WE WILL MOVE TO THE SECOND AND FINAL CASE ON TODAY'S DOCKET. WHICH IS JORDAN VERSUS THE STATE OF FLORIDA.
>> GOOD MORNING CHIEF JUSTICE THAT THEY PLEASE THE COURT. MY NAME IS ADRIENNE SHEPHERD AND ME AND MY COCOUNSEL REPRESENT JOSEPH JORDAN IN THIS CASE.
THE INITIAL 3.851 MOTION, ON THE PETITION FOR HIDEOUS CORPUS, EACH CRIMINAL DEFENDANT, IS REGARDLESS OF THE EVIDENCE AGAINST HIM IN THE ALLEGED CRIME.
THIS IS A NEW GUILT PHASE BECAUSE HE DID NOT RECEIVE A FAIR TRIAL IN THIS CASE DUE TO MULTIPLE INSTANCES OF PROSECUTORIAL MISCONDUCT MORE SPECIFICALLY FIVE IMPROPER COMMENTS THE PROSECUTOR MADE.
THE PROSECUTOR USED HIS GUILT PHASE TO INGEST AN ELEMENT OF FEAR AND EMOTION.
>> THE COMPOSITION THAT DEFENSE COUNSEL WAS SPEAKING TO MISTER JORDAN BUT I DON'T THINK IT QUALIFIES AS AN INVITING COMMENT, MISTER JORDAN WASN'T SORRY FURTHER EVEN IF YOU COULD PERHAPS SAY THIS INVITED COMMENT OF DEFENSE COUNSEL HAD GOTTEN UP AND SAID MISTER JORDAN ABSOLUTELY IS SORRY, WE ARE STILL IN THE GUILT PHASE AND MISTER JORDAN AFLAC OF REMORSE HAD NOTHING TO DO WITH THE ISSUE OF HIS GUILT AND THE PROSECUTOR'S ROLE TO HELP THE JURY UNDERSTAND THE RELEVANT EVIDENCE AT TRIAL AND APPLICABLE LAW IN HOW TO DETERMINE IF HE WAS GUILTY OF FIRST-DEGREE FELONY MURDER.
>> YOU DO ACKNOWLEDGE IF COUNSEL GOT UP THERE AND SAID MY CLIENT IS SO SORRY FOR THIS, IF HE TRIED TO PLAY ON

SYMPATHIES THAT WOULD OPEN THE
DOOR FOR THE PROSECUTOR TO
POINT OUT EXACTLY WHAT HE DID
YOU HAVE 5 LETTERS BEFORE YOU
FROM THIS DEFENDANT AND NOT
ONCE DOES HE SAY I AM SORRY.
THAT WOULD BE COMPLETELY
PERMISSIBLE.
>> THE DEFENSE COUNSEL SAID
MISTER JORDAN IS SORRY.
>> DIDN'T DEFENSE COUNSEL
RECOGNIZE THE EVIDENTIARY
HEARING?
I READ HIS TESTIMONY AS SAYING
DIDN'T OBJECT TO THAT BECAUSE I
REALIZE THAT OPEN THE DOOR FOR
THAT.
>> THAT WAS TRIAL COUNSEL'S
TESTIMONY AND THAT LENDS TO HOW
DEFICIENT HE WAS.
HE THOUGHT HE SAID MISTER
JORDAN DID HAVE REMORSE, HE
DIDN'T SAY THAT, COULDN'T
REMEMBER WHAT HIS ARGUMENT WAS.
>> TO TAKE THEIR EYES OFF THE
REAL ISSUES.
KNOWING IT IS ATTRIBUTED TO THE
PERSON HE REPRESENTED.
>> AND WOULDN'T OPEN THE DOOR.
>> I DON'T THINK THAT IS WHAT
DEFENSE COUNSEL IS TRYING TO
DO.
AND THERE IS JUST ONE IMPROPER
COMMENT, AND EVEN IF THIS COURT
-- IT IS MY POSITION THAT IT
WASN'T, IT IS NOT RELEVANT TO
MISTER JORDAN'S GUILT?
CUMULATIVELY AND INDIVIDUALLY
LOOKING AT FOUR THE COMMENTS
THEY PREJUDICE MISTER JORDAN TO
THE EXTENT HE DOES NOT RECEIVE
A FAIR TRIAL AND THESE ARE
PROSECUTORIAL MISCONDUCT, AND
FAILURE TO OBJECT THESE
COMMENTS.
AND ARGUE PROSECUTORIAL
MISCONDUCT --
>> IT IS IN EFFECT AS A
COUNTERCLAIM UNDER STRICKLAND
AND MOVING ON TO THE SECOND AND

