

>> WE NOW WILL MOVE TO THE
SECOND CASE ON TODAY'S DOCKET.
ALTERSBERGER VERSUS THE
STATE OF FLORIDA.
>> GOOD MORNING.
>> MORNING.
>> MY NAME IS JOHN WHITE.
I'M EMPLOYED BY ETA, MOTEN.
WHO IS THE REGIONAL COUNSEL FOR
THE SECOND DIRECT COURT, OR
DISTRICT OF FLORIDA.
AND OF COURSE I'M THE ATTORNEY
ON APPEAL FOR JOSHUA
ALTERSBERGER, THE APPELLANT IN
THIS PARTICULAR CASE.
NOW I'D LIKE TO START BY JUST
GIVING A VERY BRIEF PROCEDURAL
HISTORY TO THIS CASE.
IT IS PRETTY SIMPLE.
THE DEFENDANT PLED TO THE
CHARGE OF FIRST-DEGREE MURDER
AS CHARGED.
IN AN EXCHANGE FOR THAT PLEA
THE STATE DROPPED A SECOND
COUNT INVOLVING A POSSESSION OF
A, UNLAWFUL POSSESSION OF A
FIREARM AND THE STATE AGREED TO
CERTAIN RESTRICTIONS ON THEIR
PRESENTATION OF EVIDENCE DURING
THE PENALTY PHASE PROCEEDINGS
THAT WERE TO FOLLOW.
OF COURSE EVENTUALLY PENALTY
PHASE PROCEEDINGS WERE
UNDERTAKEN BEFORE A JUDGE AND
JURY AND DURING THOSE
PROCEEDINGS THE STATE PRESENTED
EVIDENCE ABOUT THE NATURE OF
THE CRIME, THE FACTUAL SCENARIO
SURROUNDING, SURROUNDING THE
SHOOTING IN PART, NO DOUBT TO
PROVE UP THEIR AGGRAVATING
CIRCUMSTANCES WHICH THEY HAD
ALLEGED AND ALSO NO DOUBT -- TO
GIVE SOME CONTEXT ABOUT THE
CASE TO THE JURY SO THEY COULD
GET A PICTURE IT OF EXACTLY
WHAT THE CASE WAS ALL ABOUT.
SO DURING THE SO-CALLED PENALTY
PHASE I FEEL THAT THE FOLLOWING
FACTS REPRESENT A FAIR SUMMARY
OF THE SALIENT EVIDENCE THAT
WERE PRESENTED TO THE COURT AND
TO THE JURY.
AND IT GOES LIKE THIS.
BACK ON JANUARY 12th OF, 2007,

MY 19-YEAR-OLD CLIENT WAS
DRIVING A TOYOTA AUTOMOBILE AND
HE WAS ACCOMPANIED BY HIS BUDDY
CLINTON KINDER.

AND THEY WERE DRIVING AROUND
AND THEY WERE LOOKING FOR
GIRLS.

THEY WERE LOOKING FOR BOOZE.
THEY WERE LOOKING FOR CIGARS
AND AT SOME POINT WHEN THEY
WERE AT A CONVENIENCE STORE,
KINDER, THE PASSENGER WHO
TESTIFIED DURING THE PENALTY
PHASE, STATED THAT WHILE THEY
WERE AT THE STORE A DEPUTY
SHERIFF WAS IN THE VICINITY AND
THAT MY CLIENT SAW THE DEPUTY
SHERIFF AND HE SAID WORDS TO
THE EFFECT OF, YOU BETTER NOT
STOP ME BECAUSE I WILL SHOOT
YOU.

THE TWO YOUNG MEN THEN DROVE
AWAY FROM THE CONVENIENCE
STORE, STARTED GOING ELSEWHERE
AND ACCORDING TO KINDER, MY
CLIENT WHO WAS VARIOUSLY
EITHER, HAD A GOOD BUZZ ON OR
WAS DRUNK, BUT HE WAS TALKING
OUT OF HIS HEAD.

HE WAS SERVING, EXCUSE ME,
SWERVING IN AND OUT OF TRAFFIC
AS HE DROVE.

THAT WAS THE DESCRIPTION OF MY
CLIENT PROVIDED BY KINDER AS TO
THAT POINT IN TIME.

WELL, REGRETTABLY OR
UNFORTUNATELY A FLORIDA STATE
TROOPER SAW THIS.

IT GOT HIS ATTENTION AND HE
MADE A U-TURN AND FELL IN
BEHIND THE TOYOTA AND EFFECTED
A TRAFFIC STOP OF THE VEHICLE.

>> YOUR ARGUMENT ON CCP IS THAT
HE SHOT THE TROOPER
IMPULSIVELY, RIGHT?

WHY DID THE COMMENT IN THE
PARKING LOT BY THE DEFENDANT
NOT NEGATE YOUR ARGUMENT?

>> HE MAKES THE COMMENT BUT
DOESN'T ACT UPON THE COMMENT.

>> HE CERTAINLY DID.

