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NEXT CASE IS OCCHICONE V STATE. MR. ABATECOLA, ARE YOU READY TO PROCEED?

YES. GOOD MORNING. MY NAME IS JOHN ABATECOLA, AND I REPRESENT THE APPELLANT, DOMINICK OCCHICONE. MR. OCCHICONE WAS DENIED RELIEF ON HIS POST CONVICTION MOTION ON TWO ISSUES, BOTH INEFFECTIVENESS CLAIMS. THE OTHER ISSUES IN MR. OCCHICONE'S CLAIMS WERE AT FIRST DENIED. THE FIRST AND MAINISH -- MAIN ISSUE THAT I WOULD LIKE TO ADDRESS IS THE CHAL HE CAN TO PREMEDITATION -- IS THE CHALLENGE TO PREMEDITATION. IN DOING SO, I WOULD LIKE TO POINT OUT MUCH OF THE EVIDENCE I WILL BE ADDRESSING IS AS RELATES TO THE PENALTY CLAIM AS WELL, A JURY 5 RECOMMENDATION. THE OPENING STATEMENTS DURING THIS CASE, TRIAL COUNSEL FOR MR. OCCHICONE GOT UP IN FRONT OF THE JURY AND TOLD THEM, ESSENTIALLY, THAT HE WAS CONCEDING THE FACT THAT MR. OCCHICONE COMMITTED THE CRIMES. COUNSEL TOLD THE JURY THAT THE ONE ELEMENT, THE ONE AND ONLY ELEMENT THAT HE WOULD BE CHALLENGING WAS THAT OF PREMEDITATION, AND IN CHALLENGING THE ELEMENT OF PREMEDITATION, COUNSEL INFORMED THE JURY THAT THEY WOULD BE HEARING FROM EXPERTS, THAT THEY WOULD BE HEARING FROM, FIRST, LAY WITNESSES, WHO SAW MR. OCCHICONE DRINKING, AND THEY WOULD BE TESTIFYING AS TO HIS DRINKING HABITS IN DRINKING HIS INTOXICATION, THE TIME LEEING UP TO THE MURDERS. -- LEADING UNTO THE MURDERS. COUNSEL, ALSO, TOLD THE JURY THAT THEY WOULD BE HEARING FROM EXPERTS, AND THE EXPERTS WOULD GET UP THERE, AND THEY WOULD TELL THE JURY THAT MR. OCCHICONE WAS UNABLE TO. THE CAPACITY TO HAVE PRETED MEDTATED INTENT TO COMMIT -- PREMEDITATED INTENT TO COMMIT ME SAY CRIMES.

WHY IS NOT THAT A LEGITIMATE TRIAL TACTIC?

WELL, YOUR HONOR, IT IS A LEGITIMATE TRIAL TACTIC, EXCEPT FOR THE FACT OF THE MATTER THAT NONE OF THIS WAS EVER DONE. TRIAL COUNSEL DIDN'T CALL LAY WITNESSES WHO WERE AVAILABLE, WHO WOULD HAVE TESTIFIED AS TO A CONTINUOUS PERIOD OF INTOXICATION BY MR. OCCHICONE IN A CONSECUTIVE PERIOD OF 36 HOURS, LEADING UP TO THE TIME OF THE MURDERS.

SO IT IS NOT THE FACT THAT THE LAWYER, IN EFFECT, SAID MY CLIENT GUILT.

THAT IS NOT WHAT I AM CONTESTING AT ALL, YOUR HONOR. WHAT I AM CONTESTING IS THE FACT THAT THE COUNSEL TOLD THE JURY THAT THEY WOULD BE HEARING FROM THESE EXPERTS AND THESE WITNESSES AND HE, IN FACT, DIDN'T DO IT. THEY WERE AVAILABLE AND DEMONSTRATED IN POST CONVICTION, AND DURING THIS HEARING --

DIDN'T COUNSEL INDICATE THAT THAT THEY, AFTER THE TESTIMONY BY THE STATE, REGROUPED AND MADE AN ASSESSMENT THAT THEY WOULD MUCH RATHER HAVE OPENING AND CLOSING THAN, AND THEY THOUGHT THAT THESE ISSUES HAD BEEN COVERED?

WELL, YES, THEY DID, YOUR HONOR, AND IF I COULD RESPOND TO THAT JUST A LITTLE BIT FURTHER. THE FACT OF THE MATTER IS THAT TRIAL COUNSEL'S ACTIONS COULDN'T HAVE BEAN BASED ON TACTIC OR STRATEGY, BECAUSE THEY WEREN'T AWARE OF THESE WITNESSES, SO FOR THEM TO SAY, WELL, YOU KNOW, WE MADE THIS DECISION TO HAVE A SANDWICH, CLOSINGS AND OPENING, YOU KNOW, THE FACT OF THE MATTER IS THEY DIDN'T KNOW OF THE EXISTENCE OF THESE WITNESSES. IN FACT, TWO OF THESE WITNESSES TESTIFIED AT TRIAL, TESTIFIED AS STATE WITNESSES, AND THEY TESTIFIED TO DAMAGING STATEMENTS, BUT THEY, ALSO, HAD INFORMATION RELEVANT THAT WOULD HAVE BEEN BENEFICIAL TO MR. OCCHICONE. THEY SAW

HIM ON THE DAY AND IN THE HOURS JUST PRIOR TO THE MURDERS, AND THEY WOULD HAVE TESTIFIED THAT HE WAS IN INTOXICATED, AND TRIAL COUNSEL FAILED TO ASK THEM ABOUT ANY OF THIS INFORMATION.

WHAT WAS THE CROSS-EXAMINATION OF THOSE WITNESSES? WHAT DID THAT CROSS-EXAMINATION --

THE CROSS-EXAMINATION ESTABLISHED THE FACT THAT, BAY HABIT, MR. OCCHICONE WAS AN ALCOHOLIC. THAT IS WHAT THE CROSS-EXAMINATION ESSENTIALLY ESTABLISHED, THAT HE DRANK A LOT. THAT HE DRANK SINCE THEY HAVE KNOWN HIM FOR TEN YEARS.

WHAT WAS -- WERE THEY DEPOSED BEFORE TRIAL?

YES. THEY WERE DEPOSED, YOUR HONOR.

WERE THEY ASKED ABOUT THE OBSERVATIONS OF THE DEFENDANT ON THE NIGHT OF OR DURING THAT PERIOD OF TIME?

NO. INCREDULOUSLY THEY WEREN'T, AND THE FACT IS THAT THEY BOTH STATED THAT THEY ARE BARTENDERS AT THIS BAR WHERE HE FREQUENTS, AND THEY STATED THAT THEY PRETTY MUCH SEE HIM EVERYDAY.

AND WHAT WAS THE TRIAL COUNSEL, I GUESS, IS ONE THING AS TO THE STRATEGY OF NOT CALLING WITNESSES, BECAUSE THAT MAY BE, CERTAINLY, A LEGITIMATE TACTIC. WHAT WAS THEIR EXPLANATION FOR NOT CROSS-EXAMINING OR SEEKING TO FIND OUT ABOUT WHAT THE BARTENDERS KNEW ABOUT THIS STATE? WAS THERE ANY TESTIMONY ABOUT THAT?

VERY LITTLE. I MEAN, I THINK THE OBVIOUS FACT WAS THAT THEY JUST DIDN'T KNOW, BUT, INSTEAD, YOU KNOW, INSTEAD OF SAYING, WELL, YOU KNOW, WE WEREN'T AWARE OF THESE WITNESSES AT THE EVIDENTIARY HEARING, INSTEAD THEY JUST SAID, WELL, IT WAS CUMULATIVE, ANYWAY.

DID YOU PLACE THE DEPOSITIONS OF THOSE WITNESSES IN THIS RECORD? I HAVE NOT HAD A CHANCE TO LOOK AT THAT. THE PRETRIAL DEPOSITIONS? BECAUSE IT IS PRETTY UNBELIEVABLE THAT SOMEONE IS WITH AN ACCUSED ON THE DAY OF THE EVENT AND THAT SUBJECT IS NEVER EVEN MENTIONED DURING A DEPOSITION, WHEN YOU ARE ASKING ABOUT THIS EVENT AND THIS PERSON.

