John B. Vining v. State of Florida

THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS SIGNING VERSUS STATE. -- IS SIGNING VERSUS STATE. -- IS VINING VERSUS STATE.

MRS. BACK US.

MAY IT PLEASE THE COURT. MY NAME IS TERRY BACKHUS. I AM REPRESENTING JOHN BRUCE SIGNING ON THIS CAUSE OF ACTION. THE CASE IS BEFORE THE COURT ON A DENIAL OF RULE 3.850 RELIEF, AFTER AN EVIDENTIARY HEARING ON SEVERAL VERY LIMITED ISSUES. ONE OF THOSE ISSUES WAS A BRADY CLAIM. THE OTHER ISSUE WAS A PARTIAL HEARING, ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, AS THEY RELATED TO THE FAILURE OF COUNSEL TO OBJECT TO JUDGE BAKER'S EXPARTE AND EXTRA RECORD INVESTIGATION INTO THE FACTS OF THE CASE. THE REMAINDER OF THE ISSUES WERE SUMMARILY DENIED BY THE COURT, AND I AM GOING TO LIMIT MY REMARKS, TODAY, TO THE ISSUES ON WHICH THE EVIDENTIARY HEARING WAS GRANTED. MR. SIGNING TURNED 70 YEARS OLD -- MR. SIGNING TURNED 70 YEARS OLD -- MR. SIGNING TURNED 70 YEARS OLD THIS YEAR AND HAS NOT HAD A HEARING ON FACTS.

IF YOU COULD CLEARLY OUTLINE WHAT INFORMATION JUDGE BAKER OBTAINED, DURING THIS INDEPENDENT INVESTIGATION THAT WAS NOT ACTUALLY PRESENTED DURING THE COURSE OF THESE PROCEEDINGS.

YES, YOUR HONOR. FIRST OF ALL, DURING THE COURSE OF THE TRIAL, THE JUDGE RELIED ON SOME EXTRA RECORD DISCUSSIONS WITH DR. STEVE JORDAN, WHO WAS A PSYCHOLOGIST, WHO HAD DONE SOME WORK ON HYPNOSIS, AND RELAXATION AND RECALL, AND HE RELIED ON SOME INFORMATION FROM DR. JORDAN. WE DON'T KNOW WHAT INFORMATION, BECAUSE COUNSEL DIDN'T OBJECT AND FIND OUT WHAT INFORMATION THAT WAS.

AND THERE WASN'T -- THAT QUESTION WAS NOT ASKED AT THE 3.850 PROCEEDING?

YES, YOUR HONOR. WE DID ASK THE QUESTION, AS TO WHY COUNSEL DID NOT OBJECT TO THAT PARTICULAR NOTICE BY COURT, AND SHE SAID THAT IT WAS HER UNDERSTANDING, BY THAT POINT, THAT THE COURT HAD ALREADY RULED ON THE ISSUE, THAT SHE COULD NOT OBJECT, AND THAT SHE WASN'T AWARE OF THE EXTENT OF THE EXTRA RECORD INVESTIGATION THAT JUDGE BAKER HAD DONE, AND HER JUSTIFICATION FOR NOT, IN FACT, BRINGING UP, DURING THE WITNESSES, THE EYEWITNESSES WHO HAD BEEN RELAXED AND RECALLED, HAD NOT CROSS-EXAMINED THE WITNESSES ON THAT PARTICULAR ASPECT OF THE CASE, WAS THAT SHE HAD THOUGHT THAT THE COURT HAD PREVENTED THEM FROM MENTIONING THAT THE WITNESSES HAD BEEN EITHER HYPNOTIZED OR RELAXED AND RECALLED, BUT DEFENSE COUNSEL DID NOT OBJECT TO IT. WE DON'T KNOW THE FULL EXTENT ACTUALLY WHAT HE DID RELY ON. JUDGE BAKER SAID, AT THE EVIDENTIARY HEARING, THAT HE SPOKE WITH DR. JORDAN, AND WHEN HE SPOKE WITH DR. JORDAN, THEY DISCUSSED THE IMPLICATIONS OF HYPNOSIS AND WHETHER OR NOT HE THOUGHT THAT THE WITNESSES HAD, IN FACT, BEEN EITHER RELAXED AND RECALLED OR HYPNOTIZED.

SO WAS HE ASKED THAT SPECIFIC QUESTION?

YES, HE WAS, YOUR HONOR.

AND WHAT DID HE SAY HE RELIED ON? DID HE SAY?

HE SAID HE RELIED ON THE DISCUSSIONS THAT HE HAD WITH DR. JORDAN, WITH REGARD TO WHETHER OR NOT THE WITNESSES HAD BEEN RELAXED AND RECALLED, AND ON THE FACT THAT HE COULD NOT SELF HIPTIZE HIMSELF, WHEN HE -- HYPNOTIZE HIMSELF, WHEN HE HAD EXPERIMENTED WITH SELF HYPNOSIS SOMETIME EARLIER IN HIS CAREER, AND HE SAID SPECIFICALLY, ON THE RECORD, THAT HE IS RELYING ON THOSE ASPECTS, IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS THE TESTIMONY OF THE EYEWITNESSES, AS WELL AS OTHER INFORMATION THAT JUDGE BAKER EXPLORED. HE EXPLORED GOING TO THE CRIME SCENE. HE CALLED UP SEMINOLE COUNTY PROBATE RECORDS, WITH REGARD TO THE ESTATE OF MISS CARUSO, PRESUMABLY WITH THE PURPOSE OF DOUBLE-CHECKING THE JEWELRY INVENTORY OF THE PROBATE ESTATE AGAINST THE EVIDENCE THAT HAD BEEN PRESENTED AT TRIAL, BUT NO ONE ACTUALLY KNEW THAT INFORMATION, UNTIL MR. -- UNTIL JUDGE BAKER TESTIFIED AT THE EVIDENTIARY HEARING.

DID ANY OF THESE EXTRA-RECORD INVESTIGATION IMPACT ON THE PENALTY PHASE, HIS EVALUATION OF THE SENTENCE? AND THAT IS WHAT, IF YOU COULD --

ACTUALLY I BELIEVE THEY IMPACTED ON BOTH PHASES, BECAUSE, AS I WAS SPEAKING ABOUT THE HYPNOSIS AND COUNSEL'S FAILURE TO CROSS-EXAMINE THE WITNESSES ON HYPNOSIS, THAT WAS WHAT HELPED SUPPORT THE AGGRAVATING CIRCUMSTANCES IN THE CASE, AND WHAT THE JUDGE RELIED ON IN SUPPORTING THE AGGRAVATING CIRCUMSTANCES IN THE CASE. IN ADDITION, THE JUDGE HAD RELIED ON SOME DEPOSITIONS THAT HAD NEVER BEEN ENTERED INTO EVIDENCE BY THE FAMILY MEMBERS, TO DISCOUNT THE MITIGATION THAT HAD BEEN PRESENTED BY COUNSEL AT TRIAL, SPECIFICALLY THE ASPECT THAT WAS PRESENTED THAT MR. SIGNING WAS GOOD FATHER -- MR. VINING WAS A GOOD FATHER, AND HE DISCOUNTED THAT MITIGATION, SPECIFICALLY BECAUSE HE HAD RELIED ON A DEPOSITION THAT HAD NEVER BEEN ENTERED INTO EVIDENCE AT THE TIME.

