Daniel Lugo v. State of Florida

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS SPENCER VERSUS STATE. SPENCER VERSUS MOORE. CONSOLIDATED CASES.

GOOD MORNING, YOUR HONOR. I AM ERIC PINKARD FROM THE CCRCs DISTRICT ON, BEHALF MR. DUSTY RAY SPENCER. WE ARE HERE ON A DIRECT APPEAL FROM THE LOWER COURTS' DENIAL OF HIS 3.850 MOTION, AND WE ARE, ALSO, HERE FOR A SIMULTANEOUSLY FILED STATE HABEAS PETITION. THE FIRST ARGUMENTS I WANT TO RAISE ARE DEVELOPED, THIS MORNING, SURROUND THE PROSECUTORIAL MISCONDUCT THAT PERVADED THE ENTIRE PROCEEDING IN THE SPENCER CASE AND THE PROSECUTORIAL MISCONDUCT IN THIS CASE, BASED UPON THE ACTIONS OF THE PROSECUTOR, BASED UPON MISSTATEMENTS OF FACT BY THE PROSECUTOR, AND BASED UPON QUESTIONING BY THE PROSECUTOR ATTORNEY IN THIS CASE. THESE WERE RAISED, BOTH AS FUNDAMENTAL ERROR IN THE 3.850 MOTION, AND WERE, ALSO, RAISED AS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FOR FAILING TO OBJECT TO THESE IMPROPER ACTIONS BY THE PROSECUTOR IN THIS CASE. AND I WOULD ASK THE COURT THAT THE THE ONSET, TO VIEW THESE MATTERS AS TO THEIR CUMULATIVE EFFECT ON THE ENTIRE PROCEEDING, NOT AS ERRONEOUSLY DONE BY THE TRIAL COURT IN THIS CASE, TAKING THEM SINGULARLY AND IN ISOLATION FROM ONE ANOTHER, BUT RATHER TAKE A LOOK AT THE CUMULATIVE EFFECT, AND WHEN YOU DO, SO I THINK IT IS APPARENT THAT IT DID HAVE SUBSTANTIAL IMPACT ON THE TRIAL AND UNDERLINES -- AND UNDERMINES THE SENTENCE GIVEN TO MR. SPENCER.

DID THE JUDGE LOOK AT IT FROM A CUMULATIVE STANDPOINT?

THE TRIAL JUDGE, MEANING THE 3.850 JUDGE? YES. I DON'T BELIEVE THE TRIAL COURT'S ORDER ADEQUATELY ADDRESSES THEM ON A CUMULATIVE STANDPOINT. I THINK THERE IS A LAUNDRY LIST AND HE GOES DOWN EACH ITEM AND BASICALLY STARTS OUT BY SAYING EACH ARE PROCEDURALLY BARRED AND THEN GOES ON TO SAY, WELL, THERE IS NO PREJUDICE ASSOCIATED WITH THIS COMMENT, WITHOUT PROPERLY TAKING A LOOK AT THE ENTIRETY OF THE CUMULATIVE EFFECT. I WOULD, ALSO, AT THE ONSET, ASK THAT THIS, TAKEN IN THE CONTEXT OF THE 7-TO-5 VOTE THAT WE HAD IN THE CASE FOR THE ADVISORY SENTENCE BY THE JURY, THE CLOSEST OF ALL POSSIBLE VOTES FOR RECOMMENDATION OF DEATH IN THIS CASE.

WHAT WAS THE REASON THAT THE DEFENSE LAWYER GAVE FOR NOT OBJECTING TO ANY OF THIS?

WELL, WE HAVE GOT A VARIETY OF COMMENTS, SOME OF THEM WHICH WERE NOT COVERED IN THE EVIDENTIARY HEARING, SO WE DON'T KNOW WHAT THE REASON WAS. THERE IS, ALSO, ONE ASPECT OF IT WHERE, FOR THE DEFENSE LAWYER, AND I CAN GET INTO IT LATER, SIMPLY SAYS HE MISSED A CERTAIN THING, BUT I THINK AS I GO THROUGH EACH ONE OF THESE, I CAN POINT OUT WHICH ONES WERE OBJECTED TO AND WHICH ONES HAD AN EXPLANATION PROVIDED, BUT THE FIRST ONE I WOULD LIKE TO DISCUSS OCCURS DURING THE PENALTY PHASE OF THIS CASE, AND IT OCCURS DURING A CRITICAL STAGE OF THE PENALTY PHASE, AS THE DEFENSE WAS OFFERING THE MENTAL HEALTH MITIGATION EXPERT TESTIMONY BY DR. KATHLEEN BIRCH, AND THE REASON THAT THIS MENTAL HEALTH MITIGATION TESTIMONY WAS SO CRITICAL IN THIS CASE, IF YOU TAKE A LOOK AT THIS COURT'S OPINION IN SPENCER ONE AND SPENCER TWO, THIS COURT DISTINGUISHED THIS CASE FROM THE SANTOS CASE, INVOLVING A SPOUSAL MURDER, AND FOUND IT TO BE SIMILAR TO THE LEMON CASE ON THE BASIS THAT THE LOWER COURT HAD NOT PUT SUBSTANTIAL WEIGHT ON THE MENTAL HEALTH MITIGATION EVIDENCE, AND IN THIS,

