# Jeffrey Lee Atwater vs State of Florida

GOOD MORNING, AND WELCOME TO ORAL ARGUMENT AT THE FLORIDA SUPREME COURT. THE FIRST CASE ON OUR DOCKET, THIS MORNING, IS AT WATER VERSUS STATE AND AT WATER VERSUS MOORE.

I REPRESENT THE STATE, AND WE ARE HERE ON AN APPEAL FOR 3.8.

AND, ALSO, A PETITION FOR HABEAS CORPUS, GENERALLY ALLEGING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. I WOULD LIKE TO TALK ABOUT TWO MATTERS, TODAY, POSSIBLY A THIRD. THE FIRST IS MY CONTENTION THAT THE HOLDING OF THIS COURT IN NIXON V SINGLETARY, HIS COUNSEL UNEQUIVOCALLY ARGUED HIS SENTENCE FOR MURDER. AT THE PENALTY PHASE, WITH REGARD TO INVESTIGATION PREPARATION AND PRESENTATION OF MITIGATING EVIDENCE IS THE SECOND ISSUE. THE THIRD ISSUE IS THE FIRST ISSUE THAT I RAISED IN THE PETITION FOR HABEAS CORPUS, AND IT DEALS WITH, AS FAR AS WHAT I CAN SEE, A SIMPLE MISTAKE ON THE PART OF THE COURT, IN INSTRUCTING THE JURY ON EDMUND TYSON, WHEN THERE WAS NO -- THERE WAS NEVER A HINT OF A CO-DEFENDANT IN THIS CASE AT ALL. THOSE ARE THE THREE ISSUES THAT I WOULD LIKE TO TALK ABOUT.

THE FIRST TWO ISSUES THAT YOU ARE GOING TO TALK ABOUT, IF I UNDERSTAND IT CORRECTLY, THE TRIAL COURT HAD AN EVIDENTIARY HEARING ON THOSE TWO ISSUES?

YES, SIR. LET ME GO TO THAT POINT RIGHT AWAY. I AM ASKING FOR A NEW TRIAL, ON WHAT I AM CALLING THE KNICKS ONE ISSUE, BUT, AS A SECONDARY RELIEF, I AM, ALSO, ASKING THAT THE CASE BE REMANDED TO THE LOWER COURT, TO MAKE A DETERMINATION AS TO WHETHER OR NOT MR. ATWATER AGREED OR CONCEPTED TO HIS COUNSEL'S STRATEGY.

YOU SAID -- WAS THERE AN EVIDENTIARY HEARING ON THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL?

NO, YOUR HONOR.

I THOUGHT JUSTICE ANSTEAD ASKED YOU IF THERE HAD BEEN AN EVIDENTIARY HEARING.

THERE WAS AN EVIDENTIARY HEARING ON THE FIRST ISSUE, ON COUNSEL'S CONCESSION THAT HIS CLIENT WAS GUILTY OF SECOND-DEGREE MURDER, DURING THE GUILT PHASE. PERHAPS I MISHEARD THE QUESTION. AND, ALSO, CONNECTED WITH THAT, ON THE ALLEGATION THAT COUNSEL HAD PREVENTED THE DEFENDANT FROM TESTIFYING. THESE WERE GUILT-PHASE ISSUES, ON THE PENALTY-PHASE ALLEGATION, AND IT WAS, AT HEARING, DENIED SUMMARILY.

AT ISSUE, WHY COULDN'T THE TRIAL COURT CONCLUDE THAT THE LAWYER DID INFORM YOUR CLIENT ABOUT HIS TRIAL COURT STRATEGY OF CONCEDING TO SECOND-DEGREE AND CLAIMING THAT THIS WAS A SECOND-DEGREE MURDER CASE NOT A FIRST-DEGREE MURDER CASE. BASED ON THE TESTIMONY OF THE LAWYERS, WHO SAID THAT, OF COURSE, IT IS THEIR USUAL PRACTICE TO INFORM THEIR CLIENTS OF THEIR STRATEGY.

ABOUT THAT, YOUR HONOR, I HAVE THE EXCERPT, HERE, FROM THE EVIDENTIARY HEARING, OF MR. SCHWARTZBERG, WHERE HE DID NOT SAY. THAT I UNDERSTAND THE TRIAL COURT MADE OUT --

TELL ME WHAT THE TESTIMONY BY THE LAWYERS WAS.

YES, SIR. IT STATES, AS LONG AS HIGH CLIENT TAKES A POSITION THAT IS -- AS LONG AS MY CLIENT TAKES A POSITION THAT IS SUPPORTED BY THE LAW OR BY THE FACTS AND IS NOT ABSOLUTELY CONTRARY TO WHAT I BELIEVE, 95 PERCENTENT OF THE TIME, I BELIEVE THAT I WOULD ADHERE TO THE WISHES OF MY CLIENT. SOMETIMES I HAVE TO ACT IN WHAT I BELIEVE TO BE MY CLIENT'S BEST INTEREST, IN ORDER, ESPECIALLY IN A CAPITAL CASE, TO SAVE THEIR LIFE. SO HE IS NOT MAKING --

IS THAT ALL HE HAD TO SAY ABOUT THAT?