WHEN YOU HAVE A JUDGE THAT OBTAINS OUTSIDE CAN RELIES ON OUTSIDE INFORMATION -- JUDGE RELIES ON OUTSIDE INFORMATION, CAN THAT BE SUBJECT TO HARMLESS ERROR TEST?

THAT IS ONE OF THE MISTAKES THAT JUDGE BRONSON DID, IF YOU LOOK AT RULE 3.850. IF YOU LOOK AT THE GARDENER VERSUS FLORIDA CASE AND PORTER, AS WELL, YOU CAN SEE THAT, IN BOTH THOSE CASES, WERE LIFE RECOMMENDATIONS BY THE JURY. OBVIOUSLY IN BOTH OF THOSE CASES, IT IS MORE OF A CONFRONTATION CLAUSE, DUE PROCESS VIOLATION, THAN A PREJUDICE PRONG-TYPE OF ANALYSIS, SO IN THESE TYPES OF CASES, IT IS OUR POSITION THAT IT CAN'T BE HARMLESS, BECAUSE, BY VIRTUE OF THE FACT THAT YOU JUST MENTIONED, THEY CAN'T TELL WHAT THE JURY RELIED O THEY CAN'T TELL, BY VIRTUE OF THE FACT THAT NO ONE OBJECTED TO JUDGE BAKER'S INVESTIGATION. WE, REALLY, DIDN'T KNOW, UNTIL WE GOT TO THE EVIDENTIARY HEARING, EXACTLY WHAT INFORMATION HE HAD GLEANED FROM THESE EXPARTE COMMUNICATIONS AND EVIDENCE, AND THAT IS THE PROBLEM THAT GARDENER ADDRESSES. GARDENER ADDRESSES THE FACT THAT YOU CAN'T TELL WHAT KIND OF INFORMATION, AND YOU CAN'T BRING THAT INFORMATION AND CHALLENGE IT, BEFORE THE APPELLATE COURTS, IF YOU DON'T KNOW WHAT THAT INFORMATION IS. IT IS OUR POSITION THAT TRIAL COUNSEL SHOULD HAVE OBJECTED TO THAT, AND COUNSEL GAVE NO STRATEGIC OR TACTICAL REASONS FOR NOT OBJECTING TO THE JUDGE'S INVESTIGATION, WHEN THEY BECAME AWARE THAT IT HAPPENED.

COULD THE COURT TAKE JUDICIAL NOTICE OF WHAT WAS IN THE PROBATE RECORDS?

MY UNDERSTANDING, YOU ARE TALKING ABOUT THE 3.850 COURT.

NO. I AM TALKING ABOUT JUDGE BAKER.

I DON'T THINK JUDGE BAKER TOOK JUDICIAL NOTICE OF. THAT I DON'T REALLY SEEING. THAT I

THINK HE JUST ON --

COULD HE TAKE JUDICIAL NOTICE OF WHAT IS IN A COURT FILE? I MEAN, THAT IS SOMETHING THAT IS --

I THINK HE COULD TAKE JUDICIAL NOTICE OF SOMETHING THAT WAS CHALLENGED IN COURT, SOMETHING THAT WAS TESTED BY THE PARTIES, BUT IF THERE IS SOMETHING SUBMITTED IN CIRCUIT COURT FILE, WHICH I AM SUGGESTING THE SEMINOLE COUNTY PROBATE RECORDS WERE NOT IN THE COURT FILE, THAT HE COULD NOT TAKE JUDICIAL NOTICE OF SOMETHING THAT WAS NOT THE SUBJECT OF THE LITIGATION TO START WITH. IT WASN'T INTRODUCED BY THE PARTIES 6 AS EVIDENCE, AND I THINK THAT IS THE PROBLEM, IS BECAUSE WHEN YOU GET INTO THAT SITUATION, AND AS I READ GARDENER IN THE PORTER CASES, IS THAT THE JUDGE IS BECOMING AN ADVOCATE, INSTEAD OF A FAIR AND IMPARTIAL ARBITER OF THE FACTS THAT ARE BROUGHT BEFORE HIM, SO MY UNDERSTANDING OF THE JUDGE'S RULE --.

IF IT WAS IN THE SOUTHERN REPORTER, IT WOULD BE OKAY.

PARDON ME?

IF THE MATERIAL WAS IN THE SOUTHERN REPORTER, IF THIS HAD BEEN SOME INFORMATION THAT HAD BEEN LISTED, AS PART OF THE PROBATE ESTATE, AND IT WAS REPORTED IN SOUTHERN REPORTER?

WELL, IF THERE WAS SOME LEGAL PRECEDENT THAT ONE OF THE PARTIES BROUGHT TO THE COURT OR IF THE JUDGE FOUND THAT IT WAS NECESSARY AND INFORMED THE PARTIES THAT, YES, I AM GOING TO RELY ON THIS CASE, WHAT DO YOU HAVE TO SAY ABOUT THAT, AND GIVE THEM AN OPPORTUNITY TO RESPOND AND TO REPLY, THEN I WOULD SAY CERTAINLY THE JUDGE WOULD DO THAT, AND CERTAINLY THE JUDGE CAN RELY ON ANY CASE LAW THAT HE WISHES TO RELY ON. HOWEVER, IN THIS CASE, THE PROBATE RECORDS WERE NOT ANY PUBLISHED OPINIONS. THEY WERE SOMETHING THAT HE HAD TO CALL THE CLERK'S OFFICE TO GET. IN ADDITION TO THAT, YOU, ALSO, HAVE THE ISSUE OF THE JUDGE CALLING THE MEDICAL EXAMINER, WHO DID TESTIFY AT TRIAL, AND ASKING HIM SOME THINGS ABOUT THE AUTOPSY REPORT AND ASKING FOR A COPY OF THE AUTOPSY REPORT THAT WAS NEVER ENTERED INTO EVIDENCE.

YOU MENTIONED THE DEPOSITION. THE DEPOSITION YOU SAY, WASN'T INTRODUCED INTO EVIDENCE, BUT I WOULD ASSUME THE DEPOSITION, IS IT AVAILABLE FOR THE COURT FILE?

THAT IS SOMETHING THAT I WASN'T CLEAR ON. I AM ASSUMING THAT MAYBE THE DEPOSITIONS WERE FILED BY THE COURT REPORTER IN THE FILE. THAT IS HOW HE GOT ACCESS TO IT. BUT IT IS OUR POSITION THAT HE SHOULD NOT HAVE CONSIDERED THE DEPOSITIONS THAT WEREN'T ENTERED INTO EVIDENCE AT THE TRIAL, BECAUSE THAT IS THE ESSENCE OF WHY YOU HAVE A TRIAL, AND ADVERSARIALLY TEST THE EVIDENCE, IF THE STATE DECIDES WHAT EVIDENCE IT IS GOING TO BRING BEFORE THE COURT, TO CONVINCE THE COURT THAT IT HAS PROVEN ITS CASE.

