Harold Lee Harvey, Jr. v. State of Florida

NEXT CASE ON THE COURT'S CALENDAR IS HARVEY VERSUS STATE. COUNSHE WILL. MR. -- COUNSEL.

GOOD MORNING, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JEFF KOPPY. WITH ME AT THE COUNSEL TABLE IS ANDREW JENNER. WE REPRESENT A PETITION OF SEVERAL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL OF HAROLD LEE HARVEY JR., AT BOTH THE GUILTY AND THE -- THE GUILT AND THE PENALTY PHASE, AND THAT THE RESULTS OF THOSE ERRORS DEPRIVE MR. HARVEY OF A A FAIR TRIAL IN THE PENALTY PROVISION. THE COURT DENIED MR. HARVEY, BASED ON ON THE FIRST PRONG OF STRICKLAND, THAT IS THE PERFORMANSWER ASPECT, AND DID NOT REACH THE PREJUDICE ASPECT. I WOULD LIKE TO TOUCH UPON THREE POINTS IN OUR BRIEF, IN PARTICULAR, THIS MORNING. THE FIRST IS THAT MR. HARVEY'S TRIAL ATTORNEY, BOB WATSON, RENDERED MR. HARVEY INEFFECTIVE ASSISTANCE OF COUNSEL, BY FAILING TO OBTAIN AN ADEQUATE AND COMPETENT MENTAL HEALTH EXAMINATION. THE SECOND IS THAT MR. WATT SON CONCEDED MR. HARVEY'S GUILT TO MURDER WITHOUT HIS CONSENT, AND THE THIRD IS THAT MR. WATT SON FAILED TO FIND AND USE A BOOKING SHEET THAT WAS CONTAINED IN HIS OWN FILES, THAT INDICATED MR. HARVEY'S PREINTERROGATION REQUEST FOR COUNSEL. TURNING, FIRST, TO THE FIRST ISSUE, THE MENTAL HEALTH ISSUE, THIS COURT, OVER THE LAST FEW YEARS, HAS MADE CLEAR THAT A CAPITAL DEFENSE ATTORNEY'S OBLIGATION TO INVESTIGATE INCLUDES THE OBLIGATION TO INVESTIGATE MENTAL HEALTH EVIDENCE. IN THIS CASE, IN PARTICULAR, IN 1995, IN THE REMAND OPINION FROM THIS COURT, THIS COURT ASKED A SPECIFIC QUESTION AS TO WHETHER DR. PAT RIL A, WHO WAS THE -- PATRILLA, WHO WAS THE PSYCHIATRIST HIRED BY MR. HARVEY'S ATTORNEY BEFORE THE ORIGINAL TRIAL, TOLD MR. WATT SON, WHO WAS THE ATTORNEY, TO HAVE MR. HARVEY EVALUATED BY AN EXPERIENCED PSYCHIATRIST. THERE HAS NOT BEEN AN EVIDENTIARY HEARING HAD ON THAT QUESTION, AND THE UNDISPUTED EVIDENCE FROM -- THERE HAS NOW BEEN AN EVIDENTIARY HEARING HAD ON THAT QUESTION, AFTERNOON THE UNDISPUTED EVIDENCE -- AND THE UNDISPUTED EVIDENCE FROM THAT HEARING SHOWS THAT MR. WATT SON WAS TOLD THAT HE NEEDED TO HAVE MR. HARVEY EXAMINED BY A PSYCHIATRIST.

WHAT WAS THE REASON FOR BEING EXAMINED BY A PSYCHIATRIST? WAS IT BRAIN DAMAGE?

DR. PATRILLA TESTIFIED, AT THE EVIDENTIARY HEARING, TESTIFIED THAT HE DID HIS INITIAL EXAMINATION OF MR. HARVEY, AND BASED ON SOME OF THE TEST RESULTS THAT HE OBTAINED DURING THAT EVALUATION, HE SAW SOME RED FLAGS OF ORGANIC BRAIN DAMAGE, AND THAT HE FELT HIMSELF UNQUALIFIED TO ASSESS IT OR, REALLY, KNOW WHAT TO DO WITH IT, AND AS A RESULT, HE THOUGHT THAT IT NEEDED TO BE EVALUATED BY A PSYCHIATRIST, AND THEREFORE TOLD MR. WATT SON TO HAVE MR. HARVEY EVALUATED BY -- MR. WATSON TO HAVE MR. HARVEY EVALUATED BY A PSYCHIATRIST.

NORMALLY A PSYCHIATRIST WOULDN'T BE THE INDIVIDUAL THAT WOULD EVALUATE BRAIN DAMAGE. YOU WOULD EXPECT THAT YOU WOULD WANT TO HAVE A NEUROPSYCHOLOGIST OR SOMETHING ALONG THAT LINE.

THAT IS TRUE, AND THAT IS THE CASE IN MOST RESPECTS. DR. PATRILLA'S TESTIMONY AT THE EVIDENTIARY HEARING, HOWEVER, WAS THAT DURING THIS TIME, WHICH WAS 1985, 1986, HE WAS COMPLETELY UNQUALIFIED AND UNFAMILIAR WITH NEUROPSYCHOLOGICAL ASPECTS, AND INDEED THERE IS SPECIFIC TESTIMONY IN THE RECORD, BY DR. PATRILLA THAT, AT THAT TIME, HE

THOUGHT ONLY A PSYCHIATRIST COULD DIAGNOSE ORGANIC BRAIN DAMAGE. IN FACT, HE SAYS I THINK THAT I DIDN'T WANT TO GET INTO IT, BECAUSE AS FAR AS I KNEW, A PSYCHOLOGIST COULDN'T GET INTO ORGANIC BRAIN DAMAGE.

WAS EVERYBODY AWARE, BACK THEN, OF THIS VERY SERIOUS AUTOMOBILE ACCIDENT THAT THE DEFENDANT HAD BEEN INVOLVED IN? DID THAT COME OUT AT TRIAL?

IT CAME OUT. IT CAME OUT IN PASSING AT TRIAL, FROM, I THINK, ONE OR POSSIBLY TWO OF THE MITIGATION WITNESSES PUT ON BY MR. WATT SON -- MR. WATSON. THE PROBLEM WITH THAT WAS THAT IT WASN'T EXPLORED AT ALL. IT WAS JUST MENTIONED HE WAS IN A CAR ACCIDENT. WE ARE, NOW, TREATING IT, IN THE BRIEFS, OF COURSE EVERYBODY IS REFERRING TO IT AS THIS TRAGIC CAR ACCIDENT. INDEED IT WAS, AND THE SIGNIFICANCE OF THAT CAR ACCIDENT ARE THE MARKED BEHAVIORAL CHANGES THAT OCCURRED IN MR. HARVEY, FOLLOW FOLLOWING THE CAR ACCIDENT.

IS THERE MEDICAL EVALUATION AT THE TIME? ARE THERE RECORDS THAT SHOW THAT HE SUSTAINED BRAIN DAMAGE?

THERE ARE MEDICAL -- HE WAS HOSPITALIZED AFTER THE ACCIDENT, FOR QUITE A WHILE. AND --

YOU SAY QUITE A WHILE.

I AM NOT SURE ABOUT THE EXACT TIME. I BELIEVE IT WAS FOR SEVERAL WEEKS, YOUR HONOR.

AND THAT IS -- THOSE RECORDS ARE IN EVIDENCE OR NOT?

