>> MAY IT PLEASE THE COURT,
I'M CURTIS FRENCH,
REPRESENTING MICHAEL
HERNANDEZ JR.
>> THIS CASE ROSE OUT OF
HOME-INVASION ROBBERY ON
NOVEMBER 18, 2004, IN WHICH
MRS. RUTH EVERETT WAS KILLED.
THERE WERE TWO PEOPLE, TWO
DEFENDANTS INVOLVED.
MICHAEL HERNANDEZ JR. AND
CODEFENDANT SHAWN ARNOLD.
SHAWN ARNOLD WAS ALLOWED TO
PLEAD GUILTY IN EXCHANGE FOR
LIFE SENTENCE.
MICHAEL WAS NOT.
THE STATE PURSUED A DEATH
PENALTY SUCCESSFULLY AFFIRMED
ON APPEAL.
THIS APPEAL IS
POST-CONVICTION APPEAL FROM
THE POST-CONVICTION RELIEF.
THE PRIMARY ISSUE ON THIS
APPEAL IS THE INEFFECTIVENESS
OF TRIAL COUNSEL IN A NUMBER
OF WAYS.
IT'S OUR CONTENTION THAT THE
INVESTIGATION IN PREPARATION
WAS CONSTITUTIONAL
INADEQUATE, THAT THEY
CONDUCTED AN INADEQUATE
MINIMAL INVESTIGATION ON
MITIGATION, NO INVESTIGATION
WHATEVER OF AGGRAVATION AND
VIRTUALLY NO PREPARATION FOR
THE TESTIMONY OF ONE OF THE
STATE'S MAJOR WITNESSES,
TAMMY HARTMAN.
TAMMY HARTMAN IS A WITNESS
THAT THIS COURT RELIED ON
TESTIMONY TO UPHOLD THE HHC
AGGRAVATOR, AVOID ARREST
AGGRAVATOR AND TO FIND
MICHAEL HERNANDEZ MORE
CULPABLE THAN HIS
CODEFENDANT.
STOKES WAS THE ATTORNEY WHOSE
PRIMARY RESPONSIBILITY WAS
THE GUILT PHASE.
THERE WERE BASICALLY THREE

INSTANCES OF PRETRIAL
STATEMENTS BY TAMMY.
FIRST WAS A HANDWRITTEN
STATEMENT SHE GAVE THE DAY
AFTER THE MURDER.
FIVE DAYS LATER GAVE A SWORN
STATEMENT TO DETECTIVE JEFF
SCHUELER.
ABOUT EIGHT MONTHS LATER ON
AUGUST 31,2005, SHE WAS
DEPOSED BY THEN DEFENSE
COUNSEL RICHARD HILL --
>> LET ME ASK YOU THIS, CUT
RIGHT TO THIS.
WHAT IS IT THAT SHE SAID IN
ANY PREVIOUS STATEMENT THAT
WAS NOT BROUGHT OUT AT TRIAL
THAT YOU BELIEVE WOULD HAVE
MADE SOME DIFFERENCE IN THIS
CASE, AND THEREFORE, MAKING
COUNSEL'S PREPARATION FOR
CHALLENGING HER TESTIMONY
INADEQUATE?
>> PRIMARILY, AT TRIAL, TAMMY
IDENTIFIED MICHAEL HERNANDEZ
AS THE SOURCE OF A NUMBER OF
INCRIMINATING STATEMENTS.
IN HER PRETRIAL STATEMENTS
FOR THE MOST PART, SHE
IDENTIFIED SHAWN ARNOLD AS
THE PERSON HAVING MADE THOSE
STATEMENTS.
>> I THOUGHT HER TESTIMONY
REALLY WAS SHE DIDN'T REALLY
REMEMBER THAT IT COULD HAVE
BEEN SHAWN OR IT COULD HAVE
BEEN MICHAEL WHO ACTUALLY
MADE THE STATEMENTS.
>> FOR THE MOST PART, I THINK
AT TRIAL SHE IDENTIFIED --
WELL, FOR EXAMPLE, SHE SAYS
MICHAEL, THIS IS TRIAL
TRANSCRIPT 1227.
MICHAEL TOLD HER HE CHOKED
THE VICTIM WHEN HE ENTERED
THE HOME.
ALL PRIOR TESTIMONY
IDENTIFIED SHAWN AS THE
SOURCE.
>> THAT HE WHAT?