HOW DO YOU DISTINGUISH THAT PRINCIPLE FROM THE PRINCIPLE THAT WE HAVE DISCUSSED IN THE AREA OF MITIGATING EVIDENCE, THAT WE INSTRUCT JUDGE TO SAY LOOK ANYWHERE IN THE RECORD TO FIND MITIGATION.

YES. THE DISTINCTION IS THAT THE MITIGATION IS IN THE RECORD, THAT THEY ARE NOT LOOKING OUTSIDE THE RECORD, TO GATHER MITIGATING EVIDENCE, AND THEY CERTAINLY SHOULDN'T LOOKOUT SIDE THE RECORD TO FIND FACTS TO SUPPORT THE AGGRAVATING FACTORS.

BUT ISN'T THE DEPOSITION, AGAIN, IT MAY NOT HAVE BEEN ENTERED INTO EVIDENCE, BUT AS FAR AS THAT CAN IS -- THAT IS CONCERNED, I AM HAVING A HARD TIME UNDERSTANDING WHY THAT WOULDN'T BE PART OF THE RECORD.

WELL, THE DEPOSITIONS, THEMSELVES, WEREN'T A PART OF THE RECORD, AND SOME OF THE WITNESSES WHOM THE DEPOSITIONS WERE TAKEN OF, WEREN'T EVEN CALLED AT THE PENALTY PHASE, SO --

WHEN DID THE -- WHEN WAS IT LEARNED THAT THE JUDGE HAD LOOKED AT THE DEPOSITION, FOR EXAMPLE? WHEN DID THAT --

WELL, THERE WERE TWO LETTERS THAT WERE SENT, OSTENSIBLY FROM JUDGE BAKER TO DEFENSE COUNSEL AND TO THE STATE ATTORNEYS OFFICE, ONE ON MARCH 1, ONE ON MARCH 14. DEFENSE COUNSEL TESTIFIED, AT THE EVIDENTIARY HEARING, THAT, WHEN THEY RECEIVED THE LETTERS, WAS THE FIRST TIME THEY REALIZED THAT THE JUDGE HAD BEEN DOING SOME EXTRA RECORD INVESTIGATION, AND AT THAT POINT, THEY THOUGHT THAT IT WAS TOO LATE TO OBJECT TO THE INFORMATION.

IN REGARD TO THE SENTENCING PENALTY PHASE, THIS WAS BEFORE THE PENALTY PHASE, CORRECT?

NO. IT WAS AFTER THE PENALTY PHASE BUT BEFORE SENTENCING.

BEFORE SENTENCING.

YES. SO, REALLY, WHEN YOU GET INTO THE ANALYSIS OF WHAT JUDGE BAKER DID AND COUNSEL'S FAILURE TO OBJECT TO IT, THE QUESTION, REALLY, BECOMES DID THE EVIDENCE THAT THE JUDGE CONSIDERED EVER UNDERGO THE ADVERSARIAL TESTING THAT IS REQUIRED UNDER STRICKLAND, AND WAS THE OUTCOME A RELIABLE OUTCOME, AND THAT IS ONE OF THE THINGS THAT GARDENER SPECIFICALLY ADDRESSES. GARDENER ADDRESSES THE FACT THAT THEY CAN'T HAVE A RELIABLE DETERMINATION OF THE FACTS OF THE CASE, IF WE DON'T KNOW EXACTLY WHAT KIND OF INFORMATION THE JUDGE RELIED ON, AND IF THE DEFENDANT DIDN'T HAVE A CHANCE TO RESPOND. IN OUR CASE, MR. VINING DIDN'T HAVE A CHANCE TO RESPOND, BECAUSE HIS COUNSEL DIDN'T OBJECT AND DIDN'T ASK THE EXTENT OF WHAT JUDGE BAKER'S INFORMATION WAS.

WELL, IF WE, NOW, KNOW THE EXTENT OF THE INFORMATION, WHAT, IF THERE WERE TO BE A NEW SENTENCING PHASE AND THIS TIME THE STATE INTRODUCED THE EVIDENCE THAT THE JUDGE SUPPOSEDLY RELIED ON, WHAT -- WHAT OTHER EVIDENCE IS THERE, AS TO THESE DISCREET ISSUES, THAT WOULD MAKE A DIFFERENCE IN THE OUTCOME? IN OTHER WORDS I GUESS WHAT I AM SAYING IS, SAY THE JUDGE RELIED AND FOUND A RECORD SOMEWHERE, SOMETHING THAT THIS DEFENDANT HAD HAD A HISTORY OF, A JUVENILE HISTORY AND RELIED ON THAT, YOU KNOW, YOU WOULD SAY AFTER RESENTENCING, WHAT I WOULD DO WOULD BE TO SHOW THAT THIS WAS A WRONG PERSON. HE DIDN'T EVEN HAVE THE RIGHT DEFENDANT OR SOMETHING THAT WOULD REFUTE IT, BUT IN TERMS OF THIS PARTICULAR CASE, AND UNDERSTANDING THAT WE CERTAINLY DON'T WANT JUDGES TO BE DOING THESE EXTRA RECORD INVESTIGATIONS, AND SO THERE IS A PROBLEM WITH THE INTEGRITY OF THE PROCESS, BUT HOW, AS TO THESE SPECIFIC THINGS THAT THE JUDGE LOOKS AT, WHAT WOULD YOU HAVE TO --

I THINK YOU WOULD HAVE TO GO BACK, IF WE ARE GRANTED A RESENTENCING, I THINK IT WOULD HAVE TO GO BACK AND TALK ABOUT WHAT HAPPENED TO THE EYEWITNESSES AND MAKE SURE THAT THE JURY WAS AWARE THAT SOMETHING HAPPENED TO THESE EYEWITNESSES, BEFORE THEY MADE THEIR -- PICKED MR. VINING OUT OF THEIR PHOTO PACKS, ABOUT THEIR TESTIMONY.

BUT THAT IS DIFFERENT, BECAUSE THIS JURY, WHEN THEY MADE THEIR DECISION, NEVER KNEW ABOUT WHATEVER TECHNIQUE THERE WAS.

RIGHT.

AND THAT IS A SEPARATE INEFFECTIVE ASSISTANCE CLAIM THAT, I THINK, YOU STATED, BUT --

WELL, I THINK IF WE WERE GRANTED A NEW SENTENCING PROCEEDING, I THINK THE STATE WOULD BRING IN THOSE WITNESSES TO PROVE UP ITS CASE AGAIN, AND I THINK WE WOULD GET INTO THAT SITUATION WHERE WE WOULD BE ABLE TO TALK ABOUT THEIR CREDIBILITY, WITH REGARD TO THAT. IN ADDITION, WE WOULD KNOW, AT THE OUTSIDE OF THE SENTENCING, WHAT THE JUDGE WAS GOING TO RELY ON, AND WHAT INFORMATION HE WAS PRESENTING OR THE STATE WAS PRESENTING TO THE COURT, AND BE ABLE TO REBUT WHATEVER WAS IN THE PROBATE RECORDS THAT THE JUDGE CAME UP WITH, AND COMPARE IT WITH THE INFORMATION WE HAVE, FIRST OF ALL, FROM THE BRADY CLAIMS, AND, ALSO, FROM SOME OF THE TESTIMONY THAT WAS TAKEN PREVIOUSLY. WE WOULD, ALSO, REBUT SOME OF THE INFORMATION THAT WAS CONTAINED IN THE DEPOSITIONS AND TAKE A LOOK AT THAT AND SEE EXACTLY WHY THE JUDGE THOUGHT THAT MR. VINING WAS NOT A GOOD PROVIDER OR GOOD FATHER AND BE ABLE TO REBUT THAT INFORMATION.