THOSE RECORDS, YES, THEY ARE IN EVIDENCE, IN THE EVIDENCE REVIEWED BY DR. NORCO, WHO IS THE PSYCHIATRIST FROM YALE THAT EXAMINED MR. HARVEY.

COULD YOU QUALITYTIVEIVELY EXPLAIN -- COULD YOU QUALITATIVELY EXPLAIN, HERE YOU ARE ASKING FOR BRAIN DAMAGE AND A REVERSAL ON NOT GETTING A COMPETENT PSYCHIATRIC EXAMINATION. HOW COMPELLING IS THE EVIDENCE OF THIS DEFENDANT'S BRAIN DAMAGE THAT THIS JURY, BACK IN THE MID'80s, NEEDED TO KNOW ABOUT THAT?

IT IS OF THE MOST COMPELLING NATURE. IT IS UNDISPUTED ON THE RECORD AND UNCONTROVERTED, FIRST OF ALL. SECOND OF ALL, IT IS DIAGNOSED BY DR. MICHAEL NORCO, WHO IS NOT THE MENTAL HEALTH PROFESSIONAL THAT REGULARLY PARTICIPATES IN THESE PROCEEDINGS FOR THE DEFENSE OR ANYTHING LIKE. THAT HE IS A PROFESSOR OF PSYCHIATRY AT YALE. HE IS ON THE EDITORIAL BOARD OF SOME PEER-REVIEWED PSYCHIATRIC JOURNEYS. HE HAS ONLY TESTIFIED TWICE IN A CAPITAL CASE, ONCE FOR THE STATE, AND HE EXAMINED MR. HARVEY, AND HE INCLUDED, BASED ON HIS THOROUGH EXAMINATION, HIS REVIEW OF TEST RESULTS, HIS REVIEW OF MR. HARVEY'S LIFE HISTORY, PUTTING IT ALL TOGETHER, THAT MR. HARVEY HAD ORGANIC BRAIN DAMAGE, AND THIS IS NOT, I SHOULD, ALSO, POINT OUT, LIKE THE CASES WHERE, MAYBE, THE ASAY CASE OR THE CHERRY CASE, WHERE THIS COURT HAS LOOKED AT MENTAL HEALTH PROFESSIONALS WHO TESTIFIED AT THE ORIGINAL PENALTY PROCEEDING AND THEN SOME NEW MENTAL HEALTH EXPERTS COME AT THE 3.850 PROCEEDING AND RENDER AND SAY NOW WE HAVE GOT ORGANIC BRAIN DAMAGE. IN THIS CASE, DR. PATRILLA, BY ALL ACCOUNTS, RECOMMENDED THE PSYCHIATRIST FOR THE PURPOSE OF EVALUATING ORGANIC BRAIN DAMAGE, AND IT WASN'T DONE. DR. PATRILLA WAS NOT QUALIFIED, AT THE TIME, TO ASSESS ORGANIC BRAIN DAMAGE AND HE HAS NOW, IN FACT, BECOME CERTIFIED -- BOARD CERTIFIED IN NEUROPSYCHOLOGY, AND HE HAS CONCLUDED, IN LOOKING AT THE TESTS THAT WERE SUBSEQUENTLY GIVEN, THAT INDEED MR. HARVEY MEETS ALL OF THE OBJECT I HAVE CRITERIA FOR ORGANIC BRAIN DAMAGE TARNKS IS SUPPORTED BY THE HISTORICAL RECORD.

I GUESS THE FOLLOW-UP IS WHERE DOES THAT LEAD US? HE HAS ORGANIC BRAIN DAMAGE. WHAT

DOES THAT DO?

IT LEADS US IN SEVERAL PLACES, I THINK. THE FIRST IS, OF COURSE, THIS COURT HAS MADE CLEAR, IN ROSEANNE OTHER CASES, THAT MEANT -- IN ROSE AND OTHER CASES, THAT MENTAL HEALTH, PARTICULARLY ORGANIC BRAIN DAMAGE IS MENTAL MITIGATION AT THE MOST WEIGHTY ORDER,, AND IT IS PRESENTED TO JURIES, QUALIFIED JURIES WHO LOOK AT THAT. SECONDLY, THE ORGANIC BRAIN DAMAGE -- SECONDLY, DR. NORCO PLACE INTO THIS -- PLAYS INTO THIS ACTION. DR. NORCO AND DR. PATRILLA, ALSO, CONCURRED IN THIS, THAT MR. HARVEY'S ORGANIC BRAIN DAMAGE, IN LIGHT OF THE HISTORY AND IN LIGHT OF THE FACTS OF THE CASE, THAT THE ORGANIC BRAIN DAMAGE IS SO SEVERE THAT IT RISES TO THREE SIGNIFICANT STATUTORY MITIGATING FACTORS. THIS IS SIGNIFICANT BECAUSE THERE WAS NO PROCEEDING AT THE ORIGINAL STATUTORY FACTORS, AND IN FACT MR. WATSON, THE TRIAL ATTORNEY, DIDN'T, REALLY, EVEN ARGUE FOR APPLICATION OF STATUTORY MITIGATING FACTORS IN HIS CLOSING ARGUMENT. THE ORGANICITY IS, ALSO, SIGNIFICANT, JUSTICE QUINCE, BECAUSE AS DR. NORCO TESTIFIED, MR. HARVEY'S ORGANIC BRAIN DAMAGE CREATES THIS, WHAT HE CALLED A HYPER AROUSEAL PHENOMENON THAT HE TESTED MR. HARVEY FOR AND DISCOVERED AND HE USES THAT TO CONNECT IT UP TO THE FACTS OF THE CRIME. IT IS DR. NORCO'S OPINION THAT THIS HYPER AROUSEAL PHENOMENON, WHICH IS A PHYSICAL TEN ONE NO, MA'AM THAT CAUSES MR. HARVEY TO REACT STUD EVENLY -- SUDDENLY IN RESPONSE TO SUDDEN STIMULI, EXPLAINS THE SHOOTING IN THE CASE.

DOES IT EXPLAIN THE FACT THAT, ACCORDING TO THE EVIDENCE, THESE TWO PEOPLE, YOU KNOW, CAME TO THIS HOUSE, BROUGHT THE GUN, THE SHOTGUN THERE, AND YOU KNOW, PASSED IT IN THROUGH THE WINDOW, ALL OF THE FACTS OF THIS CASE. DOES IT EX-PLAIN THE ACTIONS OF PLANNING THIS PARTICULAR BURGLARY AND MURDER SOME.

IT DOES NOT EXPLAIN THE ACTIONS OF PLANNING THE BURGLARY OR THE ROBBERY. BUT I THINK THE EVIDENCE IS FAIRLY PERSUASIVE THAT THESE TWO KIDS DID NOT -- THEY PLANNED TO DO A ROBBERY. THEY DID NOT PLAN TO GO TO THIS HOUSE TO KILL THE VICTIMS. AND IT WAS IN THAT SITUATION, IN THAT PANIC SITUATION, WHERE THEY DIDN'T KNOW WHAT TO DO. THE PLAN DISINTEGRATED,, BECAUSE THEY WERE SURPRISED BEFORE THEY WERE READY, BY ONE OF THE VICTIMS WHO SAW THEM, THAT THEY DIDN'T KNOW WHAT TO DO. THEY WERE TALKING. THE VICTIMS GET UP AND MAKE A RUN FOR IT, AND DR. NORCO TESTIFIED THAT THAT, IN THE PANIC SITUATION, BECAUSE OF MR. HARVEY'S ORGANIC BRAIN DAMAGE, HIS ACT OF SHOOTING THEM, IN DR. NORCO'S PROFESSIONAL OPINION, WAS AN AUTOMATIC SORT OF REFLECTION I HAVE RESPONSE. THAT WAS NOT PRE -- REFLEXIVE RESPONSE. THAT WAS NOT PREMEDITATED.

