# Bryan Frederick Jennings vs State of Florida

NEXT CASE ON THE COURT'S CALENDAR IS BRIAN FREDERICK JENNINGS VERSUS THE STATE OF FLORIDA. MR. McLAIN. -- MR. McCLAIN.

MAY IT PLEASE THE COURT. COUNSEL. FOR THE RECORD, MY NAME IS MARTIN -- IS MARTIN McCLAIN. I AM COUNSEL FOR MR. JENNINGS IN THIS CASE. I BELIEVE THAT THIS CASE IS VIRTUALLY OPEN-AND-SHUT THAT A RESENTENCING IS REQUIRED, AND I POINT TO THE STATE'S ANSWER BRIEF AS THE BEST EVIDENCE OF THAT FACT. THE STATE'S ANSWER BRIEF RESORTS TO MISREPRESENTATION OF THE LAW AND THE FACTS, IN ORDER TO AVOID DEALING WITH THE PREJUDICE OF THE CONSTITUTIONAL ERRORS THAT OCCURRED IN THIS CASE. A SPECIFIC EXAMPLE IS THE STATE'S ANSWER BRIEF SAYING, IN FOOTNOTE 15, THERE IS NO RULE OF LAW THAT REQUIRES THAT A CLAIM THAT HAS BEEN REJECTED AS A BASIS FOR RELIEF CAN SOMEHOW BECOME ERROR THAT MUST BE CUMULATIVELY EVALUATED. SUCH A THEORY HAS NO LEGAL BASIS. IN MY INITIAL BRIEF I RELIED ON LIGHTBOURNE V STATE, WHICH VERY CLEARLY SAYS A BRADY CLAIM THAT HAS BEEN PRIOR, PREVIOUSLY REJECTED, MAY HAVE TO BE REJECTED, WHERE THERE WAS NO PREVIOUS EVIDENCE THAT SHOWS THAT BRADY WAS VIOLATED, AND THIS COURT IN WADE MADE IT CLEAR THAT IS THE LAW. IT IS CLEAR, EVEN IF SOME OF THE ISSUES HAVE BEEN PRESENTED BEFORE AND THIS COURT DETERMINED THERE WASN'T A BRADY VIOLATION BECAUSE YOU COULDN'T SHOW SUFFICIENT PREJUDICE FROM THE ONE INCIDENT THAT YOU WERE PRESENTED. IN ADDITION, IN THE INITIAL BRIEF, I RELY ON JAMES. I RELY ON ANDREA JACKSON, HITCHCOCK, KRUP, BUSH, ET CETERA, ALL CASES INDICATING THAT IT IS PROPTORY RAISE A CHALLENGE TO THE JURY INSTRUCTION ON HEINOUS, ATROCIOUS AND CRUEL, AND CCP IN A SECOND 3.850, AFTER THOSE DECISIONS CAME OUT. I RELY ON THOSE CASES, AND NONE OF THOSE CASES ARE ADDRESSED IN THE STATE. AUDIENCE MEMBER: BRIEF, WHEN THE -- IN THE STATE'S ANSWER BRIEF, WHEN THE STATE SAYS THAT IT RELIES ON THOSE ISSUES. THOSE CASES CAME OUT IN 1993, AND I IMMEDIATELY FILED A MOTION FOR SUMRARY JUDGMENT, BECAUSE IT CLEAR THAT BAD JURY INSTRUCTIONS WERE GIVEN THIS THIS CASE AND COUNSOFFERED JURY INSTRUCTIONS AND OBJECTED TO THE JURY INSTRUCTIONS AND THE ISSUE WAS RAISED ON DIRECT APPEAL. IN CIRCUIT COURT, THE TRIAL LEVEL, THE STATE ATTORNEY'S OFFICE CONCEDED THIS ISSUE IS PROPERLY HERE, YET NOW WE ARE HAVING AN ARGUMENT, NO, IT WAS NOT PROPERLY THERE. THAT WAS WAIVED.

AS OPPOSED TO A CRITIQUE OF THE STATE'S RESPONSE TO YOUR BRIEF, HOW ABOUT COMING BACK TO YOUR ISSUES AND ADDRESS THE ONES THAT YOU INTEND TO ADDRESS HERE, AT THIS ORAL ARGUMENT AND DEMONSTRATE WHY THE TRIAL COURT WAS WRONG IN DENYING YOU RELIEF.

IN THE CCP JURY INSTRUCTION ISSUE, THE TRIAL COURT SAID THAT IT WAS NOT RAISE ODD DIRECT APPEAL TO THIS COURT, AND IN THE ANSWER BRIEF THAT WOULD FILED, THE CASE, IT HIS CASE NUMBER 68835, AND ISSUE 13 IN THE INITIAL BRIEF, POINT 13 CHARBLINGS ENGED THE FAILURE OF THE -- CHALLENGED THE FAILURE OF THE TRIAL COURT TO GIVE FOUR PROPER JURY INSTRUCTIONS, ONE OF THEM ON COLD, CALCULATED AND PREMEDITATED -- AND PREMEDITATED AND THE OTHER ON HEINOUS, AT ATROCIOUS AND CRUEL. THERE WAS NOT A SPECIFIC PASSAGE ADDRESSING THE OTHER THREE, BUT IT WAS AN ARGUMENT SAYING THAT THE FAILURE TO GIVE ALL FOUR WAS ERROR. THE STATE'S ANSWER BRIEF, IF YOU LOOK AT IT AT POINT 13, PAGE 38, ADDRESSES APPELLANT SUBMITTED FOUR WRITTEN INSTRUCTIONS AT THE PENALTY PHASE OF THIS TRIAL. THE TRIAL COURT DENIED ALL OF THE APPELLANT'S SPECIAL-REQUESTED

INSTRUCTIONS AND THEN THERE IS AN ARGUMENT BY THE STATE, BACK IN 1986, AS TO WHY EACH ONE OF THE INSTRUCTIONS WAS PROPERLY REJECTED.

WHY DID WE SEND THIS BACK TO THE TRIAL COURT? WASN'T IT FOR --

IT WAS FOR CHAPTER 119.

BRADY AND STRICKLAND CLAIMS?

IT WAS FOR CHAPTER 119 DISCLOSURES THAT, THE STATE HAD I AM APPROVAL ARGUED -- HAD IMPROPERLY ARGUED SHOULDN'T DISCLOSED.

SO IT WAS FOR A LIMITED PURPOSE.

CORRECT.