YOU ARE IN YOUR REBUTTAL TIME.

THANK. I WILL RESERVE THE REST OF THE TIME FOR REBUTTAL.

ONE MORE QUESTION. ARE YOU SAYING THAT DEFENSE COUNSEL DID NOT HAVE ANY KNOWLEDGE OF THE WITNESSES BEING HIP NOTCALLY REFRESHED?

NO. I THINK IT WAS PRETTY CLEARLY ON THE RECORD THAT THEY HAD BEEN NOTIFIED THAT HE WAS GOING TO RELY ON HIS OWN SELF-HYPNOSIS AND SOME --

BUT THEY KNEW THAT THERE HAD BEEN SOME KIND OF HYPNOSIS ON THESE WITNESSES.

ABSOLUTELY. AND IT WAS THE EXTENT OF THAT THAT THEY NEVER MADE THE JURY AWARE OF. THE JURY NEVER KNEW WHAT KIND OF TECHNIQUE HAD BEEN USED, TO ENHANCE THE WITNESSES' MEMORIES.

THERE WAS OPPORTUNITY, AT THAT TIME, TO HAVE DONE THAT.

THERE WAS OPPORTUNITY TO OBJECT, ABSOLUTELY. THANK YOU.

MR. LANDRY.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY, REPRESENTING THE STATE IN ITS APPEAL. WITH RESPECT TO JUDGE BAKER AND HIS INVESTIGATION, MY RECOLLECTION OF THE RECORD IS THAT HE TESTIFIED, AT THE HEARING, THAT HE DID NOT CONTACT STEVE JORDAN, IN TERMS OF THIS MOTION TO SUPPRESS. I THINK JORDAN WAS A FRIEND OF HIS OR A PSYCHOLOGIST OR SOMETHING, WHO HAD -- HE HAD TALKED TO IN THE PAST ABOUT HYPNOSIS AND THINGS OF THAT NATURE, BUT I THINK THE TESTIMONY IS QUITE CLEAR THAT JUDGE BAKER DID NOT RELY ON MR. JORDAN, IN TERMS OF RESOLVING THE MOTION TO SUPPRESS ON HYPNOSIS OR THINGS OF THAT NATURE. JUDGE BAKER TESTIFIED THAT HIS ALLEGED EXTRA RECORD INVESTIGATION INCLUDED, PRESUMABLY, READING A BOOK ON TRIAL, WHICH HE CHARACTERIZED AS A BOOK ON ADMISSIBILITY OF EVIDENCE OF HYPNOSIS, AND LEGAL QUESTIONS OF THAT NATURE. HE LIKENED IT TO A -- ANY KIND OF RESEARCH, BOOK, OR ANY KIND OF LAW BOOK THAT YOU MIGHT FIND IN THE LIBRARY. THE -- AND THE POINT OF IT IS THAT, YOU KNOW, CERTAINLY I THINK, WHEN MR. DONNA WHO'S TESTIMONY WAS BE -- MR. DONO'S TESTIMONY AT TRIAL, AND WHETHER HE HAD BEEN EXPOSED TO HYPNOSIS AND ALL OF THAT, THE JUDGE HAD CONCEDED --

DON'T YOU HAVE TO CONCEDE, UP-FRONT, THAT IT WAS ERROR, FOR THE JUDGE TO GO ON A

FROLIC ON HIS OWN, TO LOOK FOR EVIDENCE OUTSIDE OF THE RECORD, AND THEN PROCEED FROM THERE AS TO WHETHER OR NOT IT AFFECTED THE OUTCOME IN THIS CASE HERE, OR IS THE STATE TAKING THE POSITION THAT IT WASN'T ERROR, THAT A JUDGE CAN DO THIS?

WELL, IN TERMS OF WHAT HE DID, IN TERMS OF DRIVING BY OR DRIVING TO THE CRIME SCENE OR THE SCENE OF THE GEM LAB OR THE TRANSACTION OCCURRED WITH THE GEM PEOPLE, I THINK WE ARE OVERLOOKING THE FACT THAT THE JUDGE INDICATED HE WROTE TWO LETTERS TO, BOTH, THE PROSECUTOR AND THE DEFENSE ATTORNEY, ONE MARCH 1 AND ONE DATED MARCH 14, IN WHICH HE INDICATED THAT HE HAD EITHER DONE THAT OR WAS GOING TO DO. THAT HE INDICATED, IN THESE LETTERS, FOR EXAMPLE, ON THE LETTER OF THE 14th THAT I HAVE READ, ALL OF THE DEPOSITIONS, I HAVE ATTEMPTED TO OBTAIN DOCUMENTS REFERRED TO IN THE TRIAL, SUCH AS DR. HAGER'S REPORT AND THE PROBATE OF THE DECEASED EDGAR CARUSO.

AREN'T WE TALKING ABOUT THE ISSUE OF WHETHER OR NOT COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING HIM AT THAT PARTICULAR TIME? NOBODY QUESTIONS THE LETTERS.

WELL, THE FIRST PRONG, I GUESS, OF THEIR ATTACK, IS WHETHER IT WAS A GARDENER VIOLATION THEY DIDN'T KNOW AND THIS KIND OF THING, AND AS THIS COURT INDICATED ON DIRECT APPEAL, THEY DID NO.

BUT THEY -- THEY DID NEE. BUT THEY DID KNOW, AND THEY DID MAKE -- THEY DID KNOW, AND THEY DIDN'T MAKE A CHALLENGE, AND SO COUNSEL IS SAYING THAT THAT IS INEFFECTIVE.

AS TO THE PRONG OF INEFFECTIVENESS, WE DISAGREE THAT COUNSEL WAS EITHER DEFICIENT OR THAT THERE WAS ANY RESULTING PREJUDICE.

WHAT IS THE -- WHAT IS THE LACK OF INEFFECTIVENESS? HOW IS THAT NOT, IF COUNSEL KNOWS --

WELL, IN TERMS OF, SAY, VISITING THE SCENE, I MEAN, JUDGE BAKER INDICATED THAT HE WANTED TO DRIVE BY, TO GET AS COMPLETE A PICTURE OF INFORMATION AS POSSIBLE.

WHEN DID HE MAKE THIS INDICATION?