IT APPEARS, EVERY MEMBER OF THIS INDIVIDUAL'S FAMILY APPEARS AND TESTIFIES, AND WE SEEM TO HAVE INTERACTION WITH LAWYER AND FAMILY AND AN EXPLORATION OF WHAT HAPPENED OVER THIS PERSON'S LIFETIME, AND ESSENTIALLY, NOW, YOU ARE PRESENTING A PICTURE THAT WAS NOT -- IT APPEARS, FROM THIS RECORD, THAT WAS THOUGHT PAINTED FOR THE LAWYER, SO HOW WOULD YOU SUGGEST THAT, AS A REVIEWING COURT, YOU WERE ABLE TO CIRCUMVENT ALL OF THOSE THINGS, TO FIND THAT THIS LAWYER PERFORMED BELOW THE STANDARD, WITH THIS INTERACTION WITH FAMILY, BECAUSE WE SEE SO MANY, WHERE INDIVIDUALS JUST DON'T DO ANYTHING. THEY DON'T TALK TO THE FAMILY. THEY DON'T LOOK AT RECORDS. BUT HERE, WHILE THERE MAY BE SOME OTHER DEFICIENCIES, THAT ASPECT, IT APPEARED THAT THERE WAS CLOSE INTERACTION.

I UNDERSTAND THAT, AND I THINK WE HAVE A LEGAL FRAMEWORK TO GUIDE US IN THE FIRST PLACE. THAT FRAMEWORK SAYS THAT AN ATTORNEY IS PARTICULARLY IN THE ROSE CASE, THIS COURT SAID THAT AN ATTORNEY HAS THE DUTY TO DO THIS REASONABLE INVESTIGATION, AND AS PART OF THAT DUTY, HAS A DUTY TO UNDERSTAND AND INVESTIGATE HIS AVAILABLE OPTIONS AND CANNOT LATCH ON TO A THEORY OF MITIGATION, BEFORE THAT ATTORNEY DOES A REASONABLE INVESTIGATION, TO FIGURE OUT WHAT IS OUT THERE, SO THAT HE OR SHE CAN PICK

AND CHOOSE BETWEEN THE MITIGATING ELEMENTS AND PUT TOGETHER THE MOST COMPELLING CASE. IN THIS CASE, THE FACT THAT MR. WATSON PUT ON A NUMBER OF MITIGATION WITNESSES, I THINK, IS MISLEADING, BECAUSE IT IS -- THE EVIDENCE IS CLEAR THAT MR. WATSON, FROM THE BEGINNING, LATCHED ONTO THIS THEORY OF MITIGATION WHICH WE REFER TO AS THE "GOOD PERSON" THEORY OR THE "LOVING FAMILY" THEORY, DID NO INVESTIGATION HIMSELF. DIRECTED HIS INVESTIGATOR, WITHOUT MEETING HIS INVESTIGATOR, IN A LETTER, RIGHT AT THE OUTSET, GO FIND PEOPLE WHO WILL SAY THAT MR. HARVEY HAS SOCIALLY REDEEMING QUALITIES.

BUT THIS WAS DONE WITHOUT OR PRIOR TO ANY CONSULTATION WITH FAMILY OR ANYTHING AT ALL, LIKE THAT IS WHAT YOU ARE SUGGESTING.

I BELIEVE THAT IS WHAT THE EVIDENCE SUGGESTED. THE FIRST INDICATION IN THE RECORD, IN ALL OF THE RECORD, OF WHICH I AM AWARE, THAT MR. WATSON MEETS WITH FAMILY, TALKS WITH THEM, IS JUST BEFORE TRIAL, AND THE TESTIMONY OF THE MITIGATION WITNESSES AT THE 3.850 PROCEEDING ESTABLISHED THAT THE PURPOSE OF THAT WAS TO TELL THEM, GET UP THERE ON THE STAND AND SAY THAT YOU HAVE A GOOD AND LOVING FAMILY.

THIS DIDN'T FLOW FROM HIS INTERACTIONS WITH THE PSYCHOLOGIST, DIRECTING HIM IN THAT FASHION?

NO. I DON'T BELIEVE THERE IS ANY EVIDENCE THAT IT FLOWS FROM THE INTERACTIONS WITH THE PSYCHOLOGIST. CERTAINLY, THOUGH, IT IS IMPORTANT, THE QUESTION IS IMPORTANT, BECAUSE THE PSYCHOLOGIST'S TESTIMONY WAS PART OF THIS. MR. WATT SON LATCHED ONTO THIS GOOD PERSON THEORY, AND THE PSYCHOLOGIST WAS PART OF. THAT MR. WATT SON WANTED THE PSYCHOLOGIST, I THINK, TO SAY, THIS PERSON IS AN INSECURE, LOW SELF-ESTEEM PERSON, AND THAT JUST IS NOT THE SAME AS THE ORGANIC BRAIN DAMAGE AND THINGS OF THAT NATURE.

DID THE PSYCHOLOGIST ACTUALLY TESTIFY AT TRIAL THAT THIS DEFENDANT HAD ASSERTIVENESS TRAINING?

NO. THAT IS NOT THE TESTIMONY AT TRIAL. THAT IS IN HIS REPORTS.

YOU USE THAT TO SHOW THAT HE WAS JUST ON THE WRONG PAGE.

YES. IT IS CITED, FOR THE PURPOSE OF DEMONSTRATING THAT MR. WATSON HIRED DR. PATRILLA, THE PSYCHOLOGIST, TO DO A PERSONALITY EVALUATION, NOT A FORENSIC EVALUATION, NOT AN EVALUATION DESIGNED TO GET AT THE STATUTORY FRAMEWORK OF AGGRAVATING, MITIGATING FACTORS, AND THE FACT THAT MR. -- THAT DR. PATRILLA PERFORMED THE EXAMINATION AND HIS CONCLUSIONS WERE THAT THIS PERSON NEEDS ASSERTIVENESS TRAINING AND COUNSELING, YOU KNOW, PARTICULARLY ASSERTIVENESS TRAINING, WHERE HE IS SITTING, FACING THE DEATH PENALTY, SEEMS TO INDICATE, REALLY, NO UNDERSTANDING OF WHAT THE PURPOSE OF HIS EXAMINATION SHOULD HAVE BEEN. THERE IS NO EVIDENCE IN THE RECORD, EITHER, THAT MR. WATSON'S DECISION NOT TO HIFER A SKI -- TO HIRE A PSYCHIATRIST WAS IN ANY WAY STRATEGIC, WHICH IS IMPORTANT. MR. WATSON DOES NOT TESTIFY THAT HE MADE THE DECISION FOR THAT REASON. IN FACT, HE SAYS THAT HE WOULD HAVE USED EVIDENCE OF ORGANIC BRAIN DAMAGE, IF HE HAD KNOWN ABOUT IT AT THE TIME OF TRIAL, AND THAT IS AT PAGE 389 AND PAGE 415 OF THE RECORD, AND THE STATE CONCEDES IT, AS MUCH AS AS MUCH, IN THEIR BRIEF, AT -- AS MUCH, IN THEIR BRIEF, AT PAGE 11 AND 12 OF THEIR BRIEF. I WOULD LIKE TO QUICKLY TURN TO THE SECOND ISSUE, AS WELL, WHICH IS THE CONCESSION OF GUILT ISSUE. IN 1995, ON REMAND, THIS COURT ASKED THE QUESTION OF WHETHER MR. HARVEY WAS INFORMED OF THE STRATEGY TO CONCEDE GUILT, MR. WATSON'S STRATEGY TO CONCEDE GUILT AND ARGUE FOR SECOND-DEGREE MURDER. OF COURSE, IN JANUARY OF LAST YEAR, THE COURT ISSUED THE KNICKS ONE VERSUS SINGLETARY DECISION, WHICH HOLDS THAT A CONCESSION OF GUILT BY AN ATTORNEY WITHOUT CONSENT, IS PER SE INEFFECTIVE ASSISTANCE OF COUNSEL AND