SO HOW ARE YOU GETTING INTO ALL OF THESE OTHER ISSUES?

BECAUSE IN THIS INSTANCE, THIS IS A SITUATION, UNDER JAMES, WHERE THE INSTRUCTION WAS OBJECTED TO ON HEINOUS ATROCIOUS AND CRUEL, COLD, CALCULATED AND PREMEDITATED, AND FROM THE DATE OF THE JAMES OPINION, I BELIEVE I ONLY HAD ONE YEAR TO PRESENT THE CLAIM. I PRESENTED THE CLAIM. THE STATE ATTORNEY'S OFFICE AGREED THAT THE CLAIM WAS PROPERLY PRESENTED AND PROPERLY PART OF THE 3.850. I MADE THE ARGUMENT THAT THIS ACTUALLY REQUIRES A RESENTENCING, AND I SOUGHT A MOTION FOR SUMMARY JUDGMENT AND SOUGHT TO BRING IT UP TO THIS COURT EVEN SOONER.

YOU ARE SAYING THIS IS OUTSIDE THE REMAND, AND THAT IT IS A TOTALLY DIFFERENT ISSUE IN PROCEEDING, COMPLETELY OUTSIDE OF THE REMAND THAT EVEN IF THE PREVIOUS CASE HAD BEEN COMPLETELY AFFIRMED OR WHATEVER, THAT YOU WOULD HAVE A RIGHT TO BRING UP. IS THAT --

ABSOLUTELY. YEAH. THE CASE LAW -- I AM SORRY.

I AM TRYING TO GET YOU TO RESPOND TO JUSTICE SHAW'S QUESTION OF WHY THIS WOULDN'T BE EXCLUDED, BY THE LIMITATION AND THE REMAND, AND SO THAT IS WHAT HE IS ASKING YOU, I THINK.

I AM SORRY, YOUR HONOR. JAMES V STATE INDICATED THAT MR. JAMES COULD PRESENT A SECOND 3.850, RAISING THE ISSUE, AND IN ESSENCE, I AM NOT CONTENDING THAT THIS IS PART OF -- THIS IS PROPERLY PART OF THE INITIAL 3.850 THAT WAS PENDING BUT THAT I WAS ABLE TO ADD THE CLAIM, EVEN IN THAT POSTURE, UNDER JAMES, AND THAT IN THE STATE'S ANSWER BRIEF, ON DIRECT APPEAL, IN 1986, THEY SPECIFICALLY DISCUSSED THE JURY INSTRUCTION ON COLD, CALCULATED AND PREMEDITATED AND ARGUED THAT, BECAUSE OF THE DEFENSE ATTORNEY'S CLOSING ARGUMENT, IT WAS UNNECESSARY TO GIVE THE SPECIFIC INSTRUCTION THAT THE DEFENSE REQUESTED. SO I SUBMIT, UNDER THIS COURT'S CASE LAW, THAT BOTH AS TO HEINOUS, ATROCIOUS AND CRUEL, AND COLD, CALCULATED AND PREMEDITATED, THERE WAS AN OBJECTION, THERE WAS A PROFFERED INSTRUCTION, AND IT WAS RAISED ON DIRECT APPEAL TO THIS COURT, WHICH IS THE PREREQUISITE, ACCORDING TO THIS COURT, IN THOSE OPINIONS, JAMES, ET CETERA, FOR THIS COURT REVISITING THE ISSUE IN POSTCONVICTION, AND IF YOU MAKE THE SHOWING THAT THOSE HURDLES HAD BEEN SATISFIED, THIS COURT, AS IT DID IN JAMES, WOULD RECONSIDER THE ISSUE.

WHAT ABOUT -- I AM SORRY. GO AHEAD.

WHAT ABOUT THE REMAND, THOUGH, AND WHAT HAPPENED WITH REFERENCE TO THE REMABD,

AND -- THE REMAND, AND WHAT WAS THE LIMITATION ON THE ISSUES TO BE EXPLORED ON THE REMAND? WHAT HAPPENED THERE?

THIS COURT FOUND THAT FURTHER CHAPTER 119 PROCEEDINGS WERE REQUIRED. WE WENT BACK.

AND THAT YOU HAD THE RIGHT THAT, IF SOMETHING WAS DISCOVERED OUT OF THOSE DISCOVERY, WITH REFERENCE TO BRAID I -- WITH REFERENCE TO BRADY WHAT?

THE COURT REMANDED AND CITED PROVENZANO, AS I RECALL, AND I NOTED IN MY REPLY BRIEF, THAT IN PRO VENS AND--- IN PROVENZANO, BOTH WERE RAISED, BASED ON THE DOCUMENTS THAT WERE DISCLOSED, PURSUANT TO A 119 REQUEST. IN THIS PARTICULAR CASE ADDITIONAL CHAPTER 119 WAS DISCLOSED IN 1992, I BELIEVE, WHICH LELED TO MORE CHAPTER -- WHICH LED TO MORE CHAPTER 119 MATERIALS, IDENTIFYING RECORDS, AND DURING THAT TIME, WHEN WE WERE IN CIRCUIT COURT, ADDITIONAL RECORDS WERE FILED OR DISCLOSED TO US. WE DID AN AMENDMENT BACK IN 1992 AND SUBSEQUENTLY AMENDED WITH THE HEINOUS, AT ATROCIOUS AND CRUEL, COLD, CALCULATED AND PREMEDITATED JURY INSTRUCTION AND ALL THE WAY UP TO THE BRADY BILL AND IN 1997, THE JUDGE, WHO WE ARE NOW IN FRONT OF, WHOSE NAME JUST ESCAPED MY HEAD, ORDERED A FINAL AMENDED 3.850 TO BE SUBMITTED.

JUDGE LOBER?

YES.

THAT WAS DONE. SO THAT CLAIMS COMING DIRECTLY OUT OF THE REMAND ARE WHAT CLAIMS NOW?

IN THE BRIEF IT IS ARGUMENT ONE, THAT THERE WAS NO ADVERSARIAL TESTING, EITHER BECAUSE THE STATE FAILED TO DISCLOSE THIS INFORMATION OR BECAUSE THE DEFENSE FAILED TO DISCOVER AND PRESENT IT. AND THEN ARGUMENT TWO IS FOCUSING ON THE JURY INSTRUCTION ISSUES, AS I HAVE SAID FORT IN MY BRIEF, AND I -- AS I HAVE SET FORTH IN MY BRIEF, AND I AM SAYING THAT YOU CAN'T LOOK AT EACH ONE IN THE VACUUM. YOU HAVE TO LOOK ACROSS THE CLAIMS TO EVALUATE CUMULATIVELY THE EFFECT OF THE RELIABILITY ON THE OUTCOME OF THIS PROCEEDING.