WELL, HE CERTAINLY INDICATED TO THEM IN THE LETTER OF MARCH 14, WHICH WAS BEFORE THE SENTENCE WAS IMPOSED. SINCE I LIVE IN THE DOWNTOWN WINTER PARK, I AM FAMILIAR WITH THAT AREA WHERE IMPORTANT EVENTS OCCURRED IN THIS CASE. BEFORE SENTENCING --

WHAT DOES THAT HAVE TO DO WITH THE FAILURE OF COUNSEL?

WELL, CO-COUNSEL KELLY SIMS TESTIFIED, AT THE EVIDENTIARY HEARING, THAT, UPON HIS REVIEW OF THESE LETTERS, HE THOUGHT THAT THIS SIMPLY WENT TO GUILT-PHASE ISSUES AND THAT ALL OF THE GUILT-PHASE ISSUES HAD ALREADY BEEN DECIDED, AND THAT HE DIDN'T SEE ANYTHING IN HERE, REALLY, OF A PENALTY-PHASE NATURE, YOU KNOW, TO DO ANYTHING ABOUT. OBVIOUSLY, YOU KNOW, I DON'T SEE THAT TRIAL COUNSEL IS DEFICIENT, IN FAILING TO OBJECT THAT A JUDGE, YOU KNOW, DRIVES BY THE SCENE OR HAPPENS TO LOOK IN A STORE WHERE SOMETHING HAPPENED.

WHAT IS IN THIS RECORD THAT INDICATES WHAT THE TRIAL JUDGE GLEANED FROM THE VISIT TO THE CRIME SCENE?

IN THE RECORD, IN TERMS OF?

WHAT DID HE TESTIFY TO, CONCERNING WHAT HE SAW OR OBSERVED?

HE JUST SAID IT IS HIS PRACTICE TO HAVE AS COLORADO PLEAT AN UNDERSTANDING OF THE PICTURE AND OF THE TESTIMONY AS POSSIBLE, IN TRYING TO COME -- TO HAVE AS COMPLETE AND UNDERSTANDING OF THE PICTURE AND OF THE TESTIMONY AS POSSIBLE, IN TRYING TO COME UP WITH A SENTENCE. HE COMPARED IT TO A LAWYER DOING A TITLE SEARCH, AND HOW A LAWYER CAN DO ALL OF THE LEGAL POINTS ABOUT PROPERTY AND ALL OF THAT, BUT WHEN YOU ACTUALLY SEE THE PROPERTY, IT GIVES A CERTAIN DEGREE OF UNDERSTANDING, AS TO HOW THE TESTIMONY FIT IN TOGETHER, BUT JUDGE BAKER INDICATED THAT HE DID NOT LEARN ANYTHING AT ALL, ANYTHING NEW, REALLY, FROM WHAT HAD BEEN PRESENTED AT TRIAL, IN THIS VISIT OR ANYTHING ELSE. IT WAS JUST MORE OR LESS AN IDEA OF GETTING A COMPLETE PICTURE OF IT.

BUT HOW DOES TRIAL COUNSEL KNOW WHAT IS INFLUENCING THE JUDGE, THE TRIAL JUDGE, AS HE MAKES HIS DECISION, IF THE TRIAL JUDGE HAS THIS OUTSIDE INFORMATION THAT HE HAS GATHERED, EXPARTE?

WELL, BUT --

IS THERE A PROBLEM THERE?

WELL, BUT, THE STATE IS RESPONDING THAT THE JUDGE PUT EVERYBODY ON NOTICE IN THESE TWO LETTERS. THE LETTER OF MARCH 1 AND THE LETTER OF MARCH 14, AND THAT WAS BEFORE THE SENTENCING FINDINGS OCCURRED ON APRIL 9, AS I RECALL.

WELL, COULDN'T THE DEFENSE ATTORNEY, AT LEAST, OR DID HE, AS A PART OF A MOTION FOR A NEW TRIAL OR SOMETHING, BRING THIS TO THE COURT'S ATTENTION?

WELL, HE COULD, CERTAINLY, I MEAN, IF HE THOUGHT IT WAS A PROBLEM, THEN, UPON RECEIVING THE INFORMATION, HE COULD HAVE -- THEY COULD HAVE DECIDED TO TAKE SOME KIND OF COURSE OF ACTION TO EITHER COMPLAIN ABOUT IT OR SEEK WHATEVER REMEDY THEY THOUGHT. NOW, THE TESTIMONY OF SIMS WAS THAT HE DIDN'T REMEMBER THIS AS -- REGARD THIS AS, REALLY, HAVING VERY MUCH A BEARING ON ANYTHING, IN TERMS OF THE PENALTY PHASE. IT ALL HAD TO DO WITH GUILT PHASE ISSUES. NOW, CASH MAN, THE OTHER ATTORNEY, I THINK HER TESTIMONY WAS, AT THE EVIDENTIARY HEARING, THAT SHE DIDN'T RECALL HAVING GOTTEN THESE LETTERS, BUT CERTAINLY THEY WERE IN THE PD FILE, AND CERTAINLY IN THE COURT FILE, THAT THEY HAD GHOD ENTHEM.

DID -- THAT THEY HAD GOD ENTHEM.

DID THE JUDGE DISCLOSE ALL OF HIS EXPARTE INVESTIGATIONS IN THOSE TWO LETTERS?

I THINK HE DID.

HE TALKED ABOUT GOING INTO THE PROBATE FILE, AND HE TALKED ABOUT READING THE DEPOSITION?

HE SAYS, IN THE MARCH 14 LETTER, DURING THE TRIAL AND SINCE THE TRIAL, I HAVE READ ALL OF THE DEPOSITIONS AND ATTEMPTED TO OBTAIN DOCUMENTS REFERRED TO IN THE TRIAL, DEPOSITIONS THAT WERE NOT IN EVIDENCE, SUCH AS DR. HAGER'S REPORT, THE PROBATE RECORDS OF THE ESTATE OF THE DECEASED, GEORGIA CARUSO, AND THEN HE TALKED ABOUT THE VISIT TO THE JAMES TOWN SHOPPING CENTER.

AND DR. JORDANA?

WE DIDN'T TALK TO JORDAN ABOUT THE HYPNOSIS THING. I THINK THE TESTIMONY WAS THAT JORDAN WAS A FRIEND OF HIS OR A PSYCHOLOGIST THAT PREVIOUSLY MAY HAVE INTRODUCED

HIM TO HYPNOSIS.

TALKING ABOUT THIS SORT OF UNDERLYING LEGAL ISSUE ABOUT THE PROPOSEITE OF THE -- THE PROPOSE RIGHT OF THE JUDGE DOING -- ABOUT THE PROPRIETY OF THE JUDGE DOING THIS INVESTIGATION, WAS THE SAME OBTAINED WITH REFERENCE TO A JUROR PARTICIPATING IN THE SAME CONDUCT, WOULD THE SAME RULE APPLY?

NO. FOR EXAMPLE, I THINK JURORS ARE NOT PERMITED TO GO TO A CRIME SCENE WHILE ATTENDED.

SO JUDGES ARE PERMITTED TO GO TO A CRIME SCENE BUT JURORS ARE NOT?

I AM NOT CERTAIN THAT JUDGES ARE PROHIBITED FROM VISITING CRIME SCENE.