HE, ALSO, SAID IT IS HIS ROUTINE PRACTICE TO TALK TO HIS CLIENTS, BUT BOTH ATTORNEYS SAID THAT THIS WAS THEIR ROUTINE PRACTICE BUT THEY HAD NO SPECIFIC RECOLLECTION, AT ALL, OF WHAT ACTUALLY HAPPENED IN THIS CASE, WITH REGARD TO THE CONSENT ISSUE.

CLEARLY THE INFERENCE IS, THOUGH, THAT THAT IS WHAT THEY WOULD DO AND WE HAVE NO REASON TO BELIEVE THAT THEY WOULD DO OTHERWISE. WOULDN'T THAT BE A PROPER INFERENCE FROM THAT TESTIMONY?

I THINK THAT IS WHAT THE IMPLICATION WAS OF THEIR TESTIMONY. I THINK THAT IS WHAT THEY WERE EXPRESSING, BUT AS I SAID, ON REPEATED QUESTIONING, THEY COULD NOT SAY THAT IN THIS CASE. AND, OF COURSE, MR. ATWATER TESTIFIED IN THE EVIDENCE YAERING HEARING, THAT THAT HAD NOT BEEN THE CASE, AND WE, ALSO, HAVE -- HEARING, THAT THAT HAD NOT BEEN THE CASE, AND WE, ALSO, HAVE TESTIMONY IN THE RECORD OF THE DEFENDANT SAYING I DIDN'T DO THIS TO THE DOCTOR. THIS IS SOMETHING THAT DIDN'T COME UP POSTCONVICTION. IT WAS SOMETHING SAID TEN YEARS AGO, AND THE LAWYERS, ALSO, SAID, WHEN CONFRONTED WITH MR. ATWATER SAYING I DIDN'T DO THIS, THEY, ALSO, HAD SOME FAINT RECOLLECTION OF THAT. THEY SAID SOMETHING RANK A BELL OR SOMETHING OF THAT -- THEY SAID SOMETHING RANGE A BELL OR SOMETHING OF THAT NATURE. THE -- RANG A BELL OR SOMETHING OF THAT NATURE. THE LOWER COURTS, THEIR LAWYERS SAY THAT THIS WOULD BE A ROUTINE PRACTICE BUT DID NOT HAVE A SPECIFIC RECOLLECTION OF THE MATTER, WITH REGARD TO THIS CASE. THE DEFENDANT SAYS IT NEVER HAPPENED. HE NEVER DISCUSSED AND HE NEVER CONSENTED, AND HE WOULD NOT, IF THE MATTER HAD EVER BEEN DISCUSSED. THIS COURT FINDS, ON THE BASIS OF THE MacNEIL CASES THAT WERE URGED BY THE STATE, THAT IT DOESN'T MATTER, SO THERE IS NOT A FINDING OF FACT ON THIS ISSUE BEFORE THE COURT RIGHT NOW.

THE STATE SEEMS TO BE TRYING TO COUNTERARGUE ON THIS CASE THAT THE ADMISSION TO A LESSER-INCLUDED OFFENSE, IS, SOMEHOW, DIFFERENT. WHAT IS YOUR TAKE ON THAT, AND WHAT IS YOUR RESPONSE TO THAT KIND OF ASSERTION? THAT IT IS DIFFERENT THAN THE KNICKS ONE CASE. THE KNICKS ONE CASE WAS ONE WHERE THEY CAME AND ADMITED AS CHARGED.

CORRECT.

DID THAT MAKE A DIFFERENCE?

MY POSITION IS THAT, WHERE COUNSEL, IN ESSENCE, PLEADS HIS CLIENT GUILTY TO A CRIME --

ANY CRIME.

-- TO ANY CRIME, NOT TO ANY FACT, NOT TO A STIPULATION OR SOMETHING, BUT TO A CRIME, AND THAT IS AN INCLUDED LESSER OFFENSE OF THE CRIME CHARGED, THEN THAT STEPS OVER THE LINE AND IS, IN FACT, A CHRONIC PROBLEM, AND I AM BASING THAT CONTENTION, I THINK, ON PURELY DEFINITIONAL LOGIC, FOLLOWING THE LANGUAGE OF NIXON, THAT CONFESSION OF GUILT IS THE EQUIVALENT OF A GUILT PLEA.

SO HOW DO YOU RECOLLECT ONE SIL THAT POSITION WITH THE BROWN -- RECONCILE THAT POSITION WITH THE BROWN DECISION?

WELL HAD, IN BROWN, THIS COURT, THE OPINION IS VERY CLEAR THAT THERE WAS A DISCUSSION AND THERE WAS CONSENT. THIS COURT -- I THINK THERE IS A PARAGRAPH IN THE BROWN DECISION THAT DISCUSSED THAT IN SOME DETAIL, AND I BELIEVE THE COURT SPECIFICALLY FOUND THAT THERE WAS A DISCUSSION, THAT THERE WAS CONSENT ON THE PART OF THE CLIENT.

HOW ABOUT MacNEIL?

