

>> ALL RISE.

[INAUDIBLE CONVERSATIONS]

>> THE SUPREME COURT IS NOW IN SESSION.

PLEASE, BE SEATED.

>> THE COURT WILL NOW TAKE UP THE SECOND CASE ON OUR DOCKET, SIMMONS V. THE STATE OF FLORIDA.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME IS DAVID HENDRY, AND I ALONG WITH JIM DRISCOLL, WE COME FROM CCRC MIDDLE REGION IN TAMPA AND REREPRESENT ERIC LEE SIMMONS IN THIS CASE.

ERIC LEE SIMMONS IS A QUIET, COMPASSIONATE, INNOCENT YOUNG MAN WHO WAS SUBJECTED TO THE MOST COERCIVE OF INTERROGATIONS THAT THIS COURT HAS EVER SEEN IN THE HISTORY OF JURISPRUDENCE.

>> HAVE YOU HAD AN OPPORTUNITY TO SEE THE TAPE OF THE TWO HOURS' VERSION OF THE INTERROGATION?

HAVE YOU SEEN THE ACTUAL INTERROGATION?

>> ABSOLUTELY, YOUR HONOR.

>> BECAUSE, I MEAN, IT'S LIKE ANYTHING ELSE, I MEAN, IF YOU READ THE ALLEGATIONS THAT YOU HAVE MADE AND YOU SEE THE TAPE, I MEAN, IT'S -- IT LOOKS A LOT WORSE ON PAPER THAN IT DOES ON TAPE.

I MEAN, I SEE WHAT YOU'RE SAYING, THAT YOU'RE CLAIMING THAT IN THIS INSTANCE THE POLICE OFFICERS DID ALL KINDS OF THINGS SUCH AS THREATS OF THE DEATH PENALTY, INSINUATIONS THAT THEY COULD CONVINCE THE PROSECUTORS TO BE LENIENT, SUGGESTIONS THAT THE DEFENDANT, THE CLIENT WOULD RECEIVE -- WOULD NOT RECEIVE A FAIR TRIAL, ATTEMPTS TO SHOCK HIM BY POUNDING ON THE TABLE AND LUNGEING FORWARD.

>> YES.

>> THREATENING HIM WITH THE ELECTRIC CHAIR, THAT TYPE OF THING, THREATEN TO SEARCH HIS FATHER'S HOUSE AND SCREAMING AT HIM.

BUT IF YOU -- AND CALLING HIM

"HOSS."

I DON'T KNOW EXACTLY HOW THAT'S THREATENING, BUT IF -- I KNOW IF YOU READ THAT ON PAPER, IT SEEMS VERY OMINOUS.

BUT WHEN YOU SEE IT ON TAPE, IT'S NOT AS BAD AS YOU DESCRIBE IT.

>> WELL, I WOULD DISAGREE WITH THAT, YOUR HONOR, AND I WOULD POINT YOUR ATTENTION TO, THIS COURT'S ATTENTION TO PAGE 2 OF MY INITIAL BRIEF WHERE I ACTUALLY, I WATCHED THE TAPE, OBVIOUSLY, VERY CAREFULLY MANY, MANY TIMES, AND AS I SAID HERE, THE APPELLANT STRONGLY URGES THE COURT TO VIEW THE DVD AS IT ANALYZES THIS CASE.

THE MOST COERCIVE AND THREATENING EIGHT MINUTES OF THE INTERROGATION ARE LOCATED AT CAMERA COUNTER 235801 TO 0035, AND THEN TO 001701.

SO WE'RE DEALING WITH A TWO HOUR VIDEOTAPE, YOUR HONOR, AND I HAVE HIGHLIGHTED HERE FOR THE COURT THE MOST COERCIVE EIGHT MINUTES OF THIS INTERROGATION.

IF YOU WATCH IT, THERE ARE LUNGES TOWARDS THE DEFENDANT, DETECTIVE PERDUE SAYS I'M GOING TO GIVE YOU A LETHAL INJECTION, AND MR. SIMMONS, HE DENIES THIS OVER AND OVER AND OVER AGAIN.

PERHAPS 200 TIMES.

AND AT ONE TIME VERY LATE IN THE INTERROGATION HE SAYS, AGAIN, "I DIDN'T KILL THE LADY, I AIN'T KILLED THE LADY."

AND WHAT WAS THE RESPONSE?

YOU CAN GO AHEAD AND SAY THAT WHEN YOU'RE LYING ON THE TABLE WITH THE IV STICKING --

>> WHAT IS IT THAT HE SAID THAT YOU'RE TRYING TO SUPPRESS?

WHAT WAS THE STATEMENT THAT HE SAID?

ONE LINE.

>> THERE WERE, ACTUALLY, TWO VERY IMPORTANT PORTIONS OF THE TAPE.

THE FINAL STATEMENT AT THE END OF FOUR HOURS WAS "IF YOU FOUND BLOOD IN MY CAR, I MUST HAVE DID

IT."

>> OKAY, THAT'S THE ONE LINE.  
THE OTHER PORTION IS THE FACT  
THAT HE MENTIONED THAT HE HAD  
CONSENSUAL SEXUAL RELATIONS WITH  
THE VICTIM TWO WEEKS EARLIER, IS  
THAT WHAT YOU'RE SAYING THAT'S  
THE OTHER PART THAT'S BAD?

>> THAT'S, YOUR HONOR, WHAT WE  
HAVE HERE ARE TWO HOURS OF  
RECORDED INTERROGATION, THE  
OTHER TWO ARE NOT.  
AND WHAT HAPPENS IS THE  
TRANSCRIPT WE HAVE AVAILABLE NOT  
ONLY A VIDEOTAPE, BUT ALMOST A  
FULL TRANSCRIPT.  
THERE'S SOME INAUDIBLES.  
BUT THE FIRST TWO HOURS IS  
TRANSCRIBED, AND ON TAPE HE SAYS  
"IT WAS SATURDAY, AND I WAS  
DRUNK."

IT DOESN'T APPEAR THAT HE SAID I  
HAD SEX WITH HER TWO WEEKS AGO,  
AND DETECTIVE PERDUE SAID THAT  
IT WAS OFF TAPE, IT WAS PART OF  
THOSE TWO HOURS THAT WERE NOT --  
>> ALL RIGHT.

BUT THAT PROMPTED DEFENSE  
COUNSEL TO ENTER INTO A  
STIPULATION WITH THE PROSECUTOR  
WHICH WAS READ TO THE JURY  
TWICE.

AND IN THE STIPULATION HE AGREED  
THAT THE SEMEN FOUND IN THE  
VICTIM'S VAGINA BELONGED TO YOUR  
CLIENT, BUT THE ALLEGATION OF  
SEXUAL BATTERY IN THIS CASE WAS  
NOT VAGINAL PENETRATION, IT WAS  
ANAL PENETRATION.

>> YES, YOUR HONOR.

>> AND I SAW THE PICTURE, WHICH  
IS VERY GRAPHIC.

SO DIDN'T THAT STIPULATION HELP  
YOU?

I MEAN, IT SEEMED LIKE IF SHE  
WAS RAPED ANALLY -- AND THAT'S  
THE WHOLE THEORY OF THE STATE'S  
CASE -- AND HE IS CLAIMING, NO,  
I HAD SEX WITH HER TWO WEEKS  
AGO, BUT IT WAS, I HAD SEX WITH  
HER, BUT IT WAS VAGINAL.

DOESN'T THAT STIPULATION  
ACTUALLY HELP YOU?

>> THE STIPULATION AS PRESENTED  
TO THIS JURY ABSOLUTELY CONDEMNS

MR. SIMMONS TO DEATH ROW IN THIS CASE.

THAT STIPULATION SHOULD HAVE READ THAT THE SEMEN EVIDENCE WAS EVIDENCE OF CONSENSUAL SEXUAL ENCOUNTER.