I DON'T -- I AM NOT POSITIVE THEY ARE A PART OF THE RECORD. I BELIEVE THEY ARE. BUT I WOULD JUST LIKE TO ADD ON THAT A LITTLE MORE THE FACT IS THAT AS TO THE THREE OTHER WITNESSES, YOU KNOW, SO THERE ARE THOSE TWO WITNESSES, THEN THERE ARE THREE OTHER WITNESSES THAT WERE CALLED AT THE EVIDENTIARY HEARING THAT WEREN'T AVAILABLE, I MEAN THAT COUNSEL DIDN'T KNOW ABOUT. WELL, EACH OF THESE WOMEN WHO ARE BARTENDERS COULD HAVE PLACED MR. OCCHICONE WITH ANOTHER WITNESS WHO TESTIFIED AT THE EVIDENTIARY HEARING. THEY COULD HAVE PLACED MR. OCCHICONE WITH HIM ON THE EVENING OF THE CRIMES, SO THAT IS A THIRD WITNESS THAT, BECAUSE THEY DIDN'T ASK THESE QUESTIONS, THAT THEY WEREN'T AWARE OF, AND AS TO THE TWO OTHER WITNESSES, AND THESE WITNESSES ARE, ONE OF THEM IS PARTICULARLY RELEVANT. THIS IS A WOMAN THAT SAW MR. OCCHICONE AT THREE SEPARATE TIMES DURING THE 36 HOURS PRIOR TO THE INCIDENT, AND SHE SPENT A LOT OF TIME WITH HIM DURING THIS TIME, AND DURING EACH OF THESE TIMES, SHE TESTIFIES THAT HE WAS INTOXICATED, THAT HE WAS FALLING DOWN DRUNK, THAT HIS SPEECH WAS SLURRED, THAT HALF THE TIME SHE COULDN'T UNDERSTAND WHAT HE WAS SAYING. BECAUSE OF HIS INTOXICATION. AND SHE SAW HIM AS LATE AS AN HOUR AND-A-HALF BEFORE THE MURDERS, AND SHE TESTIFIES THAT HE WAS INTOXICATED. IN TRIAL, COUNSEL FAILED TO UNCOVER THIS WITNESS, AND THE FACT IS WHAT WE KNOW IS FACT IS THAT THE STATE WAS

AWARE OF THESE WITNESSES. THE STATE INTERVIEWED HER SISTER, WHO WAS THE OTHER WITNESS THAT TESTIFIED AT THE EVIDENTIARY HEARING. TRIAL COUNSEL, AT DEPOSITION, ACTUALLY ASKED A POLICE OFFICER ABOUT THIS WITNESS AND WHAT SHE SAID. THE TRIAL COUNSEL NEVER DEPOSED HER AND NEVER SPOKE TO HER, EITHER OF THESE WITNESSES, AND YOU KNOW, THEY, BOTH, WOULD HAVE BEEN EXTREMELY RELEVANT, AND AS TO THESE FIVE WITNESSES, I WOULD JUST LIKE TO GIVE YOU A LITTLE BIT --

WOULD THE TESTIMONY OF THESE WITNESSES HAVE BEEN INTRODUCED AT THE HEARING ON THE 3.850?

YES, YOUR HONOR. THE TESTIMONY WAS INTRODUCED. AND THE CULMINATION, OR THESE WITNESSES, TOGETHER, IN ADDITION TO --

THERE WAS SOME THAT WERE NOT, AND THE JUDGE MADE NOTE OF THAT IN THE ORDER.

YES, YOUR HONOR. THERE WERE SEVERAL WITNESSES THAT WE WERE UNABLE TO LOCATE PRIOR TO THE HEARING, AND I BE LOOK HE HAVE AT THE END OF THE -- I BELIEVE AT THE END OF THE HEARING, WE ACTUALLY PUT ON OUR INVESTIGATORS TO TESTIFY THAT THEY MADE A DILIGENT SEARCH TO LOCATE THESE WITNESSES, BUT THEY COULDN'T FIND THEM AT THIS POINT THIS. IS SOME TIME AFTER THE MURDERS, AND THEY WERE UNABLE TO FIND THEM, BUT THE WITNESSES WHO DID TESTIFY, THEY TESTIFIED AS TO MR. OCCHICONE'S MENTAL AND EMOTIONAL STATE. THAT HE WAS -- THEY DIDN'T SAY HE WAS ANGRY. THEY SAID HE WAS CRYING. THEY SAID HE WAS EMOTIONAL. THERE WAS, ALSO, TESTIMONY THAT DURING THIS CONSISTENT 36-HOUR PERIOD THAT HE SMOKED MARIN. THERE IS TESTIMONY THAT HE GOT IN TWO CAR ACCIDENTS DURING THIS TIME, BECAUSE OF HIS INTOXICATION. AND ONE OF THOSE ACCIDENTS, HE GOT IN A SINGLE-CAR ACCIDENT WITH A PALM TREE, AND THE OTHER ACCIDENT, THE STRONG EVIDENCE OF ANOTHER ACCIDENT, AND THAT WOULD HAVE JUST BEEN HOURS PRIOR TO THE CRIME, ALSO.

WHAT WAS THE EXPLANATION, IF ANY, AT THE EVIDENTIARY HEARING, IN THE TESTIMONY OF THE LAWYERS, AS TO MAKING THE STATEMENT ABOUT THE EXPERTS? DURING THE OPENING STATEMENTS STATEMENT AND WHAT THEY -- STATEMENT, AND WHAT THEY CONTEMPLATED AT THAT TIME, COMPARED TO WHAT HAPPENED?

THERE WASN'T MUCH TESTIMONY ABOUT IT. THE ONE LAWYER WHO MADE THE OPENING STATEMENT TESTIFIED THAT AT FIRST HE WASN'T SURE IF HE RECALLED MAKING THAT STATEMENT, AND THEN HE THINKS HE RECALLED MAKING IT, BUT I DON'T THINK IT REALLY WENT THAT FAR, BECAUSE DURING OUR PORTION, WHEN WE WERE DOING THE DIRECT, HIS RECOLLECTION SEEMED TO BE HAZY AS TO EXACTLY WHAT OCCURRED AT THE TIME OF THE CRIME.

IS THAT RECORD -- EYE MEAN, EXCUSE ME, YOUR HONOR -- I MEAN, EXCUSE ME, YOUR HONOR.

IS THERE A RECORD OF THE OPENING STATEMENT THERE, AT THE HEARING?

WAS THERE?

WAS THE TRANSCRIPT OF HIS OPENING STATEMENT AVAILABLE?

AT THE HEARING? YES, I BELIEVE SO. I AM SURE IT WAS, YOUR HONOR. UNFORTUNATELY ENOUGH PLAY WASN'T GIVEN TO THAT, APPARENTLY, BECAUSE HE JUST, YOU KNOW, I MEAN HE MADE SOME STATEMENTS. HE SAYS YOU KNOW, HE DOESN'T REALLY GET INTO WHY HE DID OR DID NOT MAKE THE STATEMENT, BUT THEY GIVE PLENTY OF REASONS WHY THEY DIDN'T CALL THE EXPERT, AND I WOULD, YOU KNOW, CONTEST THAT MOST OF THESE REASONS HAD NOTHING TO DO WITH TACTIC OR STRATEGY, AND THE MAIN POINT I WOULD LIKE TO MAKE IS THAT YOU HAVE TRIAL COUNSEL GIVING THIS OPENING STATEMENT, AND THEN YOU HAVE ANOTHER TRIAL

COUNSEL, THERE ARE THREE TRAIL ATTORNEYS, THE OTHER TRIAL COUNSEL WHO IS A LEAD ATTORNEY IN THIS CASE, TESTIFYING AT THE EVIDENTIARY HEARING IN POST CONVICTION, THAT HE NEVER, EVER, HAD ANY INTENT OF CALLING THE EXPERTS AT THE GUILT PHASE, THAT THE ONLY PLACE HE EVER INTENDED ON HAVING THEM TESTIFY WAS AT THE PENALTY PHASE. THIS IS THE LEAD ATTORNEY SAYING THIS AT THE EVIDENTIARY HEARING. SO I SUBMIT THAT THERE COULD BE, POSSIBLY, NO TACTIC OR STRATEGY AS TO WHY THE OTHER ATTORNEY IS GETTING UP IN FRONT OF THE JURY AND SAYING THAT THIS IS GOING TO HAPPEN, AND YOU KNOW, THERE MAY BE REASONS THE ATTORNEY WHO MADE THE OPENING STATEMENT DIDN'T COME INTO THE CASE UNTIL JUST A FEW WEEKS BEFORE TRIAL. YOU KNOW, I DON'T KNOW WHAT IT IS. BUT I KNOW IT WASN'T BASED ON STRATEGY, AND I CERTAINLY BE -- BELIEVE THAT IT WAS PREJUDICIAL, AND THE JURY, ASIDE FROM THE STATEMENT ALONE, I MEAN, THE FACT IS THAT EVIDENCE WAS --

WHAT DOES THE RECORD SHOW, IN TERMS OF THE AVAILABILITY OF EXPERTS THAT WOULD TESTIFY AS DESCRIBED IN THE OPENING STATEMENT THAT YOU ARE ALLUDING TO?