>> CHOKED MRS. EVERETT AS
SOON AS HE ENTERED THE HOME.
>> WHAT WAS MICHAEL'S
STATEMENT?
WE HAVE HIS STATEMENT ON THE
POLICE ON THIS ISSUE, TOO.
DIDN'T HE MAKE A STATEMENT
ABOUT CHOKING HER?
>> HE ENTERED THE HOME, HE
PUSHED HER BACK INTO THE
HOME.
I DON'T REMEMBER IF HE SAID
CHOKING OR NOT.
>> MR. FRENCH, ON THIS ISSUE
WE'RE DEALING WITH, SEEMS WE
HAVE A WITNESS THAT'S
FLOPPING WITH THE BREEZE.
I MEAN, SHE'S CHANGING
WHETHER SHE JUST DOESN'T
REMEMBER, OR FOR WHATEVER
REASON, IS THAT A FAIR
CHARACTERIZATION OF THIS
WITNESS?
ONE TIME SHE SAYS ONE THING,
NEXT TIME, I'M NOT SURE WHO
DID IT.
WE DON'T REALLY HAVE A FIRM
STATEMENT FROM HER ANYWHERE,
DO WE?
>> HER TRIAL TESTIMONY WAS
INCONSISTENT FOR SURE, THE
TOTALITY WAS MORE
INCONSISTENT.
>> THAT'S THE POINT I'M
GETTING TO.
WHEN A TRIAL LAWYER FACES A
WITNESS THAT IS ENGAGING IN
THIS TYPE OF TESTIMONY, HOW
CAN THAT LAWYER, IF THEY
DON'T REPRESENT THAT WITNESS,
PREPARE THAT WITNESS IN SOME
WAY?
I'M TRYING TO UNDERSTAND WHAT
THE LAWYER WAS SUPPOSED TO
HAVE DONE.
>> HE COULD AT LEAST READ THE
DEPOSITION.
AND THE THING IS MR. STOKES
WAS UNAWARE THERE WAS A
DEPOSITION UNTIL MIDWAY

THROUGH THE TRIAL.
WHEN RICHARD HILL GOT OUT OF
THE CASE --
>> SHE WAS CALLED AS A
WITNESS BY THE STATE HERE,
WASN'T SHE?
>> YES.
IT'S SIMPLY A MATTER OF
PREPARING.
>> THIS IS NOT SUFFICIENTLY
CROSS-EXAMINING, IS THAT THE
POINT?
>> THAT'S PART OF THE POINT.
THE INSUFFICIENCY OF THE
CROSS-EXAMINATION IS
PRIMARILY RELEVANT TO THE
FACT THAT IF THOSE STATEMENTS
CAME FROM SHAWN ARNOLD, IT
WAS INADMISSIBLE HEARSAY.
IF THE STATEMENTS WERE, IN
FACT, MADE BY SHAWN ARNOLD.
>> OKAY, SO HE DID NOT
OBJECT.
DID NOT PROPERLY OBJECT TO
HER TESTIMONY COMING IN WHEN
IT RELATED TO STATEMENTS OF
SHAWN ARNOLD.
>> CORRECT.
AND IT'S OUR POSITION THAT
MOST ALL THE STATEMENTS
SHOULD IN FACT HAVE BEEN
EXCLUDED.
IF YOU LOOK AT PRETRIAL
STATEMENTS, THEY
PREDOMINANTLY, SHE
PREDOMINANTLY IDENTIFIES
SHAWN ARNOLD AS THE SOURCE
FOR THE VARIOUS STATEMENTS.
>> WHERE IS THE SOURCE FOR
THAT WITHOUT WITNESSES?
WE CAN IMPEACH WITNESSES, AND
CROSS-EXAMINE THEM, POINT OUT
WHERE THEY'RE WRONG, I DON'T
THINK I'VE SEEN A CASE TRIAL
JUDGES HAVE THE AUTHORITY TO
SIMPLY EXCLUDE WITNESSES
WHOSE TESTIMONY IS
INCONSISTENT.
>> COULDN'T EXCLUDE HER
TOTALLY AS A WITNESS.

>> THAT'S WHAT YOU JUST SAID.
>> HEARSAY OBJECTION OR OBJECTION AS TO CONFRONTATION CLAUSE, THE BURDEN WOULD BE ON THE STATE TO ESTABLISH THE STATEMENTS INABILITY CAME FROM MICHAEL, IF THEY DID, THEY WOULD BE INADMISSIBLE. OR SHAWN ARNOLD.
IF THE STATE IS UNABLE TO DO, THAT THE TESTIMONY CAN'T COME IN.
>> I'M TRYING TO PARSE TOGETHER YOUR ARGUMENT, THAT'S ONE, HE DID NOT READ DEPOSITION.
YOU SAY THE RECORD SHOWS --
>> I'M NOT SURE HE READ THE STATEMENTS, WE KNOW HE DIDN'T READ THE DEPOSITION, HE ADMITTED HE HAD NOT SEEN THE DEPOSITION.
[INAUDIBLE]
>> TRIED TO DRAG HER OVER TO THE COUCH AND LAY HER DOWN AND SHE DROPS, AND I GO TO GRAB HER AND GRAB HER HEAD AND HER HEAD CRACK, AND I, I, HERNANDEZ, GOT THE KNIFE FROM HIM, ARNOLD, AND CUT HER NECK.
ASKED IF SHE WAS DEAD.
HE WENT ONTO SAY THEY CUT HER NECK BECAUSE HE SEEN HER FACE.
AT THE CORE OF WHAT THE WITNESS IS SAYING, AT THE CORE IS CONSISTENT WITH THAT.
YOU'RE TALKING ABOUT MINUTIA WHEN SHE CHANGES FROM DAY TO DAY.
THE BOTTOM LINE, THE CLIENT CONFESSED TO THAT.
THE JURY HEARD THAT.
>> DEFINITELY A PARTY TO THE CRIME.
WE DON'T DISPUTE HE CUT THE VICTIM'S NECK.
>> SO WHAT IS IT THAT YOU'RE SAYING THAT TAMMY SAID THAT