SO IT IS THE STATE'S POSITION THAT THE JUDGE, HERE, DID NOT COMMIT ANY IMPROPRIETIES, THAT WHATEVER THE JUDGE DID WAS PERFECTLY ALL RIGHT.

WELL, I THINK I DON'T KNOW PERFECTLY ALL RIGHT.

THAT IS SORT OF MOOT, REALLY, THE ISSUE ABOUT COUNSEL'S INEFFECTIVENESS, DOES IT NOT, IF WHATEVER THE JUDGE DID WAS PERFECTLY ALL RIGHT, THEN THERE, REALLY, IS NO ISSUE, AS TO COUNSEL'S INEFFECTIVENESS.

WELL, I THINK, YES, I THINK THAT THE JUDGE DID NOT COMMIT ANY KIND OF SERIOUS ERROR, AND HE CERTAINLY TRIED TO MAKE A RECORD AND INFORM EVERYBODY AS TO WHAT HE WAS DOING AND HAD BEEN DOING.

SO WE DON'T EVEN REACH THE ISSUE OF COUNSEL'S INEFFECTIVE INEFFECTIVENESS, THEN, IF WHAT THE JUDGE DID WAS ALL RIGHT.

IF WHAT THE JUDGE DID WAS PROPER, THEN OBVIOUSLY TRIAL COUNSEL'S ALLEGED FAILURE TO TAKE FURTHER ACTION AGAINST HIM ISN'T PERFORMANCE.

BUT IF A JUROR DID THE SAME THING, IT WOULD BE IMPROPER.

WELL, IT, I THINK, WOULD PROBABLY VIOLATE THE JUROR'S OATH, YOU KNOW, THAT HE IS SIMPLY CONFINED TO HEAR WHAT HE HEARS IN THE COURTROOM AND IN THE EVIDENCE AS PRESENTED TO THEM. IF A JUROR DECIDED TO GO OUT AND VISIT A CRIME SCENE OR SOMETHING, THAT THAT MIGHT POSE A PROBLEM.

WELL, WHAT ALLOWS A JUDGE AND WHAT, IN OUR CASE LAW, ALLOWS A JUDGE IN MAKING A SENTENCING DECISION IN A DEATH CASE, TO GO OUTSIDE THE RECORD AND HAVE, LET'S SAY HYPOTHETICALLY HE HAD CONVERSATIONS WITH EXPERTS ON SOMETHING THAT WAS MITIGATING, AND YOU ARE NOT ACTUALLY SAYING THAT WE WOULD FIND THAT TO BE APPROPRIATE, THAT IS FOR A JUDGE TO BASE HIS OR HER DECISION ON MATTERS THAT WERE NOT WITHIN THE RECORD BEFORE THE TRIAL COURT.

NO. I AM SAYING THAT SOME OF THE THINGS THAT HE HAS NOW BEEN CRITICIZED FOR DOING, SUCH AS READING DEPOSITIONS THAT ARE IN THE COURT FILE, IS SOMETHING THAT JUDGES DO, AND HIS TESTIMONY WAS, AS FAR AS HE KNOWS, JUDGES ALWAYS READ DEPOSITIONS IN THE FILE, READ EVERYTHING THAT IS IN THE FILE. I THINK IT IS PROBABLY CONSISTENT WITH THIS COURT'S EMPHASIZES -- EMPHASIS THAT THE JUDGE TAKE INTO ACCOUNT ALL OF THE INFORMATION THAT MAY BE AVAILABLE TO HIM, INCLUDING THE DEFENDANT'S PSI AND THINGS OF THAT NATURE.

BUT DO YOU AGREE THAT JUDGES CAN'T ENGAGE IN ECKTS PARTY -- IN EXPARTE CONVERSATIONS AND TELL THE LAWYERS THIS IS WHAT I DID AND THAT IS GOING TO CURE THE PROBLEM.

IT IS OBVIOUSLY MORE OF A PROBLEM, IF A TRIAL JUDGE DECIDES TO DO, YOU KNOW, INDEPENDENT EXPERT EXAMINATION ON HIS OWN, WITHOUT TELLING ANYONE, AND THE TESTIMONY OF JUDGE BAKER IS THAT HE WAS -- HE THOUGHT HE WAS FAIRLY SCRUPULOUS IN TELLING AND ADVISING PEOPLE, AND HE KIND OF REFERRED TO ANOTHER CASE IN A DIFFERENT CASE, IN WHICH HE SAID THAT HE HAD, PERHAPS, TALKED TO AN EXPERT OR HAD BEEN INVOLVED IN A -- IN CONTACTING AN EXPERT AND HAD ADVISED COUNSEL ABOUT IT ALL. IN TERMS OF JORDAN, HE DIDN'T DO THAT, WITH RESPECT TO THE MOTION TO SUPPRESS IN THIS CASE.

LET'S INDULGE THIS PRESUMPTION, FOR A MOMENT, THAT THERE IS SOMETHING WRONG WITH WHAT THE JUDGE DID HERE, AND HE INFORMED COUNSEL THAT "I WENT OUTSIDE OF THE RECORD, AND I DID EXPARTE INVESTIGATION, AND I CONSULTED WITH EXPERTS ON THE OUTSIDE." ONCE COUNSEL IS INFORMED OF THIS, DEFENSE COUNSEL, WHY ISN'T IT INCUMBENT UPON DEFENSE COUNSEL, AT THAT POINT, TO OBJECT AND MOVE FOR MISTRIAL?

WELL, IT DEPENDS ON WHAT THE SITUATION IS. I THINK COUNSEL MAY DECIDE THAT THAT IS NOT -- THAT IT DOESN'T RISE TO A LEVEL THAT NEEDS ANY FURTHER ACTION ON HIS PART. I MEAN, COUNSEL MAY DECIDE, YOU KNOW, IF YOUR HONOR IS READING A CERTAIN BOOK OR A CERTAIN, RELYING ON A CERTAIN AUTHOR OR AUTHORITY IN THE FIELD, YOU KNOW, WE MAY AGREE WITH THAT AND NOT CHOOSE TO CHALLENGE IT.

BUT HOW IS COUNSEL GOING TO KNOW WHAT IMPACT THIS HAD UPON THE JUDGE?

WELL, HE -- WELL, IN TERMS OF THE INFORMATION IN THE MARCH LETTERS, THE JUDGE IS TELLING THEM. THE JUDGE HAS TOLD THEM, IN TERMS OF THE -- HIS PRIOR INVOLVEMENT IN UTILIZING HYPNOSIS, I GUESS, TO STOP THE SMOKE PROBLEM OR SOMETHING OF THAT NATURE, HE PLACED THAT ON THE RECORD, AT THE TIME OF THE PROFESSOR OF MR. DONNER'S TESTIMONY, SO OBVIOUSLY IF THEY HAD SOME KIND OF A PROBLEM WITH THE JUDGE BEING COGNIZANT OR FAMILIAR WITH HYPNOSIS, THEY COULD HAVE INTERPOSED SOME KIND OF AN OBJECTION THERE. THEY COULD HAVE ASKED FOR WHATEVER KIND OF RELIEF THEY THOUGHT WAS APPROPRIATE. I THINK ONE OF THE STATEMENTS THAT WAS MADE ON MY OPPONENT'S ARGUMENT WAS WHETHER OR NOT ANY KIND OF ERROR COULD BE HARMLESS, AND I THINK THEIR ANSWER WAS THERE WAS NOT. I THINK WE HAVE CITED ONE CASE IN OUR BRIEF FOR THE COURT, WHICH FOUND THAT THE TRIAL JUDGE HAD RELIED ON SOME INFORMATION IN A DEPOSITION, IN HIS SENTENCING ORDER, AND THEY INDICATED THAT THE GARDENER ERROR, IN THAT INSTANCE, WAS HARMLESS ERROR, BECAUSE IN ESSENCE THE SUBSTANCE OF THAT SAME INFORMATION HAD COME OUT AT TRIAL.