PROPER COMMENT THE PROSECUTOR
MADE HE WENT ON TO THE FIRST OF
HIS TWO GOLDEN RULE ARGUMENTS
WERE NOT RAISED ON DIRECT
APPEAL, THE FIRST TIME THIS
COURT IS CONSIDERING THESE.
HIS FIRST GOLDEN WILL ARGUMENT
THE PROSECUTOR GRAPHICALLY
DESCRIBES THE FEAR AND
HOPELESSNESS AND HE EVEN USED
THE WORD IMAGINED DURING THE
INCIDENT.
CLOSING ARGUMENT IS NOT MEANT
TO BE AN EXERCISE IN
SPECULATION IN THE PROSECUTOR
-- I WOULD IMAGINE HE THOUGHT
THIS, AND MISTER KEITH COPE
THOUGHT THAT.
THIS CAN NOT REASONABLY
INFERRED FROM THE OTHER
VETERANS AND WAS NOT RELEVANT
TO MISTER JORDAN'S SKILL AND
THE PROSECUTOR IS NOT TO MAKE
THE GOLDEN RULE ARGUMENT WHERE
HE ASKED THE JURORS TO PLACE
THEMSELVES IN POSITION OF A
VICTIM AND IMAGINE THE VICTIMS
POTENTIAL DEFENSE BUSINESS AND
HOPELESSNESS, THE PROSECUTOR
DID THAT DURING YOUR COMMENT,
SO MOVING ON DURING HIS
REBUTTAL CLOSING ARGUMENTS THE
PROSECUTOR CONTINUED BY
RIDICULING THE THEORY THAT
MISTER JORDAN SNAPPED DURING
THE ROBBERY AND MAY HAVE BEEN
IN A STATE OF SEVERE EMOTIONAL
DISTRESS.
TRIAL COUNSEL OBJECTING TO THIS
COMMENT.
A FEW MINUTES LATER THE SECOND
GOLDEN RULE ARGUMENT THE
PROSECUTOR ONCE AGAIN ASKED
JURORS TO PLACE THEMSELVES IN
KEITH COPE'S POSITION AND IF
YOU COULD DO THAT IN AMERICA WE
WOULD ALL BE IN TROUBLE BECAUSE
THE MORTGAGE COMPANIES WOULD
HAVE US TIED TO THE BED.
WHAT THE PROSECUTOR WAS TELLING

THE JURY WAS TWO THINGS.
ONE IS A PROPER ARGUMENT AND
THE OTHER IS WHERE IT IS
IMPROPER.
HE IS SAYING KEITH COPE OWED
MISTER JORDAN MONEY AND HE TOOK
IT BY FORCE BUT THIS IS WHERE
THE PROSECUTOR IS IMPROPER.
HE IS SAYING IMAGINE HOW YOU
WOULD FEEL IF YOUR CREDITORS
COLLECTED YOUR DEBTS FROM YOU
IN THE SAME WAY.
THIS IS CLEARLY AN IMPROPER
GOLDEN RULE ARGUMENT.
HE IS ASKING JURORS TO PLACE
THEMSELVES IN THE POSITION OF
KEITH COPE.
IMAGINE IF THIS HAPPENS TO YOU,
THIS IS COMPLETELY INFLAMMATORY
AND IT SPURRED THE ANCHORS AND
COULD HAVE MADE THE JURORS VERY
ANGRY IN THE FIFTH AND PROPER
COMMENT, TRIAL COUNSEL
OBJECTING TO THESE COMMENTS,
THE PROSECUTOR CONCLUDED BY
STATING DON'T LET HIM GET AWAY
WITH THIS.
WHAT THE PROSECUTOR WAS DOING
IN THE CONTEXT OF THAT COMMENT
WAS TELLING THE JURORS YOU
CAN'T FIND MISTER JORDAN GUILTY
OF THE LESSER INCLUDED
OFFENSES.
YOU HAVE TO FIND HIM GUILTY OF
THE HIGHEST OFFENSE HE IS
CHARGED WITH AND THE ONLY
OFFENSE FOR WHICH CAPITAL
PUNISHMENT IS POSSIBLE AND
ESSENTIALLY WHEN YOU LOOK AT
THE COMBINATION OF ALL THESE
ARGUMENTS AND WHAT THE
PROSECUTOR TOLD THE JURY BOILS
DOWN TO THIS, FIND MISTER
JORDAN GUILTY BECAUSE YOU ARE
ANGRY AND THAT IS NOT A PROPER
ARGUMENT.
CLOSING ARGUMENT MUST NOT
INFLAME EMOTIONS AND PASSIONS
OF THE JURORS TO THE EXTENT
THEY ARE GUILTY, REFLECTS AN

