARILY MADE A STATEMENT TO THE POLICE.

>> LET ME ASK YOU ABOUT THE TIMELINE IN THIS SITUATION, WHEN DID MR. PEARCE ACTUALLY TELL THE

DEFENDANTS HE DIDN'T WANT THE DEFENSE ATTORNEYS THAT HE DIDN'T WANT TO PUT ON THE MITIGATION -- WAS IT AFTER THE GUILT PHASE OF THIS TRIAL?

>> NO.

IT WAS ARTICLE AT THE JAIL D-.

>> AT THE JAIL BEFORE THE GUILT PHASE --

>> BEFORE THE GUILT PHASE OF THE TRIAL.

AND MR. WARE SAID, WELL, I COULD GET THE PSYCHIATRIST -- NO, I DON'T WANT THAT.

AND --

>> I'M TRYING -- I GUESS WHAT I AM TRYING TO GET AT IS, IF THERE WAS TIME, I MEAN, USUALLY THE PREPARATION FOR THE PENALTY PHASE BEGINS EVEN BEFORE THE GUILT PHASE.

YOU DON'T WAIT UNTIL THE GUILT PHASE IS OVER BEFORE YOU START PREPARING FOR THE PENALTY PHASE, CORRECT.

>> YES, CORRECT.

>> SO WHEN DID THE DEFENSE ATTORNEYS ACTUALLY TALK TO MR. PEARCE AND HE TOLD THEM THAT HE DID NOT WANT TO PUT ON A PENALTY PHASE.

>> THAT WAS DONE ON THE RECORD RIGHT BEFORE PENALTY PHASE STARTED.

AFTER GUILT PHASE.

>> OKAY.

WHAT I'M GETTING AT THIS IS DEFENSE ATTORNEYS REALLY SHOULD HAVE AT THAT POINT ALREADY HAD SOME INVESTIGATION DONE.

>> ABSOLUTELY.

YOUR HONOR, PURSUANT TO THE -- ABA GUIDELINES THE DEFENSE ATTORNEYS WERE OBLIGATED TO BEGIN AN INVESTIGATION OF MITIGATION WHETHER THE CLIENT WANTED IT OR NOT.

>> LET ME JUST ASK, BECAUSE -- ALMOST OUT OF TIME, THERE WAS REFERENCE TO AN EVALUATION THAT WAS DONE AT UNIVERSITY OF FLORIDA.

WHAT I WANT TO KNOW IS, AND -- ON THIS RECORD, IF THE DEFENSE

LAWYERS HAD INVESTIGATED, WHAT RECORDS WOULD HAVE BEEN DISCOVERED THAT WOULD HAVE REVEALED SOME -- THE BIPOLAR HISTORY OF THE FAMILY? WHAT IS THAT ALL ABOUT? IF YOU COULD JUST SORT OF SOME THAT UP BECAUSE I COULDN'T --

>> IT WAS -- HE WAS TREATED AT UNIVERSITY OF FLORIDA HOSPITAL. FOR A DIAGNOSIS OF DYSLEXIA.

>> JUST DYSLEXIA, NEVER DIAGNOSED BY A -- AS BI-POLAR.

>> NO.

>> SO WHAT WOULD THAT HAVE BEEN -- I MEAN, I GUESS WHAT I AM TRYING TO UNDERSTAND, FIRST THEY HAD DONE -- THEY WOULD HAVE PRESENTED TO THE JUDGE HE HAD BEEN DIAGNOSED WITH DYSLEXIA, THAT WOULD STILL NOT HAVE CAUSED HIM TO SAY I WANT TO PUT ON A CASE OF MITIGATION.

>> NO, JUDGE.

I -- AS I SAID IN MY BRIEF, SAID AT THE EVIDENTIARY HEARING, THERE WAS AMPLE EVIDENCE PROVIDED TO WARE FOR EXAMPLE, THE HRS REPORT, STRONGLY RECOMMENDED THAT MR. PEARCE UNDER GO A PSYCHOLOGICAL EVALUATION.

>> WHEN WERE THOSE HRS RECORDS? FROM BEFORE THE -- THIS TIME.

>> OH, YES.

>> AND WHAT DID IT HAVE TO DO WITH THE HRS RECORDS.

>> THE RECORDS WERE AVAILABLE TO COUNSEL.

>> WHAT CAUSED HRS RECORDS TO COME INTO BEING?

>> OH, CHILD ABUSE.

>> THESE WERE -- BECAUSE I DON'T KNOW THAT -- AT LEAST I DIDN'T GET THAT.