JUST BECAUSE THE STIPULATION SAID THAT THIS HAD NOTHING TO DO WITH THE SEXUAL BATTERY CHARGE WHICH WAS ANAL PENETRATION --

>> WELL, IT SAYS, THE STIPULATION SAYS, "IT IS NOT RELEVANT TO THE SEXUAL BATTERY CHARGE HEREIN AS THAT CHARGE INVOLVES ALLEGATIONS OF ANAL PENETRATION AND IS NOT TO BE CONSIDERED BY YOU IN ANY WAY AS TO THAT CHARGE."

HOW DOES THAT HURT YOU?

>> SO IT IS RELEVANT TO PROVE KIDNAPPING AND MURDER WHICH IS RELEVANT -- FOR THE STATE IT GOES TO TIE THIS DEFENDANT, THE JURY'S REASONABLE INFERENCE FROM THAT EVIDENCE IS THAT MR. SIMMONS' SEMEN IS INSIDE OF THIS WOMAN'S VAGINA.

IT IS INSIDE HER VAGINA BECAUSE HE'S THE MAN WHO KIDNAPPED HER AND KILLED HER.

>> IS THAT THE WAY THE STATE ARGUED THAT?

>> YES, YOUR HONOR.

YES, YOUR HONOR.

MS. ORR, THE TRIAL COUNSEL IN THIS CASE, SHE CANDIDLY ADMITTED THAT SHE MADE A MISTAKE, AND IT WAS MAJOR ERROR ON HER PART FOR FAILURE TO PUT THAT CONSENSUAL NATURE IN THE STIPULATION BECAUSE WHEN THE STIPULATION CAME ABOUT, MS. ORR WAS OBJECTING AT TRIAL, AND SHE WAS SAYING, YOUR HONOR, MR. SEAN JOHNSON IS TESTIFYING HERE, AND HE'S MAKING REFERENCE TO A SEXUAL, HE'S MAKING REFERENCE TO A SEXUAL ASSAULT KIT.

MS. ORR SAID WHEN HE'S MAKING REFERENCE TO A SEXUAL ASSAULT KIT, IT MAKES IT LOOK LIKE THIS WAS A RAPE, AND THIS WAS NOT A RAPE.

SO MS. ORR, SHE KNEW SHE HAD THE DEPOSITIONS OF DEBORAH AND

EDWARD JOHNSON TO SHOW THAT THERE WAS CONSENSUAL SEX ON SATURDAY, DECEMBER 1ST, THE NIGHT THAT SOMEONE ELSE KIDNAPPED AND MURDERED THIS WOMAN.

ERIC SIMMONS HAD THE MISFORTUNE OF HAVING CONSENSUAL SEX WITH THIS WOMAN BEFORE SHE WAS KIDNAPPED AND MURDERED.

THE JURY DID NOT HEAR THAT THIS WAS CONSENSUAL SEX.

THEY WERE ONLY LEFT WITH AN INFERENCE THAT THIS WOMAN LEFT VERY BADLY SEXUALLY ASSAULTED, WAS SEXUALLY ASSAULTED BY ERIC SIMMONS.

AND WITH REGARDS TO, WITH REGARDS TO THE INTERROGATION, NOT ONLY DO YOU HAVE DETECTIVE PERDUE BANGING ON HIS KNEES AND SAYING I'M GOING TO SEND YOU UP THE ROAD FOR LETHAL INJECTION, DETECTIVE ADAMS BANGS ON THE TABLE AND SAYS I'M TIRED OF DEALING WITH YOU.

MOST IMPORTANTLY HERE, YOUR HONORS, AT 33:47 IN THE TRANSCRIPT ADAMS SAID, "SIMMONS STATED HE'D HAD ENOUGH, AND WE CEASED THE INTERVIEW." THAT'S IT.

"MR. SIMMONS HAD ENOUGH."  
HOW MANY TIMES DOES HE HAVE TO DENY THIS EVENT, THIS OFFENSE BEFORE THE POLICE KEEP COMING AT HIM AND COMING AT HIM, THREATENING HIM WITH LETHAL INJECTION, THE ELECTRIC CHAIR AND AN IV STICKING IN HIS ARM?  
>> DEFENSE COUNSEL TESTIFIED DURING THE EVIDENTIARY HEARING THAT SHE FILED A MOTION TO SUPPRESS THE DETENTION OF YOUR CLIENT BEING TAKEN INTO CUSTODY, BUT SHE DID NOT INCLUDE THE ARGUMENT THAT THE, ABOUT THE COERCION DURING INTERROGATION. WHAT EXPLANATION DID SHE GIVE FOR NOT PURSUING THAT ARGUMENT?  
>> SHE FELT, YOUR HONOR, SHE FELT THAT THE FOURTH AMENDMENT GROUNDS OF AN ILLEGAL SEARCH AND SEIZURE WERE GOING TO BE GRANTED.

SO SHE SAID, AGAIN, SHE CANDIDLY ADMITTED THAT SHE STOPPED SHORT OF WHAT NEEDED TO BE DONE. SHE DID NOT TAKE THAT EXTRA STEP AND RAISE THE ISSUES OF FIFTH AMENDMENT AND 14TH AMENDMENT CONCERNS --

>> SHE ALSO --

>> -- INTERROGATION.

>> SHE ALSO THOUGHT SHE WAS GOING TO WIN IN PHASE ONE AND DIDN'T REALLY PURSUE A PENALTY PHASE, AND WE'LL GET TO THAT IN A SECOND.

BUT THAT WASN'T ARGUED AT ALL, THE COERCION PART OF IT.

>> OH, NO.

IT WAS NOT BROUGHT UP.

THIS COURT DID DISCUSS THAT THERE WERE SPECIFIC THREATS OF THE ELECTRIC CHAIR, LETHAL INJECTION TO THE POINT WHERE SIMMONS TOLD HIM -- IT'S RECORDED -- AND HE SAYS, LOOK, I HAVE VERY SMALL VEINS, AND IT'S HARD TO STICK THEM.

AND SO I WANT TO POINT THE COURT'S ATTENTION BECAUSE THERE'S A GLARING ERROR IN THE LOWER COURT'S ORDER WHERE THE LOWER COURT STATES THAT PROFESSOR RICHARD LEO'S TESTIMONY WOULD NOT BE ADMISSIBLE.

AND AT THE TIME THIS COURT ISSUES THE CASE OF BLAINE ROSS WHERE IT TALKED ABOUT THE USE OF FALSE CONFESSIONS EXPERTS.

AND THIS IS BASED ON -- IT GOES WAY BACK IN 1980 TO THE BRUMMER CASE FROM THE FLORIDA SUPREME COURT, AN INTERROGATION THAT INVOLVES THESE TYPES OF THREATS, A STATEMENT AS THE RESULT OF SUCH COERCION IS TOTALLY INADMISSIBLE.

I'VE ALSO CITED TO ROGERS V. RICHMOND WHICH WAS A 1961 U.S. SUPREME COURT CASE, OVER 50 YEARS OF JURISPRUDENCE.

AND I ALSO CITE TO BECAUSE THIS TRIAL JUDGE SAID THAT THIS TESTIMONY'S NOT ADMISSIBLE, THERE'S A CASE RIGHT OUT OF THE SECOND DCA, AND THAT'S STATE V.

SAWYER, A 1990 CASE WHERE IT SAYS THE TAPES. BECAUSE WE HAD IN THAT CASE THE TAPES REVEAL THAT SAWYER WAS HARANGUED, YELLED AT, CAJOLED, URGED APPROXIMATELY 55 TIMES TO CONFESS TO AN ACCIDENTAL KILLING.

ASSISTANTS WITH THE STATE ATTORNEY'S OFFICE IF HE TOLD THE TRUTH, THREATENED FIRST-DEGREE MURDER AND ITS INTENDED CONSEQUENCES IF HE DID NOT COOPERATE, WARNED WHAT HAPPENED TO A FELLOW POLICEMAN IN CLEARWATER WHO PLAYED GAMES AND GOT CHARGED WITH FIRST-DEGREE MURDER.

THREATENED THAT HE WOULD TURN TO ALCOHOL AND EVEN THREATENED WITH EVENTUAL DEATH FROM ALCOHOL CONSUMPTION.