OKAY. WOULD YOU ADDRESS ISSUE ONE.

YES, YOUR HONOR. WITH REGARD TO ISSUE ONE, THERE ARE SEVERAL PARTS OF THE BRAID MATERIAL. FIRST, THERE IS BRADY MATERIAL, WHICH THIS COURT HAD ADDRESSED IN THE PRIOR DECISION. THAT IS INVOLVING THE JUDY SLOCKUM TAPE, WHERE SHE, IN HER TAPE, STATED THAT MR. JENNINGS WAS DRUNK THAT NIGHT, TOO DRUNK TO DRIVE. HE ASKED HER TO DRIVE HIM HOME TO CHANGE HIS PANTS. HE HAD RIPPED HIS ZIPPER, AND SHE DID THAT. THIS COURT, IN THE OPINION IN 1991, INDICATED INSUFFICIENT PREJUDICE HAD BEEN SHOWN FROM THE FAILURE TO DISCLOSE THAT, A YOU WILL THOUGH HAD HAD BEEN CONCEDED WAS IN THE STATE'S POSSESSION. IT WAS NOT DISCLOSED. SO THE ONLY ISSUE WAS THE PREJUDICE. ALSO AT THAT POINT IN TIME WAS THE CLARENCE MUSZYNSKI LETTER TO THE STATE ATTORNEY'S OFFICE, ASKING FOR THE -- FOR COUNSEL TO HELP HIM PURSUE HIS REMEDIES WHILE IN JAIL, BECAUSE MUSZYNSKI WAS APPROACHED PRIOR TO THE 1986 TRIAL IN THIS CASE, WHICH WAS THE THIRD TRIAL OF MR. JENNINGS, TO TESTIFY. ALSO THIS COURT AFFIRMED THE SUMMARY DENIAL AS TO THAT, INDICATING INSUFFICIENT PREJUDICE HAD BEEN FOUND.

HOW ABOUT TREATING THE TRIAL COURT'S RESOLUTION OF THOSE TWO ASPECTS OF THIS?

TRIAL COURT'S RESOLUTION NOW?

NOW. AND YOUR CLAIM OF WHY THAT RESOLUTION WAS INCORRECT.

THE TRIAL COURT, NOW, REDUES FUSED TO ADDRESS THEM, SAY -- REFUSED TO ADDRESS THEM, SAYING IT CANNOT REVISIT THOSE ISSUES, BECAUSE THIS COURT, FLAT SUPREME COURT, HAD ALREADY REJECTED THEM. SO -- BECAUSE THIS COURT, THE FLORIDA SUPREME COURT, HAD ALREADY REJECTED THEM. THAT WAS NOT PART OF JUDGE ROPER. HE ENHANCED KRUEGER, WHICH WAS DISCUSSED SUBSEQUENTLY IN 1984 AND WAS NOT PART OF THE RECORD THIS COURT CONSIDERED IN THE PRIOR 3.850 APPEAL.

I THOUGHT YOU JUST SAID THAT THE LETTER THAT ONE OF THE WITNESSES. I CAN'T REMEMBER HIS NAME.

MUSZYNSKI.

WROTE CONCERNING AN ATTORNEY WAS ALREADY KNOWN.

NO. IT WAS NOT KNOWN AT THE TIME OF TRIAL. IT WAS DISCOVERED, WHEN THE ORIGINAL POSTCONVICTION MOTION WAS FILED.

NOT AT THE TIME OF TRIAL BUT THE OTHER POSTCONVICTION PROCEEDING.

IT WAS KNOWN AT THAT POINT IN TIME. NO OTHER EVIDENTIARY HEARING WAS HELD. IT WAS RULED INCLUSIVE BECAUSE THE PREVIOUS RECORDS --

WHAT I UNDERSTAND ABOUT THIS LETTER IS THAT THE LETTER IS FROM HIM, TO THE STATE ATTORNEY'S OFFICE, SAYING YOU WANT ME TO GIVE YOU SOME INFORMATION, BUT I NEED TO HAVE A LAWYER IN ORDER TO PROTECT MY OWN FIFTH AMENDMENT RIGHTS, SO I WILL KNOW HOW TO PROCEED ON THIS.

WELL, IT WAS BRADY MATERIAL THAT COULD HAVE BEEN USED TO IMPEACH HIM, AT THE THIRD TRIAL, THAT WAS NOT DISCLOSED BY THE STATE.

IMPEACH HIM HOW?

BECAUSE HERE HE IS, TRYING TO GET A LAWYER, IN FACT, TO HELP HIM ATTACK, IN 3.850 PROCEEDINGS, HIS PROCEDURE CONVICTIONS. HE HAD HAD 3.8 50s GOING ON. HE HAD MADE NUMEROUS ATTACKS ON THIS.

I GUESS I READ THAT LETTER AS A LAWYER TO HELP ME KNOW MY RIGHTS, AS I AM HELPING YOU WITH THIS INFORMATION.

WELL, PERHAPS THAT IS HOW HE WOULD TRY TO EXPLAIN IT, BUT THAT IS WHAT IMPEACHMENT IS FOR IS TO SAY, OKAY, YOU WERE CONTACTED BY THE STATE IN ORDER TO TESTIFY HERE TODAY. DIDN'T YOU, THEN, CONTACT THE STATE AND SAY YOU WANTED SOMETHING FROM THE STATE, IN ORDER TO DO THAT? AND THAT IS THE PURPOSE OF IMPEACHMENT, AND I THINK THAT THAT WOULD GO TOWARDS THE JURY EVALUATING THE CREDIBILITY OF CLARENCE MUSZYNSKI, WHO HAD A HISTORY OF BEING A SNITCH, WHICH WAS PRESENTED. THAT PORTION OF IT HAD BEEN PRESENTED AT THE TRIAL IN 1986. THEN HOWARD TESTIFIED AT THE EVIDENTIARY HEARING BELOW. THIS LETTER WOULD HAVE BEEN IMPORTANT. IT WOULD HAVE BEEN USEFUL, AND HE WOULD HAVE USED IT TO IMPEACH CLARENCE MUSZYNSKI. I, ALSO, WANT TO POINT OUT --

ARE YOU BOUND BY THE PROBABILITY THAT THE RESULT WOULD HAVE BEEN DIFFERENT? ARE YOU BOUND BY THE STRICKLAND STANDARD?