MacNEIL DEALT WITH THIS MATTER, FROM THE STRICT LAND POINT OF VIEW. MacNEIL, ALSO, IS A SITUATION WHERE COUNSEL DID NOT MAKE AN UNEQUIVOCAL CONCESSION OF GUILT, AND THIS DISTINCTION, IT, ALSO, APPEARED VERY RECENTLY, IN A DECISION, I THINK, JUST RELEASED LAST WEEK. PATTON, WHERE THE COURT, ALSO, RECOGNIZED THE DISTINCTION BETWEEN A SITUATION WHERE THE CLIENT GOES TO THE JURY AND DOES WHAT MR. SCHWARBURG DID HERE. HE HELD UP THE GRUESOME PHOTOGRAPHS AND SAID IF THIS ISN'T A FINDING OF ILL WILL AND SPITE, THEN FIND FOR SECOND-DEGREE MURDER. THAT ISN'T UNEQUIVOCAL CONCESSION. THAT IS WHAT HAPPENED IN BROWN. IN MacNEIL, THERE WAS AN EQUIVOCAL CONCESSION OF, AT MOST, THE STATE HAS PROVEN MANSLAUGHTER. AT MOST, THE STATE HAS PROVEN ONE OF THE LESSER-INCLUDED OFFENSES. I THINK THAT IS AN IMPORTANT STINGS. THAT IS -- AN IMPORTANT DISTINCTION. THAT IS WHAT THEY ARGUED IN THEIR BRIEF.

BUT THE DEFENSE ATTORNEY, WE HAVE, STARTED OUT IN HIS CLOSING ARGUMENT, SAYING THE STATE HAS FAILED TO PROVE FIRST-DEGREE PREMEDITATED MURDER. THEY FAILED TO PROVE FIRST-DEGREE FELONY MURDER. CORRECT?

I BELIEVE SO. WHAT MR. SCHWARZBURG DID, WHICH, BY THE WAY IS CONTRARY TO WHAT HE SAID HE DID IN THE EVIDENTIARY HEARING. IN HIS FIRST CLOSING ARGUMENT, HIS FIRST SEGMENT, HE ADDRESSED THE FELONY MURDER AND SAID THERE WAS INSUFFICIENT EVIDENCE OF ROBBERY. IT WAS JUST AN AFTERTHOUGHT, AND SAID I WILL TALK TO YOU ABOUT THE OTHER THEORY, PREMEDITATION, IN MY CHANCE ON REBUTTAL, AND HE DID. AND AT THAT POINT, HE UNEQUIVOCALLY SAID THAT HIS CLIENT WAS GUILTY OF SECOND-DEGREE MURDER BUT NOT FIRST. YOU ARE RIGHT. HE DIDN'T CONCEDE GUILT OF FIRST-DEGREE MURDER.

SO IN ESSENCE, ISN'T THIS THE SIMILAR-TYPE ARGUMENT THAT YOU HAVE IN MacNEIL. NO, WE ARE NOT GUILTY OF FIRST-DEGREE MURDER, BUT, MAYBE, MANSLAUGHTER.

WELL, I CANNOT AGREE WITH THAT. TO ME, I HAVE BEEN THERE AND DONE THIS, MYSELF, WHERE I TALK ABOUT A REASONABLE DOUBT AS TO A CERTAIN ELEMENT OF THE OFFENSE, WITHOUT TELLING THE JURY MY CLIENT IS GUILT, GUILT, GUILTY OF A LESSER-INCLUDED OFFENSE. I THINK THERE IS AN IMPORTANT DISTINCTION BETWEEN COUNSEL SAYING, AT MOST, THE STATE HAS PROVEN A LESSER-INCLUDED OFFENSE, OR NOT EVEN SPEAKING TO IT, AND HERE, AS IN NIXON AND IN BROWN, WHERE COUNSEL INSISTS TO THE JURY THAT HIS CLIENT IS, IN FACT, GUILTY. I WANTED TO MENTION, TO THE COURT, IN DUGGAR, I THINK, ABOUT FIVE YEARS AGO, TO THE EXTENT, AS I AM ASKING, FOR A RELIEF FOR THE COURT TO CONSIDER THE MATTER, AS IN THE KNICKS ONE CASE, AND MAKE AN IDENTICAL CONSENT. THIS IS NOTHING KNEW TO HARVEY V DUGGAR. THIS WAS, ALREADY, ADDRESSED BY THIS COURT IN THAT CASE. I WOULD, ALSO, LIKE TO SUGGEST THAT THE PRACTICAL EFFECT OF WHAT I AM SAYING, HERE, AND WHAT I AM URGING, HERE, WOULD BE THAT COUNSEL AND CLIENT WOULD HAVE TO DISCUSS THESE MATTERS PRIOR TO TRIAL, INSTEAD OF --

TO WHAT EXTENT ARE YOU URGING WE SHOULD GO, IF THEY -- IF IT IS A FIRST-DEGREE MURDER CASE AND THEY WANT TO CONCEDE TO THIRD-DEGREE, YOU WOULD, STILL, HAVE TO DISCUSS IT.