WELL, TWO OF THE EXPERTS -- THE THREE EXPERTS TESTIFIED IN THE PENALTY PHASE AT THE TRIAL. AND INTERESTINGLY, THEY TALK ABOUT MOST OF THEIR TESTIMONY IS ABOUT INTOXICATION, AND TWO OF THE EXPERTS OPINE, AT VARIOUS TIMES DURING THE PENALTY PHASE, THAT THEY FELT MR. OCCHICONE LACKED THE PREMEDITATION TO COMMIT THE CRIMES. NOW, THIS IS COMING OUT AT THE PENALTY PHASE, WHERE IT IS A LITTLE BIT, YOU KNOW, AFTER THE FACT, BUT SO THAT TESTIMONY WAS THERE. IT IS IN THE PENALTY PHASE. AND YOU KNOW, BUT, THE LEAD ATTORNEY IS SAYING, AT THE EVIDENTIARY HEARING, THAT, WELL, THEY WERE NEVER GOING TO COME BACK WITH INTENT, AND IT IS JUST DEFIES WHAT CAME OUT AT PENALTY PHASE. IT DEFIES WHAT THE OTHER ATTORNEY SAID DURING OPENING ARGUMENTS.

BUT DOESN'T THIS -- DIDN'T THESE ATTORNEYS REPRESENT THAT THEY CHANGED THEIR TACTIC AND CHANGED THEIR MIND IN THE MIDDLE OF TRIAL, WHEN IT CAME OUT THAT THEIR MOTION WAS DENIED AS TO DR. MUSODINE, AND THEN THEY DECIDED THAT THEY WOULD NOT PUT ON THESE WITNESSES, AND THEY WOULD RATHER HAVE OPENING AND CLOSING, AND THIS WAS AT TRIAL? CHANGED STRATEGY? CAN THIS COURT MICROMANAGE, IN HINDE STATE, THESE TYPES OF SITUATIONS? -- IN HINDE SIGHT, THESE TYPES OF SITUATIONS -- IN HINDSIGHT, THESE TYPES OF SITUATIONS? IS THAT SOMETHING THAT THIS COURT OUGHT TO BE DO SOMETHING.

I DON'T THINK THAT IS THE CASE HERE THIS. IS WHAT ONE WITNESS IS SAYING AT THE EVIDENTIARY HEARING AND IT DEFIES WHAT THE OTHER ATTORNEY WAS SAYING. I THINK THEY WERE JUST PROVIDING EXCUSES IS HOW IT CAME OUT, BECAUSE JUST AS FAR AS THE COURT, YOU KNOW, THE COURT DID DENY THEIR MOTION AND LIMIT THEIR MOTION, BUT THE POINT I WANT TO MAKE OUT IS, PRIOR TO TRIAL, THE DEFENSE COUNSEL MADE A MOTION IN LIMINE, TO, IT WENT TO THE TRANSCRIPTS THAT WERE TAPED, REGARDING DR. MUSODINE'S TESTIMONY. THEY MADE A MOTION IN LIMINE TO KEEP THOSE TAPES OUT. THEY BECAUSE -- THEY WITHDRAW THE MOTION IN LIMINE. THEY WITHDRAW IT PRIOR TO TRIAL, AND THEY DON'T BRING UP THE MOTION, AGAIN, UNTIL AFTER THE STATE RESTS THEIR CASE, AND THEY BROUGHT UP AN ORAL MOTION AND THE COURT GETS MAD AT THEM BECAUSE THEY DIDN'T MAKE THE MOTION EARLIER, AND THE COURT SAYS IT IS UNTIMELY. THEY SHOT THEMSELVES IN THE FOOT HERE.

THEY HAVE GOT A DIFFERENT SITUATION, NOW, THAT THEY ARE DEALING WITH, SO THEY CHANGED STRATEGY.

BUT, YOUR HONOR, NOTHING CHANGED SINCE THE BEGINNING OF TRIAL. I MEAN, THEY KNEW WHAT THE TESTIMONY -- IT IS NOT LIKE SOMETHING UNEXPECTED OCCURRED AT TRIAL, SOMETHING DIDN'T GO THE WAY IT WOULD. I MEAN, EVERYTHING WENT ACCORDING TO PLAN AT TRIAL. THEY KNEW ABOUT THIS BEFORE TRIAL. THEY KNEW ABOUT THIS BEFORE THEY MADE THEIR OPENING STATEMENTS. THEY KNEW HOW IT WAS GOING TO PLAY OUT. SO YOU KNOW,

THERE IS JUST NO INDICATION AS TO WHAT THEIR DECISION WAS BASED ON. I MEAN --

WELL, IT SEEMS, IN READING THE ORDER, THAT THERE IS AN IMPRESSION, AN OVERRIDING IMPRESSION, THAT, THROUGH CROSS-EXAMINATION, THAT THESE LAWYERS BELIEVE THAT THEY HAVE PLACED ENOUGH BEFORE THIS JURY ABOUT THE INTOXICATION, AND ABOUT THE INABILITY TO CONTROL ONESELF, THAT, REALLY, THAT SOME OF THOSE OTHER TRIAL STRATEGIES WERE MORE IMPORTANT THAN BEAT AGO DEAD HORSE, SO TO SPEAK -- THAN BEATING A DEAD HORSE, SO TO SPEAK, THAN TO KEEP ADDING ON AND ON AND ON AS TO INTOXICATION.

THAT'S CORRECT. AND I WOULD LIKE TO ADDRESS THAT. FIRST OF ALL, THEIR ONLY OTHER TRIAL STRATEGY WAS WHETHER TO KEEP THE SANDWICH, BUT AS TO WHAT THEY ARE SAYING, OBOF THE ATTORNEYS -- ONE OF THE ATTORNEYS TESTIFIED AT THE EVIDENTIARY HEARING, HE ADMITTED THAT THEY HAD NOT BROUGHT FORTH INTOXICATION EVIDENCE AT THE TIME OF THE OFFENSE, TO WHICH THERE IS ACTUAL EVIDENCE. HE ADMITS THIS. HE SAID WE DEVELOPED THAT BY WAY OF HABIT, BECAUSE MR. OCCHICONE IS AN ALCOHOLIC, AND I WOULD SUBMIT, IN ACCORDANCE WITH THE JURY INSTRUCTIONS AND IN ACCORDANCE WITH CASE LAW, LANA HAS NOT V STATE IS ONE OF THE CASES, THE BURDEN OF PROVING A VOLUNTARY INTOXICATION OFFENSE IS TO COME FORWARD WITH ACTUAL EVIDENCE OF INTOXICATION AT THE TIME OF THE CRIME, AND THEY DIDN'T DO THIS. I WOULD LIKE TO MAKE JUST ONE MORE POINT ABOUT. THAT THE STATE, IN ITS CLOSING ARGUMENT, THE STATE CORRECTLY TELLS THE JURY THAT YOU HAVE NOT HEARD FROM ONE WITNESS DURING THIS TRIAL, WHO TESTIFIED THAT MR. OCCHICONE WAS INTOXICATED ANY TIME PRIOR TO THE OFFENSE, AND THE STATE WAS CORRECT IN THIS INFORMATION THAT WAS AVAILABLE, AND I AM INTO MY REBUTTAL TIME, SO I WOULD LIKE TO SAVE THAT FOR REBUTTAL. THANK YOU.

YOU MAY DO SO. MS. DITTMAR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE APPELLEE IN THIS CASE, THE STATE OF FLORIDA.

COULD YOU ADDRESS, SORT OF, THE SANDWICH THAT YOUR OPPONENT ALLUDED TO AT THE END, AND I DON'T MEAN THE SANDWICH ABOUT OPENING AND CLOSING BUT THE SANDWICH THAT HE CONCLUDED WITH THAT THE LAWYER FOR THE DEFENSE GOT UP AND SAID WE ARE GOING TO PRESENT THESE WITNESSES THAT HE WAS INTOXICATED.

IN OPENING STATEMENT.

RIGHT.

CERTAINLY.

AND EXPERTS, AND THEN THAT THE PROSECUTION ENDS UP ARGUING OR ARGUMENT TO THE JURY THAT YOU DIDN'T HEAR, YOU KNOW, ONE WITNESS SAY THAT HE WAS INTOXICATED AT THE TIME. I AM JUST -- AT THE END OF HIS ARGUMENT. I SAW THAT.