ESTABLISHES STANDARDS FOR CONSENT, THAT THERE HAS TO BE -- BELOW MUST SHOW AN AFFIRMATIVE EXPLICIT ACCEPTANCE OF DEFENSE COUNSEL STRATEGY AND THAT SILENT ACQUIESCENCE IS NOT ENOUGH. IN THIS CASE, THERE IS NO EVIDENCE IN THE RECORD OF CONSENT BY MR. HARVEY, TO MR. WATSON'S CONCESSION OF GUILT, AND THAT CONCESSION OF GUILT, AT LEAST TO THE SECOND-DEGREE MURDER, IS UNDISPUTED. MR. HARVEY, HIMSELF, IN THE ONLY CASE OR AT LEAST THE REPORTED CASE OF WHICH I AM AWARE, HIMSELF TOOK THE STAND, AND TESTIFIED THAT HE DID NOT CONSENT, AND THERE IS NO EVIDENCE IN THE RECORD AT ALL, THAT SUGGESTS ANYTHING ELSE, AND I SEE THAT I AM IN TO MY REBUTTAL TIME. SO I WILL YIELD THE PODIUM.

THANK YOU, COUNSEL. MISTERENS YO.

THANK YOU, JUST -- MISS TERENZIO.

WOULD YOU TAKE UP THAT ARGUMENT OF CONCESSION OF GUILT.

SURE. THIS COURT REMANDED, ON THIS PARTICULAR ISSUE, AND IN YOUR OPINION, YOU SAID, BECAUSE THE RECORD BEFORE US IS UNCLEAR AS TO WHETHER HARVEY WAS INFORMED OF THE STRATEGY TO CONCEDE GUILT AND ARGUE FOR SECOND-DEGREE MURDER, THAT THIS COURT SENT IT DOWN FOR THAT EXACT REASON. NOW, I THINK IT IS CLEAR, FROM THE OPENING AND CLOSING ARGUMENT OF COUNSEL AT THE GUILT PHASE, THAT HE WAS NOT AND DID NOT EVER CONCEDE TO THE CRIME CHARGED OF FIRST-DEGREE MURDER. THIS IS NOT --

LET'S EXPLORE THAT.

OKAY.

DURING HIS OPENING STATEMENT, YOU KNOW, HE TALKS ABOUT HOW THEY DIDN'T PLAN IT, AND HE PRETTY MUCH GOES THROUGH, KIND OF THOROUGHLY, WHAT THEY DID HERE. AND THEN HE TALKS ABOUT HAVING GONE OUTSIDE, CORRECT?

DO YOU HAVE --

AFTER THEY DIDN'T FIND ALL OF THE GOODS THAT THEY WANTED, AND TALKED ABOUT WHAT TO DO NEXT.

YOU ARE SAYING THAT DEFENSE COUNSEL SAID THIS IN CLOSING?

IN OPENING.

IN OPENING. OKAY. ACTUALLY WHAT -- ACTUALLY WHAT THE DEFENSE COUNSEL SAID AND APPELLATE COUNSEL HERE POINTS TO TWO PARTS OF THE RECORD OR FROM THE CLOSING -- EXCUSE ME, FROM THE OPENING STATEMENT, BUT HE TAKES THOSE OUT OF CONTEXT, JUSTICE QUINCE. HE SAYS THAT HE IS GUILTY OF FIRST-DEGREE MURDER. HOWEVER, THE VERY NEXT PARAGRAPH, HE DISCUSSES THE DIFFERENCE BETWEEN FIRST-DEGREE AND SECOND-DEGREE, AND THAT IS WHAT HE IS TALKING ABOUT. HE SAID THIS IS NOT FIRST-DEGREE MURDER. THIS IS THE RESULT OF PANIC, TWO KIDS IN WAY OVER THEIR HEADS. OF COURSE, MR. WATSON HAD TO ACKNOWLEDGE THE FACTS THAT CAME OUT IN THIS FIVE-PAGE, TWO AND-A-HALF-HOUR CONFESSION.

I UNDERSTAND THAT, BUT I AM REALLY CONCERNED ABOUT PART OF HIS OPENING STATEMENT, WHERE HE SAYS "AND THEN THEY WENT OUTSIDE, AND AT THAT TIME HAD THE IMPOSEING WEAPON, THE HANDGUN, AND THEY HAD THIS CONVERSATION, AND WITHOUT QUESTION, WHAT WAS DISCUSSED, DURING THIS CONVERSATION, WAS WHETHER OR NOT TO KILL THESE TWO PEOPLE."

I HAVE THE OPENING HERE, AND I AM TRYING TO FIND IT, SO I CAN ANSWER YOUR QUESTION, IN TERMS OF --

ABOUT 1864 AND --

OKAY.

YOU KNOW, YOU HAVE GOT THAT THEY WERE INSIDE OF THE HOUSE. THEY GO OUTSIDE, AND THE ATTORNEY EXPLAINS, TO THE JURY, THAT WHAT THEY DID, ONCE THEY GOT OUTSIDE, WAS HAD A DISCUSSION ABOUT KILLING THESE PEOPLE. DOESN'T THAT SUPPLY SOME PREMEDITATION THERE?

HE DIDN'T SUPPLY IT. ALL HE IS DOING IS ACKNOWLEDGING --

PREMEDITATION IN THE SENSE OF NOW WE ARE CONCEDING MORE THAN JUST FIRST-DEGREE MURDER. SECOND-DEGREE MURDER.