>> WELL HE DID LATER BUT THERE
IS AN INTERVENING FACTOR IN
THERE TOO WHICH I WISH TO POINT
OUT AND THAT IS WHEN THE

TROOPER FELL IN BEHIND THE
TOYOTA ATTEMPTING TO STOP THE
TOYOTA FOR ITS DRIVING
INFRACTIONS, ACCORDING TO
KINDER'S TESTIMONY MY CLIENT
WANTED TO RUN.
HE WANTED TO HIT IT.
HE WANTED TO STEP ON THE GAS
AND FLEE THE AREA.
BUT IT WAS KINDER WHO IN A
SENSE TALKED MY CLIENT INTO
STOPPING.
KINDER HAD OUTSTANDING WARRANTS
ON HIMSELF.
HE WANTED THE CAR TO STOP SO
THAT HE COULD JUMP OUT AND RUN
THROUGH SOME ORANGE GROVES AND
GET AWAY FROM THE AREA SO THAT
THOSE WARRANTS WOULDN'T BE
DISCOVERED BY THE TROOPER AND
THAT'S EXACTLY WHAT HE DID.
>> DID YOUR CLIENT HAVE A
WARRANT OUT ON HIM?
>> THERE IS NO RECORD IN
THE^EVIDENCE IN THE RECORD THAT
HE HAD ANY MOTIVE TO KILL THIS
TROOPER.
IN OTHER WORDS, HE WAS NOT, HAD
NO OUTSTANDING WARRANTS.
THERE WAS NO EVIDENCE OF THAT.
HE HAD NOT JUST COMMITTED SOME
BURGLARY OR ROBBERY WHERE HE
THOUGHT HE WAS IN
IMMINENT PERIL OF
BEING APPREHENDED BY THE
TROOPER.
>> GOING TO THE ACTUAL -- OVER
HERE.
>> I'M SORRY.
>> GOING TO THE ACTUAL SCENE OF
THIS CRIME, MY UNDERSTANDING OF
THE FACTS IS THAT THE TROOPER
APPROACHED THE VEHICLE.
HAD HIS HAND ON HIS GUN.
HAD TOLD THE TRUCK DRIVER TO
GET BACK IN HIS CAB, WHICH THE
TRUCK DRIVER DID.
AND WAS ABLE TO OBSERVE THE
WHOLE THING.
AND AS THE TROOPER APPROACHED
THE WINDOW OF YOUR CLIENT'S
VEHICLE, STILL WITH HIS
HAPPENED ON HIS GUN, YOUR
CLIENT RAISED HIS HANDS AND HAD
A SLIGHT CONVERSATION.

AND AT THAT POINT IN TIME THE TROOPER FELT COMFORTABLE ENOUGH TO TAKE HIS HANDS OFF HIS GUN AND THAT IS WHEN YOUR CLIENT TOOK OUT A GUN AND SHOT HIM. WHY ISN'T THAT, WHY DOESN'T THAT AMOUNT, THAT HEIGHTENED PREMEDITATION, ONCE HE HAD THE OPPORTUNITY TO THINK ABOUT THIS, ONCE HE SAW THAT THE TROOPER LET HIS GUARD DOWN, THAT'S WHEN HE DECIDED TO ACT, WHY IS THAT NOT CCP?

>> WELL, TO ME IT IS EVIDENCE, AND YOU'RE EXACTLY RIGHT, THAT IS PRECISELY WHAT THE RECORD REFLECTED.

BUT IN MY JUDGMENT THAT'S EVIDENCE OF PREMEDITATION BUT NOT HEIGHTENED PREMEDITATION.

>> HOW ABOUT THE FACT THAT, IT SEEMS TO ME ALSO MADE A STATEMENT IN THE CAR JUST BEFORE KINDER FLED --

>> YES.

>> -- THAT HE WAS GOING TO SHOOT THE TROOPER.

>> YOU'RE RIGHT ABOUT THAT.

>> YOU ADD THAT TO WHAT JUSTICE LABARGA JUST SAID AND DON'T YOU GET TO THIS HEIGHTENED PREMEDITATION?

>> WELL, BUT FOR THE FACT THAT WHEN HE MADE THE SECOND STATEMENT ABOUT, I'M GOING TO SHOOT HIM, THAT'S, THE POINT IN TIME WHEN KINDER SAID, STOP, LET ME GO, AND THE DEFENDANT, OR THE APPELLANT DRIVER HAD DECIDED THAT HE WAS GOING TO RUN FROM THE SCENE.

SO, I THINK THAT'S SORT OF AN INTERVENING SITUATION.

EXCUSE ME?

>> WHO DECIDED THEY WERE GOING TO RUN?

I THOUGHT IT WAS THE PASSENGER WHO WAS GOING TO RUN FROM THE SCENE?

>> HE WAS LITERALLY GOING TO RUN FROM THE VEHICLE BUT THERE WAS A POINT IN TIME THAT THE APPELLANT SAID HE WAS GOING TO SPEED OFF.

HE WAS GOING TO HIT IT.

HE WAS GOING TO RUN, DRIVE AWAY FROM THE TROOPER AND IT WAS AT THAT POINT THE PASSENGER, OBVIOUSLY HAD TO BE AT THAT POINT, SAID NO, DON'T DO THAT. STOP.

I HAVE GOT WARRANTS.

I WANT TO GET OUT OF HERE.

SO THE VEHICLE STOPS.

>> IT SEEMS TO ME THAT THE ARGUMENTS YOU'RE MAKING ARE ARGUMENTS THAT COULD BE MADE BEFORE A JURY AND THE JUDGE BUT OUR STANDARD HERE IS, THAT, AGAIN, WHEN YOU TAKE THE STATEMENT THAT WAS MADE AT THE CONVENIENCE STORE AND THE STATEMENT THAT JUSTICE QUINCE JUST MENTIONED AND THE CIRCUMSTANCES THAT JUSTICE LABARGA JUST MENTIONED, THAT THERE IS COMPETENT SUBSTANTIAL EVIDENCE OF CCP.