SURE. BEFORE THE DEFENDANT HE HAVE EASTBOUND PRESENTED THEIR -- EVEN PRESENTED THEIR OPENING STATEMENT, THE PROSECUTOR PRESENTED HIS OPENING STATEMENT. ONE OF THE THINGS, AND IN FACT THE COURT DISCUSSED IT IN THEIR DIRECT APPEAL THAT THE PROSECUTOR SAID, IN HIS OPENING STATEMENT, THAT THE DEFENSE IS GOING TO PRESENT, IN HIS APPEAL, A PSYCHIATRIST AND PSYCHOLOGIST AND THE DEFENSE OBJECTED AND SAID THE STATE SHOULDN'T TRY AND ANTICIPATE WHAT THEY WERE DOING AND THE COURT SAID IT HAS BEEN ESTABLISHED AND WE KNOW THAT THAT IS WHERE YOU ARE GOING. I AM GOING TO ALLOW THIS. SO WHEN THE DEFENSE GOT UP TO MAKE THEIR STATEMENT, THEY ALREADY HAD THE JURY

BEING TOLD BY THE STATE THAT THE DEFENSE WAS GOING TO PRESENT THIS EVIDENCE. THE DEFENSE STARTS OUT SAYING THIS IS WHAT WE ANTICIPATE OUR CASE WILL SHOW, AND ONE THING THAT I THINK IS VERY UNIQUE ABOUT THIS PARTICULAR SAYS CASE IS WE HAVE A TRIAL -- THIS PARTICULAR CASE IS THAT WE HAVE A TRIAL RECORD THAT IS UNUSUALLY DEVELOPED WITH DEFENSE COUNSEL'S STRATEGIES, AS THE CASE IS GOING ALONG. BECAUSE THERE IS DISCUSSIONS ABOUT SCHEDULING. THERE IS DISCUSSIONS ABOUT WHAT WITNESSES THE DEFENSE INTENDS TO KAU. THERE ARE SOME WITNESS THESE THEY TUNED -- TO CALL, THERE ARE SOME WITNESSES THAT THEY FIND OUT DURING THE COURSE OF THE HEARING THAT THEY ADVISE THE TRIAL COURT THAT THEY ARE GOING TO PRESENT IN THEIR CASE IN CHIEF, AND WHEN THEY ACTUALLY RESTED, THERE IS DISCUSSION ABOUT WHAT DEFENSE THE CASE IS GOING TO PRESENT AND AT THAT POINT, THEY STILL INTENDED TO PRESENT A CASE IN THE GUILT PHASE. AT THAT POINT THE ISSUE ON THE MOTION TO SUPPRESS THE TAPES THAT HAD BEEN MADE BY DR. MUSODINE CAME UP, AND AS JUSTICE SHAW NOTED, IT IS CLEAR THAT THE RULING ON THAT MOTION TO SUPPRESS, WHICH I DON'T RECALL THERE BEING A BIG DEAL ABOUT THE MOTION IN LIMINE AND THIS BEING UNTIMELY. I RECALL THAT MORE BEING A MERITS, IF YOU PRESENT THIS TESTIMONY, YOU ARE GOING TO OPEN THE DOOR TO ALLOW THE STATE TO GET INTO WHAT OCCHICONE TOLD THE EXPERTS. AND AT THAT TIME, THE COURT RULED THAT HE WOULD ALLOW THE STATE TO GET INTO THESE, TO PRESENT THIS EVIDENCE, WITH ANY EXPERT THAT THE DEFENSE CHOSE TO PRESENT AT THAT POINT. IT IS CLEAR, FROM READING THE RECORD, IN FACT, EVEN BEFORE THE RULING WAS MADE, THE DEFENSE ATTORNEY ADVISED THE JUDGE THIS IS VERY IMPORTANT TO OUR CASE. WE CAN'T GO FORWARD WITHOUT KNOWING WHAT YOUR RULING IS AND EVEN WHETHER OR NOT WE PRESENT THE LAY WITNESSES MAY DEPEND ON HOW YOU RULE ON THIS ISSUE, SO THEY WERE GETTING READY TO, AT THAT POINT THE STATE HAD RESTED, AND THE TRIAL COURT WAS ON NOTICE THAT THIS WAS SOMETHING, AND IT IS CLEARLY REFLECTED IN THE RECORD THIS WAS A PRIMARY CONSIDERATION OF THE DEFENSE STRATEGY AT THAT TIME, AND THE DEFENSE LOST THAT MOTION. THE COURT SAID I AM GOING TO ALLOW THE STATE TO GET INTO IT. THE, AT THAT POINT, THE DEFENSE ATTORNEY SAID RIGHT AWAY, PURSUANT TO THAT RULING, WE ARE GOING TO REST OUR CASE NOW. AND THE JUDGE EVEN EXPRESSED SURPRISE ON THE RECORD, AND THE DEFENSE SAID, YES, WELL, THIS IS WHAT WE ARE DOING, SO I THINK THE FACT THAT IT IS UNUSUALLY DEVELOPED IN THE TRIAL RECORD GIVES US A GOOD GLIMPSE, AND THE FACT THAT YOU HAVE ONE OF THE LEAD ATTORNEYS COMING BACK TEN YEARS LATER AND SAYING IN THE EVIDENTIARY HEARING I DON'T THINK WE EVER REALLY INTENDED TO PUT THOSE PEOPLE ON, I THINK, IS UNFAIR, BECAUSE FIRST OF ALL, YOU HAVE THE ATTORNEYS TALKED ABOUT THEIR IMPRESSION OF THE CASE GOING INTO THE CASE, AND, AGAIN, THIS IS TEN YEARS LATER, BUT BRUCE BOYER, WHO WAS THE LEAD ATTORNEY, AS FAR AS REALLY PUTTING THE CASE TOGETHER, NOT NECESSARILY DOING THE LITIGATION BUT PUTTING IT TOGETHER, SAID THAT HE FELT LIKE GOING INTO THE CASE, THAT THE DEFENSE THEORY, WHEN HE WAS ASKED WHAT THE DEFENSE THEORY WAS IN DPLT PHASE, HE SAID I FELT LIKE IT -- IN DEFENSE PHASE, HE SAID I FELT IT WAS TO GEAR UP TOWARDS PENALTY PHASE. I FELT LIKE THERE WAS ANY WAY TO CONVINCE THIS JURY THIS WAS NOT A PREMEDITATED OFFENSE.

WAS VOLUNTARY INTOXICATION, THOUGH, RAISED AS THEIR DEFENSE?

RIGHT.

I WOULD LIKE YOU TO ADDRESS WHETHER OR NOT THERE WAS A FAILURE TO DEVELOP OR CROSS-EXAMINATION TWO OF THE STATE'S WITNESSES ON SPECIFIC KNOWLEDGE THAT HOFFMAN AND LAWSON OF HAD HEAVY DRINKING FOR PROLONGED PERIODS OF TIME ON THE DAY AND NIGHT OF THE MURDER. AS I UNDERSTAND IT, AS TO THAT THEY TESTIFIED LAWSON AND HOFFMAN, THAT HE HAD BEEN A HEAVY DRINKER, AND THAT WAS SAID, BUT THAT THE ACTUAL SPECIFICS OF, FOR EXAMPLE, I GUESS, ONE OF THEM TALKING ABOUT TEN SHOTS OF SCHNAPS IN THE HOURS BEFORE, WAS NEVER HE LISTED. COULD YOU ADDRESS THAT?

LAWSON'S TESTIMONY ABOUT HIM HAVING THE TEN TO FIFTEEN, I THINK IT WAS, SHOTS OF

SCHNAPPS, KIND OF A TONGUE TWISTER, WENT TO WHEN SHE SAW HIM COME INTO THE BAR IN THE MORNING, UNTIL SEVEN O'CLOCK AT NIGHT, SO THIS IS 21 HOURS IN ADVANCE OF THE ACTUAL CRIME THAT HE IS THERE DRINKING.

WAS THERE AN EXPLANATION? GO AHEAD.