I AM BOUND BY THE BAGLEY STANDARD, WHICH IS ADOPTED, THE PREJUDICE STANDARD FROM STRICKLAND. YES.

OKAY.

AND I, ALSO, POINT OUT KYLES V WHITLEY AND STRICKLER V GREEN, IN THE CASE THAT YOU HAVE TO DO A CUMULATIVE, SO IT IS NOT JUST LOOKING AT THE MUSZYNSKI LETTER AND SAYING DOES THIS UNDERMINE CONFIDENCE IN MY OUTCOME? NO IT IS LOOKING AT THE MUSZYNSKI LETTER, THE SLOCK UP TAPE, THE -- THE SLOCKUM TAPE, THE MICHAEL HUNT NOTES AND CUMULATIVELY EVALUATING THOSE AND DOES THIS PERFORMANCE UNDERMINE CONFIDENCE IN THE OUTCOME, ALL TOGETHER, AND THESE THINGS ARE ALL RELATED, BECAUSE THE STATE CONCEDED, IN ARGUING THE JURY INSTRUCTION ISSUE BELOW, THAT WHETHER THE VICTIM WAS UNCONSCIOUS AND WHEN SHE BECAME UNCONSCIOUS DEPENDED UPON WHICH OF THE THREE SNITCHES YOU BELIEVE, BECAUSE THEIR TESTIMONY WAS NOT CONSISTENT ABOUT WHAT HAPPENED. SO AS TO THE ISSUE OF UNCONSCIOUSNESS, HE WAS SAYING WE SHOULDN'T DECIDE THIS, UNTIL WE HAVE THE EVIDENTIARY HEARING ON THE BRADY CLAIM AND THE IAC CLAIM, AND I AM OPPOSING THE MOTION FOR SUMMARY JUDGMENT, BECAUSE YOU NEED HAVE ALL OF THAT TO CONSIDER, SO EVIDENCE THAT SHOWS THAT MR. JENNINGS WAS DRUNK IS INCONSISTENT WITH MUSZYNSKI'S DESCRIPTION OF THE EVENTS. IT IMPEACHES IT, BECAUSE AS THE STATE'S EXPERTS TESTIFIED AT TRIAL, HE COULDN'T HAVE BEEN THAT DRUNK, TO DO THE THING THAT IS MUSZYNSKI SAID HE DID. NONE OF THE OTHER SNITCHES SAID HE DID THOSE THINGS. IT IS MUSZYNSKI'S TESTIMONY, STANDING UP AND DEMONSTRATING, IN COURT, AT THE TRIAL, HOW, SUPPOSEDLY, MR. JENNINGS TOOK THE CHILD AND BASHED HER HEAD INTO THE DRIVEWAY. IT IS THAT TESTIMONY THAT LEADS TO THE FINDING OF HEINOUS, ATROCIOUS AND CRUEL AND COLD, CALCULATED AND PREMEDITATED.

IS THE ONLY WITNESS THAT HAS TESTIFIED TO THAT?

THERE ARE TWO OTHER JAILHOUSE INFORMANTS, KRUEGER, WHO IS DEAD, WHOSE TESTIMONY FROM THE SECOND TRIAL WAS READ, AND THE STATE, BELOW, HASjjy CONCEDED THAT HE INDICATED SHE WAS UNCONSCIOUS. AND DID NOT DESCRIBE WHAT HAPPENED, ONCE MR. JENNINGS GOT HER OUT OF THE BEDROOM, AND CRISCO, IN A DEPOSITION, HAD INDICATED SHE WAS UNCONSCIOUS. THE TRIAL COUNSEL NEGLECTED TO BRING OUT THAT, IN HIS EXAMINATION, CROSS-EXAMINATION OF CRISCO, THAT SHE WAS RENDERED UNCONSCIOUS, VIRTUALLY IMMEDIATELY, AND, OF COURSE, UNDER THIS COURT'S CASE LAW, GUZMAN, WHICH THE STATE CITES IN THIS BRIEF, THE UNCONSCIOUSNESS OF THE VICTIM IS CERTAINLY VERY RELEVANT TO WHETHER OR NOT IT IS HEINOUS, ATROCIOUS AND CRUEL. SO, AS YOU LOOK AT THIS ISSUE, THE STATE'S MENTAL HEALTH EXPERTS REJECTED THE INTOXICATION ON THE BASIS OF MUSZYNSKI'S TESTIMONY AND HIS DESCRIPTION, SO THE EVIDENCE THAT THEY DIDN'T HAVE, THE SPECIFIC EVIDENCE FROM JUDY SLOCKUM, IN HER TAPED STATEMENT TO THE SHERIFF'S DEPARTMENT, INDICATING HOW DRUNK HE WAS, AND HIS EFFORTS TO GET ANNIS MUSIC TO COME AND PICK HIM UP, BECAUSE HE WAS TOO DRUNK AND OUT OF CONTROL AND HE WANTED HER TO COME AND TAKE HIM HOME ARE SPECIFIC KPAMP ELSE WHICH, THEN, -- EXAMPLES,, WHICH THEN, COULD HAVE BEEN USED WITH A MENTAL HEALTH EXPERT, THE STATE'S MENTAL HEALTH EXPERTS REFUSED TO CONCLUDE THERE WAS STATUTORY MITIGATION, SIMPLY BECAUSE THEY DIDN'T THINK THAT THE EVIDENCE OF INTOXICATION WAS SUFFICIENT, BUT THE STATE WAS SITTING ON THE EVIDENCE OF INTOXICATION. THE DEFENSE'S MENTAL HEALTH EXPERTS TESTIFIED HE DID MEET THE STATUTORY CRITERIA. THE STATE'S EXPERTS CONCLUDEDED THAT HE DIDN'T, SIMPLY BECAUSE THEY DIDN'T HAVE SUFFICIENT EVIDENCE OF INTOXICATION. AND THEY WEREN'T GOING TO RELY SIMPLY UPON MR. JENNINGS'S WORDS FOR IT. AND THE STATE HAD THE EVIDENCE.

ON ISSUE TWO, THE CCP INSTRUCTION PRESERVED, WAS THAT ERROR PRESERVED?