NOW WHETHER IN WEIGHING IT'S DIFFERENT BECAUSE IT MAY BE THERE WASN'T A MOTIVE OR, THAT'S ANOTHER STORY BUT IF YOU'RE, IF YOUR CLAIM ON APPEAL HERE IS THAT IT WAS, LET ME MAKE SURE, THAT THE TRIAL COURT ERRED IN FINDING IT, ISN'T OUR STANDARD JUST TO INSURE THAT THERE IS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT IT, NOT THAT THERE IS ANOTHER SIDE TO IT?

>> WELL, I UNDERSTAND THAT THE STANDARD ON APPEAL IS JUST THAT, TO DETERMINE WHETHER OR NOT THERE IS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT.

>> AND ALL OF THAT IS EVIDENCE. NOW YOU MIGHT SAY, WELL, YOU MIGHT ARGUE TO THE JUDGE OR TO THE JURY THAT IT WASN'T THE TYPE OF EVIDENCE THAT, LOOK, THIS IS A YOUNG MAN AND HE WAS, YOU KNOW, SWERVING AND HE WAS UNDER THE INFLUENCE AND SO, WHEN HE MADE THAT STATEMENT IN THE CONVENIENCE STORE THAT WAS KIND OF A, PUFFING, AND HE WANTED TO RUN AND IT WAS REALLY HIS CO -- THE OTHER PASSENGER THAT WAS, THE MIGHT HAVE BEEN

STRONGER IF HE HADN'T, IF THE OTHER PASSENGER HADN'T RUN OFF BUT, IT'S, I JUST DON'T SEE HOW THERE ISN'T ENOUGH EVIDENCE TO SUPPORT THE JURY'S AND THE JUDGE'S FINDING IN THIS CASE?

>> WELL, IF I COULD JUST READ A LITTLE EXCERPT FROM JACKSON V. STATE AND I WILL TRY TO DIRECTLY RESPOND IN THAT UNDERTAKING.

>> ONE MINUTE. ONE MINUTE. GOING BACK TO WHAT JUSTICE LABARGA SAID, HE MIGHT HAVE SAID THIS BUT IT SEEMS IF WHEN THE OFFICER SAW THAT YOUR CLIENT HAD THE WEAPON, HE BACKED UP WITH HIS HAND UP, HE WAS BACKING UP AND THAT'S WHEN THE SHOOTING TOOK PLACE, WAS IT NOT?

>> THAT'S TRUE.

>> AND WHILE HE WAS DOWN, HE TRIED TO SHOOT HIM AGAIN WHILE HE WAS DOWN BUT HIS WEAPON -- SO HE HAD A CHANCE TO CHANGE HIS MIND BUT HE DIDN'T.

>> ALL THIS HAPPENED IN A VERY SHORT PERIOD OF TIME.

>> I KNOW.

>> BUT WHEN YOU PIECE IT ALL TOGETHER, THIS DO NOT PAINT THE PICTURE OF SOME PANIC, SOME, JUST, OFF THE WALL.

THIS DEMONSTRATES FROM, FROM, FOR SEVERAL, FOR AN EXTENDED PERIOD OF TIME, THIS DETERMINATION THAT THIS IS WHAT'S GOING TO HAPPEN.

>> WELL --

>> CERTAINLY WE UNDERSTAND PANIC SITUATIONS AND JUST, YOU KNOW THINGS, THINGS HAPPENING, SOMETHING GONE AWRY, BUT THIS, THIS STARTED LONG BEFORE THE ACTUAL EVIL ACT.

>> WELL HE DIDN'T ARM HIMSELF AND SET OUT TO COMMIT A CRIME LIKE BURGLARY OR ROBBERY WHERE THERE WAS A GREAT CHANCE THAT HE WAS GOING TO BE INTO A CONFRONTATION.

>> WHAT IS EVEN WORSE.

HE HAD A GUN.

SAID HE WOULD SHOOT THE LAW

ENFORCEMENT OFFICER IF HE TRIED TO STOP HIM.

>> HE ALWAYS HAD A GUN ACCORDING TO KINDER.

>> SHOULD WE --

>> I'M SORRY, I DON'T MEAN TO SOUND ARGUMENTATIVE.

IT IS NOT AS HE SOUGHT OUT THE OFFICER.

ALMOST ALL THESE CASES WE SEE, THAT ARE QUOTED IN THE TEXT OF THE BRIEFS HAVE THAT SORT OF SCENARIO WHERE --

>> COUNSEL?

>> YES.

>> I UNDERSTAND YOU'RE WORKING WITH WHAT YOU'VE GOT HERE.

>> THAT'S TRUE.

>> AND TRYING TO REPRESENT YOUR CLIENT WHO IS ON DEATH ROW BUT ISN'T THE, THE DEFENDANT HERE SOME ONE WHO HAD EXPRESSED HIS PURPOSE, TO KILL A LAW ENFORCEMENT OFFICER IF HE WAS STOPPED?

>> THAT'S TRUE.

>> AND HE DID THAT, NOT ONCE, BUT TWICE.

>> TRUE.

>> AND THEN WHEN THE OFFICER WHO STOPPED HIM BACKED UP FROM THE CAR, AS HE, AS THE DEFENDANT BRANDISHED A WEAPON AND SHOT HIM AND TRIED TO SHOOT HIM AGAIN?