DON'T YOU THINK YOU HAVE TO TAKE THAT STATEMENT IN THE CONTEXT IN WHICH IT WAS MADE? BECAUSE RIGHT AFTER THAT, HE DOES SAY THAT LEE OPENED FIRE, WITH AN AUTOMATIC WEAPON, AND SPRAYED THE ROOM, AND IN HIS OPINION, THAT SHOWED A PANIC, BECAUSE THERE WERE BULLET HOLES ALL OVER THAT ROOM. THAT THIS WAS NOT A PREMEDITATED MURDER. AND I KNOW HE SAID THE WORDS, BUT, AGAIN, HE DIDN'T SUPPLY THAT TO THE JURY. THE JURY, ALREADY, KNEW THAT. THEY HEARD THIS CONFESSION. AND DOESN'T THE DEFENSE ATTORNEY, AND HE EXPLAINED, AT THE EVIDENTIARY HEARING, THAT ONE OF HIS -- HE HAD TWO CONCERNS. AFTER HE FOUND OUT THAT THE CONFESSION WAS GOING TO BE ADMITTED, ONE WAS CREDIBILITY BEFORE THE JURY. HE KNEW HIS CLIENT WAS GOING TO BE CONVICTED OF MURDER, WHETHER IT IS GOING TO BE MURDER ONE, MURDER TWO, OR MANSLAUGHTER, AND THE SECOND THING WAS, ALONG WITH THE CREDIBLEITY, HE HAD A CONSISTENT THEME AND HAD TO GIVE THIS JURY SOMETHING TO HANG THEIR HAT ON, TO SHOW THAT THIS KID WAS DESERVING OF THEIR SYMPATHY. NOW, THE CONFESSION IS WHAT SUPPLIED THE EVIDENCE FOR FIRST-DEGREE MURDER, NOT MR. WATT SON, AND IN TELLING THE JURY OR REMINDING THEM THAT, YES, I -- THESE ARE WHAT YOU -- THESE ARE THE FACTS THAT YOU HEARD. I MEAN, THE DEFENDANT SAID WHAT HE SAID IN THE CONFESSION. YOU CAN'T IGNORE THAT. BUT AT THE SAME TIME, HE WAS TRYING TO GIVE THEM A REASON THAT IT WASN'T FIRST-DEGREE MURDER. AS A MATTER OF FACT, IN CLOSING, HE TOOK THREE SPECIFIC FACTS TO SHOW THAT IT WASN'T FIRST-DEGREE MURDER. THE FIRST ONE WAS THAT THE DEFENDANT GAVE MR. WILLIAM BOYD MONEY FOR CHURCH. HE TOOK ALL OF HIS MONEY, AND THEN HE ASKED, MR. BOYD ASKED THEM IF HE WOULD LEAVE THEM A FEW BUCKS FOR CHURCH THE NEXT MORNING, WHICH THE DEFENDANT DID. THE SECOND ONE WAS, AS I MENTIONED BEFORE, THE SPRAYING OF THE GUN, THAT THERE WERE AT LEAST TEN BULLETS SHOT, AND SOME OF THEM SPRAYED THE ROOM, SO THAT THE DEFENSE ATTORNEY WAS TRYING TO CONVINCE THE JURY THAT HE WAS JUST SPRAYING. HE DIDN'T KNOW WHAT HE WAS DOING. IT WAS NOT AN AUTOMATIC METHODICAL KILLING, AND THE THIRD THING WAS APPARENTLY THE TRAJECTORY OF THE BULLETS WAS IN AN UPWARD MOTION, AS OPPOSED TO A DOWNWARD MOTION, AND, AGAIN, HE TRIED TO EXPLAIN TO THE JURY, WELL, THAT IS BECAUSE THE DEFENDANT HAD THE GUN AT HIS HIP. IT WAS, LIKE, SHOOTING FROM THE HIP, LITERALLY, SO I MEAN, HE DID NOT HAVE A WHOLE LOT TO WORK WITH, AND AS A MATTER OF FACT, I MEAN, THE LAST LINE OF HIS CLOSING ARGUMENT IS THAT THIS WAS NOT FIRST-DEGREE MURDER. THIS WAS SECOND-DEGREE MURDER. I MEAN, THIS IS NOT NIXON, WHERE YOU HAVE THE DEFENSE ATTORNEY SAYING I THINK THAT YOU WILL DECIDE -- I THINK THAT WHAT YOU WILL DECIDE IS THAT THE STATE OF FLORIDA, THROUGH THE PROSECUTORS, HAS PROVED ITS CASE AGAINST JOE ELTON NIXON. I THINK YOU WILL FIND THAT THE STATE HAS PROVED, BEYOND A REASONABLE DOUBT, AND ALL OF THE ELEMENTS OF THE CRIMES CHARGED. WE DON'T HAVE THAT HERE, AND, YES, YOU CAN TAKE CERTAIN EXCERPTS FROM A 30-PAGE CLOSING ARGUMENT OR OPENING ARGUMENT, BUT AS THIS COURT HAS SAID, MANY TIMES WHEN YOU ARE TALKING ABOUT IMPROPER PROSECUTORIAL COMMENT, YOU HAVE TO TAKE THE COMMENTS IN

CONTEXT, AND CONTEXT OF THE ENTIRE ARGUMENT, AND THE FACTS OF THE CASE, WHAT THIS DEFENSE ATTORNEY WAS UP AGAINST. AND I THINK JUSTICE QUINCE, IF YOU -- IF YOU TAKE IT IN THAT LIGHT, THERE IS NO WAY THAT THIS MAN, MR. WATT SON, CONCEDED GUILT TO FIRST-DEGREE PREMEDITATED MURDER. ALONG THOSE LINES, IN TERMS OF WHAT WAS ESTABLISHED AT THE EVIDENTIARY HEARING, ON THIS ISSUE, WAS THE FACT THAT MR. WATSON SAID HE DISCUSSED, WITH HARVEY, ON NUMEROUS OCCASIONS, AFTER THE CONFESSION, AFTER HE KNEW THE CONFESSION WAS GOING TO BE ADMITTED, WHAT HIS DEFENSE WAS GOING TO BE, AND THAT THE DEFENDANT, UNDERSTOOD THAT DEFENSE, THAT HE WAS GOING TO CONCEDE MURDER TWO.

LET ME ASK YOU THIS.

YES, SIR.

IF I SET OUT TO ROB A PLACE, ME AND MY COMPANION, AND WE GO IN, AND WE DON'T WEAR A MASK OR ANYTHING, AND WE COMPLETE THE ROBBERY, AND THEN WE GO OUT AND DISCUSS WHETHER WE HAVE TO KILL THESE PEOPLE, AND WE MAKE UP OUR MINDS, YES, WE ARE GOING TO HAVE TO KIM THEM, BECAUSE THEY HAVE -- TO KILL THEM, BECAUSE THEY HAVE SEEN US, AND WE GO BACK AND KILL THEM, WHAT ELEMENTS ARE MISSING THERE, FROM FIRST-DEGREE MURDER?

NONE. AS A MATTER OF FACT --

ISN'T THAT WHAT DEFENSE COUNSEL TOLD THE JURY, THAT HIS CLIENT DID?

AGAIN, IT WAS THE DEFENDANT WHO TOLD THE JURY THAT. NOT DEFENSE COUNSEL. SO ARE YOU SAYING, THEN, YOU ARE CONCEDING --

I AM NOT CONCEDING ANYTHING. IT HAS I AM ASKING YOU.

MY POINT TO YOU, NO, HE DID NOT PROVIDE THAT TO THE JURY. THE DEFENDANT PROVIDED THAT TO THE JURY, AND I GUESS MY RHETORICAL QUESTION BACK TO YOU, SIR, WOULD BE, THEN, IS IT CONCEDING FIRST-DEGREE MURDER, BY JUST RECOUNTING THE FACTS AS --

CONCEDE EVERY ELEMENT OF FIRST-DEGREE MURDER. MY POINT IS, YES, YOU HAVE CONCEDED FIRST-DEGREE MURDER. EVEN THOUGH IT IS GIVEN IN DIFFERENT SEGMENTS, BUT IF YOU CONCEDE EVERY ELEMENT OF A FIRST-DEGREE MURDER IN YOUR OPENING ARGUMENT, AND YOU ARE DEFENSE COUNSEL, IT SEEMS TO ME THAT YOU HAVE CONCEDED THAT MY CLIENT IS GUILTY OF THE CRIME CHARGED.