EMOTIONAL RESPONSE TO THE CRIME
AND DEFENDANT AS OPPOSED TO
RATIONAL APPLICATION OF THE
APPLICABLE LAW.
MISTER JORDAN'S GUILTY VERDICT
REFLECT AN EMOTIONAL RESPONSE
TO THE PROSECUTOR CONSISTENTLY
FOCUSING ON THE TRAGIC
CIRCUMSTANCES OF KEITH COPE'S
PASSING DURING CLOSING ARGUMENT
WHEN HE SHOULD HAVE FOCUSED ON
THE EVIDENCE IS RELEVANT, IT
WAS INSTRUCTED ON FIRST-DEGREE
FELONY MURDER.
>> HOW DO YOU OVERCOME THE
STRICKLAND PREJUDICE ONE?
>> YOUR HONOR, I WOULD SAY
NUMBER ONE THERE'S A REASONABLE
PROBABILITY THAT IF TRIAL
COUNSEL HAD OBJECTED TO THESE
COMMENTS AND ALL OF THEM THE
TRIAL COURT WOULD HAVE GRANTED
A MISTRIAL AND MISTER JORDAN
COULD HAVE SEEN A FAIR TRIAL IN
FRONT OF A JURY THAT DID NOT
HEAR THESE COMMENTS AND NOT
THINKING ABOUT THESE COMMENTS
WHEN DECIDING ISSUE OF HIS
GUILT.
ALTERNATIVELY IF THE JURY HAD
NOT HEARD THESE IMPROPER
COMMENTS OR BEEN GIVEN CURATIVE
INSTRUCTION NOT TO CONSIDER
THEM, THEY COULD HAVE FOUND THE
EVIDENCE AND FOUND MISTER
JORDAN GUILTY OF ONE OF THE
FELONY MURDER, THE LESSER
INCLUDED CHARGES THEY WERE
INSTRUCTED ON.
TRIAL COUNSEL OFFERED A
REASONABLE TACTICAL DECISION
FOR WHY HE FAILED TO OBJECT TO
THESE COMMENTS.
HE TESTIFIED HIS DEFENSE THEORY
IS ONE OF TWO THINGS, NOT
NECESSARILY TO GET MISTER
JORDAN ACQUITTED OUTRIGHT AND
HAVE THE JURY FOUND HIM GUILTY
OF ONE OF THE LESSER INCLUDED
OR THE ALTERNATIVE TO PREPARE

FOR WHAT HE VIEWED AS A LIKELY
PENALTY PHASE.
TRIAL COUNSEL SHOULD HAVE
RECOGNIZED PREJUDICIAL AND
INFLAMMATORY EFFECT THESE
COMMENTS WERE HAVING ON THE
JURY AND WHAT THESE COMMENTS
DID, ESSENTIALLY MADE THE JURY
FIND MISTER JORDAN GUILTY, THE
ONLY OFFENSE THAT CAME WITH THE
DEATH PENALTY AND IF ANYTHING
TRIAL COUNSEL IS GOING AGAINST
HIS DEFENSE THEORY BY NOT
ATTEMPTING TO EXCLUDE THESE--
I WILL SAVE THE REMAINDER OF MY
TIME FOR REBUTTAL.
>> GOOD MORNING, AND MAY IT
PLEASE THE COURT, MY NAME'S
PATRICK BOBEK, AND I REPRESENT
THE STATE IN THESE CASES.
FIRST CLAIM ON APPEAL IS AN
ATTEMPT TO REBRAND A DIRECT
APPEAL ISSUE AND THE INEFFECTIVE
ASSISTANCE.
AND, IN FACT, THIS EXACT CLAIM
WAS MADE ON DIRECT APPEAL.
THREE OF THE FIVE COMMENTS WERE
ANALYZED BY THIS COURT, THE
OTHER TWO WERE VERY SIMILAR IN
THAT THEY TALKED ABOUT KEITH
COPE'S FINAL HOURS.
SO THIS HAS ALREADY BEEN DECIDED
BY THIS COURT.
THE ONLY COMMENT THIS COURT
FOUND TO BE IMPROPER WAS THE
COMMENT, "DON'T LET HIM GET AWAY
WITH THIS."
EVERY OTHER COMMENT WAS FOUND TO
BE MERITLESS.
AND THEN THIS COURT ANALYZED THE
FUNDAMENTAL ERROR BECAUSE IT WAS
NOT OBJECTED TO AND FOUND THAT
THERE WAS NO FUNDAMENTAL ERROR
FROM THIS COMMENT.
WHICH LEADS ME TO MY SECOND
POINT.
THIS COURT HAS FOUND IN CHANDLER
V. STATE, A 2003 CASE, THAT ONCE
A CLAIM HAS BEEN DISPENSED WITH
IN DIRECT APPEAL UNDER