>> THAT'S TRUE.

>> OKAY.

>> I WANT TO MAKE SURE THAT WE GO BACK YOU WERE GOING TO TELL ME ABOUT JACKSON. IF WE DIDN'T HAVE THE TWO STATEMENTS, I THINK WE DO HAVE CASES THAT WOULD SAY THAT WHAT HAPPENS RIGHT BEFORE MIGHT NOT, IS NOT ENOUGH FOR CCP.

MIGHT BE ENOUGH FOR PREMEDITATION.

SO THAT'S WHY I THINK THE CONTEXT TO ME SETS THIS APART FROM OTHER CASES, AND, YOU CAN ARGUE THAT THE STATEMENT REALLY WASN'T MEANT TO BE THAT HE IS GOING TO KILL AN OFFICER THAT STOPS HIM.

BUT IT, IT'S EVIDENCE THAT

SHOWS THE HEIGHTENED
PREMEDITATION.
AND THAT'S WHERE I'M HAVING, YOU
KNOW, I MIGHT NOT AGREE THAT
WHAT HAPPENED AT THE SCENE
ALONE IS SUFFICIENT BUT IT
SEEMS COMBINED WITH THE PRIOR
STATEMENTS IT BECOMES
SUFFICIENT.

AND SO YOU WERE GOING TO, I
THINK EARLIER WHEN I WAS ASKING
YOU THAT QUESTION ABOUT IS
THERE COMPETENT SUBSTANTIAL
EVIDENCE YOU WANTED TO CITE TO
JACKSON.

SO TELL ME HOW JACKSON IS,
WHICH WAS A CASE WHERE, I'M,
FROM JACKSONVILLE, CORRECT?
THAT'S WHERE THE WOMAN SORT OF
REFLEXIVELY SHOOTS, SHE IS
HAVING A FLASHBACK AND BEEN
ABUSED WHEN SHE WAS YOUNGER.

>> WELL, THE CASE I'M REFERRING
TO IS CITED ON PAGE 19 OF MY
INITIAL BRIEF AND IT'S JACKSON
V. STATE AND IT IS DOWN TOWARDS
THE BOTTOM.

WHAT IT DOES, IT SORT OF
EELABORATES, GIVES A CLEARER
PICTURE OF WHAT THOSE FOUR
ELEMENTS TO CCP INVOLVE AND I
QUOTE, IN ORDER TO FIND A CCP
AGGRAVATING FACTOR THE JURY
MUST DETERMINE THAT THE KILLING
WAS THE PRODUCT OF COOL AND
CALM REFLECTION AND NOT AN ACT
PROMPTED BY EMOTIONAL FRENZY,
PANIC OR FIT OF RAGE.

>> BUT THAT'S WHAT JUSTICE
LEWIS IS TALKING ABOUT IS THAT
THIS GOING FROM SOMEBODY THAT
IS PULLED OVER AND, YOU KNOW,
IS, HAS, MAYBE, AN OUTSTANDING
WARRANT AND IS PANICKING AND
THEN THERE IS THE ATTACK.
AND AGAIN UNFORTUNATELY WHEN
IT'S A LAW ENFORCEMENT OFFICER
THAT PUTS HIMSELF OR HERSELF ON
THE LINE THIS HAPPENS, IF IT
HAPPENED ONCE, IT HAPPENS TOO
MUCH BUT IT IS, THERE ARE SOME
CIRCUMSTANCES WHERE THE CCP
FACTOR IS NOT FOUND OBVIOUSLY.
BUT SO WITH THIS THE EARLIER
STATEMENTS CAN -- WE'RE NOT JURY.

THE EARLIER STATEMENTS THOUGH
PROVIDE THE BASIS TO
DISTINGUISH IT FROM BEING A
FRENZIED REFLEXIVE KILLING AS
WELL AS THE CIRCUMSTANCES OF
THE ACTUAL SHOOTING.

>> WELL, IT IS NOT JUST ONE
ELEMENT OF CCP THAT MUST BE
PROVED.

IT IS ALL THE ELEMENTS OF CCP
THAT MUST BE PROVEN.

>> OKAY.

SO WHAT ABOUT THE PUTTING THE
HANDS UP, AS IF, DON'T WORRY,
I'M NOT A THREAT, AND THEN
AFTER THE LAW ENFORCEMENT
OFFICER FEELS THAT HE IS SAFE
THE SHOOTING OCCURS?
THAT SOUNDS LIKE A PLAN, MAY
NOT BE, YOU KNOW, SOUNDS LIKE A
PLAN TO ME?

>> WELL, TO ME THAT IS
SPECULATIVE.

WE DON'T KNOW WHAT TRANSPIRED
BETWEEN THE TROOPER AND THE
DRIVER OF THE VEHICLE.

>> BUT IT WAS OBSERVED.

IT IS NOT THE, WE'RE NOT
SPECULATING.

IT IS FROM A WITNESS THAT SAW
THIS.

>> YES, WELL I UNDERSTAND BUT
WE DON'T KNOW WHAT WORDS WERE
SPOKEN.

WE DON'T KNOW WHY THE OFFICER,
THE TROOPER TOOK HIS HAND OFF
HIS GUN. RELAXED HIS --

>> TOOK HIS HAND OFF THE GUN
BECAUSE HE WOULD BE SHOT, DID
HE?