IS INCONSISTENT WITH THAT?
>> FOR ONE THING SHE
TESTIFIED THAT MICHAEL TOLD
HER HE DELIBERATELY BROKE HER
NECK BY TWISTING IT IN A
SPINNING MOTION.
WE PUT ON DR. RIDDICK WHO
TESTIFY IF YOU LOOK AT NATURE
OF THE BREAK ON THAT NECK, IT
DIDN'T HAPPEN THAT WAY.
BY THE WAY, DR. MINIARD WAS
THE MEDICAL EXAMINER WHO
TESTIFIED AT TRIAL.
SHE TESTIFIED BEFORE TAMMY.
THE WAY HER NECK WAS BROKEN,
IT WAS BROKEN ACROSS THE
FRONT, WHICH MEANT IT WAS
BROKEN BY SOMEBODY TAKING HER
HEAD AND FORCING IT BACK,
CONSISTENT WITH SOMEBODY LIKE
SHAWN ARNOLD TAKING A PILLOW,
COMING BEHIND HER TAKING A
PILLOW AND FORCING HER HEAD
BACK WITH A GREAT DEAL OF
FORCE.
SHE DID NOT ADDRESS ANY OTHER
POSSIBILITY.
SPECIFICALLY, DIDN'T HAVE THE
OPPORTUNITY TO ADDRESS
TAMMY'S TESTIMONY THAT
MICHAEL DELIBERATELY BROKE
HER NECK WITH A SPINNING OR
TWISTING MOTION.
AND DR. RIDDICK ALSO --
>> WHETHER IT WAS A BENDING
OR TWISTING, HE COULD HAVE
TOLD HER THAT.
WHETHER IT WAS OR WASN'T, HE
AGREES IN HIS OWN STATEMENT
THAT HE GRABBED HER AND HE
GRABBED HER BY THE NECK AND
HER NECK CRACKED.
NOW, IT JUST SEEMS TO ME, WE
HAVE HERE, IN HIS OWN WORDS
SOMETHING THAT REALLY
CORROBORATES BASICALLY WHAT
THE WITNESS SAYS.
WHILE IT MAY NOT BE EVERY
DETAIL THAT'S CORROBORATED,
THE ESSENCE OF THE CRIME IS

CORROBORATED BY HIS OWN
STATEMENT.
SO I AM HAVING A HARD TIME
TRYING TO FIGURE OUT WHERE
IT'S INEFFECTIVE ASSISTANCE
OF COUNSEL BECAUSE THE TRIAL
ATTORNEY DIDN'T GO THROUGH
EVERY STATEMENT THAT SHE MADE
AND POINT OUT ALL THE
INCONSISTENCIES IN THOSE
STATEMENTS.
>> THE INITIAL DEFICIENCY WAS
THAT HE DIDN'T PREPARE FOR
HER TESTIMONY.
BESIDE THAT, AS I RECALL
MICHAEL'S STATEMENT, HE
DROPPED HER WHILE TRYING TO
MOVE HER FROM THE CHAIR TO
THE COUCH AND HEARD HER NECK
CRACK OR HEAD CRACK.
>> I GRAB HER AND I GRAB HER
HEAD.
>> UH-HUH.
ALL RIGHT.
>> ALL RIGHT, AND ALSO THERE
IS THE POINT ABOUT THE KNIFE
IN THE NECK.
I CAN UNDERSTAND YOUR
ARGUMENT, PERHAPS THAT SHE
SHOULD HAVE BEEN IMPEACHED.
KNOWN MORE ABOUT WHETHER THE
NECK WAS BROKEN INTENTIONALLY
OR IN REACTION OR WHATEVER.
BUT HE STUCK THE KNIFE IN HER
NECK TO KILL HER.
>> I'D LIKE TO MOVE ONTO
AGGRAVATION.
THAT DID NOT OCCUR IN THIS CASE.
BASICALLY THE PRIOR AGGRAVATOR
WAS SUPPORTED BY
ABOUT THE STRANGULATION.
IN EFFECT, PROVING THE CRIME
THAT IT HAD BEEN UNABLE TO PROVE
AT THE ORIGINAL SENTENCING.
AT THE ORIGINAL -- AT TRIAL.
AND IT'S OUR POSITION THAT --
>> BUT WAS THERE TESTIMONY THAT
HE WAS CONVICTED OF ATTEMPTED
MURDER?
>> NO.