SO MY POINT BEING THAT, AND THAT WAS LILY LAWSON, AND, ALSO, WITH CHERYL HOFFMAN, THEY HAD SEEN HIM, BUT IT WAS CONSIDERABLY EARLIER IN THE DAY. NEITHER ONE OF THEM HAD SEEN HIM, AT ALL, CLOSE IN TIME TO THE OFFENSE, SO WHAT THEY HAD TO ADD, REALLY, WAS NOTHING APPRECIABLE TO WHAT HIS DRINKING HABITS, WHICH WERE ALREADY ESTABLISHED AND ALREADY IN THE RECORD, WENT TO. THEY HAD NOTHING THAT WOULD SAY THEY HAD SEEN HIM. NOW, CHERYL, LILY LAWSON DID SAY THAT SHE CAME BACK TO THE BAR THAT EVENING THAT SHE WASN'T WORKING AN AS A BARTENDER BUT SHE CAME BACK SOCIALLY AND WAS PLAYING DARTS. SHE RECALLS THAT SHE WAS THERE BETWEEN THE HOURS OF ABOUT EIGHT AND ELEVEN O'CLOCK, SOMETIME WITHIN THAT TIME PERIOD, THAT SHE HAD SEEN OCCHICONE LEAVE THE BAR WITH HIS FRIEND, MIKE STILLWAGON. STILLWAGON TESTIFIED AT THE EVIDENTIARY HEARING THAT THEY LEFT THE BAR AT 8:30 THAT EVENING AND THEY WENT BACK TO OCCHICONE'S RESIDENCE. HE COULDN'T RECALL IF OCCHICONE HAD ANYMORE TO DRINK, BUT HE SAID, BASICALLY, OCCHICONE PASSED OUT AT THAT POINT AND STILLWAGON LEFT. WE DON'T HEAR MORE ABOUT HIM UNTIL 8:30, SO HE SEEMS TO HAVE SLEPT OFF SOME OF THE ALCOHOL EFFECTS AT THAT TIME. WHEN HE COMES INTO THE BAR AT 11:30, DEBORAH NEWELL IS THE BARTENDER WHO TESTIFIED AT TRIAL THAT HE HAD TWO DRINKS AT THAT TIME AND HAD NOT APPEARED TO BE DRINKING WHEN HE CAME TO THE BAR, AND SHE DID NOT FEEL HE WAS INTOXICATED WHEN HE LEFT AT ABOUT 2:30. CHERYL HOFFMAN IS THE BARTENDER WHO WORKED THE SHIFT FROM TWELVE NOON TO 6:00 P.M., AND SHE SAID THAT SHE RECALLED HAVING SEEN MR. OCCHICONE IN THE BAR. SHE THOUGHT THAT HE HAD HAD ABOUT FIVE OR SIX DRINKS. SHE COULDN'T REMEMBER IF HE ACTUALLY HAD ANYTHING AFTER SHE GOT THERE. SO I ASSUME THIS WAS THE NOON.

THAT WAS HER TESTIMONY AT THE EVIDENTIARY HEARING.

AT THE EVIDENTIARY HEARING.

SHE IS CLOSER IN TIME. CROSS-EXAMINATION, AT THE TIME OF TRIAL, NOTHING ABOUT THAT?

I BELIEVE THAT THAT WAS TO HIS HABITS AND HIS PATTERN.

AGAIN, I UNDERSTAND THAT MAYBE YOU ARE GOING TO SAY THAT IN ANY EVENT MAYBE IT WOULDN'T HAVE MADE A DIFFERENCE, BUT I CAN UNDERSTAND SOMEONE DECIDING NOT TO CALL A WITNESS, AND I CAN UNDERSTAND SOMEONE, YOU KNOW, FOR ALL THESE TACTICAL ADVANTAGES, BUT WHAT WOULD YOU -- WHAT WOULD BE THE TACTICAL REASON, IF WHAT YOU HAVE GOT TO ESTABLISH WITH VOLUNTARY INTOXICATION, IS ACTUAL DRINKING, NOT THE HABIT OF NOT TALKING -- ELICITING TESTIMONY FROM THE BARTENDERS WHO SAW HIM ON THE DAY OF THE ACCIDENT, AS TO WHAT HE WAS DRINKING.

WELL, WHAT CHERYL HOFFMAN TESTIFIED TO AT THE EVIDENCE YEAR -- AT THE EVIDENTIARY HEARING WAS THAT WHEN SHE SAW OCCHICONE AT THE BAR, THAT HE DID NOT APPEAR TO BE STAGGERING AT ALL WHEN HE WAUCHBLTHD HE WAS NOT SLURING HIS SPEECH. HE DID NOT APPEAR TO BE INTOXICATED, SO I DON'T KNOW HOW THAT WOULD HAVE REALLY BENEFITED THE DEFENSE, FOR HER TO BRING THAT OUT IN CROSS-EXAMINATION.

DO WE KNOW, FOLLOWING UP WITH WHAT JUSTICE LEWIS ASKED, SO THERE COULD BE A TACTICAL REASON IF THEY WERE ASKED ABOUT THAT IN THE DEPOSITION AND THEN DECIDED, YOU KNOW, THIS IS NOT INFORMATION, IT IS GOING TO BE TWO-EDGED, AND I AM NOT GOING TO USE IT, SO DO WE KNOW FROM THIS RECORD WHAT WAS INQUIRED ABOUT --

THOSE DEPOSITIONS ARE NOT IN THIS RECORD.

THEY ARE NOT. THEY WERE NOT INTRODUCED? NOT --

NO. NO. SO, AGAIN, YOU HAVE THE SAME PROBLEM THAT YOU HAVE PEOPLE WHO HAD SEEN HIM MUCH EARLIER ON THE MORNING OF JUNE 9. THIS OFFENSE OCCURRED AT FOUR O'CLOCK IN THE MORNING ON JUNE 10, AND YOU HAVE DEFENSE ATTORNEYS, THEY HAD DEPOSED BOTH OF THESE WITNESSES. THEY MADE INFORMED STRATEGIC DECISIONS ABOUT WHETHER OR NOT TO PRESENT THESE WITNESSES AS WELL AS WHETHER OR NOT TO PRESENT THE EXPERT WITNESSES. THERE IS NO CLAIM HERE THAT THEY DIDN'T HAVE ALL OF THE INFORMATION. THERE IS NO CLAIM THAT THEY DIDN'T MAKE A STRATEGY DECISION. THE ONLY CLAIM, REALLY, IS, WELL, THEY SHOULD HAVE DONE SOMETHING THAT THEY DIDN'T DO. THAT IS A DISAGREEMENT WITH THE STRATEGY DECISION. THAT IS NOT SAYING THAT THEY DIDN'T MAKE AN INFORMED STRATEGIC DECISION, AND THIS COURT HAS --

COME BACK TO THAT FOR A MINUTE AND FOCUS ON SO WE UNDERSTAND A LITTLE MORE CLEARLY. ABOUT THE TRIAL COURT'S RULING, REFERENCE TO THE MOTION TO SUPPRESS OR THE MOTION IN LIMINE, WITH REFERENCE TO THE DOCTOR AND WHAT THE DOCTOR WAS TOLD BY OCCHICONE DURING THAT, IN OTHER WORDS, COULD YOU GIVE US A LITTLE MORE DETAIL ABOUT THAT.

CERTAINLY.

AND WHY THAT WOULD HAVE IMPACTED THE LAWYER'S DECISION, YOU KNOW, TO REST THEIR CASE RIGHT THERE, AS OPPOSED TO GOING FORWARD, YOU KNOW, WITH ADDITIONAL EVIDENCE.

DR. MUSODINE HAD BEEN COURT-APPOINTED TO EVALUATE MR. OCCHICONE FOR COMPETENCY PURPOSES PRIOR TO TRIAL. HE TAPE-RECORDED HIS EVALUATION OF DOMINICK OCCHICONE. OCCHICONE, IN THAT EVALUATION, WAS INCREDIBLY SPECIFIC ABOUT DETAILS ON EVERYTHING THAT HAPPENED ON THE NIGHT OF THIS OFFENSE. HE REMEMBERED SONGS THAT HE HAD LISTENED TO ON THE RADIO BEFORE GOING OVER TO ANITA'S HOUSE. HE REMEMBERED THE BRAND OF COLON THAT HE -- OF COLOGNE THAT HE WORRY WHEN HE WENT OVER THERE. ACCORDING TO THE TESTIMONY AT THE EVIDENTIARY HEARING, THE OTHER THING THEY WERE CONCERNED ABOUT WAS HIS DPEEN OR. HE USED PROVEN -- HIS DEMEANOR. HE USED PROFANITY ON THE TAPE, AND THEY HAD OBSERVED THE JURY REACTING EARLIER IN THE TRIAL TO ONE OF THE WITNESSES WHO TALKED ABOUT OCCHICONE USING PROFANITY AND THERE WAS A REACTION, SO THEY THOUGHT THAT THEY DID NOT WANT THE JURY TO HEAR THESE TAPES, AND THEY WENT INTO SEVERAL REASONS, AT THE EVIDENTIARY HEARING, WHY THAT CONCERNED HIM, THE FACT THAT HE APPEARED TO BE CONFESSING ONCE AGAIN, THE FACT THAT IT WAS JUST PUTTING THIS HISS GUILT BACK BEFORE THE JURY. WHAT -- JUST PUTTING HIS GUILT BACK BEFORE THE JURY. WHAT THE COURT RULED WAS THAT, IF THE STATE WOULD BE PERMITTED TO PRESENT DR. MUSODINE AND PLAY THE TAPES FOR THE JURY, IT WAS THAT RULING THAT, I THINK, WAS PIVOTAL TO THE DECISION TO REST WITHOUT ANY WITNESSES AT ALL IN THIS CASE, BECAUSE THEY CLEARLY DID NOT WANT THE JURY TO HEAR THOSE TAPES. THEY FELT LIKE IT WAS VERY DAMAGING TO BE ABLE TO GET UP AND MAKE A CREDIBLE ARGUMENT ON VOLUNTARY INTOXICATION, WHICH WAS CLEARLY THEIR MAIN DEFENSE TO THE JURY, WHEN THEY HAD OCCHICONE TELLING THIS MENTAL HEALTH EXPERT, MONTHS AFTERWARDS, THAT HE REMEMBERS SUCH DETAILED RECALL OF THE NIGHT OF THE OFFENSE THAT HE FELT IT WAS TOTALLY INCONSISTENT WITH THEIR DEFENSE, SO THEY REALLY DID NOT WANT THOSE TAPES TO COME OUT, AND ONCE THE RULING WAS MADE THAT THE STATE WOULD BE ALLOWED TO PRESENT THOSE TAPES, THEY IMMEDIATELY STATED THEY WERE RESTING ON THE RECORD.