THE STATE, THIS IS WHAT STATE V. SAWYER, A SECOND DCA CASE RIGHT IN THE SAME JURISDICTION AT LAKE COUNTY.

>> LET ME ASK YOU, LET ME ASK YOU, I UNDERSTAND WHERE YOU'RE GOING WITH THIS, BUT I WANT TO CONCENTRATE A BIT ON TRIAL COUNSEL.

MY UNDERSTANDING FROM READING THE RECORD IS TRIAL COUNSEL -- AND I'M A LITTLE CONFUSED HERE. YOU'VE GOT MS. ORR, AND WHAT IS THE NAME OF THE SECOND CHAIR?

>> JEFFREY FISTER.

>> NOW, MS. ORR WAS NOT QUALIFIED --

>> YES.

>> -- UNDER OUR RULES TO TRY THIS CASE.

SO I TAKE IT MR. FISTER IS THE ONE THAT WAS?

THAT WAS QUALIFIED?

>> THAT'S CORRECT, YOUR HONOR.

>> OKAY.

>> THERE WAS A BATTLE FOR MR. SIMMONS.

HE WANTED A CHANGE OF COUNSEL, HE WANTED MS. ORR TO REPRESENT HIM BECAUSE SHE HAD A VERY GOOD REPUTATION IN THE JAIL THERE. AND HE WAS VERY UNHAPPY WITH THE SERVICES OF THE PUBLIC DEFENDER.

SO MS. ORR WANTED TO TRY THIS CASE, BUT SHE COULDN'T TRY THE CASE, I BELIEVE, BECAUSE SHE MIGHT HAVE BEEN ONE CASE SHORT OF WHAT WAS NECESSARY FOR CAPITAL TRIALS.

SO SHE WAS NOT DEATH QUALIFIED. SHE WAS VERY CLOSE.

SO WHAT SHE DID IS MR. JEFFREY FISTER BECAME, ACTUALLY, THE FIRST CHAIR, AND SHE WOULD BE THE SECOND CHAIR, BUT SHE VIRTUALLY CONDUCTED THE ENTIRE TRIAL.

JEFFREY FISTER SAID, I WAS JUST SITTING THERE, I DIDN'T GET PAID FOR THE CASE.

HE WAS BASICALLY JUST SITTING THERE AS A FIGUREHEAD, AND HE DID NOT PARTICIPATE AT ALL IN THE PENALTY PHASE.

>> AGAIN, TIME IS LIMITED AND THERE ARE JUST A TON OF ISSUES IN THIS CASE.

SHE, I BELIEVE, HER TESTIMONY DURING THE EVIDENTIARY HEARING WAS THAT SHE BASICALLY THREW ALL HER EGGS IN THE GUILT PHASE BASKET.

>> THAT'S CORRECT.

>> DIDN'T CONCENTRATE MUCH ON PENALTY.

AND SHE WAS SHOCKED THAT THE JURY CAME BACK WITH A GUILTY VERDICT IN THIS CASE GIVEN THE EVIDENCE.

>> AND OUR POSITION IS THAT SHE ONLY UTILIZED HALF THE EGGS THAT WERE AVAILABLE IN THAT GUILT PHASE BASKET.

>> OKAY.

ALL RIGHT.

NOW, AND, AGAIN, I'M -- GIVEN THE TIME LIMITATIONS, PENALTY SIDE OF THIS IS IMPORTANT.

IT SEEMS TO ME THAT THE ONLY EVIDENCE THAT WAS PRESENTED IN THE PENALTY PHASE BY THE DEFENSE IN THIS CASE WAS THEY PRESENTED THE PROBABLE CAUSE AFFIDAVIT OF THE, YOUR CLIENT'S PRIOR FELONY CONVICTION, I GUESS, IN SOME WAY TO MINIMIZE THE STATE'S POSITION.

THEN THEY WANTED TO SHOW THAT IT



WASN'T THAT BIG A DEAL.  
BUT IT PROVED THAT HE RAN A  
POLICE OFFICER OFF THE ROAD  
INTENTIONALLY.  
AND THEN THEY PRESENTED  
TESTIMONY OF A JAIL GUARD,  
SERGEANT CRAIG LESLIE, I  
BELIEVE, WHO TESTIFIED -- I  
GUESS THEY PUT HIM ON TO SAY HE  
HAD A PRETTY GOOD DISCIPLINARY  
RECORD, ONLY HAD ONE, ONE  
COMPLAINT.  
BUT THEN HE ALSO TESTIFIED THAT  
YOUR CLIENT, WHAT, HAD TO BE --  
ASKED TO BE JAILED SEPARATELY  
BECAUSE FROM OTHER PRISONERS  
BECAUSE HE MIGHT HURT SOMEONE.  
>> THAT'S WHAT HE SAID, THAT WAS  
THE TESTIMONY.  
>> I CAN'T IMAGINE THAT BEING  
HELPFUL.  
SO THOSE ARE THE ONLY TWO  
THINGS, AND NOW THE DEFENDANT --  
YOUR CLIENT'S SISTER WHO  
TESTIFIED THAT HE WAS A GOOD GUY  
AND ALSO DID SOME BAD, TALK  
BADLY ABOUT THE VICTIM WHICH,  
OBVIOUSLY, WASN'T HELPFUL  
EITHER.  
SO THOSE ARE THE THREE THINGS  
THAT WERE PRESENTED.  
>> THE EVIDENCE THAT WAS  
PRESENTED AT THE PENALTY PHASE  
BY DEFENSE COUNSEL WAS ACTUALLY  
MORE AGGRAVATING THAN  
MITIGATING.  
AND IF YOU LOOK AT JANICE ORR,  
MR. FISTER WAS SUPPOSED TO BE  
THE PENALTY PHASE GUY, BUT  
MS. ORR DID THE CLOSING  
ARGUMENT, AND ALL SHE DID WAS  
QUARREL WITH THE JURY'S VERDICT.  
SHE TESTIFIED, ACTUALLY, AT THE  
EVIDENTIARY HEARING SHE THOUGHT  
IT MIGHT BE BETTER IF  
MR. SIMMONS RECEIVED A DEATH  
PENALTY BECAUSE HE COULD GET THE  
GUARANTEED REVIEW BY THIS COURT.  
>> WELL, I'M MORE CONCERNED -- I  
MEAN, I'M CONCERNED ABOUT THAT,  
BUT I'M MORE CONCERNED ABOUT THE  
AVAILABILITY OF MENTAL HEALTH  
TESTIMONY THAT WASN'T PURSUED.  
DR. HENRY DEE, PSYCHOLOGIST,  
WOULD TESTIFY THAT HE REVIEWED

THE SCHOOL RECORDS, ALL KINDS OF PROBLEMS THERE IN SCHOOL.

ADHD.

>> AND A PET SCAN, YOUR HONOR.

>> THAT WAS DONE BY DR. FRED WOOD --

>> WE HIRED.

>> -- THAT SHOWED ORGANIC BRAIN DAMAGE.

>> THAT'S CORRECT.

>> TO YOUR CLIENT THAT SUBSTANTIALLY IMPAIRED HIS ABILITY TO THINK AND ACT LOGICALLY.

>> WE WERE ABLE TO GET THE TWO STATUTORY MENTAL HEALTH MITIGATORS FROM DR. WOOD AND DR. DEE, YOUR HONOR.

>> AND YOU HAD A PSYCHOTHERAPIST WHO ALSO TESTIFIED --

>> [INAUDIBLE]

>> -- DURING THE HEARING.

NONE OF THAT WAS PRESENTED DURING THE PENALTY PHASE IN THIS CASE.

>> NO, IT WAS NOT.

>> AND WHAT WAS TRIAL COUNSEL'S RESPONSE TO THAT?

>> WELL, AGAIN, MS. ORR SAID THAT SHE THOUGHT IT MIGHT, HE MIGHT BE BETTER OFF ON DEATH ROW THAN WITH A LIFE SENTENCE, AND MR. FISTER SAID HE JUST FELT LIKE A FIFTH WHEEL, AND HE FELT LIKE HIS HANDS WERE TIED --

>> WELL, HE WANTED TO PLEAD THE CASE OUT.