THE STATE DIDN'T SPECIFICALLY
CLAIM THAT, NO.
BUT THE EVIDENCE --
>> THE ONLY EVIDENCE WAS THE
JUDGMENT AT THE ATTEMPTED
FIRST-DEGREE MURDER.
>> I'M SORRY?
>> THE ONLY EVIDENCE PRESENTED
WAS THE JUDGMENT.
>> THE JUDGMENT AND THE
TESTIMONY OF DEPUTY BARTLEY THAT
HE OBSERVED MICHAEL STRANGLING
HIS CODEFENDANT.
>> WAS THAT HANDWRITTEN DOWN
SOMEWHERE?
>> TYPED IN.
>> TYPED IN.
SO YOUR POSITION IS THAT THAT
SHOULD HAVE BEEN AT LEAST
REDACTED.
>> AT THE VERY LEAST IT SHOULD
HAVE BEEN REDACTED.
IT'S NOT A VALID AGGRAVATING
CIRCUMSTANCE THAT HE HAD BEEN
CHARGED WITH A CRIME.
THE JUDGMENT IS SHOWN AT PAGE
998.
THE RECORD SAYS THE DEFENDANT
--
>> HOW DID THE TRIAL JUDGE DEAL
WITH THE PRIOR VIOLENT FELONIES
IN THE SENTENCING ORDER?
THAT WAS NOT MENTIONED, WAS IT?
>> THE TRIAL JUDGE DIDN'T SAY
THAT HE WAS GOING TO GIVE
ATTEMPTED PREMEDITATED MURDER.
OUR CONCERN IS WITH THE JURY AND
WHAT THE JURY -- HOW IT
IMPROPERLY AFFECTED THE JURY.
STATE POINTS OUT THAT THE ONLY
AGGRAVATOR WOULD HAVE BEEN
ESTABLISHED ANYWAY AND THAT'S
TRUE, BUT THERE'S A SERIOUS
DIFFERENCE BETWEEN BATTERY AND
ATTEMPTED FIRST-DEGREE
PREMEDITATED MURDER.
DEPUTY BARTLEY'S TESTIMONY ALSO
SHOULD NOT HAVE BEEN PRESENTED.
>> YOU'RE WELL INTO YOUR --
>> OKAY.

I'D LIKE TO RESERVE.
>> MAY IT PLEASE THE COURT,
ASSISTANT ATTORNEY GENERAL
CHARMAINE MILLSAPS FOR THE
STATE.
>> LET ME JUST ASK YOU A
QUESTION BEFORE YOU START.
WHY WOULD THE PROSECUTOR
INTRODUCE INTO EVIDENCE A
JUDGMENT, INCLUDING A CRIME FOR
WHICH THE DEFENDANT WAS NOT
CONVICTED OF?
WHY WAS THAT INCLUDED IN THAT
JUDGMENT?
WHY WAS THAT NOT REDACTED OR
SOME STEPS TAKEN -- WHY ARE WE
DEALING WITH THAT ISSUE I GUESS
IS MY POINT.
>> YOUR HONOR, OBVIOUSLY THAT
WOULD HAVE BEEN THE BETTER WAY
TO HANDLE IT, BUT LAWYERS THINK
THEY KNOW WHAT NO PROS MEANS.
TO A PROSECUTOR IT'S HE KNOWS HE
DIDN'T GET A CONVICTION FOR
THAT.
HE'S TELLING THE JURY WHAT HE
WAS CONVICTED OF WAS JUST
BATTERY ON A DETAINEE.
THE JURY IS TOLD THAT.
SO CAN'T JUST LOOK AT THE PIECE
OF PAPER.
YOU HAVE TO LOOK AT WHAT THE
PROSECUTOR SAID THE CONVICTION
WAS.
EVERYBODY, THE OPPOSING COUNSEL,
WHEN HE TESTIFIED.
EVERYBODY SAID THAT IT WAS CLEAR
TO THIS JURY THAT THE CONVICTION
WAS ONLY FOR BATTERY ON A
DETAINEE.
I VERY MUCH DISAGREE THAT WE'RE
NOT ALLOWED TO PRESENT THE
UNDERLYING FACTS OF DEPUTY
BARTLEY DESCRIBING THE INCIDENT,
INCLUDING THE STRANGLING.
EVEN IF YOU'RE ACQUITTED, WE
DON'T THEN CHANGE THE FACTS OF
THE UNDERLYING CRIME.
WE STILL TESTIFY TO THE FACTS OF
THE UNDERLYING CRIME.