WELL, BASED ON WHAT YOU SAID IN NIXON, AND WHAT THE DEFENSE ATTORNEY SAID IN NIXON, I THINK THIS IS A FAR CRY FROM NIXON, IN TERMS OF HE DIDN'T SAY REPEAT THE FACTS AND THEN SAY, YES, THOSE FACTS ALL JUSTIFY FIRST-DEGREE PREMEDITATED MURDER. DO THE FACTS? YES. I MEAN THIS COURT FOUND CCP IN THIS CASE. BUT, AGAIN, THE DEFENSE ATTORNEY FELT THAT HE HAD TO MAINTAIN CREDIBILITY WITH THE JURY, ACKNOWLEDGE WHAT HE WAS UP AGAINST, BUT HE STILL TRIED TO GIVE THE JURY SOME OTHER FACTS THAT HE WAS ABLE TO UNCOVER, TO SUPPORT SECOND-DEGREE MURDER.

ON THAT POINT, THEN, GOING TO WHAT HIS FIRST ONE IS, SINCE THE STRATEGY IN THIS CASE WAS TO SHOW THAT THIS WAS AN IMPULSIVE ACT, WOULDN'T A REASONABLE DEFENSE COUNSEL WANT TO LOOK TO ANYTHING IN THE DEFENDANT'S MENTAL STATUS THAT WOULD SUPPORT THE STATUTORY MENTAL MITIGATORS, TO SHOW IMPULSIVITY, TO SHOW SOMETHING THAT WOULD GIVE THE JURY A REASON TO SAY, YES, THIS IS FIRST-DEGREE MURDER, BUT IT IS MITIGATING, AND YET THERE WAS A REQUEST FURROW-FOR A PSYCHIATRIST. APPARENTLY THE RAW DATA SHOWS BRAIN DAMAGE, BUT THE PSYCHOLOGIST THAT WAS HIRED DIDN'T KNOW THAT IT SHOWED BRAIN DAMAGE. THERE WAS -- I MEAN, WHAT DO YOU SAY ABOUT HOW, IN LIGHT OF

THAT STRATEGY -- IN OTHER WORDS THERE WASN'T MUCH -- WHAT I AM HEARING YOU SAY IS THERE IS NOT MUCH TO DO WITH THIS CASE, AS FAR AS GUILT, BECAUSE HE HAS CONFESSED TO GUILT, SO IF YOU ARE A DEFENSE ATTORNEY, WHAT YOU ARE GOING TO BE TURNING TO IS WHAT -- IS THERE ANYTHING YOU CAN DO TO SAVE YOUR CLIENT'S LIFE.

CORRECT. AND WHAT DEFENSE COUNSEL IS NOW SUGGESTING MR. WATSON SHOULD HAVE DONE IS THE VERY THING MR. WATSON SAID HE WANTED TO AVOID, AND MR. WATSON SAID THE LAST THING I WANTED TO DO, KEEPING IN MIND CREDIBILITY, THAT I DID NOT WANT TO GIVE A BAD EXCUSE FOR A BAD BEHAVIOR, AND HE WANTED TO GIVE THE JURY SOMETHING TO JUSTIFY A RECOMMENDATION FOR LIFE. NOW, HE DID HIRE A PSYCHOLOGIST -- A PSYCHOLOGIST, DR. PATRILLA, AND I CHALLENGE DEFENSE COUNSEL TO POINT TO ANY PLACE IN THIS RECORD, AT TRIAL OR AT THE EVIDENTIARY HEARING, WHERE DR. PATRILLA SAID THAT HE TOLD MR. WATSON THAT HE WAS UNQUALIFIED TO DO THE TESTING THAT HE DID. TO THE CONTRARY, DR. PATRILLA, AT THE EVIDENTIARY HEARING, SAID THAT HE RECOMMENDED A PSYCHIATRIST, SIMPLY BECAUSE SUCH AN EXPERT WOULD BE THOROUGH AND WOULD OFFER A SECOND OPINION. AT NO TIME DID HE EVER TELL MR. WATSON THAT HE WAS INCOMPETENT TO DO THE TESTING THAT HE DID. AND AS A MATTER OF FACT, DEFENSE ATTORNEY SAYS THAT DR. PATRILLA, IN HIS PENALTY-PHASE TESTIMONY, MADE A PASSING REFERENCE THAT THERE WAS NO ORGANIC BRAIN DAMAGE, AND THAT SIMPLY ISN'T TRUE.

LET ME GET BACK TO WHAT I GUESS WHAT I WAS TRYING TO GO TO BEFORE, IS YOU SAID THAT HE HAD HIS BEST SHOT WAS GOING TO BE SECOND-DEGREE MURDER, SO WHAT HE -- WHY WOULDN'T HE, FIRST, EVEN IF HE WAS GOING TO REJECT IT, WOULDN'T A REASONABLE DEFENSE ATTORNEY LOOK AT AND SAY I NEED TO SEE A PICTURE OF THIS DEFENDANT'S MENTAL STATUS, GIVEN THAT HE HAD THIS AUTOMOBILE ACCIDENT SEVERAL YEARS BEFORE, TO SEE IF THERE IS EVEN -- WHETHER IT IS EVEN FOR GUILT PHASE, TO GIVE THE JURY SOME BASIS, SAY, THEN, FOR FINDING SECOND-DEGREE MURDER, FOR SAYING THAT WHAT HAPPENED IN THIS TIME WAS, ALTHOUGH IT WAS, IT LOOKS LIKE IT WAS PLANNED, IT, REALLY, WASN'T PLANNED, BECAUSE -- DOES IT -- NORTHER TO DECIDE THAT YOU -- IN ORDER TO DECIDE THAT YOU ARE GOING TO PAINT A PICTURE ONE WAY, DON'T YOU NEED TO KNOW THE ACTUAL PICTURE?

OF COURSE YOU DO, AND THAT IS EXACTLY WHAT MR. WATSON DID. HE HIRED A PSYCHOLOGIST. HE DISCUSSED GETTING A PSYCHIATRIST, AND AFTER TALKING TO THE FAMILY, HE HAD THE PSYCHOLOGIST TALK TO THE PRINCIPAL, SCHOOL COUNSELOR, TEACHERS, PEOPLE AT WORK, AND HE EMPFATCALLY SAID, AT THE EVIDENTIARY HEARING, THERE IS NOTHING ME TO GO ON. IF THERE WAS COMPELLING EVIDENCE OF ORGANIC BRAIN DAMAGE, THAN IS WHAT HE TESTIFIED TO, HE SAID IF THERE HAD BEEN, OF COURSE I WOULD HAVE PRESENTED. THAT HOWEVER, THERE -- PRESENTED. THAT HOWEVER, THERE ISN'T ANY, AND IN FACT, 24 YEARS LATER, WHAT THEY CAN DO WITH THEIR DOCTORS IS TO SAY THEY HAD TO CONCEDE, ON CROSS-EXAMINATION, THAT AT BEST, THERE IS AN INDICATION OF BRAIN DAMAGE. NONE OF THEM RECOMMENDED PHYSICAL TESTING, AND THEY, ALSO, CONCEDED BRAIN DAMAGE ON CROSS-EXAMINATION, AND THAT IS BECAUSE THE TESTS WOULD NOT HAVE SHOWN ORGANIC BRAIN DAMAGE. THEN THEY BASE THEIR OPINIONS ON --

BUT I THOUGHT THAT HE SAID, ON -- BEFORE, THAT EVEN THE TEST, IN 1985, INDICATED ORGANIC BRAIN DAMAGE.