THOUGH, WE ARE AT THE CRITICAL STAGE OF THE PENALTY PHASE, AND THE DEFENSE, DR. KATHLEEN BIRCH IS CALLED TO DISCUSS THESE THINGS, AND THE PROSECUTOR BLATANTLY CROSS-EXAMINED THIS EXPERT, POINTING OUT THAT CERTAIN STATEMENTS MADE BY MR. SPENCER WERE NOT UNDER OATH AND BASICALLY ASKING THE JURY TO DISBELIEVE THESE STATEMENTS, BECAUSE IN THE EXACT WORDS OF THE PROSECUTOR, WOULD YOU CONSIDER THE TYPE OF TESTIMONY THAT THE JURY WOULD HAVE RECEIVED, IT THAT THE JURY WOULD HAVE HEARD, THAT BEING SWORN TESTIMONY SUBJECT TO CROSS-EXAMINE BY THE STATE AND THE DEFENSE, TO BE A SUPERIOR FORM OF FACTO FINDING FOR FACTUAL -- OF FACT FINDING FOR FACTUAL DETERMINATION, JUST LINKENING TO WHAT YOU DID DURING -- JUST LIKEENING TO WHAT YOU DID DURING DUSTY WAY SPENCER. THERE IS NO FACT FINDING FOR TELLING THE JURY THAT HE SHOULD NOT HAVE GIVEN THESE STATEMENTS TO THE JURY BY THE DOCTOR, BECAUSE HE DID NOT TESTIFY. IN OTHER WORDS YOU CAN'T BELIEVE ANYTHING, BECAUSE IT WASN'T SUBJECT TO CROSS-EXAMINE. SO THE LAW IN THIS STATE IS THAT ANY COMMENT WHICH IS REASONABLY SUSCEPTIBLE TO THE COMMENT ON THE DEFENDANT'S FAILURE TO TESTIFY IS INAPPROPRIATE, AND IN THIS CASE, YOU DON'T EVEN HAVE THE STANDARD OF REASONABLY SUSCEPTIBLE. THAT IS A OUTRIGHT FRONTAL ASSAULT ON THE DEFENDANT'S FAILURE TO TESTIFY IN THIS CASE AND IS AN ESSENTIAL PART OF THE PRESENTATION. AS TO SHE COMPOUNDS THE PROBLEM, PROSECUTOR DOES IN THIS CASE, BY ASKING DR. LIPPMAN, WHEN HE TESTIFIES, ANOTHER DEFENSE WITNESS IN THE AREA OF CRIMINAL MITIGATION, SHE ASKED DID THIS DEFENDANT LIE, AND, AGAIN, THIS IS NOT UNDER OATH, AND IN THE STATE'S ANSWER BRIEF, THIS IS IN PENALTY PHASE, BECAUSE MR. SPENCER WAS ALREADY FOUND GUILTY. WELL, HE HASN'T HAD THE DEATH PENALTY IMPOSED YET, SO THE DEFENSE SAYS THAT EXTENDS TO THE PENALTY PHASE AS WELL AS THE GUILT PHASE.

HOW DO YOU DISTINGUISH THAT KIND OF QUESTIONING OR COMMENT, THOUGH, FROM SITUATIONS WE SEE MANY TIMES, AND I DON'T BELIEVE THAT WE HAVE EVER FOUND OBJECTIONABLE, WHERE THE STATE DOES CONTEND THAT A DEFENDANT SELF-SERVING OR SELF-SUPPORTING ABOUT PARTICULAR MATTTORIES AN EXPERT IS ENTITLED TO MUCH LESS WEIGHT OR CREDIBILITY THAN ACTUAL EVIDENCE THAT WOULD GO BEFORE A JURY TO ESTABLISH THE SAME THING? THAT IS IT IS A MUCH WEAKER CASE IN TERMS OF MITIGATION, AND THEN FOR AN EXPERT TO RELY ON, AS OPPOSEED TO WHEN WITNESSES ARE BROUGHT AND YOU KNOW, INTO PENALTY PHASE, AN ELABORATE PREDICATE TESTIMONY IS LAID, DO YOU UNDERSTAND WHAT I AM TALKING ABOUT?

YEAH. I UNDERSTAND.

HOW WOULD YOU DISTINGUISH WHAT HAPPENED HERE, BETWEEN WHAT WE SEE AT LEAST OFTEN?

WELL, I THINK THAT YOU CAN ASK THE QUESTION, THAT, WELL, THIS IS THE DEFENDANT TELLING YOU THIS AND HE HAS AN INTEREST IN THE OUTCOME OF THESE PROCEEDINGS. YOU CAN COUCH IT IN THOSE TERMS, BUT I DON'T THINK THERE IS ANY LAW OUT THERE THAT I KNOW THAT ALLOWS THE PROSECUTOR, ON THE MERE FACT OF THE DEFENDANT MAKING A STATEMENT TO MEANTAL HEALTH EXPERT, TO, THEN, COMBAT THAT, COMMENT ON THE FAILURE TO TESTIFY. THANK IS SUCH A FUNDAMENTAL RIGHT THAT YOU CAN'T CROSS THAT LINE. THERE ARE OTHER WAYS OF IMPEACHMENT ALONG THE LINES THAT YOU ARE DISCUSSING, WITHOUT CROSSING THAT LINE, AND WHEN YOU SAY, WELL, HE WOULD HAVE BEEN SUBJECT TO CROSS-EXAMINE, THEN YOU KNOW, YOU ARE AT THE POINT WHERE YOU ARE TALKING ABOUT THAT THE MAN DIDN'T TESTIFY, AND THAT IS WHERE SHE GOT TO IN THIS CASE.

WHAT IS THE CLOSEST CASE YOU HAVE BEEN ABLE TO FIND DISCUSSING THAT ISSUE?

WELL, I DON'T THINK I HAVE HFER FOUND A -- I HAVE EVER FOUND SUCH A CASE, WHERE YOU SAY THE EVIDENCE IS UNCONTROVERTED OR SOMETHING ALONG THOSE LINES. THE PROSECUTOR

WOULD MAKE A MORE SUBTLE STATEMENT ABOUT THAT, AND THAT CAN BE REVERSIBLE ERROR, I THINK, IN SEVERAL CASES. THAT COMES TO MIND FIRST. BUT THIS IS BLATANT, AS YOU CAN IMAGINE. I MEAN, I DON'T KNOW HOW ELSE, UNLESS YOU JUST SAID DON'T BELIEVE IT BECAUSE HE DIDN'T TESTIFY, BUT THERE IS NOTHING ELSE TO REFER TO, OTHER THAN WHAT WE HAVE IN THE RECORD.