HE WAS TRYING TO DO THAT.

>> HE WANTED TO PLEAD --

>> TO LIFE?

>> -- TO TRY TO GET A LIFE SENTENCE.

UM --

>> NOW, WASN'T MR. FISTER PREPARED TO GIVE THE CLOSING ARGUMENT, AND MS. ORR WOULDN'T ALLOW HIM TO DO IT?

>> I DON'T KNOW, IT WASN'T CLEAR AT THE EVIDENTIARY HEARING WHAT HAPPENED THERE, BUT OUR UNDERSTANDING WAS THAT MR. FISTER WAS GOING TO BE THE PENALTY PHASE GUY, AND MS. ORR WAS GOING TO BE THE GUILT PHASE --

>> RIGHT.

>> AND WHAT HAPPENED WAS MS. ORR JUST STEPPED IN, SHE QUARRELED WITH THE VERDICT, AND SHE SAID SHE WISHED SHE COULD HAVE DONE A BETTER JOB AND, YOU KNOW, THEY ACTUALLY CALLED MR. SIMMONS' SISTER WHO CAME AND STARTED TO DISPARAGE THE VICTIM IN THE CASE SO, WHICH WAS REALLY DISTASTEFUL.

>> COUNSEL, YOU ARE NOW DOWN TO A LITTLE OVER THREE-AND-A-HALF MINUTES OF YOUR TOTAL TIME, SO YOU'RE INTO REBUTTAL.

>> OKAY.

BEFORE I SIT DOWN I WOULD JUST -- BECAUSE I DIDN'T HAVE TIME TO TALK ABOUT IT, BUT WHAT WE HAVE HERE ON THE JOHN FITZPATRICK ISSUE IS WILLFUL OBSTRUCTION OF JUSTICE BY THE STATE, AND THIS IS THE MOST EGREGIOUS CASE OF POLICE AND PROSECUTORIAL MISCONDUCT THIS COURT EVER HAS SEEN, AND I'LL SAVE THE REST FOR REBUTTAL.

THANK YOU.

>> MAY IT PLEASE THE COURT, ASSISTANT ATTORNEY GENERAL STEVEN AKE ON BEHALF OF THE STATE OF FLORIDA IN THIS CASE.

>> CAN YOU JUST, ON THIS ISSUE OF WHETHER THE DEFENSE COUNSEL, DID SHE HAVE A STRATEGY NOT TO DO WELL IN THE PENALTY PHASE SO THAT --

>> NO, YOUR HONOR --

>> -- THIS COULD BE TAKEN OVER? WHAT DID SHE SAY?

>> THE TESTIMONY --

>> LET ME JUST FINISH MY QUESTION.

IT'S JUST GOING TO BE BETTER FOR -- WHAT DID SHE SAY IN THE EVIDENTIARY HEARING THAT COULD LEAD SOMEONE TO BELIEVE THAT THAT MIGHT HAVE BEEN HER STRATEGY?

>> MS. ORR WAS NONE TOO EAGER TO FALL ON HER SWORD AT THE EVIDENTIARY HEARING, YOUR HONOR, AND ADMIT HER INEFFECTIVENESS ALL OVER THE PLACE, AND THE TRIAL JUDGE PROPERLY DIDN'T

FACTOR THAT INTO HIS DECISION  
MAKING.

BUT SHE TESTIFIED WHEN SHE CAME  
ON TO THE CASE, SHE HIRED  
JEFFREY FISTER BECAUSE HE WAS  
QUALIFIED.

HE WAS GOING TO BE THE PENALTY  
PHASE ATTORNEY.

THE TESTIMONY WAS HE WAS, IN  
FACT, THE PENALTY PHASE  
ATTORNEY, HE HELPED PREPARE IT  
AND WAS GOING TO PRESENT  
EVIDENCE.

THEY HAD A DIFFERING OPINION AS  
TO WHAT EVIDENCE WAS GOING TO BE  
PRESENTED IN THIS CASE.

THE CLIENT, MR. SIMMONS, WAS THE  
DECIDING FACTOR ON WHAT EVIDENCE  
WAS PRESENTED.

JEFFREY -- MR. FISTER TESTIFIED  
THAT HE HAD THE SCHOOL RECORDS,  
HE HAD THE MENTAL HEALTH  
RECORDS, THEY HAD A  
NEUROPSYCHOLOGIST,  
DR. McMAHON, THAT THEY HAD  
RETAINED.

THEY HAD HER EVIDENCE.

THE DECISION WAS TO GO WITH A  
STRATEGY OF PRESENTING

MR. SIMMONS AS A GOOD GUY  
BECAUSE MR. SIMMONS AND HIS  
FAMILY DID NOT WANT TO PUT ON  
ANY BAD EVIDENCE BEFORE THE  
JURY, AND THAT WAS HIS  
TESTIMONY --

>> WAS IT A GOOD GUY EVIDENCE?  
A LOT OF TIMES WHEN THERE'S GOOD  
GUY EVIDENCE, IT ACTUALLY IS  
GOOD GUY EVIDENCE.

SO WHAT WAS THE --

>> WELL, THE SISTER --

>> WHAT WAS THE GOOD GUY  
EVIDENCE THAT THE JURY HEARD  
ABOUT THIS DEFENDANT?

>> THAT CAME FROM THE SISTER,  
YOUR HONOR, IT CAME FROM THE  
DEFENDANT'S SISTER THAT HE WAS A  
CHRISTIAN, A VERY LOVING PERSON,  
WHAT HAVE YOU.

HER TESTIMONY WENT TO THAT  
ASPECT OF IT.

AGAIN, THOUGH, MR. FISTER  
TESTIFIED THAT HE ATTEMPTED TO  
GET DETAILS FROM THE FAMILY AND  
FROM THE DEFENDANT, AND THEY

WEREN'T FORTHCOMING WITH THIS INFORMATION.  
THEY DID NOT WANT TO PRESENT IT. HE SPECIFICALLY SAID THEY DIDN'T WANT TO PRESENT ANY DIRTY LAUNDRY TO THE JURY, THEY DIDN'T WANT TO PRESENT ANYTHING THAT MADE MR. SIMMONS LOOK MENTALLY WEAK OR OF A LOW INTELLECT. THEY DID NOT WANT THE JURY HEARING THAT INFORMATION.  
>> ONE OF THE THINGS THAT STRUCK ME HERE IS THE PUBLIC DEFENDER, I BELIEVE, HAD THE CASE FIRST -->> ALMOST A YEAR.  
>> -- AND THEY TURN OVER THREE OR FOUR BOXES OF FILES OVER TO MS. ORR.  
AND ACCORDING TO HER TESTIMONY, SHE ONLY HAD ABOUT A MONTH TO PREPARE THIS CASE FOR TRIAL. AND SHE TURNED OVER THE PENALTY PHASE TO MR.-- WHAT'S THE OTHER LAWYER'S NAME?  
>> FISTER.  
>> MR. FISTER.  
SO SHE BASICALLY JUST CONCENTRATED ON THE GUILT SIDE OF IT.  
>> WHAT HAPPENED, YOUR HONOR, IS THE TRIAL WAS SCHEDULED FOR ABOUT A MONTH AFTER HER APPOINTMENT, BUT IT GOT CONTINUED FOR, I THINK, A SIX MONTH PERIOD OF TIME, SO SHE ACTUALLY DID HAVE MUCH MORE TIME.  
>> WHAT DID SHE DO IN THAT SIX MONTH PERIOD AS FAR AS THE PENALTY PHASE?  
>> AS FAR AS THE PENALTY PHASE, I DON'T BELIEVE SHE WAS DOING THAT MUCH INVESTIGATION AS MR. FISTER WAS PRIMARILY THE PENALTY PHASE ATTORNEY.  
>> AND WHAT DID HE DO IN THAT SIX MONTH PERIOD?  
>> WELL, THEY HAD THE FORENSIC ASSESSMENT FORM FROM THE PUBLIC DEFENDER'S OFFICE WHICH WAS THIS 40-PAGE FORM THAT HAD BEEN FILLED OUT, THEY HAD THAT INFORMATION.  
THEY HAD DR. McMAHON ONBOARD THAT HAD BEEN PREVIOUSLY

APPOINTED FROM THE PUBLIC  
DEFENDER, HAD RETAINED --

>> SO THEY MET WITH

DR. McMAHON?