>>> I'M SORRY.

>> THAT'S SPECULATIVE.

>> I'M SORRY.

>> WHAT IS YOUR EXPLANATION AS
TO ONCE THE OFFICER PUTS THE
GUN DOWN AND THE WORSE THAT IS
GOING TO HAPPEN THAT HE IS
GOING TO GET A SPEEDING TICKET
OR HE IS, I DON'T KNOW WHAT HIS
ALCOHOL LEVEL IS, BUT HE WAS --
WOULD THEN PULL OUT A GUN AND
SHOOT THE OFFICER?

WHAT IS, YOU'VE BEEN SAYING,
WELL, YOU CAN'T SPECULATE THIS
OR THAT BUT WHAT IS THE DEFENSE

THEORY OF WHAT, OTHER THAN
BEING PART OF THE PLAN HE HAD
COME UP WITH BEFORE, THAT, FOR
THE SHOOTING?

>> WELL --

>> CLOSE TO EXECUTION-STYLE,
ISN'T IT?

>> WELL HE CERTAINLY SHOT HIM
AT CLOSE RANGE AND CLOSE BY BUT
EXECUTION-STYLE, TO ME IS WHERE
SOMEBODY IS TOTALLY
INCAPACITATED, TIED UP, TAPED
UP AND YOU GO UP AND BLOW THEIR
BRAINS OUT.

>> THAT MIGHT BE ONE WAY IT IS
BUT CERTAINLY NOT THE ONLY WAY
IT CAN BE EXECUTION-STYLE.

>> WELL --. THE --

>> LET ME ASK YOU THIS.

>> SURELY.

>> AND GOING AWAY FROM CCP A
BIT AND GOING TO YOUR SECOND
ISSUE IN THIS CASE THAT I'M
VERY INTERESTED IN WHICH IS
YOUR CLAIM THAT YOUR CLIENT'S
GUILTY PLEA MAY HAVE BEEN
PRESSURED BY HIS LAWYERS.
DID YOU NOT RAISE THAT?
MOVE YOUR MICROPHONE A LITTLE
CLOSER?

>> I'M SORRY.

THE DEFENDANT'S PLEA WAS
KNOWING, INTELLIGENT AND
VOLUNTARY.

YOU'RE CLAIMING IT WAS NOT
KNOWING, INTELLIGENT AND
VOLUNTARY.

HE PLED GUILTY.

THAT IS ONE OF YOUR CLAIMS IN
THE APPEAL, ISN'T IT?

GOING TO THAT PARTICULAR ISSUE,
WHICH IS OF VERY INTEREST TO
ME, YOUR CLAIM THAT YOUR CLIENT
WAS PRESSURED BY HIS LAWYERS
INTO PLEADING GUILTY BY THE USE
OF SCARE TACTICS AND BY SETTING
UP A MEETING WITH HIS MOTHER AT
THE JAIL SO THAT SHE WOULD
RECOMMEND THAT HE PLEAD GUILTY.
THE TRIAL COURT FOUND YOUR
CLIENT FILED A MOTION AFTER HE
WAS SENTENCED, AFTER HE WAS
SENTENCED, TO, WITHDRAW HIS
GUILTY PLEA, CLAIMING THAT IT WAS
NOT VOLUNTARILY MADE.

THE TRIAL COURT FOUND THAT THE
GUILTY PLEA, BY THE TRIAL
LAWYERS, WAS A STRATEGIC,
WELL-REASONED DECISION.

GIVEN THE FACTS OF THIS CASE,
AND THE CASE THAT THE STATE HAD
AGAINST YOUR CLIENT, WHY WAS
THAT NOT A GOOD STRATEGIC
DECISION ON THE PART OF THE
TRIAL LAWYERS IN THIS CASE TO
CONVINCE YOUR CLIENT, LET'S
PLEAD GUILTY.

LET'S GET THAT OUT OF THE WAY
AND SHOOT FOR A LIFE SENTENCE
AT THE PENALTY PHASE?
WHY IS THAT NOT A GOOD
STRATEGIC DECISION?

>> YOUR HONOR, THAT WAS A GREAT
DECISION.

>> SO WHAT IS THE PROBLEM?

>> IN MY JUDGEMENT.

BECAUSE OF, I WILL GET TO THAT
IN JUST ONE MOMENT IT WAS
REALLY GOOD BECAUSE THE
EVIDENCE OF GUILT WAS SO
PERVASIVE AND OVERWHELMING.
ENTERING INTO THE AGREEMENT,
THEY WERE ABLE TO CUT OUT SOME
OF THE MORE DAMNING PENALTY
PHASE EVIDENCE, FOR EXAMPLE AND
GET RIGHT ON TO, DOWN TO THE
NUB.

BUT YOU'RE MISTAKEN.

I DIDN'T FILE THAT MOTION TO
HAVE HIS PLEA WITHDRAWN.

I HAD NOTHING TO DO WITH THIS
CASE AT THE TRIAL LEVEL.

>> TRIAL LAWYERS DID BUT DID
YOU NOT RAISE THIS ON APPEAL?

>> IT WAS PRO SE AND THE REASON
YOU'RE EVEN, YOU'RE EVEN --

>> I'M SORRY.

MAYBE I'M MISTAKEN.

I THOUGHT THAT WAS RAISED.

>> THE REASON YOU'RE EVEN
LOOKING AT IT BY THE WAY IS
BECAUSE THE ATTORNEY GENERAL'S
BROUGHT IT UP.