YES. IN CIRCUIT COURT, IN THE PROCEEDINGS THAT HAPPENED, THE STATE, AND IT APPEARS WE HAVE AN APPEAL, WHICH APPEARS IN THIS COURT, AND IT HIS CASE NUMBER 83-8416789 THE RECORD FROM THE MOTION -- 83-841. THE RECORD FROM THE MOTION FOR SUMMARY JUDGMENT

IS IN THAT RECORD. THE AND THE STATE ATTORNEY ARGUED AT THAT TIME THAT, YES, HEINOUS ATROCIOUS AND CRUEL IS ON THE MERITS. THE ONLY ISSUE IS HARMLESS AND BEYOND A REASONABLE DOUBT. AND ON THE ISSUE OF CCP, IT WAS RAISED AT THE TRIAL COURT LEVEL, AND WE ARE SAYING IT WAS NOT SUFFICIENTLY RAISED TO THE SUPREME COURT ON DIRECT APPEAL, AND THAT IS OUR ARGUMENT.

WHAT WAS THE CHALLENGE TO WHEN IT WAS OBJECTED TO, WHAT WAS THE BASIS OF THE CHALLENGE?

THAT THE LANGUAGE DIDN'T SUFFICIENTLY TELL THE JURY OF WHAT NEEDED TO BE FOUND FOR COLD, CALCULATED AND PREMEDITATED.

SO IT WAS A CONSTITUTIONALLY VAGUE CHALLENGE.

AND A PROPOSED ALTERNATIVE INSTRUCTION PROCEEDING THE ROGERS SORT OF DEFINITION WAS OFFERED.

DIDN'T JUDGE LOW BERT, THOUGH, IN HISORD HE, WHAT HE FOUND -- IN HIS ORDER, WHAT HE FOUND WAS THAT IT WAS PRESERVED, GENERALLY, IN THE TRIAL COURT, BUT WAS -- BUT THE ONLY THING THAT WAS ARGUED IN THE DIRECT APPEAL WAS THE HAC, AS OPPOSED TO THE CCP?

I WAS SHAKING MY HEAD WAS -- MY HEAD, BECAUSE I WASN'T UNDERSTANDING. HE FOUND IT WASN'T RESERVED AT TRIAL. HIS ONLY COMPLAINT WAS WHETHER IT WAS ADEQUATELY PRESERVED IN THE DIRECT APPEAL.

BUT THEN HE FOUND IT TO BE HARMLESS.

I AM NOT SURE HE WENT AHEAD AND ADDRESSED THE HARMLESSNESS, BUT IT COULD NOT BE HARMLESS. THE STATE'S MENTAL HEALTH EXPERT TESTIFIED THIS WAS NOT A PLANNED CRIME. IT THIS WAS A CRIME OF I AM -- THIS WAS A CRIME OF IMPULSE. WHEN THE STATE'S OWN EXPERT IS SAYING THIS IS A CRIME OF IMPULSE, THE FAILURE TO TELL THAT THERE NEEDED TO BE A PREEXISTING PLAN --

BUT JUDGE LOBER FOUND THAT THERE WAS NO HARM FOUND.

JUDGE HARRIS FOUND IN MITIGATION. THE REASON HE FOUND IN MITIGATION IS BECAUSE THE STATE DIDN'T DISCLOSE THE SLOCKUM TAPE AND, ALSO, BECAUSE ANNIS MUSIC WASN'T CALLED, BECAUSE TRIAL COUNSEL DID NOT CONTACT HER, EVEN THOUGH THEY HAD BEEN TOLD TO AND THEY DON'T KNOW WHAT SHE WOULD SAY. THAT WOULD HAVE PROVIDED THE MITIGATION AND THE BASIS FOR THE STATE TO CONCLUDE THAT THE STATUTORY MITIGATION WAS THERE. IT IS THE ABSENCE OF THAT EVIDENCE. JUDGE LOBER DID NOT DO THE CUMULATIVE ANALYSIS THAT IS ABSOLUTELY NECESSARY. MOREOVER, CONTRARY TO WHAT THE STATE SAYS, HARMLESS ERROR ANALYSIS IS REVIEWED DE NOVO BY THIS COURT. IT IS NOT A QUESTION OF WHETHER THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT A DETERMINATION OF HARMLESS ERROR. THAT IS NOT HOW IT IS DONE. IT IS A DE NOVO REVIEW THAT IS REQUIRED BY CALIFORNIA V CHAPMAN. IT IS A CONSTITUTIONAL STANDARD, AND IT IS THE STATE'S BURDEN OF PROOF TO PROVE, TO YOU, THAT IT IS HARMLESS BEYOND A REASONABLE DOUBT, AND WHERE YOU HAVE THE STATE'S MENTAL HEALTH EXPERT SAYING THIS IS NOT A PREPLANNED CRIME. IT IS A CRIME OF IMPULSE, AND THE SPECIFIC QUOTATION OF THAT IS IN MY BRIEF. IT -- THERE IS NO WAY YOU CAN SAY THAT THIS IS HARMLESS BEYOND A REASONABLE DOUBT. HAD THE JURY KNOWN THAT AGGRAVATOR WOULD BE GONE. SO WE HAVE A SITUATION WHERE WE ARE TALKING WHERE REMOVING -- WHERE WE ARE TALKING ABOUT REMOVING AGGRAVATORS FROM THE DEATH SIDE OF THE SCALE AND ADDING MITIGATING FACTORS WHICH WERE NOT FOUND ON THE LIFE SIDE OF THE SCALE, AND THE U.S. SUPREME COURT IN WILLIAMS MOST RECENTLY SAID YOU HAVE GOT TO LOOK AT THE MITIGATION, NOT ONLY AT THE TRIAL BUT AT THE 3.850

PROCEEDING, EVALUATE IT ALL TOGETHER, AND WHEN YOU DO THAT, COMPETENCE HAS TO BE UNDERMINING THE OUT COME, AND THIS COURT CANNOT CONCLUDE THAT THE FAILURE TO PROVIDE THE PROPER JURY INSTRUCTIONS IS HARMLESS BEYOND A REASONABLE DOUBT. I SEE MY TIME IS UP.