>> EXCUSE ME?

>> THEY MET WITH DR. McMAHON?

>> YES.

AND THEY SPOKE WITH HER, AND SHE  
TOLD JANICE ORR SHE, BASICALLY,  
WASN'T GOING TO HAVE THAT MUCH  
HELPFUL INFORMATION TO TESTIFY.  
AGAIN, THEY MADE THAT DECISION  
TO PRESENT HER TESTIMONY AT THE  
SPENCER HEARING WHICH THEY DID.

>> MS. ORR TESTIFIED, THOUGH,  
THAT APPARENTLY MR. FISTER WAS  
INTENT PRETTY MUCH IN TRYING TO  
CONVINCE THE DEFENDANT IN THIS  
CASE, MR. SIMMONS, AND THE  
FAMILY TO HAVE HIM PLEAD GUILTY  
AND GET A LIFE SENTENCE.

AND THAT DIDN'T SIT WELL WITH  
THE FAMILY.

SO HE DIDN'T HAVE THAT  
CONNECTION.

SO, I MEAN, THE PICTURE I'M  
GETTING HERE FROM READING THIS  
RECORD IS THAT WE HAVE THIS ONE  
ATTORNEY BASICALLY THROWING  
EVERYTHING SHE'S GOT ON THE  
GUILT SIDE OF IT AND WAS SHOCKED  
WHEN IT WAS A GUILTY VERDICT.

THEN SHE'S TRUSTING THIS OTHER  
ATTORNEY TO DO THE PENALTY SIDE  
OF IT, AND HE'S, HE SEEMS TO BE  
CONCENTRATING BASICALLY MOSTLY  
ON TRYING TO GET THE GUY TO  
PLEA.

MEANWHILE, I MEAN, THERE WAS AN  
EVIDENTIARY HEARING WHERE ALL  
THESE DOCTORS SURFACED, SO, I  
MEAN, IT SEEMS LIKE HE DIDN'T DO  
THAT.

>> WELL, YOUR HONOR, I KIND OF  
CORRECT YOU ON SOME POINT.

JANICE ORR TESTIFIED THAT THE  
REASON FISTER DIDN'T HAVE A GOOD  
RELATIONSHIP WAS BECAUSE HE  
WANTED THIS PLEA.

HIS TESTIMONY WAS HE DIDN'T HAVE  
A GREAT RELATIONSHIP WITH THE  
FAMILY BECAUSE HE WANTED THEM TO  
CONSIDER IT.

HE WASN'T BENT ON GETTING THEM  
TO ENTER A PLEA, HE JUST WANTED

THE FAMILY TO CONSIDER IT.  
THEY DIDN'T WANT TO LISTEN TO  
THAT AT ALL, AND FROM THE OUTSET  
THAT SOURED HIS RELATIONSHIP  
WITH THE FAMILY.  
BUT HE STILL TALKED TO THEM.  
HE STILL TALKED TO THE FATHER  
AND THE SISTER AND THE MOTHER,  
BUT THEY DIDN'T WANT TO PRESENT  
ANYTHING.  
THAT'S THE KEY HERE IS THAT HE  
WROTE A MEMO TO HIS FILE.  
THE DEFENDANT DID NOT WANT TO  
PRESENT ANYTHING THAT WOULD MAKE  
HIM LOOK BAD TO THE JURY IN  
TERMS OF MENTAL HEALTH OR ANY  
PRIOR FAMILY UPBRINGING OR  
ANYTHING LIKE THAT.  
THEY ALSO HAD DR. McMAHON.  
SHE DIDN'T COME UP WITH ANYTHING  
REALLY EXCEPT THAT HE HAD A LOW  
INTELLIGENCE IN THIS CASE.  
AND EVEN IN THE POSTCONVICTION  
DR. DEE'S TESTIMONY IS NOT  
EXACTLY STELLAR.  
HE RELIES ON THE PET SCAN FOR  
HIS OPINION THAT THE STATUTORY  
MITIGATORS APPLY IN THIS CASE,  
BUT THE STATE INTRODUCED A  
REBUTTAL EXPERT ON THAT WHICH  
THE TRIAL COURT GAVE WEIGHT TO  
THAT, BASICALLY, REFUTED THE PET  
SCAN RESULTS AND SAID THAT HIS  
BRAIN WAS TOTALLY NORMAL.  
>> COULD YOU ADDRESS THE  
CONFESSION?  
>> WASN'T THAT BASED ON -- WAS  
ANOTHER PET SCAN DONE OR --  
>> NO, HIS INTERPRETATION OF  
DR. WOOD'S METHODOLOGY AND  
CONCLUSIONS, HE SAID, WERE  
BASICALLY WRONG.  
>> I THOUGHT A PET SCAN WAS MORE  
OBJECTIVE, THAT IT EITHER IS  
THERE OR IT'S NOT THERE?  
>> WELL, YOUR HONOR, WHAT HE  
SAID WAS -- HE USED A,  
BASICALLY, SAID A BLACK AND  
WHITE SCALE THAT SHOULD BE USED  
THAT SHOWS 256 DIFFERENT DEGREES  
OF BLACK AND WHITE AND THAT  
DR. WOOD USES A COLOR SCALE  
WHICH TENDS TO SKEW THE DATA  
AND, BASICALLY, HIS TAKE WAS  
IT'S REALLY NOT AS BAD AS

DR. WOOD'S MAKING IT OUT TO BE,  
AND IT'S ACTUALLY QUITE NORMAL.  
SO THEY HAD A DIFFERENCE ON  
METHODOLOGY ON THAT, AND  
THEY'RE, YOU KNOW, THEY'RE BOTH  
CONSIDERED EXPERTS ON IT, AND I  
THINK THE TRIAL JUDGE GAVE  
WEIGHT TO THE STATE'S EXPERT  
RATHER THAN DR. WOOD IN THIS  
CASE.

YOUR HONOR ASKED ME, I THINK, ON  
THE CONFESSION PART.

>> YEP.

>> THE FIRST ISSUE DEALS WITH  
TRIAL COUNSEL'S FAILURE TO ARGUE  
THAT THE STATEMENT SHOULD HAVE  
BEEN SUPPRESSED BASED ON ALLEGED  
COERCIVE CONDUCT.

FIRST AND FOREMOST, THE TRIAL  
JUDGE DENIED THIS BECAUSE  
THERE'S NEVER BEEN ANY EVIDENCE  
THAT SIMMONS MADE A  
QUOTE-UNQUOTE FALSE CONFESSION.  
AT THE VERY END OF THIS  
INTERROGATION AFTER HE WAS  
CONFRONTED, HE DENIED THE MURDER  
THROUGHOUT THE WHOLE FOUR HOUR  
INTERROGATION.

AT THE END WHEN THE OFFICERS  
TOOK A BREAK AND WENT DOWN TO  
THE SALLY PORT AND SAW THAT  
BLOOD HAD BEEN FOUND IN HIS CAR,  
THEY CONFRONT HIM WITH THAT  
INFORMATION, AND THEN HE MAKES  
THE STATEMENT, THE SINGLE  
STATEMENT, WELL, IF YOU FOUND  
BLOOD, I MUST HAVE DONE IT.  
THAT WAS THE ONE STATEMENT THEY  
WERE CONCERNED WITH IN THIS  
CASE, AND EVEN THEIR EXPERTS  
SAID HE DIDN'T KNOW IF THAT WAS  
A FALSE CONFESSION.

SO THE TRIAL JUDGE IN THIS CASE  
SAID, I LISTENED TO JANICE ORR,  
THE TRIAL ATTORNEY.