YES.

IF YOU WANT TO. BUT YOU WOULD NOT HAVE TO, IF YOU ARE SIMPLY CONCEDING TO AN ELEMENT OF THE OFFENSE?

THAT'S RIGHT.

HOW FAR DO YOU WANT US TO GO WITH THAT?

IF IT IS AN ACTUAL OFFENSE ON THE BOOKS, AN OFFENSE THAT IS A LESSER-INCLUDED OFFENSE, BECAUSE IT CONTAINS THE SAME ELEMENTS THAT THE OFFENSE CHARGED DOES, I AM SAYING THAT IS STEPPING OVER THE LINE, AND THAT CAUSES A CHRONIC PROBLEM, BECAUSE THAT IS WHERE COUNSEL IS PLEADING HIS CLIENT GUILTY TO THE JURY. AS FAR AS A STIPULATION AS TO A FACT, IT MIGHT BE AN ESSENTIAL ELEMENT. IT MIGHT BE SOME OTHER FACT THAT WOULD BE A DIFFERENT MATTER. I AM NOT URGING THAT. I SAMING THE EFFECT WOULD BE CLOSER COMMUNICATIONS BETWEEN COUNSEL AND CLIENT AND, ALSO, THAT THESE TYPES OF ISSUES WOULD BE RESOLVED AT THE TRIAL COURT, INSTEAD OF IN POSTCONVICTION DOWN THE ROAD.

WHAT IS THE -- ONCE THE ALLEGATION IS MADE THAT THIS WAS NOT DISCUSSED WITH THE CLIENT, THE BURDEN, THEN, IS UPON THE LAWYER, IT IS YOUR ARGUMENT, TO -- WHAT DOES THE LAWYER HAVE TO COME FORWARD WITH? THE LAWYER, IN THIS INSTANCE, CAME FORWARD AND SAID I WOULD USUALLY, I WOULD CUSTOMARILY, TELL MY CLIENT THIS IS WHAT WE ARE GOING TO DO, AND THIS IS WHAT IS BEFORE THE TRIAL JUDGE AT THIS POINT, A POSITIVE ALLEGATION THAT, NO, I NEVER KNEW THAT HE WAS GOING TO SAY THAT I WAS GUILTY OF THIS LESSER CRIME, AND THE LAWYER SAID, WELL, THAT IS MY CUSTOMARY OFFICE ROUTINE IS I WOULD TELL HIM THIS. IS THIS A JUDGMENT CALL OR WHAT PROOF HAS TO COME IN, AT THAT POINT, IN YOUR OPINION?

YOUR HONOR, I HAVE NOT THOUGHT THE MATTER THROUGH, TO THE POINT OF BURDEN OF PROOF, AND WHERE THE COURT MAKES A FACTUAL FINDING IN THAT REGARD, BECAUSE AS I HAVE EMPHASIZED THE COURT, ON THAT THEORY OF LAW, DID NOT MAKE THAT FACTUAL FINDING IN THAT PARTICULAR CASE. JUST AS A THOUGHT, I HAVE SPENT A LOT OF TIME IN THE PUBLIC DEFENDER'S OFFICE, AND THEY USE CHECKLISTS. IT WOULD NOT SURPRISE ME AT ALL, IN REFERENCE TO NIXON, THAT THE WORD HAS GO FORTH THAT, IF YOU ARE ARGUING THIS, YOU HAD BETTER TALK TO YOUR CLIENT BEFORE GOING FORWARD. THE LAWYER SAID HE DID NOT DO THAT. AN I WAS A PUBLIC DEFENDER, ONCE, MYSELF, AND YOU HAVE NUMEROUS CASES, AND APPARENTLY YOU HAVE HAD A LOT OF TRIAL CASES. YOU DON'T REMEMBER THEM ALL, WHEN THEY GO BACK IN TIME THAT WAY, AND THE MOST THAT YOU CAN SAY IS I NORMALLY DO THIS. IT WOULD BE UNUSUAL FOR ME NOT TO HAVE TALKED TO MY CLIENT ABOUT THIS. BUT YOU SAY THAT IS NOT SUFFICIENT.

WELL, I DON'T THINK I AM GOING THAT FAR. I AM SAYING, IN THIS PARTICULAR CASE IT IS NOT, BECAUSE OF THE EXCERPT THAT I HAVE READ FROM MR. SCHWARZBURG, WHICH SAID THAT HE DOES MAKE EXCEPTIONS. IF HE BELIEVES THE FACTS ARE DIFFERENT, HE WILL MAKE AN EXCEPTION, AND WHAT'S MORE, HE WILL MAKE MORE OF AN EXCEPTION IN CAPITAL CASES. THAT IS TESTIMONY FROM THE EVIDENCE YAERING HEARING. FURTHER, THIS IS A CASE WHERE MR. ATWATER TOLD DR. MARINE, PRIOR TO TRIAL, THAT HE DIDN'T -- DR. MARIN, PRIOR TO TRIAL, THAT HE DIDN'T DO IT, SO THE WORD, ALL ALONG, WAS I DIDN'T DO IT, AND THEN WE HAVE COUNSEL GOING BEFORE THE JURY AND SAYING YES, HE DID, ALTHOUGH IT IS NOT AS MUCH AS THEY SAY "YES, HE DID", BUT I THINK I UNDERSTAND WHAT YOUR HONOR IS ASKING, AND I HONESTLY HAVEN'T THOUGHT IT OUT TO THE POINT WHERE I WOULD ANNOUNCE WHAT I THINK SHOULD BE AN EVIDENTIARY ROLE, ON CASES OF THIS NATURE, BUT I DO THINK THE ENCOURAGEMENT, AS I SAY, WITH DEFENSE COUNSEL, WOULD BE TO DO SOMETHING, SO THAT THERE IS SOMETHING IN THE FILE, SO THAT THE MATTER CAN BE ADDRESSED.