I DIDN'T RAISE THAT AS AN
APPELLATE ISSUE.

>> I'M MISTAKEN THEN.

>> I DIDN'T FEEL IT HAD
ARGUEABLE MERIT.

THEY WENT INTO REASONS FOR IT

THAT ARE UNKNOWN.

>> WE LOOK AT LOT OF THINGS
WITH ARGUEABLE MERIT.

>> THAT IS PROBABLY A GOOD
THING TO MAKE SURE THAT FROM
WHAT WE CAN SEE THAT THIS WAS A
KNOWING AND VOLUNTARY PLEA.

>> I CERTAINLY READ ALL OF THAT
AND I MADE MY OWN ANALYSIS AND
THERE WAS A CONFLICT IN
TESTIMONY AND THIS, THAT AND
THE OTHER.

HE HAD TAKEN A ADVANTAGE OF
BARGAINING AND GONE THROUGH THE
WHOLE PROCESS AND ONLY FILED A
MOTION AFTER HE GOT A BAD
OUTCOME FROM THE JUDGE.

LIKE A CONTRACT THING AND
SOMEONE ONLY PARTIALLY THE
PERFORMED AND GOTTEN BENEFIT OF
THE BARGAIN I SHOULD SAY AND
WANTED OUT.

I DIDN'T MAKE THAT AN ISSUE ON
APPEAL AND I'M NOT REALLY NOT
PREPARED TO MAKE AN EXTENSIVE
ARGUMENT OR COMMENTS ABOUT
THIS.

>> -- HERE, THAT LAW
ENFORCEMENT OFFICER
UNQUESTIONABLE AS A SIGNIFICANT
AGGRAVATOR.

CCP, YOU MIGHT SAY WELL, IT IS
NOT THE STRONGEST CCP BUT THERE
IS CCP.

ARE YOU MAKING ANY ARGUMENT
THAT, I SEE THAT THERE WERE ANY
MITIGATORS THAT WERE NOT
APPROPRIATELY EVALUATED?

MENTAL HEALTH MITIGATORS?

THE, EMOTIONAL, UNDER,
EMOTIONAL DISTURBANCE,
STATUTORY MITIGATORS, THAT
SHOULD HAVE BEEN FOUND?

ANYTHING OF THAT NATURE?

>> WELL, I WILL TELL YOU THIS.

I HAVE SOME STRONG FEELINGS
ABOUT THAT, BUT I HAVEN'T
ARGUED IT BECAUSE THE, YOUR JOB
IS NOT TO SIT IN JUDGING FACTS
AS YOU ALREADY KNOW.

IT IS TO DETERMINE WHETHER OR
NOT THE TRIAL JUDGE OR APPLIED
THE CORRECT LAW.

>> WHAT DO YOU MEAN, THAT YOU
HAVE STRONG FEELINGS? IF THIS

IS A, IF THERE IS STRONG
MITIGATION, THAT WASN'T
PROPERLY EVALUATED THERE IS
ABSOLUTELY IN OUR
PROPORTIONALITY REVIEW
SOMETHING WE NEED TO KNOW.
BUT IF YOU HAVEN'T RAISED IT,
THEN WE ARE NOT IN A POSITION TO
SECOND-GUESS THAT.

THAT CONCERNS ME IF YOU'RE
SAYING YOU HAVE STRONG FEELINGS
BUT SINCE YOU RAISED A WHOLE
LOT OF OTHER THINGS THAT ARE,
WHAT WOULD BE PRO-FORMA
CHALLENGES.

I DON'T UNDERSTAND YOUR
STATEMENT HERE.

>> I DIDN'T FEEL THAT I COULD
ASK THIS COURT TO SECOND-GUESS
THE TRIAL JUDGE'S EVALUATION OF
MITIGATING EVIDENCE TO BE QUITE
CANDID WITH YOU.

THE ONE THAT TROUBLES ME THE
MOST IS HIS WHOLE FAMILY
UPBRINGING.

THE FACT THAT TWO WOMEN CAME
DOWN, TWO TEACHERS CAME DOWN
FROM SOUTH CAROLINA AND
TESTIFIED BEFORE THE JUDGE AND
JURY THAT THEY REMEMBER THIS
APPELLANT WHEN HE WAS A GRADE
SCHOOLKID.

AND THEY REMEMBER THAT EVERY
DAY HE WORE THE SAME CLOTHES,
OVER AND OVER AND OVER AND
OVER.

If there are strong mitigations,
that wasn't properly evaluated
and it's something we need to
know.

So if you haven't raised it,
then we are not in a position to
second-guess that, but that
concerns me if you are saying
you have strong feelings,
because you raised a whole lot
of things that are what would be
pro forma challenges.

I don't understand your
statement.

>> I didn't feel that I could
ask this court to second-guess
the trial judges evaluation of
mitigating evidence, to be quite
candid with you.

The one that troubles me the most is his whole family upbringing, the fact that two women came, two teachers came down from South Carolina and testified before the judge and jury that they remembered this young appellate when he was a gradeschool kid, and they remembered every day he wore the same clothes over and over and over and they felt sorry for him and when they heard about the case, they came down and they wanted the jury to know about that.

That is two people that came down.

Then there was the woman from the health services people that said, you know, she picked up on the mother-child relationship when Altersberger was brought in there for one reason or another, and maybe had shots.