HER TAKE AFTER TALKING WITH  
SIMMONS WAS IT WAS NOT A  
CONFESSION, IT WAS A SARCASTIC  
COMMENT.

>> HAS SHE ACTUALLY VIEWED THE  
VIDEOTAPE --

>> OH, YES.

>> -- AND BASED ON HER VIEW SHE  
THOUGHT THE ONLY ISSUE WAS THAT  
HE WAS, SHOULDN'T HAVE BEEN



ARRESTED OR THAT WASN'T PROBABLE  
CAUSE TO ARREST HIM?

>> WELL, SHE DIDN'T GO INTO ANY  
DETAIL ON THAT, SHE SIMPLY  
TESTIFIED THAT BASED ON THOSE IT  
WAS HER THEORY IT WAS NOT A  
FALSE CONFESSION BUT, RATHER, A  
SARCASTIC COMMENT.

THEY NEVER CALLED THE DEFENDANT  
AT ANY TIME TO TESTIFY THAT, IN  
FACT, IT WAS A FALSE CONFESSION.  
SO HER STRATEGY WAS --

>> I GUESS MY QUESTION REALLY IS  
THAT MAY HAVE BEEN HER VIEW OF  
WHAT WAS SAID, BUT SHE CERTAINLY  
UNDERSTOOD THAT THE STATE WAS  
GOING TO USE IT AS AN ADMISSION,  
CORRECT?

>> WELL, THEY WERE GOING TO  
INTRODUCE THAT AND ARGUE THAT.

>> AND SO WOULDN'T IT SEEM  
LOGICAL THAT SHE WOULD LOOK AT  
THIS TAPE AND SAY WE ONLY GOT TO  
THIS POINT BECAUSE THE POLICE  
OFFICERS USE THESE, WHAT SOME  
MIGHT CONSIDER TO BE  
INTIMIDATING TACTICS IN ORDER TO  
GET EVEN TO THAT POINT.

SO, I MEAN, I'M JUST -- IT LOOKS  
A LITTLE STRANGE TO ME KNOWING  
THAT THE DEFENDANT, THAT THE  
STATE IS GOING TO USE THAT  
CONFESSION OR THAT STATEMENT AS  
A CONFESSION AND NOT EXPLORE THE  
POSSIBILITIES OF TRYING TO, UM,  
SUPPRESS IT BECAUSE OF HOW THEY  
GOT THE STATEMENT.

>> WELL, YOUR HONOR, SHE'S THE  
ONE THAT ACTUALLY INTRODUCED THE  
ENTIRE VIDEOTAPE.

SHE WANTED THE JURY TO SEE THE  
VIDEOTAPE OF HER CLIENT DENYING  
THIS FOR, YOU KNOW, TWO HOURS  
UNDER THIS INTERROGATION.

SHE WANTED TO ARGUE TO THE JURY  
THAT IT WAS A SARCASTIC COMMENT.  
I THINK THAT WAS HER STRATEGY,  
AND THAT'S WHAT THE TRIAL JUDGE  
FOUND IN THIS CASE IS SHE DID  
NOT HAVE A BASIS --

>> SHOWED THAT IT WAS COERCIVE  
ENVIRONMENT AND THE STATEMENT  
WAS ONLY THE PRODUCT OF  
COERCION, AND YOU WOULDN'T HAVE  
TO WORRY ABOUT ANY OF THAT

COMING IN.

>> WELL, YOU'D HAVE TO HAVE A BASIS TO DO THAT, AND YOUR BASIS WOULD HAVE TO BE YOU'D HAVE TO THINK THAT YOUR CLIENT MADE A FALSE CONFESSION THAT WAS A RESULT, OF COURSE, OF CONDUCT WHICH WAS NOT THE CASE.

>> WELL, IN A FIFTH AMENDMENT CLAIM YOU HAVE TO BELIEVE THAT IT IS, UM, THAT IT WAS COERCED. YOU DON'T HAVE TO BELIEVE THAT THE CLIENT IS NOT GUILTY OF THE CRIME.

AM I MISSING SOMETHING?

>> NO.

YOU HAVE TO BELIEVE THAT YOUR CLIENT MADE THE STATEMENT AS A RESULT OF COERCION --

>> RIGHT.

>> -- WHICH SHE NEVER BELIEVED HE DID.

>> WELL, BUT THE, BUT AS A LAWYER, LIKE, LET'S ASSUME THAT I BELIEVE THAT MY CLIENT IS GUILTY.

I THOUGHT THAT THE WAY THE SYSTEM WORKED IS THAT YOU DO WHATEVER AS A DEFENSE LAWYER, YOU DO EVERYTHING THAT IS ETHICALLY PERMITTED TO RAISE CLAIMS, I MEAN, UNFORTUNATELY, WE SEE A LOT OF LAWYERS THAT RAISE WAY TOO MANY CLAIMS, AND WE GO, PLEASE, COULD YOU, PLEASE, LIMIT IT TO THE GOOD CLAIMS?

I'M SORT OF AT A LOSS FOR UNDERSTANDING THAT IF YOU'RE GOING TO ATTACK AND SEEK TO SUPPRESS EVIDENCE WHY YOU WOULDN'T USE BOTH THE FOURTH AND THE FIFTH AMENDMENT IN PRESENTING IT TO THE TRIAL JUDGE AND THEN, ULTIMATELY, TO THIS COURT?

WELL, THAT ONE ISN'T AS STRONG AS MY FOURTH AMENDMENT, SO I'LL JUST, I'LL JUST PASS ON THE FIFTH AMENDMENT.

>> RIGHT.

SHE CERTAINLY COULD HAVE MADE THAT ARGUMENT, YOUR HONOR, AND THAT WAS THE WHOLE --

>> THE REASON BEING, IS HER

REASON WHAT YOU'RE SAYING HER  
REASONABLE STRATEGY WAS SHE  
ACTUALLY WANTED ALL OF THAT  
EVIDENCE TO COME IN?  
>> WELL, SHE DID MOVE TO  
SUPPRESS IT ON OTHER GROUNDS --  
>> SO SHE OBVIOUSLY DIDN'T WANT  
IT TO COME IN.  
>> MY -- OUR POSITION IS BASED  
ON HER TESTIMONY AND WHAT THE  
JUDGE FOUND SHE DID NOT HAVE  
BASIS TO THINK THAT THIS WAS A  
COERCED CONFESSION BECAUSE SHE  
DIDN'T BELIEVE THAT.  
SO SHE'S NOT GOING TO MOVE TO  
SUPPRESS IT --  
>> LET ME JUST READ TO YOU ONE  
PART OF THE TRANSCRIPT.  
THIS IS MR. PERDUE, THE OFFICER.  
"WE'RE FIXING TO DISSECT YOUR  
APARTMENT.  
WE'RE FIXING TO DISSECT YOUR  
PARENTS' HOUSE.  
WE'RE GOING TO DISSECT YOUR CAR.  
YOU'VE GOT YOUR OWN FRIEND  
CALLING HERE NOW TELLING US,  
TELLING ME THAT AT 9:00 SATURDAY  
NIGHT HE TALKED TO YOU ON YOUR  
OWN DAMN PHONE, AND SHE'S WITH  
YOU AT YOUR APARTMENT.  
YOU'RE LYING TO US.  
I'M GOING TO SEND YOU DOWN THE  
ROAD FOR FIRST-DEGREE MURDER,  
INAUDIBLE, LETHAL INJECTION."  
THE DEFENDANT: INAUDIBLE.  
MR. PERDUE: NOW, IS THAT WHAT  
YOU WANT?  
THE DEFENDANT: INAUDIBLE.  
MR. PERDUE: I DON'T WANT TO SEE  
YOU DIE.  
ENOUGH PEOPLE HAVE DIED.  
THE DEFENDANT: I AIN'T KILLED  
THAT LADY, MAN, I DON'T -- I  
MEAN, THAT'S JUST ONE, ONE PIECE  
OF IT."  
>> AND THAT'S THE ONLY ONE, YOUR  
HONOR, I WOULD SUBMIT PRETTY  
MUCH.  
THE, BY FAR THAT IS THE WORST  
STATEMENT IN THIS WHOLE  
INTERROGATION.  
IT COMES VERY EARLY ON INTO  
THE --  
>> WELL, MY POINT IS HOW COULD A  
REASONABLY COMPETENT DEFENSE