FUNDAMENTAL ERROR, YOU CAN THEN
NOT PROCEED WITH INEFFECTIVE
ASSISTANCE CLAIM ON
POST-CONVICTION, WHICH IS WHERE
WE'RE AT NOW.
BUT IF THIS COURT DOES DECIDE TO
GET TO EACH OF THE FIVE
COMMENTS, I'D ALSO ARGUE EACH OF
THEM ARE IMPERMISSIBLE, ALTHOUGH
I WILL CONCEDE SINCE THIS
COURT--
>> LET ME ASK YOU ABOUT ONE
ISSUE THAT WAS ADDRESSED ON
DIRECT APPEAL.
>> YES.
>> THE PROSECUTOR SAID, "I TOLD
YOU IT WAS COMING AND THERE WE
HEARD IT, IT'S EVERYBODY'S FAULT
BUT THE DEFENDANT'S."
"IF HE HAD STAYED IN THE MIDDLE
OF THE BED, HE WOULD STILL BE
ALIVE, COME ON."
"EVERYBODY'S FAULT BUT HIS."
"I MEAN, HE SNAPPED, IS THAT AN
OFFENSE?"
"HE SNAPPED?"
DID WE DETERMINE THAT THAT WAS
NOT DENIGRATING TOWARD THE
THEORY OF THE DEFENSE?
>> THAT'S CORRECT.
THAT'S ONE OF THE COMMENTS THAT
WAS ANALYZED BY THIS COURT AND
ONE OF THE COMMENTS THAT THE
COURT FOUND WAS MERITLESS ON
DIRECT APPEAL.
>> DID WE SAY IT WASN'T
DENIGRATING, OR DID WE JUST SAY
THAT THERE WAS NO--
>> THE COURT ADDRESSED ALL EIGHT
TOGETHER, SAID THERE WERE EIGHT
OTHER PROSECUTORIAL PRODUCTS
ADDRESSED BY THE DEFENDANT, AND
ALL OF THEM ARE MERITLESS.
SO THE ONLY COMMENT THAT WAS
ADDRESSED AT ALL WAS THE "DON'T
LET HIM GET AWAY WITH THIS."
AND THE COURT DIDN'T ANALYZE THE
OTHER EIGHT.
>> BUT MERITLESS IN THE CONTEXT
OF FUNDAMENTAL ERROR.

>> NO, IN THAT THERE WAS NO ERROR.
THE ONLY COMMENT THAT THE COURT FOUND ERROR WITH WAS DON'T LET THEM GET AWAY WITH THIS.
THEY SAID ALL THE CLAIMS ON THE OTHER COMMENTS WERE MERITLESS.
THAT'S WHY THERE WAS DISCUSSION ON FUNDAMENTAL ERROR ANALYSIS ON JUST THAT COMMENT.
BUT MY ARGUMENT WOULD BE THAT THERE'S NO DEFICIENT PERFORMANCE BECAUSE THESE COMMENTS WEREN'T OBJECTIONABLE.
AND IF THEY WERE, THE TRIAL COURT BELOW FOUND THAT THE TRIAL COUNSEL'S STRATEGY WAS A SOUND ONE.
THIS WAS A CASE OF OVERWHELMING EVIDENCE OF GUILT.
THE GUILTY VERDICT WAS A FOREGONE CONCLUSION.
THEY EVEN CANDIDLY SAID THEIR ONLY HOPE WAS THE JURY WOULD IGNORE THE FELONY MURDER RULE TO AVOID A FIRST-DEGREE MURDER CONVICTION.
SO HE KNEW THAT HE WAS PREPARING FOR AN INEVITABLE PENALTY PHASE AND THAT CREDIBILITY OF THE JURY WAS VERY IMPORTANT.
SO HE SAYS THAT IN THOSE KINDS OF CASES, WHICH THIS WAS ONE, THAT HE HAS A STRATEGY OF NOT OBJECTING UNLESS THE PROSECUTOR GOES WAY OVER THE LINE, WHICH DIDN'T HAPPEN HERE.
AND EVEN IF THIS COURT FINDS ALL FIVE OF THESE WERE OBJECTIONABLE AND SHOULD HAVE BEEN OBJECTED TO, I THINK-- AS WAS POINTED OUT BEFORE-- THAT YOU CAN'T FIND PREJUDICE.
AND, AGAIN, THAT'S BECAUSE OF THE OVERWHELMING EVIDENCE OF GUILT.
HE CONFESSED THE CRIME TO HIS FRIENDS IN HOLLYWOOD, TO TWO DIFFERENT PEOPLE HE STAYED WITH.
AFTER HE CAME BACK, HE CONFESSED