YOUR HONOR, OBVIOUSLY IT WOULD HAVE BEEN BETTER IF THIS HAD BEEN REDACTED, BUT THE ARGUMENT REALLY DEPENDS ON THE JURY MAKING A WHOLE BUNCH OF STEPS, NOT ONLY A WHOLE BUNCHES OF LEAPS, FIRST, THAT HE WAS CONVICTED EVEN THOUGH HE SAYS NO PROS.
AND I AGREE WITH YOU.
MAYBE A COMMON PERSON WOULDN'T KNOW WHAT NO PROS IS.
BUT THEY'RE ALSO NOT SEEING GUILTY THERE.
AND THEY WOULD THINK TO THEMSELVES, WELL, WAIT A MINUTE, PROSECUTOR DIDN'T SAY THAT TO US.
PROSECUTOR KEPT SAYING BATTERY ON A DETAINEE.
SO I DON'T THINK THEY'RE GOING TO LOOK BEYOND THE PIECE OF PAPER AND DRAW ALL THESE INFERENCE UPON INFERENCE, WHICH IS CONTRARY TO WHAT THE PROSECUTOR IS TELLING THEM.
THE PROSECUTOR IS TELLING THEM IT'S A BATTERY ON A DETAINEE CONVICTION.
SO I DON'T THINK THERE'S ANY PREJUDICE BECAUSE OF THAT.
I DON'T THINK THE JURY WOULD GO THAT FAR IN DIRECT CONTRAST TO WHAT THE PROSECUTOR'S TELLING HIM.
THEY'RE GOING TO SAY IF HE WAS CONVICTED OF ATTEMPTED MURDER, THE PROSECUTOR WOULD HAVE TOLD US THAT.
>> BUT HE WAS ALSO CONVICTED OF BATTERY ON A LAW ENFORCEMENT OFFICER, WASN'T HE?
>> HE WAS, SO THE PREJUDICE IS REALLY ALL KINDS OF NO PREJUDICE.
THIS AGGRAVATOR WOULD EXIST BASED ON AN ENTIRE SEPARATE INCIDENT WHERE HERNANDEZ ATTACKED AN OFFICER WHO WAS TAKING HIM TO DR.LARSON'S

OFFICE AS PART OF AN ESCAPE
ATTEMPT.
SO THE BATTERY -- THE ENTIRE
OTHER -- THE PRIOR VIOLENT
FELONY IS REALLY SUPPORTED BY
TWO SEPARATE CRIMES AND THAT
CRIME REMAINS VALID REGARDLESS.
I WOULD ALSO LIKE TO TALK ABOUT
THE OTHER ONE, THE BATTERY ON --
THERE WAS PROBLEM WITH THE
PAPERWORK ON THAT ONE AS WELL.
THE VERDICT THERE, THERE ARE TWO
FORMS OF AGGRAVATED BATTERY,
AGGRAVATED BATTERY WITH A DEADLY
WEAPON AND AGGRAVATED BATTERY
WITH GREAT BODILY HARM.
THE JURY ACTUALLY CONVICTED THE
FIRST JURY OF THIS FORM, OKAY?
AND THE JUDGMENT REFLECTED THE
GREAT BODILY HARM.
IN OTHER WORDS, IT WAS THE
WRONG THEORY.
BUT AGGRAVATED BATTERY REALLY IS
AN ALTERNATIVE CONDUCT CRIME AND
EITHER ONE OF THOSE IS VALID.
SO THAT ONE I DON'T THINK IT
HURT AT ALL AND WASN'T EVEN A
DEFICIENT PERFORMANCE FOR NOT
FIXING THAT ONE BECAUSE THAT'S
REALLY JUST SIX OF ONE AND HALF
A DOZEN OF ANOTHER.
SO THAT ONE IS PERFECTLY VALID.
>> WHAT YOU'RE SAYING IS THE
INJURIES SUSTAINED BY THE DEPUTY
DID NOT AMOUNT OR WERE NOT
SUFFICIENT TO CONSTITUTE
AGGRAVATED BATTERY BY HARM.
HOWEVER, BEING HIT IN THE HEAD
WITH A TOILET SEAT OR A TOILET
SEAT LID, THAT'S A WEAPON.
>> AND THAT'S WHAT THE FIRST
JURY FOUND.
THEY LITERALLY FOUND AGGRAVATED
BATTERY WITH A DEADLY WEAPON.
AND UNDERSTAND IT WAS THAT THE
LID, THE REALLY HEAVY PART THAT
YOU LIFT THAT HE HIT HIM WITH.
AND THIS -- AND SO THERE'S NO
DOUBT THAT THAT WAS USED AS A
DEADLY WEAPON.