COUNSEL HAVE NOT SEEN THAT --  
HAVE NOT SEEN THAT AND ARGUED  
THAT IN THE MOTION TO SUPPRESS?  
>> WELL, AS THE JUDGE FOUND YOU  
STILL HAVE TO HAVE A CASUAL  
CONNECTION BETWEEN THE ALLEGED  
COERCIVE CONDUCT AND WHAT  
ACTUALLY IS THE STATEMENT.  
THIS HAPPENS AT THE VERY  
BEGINNING OF THE INTERVIEW.  
THIS IS WITHIN THE FIRST HALF  
HOUR OF THE INTERVIEW.  
THEY TURNED THEIR WHOLE APPROACH  
AROUND MIDWAY THROUGH THIS  
INTERVIEW.  
THEY WENT FROM THIS  
CONFRONTATIONAL APPROACH TO WHAT  
THEY CALLED A FATHERLY APPROACH,  
AND THAT WAS A FACTUAL BASIS  
THAT THE JUDGE SAID WAS REVEALED  
BY THE --  
>> YOU WOULD SAY, I MEAN, THIS  
IS, WE COULD DECIDE OR MAY  
DECIDE THAT SHE SHOULD HAVE  
RAISED IT AS A REASONABLY  
COMPETENT DEFENSE LAWYER BUT  
THAT A REASONABLE JUDGE AND THIS  
COURT WOULD NOT FIND IT TO BE A  
SUPPRESSIVE, SUPPRESSED UNDER  
THE FIFTH AMENDMENT, CORRECT?  
>> RIGHT.  
>> THAT WOULD BE THE SECOND  
PRONG.  
>> PRONG, RIGHT.  
>> THE THING THAT I FIND ABOUT  
THE COUNSEL, AND IT'S ALWAYS  
IMPORTANT TO ME TO SEE THE  
ENTIRE PERFORMANCE OF COUNSEL.  
AND I KNOW IN MANY CASES THE  
STATE LIKES TO TALK ABOUT THIS  
IS A, THE PUBLIC DEFENDER OF THE  
CIRCUIT, OR THEY TRIED 20 DEATH  
PENALTY CASES AND, YOU KNOW, IT  
SORT OF CAN -- WE SORT OF CAN  
TAKE SOME STOCK IN WHEN THEY  
MAKE DECISIONS THAT WE CAN HAVE  
SOME FAITH IN IT BECAUSE OF THAT  
BACKGROUND.  
>>> A REASONABLE JUDGE AND THIS  
COURT COULD NOT FIND IT TO BE A  
SUPPRESSED UNDER THE FIFTH  
AMENDMENT, CORRECT?  
>> RIGHT.  
>> THAT WOULD BE THE SECOND  
PRONG.

>> RIGHT.

>> THE I THINK THAT I FIND ABOUT THE COUNSEL, AND IT WAS ALL IMPORTANT TO ME TO SEE THE ENTIRE PERFORMANCE OF COUNSEL, AND I KNOW IN MANY CASES, STATE LIKES TO TALK ABOUT THIS WAS THE PUBLIC DEFENDER OF THE CIRCUIT OR THEY TRIED 20 THEFT PENALTY CASES AND, YOU KNOW, SORT OF CAN TAKE SOME STOCK IN WHEN THEY MAKE DECISIONS WE HAVE FAITH IN IT BECAUSE OF THAT BACKGROUND. WHAT I'M CONCERNED ABOUT IN THIS CASE IS WHETHER, YOU KNOW, THIS WAS SOMEBODY THAT WASN'T DEBT QUALIFIED, AND WE HAVE REASONS FOR DEATH QUALIFICATION FOR LAWYERS.

AND YET SHE DID THE ENTIRE, ESSENTIALLY DID THE ENTIRE TRIAL.

AND THAT THE RESULT, OBVIOUSLY, IT'S NOT JUST BECAUSE YOU GET A BAD RESULT.

BUT THE INTEGRITY OF THE PROCESS SEEMS TO ME TO BE, HAVE BEEN UNDERMINED.

SO IT MAY BE THAT IN THE GUILT PHASE IT DOESN'T INFECT THE GUILT PHASE.

BUT IN THE, YOU KNOW, THE PENALTY PHASE I THINK TO ME WE CONSIDER HER WHOLE PERFORMANCE. WHAT'S WRONG WITH FIRST OF ALL, DID YOU AGREE THAT WE CAN LOOK AT THE WAY THE WHOLE TRIAL WAS CONDUCTED?

I THINK YOU CAN.

I THINK THAT'S WHAT THE JUDGE EXPRESSED A PROBLEM WAS WITH. HE WAS IN THIS CATCH 22 EARLY POSITION.

HE INITIALLY DENIED A REPRESENTATION BECAUSE THEY HAD THE PUBLIC DEFENDERS OFFICE AND SHE QUALIFIED.

HE SAYS IF I WOULD HAVE STUCK WITH IT AND DENIED COUNSEL TO HAVE THE RIGHT CHOICE I WOULD HAVE BEEN REVERSED TO HAVE HIS RIGHT WITH COUNSEL.

WHEN HE BROUGHT MR. FISTER ONBOARD HE REALIZED THAT SHE WAS NOT QUALIFIED.

>> IT WAS THE DEFENDANT'S CHOICE.

>> DEFINITELY.

AND HE PROCEEDED TO LISTEN TO -- CLEAR FROM BOTH ORES IN HIS TESTIMONY THAT SHE WAS RUNNING THE SHOW WITH THE FAMILY AND WITH THE DEFENDANT.

>> WHEN --

IN TERMS OF THE CONFESSION, THERE WERE TWO PARTS, ONE YOU SAYS THE SARCASTIC. WHAT WAS DONE ABOUT THE PART THAT THEY HAD HAD CONSENSUAL SEX?

>> COUNSEL SAID THAT THE STATE WAS ARGUING THAT THAT PROVED IT WAS KIDNAPPING.

GIVEN A STATEMENT THAT HE HAD HAD SEX WITH HER TWO WEEKS PRIOR WAS FALSE.

WOULD HAVE SHOWN THAT HAD THE SEMEN EVIDENCE TESTIFIED THAT IT WOULD HAVE NOT LASTED FOR THAT LONG.

BASICALLY HE WAS LYING TO THE LAW ENFORCEMENT OFFICERS AND THAT WAS ARGUED TO THE JURY AS TO THAT.

THAT'S WHY THE STIPULATION WAS WORDED THE WAY IT WAS.

IT DIDN'T GO TO THAGE

PENETRATION BUT THE FACT THAT THE DEFENDANT WAS LYING TO THE OFFICER AS ABOUT WHEN HE HAD SEX WITH --

THE VICTIM.

AGAIN, COUNSEL TALKS ABOUT THE

NEIGHBORS I WANT TO BRIEFLY  
BRING THAT UP.  
AGAIN, HE'S MISSING THE FACT  
THAT THE DEFENDANT TOLD HIS  
ATTORNEYS, HE DID NOT HAVE SEX  
WITH THE VICTIM ON THAT DAY.  
AND YET HE'S TURNING AROUND AND  
SAYING COUNSEL WAS INEFFECTIVE  
FOR CALLING WITNESSES FOR LYING  
BECAUSE HE DID NOT HAVE SEX WITH  
HER THAT DAY.

>> WHAT DID THE EVIDENCE --  
I SUPPOSE WAS THE SEMEN WAS THE  
EXPERT ABLE TO SAY WHEN THE  
SEMEN WAS LIKELY DEPOSITED?