MY ONLY POINT IS, AT THAT EVIDENCE YAERING HEARING, SOMEBODY HAS TO MAKE A CALL.

YES, SIR -- AT THAT EVIDENTIARY HEARING, SOMEBODY HAS TO MAKE A CALL.

SHOULD IT MAKE A DIFFERENCE IN THE INITIAL STATEMENT THAT THE LAWYER MAKES TO THE JURY, OR SHOULD BE IN AFTER THE EVIDENCE AND MAKES IT IN THE CLOSING ARGUMENTS?

THAT APPEARS IN THE CASES THAT I HAVE TALKED ABOUT. OFTEN IT IS IN THE OPENING STATEMENT. MY POSITION IS THAT IT MAKES NO DIFFERENCE WHATSOEVER, AND IF THE LAWYER MAKES THIS CONCESSION IN THE CLOSING ARGUMENT, HE IS AS MUCH AS TELLING THE JURY NEVER MIND WHAT THE STATE SAYS. HERE. I AM THROWING IN THE TRIAL RIGHT NOW, SO I DON'T THINK IT MAKES A DIFFERENCE, WHEN PRESENTED. THANK YOU. IF I CAN, I WILL RESERVE.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA, REPRESENTING THE STATE OF FLORIDA. WHAT WE HAVE, HERE, ARE TWO EXPERIENCED LAWYERS WHO, AT THE TIME THIS HE -- AT THE TIME THAT THEY REPRESENTED THIS DEFENDANT, HAD WELL OVER 200 CASES, IN ADDITION TO CAPITAL CASES. BOTH OF THESE MEN CAME TO THIS HEARING AND TESTIFIED THAT IT WAS THEIR NORMAL COURSE OF ACTION TO SIT DOWN WITH A CLIENT, GO OVER THE FACTS, TELL THEM WHERE THEY STOOD AND WHAT THE POSSIBLE OPTIONS WERE AND ON IT GO THROUGH THOSE OPTION -- WERE AND TO GO THROUGH THOSE OPTIONS. BOTH LAWYERS SAID THEY DEVIATED FROM THAT. MR. SCHWARZBURG SAID THAT HE HAD TO DO DEPOSITIONS, BECAUSE THERE WAS A CONFLICT, THAT THEY WERE APPOINTED AT THE LAST MINUTE AND DEPOSITIONS HAD BEEN SET UP. HE WENT AHEAD AND DID DEPOSITIONS. HE HAD STATE DISCOVERY AT THE TIME THAT HE MET WITH ATWATER, AND WHEN HE MET WITH ATWATER, THEY WENT OVER THE PROBLEMS THEY HAD AND INCLUDED THE EVIDENCE, INCLUDING MR. ATWATER'S STATEMENTS AHEAD OF TIME, MR. ATWATER'S USE OF SUBTERFUGE TO GET INTO THE BUILDING, MR. ATWATER'S STATEMENTS, AFTERWARD, THAT HE KILLED HIM. HE WAS COVERED IN BLOOD. AND HE WOULD DO IT AGAIN. BASED WITH THIS EVIDENCE AND POSSIBLY FACING THE DEATH PENALTY, WITH VERY LITTLE IN MITIGATING EVIDENCE, THE TRIAL ATTORNEY, EXCUSE ME, SAID THAT THE ONLY WAY TO SAVE HIS CLIENT'S LIFE WAS TO GO FOR FIRST-DEGREE.

HAVEN'T WE, ALREADY, REJECTED THAT IN NIXON? THERE COULDN'T BE CLEARER FACTS IN THE CASE THAN IN NIXON. THEY WERE HERE, IN TALLAHASSEE, AND SAW THE PERSON THAT THEY WERE CHARGED WITH IN THE CAR. THAT THEY HAD BEEN BURNED AND IT WAS A CLEAR-CUT CASE. IN ADDITION, MR. NIXON DIDN'T TESTIFY AT TRIAL. BUT THE COURT SAID, NONETHELESS, YOU HAVE TO HAVE EVIDENCE, BECAUSE IT WAS KNOWLEDGEABLE -- IN OTHER WORDS IT WAS TANTAMOUNT TO A PLEA. HOW DO YOU DEAL WITH THAT?