YOU SAID ALL ALONG YOU WERE GOING TO POINT OUT WHERE THE DEFENSE LAWYER GAVE AN EXPLANATION FOR, OR IF THAT WAS, WAS THERE ONE ON THIS?

THERE WASN'T ONE. THIS WAS ONE OF THE NON-HEARING, THERE WAS NO EVIDENTIARY HEARING IN THIS AREA HERE, SO WE DON'T KNOW WHY THE DEFENSE ATTORNEY DIDN'T OBJECT TO THIS ONE, BUT I CAN'T THINK OF ANY STRATEGIC REASON TO NOT OBJECT AND PROTECT YOUR CLIENT'S RIGHTS FROM A DIRECT COMMENT ON HIS RIGHT NOT TO TEST TIE. WHAT -- TOS IT PHI.

A WHAT -- TO TESTIFY.

WHAT DID THE TRIAL COURT SAY?

THE TRIAL COURT SAID IT SHOULD HAVE BEEN PROCEDURALLY BARDO A MATTER OF DIRECT APPEAL. I DON'T THINK THAT IS CORRECT.

DID THE TRIAL COURT OR THE LOWER COURT GO INTO THE MERIT?

JUST, I BELIEVE, IT CITES THIS COURT'S OPINION IN SPENCER AND JUST SAYS THE COMMENTS AREN'T EGREGIOUS ENOUGH TO AMOUNT TO FUNDAMENTAL ERROR. THAT IS MY RECOLLECTION THAT THAT WAS THE ORDER OF THE LOWER COURT.

THIS WAS PRESENTED AS INADEQUACY OF THE TRIAL COUNSEL?

YES. IT WAS SUBMITTED AS INADEQUACY OF TRIAL COUNSEL FOR FAILURE TO OBJECT, SO WE HAVE GOT THE STRICKLAND STANDARD IN REGARD TO THAT.

WAS THAT RAISE ODD APPEAL?

IT WAS RAISE ODD APPEAL AND ALSO INCLUDED IN THE HABEAS. YES, IT IS COVERED.

IF IT IS FUNDAMENTAL ERROR, FIRST WE HAVE TO ANALYZE WITH EACH OF THESE, WHETHER IT IS ERROR, WHAT KIND OF ERROR, AND THEN SEE WHERE IT WOULD FIT IN, IN THE SCHEME.

RIGHT. I THINK IT WOULD HAVE TO BE VIEWED AS FUNDAMENTAL ERROR, FOR THE APPELLATE COUNSEL TO BE INEFFECTIVE FOR FAILING TO RAISE IT, AND THEN WHEN HE IS TALK BAG TRIAL COUNSEL, YOU ARE TALKING ABOUT BACK IN THE STRICKLAND STANDARDS. THE DIFFERENCE BETWEEN THE FUNDAMENTAL ERROR AND THE STRICKLAND ANALYSIS UNDERMINES THE JURY. THAT WOULD BE THE METHOD OF ANALYSIS, BUT I AM NOT SURE WHAT CONFLICT THERE IS.

WAS THERE ANY EFFORT TO BRING FORWARD EXPERT TESTIMONY, THROUGH AFFIDAVIT OR THE TESTIMONY OF A CRIMINAL DEFENSE LAWYER, AS TO THE REASONABLENESS OF --

HOW --

HOW A COMPETENT TRIAL LAWYER WOULD REACT?

NO. THERE WAS NOT, AT THE EVIDENTIARY HEARING, ANY SUCH TESTIMONY. SECONDLY, THE ACTIONS OF THE PROSECUTOR IN THIS CASE, DURING THE GUILT PHASE OF THIS, DURING THE CLOSING ARGUMENT OF THE PROSECUTOR, ON THIS CENTRAL ISSUE OF THIS CASE DURING THE GUILT PHASE, I BELIEVE, ON THE ISSUE OF PREMEDITATION, WHICH WILL BE THE DISTINGUISHING

FACTOR BETWEEN PREMEDITATED FIRST-DEGREE MURDER AND SOME LESSER-INCLUDED OFFENSE, WHICH I THINK WAS A CLOSE CASE IN THIS CASE, GIVEN THE FACT THAT THIS COURT DID STRIKE THE CCP AGGRAVATOR AS FINDING THAT IT WASN'T A HEIGHTENED LEVEL OF PREMEDITATION, SO THAT IT WAS A CONSIDERABLE ISSUE AT GUILT PHASE, ALSO. THE PROSECUTOR, WHILE ARGUING THIS CRITICAL PART OF THE CASE, DON -- AND THIS IS ON VIDEOTAPE DONE BY A LOCAL NEWS SHOW, ACTUALLY VIDEOTAPED THE PROSECUTOR DOING THIS, DONNED THE ACTUAL GLOVES THAT SHE ALLEGED THAT MR. SPENCER USED DURING THIS HOMICIDE, AND THEN IN A QUIVERING, BLUBBERING TYPE EMOTIONAL OUTBURST THE BEFORE THE JURY, GOT GOT TO THE POINT DURING THIS PREMEDITATION, WHERE SHE COULDN'T SPEAK ANY LONGER, AND SAID PREMEDITATION, AND SHE GETS TO THE POINT WHERE SHE CAN'T CONTINUE ANY LONGER, WALKS BACK TO THE COUNSEL TABLE AND COMPOSES HERSELF AND THEN CONTINUES ON. I THINK ANY TIME YOU HAVE A SITUATION WHERE AN ARGUMENT BY THE PROSECUTOR IS DESIGNED TO EVOKE A RESPONSE BY THE JURY IS INAPPROPRIATE, AND I CITED THE TAYLOR CASE IN THE BRIEF, WHERE THE PROSECUTOR USED THE MURDER WEAPON AND SLAMMED IT ON THE TABLE DURING HIS CLOSING ARGUMENT, AND THAT WAS FOUND TO AND IMPROPER EMPLOY TO THE -- AN IMPROPER PLOY TO THE EMOTION OF THE JURY, AND IN IN CASE THE IMPROPER BLUBBERING DURING THE CLOSING ARGUMENT, IS INAPPROPRIATE, AND I WOULD INVITE THE COURT TO TAKE A LOOK AT THAT VIDEOTAPE, BECAUSE IT DOES --