IT IN A LETTER TO THE VICTIM'S
EX-WIFE.
HE CONFESSED IT IN A RECORDED
INTERVIEW WITH THE POLICE
DETECTIVE.
HIS FINGERPRINTS WERE AT THE
SCENE.
IT SIMPLY WAS ALWAYS GOING TO
END IN A GUILTY VERDICT.
SO SINCE THERE'S NO DEFICIENCY
AND PREJUDICE, THIS CLAIM SHOULD
BE DENIED.
IF THERE ARE NO OTHER QUESTIONS,
I ASK THAT YOU DENY HABEAS--
>> CAN I JUST GO BACK TO THE
POINT THAT JUSTICE LAWSON AND I
ASKED YOU ABOUT?
>> YES.
>> THIS IS PAGE 929, 930 OF THE
OPINION.
QUOTE: FINALLY, JORDAN RAISES
EIGHT CLAIMS.
ONE OF THE ONES YOU'RE
DISCUSSING.
>> YES.
>> "WE FIND THOSE CLAIMS
MERITLESS AND UNPRESERVED FOR
APPELLATE REVIEW."
"NONE OF THE COMMENTS CONSTITUTE
FUNDAMENTAL ERROR."
"ACCORDINGLY, WE DENY REVIEW FOR
THESE CLAIMS."
YOU'RE SAYING THAT STATEMENT IS
A STATEMENT OF US ON THE MERITS?
>> NO.
I AGREE WITH YOUR READING THERE,
JUDGE.
>> OKAY.
>> BUT AGAIN, IN THAT CONTEXT
CHANDLER V. STATE WOULD INSTRUCT
YOU THAT BECAUSE THEY WEREN'T
FUNDAMENTAL ERROR ON DIRECT
REVIEW, THEY'RE NOT INEFFECTIVE
ASSISTANCE ON POST-CONVICTION
REVIEW.
>> BACK TO THE ONE THAT I WAS
ASKING YOU ABOUT, WHY WOULDN'T
THAT BE DENIGRATING?
DO YOU THINK THAT'S NOT
DENIGRATING?

>> I THINK HE GETS CLOSE TO THE LINE, BUT I THINK IT'S A FAIR COMMENT ON THE DEFENSE.
I MEAN, THE DEFENSE THROUGHOUT WAS TRYING TO REDUCE HIS CULPABILITY BY SAYING IF THINGS HAD BEEN DIFFERENT, KEITH COPE WOULD BE ALIVE.
>> WELL, THE DEFENSE USUALLY DOES THAT.
IT'S NOT UNCOMMON.
>> WHAT?
>> THAT'S NOT UNCOMMON.
>> YEAH.
[LAUGHTER]
I MEAN, IN-- YEAH.
WAS HIS LANGUAGE HARSHER THAN ABSOLUTELY NECESSARY?
YES.
I DON'T THINK IT RISES TO THE LEVEL OF DENIGRATING THE DEFENSE.
IF THERE ARE NO FURTHER COMMENT-- QUESTIONS, I YIELD MY TIME.
>> I'D LIKE TO ADDRESS THE POINT ABOUT THE FACT THAT WE ARE REBRANDING THE DIRECT APPEAL ISSUES AS A POST-CONVICTION ISSUE.
FIRST OF ALL, I AGREE WITH THE STATEMENT THAT ONCE THE COURT HAS FOUND THAT SOMETHING IS NOT FUNDAMENTAL ERROR, THAT YOU TYPICALLY CAN'T PROVE PREJUDICE UNDER STRICKLAND.
HOWEVER, TO YOUR POINT, JUSTICE LUCK, THIS COURT DID NOT CONSIDER THE CUMULATIVE EFFECT OF THE CURRENT FIVE ARGUMENTS WE ARE--
>> THREE OF THEM WE DID, DIDN'T WE?
>> YES, YOUR HONOR.
>> SO IT'S JUST THE TWO.
>> YOUR HONOR, I WOULD STILL ARGUE WHEN WE'RE LOOKING AT THE CUMULATIVE EFFECT, WHEN YOU ADD THE ARGUMENTS, IT CHANGES THE STORY THAT THE PROSECUTOR IS