AND IN THEIR TESTIMONY, NOW, AT THE POST CONVICTION HEARING, DID THEY AFFIRM THAT THAT PLAYED A CRITICAL ROLE IN THEIR DECISION?

YES. THAT, AMONG MANY OTHER THINGS. THEY TALKED ABOUT HOW THEY, ALL THREE ATTORNEYS, CONSULTED WITH EACH OTHER. THEY THE EVENING -- THERE WAS A RECESS, JUST PRIOR TO THE STATE RESTING IN THIS RULING BY THE TRIAL COURT, AND OVER THE -- THAT THAT EVENING THEY HAD CONSULTED A FOURTH ATTORNEY, WHO WAS EXPERIENCED CRIMINAL ATTORNEY, IN THE AREA, AND HE, ALSO, TESTIFIED AT THE EVIDENTIARY HEARING THAT THEY HAD CALLED HIM THE NIGHT THAT THE STATE WAS ANNOUNCING THAT IT WASRIESING, AND THEY HAD THIS -- WAS RESTING, AND THEY HAD THIS DECISION TO MAKE, AND THAT WAS ONE OF THE FACTORS THAT THEY ALL TALKED ABOUT, THEY TALKED ABOUT THE FACTORS OF THE PRO AND CON FACTORS OF PUTTING ON A CASE AND NOT PUTTING ON A CASE, AND THEY TALKED ABOUT KEEPING THE SANDWICH CLOSING ARGUMENT, AS A REASON TO GO FORWARD, AND THEY TALKED ABOUT HOW THEY HAD UNEXPECTEDLY BEEN ABLE TO BRING OUT MORE OF THE WITNESSES ON CROSS-EXAMINATION ABOUT HIS HISTORY OF ALCOHOL AND HIS DRINKING HABITS, AND THEY FELT LIKE THEY HAD A LOT MORE TO LOSE THAN THEY DID TO GAIN BY PRESENTING ANYBODY. THEY, ALSO, FELT LIKE THEIR EXPERTS WERE NOT GOING TO BE TREMENDOUSLY HELPFUL WITH THEIR PARTICULAR DEFENSE, BECAUSE THEIR EXPERTS APPARENTLY WERE NOT ABSOLUTELY ADAMANT THAT HE COULD NOT PRE-MED DATE THIS CRIME.

-- PREMEDITATE THIS CRIME.

THEY FOCUSED SPECIFICALLY ON THE LAY WITNESSES AND THEIR CONSIDERATION ABOUT INTOXICATION?

THAT WAS PART OF THEIR CONSIDERATION AND WHEN THEY DISCUSSED WITH EACH OTHER, BECAUSE THEY COULD PUT ON, BECAUSE THEY HAD THE LAY WITNESSES. THEY HAD LILY LAWSON, WHO HAD ALREADY TESTIFIED. THEY HAD SOME OF THE OTHER LAY WITNESSNESS. THEY THIS JOANNE CARDACO, WHO TESTIFIED IN PENALTY PHASE, HAD BEEN SUBPOENAED AS A GUILT-PHASE WITNESS AND THEY TALKED ABOUT PUTTING HER ON IN GUILT PHASE, CONCERNING MR. OCCHICONE'S STATE OF MIND. THEY, ALSO, HAD A NURSE AT THE JAIL WHO WAS PREPARED, ACCORDING TO HER STATEMENTS AT THE TIME, TO TESTIFY THAT MR. OCCHICONE HAD A BUMP ON HIS HEAD WHEN HE WAS ARRESTED, WHICH WOULD SUPPORT THE DEFENSE THEORY THAT MR. ARSNER, THE VICTIM, WAS COMING AT HIM WITH A BROOMSTICK. THEY ALSO TALKED ABOUT AUDREY HALL, WHERE HER CAR WAS PARKED AND THAERP WEAR OF HER, AND THEY, ALSO, MADE A DECISION NOT TO PUT ON ANY OF THOSE WITNESSES AND TO REST, AND THEY TALKED ABOUT ALL OF THEM AND NOT NECESSARILY WE CAN PUT ON THESE OTHERS WITHOUT PUTTING ON THE EXPERTS IN OPENING THE DOOR TO THE STATE, BUT HAD HE EVALUATED WHAT THEY HAD TO GAIN FROM ALL OF THOSE.

JUST MAKE SURE. WHAT WAS THE TESTIMONY, THOUGH, ABOUT NOT CROSS-EXAMINING THE BARMAIDS?

THEY WERE NOT ASKED ABOUT WHY THEY DIDN'T CROSS-EXAMINATION THEM.

BUT YOU WOULD AGREE THAT IS A DIFFERENT ISSUE THAN WHETHER YOU PUT WITNESSES ON, BECAUSE CROSS-EXAMINATION IS YOU CAN STILL RETAIN YOUR ADVANTAGE OF HAVING YOUR OPENING AND CLOSING.

SURE. I THINK CROSS-EXAMINATION IS VERY OFTEN RECOGNIZED AS BEING ONE OF THE MOST STRATEGIC THINGS THAT ANY ATTORNEY DOES, AND AS FAR AS YOU KNOW, YOU ASKED EARLIER, IF THE DEPOSITIONS REFLECTED THAT THEY HAD DONE GONE INTO THIS, WOULD THEY KNOW TO ASK, FOR EXAMPLE, HOFFMAN WOULD SAY THAT HE DIDN'T APPEAR TO BE INTOXICATED. THAT MAY HAVE BEEN A STRATEGIC DECISION. THEY DIDN'T WANT TO BRING THAT OUT. LAWSON, REALLY, DBLT DIDN'T, THE THINGS THAT -- DIDN'T, THE THINGS THAT SHE SAW WAS SO MUCH EARLIER IN THE DAY THAT IT JUST MAY NOT HAVE OCCURRED TO THEM. WE DON'T KNOW,

BECAUSE THAT WAS NOT EXPLORED AT THE EVIDENTIARY HEARING AT ALL. THEY WEREN'T ASKED IT THEY CONSIDERED HAVING THAT AS PART OF THEIR CROSS-EXAMINATION. BUT THE BOTTOM LINE IS THAT IT REALLY WOULD NOT HAVE MADE A DIFFERENCE, AND THE TRIAL JUDGE FOUND THAT THERE WAS ABSOLUTELY NO DEFICIENCY IN THE STRATEGIC DECISIONS THAT WERE MADE. THERE WAS NO LACK OF INFORMATION WHICH THE DEFENSE ATTORNEYS DIDN'T HAVE TO BE ABLE TO MAKE THE STRATEGIC DECISION. IT ISIOUS NOW THERE IS A DISAGREEMENT WITH, WELL, THIS IS SOMETHING I WOULD HAVE DONE DIFFERENTLY.

WELL, ALL THREE OF THESE ATTORNEYS, WERE THEY APPOINTED, OR WERE THEY PRIVATELY RETAINED?