THE LOWER COURT TOOK A LOOK AT IT AS WELL, DIDN'T HE? ANOTHER LOWER COURT LOOKED AT THE VIDEOTAPE, AND THE LOWER COURT BASICALLY FOUND THAT, BECAUSE THE PROSECUTOR WAS NOT CRYING, SO TO SPEAK, THERE WASN'T TEARS, I GUESS IT WAS PLED THAT WAY IN THE 3.850, THAT SHE WAS CRYING, BUT BECAUSE OF THAT, THEN IT DIDN'T RISE TO THE LEVEL OF EVOKING AN EMOTIONAL RESPONSE, BUT EVEN WITHOUT THE TEARS, THERE IS A CLEAR EMOTIONAL RESPONSE. I MEAN, THIS IS A EMOTIONAL OUTBURST. IF YOU LOOK AT THIS VIDEO TAPE, IT IS STRIKING. THIS PROSECUTOR DOES MAKE AN EMOTIONAL OUTBURST TO THE JURY, AND IT IS CROSSING THE LINE.

IS THAT A POSTCONVICTION THE SAME AS THE TRIAL JUDGE?

YES.

SO THE POSTCONVICTION JUDGE WAS THE SAME JUDGE THAT ACTUALLY WAS IN THE COURTROOM AT THE TIME THIS HAPPENED?

THAT'S CORRECT. AND THIS IS ONE CASE WHERE THE DEFENSE ATTORNEY APPROACHED THE BENCH, I BELIEVE LATER ON IN THE PROCEEDINGS, AND SAID, WELL, PERHAPS I SHOULD HAVE OBJECT TO DO THAT, AND THEN IT BEING TOO LATE, I COULDN'T, BUT HE DOES SOMEWHAT ADMIT THAT, IF YOU READ THE TRANSCRIPT, THAT HE SHOULD HAVE OBJECT TO DO THAT. LAST AREA, GETTING AWAY FROM THE, WELL, THE MISSTATEMENTS OF FACTS BY THE PROSECUTOR INVOLVE THREE DIFFERENT AREAS, AND IT INVOLVED AN IMPROPER STATEMENT OR MISSTATEMENT OF FACT BY THE PROSECUTOR THAT TIMOTHY JOHNSON WOULD TESTIFY OR HAD SEEN MR. SPENCER HIT MRS. SPENCER WITH AN IRON ON THE JANUARY 4 INSIDE KENT, NO SUCH -- INCIDENT. NO SUCH TESTIMONY EVER TOOK PLACE. THE WITNESS NEVER SAW MR. SPENCER STRIKE MRS. SPENCER WITH THE IRON, THAN IS WHAT HE TESTIFIED TO. THERE IS, ALSO, TESTIMONY, OR THE PROSECUTOR STATED, IN OPENING STATEMENT, THAT THERE WOULD BE TESTIMONY THAT THE VICTIM WAS ARMED WITH A RIFLE ON THE DAY OF THE OFFENSE, BY KRISTA MAYS. THAT WITNESS NEVER TESTIFIED. THAT MATTER WAS RAISED ON DIRECT APPEAL AND CONSIDERED BY THIS COURT, BUT I AM JUST THROWING IT IN AS CUMULATIVE EFFECT THAT THAT -- CUMULATIVE EFFECT OF THE PROSECUTORIAL MISCONDUCT IN THIS KA.S I THINK YOU HAVE TO CONSIDER ALL OF THE MISCONDUCT. LASTLY IN THAT AREA, THE PROSECUTOR IMPROPERLY ARGUED, DURING THE PENALTY PHASE, THAT MR. SPENCER HAD TOLD DR. LIPPMAN THAT HE WOULD CALL THE VICTIM IN THIS CASE, AND THAT IS AN ESSENTIAL PART OF THE PREMEDITATION ANGLE ON THIS CASE OF THE STATE, THAT THIS DISTINGUISHES BETWEEN FIRST AND SECOND-DEGREE AND IS