PAINTING.
AND I WOULD ALSO GO BACK TO JUSTICE LUCK'S POINT THAT THIS COURT DID NOT CONSIDER THE MERITS.
IT WAS A BLANKET STATEMENT THAT WE FIND THEM MERITLESS.
SO I DON'T THINK THAT EVEN WITH THE CHANDLER DECISION AND THAT GENERAL PROPOSITION, I DON'T THINK THAT THE THREE COMMENTS THAT WERE SOMEWHAT DECIDED ON DIRECT APPEAL ARE BARRED IN THIS CONTEXT.
FURTHER, THOSE COMMENTS ON DIRECT APPEAL WERE ALL CONSIDERED UNDER THE VERY HIGH FUNDAMENTAL ERROR STANDARD, AND THAT'S BECAUSE TRIAL COUNSEL WAS DEFICIENT AND FAILED TO OBJECT.
>> BUT YOU JUST CONCEDED THAT IF WE DIDN'T FIND FUNDAMENTAL ERROR, WE CAN'T FIND PREJUDICE UNDER STRICKLAND.
>> I THINK IF WE WERE-- YOUR HONOR, I WOULD AGREE WITH THAT IF WE WERE ATTEMPTING TO RAISE ALL OF THE EXACT SAME IMPROPER ARGUMENTS THAT WERE DECIDED ON DIRECT APPEAL--
>> YOU'RE JUST RAISING MOST OF THEM.
>> WE'RE RAISING, OF OUR FIVE, THREE OF THEM--
>> SO THE QUESTION WOULD BE WHETHER THE ADDITION OF THE ONE COMMENT ABOUT CREDITORS IN AMERICA AND DEBTORS IN AMERICA WOULD TAKE IT OVER THE EDGE AND MAKE IT SO THAT IT WOULD UNDERMINE OUR CONFIDENCE IN THE OUTCOME?
>> YES, YOUR HONOR.
I DO THINK THAT THE ADDITION OF THE-- IT'S ACTUALLY TWO GOLDEN RULE ARGUMENTS TO THOSE THREE PREVIOUS ONES-- WOULD PUSH IT OVER THE EDGE.
AND I THINK THAT THE CUMULATIVE EFFECT OF THE FIVE COMMENTS THAT

WE'RE CURRENTLY CONTESTING
INCLUDING THOSE TWO NEW
COMMENTS, LIKE I SAID, SHIFTS
THE STORY.
AND, YES, I THINK IT AMOUNTS NOT
ONLY TO FUNDAMENTAL ERROR, WHICH
IS NOT THE STANDARD WE'RE
REQUIRED TO MEET IN THIS
CONTEXT, BUT THERE IS A
REASONABLE PROBABILITY THAT THE
CUMULATIVE EFFECT OF THESE FIVE
IMPROPER COMMENTS AFFECTED THE
VERDICT.
AND IF TRIAL COUNSEL HAD BEEN
ADEQUATE AND OBJECTED,
CONTEMPORANEOUSLY OBJECTED WHEN
THESE COMMENTS WERE MADE, THEN
THIS COURT WOULD HAVE BEEN
DECIDING ALL OF THOSE IMPROPER
COMMENTS UNDER DIRECT APPEAL
UNDER THE HARMLESS ERROR
STANDARD WHICH IS SIMILAR TO
WHAT WE HAVE TO PROVE AT THIS
POINT, THAT THERE WAS NO
REASONABLE PROBABILITY THAT THE
COMMENTS AFFECTED THE VERDICT.
HOWEVER, THIS COURT WAS REQUIRED
TO CONSIDER IT UNDER THE
FUNDAMENTAL ERROR STANDARD.
AND THAT'S DUE TO TRIAL
COUNSEL'S DEFICIENCY.
SO THERE'S CLEAR, CLEAR
DEFICIENCY HERE ON-- AS TO THAT
POINT.
TO JUSTICE LUCK'S QUESTION ABOUT
WHETHER OR NOT THIS COURT
EXPLICITLY OR-- I MAY BE
ATTRIBUTING THAT QUESTION TO--
>> WE BOTH ASKED IT.
>> I'M SORRY?
>> WE BOTH ASKED IT.
>> OKAY.
THERE WAS A QUESTION ABOUT
WHETHER OR NOT THIS COURT
EXPLICITLY, AS FAR AS THAT
COMMENT ON DENIGRATING THE
DEFENSE, SAID THAT WAS ACTUALLY
DENIGRATING THE DEFENSE.
THIS COURT DIDN'T EXPLICITLY
MAKE A FINDING ON THAT COMMENT.