THEY WERE PRIVATELY RETAINED. CRAIG LOUISIANA PORT TESTIFIED THAT -- CRAIG LAPORTE IS ONE THAT MR. OCCHICONE CALLED THE MORNING OF HIS ARREST AND SAID I AM ARRESTED. I NEED AN ATTORNEY. MR. OCCHICONE SHORTLY THEREAFTER ASSOCIATED BRUCE BOYER, BECAUSE MR. LAPORTE HAD NOT DEALT WITH CRIMINAL EXPERIENCE, AND HE HAD MORE EXTENSIVE CRIMINAL EXPERIENCE AND, ALSO, HAD EXPERIENCE WITH CAPITAL CASES, AND SO HE BROUGHT BRUCE BOYER IN, AND THEY STARTED INVESTIGATING AND PREPARING FOR THE TRIAL. A LITTLE LATER ON, BRUCE BOYER BROUGHT BRUCE YOUNG, WHO WAS ANOTHER PROSECUTOR THAT HE HAD WORKED WITH AT THE STATE ATTORNEY'S OFFICE, AND WAS OUT IN PRIVATE PRACTICE, BROUGHT HIM IN TO BE THE MAIN LATE GATOR ON TO, SO THE -- -- THE MAIN LITIGATE OR ON IT, SO ALL THREE TESTIFIED THAT EVEN THOUGH IT WASN'T ONE LAW FIRM, THEY WERE ALL PRIVATELY DOING THEIR OWN BUSINESS, BUT THEY ASSOCIATED TOGETHER FOR PURPOSES OF THIS CASE, AND THEY CONSULTED FREQUENTLY. THEY KEPT UP WITH WHAT EACH OTHER WAS DOING. IT IS NOT THE TYPE OF CASE YOU SOMETIMES SEE WHERE YOU HAVE TWO ATTORNEYS AND ONE SAYS, WELL, I PREPARED FOR GUILT PHASE BECAUSE I THOUGHT COCOUNSEL WAS GOING TO BE DOING PENALTY, AND THE OTHER GUY SAYS I THOUGHT EXACTLY THE SAME THING. IT WAS WHERE THEY WENT INTO IT AS A TEAM AND HAD A LOT OF DISCUSSIONS AND THEY TALKED ABOUT HOW MR. OCCHICONE PLAYED INTO THEIR PREPARATION AND EVERYTHING LEADING UP TO IT, AND THEY, ALSO, TESTIFIED ABOUT TWO PRIVATE INVESTIGATION FIRMS THAT THEY HIRED AND WENT TO THE BARS AND DID AS MUCH INVESTIGATION AS THEY COULD. THERE WAS EXTENSIVE INVESTIGATION UP TO THE TRIAL AND THEY CONSULTED WITH ANOTHER ATTORNEY, PETE PROWLY, WHEN THEY MADE A DECISION ABOUT WHETHER OR NOT TO REST THEIR CASE.

DID THE COURT, AND OF COURSE THE DEFENDANT DID NOT TESTIFY, BUT DID THE COURT INQUIRE OF THE DEFENDANT, DURING THE COURSE OF THE TRIAL, REGARDING HIS FAILURE OR DECLINING TO TESTIFY? DO YOU RECALL THAT? I DON'T KNOW THAT THAT IS A ISSUE HERE, BUT --

I DON'T RECALL THAT. I KNOW THAT HE DID TESTIFY IN THIS PENALTY PHASE.

HE DID IN THE PENALTY.

HE TESTIFIED ABOUT HIS SON. AND IT WAS VERY BRIEFLY, BUT I DON'T RECALL, AT THE TIME, IT SEEMS LIKE, TO MY RECOLLECTION, THAT AT THE TIME THE DEFENSE RESTED, THE COURT ASKED THE DEFENDANT IF HE AGREED WITH THAT DECISION, AND HE DID. BUT I CAN'T REPRESENT THAT FOR SURE. BUT I HAVE THAT MEMORY.

COULD YOU ADDRESS THE ONE ASPECT OF THE BRADY CLAIM, CONCERNING THE FAILURE TO FIND OUT OR DISCLOSE THAT THERE WAS A PLEA DEAL WITH, I THINK IT WAS BAKER?

YES. PHIL BAKER WAS A JAIL HOUSE INFORMANT THAT WAS USED BY THE STATE, AND IN MAY OF 1987, PHIL BAKER GAVE A DEPOSITION IN THIS CASE, STATING HIS KNOWLEDGE THAT OCCHICONE HAD MADE CERTAIN STATEMENTS TO HIM. HE SAID, AT THE TIME OF HIS DEPOSITION, THAT AT THAT POINT, HE HAD A PENDING GRAND THEFT CHARGE THAT HE HAD BEEN TOLD HIS GUIDELINE

RANGE FOR THE PENDING GRAND THEFT WAS PROBATION, COMMUNITY CONTROL, OR 20 TO 30 MOINTS MONTHS, AND ALTHOUGH HE DID -- MONTHS, AND ALTHOUGH HE DID NOT HAVE A DEAL WITH THE STATE, HE WAS HOPING TO GET PROBATION ON THAT BECAUSE OF HIS COOPERATION IN THIS CASE. HE, ALSO, STATED THAT HE HAD AN OUTSTANDING, I THINK, A VIOLATION OF PROBATION CHARGE THAT WAS OUTSTANDING THAT HE WAS HOPING TO GET A FAVORABLE RECOMMENDATION ON. IN JULY OF 1987, MR. BAKER WAS SENTENCED FOR THAT PENDING GRAND THEFT, TO PROBATION, SO HE RECEIVED THE SENTENCE HE HAD HOPED FOR. THIS CASE WAS TRIED IN SEPTEMBER OF '87, SO HE HAD ALREADY BEEN SENTENCED. HE TESTIFIED, AT THE TIME OF TRIAL, THAT HE HAD HAD THIS GRAND THEFT CHARGE OUTSTANDING WHEN HE CAME FORWARD WITH THIS INFORMATION; THAT ALTHOUGH HE HAD NO SPECIFIC UNDERSTANDING WITH THE PROSECUTOR, THAT HE HAD HOPED TO RECEIVE PROBATION ON THAT CHARGE AND THAT ULTIMATELY HE HAD RECEIVED PROBATION ON THAT CHARGE.

WASN'T THERE A SENTENCING DOCUMENT, THOUGH, THAT SAID SPECIFICALLY THAT IS WHY HE RECEIVED THAT CHARGE?

THAT DOCUMENT IS NOT IN THIS RECORD. THE TRIAL JUDGE, IN HIS ORDER, SUMMARILY DENYING THIS CLAIM, APPARENTLY WENT BACK AND LOOKED AND FOUND MR. BAKER'S SENTENCING DOCUMENT. THAT WAS NOT USED AS A BASIS IN THE 3.850. THAT WAS NOT ONE OF THE ALLEGATIONS THAT HIS GUIDELINE SCORE SHOULD ACTUALITY TULLY HAVE REFLECTED THAT. THE -- SHOULD ACTUALLY HAVE REFLECTED THAT. THE TRIAL JUDGE WENT BACK AND SAW IT AND SAID, BASED ON THE FACT ON THIS SCORE SHEET, ACCORDING TO THE JUDGE'S ORDER, THERE WAS A DOWNWARD DEPARTURE, AND IT SAYS SPECIFICALLY THE REASON FOR THAT WAS HIS AGREEMENT TO TESTIFY IN THIS CASE, SO WE KNOW THAT THERE WAS FAVORABLE TREATMENT. NOW, THE TRIAL COURT'S ORDER USES THE WORD DEAL, AND I THINK WHETHER YOU CHARACTERIZE IT AS A DEAL OR NOT A DEAL, I THINK, ISN'T SIGNIFICANT. I THINK, TO ME, A DEAL IMPLIES THAT THERE WAS A PREEXISTING AGREEMENT THAT THIS WOULD HAPPEN, AND THERE IS NO EVIDENCE THAT THIS WAS A PREEXISTING AGREEMENT.

THERE WAS NO EVIDENTIARY HEARING ON THE CLAIM.

NO. BUT THERE IS, ALSO, NO -- NO REAL ALLEGATION OF THAT. I MEAN, THE ONLY ALONGITION OF THAT IS, WELL, LOOK, AFTER THE FACT HE GOT PROBATION, WHICH WE KNOW. WE KNOW, TO THE EXTENT THAT IS CONSIDERED FAVORABLE TREATMENT, WE KNOW HE GOT FAVORABLE TREATMENT. THAT IS EXACTLY WHAT HE TESTIFIED TO AT THE TIME OF TRIAL. WHAT HE TESTIFIED TO IS WHAT HAD HAPPENED, AND IT HAD HAPPENED BEFORE THEN, AND IF THE DEFENSE ATTORNEYS AT THE TIME WERE REALLY CONCERNED ABOUT IT, HIS SENTENCING HAD ALREADY TAKEN PLACE. THEY COULD HAVE GOTTEN THAT RECORD AND SHOWN IT TO HIM AT THE TIME OF TRIAL, IF THEY FELT LIKE THAT WAS IMPORTANT, SO THAT WAS ALL TAKEN CARE OF PRIOR TO THE TRIAL. THANK YOU VERY MUCH, YOUR HONORS.

THANK YOU. COUNSEL?

REBUTTAL?