ALSO A CRITICAL MITIGATION OF THIS CASE IF YOU READ SPENCER ONE AND SPENCER TWO, SO ALL OF THESE MISSTATEMENTS BY THE PROSECUTOR, AND, AGAIN, I THINK YOU HAVE TO TAKE A LOOK CUMULATIVELY AT THE ARGUMENTS, THE BLUBBERING IN CLOSING ARGUMENT, IT GOES ALL OF THE WAY THROUGHOUT THIS CASE. YOU HAVE GOT THE OPENING STATEMENT IMPROPER AND QUESTIONING IMPROPER AND CLOSING ARGUMENT AND GUILT PHASE IMPROPER. YOU HAVE GOT QUESTIONING IN PENALTY PHASE IMPROPER, AND IT IS PERVASIVE ALL OF THE WAY THROUGH, AND I WOULD ASK THE COURT TO TAKE A LOOK AT THE CUMULATIVE EFFECT OF THAT. ALSO WE HAVE SOME INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS FOR FAILING TO CALL ESSENTIAL WITNESS, DEALING WITH THE ESSENTIAL ISSUE OF PREMEDITATION PREMEDITATION. SPECIFICALLY THOSE WITNESSES ARE CURTIS SING, ANDY BROCKHOLD AND BRITON AND THE EVENING BEFORE THE HOMICIDE, ALL WOULD HAVE STATED, AND THEY WERE CALLED AT THE EVIDENTIARY HEARING, AND THEY STATED THAT MR. SPENCER TOLD THEM THAT HE WENT OVER TO THE HOUSE FOR THE PURPOSE OF RETRIEVING HIS CAR TITLE AND TO GET HIS PERSONAL BELONGINGS BACK BECAUSE THEY WERE IN THE MIDST OF A DIVORCE, SO IT NEGATES THIS ISSUE OF PREMEDITATION, AND ALSO IT IS IMPORTANT, ALSO, FOR THE PENALTY PHASE, BECAUSE THE LOWER COURT FOUND THAT, BECAUSE THIS, IN THE LOWER COURT'S OPINION THIS MURDER WAS PLANNED, THAT THAT IS WHAT NEGATED THE MENTAL HEALTH MITIGATION EVIDENCE IN THIS CASE, AND THAT IS WHAT THIS COURT SEIZED UPON, SO TO SPEAK, TO DISTINGUISH IT FROM SANCHEZ AND FIND IT SIMILAR TO THE LIMON CASE. LASTLY, IN THE GUILT PHASE, THE PENALTY PHASE, THERE WAS AVAILABLE EVIDENCE OF DISSOCIATIVE STATE ON THE PART OF THE WITNESSES IN THIS CASE, AND BOTH DR. LIPPMAN AND THE OTHER DOCTOR TESTIFIED THAT MR. SPENCER DIDN'T KNOW WHAT HE WAS DOING AND WOULDN'T HAVE CONTROL OVER HIS ACTIONS. THAT IS IMPORTANT WHEN YOU GET TO THE PENALTY PHASE, BECAUSE THE ESSENTIAL INGREDIENT, AND THIS COURT USES IT, AGAIN, WAS THE QAUFLT THE MENTAL HEALTH MITIGATION EVIDENCE, AND THIS COURT FOUND THAT, NOT PLACING A LOT OF WEIGHT ON IT, BECAUSE THE LOWER COURT FOUND THAT THIS MURDER WAS PLANNED, SO TO SPEAK, SO ON THE ONE HAND YOU HAVE GOT SEVERAL WITNESSES SAYING THIS WASN'T PLANNED, BECAUSE YOU WOULDN'T SAY I AM GOING TO HER HOUSE TO GET MY TITLE, IF YOU WERE PLANNING TO GO OVER THERE AND KILL THE VICTIM, BECAUSE YOU WOULDN'T BE BROADCASTING IT. ALSO THE CIRCUMSTANCES OF THIS CASE, IF YOU TAKE A LOOK, THIS HOMICIDE WAS COMMITTED IN FRONT OF AN EYEWITNESS, SO IT WASN'T PLANNED TO THE POINT WHERE THE PERSON WAS TRYING TO GET AWAY WITH IT SO TO SPEAK. LASTLY, THE LAST INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, COUNSEL CONCEDED TO PREMEDITATION IN THE OPENING STATEMENT, BY STATING THAT MR. SPENCER INTENDED TO DO THESE ACTS, WHICH WE FEEL WAS INEFFECTIVE ASSISTANCE, FOR CONCEDING THE VERY POINT THAT WAS THE ESSENTIAL ISSUE OF THE CASE. I AM IN MY REBUTTAL. I WILL SIT DOWN.

THANK YOU. MR. BROWNE.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. TAKING APPELLANT'S ISSUES IN TURN, IT IS CLEAR WHAT THE PROSECUTOR WAS DOING, DURING THE YOLKS OF DR. BIRCH -- DURING THE CROSS-EXAMINATION OF DR. BIRCH WAS TESTING THE FOUNDATION OF HER KNOWLEDGE, IN OTHER WORDS THAT THE JURY HAD LISTENED TO THE TESTIMONY AND HAD HEARD THE WITNESSES TESTIFY ABOUT THE FACTS OF THIS CASE, SO THE PROSECUTOR WAS POINTING OUT TO THE JURY THAT DR. BIRCH HAD NOT LISTENED TO THE TRIAL TESTIMONY. SHE HAD RELIED UPON REPORTS AND UP IN REPORTS AND, YES, THE SELF-SERVING STATEMENTS OF DUSTY RAY SPENCER. IN THE STATE'S OPINION, WHEN THIS VAST AMOUNT OF SELF-SERVING HEARSAY IS COMING IN, IT IS APPROPRIATE FOR THE PROSECUTOR TO TEST THE FOUNDATION OF THAT KNOWLEDGE. NOW, PROSECUTOR DID NOT MAKE A DIRECT COMMENT ON HIS FAILURE TO TESTIFY. IN FACT, WHEN DR. BIRCH TESTIFIED, THE PROSECUTOR HAD NO WAY OF KNOWING WHETHER OR NOT TELL PEL APARTMENT WAS EVEN GOING TO TESTIFY IN THE PENALTY PHASE. PROSECUTOR SIMPLY STATED, WELL, DID YOU CROSS-EXAMINATION DUSTY RAY SPENCER, TO LOOK FOR CONTRADICTIONS BETWEEN WHAT HE TOLD YOU AND WHAT WAS APPARENT FRLT POLICE REPORTS -- FROM THE POLICE REPORTS, WHAT OTHER WITNESSES HAVE SAID, SO THAT IS