NIXON WAS BASED ON CHRONIC, AND IN CHRONIC, THE COURT SAID THAT COUNSEL IS INEFFECTIVE, IF THEY FAIL TO SUBJECT THE STATE'S CASE TO AN ADVERSARIAL TESTING. IN THIS CASE WE HAD TWO ATTORNEYS WHO DID THOROUGHLY SUBJECT THE STATE'S CASE TO AN ADVERSARIAL TESTING AND DID NOT CONCEDE THE CRIME AS CHARGED, WHICH IS WHAT HE DID IN NIXON. IT WAS EXACTLY THE CRIME AS CHARGED, WHEREAS HERE WE ARE GOING FOR A LESSER, AND THIS COURT, IN BROWN, AND THE COURT, IN MacNEIL, AND RECENTLY THE FOURTH DISTRICT, IN HARRIS, HAVE, ALL, AGREED, WHEN IT IS A LESSER OFFENSE, AND WHEN IT IS -- THEY DO SUBJECT THE STATE'S CASE TO TESTING, THAT THERE IS NOT A CHRONIC PROBLEM, AND USES A CLEAR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, AND WHAT HE HAS TO ESTABLISH, HERE, IS PREJUDICE. HIS COUNSEL ARGUED FOR SECOND-DEGREE. NOT ONLY DID THEY NOT FIND SECOND-DEGREE BUT THE TRIAL COURT, ALSO, FOUND CCP, WHICH IS CLEAR PREMEDITATION AND WHAT THIS COURT HAS UPHELD, SO BASED ON THAT, HE CANNOT SHOW ANY KIND OF PREJUDICE WHATSOEVER, BY COUNSEL MAKING THESE STATEMENTS. FURTHER, AS YOUR HONOR AS NOTED, THE TRIAL COURT DID NOT MAKE A SPECIFIC FINDING, AS HE HAD BEEN TOLD, BUT HE DID FIND IT NECESSARY TO MAKE THAT RECONCILIATION, BECAUSE THERE WAS NO SHOWING OF PREJUDICE. BUT COUNSEL SAID THIS IS MY NORM. I HAVE NOT DEVIATED FROM THIS NORM. I

HAVE DONE HUNDREDS OF CASES. I WOULD HAVE HAD NO REASON TO NOT DO IT IN THIS CASE.

WHAT DO WE DO WITH THE PRINCIPLE OF LAW THAT TELLS US THAT NEGATIVE OR THE ABSENCE OF EVIDENCE DOES NOT OVERCOME POSITIVE EVIDENCE, SUCH AS A RINGING LIGHT AT A CROSSING. ONE WITNESS SAYS I DIDN'T HEAR IT. THE OTHER WITNESS SAYS, YES, IT WAS RINGING, AND OUR LAW TELLS US THAT THAT NEGATIVE, I DIDN'T HEAR IT, DOES NOT OVERCOME THE POSITIVE. WHAT DO YOU DO WITH THAT KIND OF PRINCIPLE HERE?

WHAT WE HAVE HERE IS A DETERMINATION AND CREDIBILITY. ATWATER TESTIFIED. THE COURT OBVIOUSLY DID NOT ACCEPT ATWATER'S TESTIMONY, BECAUSE HE DID NOT FIND THAT HE HAD BEEN TOLD, SO IT IS NOT A NEGATIVE, IN THE SENSE THAT HE HEARD ATWATER AND HE, OBVIOUSLY, DID NOT BELIEVE HIM.

BUT I GUESS THE DEFENSE'S ARGUMENT TO THAT WOULD BE THAT HE DIDN'T FIND THAT THE ATTORNEYS DID TELL HIM, EITHER, AND SO YOU, REALLY, DON'T HAVE A FINDING, SO SHOULD WE HAVE A TRIAL COURT MAKE A FINDING, ONE WAY OR THE OTHER?

I DON'T THINK THAT IS NECESSARY. I MEAN, OF COURSE, YOU CAN DO THAT, BUT THE BOTTOM LINE IS, BEFORE YOU CAN DID GET TO DEFICIENT -- BEFORE YOU CAN GET TO DEFICIENT PERFORMANCE, YOU HAVE TO GET TO PREJUDICE, AND THERE IS NO SHOWING OF PREJUDICE. HE ARGUED FOR SECOND-DEGREE. HE GOT PREMEDITATION. THERE WERE A NUMBER OF WITNESSES WHO PUT HIM AT THE SCENE. THIS COURT, ITSELF, FOUND THAT THERE WAS OVERWHELMING EVIDENCE OF GUILT, SO IT IS CLEARLY UNNECESSARY FOR YOU TO SEND IT TO BE -- TO SEND IT BACK TO THE COURT TO MAKE THAT DETERMINATION, WHEN THERE IS NO PREJUDICE. COUNSEL, ALSO, SAID THAT HE WAS GOING TO MENTION THE SUMMARILY -- THE SUMMARY DENIAL --

EXCUSE ME. COULD THEY EVER SHOW PREJUDICE IN THAT CIRCUMSTANCE?