AND THE ONLY REASON THE DEPUTY JARVIS WASN'T REALLY HURT IS BECAUSE HE'S JUST THAT BIG A MAN.
SO THERE'S NO DOUBT THE JURY FOUND THAT THAT -- ONE OF THE ALTERNATIVE FORMS.
IN OTHER WORDS, WHAT I'M SAYING TO YOU, THAT WOULD STILL BE A CONVICTION FOR AGGRAVATED BATTERY.
AND IT REALLY IS SIX OF ONE AND HALF A DOZEN OF THE OTHER.
SO I DON'T THINK THAT ONE -- WE HAVE TWO DIFFERENT CONVICTIONS.
THE PAPERWORK PROBLEM IN ONE DIDN'T MATTER ONE BIT.
AND I DON'T THINK THE PAPERWORK PROBLEM IN THE OTHER ONE REALLY LED TO THE PROBLEM.
BUT, YOUR HONOR, I DO AGREE THAT IT IS MUCH BETTER TO JUST -- IN CASE JURIES DON'T KNOW WHAT NOLO IS, IT WOULD BE MUCH BETTER FOR THE PROSECUTOR TO REDACT, AND YOU MIGHT WANT TO SUGGEST THAT IN YOUR OPINION, THAT WHEN THERE IS A PRIOR CONVICTION AND IT'S AMBIGUOUS, THAT WE RECOMMEND THAT PROSECUTORS REDACT AND -- [INAUDIBLE]
>> AND THAT A SUFFICIENT EFFORT WAS NOT MADE TO PROPERLY CROSS-EXAMINE HER ABOUT THE NUMBER OF INCONSISTENCIES THAT SHE HAD IN THE MANY STATEMENTS THAT SHE GAVE.
>> I WOULD SAY THIS.
DEFENSE COUNSEL DIDN'T NEED TO DO THAT BECAUSE THE PROSECUTOR WAS DOING IT FOR HIM.
UNDERSTAND, SHE WAS IMPEACHED WITH HER PRIOR DEPO BY THE PROSECUTOR.
IT WAS JUST A GIVEN THAT HER STATEMENTS WERE INCONSISTENT.
THE JURY ALREADY KNEW THAT.
SHE WAS CONFUSED ABOUT MANY OF THE DETAILS.
BUT UNDERSTAND WHAT THE REAL

CLAIM I TAKE THIS TO BE, IS THAT
TAMMY HARTMAN, BECAUSE THE
CONVERSATIONS ALL HAPPENED
TOGETHER, SOMETIMES SHE COULD
NOT BE CLEAR WHO SAID WHAT.
SO THERE WAS AN OBJECTION BY
DEFENSE COUNSEL.
YOU CANNOT SAY COUNSEL WAS
DEFICIENT PERFORMANCE FOR NOT
OBJECTING.
AND REMEMBER WHAT YOUR REAL
OBJECTION IS.
IT'S A PROBLEM.
THAT WOULD BE WHAT DEFENSE
COUNSEL SHOULD -- WHEN HE
OBJECTS, HE WOULD OBJECT ON
BRUTON GROUNDS, THAT THE
CODEFENDANT IS NOT TESTIFYING,
SO HE NEED TO BE CLEAR ABOUT
WHAT STATEMENTS COME TO THE
WITNESS.
HE STOOD UP AND OBJECTED ON PAGE
-- I WANT TO GIVE YOU A CITE.
DEFENSE COUNSEL OBJECTED ON PAGE
1217 OF THE TRIAL TRANSCRIPT,
VOLUME 8, AND DEFENSE COUNSEL
DID OBJECT AND SAID I ONLY WANT
HER TESTIFYING AS TO WHAT HER
HERNANDEZ SAYS, NOT TO WHAT
ARNOLD SAID.
AND THEN THE PROSECUTOR HIMSELF
INSTRUCTS THE WITNESS DO NOT
TESTIFY AS TO WHAT ARNOLD SAID.
ONLY TESTIFY AS TO WHAT
HERNANDEZ SAID.
AND LATER IN THE WITNESS'S
TESTIMONY, HARTMAN'S TESTIMONY,
AT PAGE 1228 OF THE SAME VOLUME,
SHE SAYS THEY TOLD HER THE
VICTIM JUST WOULDN'T DIE.
SHE SAYS, OH, WAIT A MINUTE, I
SHOULDN'T SAY THAT BECAUSE I
CAN'T REMEMBER WHICH ONE TOLD
HER.
UNDERSTAND, IF YOU'RE DEFENSE
COUNSEL SITTING THERE, YOU THINK
NOT ONLY HAS THE PROSECUTOR
INSTRUCTED HIS OWN WITNESS NOT
TO TESTIFY AS TO ARNOLD'S
STATEMENTS, BUT WHEN SHE DOES,