NOT IMPROPER IN THAT CONTEXT, AND MOREOVER, THERE IS SOMETHING THAT I MISSED IN MY BRIEF. FIRST OF ALL, IT WAS NOT PRESERVED AS AN ISSUE OF PROSECUTORIAL MISCONDUCT, AND WE HAVE ARGUED THAT IN OUR BRIEF, BUT THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHAT DID COUNSEL DO WITH THAT IN HIS OWN CLOSE SOMETHING HE USED IT TO HIS ADVANTAGE. HE GOES WHAT DID THE PROSECUTOR DOT? PROSECUTOR, ON CROSS-EXAMINATION SAID -- DO? THE PROSECUTOR, ON CROSS-EXAMINATION, SAID YOU DIDN'T HAVE DUSTY RAY SPENCER UNDER OATH. THAT IS A SMOKE SCREEN, BECAUSE WHAT THE DEFENSE DID WAS CORROBORATE WHAT DUSTY RAY SPENCER SAID, AND THEN THE DEFENSE ATTORNEY WENT ON TO SAY, HEY, LOOK, HERE IS THE CORROBORATION THAT WE PROVIDED TO, AND NOT ONLY THAT, THE DEFENSE ATTORNEY PROVIDED YOU AND SAID LOOK AT THESE TWO EXPERTS, WHOSE TESTIMONY WAS UNREBUTTED BY THE STATE, SO IT CERTAINLY COULD NOT HAVE RAISED TO THE LEVEL OF INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON THIS RECORD AND BASED ON THAT ATTORNEY'S CONDUCT, AND I INVITE THIS COURT TO LOOK AT PAGES 411 THROUGH 414, WHERE THAT WAS ADDRESSED. CLEARLY THE PROSECUTOR WAS NOT DEFECTIVE IN THAT CASE.

DID THE PROSECUTOR, LATER, IN HIS SUMMATION TO THE JURY, GO BACK TO THIS ISSUE SGLU.

I DON'T BELIEVE SO, YOUR HONOR. I REREAD IT, BUT I DIDN'T SEE IT ON DIRECT.

IS THERE ANY CLAIM BEING MADE HERE?

NO. ABSOLUTELY NONE. EMPHASIZE THAT.

GOING BACK AND SAY TO THE JURY THAT, AND REMINDS THEM THAT THEY DIDN'T HAVE ANY SWORN TESTIMONY BY THE DEFENDANT AS TO THESE THINGS?

NO, YOUR HONOR, ABSOLUTELY DID NOT.

IN TERMS OF, AND I WANT TO ASK YOUR CANNED I HAD -- YOUR CANDID OBJECTION TO THIS, BETWEEN THE STANDARD AT TRIAL AND WHAT IS THE STANDARD ON APPEAL, WHETHER THE APPELLATE ATTORNEY RAISES THAT ON APPEAL AND THEN HOW WE LOOK AT IT POSTCONVICTION. IF WE HAD A CASE HERE, WHERE YOU TAKE ONE OF THE ERRORS THAT THEY ARE ASSERTING, THAT IF THERE HAD BEEN AN OBJECTION, THE WAY OUR CASE LAW WAS AT THE TIME, THERE WOULD HAVE BEEN, UNDER THE DEGRILL YO STANDARD, A -- A DEGRILIO STANDARD, A REVERSAL, IT DIDN'T SEEM TO ME, AGAIN, A COMMENT THAT COULD HAVE CAUSE ADD REVERSAL OF THE ORIGINAL CONVICTION IS NOT THE SAME THING AS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL OR IS IT? WOULD YOU A QUAINT THAT? IF YOU HAD HYPOTHETICALLY, HERE, ONE OF THESE THINGS THAT, IF OBJECTED TO, WE WOULD HAVE, UNDER THE DEGRILIO, COULDN'T HAVE SHOWN IT WAS HARMLESS BEYOND A REASONABLE DOUBT, IS THAT YOUR INEFFECTIVE ASSISTANCE --

YOUR HONOR, I DON'T THINK ANY OF THESE ALONE WOULD MEET THE STANDARDS. IN OTHER WORDS THE STATE COULD SHOW THEY WERE HARMLESS, BUT THERE ARE TWO DIFFERENCES, BECAUSE WHEN IT APPEARS IN THE RECORD, THIS COURT CAN ADDRESS IT. THE STATE HAS THE BURED EN-- THE BURDEN AT THAT POINT, BUT WHEN YOU ARE TALKING ABOUT A COLLATERAL ATTACK, THE DEFENDANT HAS THE BURDEN.

BUT THE LAWYER IS NOT THE ONE THAT IS A LITTLE SLOW ON THE UPTAKE, THE DEFENDANT REALLY NEVER HAS A WAY OF ADEQUATELY, REALLY, EVER GETTING THE KIND OF REDRESS, AND HAVING A LAWYER TO KNOW THESE WERE IMPROPER.

THERE ARE DIFFERENT STANDARDS INVOLVED. CERTAINLY IT PUTS THEM AT A --DY- IS THAT NONE OF THESE WOULD HAVE MAY NOT BE ERROR, AND WOULDN'T EVEN MEET THE STANDARD.

CERTAINLY THEY WOULD BE HARMLESS. COUNSEL MADE MUCH OF THE PROSECUTOR PUTTING

ON GLOVES IN CLOSING ARGUMENT AND BLUBBERING. THAT IS NOT WHAT HAPPENED, YOUR HONORS. THE PROSECUTOR DID PUT ON A PAIR OF GLOVES. THE GLOVES WERE ADMITTED INTO EVIDENCE. THEY ARE EVIDENCE OF PREMEDITATION. THE PROSECUTOR DIDN'T MAKE THREATENING GESTURES WITH THE GLOVES, DIDN'T MAKE A CHOKING GESTURE, DIDN'T SLAP THE JURY. SHE SIMPLY PUT ON THE GLOVES AND SAID THIS SHOWS PREMEDITATION. WHAT COUNSEL REFERS --

WAS THAT NOT EVOKING EMOTION?