SO WHAT YOU ARE SAYING IS THERE IS A HISTORY OF CHILD ABUSE IN HRS INVESTIGATED IT.

>> YES.

BETWEEN BETWEEN MR. PEARCE AND LISA DAWSON, HIS COMMON LAW WIFE.

>> OKAY.

CHILD ABUSE BY HIM?

>> MAINLY BY LISA DAWSON.  
>> NOT ABUSED AS A CHILD?  
HIS OWN CHILDHOOD.  
>> HE WAS ABUSED --  
>> THOSE ARE NOT THE HRS  
RECORDS.

>> NO.

NO.

NO.

NO.

NO.

NO.

THIS HRS RECORDS -- AND A  
PREVIOUS PROBATION RECORD  
INDICATED THAT HE HAD A DRUG  
PROBLEM AND WAS IN DESPERATE  
NEED OF PSYCHOLOGICAL EVALUATION  
AND COUNSELLING.

AND THE DEFENSE DIDN'T LOOK AT  
THAT.

HE DIDN'T KNOW WHAT TO LOOK AT.

THE DEFENSE, MR. WARE JUST  
MERELY READ A LITTLE BIT OF THE  
PD MANUALS, DIDN'T READ IT ALL  
AND DIDN'T TALK TO ANYBODY.

AND TOOK IT FROM THERE.

THE ONLY INVESTIGATION HE DID  
WAS WHAT HE LEARNED FROM THE  
GUILT PHASE.

>> WITH OUR ASSISTANCE YOU HAVE  
EXHAUSTED MORE THAN YOUR TIME.

>> IN THE COURT HAS NOTHING  
FURTHER, 128 --

>> YOU ARE OVER BY THAT AMOUNT.

>> I'M SORRY.

>> NOT A PROBLEM.

BRING YOUR ARGUMENT TO A  
CONCLUSION, WE --

>> I WOULD ASK THE JUDGMENT OF  
THE CIRCUIT COURT BE AFFIRMED.

THANK YOU.

>> THANK YOU.

>> JUSTICE QUINCE IN ANSWER TO  
ONE OF YOUR QUESTIONS, IT IS NOT  
TRUE THAT DEFENSE ATTORNEYS JUST  
WAITED UNTIL THE GUILT -- AFTER  
THE GUILT PHASE TO BEGIN THEIR  
INVESTIGATION OR TALK TO PEARCE  
ABOUT POTENTIAL MITIGATION, HE  
INDICATED HE DIDN'T WANT ANY  
MITIGATION VERY EARLY ON IN THE  
CASE AND --

>> WHEN YOU SAY VERY EARLY ON  
WHEN DID THIS TAKE PLACE.

>> PRIOR TO THE GUILT PHASE TRIAL EVER -- IMMEDIATELY AFTER WARE WAS APPOINTED HE WAS NOTIFIED BY IVY THAT HE DIDN'T WANT A PENALTY PHASE AND WENT OVER THERE AND TRIED TO PERSUADE HIM TO CHANGE HIS MIND.

>> PART OF THE TESTIMONY AT THE EVIDENTIARY HEARING.

>> THAT'S CORRECT AND I CITED THAT EXTENSIVELY IN MY BRIEF. MARK WARE'S TESTIMONY CLEARLY CONFLICTS WITH PEARCE. VERY EARLY ON HE WANTED HIM TO PRESENT MITIGATION AN ALLOW HIM TO CONTACT MITIGATION WITNESS AND MARK WEAR WARE WAS NOT INEFFICIENT TUFF IN DEFICIENT IN KNOWING WHAT TO DO.

HE NEW FAMILY BACKGROUND WAS IMPORTANT AND NEW A MENTAL HEALTH EVALUATION WAS IMPORTANT, PEARCE SIMPLY WOULD NOT COOPERATE AND ONLY AUTHORIZED HIM TO TALK TO ONE INDIVIDUAL, JUSTICE PARIENTE, IN RESPONSE TO YOUR QUESTION, THERE WAS NO PRIOR PSYCHOLOGICAL HISTORY ON MR. PEARCE, HE HAD NEVER BEEN TREATED FOR PSYCHOLOGICAL ILLNESS AND E THE HRS RECORDS REFERRED TO HIM BEING A DELINQUENT FATHER AND PROVIDING NO EMOTIONAL SUPPORT FOR HIS CHILDREN AND BASICALLY, BEING A CRIMINAL.