There were no feelings between the two, and my client is a little kid who seemed like he was just sort of lost and unloved and so on and so forth. I'm kind of paraphrasing but there was some concern that she remembered from way back then.

>> You can keep going but you are now down to less than four minutes total so you are well into the use of your rebuttal.
>> Thank you but I would like to flesh this out if I may.

Then there was the next-door neighbor.

>> Was there in a mental health expert that was brought in?

It is all very interesting, a dysfunctional family and a poor background and all of this, but did the defense bring out any kind of expert that would put all of this together in some coherent form for us, because we see poor defendants and dysfunctional families all the time.

But that alone is not going to be the kind of mitigation that

is going to say, Oh my goodness, this guy shouldn't get a death sentence.

>> My recollection, from reading the record, was there were at least two, maybe three forensic-type people that came in, mental health type people, that came in and testified and that they told the clerk candidly that they could not tie their findings although they made findings that correlate them to the crime itself.

In other words to say, this frontal lobe issue or this temporal lobe issue caused this crime to happen.

They wouldn't touch that, so I guess my short answer is I don't believe there was any testimony in tying everything together in that fashion.

Okay, thank you all.

>> May it please the court, Meredith Charbula Assistant Attorney General for the state. Justice Poulsen the trial judge in in the sentencing order specifically rechecked Altersberger's crime and was compulsive down on page 989 in the sentencing order and in fact the court said that it previously found the defendant had a -- so he specifically rejected the notion that this crime was impulsive.

>> Is there anything as to where the gun was or where did the defendant keep the gun?

Where did it come from?

>> No, it was either in a car or hidden on his person.

Kinder testified he had not seen the gun and he had been with the defendant since 11:00 in the morning.

He had not seen the gun but it was obviously readily accessible to the defendant because when, as was correctly said, when the trooper came up to the car, Sergeant Sottile came up to the car and he had his hand on the

service weapon and Altersberger had his hands up. One thing you have to remember is any notion that is speculative that Altersberger was engaged in some sort of subterfuge is belied by the fact that Sergeant Sottile had 24 years of experience with a year of retirement, so that he is a very experienced officer so whatever Altersberger did, it made Sergeant Sottile more comfortable and he took his hand off the service weapon and that is when Altersberger put his hands down, came up with the gun and pointed it at Sergeant Sottile.

Sergeant Sottile raised his hands and backed up and Altersberger shot him in the chest.

Trooper Sottile fell to the ground.

Altersberger pointed the pistol at Sergeant Sottile's head and pulled the trigger and we have Mr. Murray parked right behind Sergeant Sottile's marked patrol vehicle and is witnessing the whole thing.

>> Was the weapon ever recovered?

>> It was.

He had secreted it at Kinder's father's home and surrendered the firearm to the police but that was not introducing evidence.

>> Was it a revolver?

>> It was a semiautomatic.

>> The reason it misfired?

>> There is nothing in the record.

The trucker who had some experience with firearms, I didn't see anything in the record of why the weapon was tested or why it did not fire. The trucker behind him, Mr. Merise, had the idea that the weapon jammed but I can't tell you whether it jammed or there were no more bullets in

the magazine.

I can't tell you that.

>> Tell me about the impulse, what you talked about before, because didn't one of the mental health experts talk about the fact that the defendant had some kind of, I don't know if it's frontal lobe or some kind of brain damage, and that condition would in fact impair his ability to control his actions and it would cause him to be impulsive. >> So, what else did they say? Did they tie that whole lack of control impulse into this offense?

>> No.

There were two experts who testified, a Dr. Krop and Dr. Gur who is a neuropsychologist and he teaches at the University of Pennsylvania.

Dr. Gur never saw the defendant. He only looked at his records.

Dr. Krop never talked to the defendant about the crime.

Dr. Gur specifically said he's talking about statistics really. He's not looking at the individual.

He sees a reduced size amygdala the right frontal orbit and he sees that and he says those things are associated with impulsivity, temper tantrums, losing it, etc. but when asked specifically whether he was tying his finding specifically to the crime, he said no.

>> And the judge specifically noted that and said neither expert was willing to connect that to the murder, this activity to the murder of the trooper.

A question about the age of what was done in terms of the age of the defendant.

The defendant was 19 at the time in the judge, there was testimony by Dr. Krop that he was, because of his mental issues, that his chronological

age was much lower.

What did Dr. Krop say about his emotional maturity, and anything?

>> He said in his opinion he was emotionally immature, lower than his chronological age.

>> Can you be more specific than that?

>> I don't recall, he is 12 or 13 or 14 or 15 emotionally.

I don't recall anything specifically that he was emotionally immature.

>> Do we know, at the time, where was he living?

Was he working?

What was his ability to get along in the world?

>> I believe he was living with, I don't specifically recall. He was living in the area but he wasn't working and I think he may have been officially enrolled in high school but he did not go to class.

His mother mentioned something about him still being in high school but wasn't going to class and wasn't working.

>> So he never graduated?

Never dropped out officially but never graduated?

>> Dr. Krop said he reviewed the school records but he didn't specifically mention whether he had graduated but what happened is he was involved for a significant amount of time with the juvenile justice system and I believe at age 17 he was arrested along with his mother and his step-dad there for drugs. He was put into juvenile justice.

He went to boot camp.

>> Is this in the record?

>> Yes, maam.

Of course.

>> This whole juvenile justice -- do we have the juvenile justice records?