YOUR HONOR, I WAS THERE. THE PROSECUTOR TESTIFIED DURING THE EVIDENTIARY HEARING. SHE DID NOT CRY. SHE DID NOT BLUBBER. THERE WAS, I BELIEVE THE PROSECUTOR AND THE JUDGE TESTIFIED IT WAS A QAFER IN THE VOICE. IT WAS SO -- QUAIVER IN THE VOICE. IT WAS SO I AM PERCENT I BELIEVE THAT THE PROSECUTE -- IMPERCEPTIBLE, THAT THE PROSECUTOR -- THAT THE DEFENSE ATTORNEY SAID WAS THAT DONE? WAS NOT EVEN WORTHY OF A MENTION ON DIRECT APPEAL, MUCH LESS A COLLATERAL ALEC -- COLLATERAL ATTACK ON THIS CASE, AND BY THE TIME THE DEFENSE ATTORNEY THOUGHT SHE HAD QAFERRED, IT WAS DONE. SHE HAD COMPOSED HERSELF.

THIS WAS ON DIRECT APPEAL? IT WAS THE TRIAL JUDGE THAT WAS THERE WHEN IT ACTUALLY --

YES, YOUR HONOR. THE HONORABLE JUDGE PERRY, I BELIEVE. AS FOR THE MISSTATEMENT OF FACTS THE COUNSEL HAS RAISED THE ISSUE OF THE PROSECUTOR'S OPENING STATEMENT ABOUT OBSERVING, TIMOTHY JOHNSON OBSERVING THE VICTIM BEING STRUCK BY THE IRON. WELL, THAT WAS WHAT THE PROSECUTOR SAID IN OPENING, BUT SHE CORRECTED HERSELF ON HER OWN CLOSING, AND I INVITE THIS COURT TO REVIEW PAGE 1037. WHEN THAT DID NOT COME TO FRUITION DURING TRIAL, THE PROSECUTOR CORRECTED IT. NOT ONLY DID THE PROSECUTOR CORRECT THAT IMPRESSION, BUT THE DEFENSE ATTORNEY DID AS WELL. THE JURY WAS NOT PRESENTED WITH FALSE INFORMATION.

ON THE CONCESSION OF INTENT, THAT IS INVOLVED HERE, BECAUSE WE HAVE DEALT WITH THAT A COUPLE OF TIMES.

VERY RECENTLY, IN FACT, YOUR HONOR. I BELIEVE I CITED SUPPLEMENTAL AUTHORITY IN ATWATER V STATE. THIS IS A VERY SIMILARLY SITUATION. WE HAVE ATWATER, BROWN, AND I BELIEVE ANOTHER CASE THAT THE STATE CITED, WHERE YOU ARE CONFRONTED WHAT OVERWHELMING AMOUNT OF EVIDENCE. YOU HAVE AN EYEWITNESS TO THE MURDER. THE DEFENSE ATTORNEY IN THAT POSITION CANNOT SIMPLY GET UP THERE AND IGNORE THE FACT THAT IT OCCURRED. HE MADE A REASONABLE STRAT EDGE.

-- STRATEGIC DECISION. THE FACT THAT THE DEFENSE ATTORNEY FEST TIED IN THIS -- TESTIFIED IN THIS ISSUE THAT I AM NOT GOING TO LOSE MY CREDIBILITY. I AM TRYING TO GET UP THERE AND SAVE THIS MAN'S LIFE. THE FACT THAT IT DIDN'T HAPPEN, I WOULD LOSE MY CREDIBILITY.

COUNSEL IS NOT MERELY ARGUING THAT IT DIDN'T HAPPEN BUT THAT THERE WAS A CONCESSION OF INTENT RESPECT WHICH WAS CRITICAL HERE FOR THE DEGREE.

YOUR HONOR, IF YOU LOOK, IT WAS ABUNDANTLY CLEAR THERE WAS NO CONCESSION OF INTENT. BECAUSE THE TRIAL COUNSEL WAS MAKING THE DIFFERENCE BETWEEN PREMEDITATION AND JUST ACT HAPPENING AND INTENDING TO STRIKE HER. ACCORDING TO HIS ARGUMENT, THIS WAS A HEAT OF PASSION MURDER. THE STATE HAS NOT PROVED PREMEDITATION, SO YOU CANNOT SAY AS THE STATE ATTORNEY, THAT IT WAS THE FACT THAT SHE WAS MURDERED, HORRIBLY MURDERED IN FRONT OF HER OWN SON. WHAT IS COUNSEL TO REASONABLY DO AND IN FACT COUNSEL HAS NOT ARGUED WHAT ALTERNATIVE THEORY WOULD HAVE CARRIED THE DAY, SO COUNSEL WAS NOT INEFFECTIVE IN ANY WAY. REGARDING THE HEARSAY AND THE CAR TITLE, THAT WAS INADMISSIBLE HEARSAY. COUNSEL CANNOT BE INEFFECTIVE FOR FAILING TO

PRESENT THE WITNESSES THAT ALLEGEDLY WOULD HAVE TESTIFIED THAT THE NIGHT BEFORE THE MURDER DUSTY SAID HE WANTED TO GO TO HIS HOUSE TO GET HIS CAR TITLE. THAT IS SELF-SERVING HEARSAY. PERIOD. THAT IS NOT ADMISSIBLE. BECAUSE HE DID NOT GET HIS CAR TITLE. HE DID NOT GET ANY OF HIS THINGS FROM THE HOUSE. HE WENT TO THE HOUSE. THAT IS THE ONLY PART OF IT THAT WOULD HAVE COME IN. THE REMAINDER OF IT WAS HEARSAY, FOR WHICH NO EXCEPTION WOULD APPLY. THE DISASSOCIATETIVE STATE ARGUMENT, WHICH COUNSEL PRESENTED IN THE PENALTY PHASE, THAT EVIDENCE WAS PRESENTED. DR. LIPPMAN TESTIFIED DURING THE PENALTY THAIS -- PHASE, THAT HE THOUGHT THAT DUSTY RAY SPENCER HAD ENTERED SOME TYPE OF DISSOCIATIVE STATE, SO THAT WAS PRESENTED FOR CONSIDERATION. DR. BIRCH DID NOT SAY HE WAS IN A DISSOCIATIVE STATE. THE ROPE FOR THAT WAS SHE REMAINED SKEPTICAL AT THE TIME OF THE TRIAL, AT THE TIME OF THE PENALTY PHASE, ABOUT HIS SELF-SERVING CLAIM OF AMNESIA. NOW, YOU CAN'T BLAME THE DEFENSE ATTORNEY FOR HER SUDDEN CHANGE OF OPINION. IT WAS NOT BASED ON ANY LACK OF INFORMATION OR MATERIAL THAT THE DEFENSE ATTORNEYS PROVIDED HER. AND THE JURY WAS, BOTH OF THOSE EXPERTS TESTIFIED THAT THE STATUTORY MENTAL MITIGATORS APPLIED, AND BASED ON THAT TESTIMONY, THIS COURT FOUND THAT THEY DID APPLY. COUNSEL WAS NOT IN ANY WAY INEFFECTIVE. IF THERE ARE NO FURTHER QUESTIONS, THE STATE WILL RELY ON ITS BRIEF. THANK YOU.