ISN'T THERE A DIFFERENCE, THOUGH, BETWEEN LOOKING, SAY, AT A PSI THAT IS IN THE RECORD BUT JUST WASN'T INTRODUCED BY COUNSEL, OR LOOKING AT A DEPOSITION THAT IS IN THE RECORD BUT JUST WASN'T INTRODUCED BY COUNSEL, OR EVEN TELLING LAWYERS I READ THIS TREESIES ON SCIENTIFIC EVIDENCE -- THIS TREATIES ON SCIENTIFIC EVIDENCE, AND THIS IS WHAT IT WAS, VERSUS DOING EXTRA JUDICIAL INVESTIGATION, BECAUSE AT THAT POINT, THERE IS NO WAY OF ASSESSING WHAT IMPACT THAT OTHER INFORMATION HAD ON THE SGIINGS SDIINGS-MAKING PROCESS.

-- ON THE DECISION-MAKING PROCESS.

EXCEPTIONENT THAT JUDGE -- EXCEPT THAT JUDGE BAKER TESTIFIED, AND HE STATED THAT ANY OF THIS ALLEGED INFORMATION THAT HE RECEIVED, THE PROBATE FILES OR WHATEVER, HE ATTACHED AND PUT IN THE COURT FILE, SO IT IS THERE. IT IS AVAILABLE, EITHER FOR COUNSEL TO LOOK AT OR ANY STATE OR FEDERAL REVIEWING COURT, SO THE INFORMATION IS THERE TO

MAKE A JUDGMENT AS TO WHAT WAS, IN FACT, CONSIDERED. OR REVIEWED, ANYWAY. IN ANY EVENT, THE -- THERE IS NOTHING IN THERE THAT, YOU KNOW, SEEMED, TO ME, TO IMPACT, IN TERMS OF THE SENTENCING PROCEEDING. ALL OF THE EVIDENCE CAME OUT AT TRIAL, AND THAT WAS CHALLENGED, RELATING TO THE CRIME AT ISSUE, AND THERE WAS NO ADDITIONAL, REALLY, INFORMATION THAT HE CLAIMED.

YOU ARE NOT SAYING THAT THE JUDGE CAN GO OUTSIDE THE RECORD AND GET THIS INFORMATION AND DO SOMETHING WRONG AND THEN, IF IT IS WRONG, AND THEN SANITIZE IT BY SAYING IT HAD NO INFLUENCE ON ME.

WELL, I AM SAYING THAT THE JUDGE WAS FAIRLY SCRUPULOUS IN TELLING PEOPLE, EITHER BEFORE HIS DECISION, CERTAINLY BEFORE HIS DECISION WAS MADE, AND EITHER SIMULTANEOUSLY OR CONCURRENTLY WITH THE TIME THAT HE WAS DOING IT, AS TO WHAT HE WAS DOING, AND OBVIOUSLY THE DEFENSE HAD NO PROBLEM WITH THAT AT THE TIME. THEY WERE AWARE OF IT.

WHY DID COUNSEL HEARSAY, THAT IT HAD NO IMPACT ON HIS DECISION-MAKING?

OBVIOUSLY YOU HAVE THE SENTENCING ORDER THAT THE JUDGE INDICATED. IN THIS CASE, WE OBVIOUSLY HAD THE TESTIMONY OF JUDGE BAKER, AT THE EVIDENTIARY HEARING.

REFRESH MY MEMORY. HAS JUDGE BAKER BEEN REVERSED BY THE FIFTH DISTRICT IN ANOTHER CASE OR CASES? THE SAME KIND OF CONDUCT?

I THINK THERE HAS BEEN, LIKE, ONE OR TWO PROHIBITION ACTIONS IN, I THINK, THE FIFTH DCA.

WHAT HAPPENED IN THOSE ACTIONS?

I THINK IN ONE CASE THE PROHIBITION WAS GRANTED, AND THE SECOND ONE, IT WAS DENIED.

FOR THE SAME KIND OF CONDUCT?

WELL, SIMILAR ALLEGATIONS THAT HE EITHER RELIED ON AN EXPERT THAT THEY DIDN'T KNOW ABOUT OR SOME KIND OF INVESTIGATION ALONG THAT LINE.

DID HE MAKE A DISCLOSURE IN THOSE CASES, BEFORE THE IMPOSITION OF SENTENCE?

WELL, THAT WASN'T -- I DON'T THINK THERE WERE CRIMINAL -- I THINK THEY MAY HAVE BEEN CIVIL CASES. I CAN'T RECALL, OFFHAND, WHETHER -- I THINK IN ONE CASE, THE COURT, THE APPELLATE COURT RULED THAT THE COMPLAINT THAT THE PETITIONER WAS RAISING WAS UNTIMELY. HE DIDN'T OBJECT IN TIME, AND THAT IT WAS, ALSO, LEGALLY INSUFFICIENT. THE OTHER ONE, I JUST CAN'T RECALL OFFHAND. THE CASES ARE CITED IN MY OPPONENT'S WREEF. -- BRIEF.

DO YOU GET THE IMPRESSION THAT THE JUDGE THINKS IT IS PROPER FOR HIM FOR INFORM HIMSELF, HE BETTER INFORM HIMSELF, IN THIS CASE IN THIS MATTER, GOING OUTSIDE THE RECORD?