ONCE AGAIN, IT WAS A BLANKET STATEMENT.
THIS COURT EXCLUSIVELY CONSIDERED TWO COMMENTS, ONE THAT WAS THE TRIAL COURT FOUND WAS NOT ERROR, AND IT CONSIDERED THE "DON'T LET HIM GET AWAY WITH THIS" STATEMENT WHICH THIS COURT DID FIND WAS IMPROPER.
SO IT'S CLEAR THAT TRIAL COUNSEL WAS DEFICIENT FOR FAILING TO OBJECT TO WHAT THIS COURT HAS FOUND TO BE AN IMPROPER COMMENT.
AS FOR DENIGRATING THE DEFENSE, THIS COURT DID NOT MAKE AN EXPLICIT FINDING WHETHER OR NOT THAT'S WHAT IT WAS, BUT IT'S OUR POSITION THAT--
>> I MEAN, I DON'T KNOW THAT YOU CAN ASSUME THAT JUST BECAUSE THE COMMENT WAS IMPROPER THAT IT WAS INEFFECTIVE ASSISTANCE NOT TO OBJECT IN CONTEXT.
PARTICULARLY THAT ONE, BECAUSE IT WAS SANDWICHED UNDER A LONG, CORRECT EXPLANATION OF THE LAW THAT THEY'VE, THAT YOU WILL HAVE AN OPPORTUNITY, JURY, TO INCLUDE ALL THESE LESSER-INCLUDED OFFENSES.
BUT THE EVIDENCE, I WOULD SUBMIT, IS OVERWHELMING THAT THIS CHARGE HAS BEEN PROVEN BEYOND A REASONABLE DOUBT, AND THE LAW REQUIRES YOU TO GIVE A VERDICT FOR THE HIGHEST OFFENSE THAT'S BEEN PROVEN BEYOND A REASONABLE DOUBT.
AND THEN HE SAID IT THIS WAY, "DON'T LET HIM GET AWAY WITH IT," MEANING, IF YOU LOOK AT IT IN CONTEXT, DON'T-- FOLLOW THE LAW, ESSENTIALLY.
AND SO YOU WONDER IF THE OBJECTION TO THAT ONE LITTLE PHRASE IN THE CONTEXT OF AN OVERALL, WOULDN'T IT HAVE BROUGHT MORE ATTENTION TO IT?
I MEAN--
>> I, YOUR HONOR, I AGREE WITH

THE STATEMENT THAT JUST BECAUSE
THIS COURT FINDS A COMMENT
IMPROPER THAT DOESN'T
NECESSARILY MEAN IT WAS
DEFICIENT TO OBJECT TO IT.
I THINK WHEN WE'RE LOOKING AT
THE CUMULATIVE EFFECT-- AND IT
IS SANDWICHED INSIDE A LONG KIND
OF SOLILOQUY ABOUT OTHER THINGS,
BUT IT IS THE FINAL OF THOSE
FIFTH IMPROPER COMMENTS.
IT IS THE LAST ONE, SO--
>> LET ME ASK, DID COUNSEL OFFER
A STRATEGIC REASON FOR NOT
OBJECTING THERE THAT THE TRIAL
COURT CREDITED AS MAKING IT
NONDEFICIENT FOR FAILING TO
OBJECT?
>> YES, YOUR HONOR.
TRIAL COUNSEL TESTIFIED AT THE
EVIDENTIARY HEARING THAT HIS
STRATEGIC REASON OVERALL FOR NOT
OBJECTING WAS TO MAINTAIN
CREDIBILITY WITH THE JURY FOR
THE LIKELY PENALTY PHASE.
AND HE FURTHER-- HE DIDN'T, I
GUESS, WANT TO DRAW ATTENTION?
YOUR HONOR--
>> AND THE TRIAL COURT CREDITED
THAT.
>> YES, YOUR HONOR.
>> RIGHT.
>> THEY FOUND IT WAS A
REASONABLE TRIAL STRATEGY.
I THINK THAT COULD BE A
REASONABLE TRIAL STRATEGY
GENERALLY.
I THINK WHEN YOU GET TO THE
POINT WHERE YOU HAVE THIS AMOUNT
OF IMPROPER COMMENTS AND THE
FACT THAT, AS OPPOSING COUNSEL
SAID, THERE IS SIGNIFICANT
EVIDENCE AGAINST MR. JORDAN AND
TRIAL COUNSEL IS PREPARING FOR A
LIKELY PENALTY --
>> BUT THIS IS NOT A CASE WHERE
THE TRIAL COURT SAT ON THEIR
HANDS.
WE'VE HAD CASES WHERE THERE WAS
NO OBJECTION AT ALL, AND IT