I THINK IT WOULD PROBABLY BE FAIRLY DIFFICULT TO SHOW PREJUDICE, WHERE THEY ARGUED FOR A LESSER OFFENSE. THE LESSER OFFENSE WAS NOT ACCEPTED, AND THE COURT FOUND OVERWHELMING EVIDENCE OF PREMEDITATION, BUT I THINK IT WAS HIS BEST SHOT, AND THEIR DETERMINATION WAS, IF THEY HAD GONE IN AND SUBMITTED EVIDENCE THAT WAS CONTRARY TO THE EVIDENCE, THAT THEY WOULD HAVE LOST CREDIBILITY, THAT THE JURY WOULD HAVE HELD THAT AGAINST MR. ATWATER, AND THAT THEIR BEST HOPE FOR SUCCESS IN THIS CASE WAS TO SAVE MR. ATWATER'S LIFE.

WHAT KIND OF -- WE HAVE THE SAME, IF THE JR. HAD, IN FACT, FOUND HIM GUILTY OF SECOND-DEGREE MURDER? WOULDN'T YOU HAVE SOME SIMILAR TYPE PROBLEM, THAT THE GUY HAS -- HAS CONCEDED GUILT HERE, AND BUT FOR THE FACT THAT THE ATTORNEY CONCEDED GUILT TO THE SECOND-DEGREE MURDER, WE MAY HAVE FOUND MANSLAUGHTER.

WELL, OF COURSE YOU WOULD HAVE THE SAME TYPE OF ARGUMENT. FOR EXAMPLE, IN HARRIS, WHERE THEY PROVIDED SUPPLEMENTAL AUTHORITY, THEY DID FIND THE LESSER OFFENSE, AND THE COURT CONSIDERED WOULD THEY HAVE FOUND A LESSER OFFENSE, AND FOUND, NO, THAT THE LESSER OFFENSE, REALLY, SUPPORTED THIS THEORY, AND HE, THEREFORE, GOT THE BENEFIT OF HIS COUNSEL'S ARGUMENT. OF COURSE THIS COURT CLEARLY COMES UNDER SEPARATE FACTS, BUT IN THIS PARTICULAR CASE, THE EVIDENCE IS OVERWHELMING THAT MR. ATWATER COMMITTED A PREMEDITATED FIRST-DEGREE MURDER, WHICH IS, ALSO, A FELONY MURDER, BECAUSE IT WAS DURING THE COURSE OF ROBBERY. AS FOR THE SUMMARY DENIAL, THE PENALTY-PHASE ISSUES, BASICALLY EVERYTHING THERE, IT IS CUMULATIVE TO WHAT WAS PRESENTED, THROUGH THE TESTIMONY OF DR. MARIN. DEFENSE COUNSEL RELIED UPON THE FACT THAT THEY DID NOT HAVE A BUNCH OF FAMILY MEMBERS TO ARGUE, SEE, HOW ABANDONED HE IS? NOBODY IS HERE TO ARGUE FOR HIM. BUT HE HAD THIS DEPRIVED CHILDHOOD, AND HE WASABLE TO GET EVERYTHING THAT THEY ARE, NOW, TRYING TO SUBMIT, THROUGH DR. MARIN'S TESTIMONY. I SUBMIT THAT THE TRIAL COURT PROPERLY ARGUED THAT -- THE TRIAL COURT

PROPERLY DENIED THAT AND THAT IT SHOULD BE AFFIRMED.

CAN YOU ADDRESS THE LAST POINT AS TO WHY IT WAS NOT DONE CAMETIVE AS TO WHY IT -- DONETIVE TO WHY -- DUPLICATIVE, CUMULATIVE, TO WHAT WAS PRESENTED AT THE PENALTY PHASE, AND WHY, UNDER THOSE CIRCUMSTANCES, THIS SUMMARY DENIAL IS APPROPRIATE OR INAPPROPRIATE.

I HAVE A NUMBER OF THINGS TO SAY ABOUT THAT. ONE I AM GOING TO SAY IT IS POSSIBLE AND PROPER, BUT IF I GET A CHANCE TO SAY THIS, IT IS GOING TO BE MORE ON THE RECORD IN THAT REGARD. THERE ARE ADDITIONAL FACTS THAT WEREAL EDGED IN THE 3.8.