ABSOLUTELY NOT. THAT IS NOT WHAT HE TESTIFIED TO, JUSTICE QUINCE, AT TRIAL, AND IF YOU ARE LOOKING AT WHAT DEFENSE ATTORNEY DID, YOU HAVE TO TAKE INTO CONSIDERATION WHAT HE KNEW AT THE TIME. SIMPLY BECAUSE PATRILLA COMES BACK, TWELVE YEARS LATER, AND SAYS, YOU KNOW, THAT IQ TEST THAT I DID, THE FACT THAT THERE WAS A TWELVE-POINT DIFFERENCE BETWEEN THE VERBAL AND THE PERFORMANCE SCORES, MAY HAVE INDICATED BRAIN DAMAGE. AS A MATTER OF FACT, I URGE THIS COURT TO LOOK AT HIS TESTIMONY, FROM PAGES 2756 TO 2758, WHERE HE DISCUSSES THAT TO THE JURY, AND HE SAYS, HERE, NUMBER ONE,

HE EITHER HAS THE LIKELIHOOD OF ORGANIC MENTAL DISORDER OR LIKELIHOOD OF SOME EMOTIONAL PROBLEMS, SO WHAT I DID, I GAVE HIM ALL THESE OTHER TESTS. HE GIVE GAY HIM THE I -- HE GAVE HIM THE IQ TEST. HE GAVE HIM THE BENDER GUESS TALT TEST, AND THEY ALL -- GESTAULT TEST, AND THEY ALL CAME OUT NORMAL. IT CAME OUT NORMAL, HE SHOWS, WITHOUT SUGGESTING THE LIKELIHOOD OF ANY FRONTAL LOBE DAMAGE, TEMPORAL LOBE DAMAGE. WHAT I AM TALKING ABOUT IS BRAIN DAMAGE. HE DIDN'T HAVE IT. AND THEN TWO PAGES LATER. HE TALKS ABOUT THE BENDER GESTAULT, AND WAS ASKED THE QUESTION AND SAYS YOU DO THAT AS AN INDICATION OF NEUROLOGICAL DAMAGE. HE SAYS, YES, THAT IS WHY I DID THAT TEST, AND THEN HE GOES ON TO EXPLAIN, WHEN I GAVE THE BENDER-GESTAULT, WHAT YOU DO, AS A PSYCHOLOGIST, IS YOU ARE LOOKING FOR INDICATIONS OF BRAIN LESIONS OR WHATEVER, AND, ALSO, YOU LOOK FOR EMOTIONAL INDICATORS ON THE TEST. THIS IS JUST ONE PIECE OF THE PUZZLE, AND THEN HE TALKS ABOUT HOW HE DID NOT FIND ORGANIC BRAIN DAMAGE. HE DID NOT TELL MR. WATSON THAT HE COULD NOT RENDER AN OPINION AS TO ORGANIC BRAIN DAMAGE. HE NEVER TOLD HIM THAT.

OKAY. BUT HE, NOW, SAYS, DR. PATRILLA, TESTIFYING TODAY, SAYS THAT NOW HE REALIZES, LOOKING AT THE TEST THAT HE ACTUALLY DID, THAT THERE WERE -- THE TESTS THAT ARE THE MOST RELIABLE INDICATORS OF ORGANIC BRAIN DYSFUNCTION WERE, IN FACT --.

THE BENDER-GESTAULT.

BUT HE SAID THAT HE NOW LOOKS AT THESE TEST RESULTS AND SAY THEY ARE HIGHLY INDICATIVE OF THE PROBABILITY OF BRAIN DYSFUNCTION.

TWO ANSWERS TO. THAT NUMBER ONE IS SO WHAT? TWELVE YEARS AFTER THE FACT, YOU CAN COME IN. YOU CAN GO OUT AND GET DOCTORS, LATER, TO COME IN AND DISAGREE WITH PRIOR RESULTS. I MEAN, IF THAT IS THE STANDARD --

ACTUALLY IT WAS DR. PATRILLA SAID --

EXACTLY. BUT WHAT HE SAID WAS, BASED ON THE DIFFERENCE IN THE IQ SCORES, THAT THAT POSSIBLY WAS AN INDICATION, TO HIM. AT THE TIME, WHAT I JUST READ TO YOU, HE DISCOUNTED THAT. TWELVE YEARS LATER, HE SAYS THAT, BUT, ALSO, JUSTICE PARIENTE, ONE OF THE OTHER DOCTORS, DR. FISHER, SAID, AND THE ONLY DISAGREEMENT, TWELVE YEARS LATER, WITH PATRILLA, IS THIS INDICATION OF ORGANIC BRAIN DAMAGE, NOT THAT HE HAS IT. AT BEST THERE, IS A INDICATION OF IT, AND, AGAIN, HE SAYS, WELL, THOSE TEST SCORES, YES, MAYBE I WOULD HAVE DONE MORE TESTING. HE, ALSO, CONCEDED, THOUGH, ON CROSS EXAM, THAT THE DIFFERENCE IN THOSE TEST SCORES, COULD, ALSO, HAVE BEEN INDICATIVE OF DEPRESSION ON THE PART OF THE DEFENDANT.

JUSTICE SHAW HAS A QUESTION.

OKAY.

BACK TO MY INITIAL QUESTION. I DON'T WANT TO BEAT A DEAD HORSE TO DEATH. BUT IF THE RECORD PROVES YOU WRONG, IN THAT I RECOGNIZE THE STATE'S POSITION IS THERE WAS NO CONFESSION OF GUILT TO THE CHARGED CRIME, AND I APPRECIATE THAT, BUT IF THE RECORD PROVES YOU WRONG, WHAT IS YOUR FALLBACK POSITION? IS IT AN AUTOMATIC REVERSAL HERE? BECAUSE, I THINK, YOU CONCEDED THAT IT WAS NOT DISCUSSED WITH THE DEFENDANT, THAT THERE WOULD BE A PLEA TO THE CRIME CHARGED, OR THE STATE SAYING THAT IT WAS DISCUSSED WITH THE DEFENDANT?

THERE WAS NEVER A DISCUSSION TO PLEA TO FIRST-DEGREE MURDER. MR. WATSON TESTIFIED, AT THE EVIDENTIARY HEARING, THAT HIS DISCUSSIONS WITH HARVEY WERE TO PLEA, BUT TO CONCEDE THE FACTS TO MURDER, TO OO TO MURDER TWO ONLY. THERE WAS NO NEVER -- TO

MURDER TWO ONLY. THERE WAS NEVER, AND I DON'T THINK THE STATE CONCEDED -- WELL, LET ME PUT IT THIS WAY. THERE WAS NO DISCUSSION OR TESTIMONY REGARDING A PLEA TO FIRST-DEGREE MURDER, BECAUSE IT NEVER TOOK PLACE, BECAUSE MR. WATSON NEVER INTENDED TO CONCEDE FIRST-DEGREE MURDER, AND OBVIOUSLY THE STATE, I MEAN THIS COURT, OBVIOUSLY, CAN READ THE RECORD THE SAME AS WE CAN, AND I THINK THE OVERALL TEN OR OF THE -- TENOR OF THAT ARGUMENT WAS TO MURDER TWO ONLY. NOW, IN TERMS OF WHAT THIS COURT HAS SAID, IN NIXON, A GUILTY PLEA TO MURDER ONE IS PER SE REVERSIBLE, SO I DON'T KNOW IF THIS COURT IS GIVING THE STATE A FALLBACK POSITION ON MURDER ONE, BUT MR. WATSON TESTIFIED THAT HE HAD DISCUSSIONS WITH HIS CLIENT, AS TO CONCEDING TO MURDER TWO, AND --

YOUR TIME IS UP, MISS TERENZIO. THANK YOU. REBUTTAL.