COULD MORE CREDIBLY BE STATED
THAT COUNSEL WAS ASLEEP AT THE
WHEEL.
THIS IS NOT ONE OF THOSE CASES.
>> I WOULD SAY HE WAS NEARLY
ASLEEP AT THE WHEEL.
THE ONE THAT HE OBJECTED TO WAS
CERTAINLY IMPROPER.
HE MISSED THE FIVE OTHER ONES,
AND HE FAILED TO, YOU KNOW-- IF
HE WAS TRYING TO PREPARE FOR
WHAT HE VIEWED AS A LIKELY
PENALTY PHASE, HE SHOULD HAVE
RECOGNIZED THAT WHEN YOU'RE
ASKING THE JURY TO IMAGINE WHAT
IT FEELS LIKE TO BE TIED UP AND
LEFT, THAT THAT'S GOING TO MAKE
THEM ANGRY, AND THAT'S GOING TO
MAKE THEM THINK, YOU KNOW, THIS
GUY HAS BEEN CHARGED--
>> MORE ACCURATELY, HE DID NOT
ASK THE JURY TO IMAGINE WHAT IT
FELT LIKE TO BE TIED UP AND
LEFT, DID HE?
HE USED THE WORD "IMAGINE" ONE
TIME, AS I RECALL, AND HE SAID
SOMETHING AND THEN SAID, "I
WOULD IMAGINE."
BUT HE WASN'T ASKING THE JURY TO
IMAGINE.
>> HE-- NOT IN THAT COMMENT.
>> RIGHT.
>> THERE WAS THE OTHER COMMENT
WITH THE MORTGAGE COMPANIES
WHERE HE'S NOT SAYING IMAGINE IF
YOU'RE, BUT THE IMPLICATION IS
CLEAR THERE.
I DON'T THINK THAT HE-- THE
PROSECUTOR'S REQUIRED TO
EXPLICITLY SAY, YOU KNOW, "FEEL
THIS" OR "IMAGINE THIS," BUT
IT'S CLEAR WHAT HE'S IMPLYING TO
THE JURY.
AND TO CONCLUDE, YOUR HONORS,
TRIAL COUNSEL WAS DEFICIENT FOR
FAILING TO OBJECT TO THE
PROSECUTOR'S FIVE IMPROPER
CLOSING ARGUMENTS.
AND THERE IS A REASONABLE
PROBABILITY THAT, HAD TRIAL

COUNSEL OBJECTED, ONE OF TWO
THINGS WOULD HAVE HAPPENED; THE
TRIAL COURT WOULD HAVE EITHER
GRANTED A MISTRIAL AND
MR. JORDAN COULD HAVE HAD A FAIR
TRIAL IN FRONT OF AN IMPARTIAL
JURY OR, IN THE ALTERNATIVE, THE
JURY WOULD NOT HAVE BEEN SO
ENFLAMED BY THESE IMPROPER
COMMENTS, AND THEY WOULD HAVE
BEEN ABLE TO RATIONALLY
UNDERSTAND THE EVIDENCE OR
RATIONALLY CONSIDER THE EVIDENCE
RAISING REASONABLE DOUBT AS TO
MR. JORDAN'S GUILT AND VERY
LIKELY COULD HAVE FOUND HIM
GUILTY OF ONE OF THE
LESSER-INCLUDED OFFENSES.
WE ARE REQUESTING THAT
MR. JORDAN BE GRANTED A NEW
GUILT PHASE SO THAT HE MAY
RECEIVE A FAIR TRIAL.
AND IF THERE ARE NO FURTHER
QUESTIONS?
>> ALL RIGHT.
YOUR TIME HAS NOW EXPIRED.
WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
COURT WILL NOW STAND IN RECESS.