SHE CATCHES -- LATER ON, SHE
CATCHES HERSELF.
IN OTHER WORDS, THERE'S -- HE
DOESN'T POINT TO A POINT IN THE
TRIAL TRANSCRIPT WHERE A REAL
BRUTON PROBLEM HAPPENED.
NOT ONLY HAS THE PROSECUTOR
INSTRUCTED THIS WITNESS DO NOT
TESTIFY AS TO ARNOLD'S
STATEMENTS, OKAY?
BASED ON DEFENSE COUNSEL'S
OBJECTION.
LATER ON WHEN SHE DOES IT, SHE
CATCHES HERSELF.
THERE'S NO WAY DEFENSE COUNSEL
WOULD HAVE SEEN -- AND I STILL
HAVEN'T SEEN WHERE REALLY --
BRUTON AND INCONSISTENCY ARE TWO
DIFFERENT THINGS.
LET'S SEPARATE THIS OUT.
THE BRUTON PROBLEM JUST DOESN'T
EXIST.
HE DID OBJECT.
THERE'S NOTHING IN THE TRIAL
TRANSCRIPT THAT REALLY SHOWS --
NOW, AT THE EVIDENTIARY HEARING
DOES SHE THEN COME BACK AND SAY
BUT AT THE TIME THERE IS NO
OBVIOUS BRUTON PROBLEM.
AND THE ONE TIME IT DOES OCCUR,
DEFENSE COUNSEL DOES OBJECT.
NOW, THAT'S BRUTON.
OVER HERE WE HAVE
INCONSISTENCIES.
WHAT --
>> LET ME JUST SWITCH GEARS FOR
A SECOND ABOUT ANOTHER ISSUE
THAT STRUCK MY INTEREST AND THAT
INVOLVES COUNSEL STOKES.
I BELIEVE MR. STOKES REPRESENTED
AND CONCENTRATED IN THE GUILT
SIDE OF THE REPRESENTATION IN
THIS CASE.
AM I CORRECT?
>> YES, YOU ARE.
ROLLO WAS PENALTY PHASE COUNSEL.
>> AND THE ISSUE WAS RAISED AT
THE POSTCONVICTION HEARING,
COUNSEL ATTEMPTED TO INTRODUCE
INTO EVIDENCE THE VARIOUS BAR

DISCIPLINE PROCEEDINGS AGAINST
MR. STOKES.
SIX OF THEM, TO BE SHORT.
OF THE SIX, ABOUT FOUR OF THEM
INVOLVED DEFICIENCY OR
DEFICIENCIES IN HIS
REPRESENTATIONS OF OTHER
CLIENTS.
WE ALSO MENTION MR. STOKES'
REPRESENTATION OR WE RAISED SOME
CONCERN ABOUT MR. STOKES'
REPRESENTATION IN COLEMAN VERSUS
STATE IN 2011.
THE JUDGE EXCLUDED THAT
TESTIMONY ABOUT MR. STOKES'
PRIOR REPRESENTATION ISSUES.
WHY WOULD SOMETHING LIKE THAT
NOT BE ADMITTED IN A
POSTCONVICTION PROCEEDING TO
SHOW A JUDGE OR A JURY THAT THIS
LAWYER HAS HAD ALL KINDS OF
ISSUES IN REPRESENTING OTHER
PEOPLE AND DIDN'T DO HIS WORK,
WAS DEFICIENT IN PREPARING FOR
TRIAL IN OTHER CASES.
WHY WOULD SOMETHING LIKE THAT
NOT BE ADMISSIBLE IN A
POSTCONVICTION PROCEEDING?
>> WELL, IN POSTCONVICTION THERE
IS NO JURY.
>> AT THE HEARING.
>> THE STATE'S POSITION IS THAT
UNDER THIS COURT'S CASE OF CRUZ,
THAT'S NOT RELEVANT, IT'S AT
ADMISSIBLE.
IT'S PROPENSITY EVIDENCE.
STRICKLAND DOESN'T WORK BY
PROPENSITY.
YOU'RE GOING TO GET INTO, UNDER
THIS COURT'S -- THE SAME PROBLEM
YOU WOULD HAVE IN CRUZ WITH
EXPERTS.
WHAT YOU'RE GOING TO GET INTO IS
INSTEAD OF FOCUSING ON
INEFFECTIVENESS IN THIS CASE AND
THIS TRIAL, WHICH IS WHAT
STRICKLAND REQUIRES, THIS
PARTICULAR TRIAL, YOU'RE GOING
TO GET INTO ENTIRE OTHER CASES
AND INEFFECTIVENESS THERE.