THANK YOU. ILL LIKE TO GO, FIRST, TO THE STATE -- I WOULD LIKE TO GO, FIRST, TO THE STATE'S POINT THAT DR. PATRILLA PASSED ON THE ORGAN IB BRAIN DAMAGE. -- ORGANIC BRAIN DAMAGE. DR. PATRILLA, AND THIS IS TESTIFIED TO IN THE PENALTY PHASE, BASED THAT COMMENT ON HIS TEST RESULTS AND READING OF THE BENDER, WHICH HE SAID SHOWED NO ERRORS, AND THE WEXLER SKILL TEST, WHICH SHOWED NO ERRORS, AND AT THE 3.850 HEARING, DR. PATRILLA AND DR. NORCO AND EVERYBODY HAS LOOKED AT THOSE RAW RESULTS, BACK FROM 1985 AND 1986 AND RECOGNIZED ERRORS IN THOSE RESULTS AND CONCLUDED THAT, INDEED, THEY DID INDICATE ORGANIC BRAIN DAMAGE, AND DR. PATRILLA DID NOT PERFORM A NEUROPSYCH BATTERY. HE WAS NOT REQUIRED TO DO SO, AND HE SAID THAT THERE WAS NO ORGANIC BRAIN DAMAGE, BECAUSE HE WAS INCOMPETENT. HE RECOMMENDED THE PSYCHIATRIST FOR THAT REASON AND THOUGHT THE PSYCHIATRIST WAS PICK IT UP, AND BECAUSE WATSON WANTED HIM TO FOCUS ON EMOTIONAL CONCERNS. I WOULD, ALSO, LIKE TO TOUCH THE POINT THAT THE STATE SAID WATSON SAID HE WOULDN'T USE, THAT HE WANTED TO AVOID BAD EXCUSE FOR BAD BEHAVIOR.

WOULD YOU ADDRESS WHAT IS YOUR POSITION THAT TRIAL COUNSEL SHOULD DO WITH FACTUAL INFORMATION THAT IS GOING TO COME BEFORE A JURY, UNDER THESE CIRCUMSTANCES? IS THE TRIAL ATTORNEY NOT TO ADDRESS WHAT THOSE FACTS WILL BE? IS THAT WHAT ONE NEEDS TO DO, TO JUST NOT DISCUSS ANY FACTS, IF YOU DON'T HAVE THAT SPECIFIC AGREEMENT? WHAT DOES NIXON -- WHAT DO YOU READ NIXON TO REQUIRE?

OKAY. I THINK NIXON IS CLEAR ON THIS, YOUR HONOR. I BELIEVE NIXON SAYS THAT, EVEN IN THE FACE OF OVERWHELMING GUILT, THAT THE DEFENDANT MAINTAINS HIS FUNDAMENTAL RIGHT TO SUBJECT THE STATE'S CASE TO AN ADVERSARIAL TESTING, AND THAT EVEN IF THE DEFENDANT -- EVEN IF THERE IS NO OTHER DEFENSE, THAT THAT HAS TO BE THE DEFENSE. YOU HAVE TO AT LEAST HOLD THE STATE TO THAT BURDEN OF PROOF. IF YOU HAVE A CONFESSION IN THIS CASE, IT WOULD DEPEND ON THE CIRCUMSTANCES OF A PARTICULAR CASE.

WELL, I UNDERSTAND THE KNICKS ONE LAW. BUT WHAT I NEED TO KNOW IS WHAT IS A DEFENSE ATTORNEY SUPPOSED TO DO WITH THE FACTS THAT ARE GOING TO COME IN, AS YOU SEE IT, UNDER NIXON? DISREGARD IT? NOT DISCUSS IT? WHAT IS THE LEGAL STANDARD TO AVOID THE INEFFECTIVE ASSISTANCE OF COUNSEL?

WELL, I BELIEVE THAT THEY WOULD DEPEND ON THE CIRCUMSTANCES OF THE CASE. IN THIS CASE, FOR INSTANCE, IF MR. WATSON HAD DONE -- CAN'T BE, REALLY, EVALUATED IN A VACUUM. IF HE HAD DONE THE PSYCHOLOGICAL HE VALUE WAYS, HE WOULD HAVE HAD DR. NORCO'S TESTIMONY, WHICH WOULD HAVE SUGGESTED, WHICH WOULD HAVE HELPED EXPLAIN THE FACTS THAT WERE CONTAINED IN THE CONFESSION. IT WOULD HAVE HELPED EXPLAIN THE FACT THAT IT WAS AN AUTOMATIC REFLECTION I HAVE RESPONSE. IT WAS NOT PREMEDITATED.

LET'S TAKE IT THAT HE HAD DR. PATRILLA'S INFORMATION. THAT IS GOING TO BE THE TESTIMONY

ON THE STAND. WHAT IS A DEFENSE ATTORNEY SUPPOSED TO DO? I AM STILL TROUBLED BY HOW DO YOU DEAL WITH THE FACTS OR WHATEVER THE FACTS ARE? DO YOU IGNORE THEM? DO YOU NOT DISCUSS THEM? THAT IS ALL I AM LOOKING FOR IS WHAT DO YOU DO WITH REGARD TO THOSE?

I THINK, I REALLY, CERTAINLY YOU HAVE TO TAKE, ASSURE PLANNING YOUR STRATEGY, YOU HAVE TO TAKE THOSE FACTS INTO ACCOUNT, AND YOU -- THERE ARE DIFFERENT WAYS TO ADDRESS THAT. YOU -- ON ONE HAND, SUCH AS IN THIS CASE, YOU CAN TAKE THE FACTS AND SAY, LADIES AND GENTLEMEN OF THE JURY, YOU MAY HEAR FACTS COMING IN FROM MR. HARVEY'S CONFESSION ABOUT X, Y AND Z, BUT YOU, ALSO, HEAR DR. NOCCO EXPLAIN THAT, DESPITE THAT --

BUT DR. NORCO WASN'T THERE. THIS IS DR. PATRILLA. THIS LAWYER HAD "X" FACTS. HOW DOES HE DEAL WITH THOSE FACTS?

HE DEALS WITH THOSE FACTS BY EITHER EXPLAINING THEM. MAYBE HE ARGUES THAT THE CONFESSION IS UNRELIABLE OR INACCURATE, BECAUSE OF THE STRESSORS. MAYBE -- THAT IS WHAT I GUESS I AM TRYING TO SAY, IS, IF -- IT CAN'T REALLY BE EVALUATED IN A VACUUM, BUT IF YOU DIDN'T HAVE DR. NORCO'S TESTIMONY, IF ALL YOU HAD WERE THOSE FACTS, I THINK YOU DO HAVE TO IGNORE THEM. YOU HAVE TO LOOK AT THE MOST FUNDAMENTAL LEVEL, YOU HAVE TO EITHER PUT THEM INTO YOUR STRATEGY OR YOU HAVE TO IGNORE THEM, IF THE CLIENT DOESN'T CONSENT TO CONCEDING GUILT AND MAKE THE PROSECUTION TEST THEIR CASE, AND IF THE CLIENT IS CONVICTED, AS A RESULT OF THAT, AS THIS COURT SAID IN NIXON, THAT IS THE CLIENT'S FAULT, FOR NOT CHOOSING A BETTER STRATEGY.

THANK YOU, MR. KOPPY. I I THINK YOUR TIME IS UP. THANK YOU, COUNSEL. WE APPRECIATE YOUR ASSISTANCE IN THIS CASE VERY MUCH. AND THE COURT WILL BE IN RECESS FOR 15 MINUTES.