THANK YOU, MR. BROWNE. MR. PINKARD.

VERY BRIEFLY, THE ALTERNATIVE THEORY IS THAT IT IS A LESSER-INCLUDED OFFENSE, RATHER THAN FIRST-DEGREE MURDER. YOU HAVE A LESSER OFFENSE, SO THAT WOULD BE THE ALTERNATIVE THEORY. AS TO THE HEARSAY EXCEPTION TO THE STATEMENTS BY THE LAY WITNESSES, I BELIEVE THE EVIDENCE CLEARLY SETS OUT THAT THEY CAN BE INTRODUCED FOR EXPLAINING FUTURE ACTS TO BE DONE IN THE FUTURE, SO YOU SAY I AM GOING OVER THERE TO GET THE CAR TITLE, THEN THAT WOULD BE A FUTURE ACT, AND ALSO EVEN IF THEY WEREN'T ADMISSIBLE IN GUILT PHASE, THEY WOULD BE ADD MIFBL IN -- ADMISSIBLE IN PENALTY PHASE, CLEARLY, AND YOU WOULD ALLOW THE DEFENSE TO PUT ON, AGAIN, THAT LIMITATION VERY IMPORTANT IN THE GUILT AND PENALTY PHASE. LASTLY, IT IS ABSOLUTELY NOT TRUE THAT THE PROSECUTOR IN THIS CASE OF CORRECTED THAT MISSTATEMENT ABOUT THE IRON, AND AGAIN, THIS IRON IS THE INCIDENT THAT THE AGGRAVATOR IN THIS CASE. THIS IS, WITHOUT THAT AGGRAVATOR IN THIS CASE, YOU DON'T HAVE, UNDER PROPORTIONALITY, A VALID DEATH PENALTY. IN 1037, IT REFERS TO THE ARGUMENT, NOT OF THE PROSECUTING ATTORNEY BULL OF THE DEFENSE ATTORNEY, SO I THINK MY -- ATTORNEY BUT OF THE DEFENSE ATTORNEY, SO I THINK MY COLLEAGUE MISSTATED.

THERE WAS OTHER EVIDENCE BROUGHT IN, WAS THERE NOT, THAT AN IRON WAS USED?

THE ONLY OTHER EVIDENCE THAT WAS BROUGHT IN, THERE WAS A DOCTOR THAT TESTIFIED THAT THE VICTIM HAD SAID THAT THERE WAS AN IRON USED. OTHER THAN THAT, THERE WAS NO OTHER EVIDENCE OF THE IRON. ABOUT BUT THAT EVIDENCE WAS, THEN, ALONG --

BUT THAT EVIDENCE WAS, THEN, ALONG WITH THE NATURE OF THE INJURIES INFLICTED IN THAT EPISODE.

THAT PARTICULAR STATEMENT BY THE VICTIM WAS IN. I DON'T THINK THERE WAS MEDICAL TESTIMONY THAT AN IRON WOULD HAVE BEEN USED, THOUGH. I THINK IT WAS CONTRARY TO. THAT I DON'T THINK THERE WAS A MEDICAL -- CONTRARY TO THAT. I DON'T THINK THERE WAS A MEDICAL DOCTOR THAT INTRODUCED THAT AN IRON WAS USED IN THIS CASE.

THAT WAS ESSENTIALLY UNREBUTTED, WAS IT NOT?

UNREBUTTED.

IF THERE WAS NO OTHER TESTIMONY OR YOUR CLIENT DIDN'T TESTIFY, FOR INSTANCE, I DIDN'T USE AN IRON, THERE WASN'T ANYTHING LIKE THAT THAT OCCURRED THERE.

CORRECT. THERE WAS NO OTHER EVIDENCE REGARDING THE IRON. HOWEVER, I THINK THAT THAT BEING SAID, STILL THE EYEWITNESS TESTIMONY WAS INCORRECTLY STATED AS TO THE IRON. I THINK EVEN THOUGH THERE WAS SOME STATEMENT BY THE VICTIM, I THINK THAT, IN AND OF ITSELF, WHEN YOU ARE TALKING ABOUT THE AGGRAVATOR ON THE CASE AND YOU HAVE GOT 50 PERCENT OF THE EVIDENCE SHOULD HAVE BEEN ELIMINATED, MEANING THE EYEWITNESS TESTIMONY WAS INCORRECTLY STATED BY THE PROSECUTOR AND NOT PROPERLY CORRECTED.

THANK YOU, MR. PINKARD.

THANK YOU.

YOUR HONOR, IT IS UNUSUAL, BUT I HAVE THAT PAGE OF TRANSCRIPT HERE, AND IT WAS IN CLOSING. I HAVE BEEN ACCUSED OF MISSTATING.

YOU CAN JUST STATE THE RECORD NUMBER.

PAGE 1037.

THANK YOU. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.