I JUST HAVE UP KEL OF POINTS I WANT TO MAKE. -- I JUST HAVE A COUPLE OF POINTS I WANT TO MA. FIRST, WITH REGARD TO LILY LAWSON -- I WANT TO MAKE. FIRST, WITH REGARD TO LILY LAWSON, JUSTICE PARIENTE, YOU ASKED ABOUT THAT, AND LILY LAWSON, HER TOES TESTIMONY WAS VERY -- HER TESTIMONY WAS VERY REVEAL VEEING. NOT ONLY DOES SHE -- REVEALING. NOT ONLY DOES SHE TESTIFY THAT SHE SAW HIM INTOXICATED, BUT SHE TESTIFIED THAT HE WALKS OUT OF THE SHOOTERS AT ELEVEN O'CLOCK WITH A BOTTLE OF VODKA WITH HIM, AND I THINK THAT WAS CERTAINLY RELEVANT IN THIS CASE, AND, AGAIN, THE DEFENSE COUNSEL FAILED TO ASK ANYTHING ABOUT THAT, AND WHAT WE ARE LEFT WITH AT TRIAL IS THAT THE ONLY WITNESS WHOSE TESTIMONY YOU HEAR ABOUT IS THIS WOMAN AT SHOOTERS, A

BARTENDER, DEBORAH NEWELL, WHO SAID MR. OCCHICONE CAME IN AT ONE O'CLOCK. HE HAD A COUPLE OF DRINKS AND HE WAS FINE, YET NEWELL HAD BEEN WORKING THERE SINCE SIX O'CLOCK IN THE EVENING AND MR. OCCHICONE HAD BEEN THERE, ON AND OFF, THROUGHOUT THE WHOLE EVENING, SO THE TESTIMONY OF THE WITNESSES WOULD, ALSO, HAVE BEEN REBUT WAG SHE WAS SAYING.

SO YOU HAVE THE SITUATION WHERE THE JURY HEARS ABOUT A COUPLE OF DRINKS RIGHT BEFORE, INSTEAD OF HEARING ABOUT A WHOLE DAY.

YES, YOUR HONOR. THAT IS EXACTLY WHAT HAPPENED. IN THE STATE, IT CAN'TIZES ON THIS IN THEIR CLOSING. THEY SAY YOU HAVEN'T HEARD FROM-OWE-CAPITALIZES ON THIS IN THEIR CLOSING. THEY SAY YOU HAVEN'T HEARD FROM ANYBODY WHO SAW HIM INTOXICATED. THE ONLY PERSON WHO TESTIFIED WAS DEBORAH NEWELL AND SHE SAID, YEAH, SHE WAS THERE ALL EVENING AND SHE SAW HIM HAVE A COUPLE OF DRINKS BEFORE SIX O'CLOCK. JUST A COUPLE OF POINDSD%OK WOULD LIKE TO MAKE. ALL OF THIS EVIDENCE IS ALSO RELEVANT TOWARD THE PENALTY PHASE, AND THERE WAS A 7-5 VOTE AT THE PENALTY PHASE. THE JUDGE DID NOT FIND THE STATUTORY MITIGATOR. HE DID NOT FIND THE ONE STATUTORY MITIGATOR BUT FOUND ONE. HE DID NOT FIND THE ONE THAT WAS TO THE CONDUCT THAT WAS SUBSTANTIALLY IMPAIRED, AND THIS, CERTAINLY, COULD HAVE BEEN USED TOWARDS PENALTY PHASE, AND THE JUDGE, ALSO, FOUND THE AGGRAVATOR OF COLD, CALCULATED AND PREMEDITATED, AND I CERTAINLY CONTEND THAT THIS WAS RELY HAVEN'T -- THIS WAS RELEVANT TO REBUT THAT AGO GRATE OR, AS WELL AS THIS -- THAT AGGRAVATOR, AS WELL AS THIS NONSTATUTORY EVIDENCE. I CONTEND, WITH 3.8.

THAT WOULD HAVE MADE -- 3.850, THAT THAT WOULD HAVE MADE A DIFFERENCE AND COME BACK IN THE PENALTY PHASE, AND JUST WITH RESPECT TO THE BREAD CLAIM, YOU ARE -- WITH THE BRADY CLAIM. YOU ARE RIGHT. THERE SHOULD BE NO EVIDENTIARY HEARING ON THE BRADY CLAIM. THE RECORD STANDS WHETHER THE FACTS CONCLUSIVELY --

WAS THERE AN ALLEGATION HERE THAT THERE WAS AN EXPLICIT DEAL BETWEEN THE STATE AND THIS PRISONER?

YES, YOUR HONOR.

WHAT WAS THE ALLEGATION?

YES, THERE WAS AN ALLEGATION. HOWEVER, POST CONVICTION COUNSEL DIDN'T MAKE THAT ALLEGATION ON THE BASIS OF THE TRIAL, OF A TRANSCRIPT, POST-CONVICTION COUNSEL MADE THAT ALLEGATION ON THE BASIS OF THE VICTIM, THIS WOMAN ON WHO THE -- THIS BAKER, BAKER TESTIFIES, AND THE CASE IN WHICH BAKER HAD A DEAL WITH, THIS WOMAN WHO IS THE VICTIM OF THAT CRIME, SHE TESTIFIES THAT THE STATE ATTORNEY TOLD HER THAT THEY WERE GIVING BAKER A DEAL, SO POST-CONVICTION COUNSEL FOUND OUT ABOUT IT THROUGH OTHER MEANS, BUT THE FACT OF THE MATTER IS THAT THE JUDGE, THIS HAD ORDER, CONCEDES THAT A -- IN THIS ORDER, CONCEDES THAT A DEAL WAS MADE.

WHAT WAS THE ALLEGATION THAT WAS MADE, HERE, IN YOUR POST-CONVICTION MOTION. IN OTHER WORDS WAS THE ALLEGATION THAT THE STATE HAD AN EXPLICIT AGREEMENT WITH BAKER, GOING INTO THE TRIAL, THAT HE WOULD RECEIVE PROBATION OR WHATEVER --

FOR HIS TESTIMONY.

WAS THAT THE ALLEGATION?

I BELIEVE SO, YOUR HONOR. I BELIEVE SO. AND THE ALLEGATION WAS THAT HE DID, IN FACT, HAD A DEAL, AND THE STATE SAID AT TRIAL LET HIM TESTIFY TO THE FACT THAT HE DIDN'T HAVE A

DEAL AND DIDN'T SAY ANYTHING ABOUT HIM. TO THE BEST OF MY RECOLLECTION, I DO BELIEVE THAT IS THE ALLEGATION. NOW, WHAT I DO KNOW IS THAT THE ALLEGATION CAME FROM THIS WITNESS, AS OPPOSEED TO FROM A TRANSCRIPT THAT THE JUDGE APPARENTLY GATHERED HIS INFORMATION FROM. AND IN THE SECOND PART OF THE BRADY CLAIM, IS THAT THERE WERE WITNESSES. THERE IS AN ALONGITION THAT THE STATE KNEW THE PREMEDITATION AND THE INTOXICATION ISSUE WOULD BE RELEVANT IN THIS CASE, AND THERE IS AN ARGUMENT THAT THE STATE WITHHELD THE NAMES OF WITNESSES WHO SAW MR. OCCHICONE DRINKING ON THE DAY OF THE OFFENSE, AND THERE IS NOTES, FROM THE STATE ATTORNEY'S FILES, AND THEY ARE ATTACHED TO THE 3.850 MOTION. FOR INSTANCE THERE AN AFFIDAVIT FROM ONE WITNESS WHERE HE SAYS "SAW MR. OCCHICONE AT 6:30 ON THE EVENING OF THE MURDERS". SAID MR. OCCHICONE HAD ABUZZ ON. AND THE STATE DIDN'T DISCLOSE THIS, AND I WOULD SUBMIT THAT THE STATE KNEW THAT THIS WOULD BE RELEVANT AND THEY FAILED TO DISCLOSE IT, AND THAT MR. OCCHICONE SHOULD GET AN EVIDENTIARY HEARING ON THIS.

WERE THESE AFFIDAVITS OR NOTE?

THESE WERE NOTES THAT THE STATE ATTORNEY'S INVESTIGATORS TOOK. THEY WERE IN THE STATE ATTORNEY'S FILES, SO A SIMILAR SITUATION IN YOUNG V STATE. THESE WERE NOTES THAT THE STATE ATTORNEY HAD IN THEIR POSSESSION AND WE GOT THROUGH POST-CONVICTION, AND I WOULD RESPECTFULLY URGE THIS COURT TO VACATE MR. OCCHICONE'S SENTENCE AND TO REMAND THE CASE FOR A NEW TRIAL IN THIS ISSUE OR AT MINIMUM FOR A PENALTY PHASE ON THIS ISSUE, AT THE VERY LEAST, SUMMARILY ON THE DENIED CLAIMS. THANK YOU.

THANK YOU, COUNSEL. THANKS TO BOTH OF YOU FOR ASSISTING US. WE WILL BE IN RECESS.

PLEASE RISE.