I GET THE IMPRESSION THAT THE JUDGE FEELS THAT IT IS INCUMBENT UPON HIM, AND IN ORDER TO MAKE THE BEST DECISION POSSIBLE, HE WOULD LIKE TO MAKE WHATEVER USE IS POSSIBLE OF PUBLIC KNOWLEDGE AND PUBLIC RECORDS AND THING THAT IS ARE IN THE COURT FILE. IN ADDITION, FOR EXAMPLE, I WANTED TO MENTION THAT THE, YOU KNOW, THE DEFENSE IS MAKING THE CLAIM THAT THE DEFENSE DIDN'T KNOW ABOUT DEPOSITIONS BEING READ OR SOMETHING OF THAT NATURE. CLEARLY AT THE PENALTY PHASE, WHEN QUESTIONS CAME UP ABOUT OFFICER FERGUSON, WHO INVESTIGATED THE GEORGIA INCIDENT, THERE WAS A BENCH

CONFERENCE, AS TO WHETHER OR NOT THE DEFENSE WAS CONTENDING THAT THE STATE WAS IMPROPERLY SEEKING NONSTATUTORY AGGRAVATORS AND THINGS OF THAT NATURE, AND THE JUDGE IS MAKING COMMENTS, INDICATING THAT HE HAS READ FERGUSON'S DEPOSITION, SO CLEARLY HE, THE DEFENSE WAS ON NOTICE THAT THE JUDGE HAD BEEN READING DEPOSITIONS, AND, AGAIN, THERE WAS NO COMPLAINT, THERE WAS NO GARDENER-TYPE VIOLATION ALLEGED AT THAT TIME, SO AGAIN, I THINK IT IS FAIR TO SAY, IN RESPONSE TO YOUR QUESTION, YOUR HONOR, THAT THE JUDGE FEELS, AND HE REPEATED THROUGHOUT IN HIS EVIDENTIARY HEARING TESTIMONY THAT, HE SIMPLY WANTED TO HAVE AS COMPLETE A RECORD AS POSSIBLE, FOR REVIEW BY EVERYBODY, NOT ONLY HIMSELF, SO THAT HE COULD MAKE THE APPROPRIATE DECISION IN THIS VERY SERIOUS CASE. WE WOULD ASK THE COURT TO AFFIRM THE TRIAL COURT'S DENIAL OF POSTCONVICTION RELIEF, AND IF THE COURT HAS NO OTHER QUESTIONS, THEN I WILL ASK THE COURT TO AFFIRM. THANK YOU.

REBUTTAL.

I WANT TO MAKE IT VERY CLEAR THAT COUNSEL NEVER DECIDED NOT TO CHALLENGE THE EXTRA JUDICIAL INVESTIGATION THAT JUDGE BAKER DID. IT WAS THEIR POSITION, ALL THROUGHOUT THE EVIDENTIARY HEARING, THAT THEY DIDN'T REALIZE AND DIDN'T KNOW THE EXTENT OF WHAT THE JUDGE WAS DOING AT THE TIME, AND WHEN MR. SIMS MADE THE COMMENT THAT HE FELT THAT SOME OF THIS EVIDENCE WENT PURELY TO GUILT PHASE, HE WAS TALKING ABOUT IN THE CONTEXT OF THE JUDGE'S DRIVE TO THE CRIME SCENE, AND HIS DISCUSSION IS AT PAGE 234 OF THE POSTCONVICTION RECORD ON APPEAL.

WHAT DOES DEFENSE COUNSEL SAY ABOUT THESE LETTERS, TO WHICH YOUR OPPONENT REFERS?

MS. CASH MAN TESTIFIED THAT SHE DIDN'T RECALL WHEN SHE RECEIVED THE LETTERS. SHE RECALLED THAT SHE RECEIVED THEM AFTER THE TRIAL WAS COMPLETED. SHE SAID BY THEN, SHE THOUGHT THERE WAS NOTHING SHE COULD DO, BECAUSE OF THE CONTEMPORANEOUS OBJECTION RULE, THAT HE HAD ALREADY DONE THE INVESTIGATION, HE HAD ALREADY CONSIDERED THESE THINGS, AND THAT, AT THAT POINT, IT WAS TOO LATE, BECAUSE ALL THAT WAS LEFT WAS SENTENCING.

THIS WAS BEFORE SENTENCING.

IT WAS BEFORE SENTENCING, YOUR HONOR, AND WE ARE SUGGESTING THAT THAT WAS NOT A TACTIC OR STRATEGY. THERE WAS NO REASONABLE PURPOSE IN HER NOT OBJECTING AT THAT POINT, WHEN SHE BECAME AWARE THAT THAT HAD ACTUALLY OCCURRED, AND I DISAGREE WITH MR. LANDRY THAT THE JUDGE INFORMED COUNSEL, CONTEMPORANEOUSLY WHEN HE WAS DOING HIS INVESTIGATION, BECAUSE HE DID NOT. HE DID NOT TELL THEM, UNTIL AFTER HE HAD COMPLETED THE INVESTIGATION, AND OBVIOUSLY HE DID GLEAN NEW INFORMATION FROM THE INVESTIGATION HE WAS DOING. HE WENT TO THE CRIME SCENE, AND WE WILL NEVER KNOW, BECAUSE HE WANTED TO MAKE THAT MORE CLEAR IN HIS MIND.

DIDN'T YOU HAVE A CHANCE TO QUESTION THE JUDGE AT THE EVIDENTIARY HEARING?

I DID. YES.

AND DON'T WE -- DIDN'T WE HAVE THE -- THAT ISSUE FLESHED OUT AND DETERMINED THAT THE COURT, THEN, MADE A DETERMINATION THAT, IF, IN EFFECT, IF YOU DID COMMIT, IF IT WAS ERROR FOR DEFENSE COUNSEL NOT TO RAISE IT, THAT ALL THE INFORMATION THAT CAME OUT WAS ULTIMATELY HARMLESS?

THAT IS WHAT HE SAID. HE SAID THERE WAS NO PREJUDICE, AND THAT IS WHY I ARGUED IN MY BRIEF THAT THE POINT THAT HE HAD NOT, OBVIOUSLY, READ THE GARDENER AND PORTER CASES, BECAUSE IN THOSE CASES, IF WE FOLLOWED HIS LOGICAL REASONING, THAT, IN PORTER

AND GARDENER, THEY WOULD HAVE NEVER GOTTEN RELIEF EITHER, BECAUSE THEY HAD LIFE RECOMMENDATIONS FROM THE INJURY -- FROM THE JURY, SO THERE WOULD HAVE BEEN NO PREJUDICE TO THE DEFENDANT IN THOSE CASES, AND OBVIOUSLY THAT IS NOT THE STANDARD. IF YOU READ GARDENER CLOSELY, IT SAYS, BASICALLY, THAT THIS IS A CONFRONTATION CLAUSE DUE PROCESS ISSUE, AND THAT WHEN IT IS A DEFECT IN THE DUE PROCESS, SPECIFICALLY FROM READING THE CASE, IT IMPLIES THAT PREJUDICE IS NOT NECESSARY TO BE SHOWN AND THAT IT CAN'T BE HARMLESS.

OKAY.

IN ADDITION, ONE OTHER THING I WANTED TO POINT OUT TO THE COURT IS THAT JUDGE BRONSON NEVER DID ANY KIND OF CUMULATIVE ANALYSIS OF ALL OF THE BRADY INFORMATION THAT ACTUALLY WENT TO THE EYEWITNESS TESTIMONY AND GOING TO THE ISSUES THAT HE HAD ALREADY DECIDED ON THE HYPNOSIS AND THE EXTRA JUDICIAL INVESTIGATION. JUDGE BRONSON NEVER DID THAT.

I THINK THAT YOUR TIME IS UP.

THANK. I WOULD ASK THAT YOU REVERSE AND REMAND THE CASE. THANK YOU.

THANK YOU, COUNSEL, IT FOR ALL YOUR HELP. THE COURT WILL BE IN RECESS FOR 15 MINUTES.
THE MARSHAL: PLEASE RISE.