>> No, Dr. Krop explained --

>> We haven't looked at them ourselves?

Is there a diagnosis during the time he was in the juvenile justice system?

>> Well, I can say that Dr. Krop never testified that he had ever been diagnosed with anything but he did testify he was put on a drug and I think, can't remember the specific name of the drug but it's actually used for high blood pressure and off label for ADHD in children to control the temper at some point when he was in the DJJ but he has never been diagnosed with any kind of major mental illness and neither Dr. Krop nor Dr. Gur diagnosed him with any type of mental on this.

>> Is there any pattern of him having had violent behavior during his life?

>> Yes, part of, according to Dr. Krop and I'm going through his testimony because the records themselves are not in the record.

To the best of my knowledge, Dr. Krop testified he had been involved in the juvenile justice system a couple of times because of domestic violence with his mother.

He engaged in domestic violence with his mother.

>> The mother that also forced him to be arrested on drugs? That is oftentimes when young people act out unfortunately when they themselves have been exposed or victims of domestic violence.

>> I don't recall anything in Dr. Krop's testimony where he was a witness or victim of domestic violence.

Now there was testimony that his mother used corporal punishment to access and that the school system and perhaps even the DJJ system was trying to work with her to find more creative ways to punish him other than the use of corporal punishment but as far as domestic violence, toward

where one of the many men she brought into the household beat her up and he saw that.

>> That is corporal punishment to one but might mean domestic violence to another.

>> It wasn't fleshed out to the extent of it, whether he suffered injuries and how often it happened.

I only know from the testimony during the penalty phase that there were efforts to channel her punishment -- there was corporal punishment but I don't recall any fledging out of how often, what with, with a belt, with a hand, with a paddle or a 2 x 4.

I don't know.

It's not in the record so that wasn't before the jury that he was abused other than emotionally.

I think clearly the testimony established from Dr. Krop as well as his own mother who -- and the teachers -- that he was emotionally deprived and moved around, had a series of men throughout the house, none of which were a positive role model and the trial considered all that in the mitigation.

>> What about common terms of the 9-3 vote, the two aggravators are CCP and law enforcement.

I would assume the law enforcement aggravator was not contested?

>> It was not.

>> Was it agreed to?

>> I wouldn't say that, no but it was not contested.

>> Okay so with this case, if CCP were not a factor here, would this be a death penalty case?

>> Absolutely.

I think this is similar to the Burns case this court from this day forward should state unequivocally the murder of a law enforcement officer is among

Florida's greatest aggravators.
It should be crystal clear from
this day forward.

>> Because we have talked about
everything being weighty but it
does seem to me the murder of a
law enforcement officer should
be afforded the greatest weight
for reasons that you are about
to say.

>> One of the reasons I say that
is not only did we lose another
law enforcement officer
yesterday, but the fact is the
trial judge when he was, you
know, talking about -- talking
about the instructions to the
jury, one of the things he said
was he read cases this digest of
a murder a law enforcement
officer would be proportionate.
This court should say that is
not the case.

One thing I would like to say
before I sit down, and I'd like
to explain why, first of all,
the state of course, this court
must review the sufficiency of
the evidence supporting
conviction and the guilty plea
to make sure it's adequate to
make sure it's involuntary and
that is why this Attorney
General addresses that just as
it addresses proportionality
even when this court does not
waive it.

So that is why the Attorney
General says this and there was
no claim that the trial judge
erred in denying the motion of
withdrawal pleased that the
state briefs that because this
court has the obligation to
review the record to ensure that
colloquy was sufficient to make
sure it was a voluntary plea.
Justice Labarga if you look at
the quality you will see the
defendant made that decision and
the trial judgment over what
that meant.

>> For the first time in my
career, I stand corrected.

>> I have often made mistakes,

but that is why I just wanted to explain, but that is why the attorney general briefed that. One last thing I would like to say before I sit down is, any notion the defendant was, you know, one of the things the appellate talked about during his argument was that the defendant was drunk.

If you look at the record, the last, according to Mr. Kinder, the defendant, drank a cup of alcohol, Coke and Brandy, before the murder happened at 3:25 in the afternoon.

In the meantime they left Kinder's house and went to a convenience store to buy some girls some booze.

They went to the Golden Corral. They went to another convenience store where Altersberger saw the police and said, you had better not stop me or I will shoot you and then went to the same -- This notion of swerving in and out of drunkenness, no. Kinder testified he was not driving.

In the Spencer hearing, two witnesses came in who along with the truck driver action to give a good illustration of the scale albeit aggressive and reckless the scale at which

Mr. Altersberger was driving. I'm sure everyone in this court has been in the left lane and someone comes up on your tail and motions you to get over and when you don't, whips to the right lane and goes in front of you.

That is exactly what he was doing and the testimony at the Spencer hearing tells he was doing out and he was getting into little bitty corners of the cars are not hitting a single one.

Any notion he is intoxicated at the time is simply not supported by the record.

Instead, he was driving skillfully, albeit aggressively and recklessly.

So this notion of swerving in traffic is indicative of the fact he was drunk is absolutely refuted by the record and any notion that should be a factor in CCP or rejecting this case on proportionate ground should be soundly rejected.

With that, the state unless the court has any other questions, the state would respectfully address pursuant to his guilty plea in his sentence to death.

>> We thank you both for your arguments and the court will now stand in recess for 10 minutes.

>> All rise.