>> BUT HERE'S MY -- AND I
UNDERSTAND THAT, BUT JUST IN
TERMS OF HOW WE LOOK AT
DEFICIENT PERFORMANCE.
OVER AND OVER AGAIN WE WILL LOOK
AT TESTIMONY ABOUT THE AMOUNT OF
TIME SOMEBODY HAS BEEN DOING
CAPITAL REPRESENTATION AND THE
JUDGE WILL SAY THIS IS ONE OF
THE MOST EXPERIENCED CAPITAL
LAWYERS.
AND SO WE -- EVEN THOUGH IT IS
NOT -- THE QUESTION -- UNDER
THAT, THAT TESTIMONY SHOULDN'T
COME IN BECAUSE IT DOESN'T
MATTER IF THEY WERE --
REPRESENTED DEFENDANTS FOR 30
YEARS OR FIVE YEARS.
WHAT THEY DID IN THAT CASE.
BUT WE ALLOW THAT IN TO KIND OF
GET A PICTURE OF IT.
AND SINCE WE GIVE A STRONG
PRESUMPTION THAT COUNSEL'S
PERFORMANCE IS WITHIN
CONSTITUTIONALLY ADEQUATE
PARAMETERS, IT SEEMS TO ME THAT
THE BETTER ARGUMENT MIGHT BE
THAT YOU WOULD WEED OUT THOSE
COMPLAINTS THAT HAVE -- YOU
KNOW, THAT ARE REMOTE IN TIME OR
HAVE NOTHING TO DO WITH
PERFORMANCE IN A CAPITAL CASE.
BUT I'M SORT OF WONDERING WHY,
SINCE IT IS A JUDGE, NOT A JURY,
IT WOULDN'T AT LEAST COME IN TO
GIVE THE TOTAL PICTURE OF WHO
THIS PERSON WAS AT AROUND THE
TIME OF THE REPRESENTATION.
AND I DON'T SEE THE -- YOU KNOW,
IT'S RELEVANT TO THE EXTENT THAT
IT'S NOT REMOTE OR DOESN'T HAVE
TO DO WITH -- SAY THE PERSON
TOOK TRUST ACCOUNT MONEY.
THAT WOULDN'T BE RELEVANT
DIRECTLY TO THE PERFORMANCE AS
AN ATTORNEY.
BUT PERFORMANCE IN OTHER CASES
CLOSE IN TIME.
WHY ISN'T IT TO GIVE THE FULL
PICTURE, JUST LIKE WE DO WHERE

WE DO THE ANALYSIS THAT THIS IS
AN EXPERIENCED CAPITAL ATTORNEY?
>> AND, YOUR HONOR, I DO AGREE
PRIOR EXPERIENCE IS IMPORTANT TO
GET THE ENTIRE PICTURE.
BUT UNDERSTAND WE DON'T GO
THROUGH THE OTHER CASES.
I MEAN, WE DON'T ASK ONCE WE
FIND OUT -- LET'S SAY YOU'RE
DEALING WITH ALAN SHIPPERFIELD
AND WE MAY ASK HIM THE NUMBER OF
CAPITAL CASES AND THE OUTCOME,
BUT WE DON'T GO THROUGH EVERY
ONE OF THOSE CASES IN SOME
DETAIL.
WE DO NOT LITIGATE THE PRIOR
CASES WHEN WE TALK ABOUT
COUNSEL'S EXPERIENCE.
[INAUDIBLE]
>> AND USUALLY IN POSTCONVICTION
PROCEEDINGS WE HAVE TO DEAL WITH
THIS QUESTION OF STRATEGIC --
OR STRATEGY.
YOU KNOW, WHEN YOU'RE DEALING
WITH STRATEGY, IF I SEE THAT THE
LAWYER'S BEEN PRACTICING LAW AND
BEEN TRYING CAPITAL CASES FOR A
NUMBER OF YEARS, THAT HAS
SPECIAL MEANING.
SO WHY ARE WE ALLOWED TO
CONSIDER THAT, BUT YET ON THE
OTHER HAND WE'RE NOT PERMITTED
TO LOOK INTO THE FACT THAT A
LAWYER MAY HAVE BEEN FOUND BY
THE BAR TO HAVE BEEN DEFICIENT
IN A NUMBER OF CASES?
>> WELL, YOUR HONOR, THE
CONVERSE OF LOTS OF EXPERIENCE
IS VERY LITTLE EXPERIENCE, AND
YOU DO LOOK AT THAT.
SO THE CONVERSE IS NOT -- TO ME,
WE DO DO THE MIRROR.
WHEN YOU HAVE HIGHLY EXPERIENCED
COUNSEL YOU TAKE THAT INTO
CONSIDERATION.
WE DISCUSSED BIG PICTURE THAT HE
IS HIGHLY EXPERIENCED COUNSEL
AND THEY'RE ALLOWED TO INTRODUCE
THAT THIS -- THAT COUNSEL ON THE
OTHER HAND, SOME OTHER COUNSEL,

THIS WAS HIS FIRST CAPITAL CASE.
HOW MANY TIMES HAS THAT ARGUMENT
BEEN MADE TO YOU?
SO THE CONVERSE OF VERY
EXPERIENCED COUNSEL IS LITTLE
EXPERIENCED COUNSEL AND YOU DO
TAKE THAT INTO CONSIDERATION.
>> WHY ISN'T THAT AS FAR AS
EVALUATING WHETHER IT WAS A
REASONABLE STRATEGIC DECISION --
IF SOMEONE -- IF THEY GET ON THE
STAND AND THEY GO I DIDN'T CALL
DR.SO AND SO BECAUSE MY
EXPERIENCE IS THIS.
YOU KNOW, YOU'RE SAYING, WELL,
IMPEACHMENT ON A COLLATERAL