THANK YOU, MR. McCLAIN. MR. NUNNELLEY. MAY IT PLEASE IT IS COURT --

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY AND I REPRESENT THE STATE IN THIS PROCEEDING. THE PROBLEM IS I DON'T KNOW WHAT PROCEEDING I AM SUPPOSED TO ARGUE. I HAVE HEARD ARGUMENT CONCERNING A CASE THIS COURT CITED IN 1987. I HAVE HEARD ARGUMENT CONCERNING THIS COURT'S DISPOSITION OF THE 3.850 APPEAL IN 1991. I HAVE HEARD ARGUMENT CONCERNING THIS COURT'S DISPOSITION OF THE MOTION FOR SUMMARY JUDGMENT, AND I HAVEN'T HEARD A THING ABOUT THE CASE WE ARE HERE ON TODAY. I HAVE, HOWEVER, HEARD NUMEROUS ENLIGHTENING COMMENTS ABOUT MY BRIEF. NONE OF WHICH DESERVE FURTHER COMMENT. WITH RESPECT TO THE ONLY ISSUE THAT IS REALLY BEFORE THIS COURT, THAT BEING THE BRADY ISSUE, WHAT WE HAVE IS SMOKE AND MIRRORS. THAT IS ALL THAT IS BEFORE THIS COURT.

WAIT A MINUTE. BEFORE YOU GO TOO MUCH INTO THAT, RELATIVE TO OUR REMAND, DO YOU FEEL THAT, IS IT THE STATE'S POSITION THAT BRADY AND STRICKLAND OR 119 IS ALL THAT COULD BE LOOKED AT, OR WHAT IS WRONG WITH THE DEFENDANT'S THEORY THAT HE HAD A CERTAIN AMOUNT OF TIME TO RAISE ALL OF THESE OTHER ISSUES AND -- OUTSIDE, EXCLUSIVE OF OUR REMAND, HE CAN RAISE THESE ISSUES, DURING THIS TIME? IS THERE A FLAW IN THAT?

WELL, JUSTICE SHAW, MY ANSWER TO THAT QUESTION IS THIS. AND IT COMES DOWN, FUNDAMENTALLY, TO WHETHER OR NOT THIS COURT MEANS WHAT IT SAYS! IF THIS COURT SAYS WE REMAND THIS CASE FOR THE LIMITED PURPOSE OF ALLOWING THE DEFENDANT TO RAISE WHATEVER BRADY CLAIMS HE MAY FIND, AS A RESULT OF CHAPTER 119 DISCLOSURE, I THINK THAT IS PRETTY CLEAR THAT THIS COURT SAID TO DO THAT.

BUT HE INDICATED THAT HE RAISED THIS OTHER ISSUE ABOUT THE JURY INSTRUCTIONS AND THE STATE CONCEDED THAT THAT WAS APPROPRIATELY RAISED, AND IT WAS PRESENTED, ARGUED TO THE JUDGE?

YOUR HONOR, THAT WENT UP ON A SUMMARY JUDGMENT MOTION THAT -- AND LET ME KIND OF STEP BACK, AND, AGAIN, I DIDN'T COME HERE PREPARED TO ARGUE THE MOTION FOR SUMMARY JUDGMENT. I THOUGHT I HAD ALREADY WON ON THAT ONE. I AM HAVING TO REALLY KIND OF REACH BACK HERE, JUSTICE HARDING, AND I APOLOGIZE FOR THAT, BUT MY RECOLLECTION OF THE WAY THIS CASE PROCEEDED, AND IT IS THE PRIMARY REASON THIS CASE HAS TAKEN SO LONG, FROM THE TIME OF THE REMAND UNTIL WE ARE BACK UP HERE, BUT MY MEMORY IS THAT HE ATTEMPTED TO ARGUE THE JURY INSTRUCTIONS, AND THEN HE FILED WHAT AMOUNTS TO AN INTERLOCUTORY APPEAL TO THIS COURT, IN AN ATTEMPT TO SHORT CIRCUIT THIS COURT'S REMAND AND GET BACK HERE ON A JURY INSTRUCTION ISSUE. I SIMPLY DO NOT REMEMBER WHAT THE STATE'S ARGUMENT WAS. I WASN'T THERE. I DON'T REMEMBER. THE RECORD SPEAKS FOR ITSELF. IT IS OVER AND DONE WITH, HOWEVER. JUDGE LOBER --

JUDGE LOBER DID DEAL WITH THAT IN THIS --

HE DID ADDRESS IT, YOUR HONOR, AND THE ISSUE IS NOT -- I AM NOT REALLY BEATING THE DRUM ABOUT WHETHER HE DID SOMETHING HE SHOULDN'T HAVE DONE. HE DID WHAT HE DID. THAT IS WHAT I AM HERE ON. AND THE FACT OF THE MATTER IS WHAT I AM HERE ON ARE SOME VERY EXPLICITY FINDINGS IN HIS ORDER -- EXPLICIT FINDINGS IN HIS ORDER ABOUT THE HEINOUS, ATROCIOUS AND CRUEL AND THE CCP AGGRAVATOR. IF WE ASSUME THAT THOSE WERE PROPERLY PRESENTED AND EVEN IF WE ASSUME THAT JUDGE LOBER SHOULD HAVE CONSIDERED THEM, HE MADE SOME VERY, VERY SPECIFIC FACT FINDINGS REGARDING HARMLESS ERROR,

PAGES 15 AND 16 OF HIS ORDER AND I APOLOGIZE THAT I DON'T HAVE A PAGE COPY WITH THE NUMBERED STAMPS ON IT. REGARDLESS OF THE FACT THAT THIS MURDER IS HEINOUS, ATROCIOUS OR CRUEL, UNDER ANY DEFINITION OF THAT AGGRAVATING CIRCUMSTANCE, AND THAT, YOUR HONORS, IS THE PROPER HARMLESS ERROR ANALYSIS. SAME FINDING AS HE MADE, ALSO, A FINDING AS TO THE HARMLESSNESS OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE FINDING THAT THE REQUIREMENTS OF JACKSON ARE SATISFIED.

WHAT ABOUT THE ISSUE THAT YOUR OPPONENT HAS RAISED, THOUGH, ABOUT WHETHER THE VICTIM WAS CONSCIOUS OR UNCONSCIOUS?

THAT IS A FACT QUESTION, THAT WAS PROPERLY DECIDED AT THE TIME OF THE TRIAL. IF THERE IS -- I KNOW WHERE YOU ARE GOING, JUSTICE ANSTEAD.

I DON'T KNOW WHERE I AM GOING. IF YOU KNOW WHERE I AM GOING, TELL ME.