, AND -- THAT WERE ALLEGED IN THE 3.850, AND THEY WERE CONCRETE BACKGROUND THAT HE WAS A PASTOR IN A CHURCH. SOME ATHLETICS THAT HE WAS IN. OTHER MATTERS THAT I LESSTED OUT IN THE BRIEF. THERE WERE TEN OR 11 OF THEM, AND I DIDN'T KNOW HOW TO TITLE IT, BUT THERE WERE ADDITIONAL FACTS IN THE 3.850 THAT WERE NOT TOUCHED UPON BY DR. MARIN IN THE PENALTY PHASE, EXCEPT FOR A VERY BRIEF REFERENCE TO THEM. HAD HE A BAD BACKGROUND AND AN UNCARING MOTHER AND THINGS OF THAT SORT. SO I AM SAYING THERE ARE ADDITIONAL FACTS. I JUST DISAGREE WITH THAT CONCLUSION BY THE COURT. BEYOND THAT, IT IS AN ISSUE OF INVESTIGATION, AND, ALSO, PREPARATION AND PRESENTATION OF EVIDENCE. IN THIS CASE, THERE IS A, REALLY, CLEAR DEFICIENCY, BECAUSE MR. WHITE CAME TO THE COURT SHORTLY BEFORE THE TRIAL, AND I CITED THAT VERBATIM, THAT TRANSCRIPT VERBATIM, AND HE SAID, IN ESSENCE, THAT HE WAS READY FOR THE TRIAL. HE WAS NOT READY FOR THE PENALTY PHASE. I BELIEVE THAT THE DOCTOR HAD SEEN MR. ATWATER. DR. MARIN HAD SEEN MR. ATWATER, BUT THERE HAD NOT BEEN ANY COMMUNICATION AT THAT POINT. I THINK THAT IS JUST WHAT HE SAID. THE NEXT TIME WE SEE DR. MARIN IS AFTER MR. ATWATER HAS BEEN FOUND GUILTY AND THE PENALTY PHASE IS DUE IN ABOUT A WEEK, AND IS HE IN A DEPOSITION WITH THE STATE. THE STATE ASKS HIM --

I AM SORRY. I DIDN'T QUITE UNDERSTAND WHAT YOU SAID. WHAT WAS IN ABOUT A WEEK?

THE PENALTY PHASE OCCURRED ABOUT TWO WEEKS AFTER THE TRIAL, AFTER MR. ATWATER WAS FOUND GUILTY, AND DR. MARCH IAN WAS DEPOSE -- DR. MARIN WAS DEPOSED BY THE STATE IN BETWEEN THE TWO, SO IT WAS ABOUT A WEEK AFTER AND A WEEK BEFORE. THE PROSECUTION ASKED DR. MARIN WORDS TO THE EFFECT, WELL, YOU HAVE BEEN IN CONSULTATION WITH COUNSEL AND THEY HAVE GIVEN YOU INFORMATION ABOUT THIS CASE. MARIN SAYS I HAVE NOT RECEIVED ANYTHING. I HAVE NOT TALKED TO ANY OTHER PERSON IN THIS CASE, OTHER THAN MR. ATWATER. THE ONLY COMMUNICATION I HAVE HAD WITH DEFENSE COUNSEL IS, MAYBE, A PHONE CALL TO MR. SCHWARZBURG, WHO HAD DONE THE GUILT PHASE NOT THE PENALTY PHASE. IN OTHER WORDS, ZERO. NOW, THE NEXT THING WE SEE IS DR. MARIN, BECAUSE WE DON'T HAVE AN EVIDENTIARY HEARING, DR. MARIN TESTIFYING AT THE PENALTY PHASE, AND HE CHANGED HIS STORY. HE DESCRIBED MR. ATWATER IN TERMS THAT WERE PICKED UP BY THE PROSECUTION AND ARGUED TO THE JURY, AS THE KEY WITNESS, THE DEFENSE EXPERT, DESCRIBING MR. ATWATER AS HEED ONEISTIC, ANTISOCIAL, A DISDAIN FOR VALUES. THAT TESTIMONY CAME OUT AND WAS PUT BEFORE THE JURY. THE STATE PICKED IT UP AND MADE A MAJOR POINT OF IT IN THEIR CLOSING ARGUMENT, AND WE HAVE NO EVIDENCE AT ALL OF CONVERSATION BETWEEN COUNSEL AND THEIR EXPERT. IT IS VERY CLEAR THAT IT IS DEFICIENT ON ITS FACE, AND THE EXPERT WITNESS BECOMES THE KEY PROSECUTION WITNESS, IN ARGUING FOR THE DEATH PENALTY. I, ALSO, WANTED TO TOUCH, BRIEFLY, ON THE INMAN TYSON ARGUMENT, REGARDING INEFFECTIVE ASSISTANCE, BECAUSE THE EFFECT OF THAT INSTRUCTION TO THE JURY WAS, WELL, THE INSTRUCTION, ITSELF, SAYS ACTED IN A STATE OF MIND OF RECKLESS INDIFFERENCE TO LIFE, HUMAN LIFE. DEFENSE COUNSEL ARGUED THAT HIS CLIENT IS GUILTY OF SECOND-DEGREE MURDER, WHICH, BY ITS TERMS, BY THE INSTRUCTIONS, IS INDIFFERENCE TO HUMAN LIFE, SO ALTHOUGH I THINK THERE WAS A SIMPLE MISTAKE ON THE PART OF COURT AND PROBABLY ON THE PART OF COUNSEL, IN ALLOWING THIS TOTALLY

INAPPROPRIATE INSTRUCTION TO GET IN, THE NET EFFECT, COUPLING COUNSEL'S ARGUMENT AT TRIAL AND THE INSTRUCTION AT PENALTY PHASE IS THAT WE HAVE DEFENSE COUNSEL SAYING THAT HIS CLIENT IS ELIGIBLE, A SUITABLE CANDIDATE FOR THE DEATH PENALTY. I THANK YOU ALL VERY MUCH FOR YOUR ATTENTION AND CONSIDERATION.

THANK YOU.