ESSENTIALLY, AND THAT IS WHY COUNSELING WAS RECOMMENDED, NOT THAT HE WAS ABUSED AS A CHILD AND IF THERE WAS ANY EVIDENCE OF ABUSE BELOW, IT WAS HE GOT ONE OR TWO, ACCORDING TO HIS BROTHER, ONE OR TWO PREEMPTIVE BEATINGS AND THE MOM DENIED THERE WAS ANY ABUSE WHATSOEVER IN THE HOME.

>> BEATINGS, YOU MEAN SPANKINGS WITH A BELT.

>> YES, ONLY WHEN THEY MISS BEHAVED AND THAT WAS ACCORDING TO PEARCE'S BROTHER AND THE MOM DENIED THERE WAS ANY KIND OF ABUSE AND MAINLY THEY LOST PRIVILEGES OR WERE PLACED ON

RESTRICTIONS.

>> LET'S GO BACK TO THE FACE OF THE ORDER ITSELF BECAUSE THE ORDER ITSELF IS REALLY QUITE, QUITE SPARSE.

TO PUT IT LIGHTLY.

THERE IS NO EVALUATION REALLY IN DETAIL OF EVIDENCE, ON EITHER ONE OF THOSE ISSUES.

BUT, ASSUMING THAT, DOES THAT MAKE THAT ORDER DEFECTIVE IF WE LOOK AT THE RECORD AND ALTHOUGH THEY ARE DISPUTED, WE ARE NOT SAYING IT IS NOT DISPUTED, MR. BROWN BUT THERE IS EVIDENCE THAT IS NOT FAVORABLE TO THE STATE.

>> THAT'S CORRECT.

>> AND WHAT EFFECT, WHAT DO WE DO WITH AN ORDER SUCH AS THAT?

>> I THINK THIS COURT HAS TO -- DENOVO REVIEW UNDER STRICKLAND AND I THINK THE ORDER IS ENTITLED, IF ANY -- TO ANY DEFERENCE AND AGAIN THERE IS NO CREDIBILITY DETERMINATION, MR. KYLIE SEES IT I READ THE ORDER A NUMBER OF TIMES AND I DON'T SEE IT IN THE ORDER.

>> NO.

NO.

NO.

IT'S NOT IN THE ORDER ITSELF, THAT IS WHAT I PREFACED THE WHOLE DISCUSSION ABOUT, MORE WOULD YOU STAND BEFORE US AS AN OFFICER OF THE COURT AND SAY THERE IS NO EVIDENCE.

IT MAY NOT BE THE CREDIBLE EVIDENCE BUT THERE IS EVIDENCE.

>> NO, I CANNOT TELL YOU THERE IS NO EVIDENCE.

>> RIGHT.

>> IF YOU TAKE PEARCE'S TESTIMONY AT FACE VALUE AND IGNORE HIS STATEMENTS DURING THE

--

>> I'M OUT OF TIME.

>> ONE BRIEF POINT.

JUSTICE BELL, THE ALLEGEDLY COLLATERAL CRIME WHICH WASN'T WAS MENTIONED EXACTLY AS YOU NOTED, ONE TIME IN OPENING, ONE TIME IN CLOSING, AND IN CLOSING,

IT WAS MENTIONED ONLY TO REBUT  
THE DEFENSE CONTENTIOUS, AGAIN,  
MADE IN OPENING ARGUMENTS, THAT  
THESE TWO BOYS VOLUNTARILY  
ENTERED THE CAR.

AND CERTAINLY, IT WAS RELEVANT  
TO THE FACT THAT HE WOULDN'T  
VOLUNTARILY GET INTO A CAR CAR

--

>> LET ME ASK YOU, YOU SAID  
MR. KYLIE PREPARED THE ORDER.

>> YES, HE DID, YOUR HONOR.

>> AND DID YOU SUBMIT YOUR OWN  
PROPOSED ORDER?

>>.

NO.

NO.

I WAS NOT ASKED TO, YOUR HONOR  
BE I DID MAKE OBJECTIONS TO THE  
ORDER.

>> I KNOW WE'RE OVER TIME BUT I  
DON'T WANT IF WE WANT TO EXPLORE  
THAT QUESTION.

>> STATE HAS NOTHING FURTHER WE  
ASK THAT YOU REVERSE THE  
DECISION OF THE POSTCONVICTION  
FOR --

>> THANK YOU VERY MUCH, THE  
COURT WILL TAKE THIS CASE  
UNLEADED ADVISEMENT.