I AM NOT SURE I WANT TO. THE FACT IS THAT IS WHAT WE HAVE JURIES TO DECIDE. IF YOU HAVE TESTIMONY THAT DIFFERS, ABOUT WHETHER THE VICTIM BECAME UNCONSCIOUS AT POINT A IN THE CRIME OR POINT B IN THE CRIME, THAT IS WHAT WE HAVE A JURY TO DO. I WOULD POINT OUT, HOWEVER, THAT, AND THIS IS, PERHAPS, REALLY, SIGNIFICANT, THERE IS A LETTER WRITTEN, BY JENNINGS, THAT SAYS THAT, I BELIEVE IT WAS MUSZYNSKI'S TESTIMONY WAS CORRECT, SO IT IS NOT JUST THAT WE HAVE CLARENCE MUSZYNSKI OVER HEARSAYING THIS. WE HAVE JENNINGS, SAYING, IN THIS OTHER LETTER TO SOMEONE WHOSE NAME ESCAPES ME, THAT THAT IS RIGHT.

WHAT DO YOU PERCEIVE HIS CLAIM TO BE, IN TRYING TO SEE WHERE WE ARE GOING HERE. IS THIS THAT HE IS SAYING THAT THE STATE HAS WITHHELD EVIDENCE THAT THE VICTIM WAS UNCONSCIOUS AT THE TIME SHE WAS KILLED? IS THAT WHAT YOU PERCEIVE THE CLAIM TO BE? THAT HAVE A BRADY VIOLATION THERE?

NO, YOUR HONOR. MY UNDERSTANDING --

IN THE EVIDENCE?

MY UNDERSTANDING OF THE CLAIM AND I AM NOT ENTIRELY CERTAIN THAT I DO UNDERSTAND THE CLAIM. IT SEEMS TO BE KIND OF LIKE A PUFF OF SMOKE THAT YOU CAN'T GET A HANDLE ON, BUT THE BEST I CAN TELL IS THAT IT CENTERS ON THIS NOTE FROM MIKE HUNT, WHO WAS THE TRIAL PROSECUTOR IN THE SECOND TRIAL. THERE WAS SOME FOUR YEARS, I BELIEVE, AFTER THE MURDER, AND CAME AFTER A REVERSAL BY THIS COURT AND A REMAND FOR A NEW TRIAL AND PENALTY PHASE, THAT INDICATED THAT, AND I AM GOING TO PUT A FOOTNOTE HERE, I HAVE TROUBLE KEEPING KRUEGER AND MUSZYNSKI STRAIGHT. MY BRIEF HAS IT STRAIGHT. BUT THE BOTTOM LINE IS THAT HUNT'S NOTE, IN HIS FILE, GOT THE ORDER IN WHICH THOSE TWO WITNESSES WERE INTERVIEWED BACKWARDS. MIKE HUNT WAS NOT INVOLVED IN THE ORIGINAL INVESTIGATION OF THIS CASE. HE WAS NOT INVOLVED IN THE ORIGINAL TRIAL OF THIS CASE. BUT WHAT WE DO HAVE IS THE TESTIMONY OF THE CASE AGENT, WHO WAS VERY MUCH INVOLVED IN THE ORIGINAL INVESTIGATION. AND HIS TESTIMONY IS NOT SUBJECT TO DISPUTE, AND IT WAS THAT KRUEGER WAS INTERVIEWED FIRST, AND THEN MUSZYNSKI WAS INTERVIEWED. AND QUITE HONESTLY, THERE HAS BEEN NO EXPLACATION OF HOW THESE INDIVIDUALS THAT CAME TO LIGHT REALLY CAME TO MAKE A DIFFERENCE ANYWAY, BUT ASSUMING THAT IT DOES MAKE A DIFFERENCE, THE CASE AGENT IS THE ONE WHO REVIEWED THE FILE AND DETERMINED WHO HE INTERVIEWED FIRST.

WAS THERE A WITNESS, AS DETERMINED BY THE TRIAL COURT HERE, WHO WAS GOING TO TESTIFY THAT THE VICTIM WAS UNCONSCIOUS, ACCORDING TO THE DEFENDANT, AND THAT THE STATE DIDN'T PROVIDE THAT? WAS THERE A CLAIM MADE?

NO.

AND THAT THE STATE DIDN'T PROVIDE THAT INFORMATION TO THE DEFENDANT, AND THAT WAS A BRADY VIOLATION? THERE WAS NOT A CLAIM MADE LIKE THAT?

NO, YOUR HONOR. AND.

--

WHAT ABOUT THE INTOXICATION CLAIM? THAT IS THAT A CLAIM, IF I UNDERSTAND IT, THAT A WITNESS SAID THAT HE WAS INTOXICATED. APPARENTLY THERE WERE A NUMBER OF WITNESSES THAT WERE AVAILABLE ABOUT INTOXICATION? IS THAT RIGHT?

WELL, YOU HAVE -- THE SHORT ANSWER IS YES, AND LET ME KIND OF EXPLAIN WHAT IS GOING ON HERE. A NUMBER OF THESE -- WELL, MR. JENNINGS, ANNIS MUSIC CLAUSEN AND KATHERINE MUSIC ARE ALL COUSINS. I THINK THEY ARE RELATED. ANNIS AND KATHERINE ARE DAUGHTER AND MOTHER. I BELIEVE THAT KATHERINE IS THE ONE THAT TESTIFIED AT TRIAL AND ANNIS IS THE DAUGHTER. KATHERINE'S TESTIMONY, REGARDING THE LEVEL OF INTOXICATION, AS TRIAL COUNSEL, WHEN HE TESTIFIED AT THIS MOTION RECENT 3.850 HEARING POINTED OUT, WAS NOT CONSISTENT WITH THE TESTIMONY GIVEN BY ANNIS MUSIC. YOU HAVE THE TWO MOM AND DAUGHTER ARE INCONSISTENT WITH WHAT THEY ARE SAYING. MR. HOWARD, WHO WAS TRIAL COUNSEL IN THE LAST TRIAL, TESTIFIED THAT THERE WAS VERY LITTLE OBJECTIVE SUPPORT FOR ANY DEFENSE, BASED UPON INVOLUNTARY INTOXICATION. HE POINTED OUT THAT THAT DEFENSE HAD BEEN USED UNSUCCESSFULLY IN ONE OF JENNINGS'S PRIOR TRIALS, AND WITH THE CLEAR IMPLICATION BEING THAT WE ALREADY LOST ON THAT ONE SO I AM GOING TO TRY SOMETHING ELSE.

HE DEFENDED HIM ON THE BASIS THAT HE DIDN'T DO IT?