>> HE SAID IT WOULD HAVE NOT  
SHOWED UP FIVE OR SIX DAYS IN  
THE LEVELS THAT IT WAS.  
BASED ON WHEN HER BODY WAS  
FOUND.

HER BODY WAS FOUND I BELIEVE 24  
TO 48 HOURS AFTER THE MURDER.

SO --

>> IT WAS NO -- BUT I GUESS  
WHAT I'M GETTING TO IS THAT  
THERE WAS REALLY NO INDICATION  
THAT IT HAD TO HAVE BEEN DONE  
THAT THE INTERCOURSE HAD TO HAVE  
TAKEN PLACE AT OR NEAR THE TIME  
OF THE MURDER.

>> NO.

THERE WAS NO ARGUMENT REGARDING  
THAT.

AS FAR AS WHAT TOOK PLACE THERE.  
IT WAS A VIOLENT DEATH WITH ANAL  
ASPECT NOTHING REGARD TO THE  
SEXUAL INTERCOURSE.

I BELIEVE I'M EXHAUSTED ALL OF  
THE ISSUES.

IF THIS COURT HAS ANY FURTHER  
QUESTIONS OTHERWISE I WOULD  
RESIDE ON OUR BRIEFS AND ASK THE  
COURT TO AFFIRM, THANK YOU.

>> THE DEFENDANT WAS NOT ON  
TRIAL FOR LYING TO THE POLICE  
BUT ON TRIAL FOR SEXUAL ASSAULT,  
KIDNAPPING AND MURDER.

THE JURY INFERRED SINCE IT WAS  
FOUND INSIDE THIS WOMAN WITHOUT  
AN INNOCENT EXPLANATION THAT'S

WHY THEY CONVICTED HIM.  
HAD THE JURY HEARD THIS WAS  
CONSENSUAL TURNS INTO A  
DIFFERENT LIGHT.  
>> HOW WOULD THEY HAVE HEARD IT  
WAS CONSENSUAL SEX?  
HOW OLD THEY HAVE HEARD THAT?  
>> WE CALLED IN AN  
POSTCONVICTION CALMED DEBORAH  
AND EDWARD JOHNSON THEIR  
DEPOSITIONS WERE TAKEN  
PRE-TRIAL.  
COULD HAVE TESTIFIED THEY  
WEREN'T FRIENDLY WITH  
MR. SIMMONS.  
THEY CAME TO COURT AND THEY SAID  
WE HEARD LOUD CONSENSUAL SEX  
NEXT DOOR TO US ON THE DAY THAT  
SHE DISAPPEARED, KIDNAPPED AND  
MURDERED.  
AGAIN THIS PUTS IT INTO A  
COMPLETELY DIFFERENT LIGHT.  
AT ONE POINT --  
>> WAIT A MINUTE.  
DID THEY PUT ANY PERSON WITH  
THAT?  
THEY SIMPLY SAID THEY HEARD LOUD  
CONSENSUAL SEX.  
>> BETWEEN THEIR NEIGHBOR ERIC  
SIMMONS AND THE WOMAN KNOWN AS  
DEBORAH TRESLER.  
THE FACT FINDER WOULD HAVE HAD A  
REASONABLE DOUBT RESPECTING  
GUILT.  
>> I NEED TO GO BACK TO WHAT  
YOU JUST SAID.  
SO YOU HAD A -- YOU'RE SAYING  
THAT THERE WERE WITNESSES WHO  
COULD HAVE PUT MR. SIMMONS AND  
THE VICTIM AS HAVING SEX ON THE  
DAY OF THE MURDER?  
>> ABSOLUTELY.  
WHICH WOULD HAVE EXPLAINED.  
>> SO WHICH WOULD HAVE  
EXPLAINED --  
>> WOULD HAVE EXPLAINED THAT  
THEY WERE -- HAD A CONSENSUAL  
SEXUAL RELATIONSHIP TOGETHER AND  
RATHER THAN BEING COMPLETELY  
TIEING HIM TO A MURDER, THIS IS



EXCULLPRITORY EVIDENCE NO  
EVIDENCE FOR HIM TO KILL THIS  
WOMAN.

>> IT COULD BE TAKEN THAT WE'RE  
PUTTING HIM CLOSER TO HER ON THE  
SAME DAY AS A THE MURDER.

IF YOU HAVE A WITNESS WHO COMES  
IN AND SAYS, YEAH, THEY HAD  
CONSENSUAL SEX THAT DAY, SO, YOU  
KNOW, I THINK I'M SAYING IT  
LOOKS TO ME LIKE THOSE KINDS OF  
WITNESSES CAN GO BOTH WAYS.

>> THEY DID NOT ACTUALLY SEE  
THEM HAVING SEX.  
THEY HEARD TWO PEOPLE HAVING  
SEX, THAT RECOGNIZED HIM BUT DID  
NOT TESTIFY TO THE WOMAN  
ENGAGED.

THAT'S MY RECOLLECTION OF THE  
RECORD.

>> THEY KNOW THEIR NEIGHBOR TO  
BE ERIC SIMMONS AND LATER KNEW  
IF THE MURDER VICTIM DEBORAH TO  
BE THE WOMAN THEY SAW ERIC  
SIMMONS WALKING TO HIS APARTMENT  
WITH.

I WANTED TO --  
I HAVE A FEW SECONDS LEFT HERE.  
JANICE BELIEVED IN HIS  
INNOCENCE.

I BELIEVE IN HIS INNOCENCE IN  
NEVER THOUGHT ANYTHING THIS WAS  
A FALSE CONFESSION EXTRACTED BY  
LAW ENFORCEMENT.

MR. AKE WAS TALKING ABOUT HOW  
THIS FATHERLY APPROACH WOULD ACT  
TO CURE THE TAIN OF A COURSE  
CONFESSION.

IT ABSOLUTELY DOES NOT.  
THIS COURT ISSUED BREWER IN 1980  
AND SAID THAT EVEN PP COURT AND  
AN ADVISORY RIGHTS BY A JUDGE  
WILL NOT ACT TO CURE THE TAIN OF  
OF PRIOR COHEARSIVE  
INTERROGATION LIKE THEY WERE  
EMPLOYED IN THIS CASE.

THE LOWER COURT SAID THAT  
MR. SIMMONS WAS DISINGENUOUS  
BECAUSE HE RACED CLAIMS.

I WOULD SUBMIT IF THAT'S THE

CASE JUDGE JOHNSON SHOULD HAVE REACCUSED HIMSELF.  
MR. SIMMONS STARTED OUT NOT ON A LEVEL PLAYING FIELD HERE.  
>> WAS THERE AN EXPLANATION TO THE BLOOD IN HIS CAR?  
>> EXCUSE ME?  
>> AN EXPLANATION OF THE BLOOD IN HIS CAR?  
>> HE WORKS IN A LANDSCAPING BUSINESS WITH HIS FATHER AND TESTIMONY AT THE HEARING THAT THEY -- THAT THIS WOMAN, THE VICTIM, DAMAGED HERSELF ON SOME THORNY BUSHES AND SHE WAS ALWAYS IN HIS CAR TAKING HER ON RIDES AND SUCH.  
SO THERE'S A REASONABLE EXPLANATION FOR THE SEMEN IN THE VAGINA, REASON FOR MINOR BLOOD FOUND IN THE CAR.  
JUDGE JOHNSON SAID THERE WAS NO BLOOD IN THIS CAR.  
ONE SAID I CAN'T SEE BLOOD IN THE CAR.  
NOT LIKE WE HAVE A WHOLE LOT OF BLOOD.  
ANY MINUTE TRACES OF BLOOD ARE EXPLAINED BY THE THORNY BUSHES TESTIMONY WHICH SHOULD HAVE BEEN PRESENTED AT TILE AS WELL.  
AND --  
I WOULD JUST CLOSE WITH MR. SIMMONS NEVER EVER WAIVED HIS RIGHT TO EFFECTIVE COUNSEL. LOWER COUNTRY WAS WRONG TO DENY OUR 38 NOTION.  
THANK YOU.  
>> THANK YOU BOTH FOR YOUR ARGUMENTS.