YES, SIR. THIS IS AFTER JENNINGS'S CONFESSION HAD BEEN SUPPRESSED.

AND MR. HOWARD POINTED OUT, BY THE WAY, THAT, AS THIS COURT IS WELL AWARE, INVOLUNTARY INTENTION INDICATION IS NOT A DEFENSE TO A SEX BATTERY.

SEXUAL BATTERY.

SO, AGAIN, IT IS MUCH ADD DO ABOUT NOTHING. AGAIN -- IT IS MUCH ADO ABOUT NOTHING. I AM NOT PRECISELY CLEAR ON WHAT THIS IS. THE BEST I CAN TELL IS THE BRADY CASE DEALS WITH THE MUSZYNSKI ORDER OF INTERVIEWING.

ISN'T THERE, ALSO, A BRADY CLAIM, BASED UPON, I THINK HIS NAME IS BILLY CISCO. ISN'T THERE A BRADY CLAIM HERE, THAT THE STATE HAD, IN ITS POSSESSION, A STATEMENT BY HIM CONCERNING THIS GIRL BEING UNCONSCIOUS, AND I KNOW YOU STARTED OFF SAYING THAT THAT WAS SOMETHING THAT THE JURY HAD TO EVALUATE, BUT THE QUESTION BECOMES DID THE JURY HAVE THE INFORMATION BEFORE IT TO DO THEIR EVALUATION?

IF I COULD HAVE JUST A MOMENT TO FIND THE DISCUSSION THAT MR. CISCO'S TESTIMONY, IN THE ORDER THAT APPEARS, AT PAGE 12 OF THE ORDER, AND IT IS REALLY MORE OF A -- IT IS REALLY -- IT IS A GIGLIO CLAIM AS OPPOSED TO A BRAID CLAIM, AND IT IS REALLY NOT PRESSED IN THE DEFENDANT'S BRIEF. CRISCO SAID ONE THING IN DEPOSITION. IN HIS TRIAL TESTIMONY, IT WAS THAT HE WAS SIMPLY AS JUDGE LOBER FOUND, DIFFERENT. IT WASN'T A KNOWING PRESENTATION OF FALSE TESTIMONY, WHICH IS WHAT YOU WOULD HAVE TO HAVE TO HAVE A GIGLY-CLAIM -- A GIGLIO CLAIM, AND IF I CAN SCAN IT REAL QUICK, THERE IS NO MUSZYNSKI TESTIFIED ABOUT WHEN THE VICTIM WENT UNCONSCIOUS. KRUEGER'S TESTIMONY INFERRED WHEN SHE WENT UNCONSCIOUS, AND WE HAVE TO COME BACK TO JENNINGS.

WHAT DID BILLY CRISCO SAY AT TRIAL?

AT TRIAL, CRISCO SAID WENT IN THE BEDROOM, PICKED UP THE GIRL AND DROPPED HER OUT THE WINDOW, AND IN DEPOSITION HE HAD SAID THAT SHE HIT HER HEAD WHEN SHE WAS DROPPED OUT AND WAS UNCONSCIOUS FROM THAT POINT ON. THAT WAS IN CRISCO'S DEPOSITION. TRIAL COUNSEL WAS PRESENT FOR THAT. SO THERE IS NO -- THAT IS NOT A BRADY CLAIM. THAT IS JUST NOT. I MEAN, THERE IS NO -- YOU DON'T HAVE THE THRESHOLD SUPPRESSION OF EVIDENCE ISSUE THAT YOU WOULD HAVE TO HAVE TO HAVE A BRADY CLAIM.

WAS THAT EXPLORED AT TRIAL BY THE DEFENSE COUNSEL?

I SIMPLY DON'T REMEMBER, JUSTICE PARIENTE. I SIMPLY DON'T.

WOULD THAT BE THE SORT OF MATERIAL FACT THERE, IF THE ISSUE IS CONSCIOUSNESS, AND THE JUDGE -- THE ATTORNEY DOESN'T IMPEACH ON SOMETHING VERY, VERY SIGNIFICANT, WHICH IS -- BRING OUT THAT, AT DEPOSITION, THAT HE SAID THAT THE LITTLE GIRL WAS UNCONSCIOUS, AND THE TRIAL DIDN'T, BUT I DON'T KNOW WHETHER -- I SEE WHAT YOU ARE SAYING, THAT IT IS NOT IN THE NATURE OF A GIGLIO CLAIM THEN.

WASN'T THIS PRESENTED AS AN INEFFECTIVENESS OF COUNSEL CLAIM?

I AM NOT SURE HOW IT WAS PRESENTED, JUSTICE ANSTEAD. I AM NOT SURE THAT IT WAS. WHAT I WOULD POINT OUT THAT, IN THE DEFENDANT'S INITIAL BRIEF, HE DOESN'T CITE GIGLIO AT ALL. I DON'T BELIEVE THAT THE CRISCO ISSUE WAS EVEN PRESSED ON APPEAL TO THIS COURT IN THIS PROCEEDING. IT IS SOMETHING THAT IS COMING IN, APPARENTLY, AT THE LAST MINUTE, AS BEST I CAN TELL. THE CRISCO-ISSUE --

IT IS IN THE TRIAL JUDGE'S ORDER.

HE MADE A FINDING ABOUT, IT BUT THAT DOESN'T MEAN THAT IT WAS ARGUED ON APPEAL IN THIS PROCEEDING. I DON'T REMEMBER THIS BEING AN ISSUE, TO BE HONEST WITH YOU. I DON'T REMEMBER CRISCO BEING, REALLY, MUCH OF AN ISSUE, SO, AGAIN, I AM NOT CLEAR ON EXACTLY WHERE MY OPPONENT IS GOING ON THIS APPEAL. WE COME DOWN TO, AGAIN, THE BRADY ISSUE WAS OVER THE KRUEGER-MUSZYNSKI ORDER OF AND ANSWER, IF YOU WILL, AND -- APPEARANCE, IF YOU WILL, AND THAT WAS NOT A BRADY ISSUE. IF THE COURT HAS NO FURTHER QUESTIONS, THE STATE REQUESTS THAT THE DENIAL OF THE 3.850 RELIEF SHOULD BE AFFIRMED IN ALL RESPECTS.

THANK YOU. I BELIEVE YOUR TIME HAS EXPIRED, MR. McCLAIN. THANK YOU, COUNSEL. WE APPRECIATE YOUR ASSISTANCE MUCH WE WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.