Matthew Marshall v. State of Florida

MR. CHIEF JUSTICE

NEXT CASE ON THE COURT'S CALENDAR IS MARSHALL VERSUS STATE. MS. DON HO. -- MS. DONOHO.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS MELISSA MINSK DONOHO, AND I WOULD LIKE TO DISCUSS TWO ISSUES FROM MY BRIEF. THE FIRST ISSUE IS THAT THE LOWER COURT ERRED, WHEN IT DENIED MR. MARSHALL A REHEARING ON THE JURY MISCONDUCT, AND SECONDLY I WOULD LIKE TO DISCUSS THE INEFFECTIVE ASSISTANCE OF COUNSEL THAT MR. MARSHALL SUFFERED DURING HIS PENALTY PHASE. FIRST OF ALL, THE LOWER COURT ERRED IN DENYING MR. MARCH -- MR. MARSHALL A HEARING ON JUDICIAL MISCONDUCT. AS THE COURT ALREADY KNOWS, SUMMARY DENIAL IS DE NOVO OR PRELIMINARY REVIEW.

I HAVE A QUESTION, IAM NT RE HOWTAS RAISED, BUTED AFFIDAVIT THAT YOU ATTACHED STATES THAT THE ATTORNEY LEARNED THIS INFORMATION RIGHT AFTER THE TRIAL. WHY ISN'T THIS A PROCEDURAL-BARRED CLAIM?

YOUR HONOR, THAT QUESTION CAN BE ANSWERED BY LIKING AT AKE V OKLAHOMA, AND I AM TRYING TO UNDERSTAND YOUR QUESTION, MEANING THAT BECAUSE IT WASN'T RAISED ON DIRECT APPEAL.

IF THIS IS A JUROR MISCONDUCT ISSUE THAT IS BEING RAISED WELL OVER A DECADE AFTER THE ORIGINAL TRIAL, AND THE ATTORNEY'S AFFIDAVIT ON ITS FACE SAYS THAT HE WAS CONTACTED --

IT WASN'T THE TRIAL ATTORNEY. IT WAS A THIRD, A DIFFERENT ATTORNEY. IT WAS A TOTALLY DIFFERENT ATTORNEY, AN ATTORNEY BY THE NAME OF RONALD B SMITH. THE ATTORNEY WHO REPRESENTED MATTHEW MARSHALL AT TRIAL WAS CLIFFORD BARNES, AND THE AFFIDAVIT THAT WE ATTACHED TO THE 3.850, WAS REPRESENTING A CLIENT OF HIS OWN, WAS HAVING A CONVERSATION WITH A FAMILY MEMBER OF THAT CLIENT, WHEN THAT FAMILY MEMBER DIVULGED THAT SHE HAD MISTRUST IN THE JURY SYSTEM, BECAUSE SHE HAD SERVED ON THE MARSHALL CASE, AND THEN SHE, THERE AFTER, DESCRIBED THE MISCONDUCT THAT SHE WITNESSED IN THE JURY ROOM.

AND THAT CONVERSATION OCCURRED RIGHT AFTER THE TRIAL IN THE MARSHALL CASE?

NO. WE DON'T KNOW EXACTLY WHEN.

THAT WOULD BE SOMETHING THAT, IF THERE WERE AN EVIDENTIARY HEARING --

EXACTLY.

YOU WOULD AGREE THAT IF IT HAD BEEN KNOWN WITHIN TWO YEARS, THEN IT WOULD BE PROCEDURALLY BARRED.

IF IT COULD HAVE BEEN KNOWN, BUT I AM NOT SURE WHEN THIS LAWYER WOULD HAVE HAD THE CONVERSATION. THE AFFIDAVIT, I THINK, WAS TAKEN IN 1996.

AND THIS, WE DON'T KNOW WHEN THE CONVERSATION TOOK PLACE FROM THE FOUR CORNERS OF THE AFFIDAVIT.

FROM THE FOUR CORNERS OF THE AFFIDAVIT, THAT'S CORRECT.

FROM THE FOUR CORNERS OF THE AFFIDAVIT, WE DON'T KNOW WHO THE PERSON TALKED TO.

THAT'S CORRECT. THE ATTORNEY CANNOT REMEMBER THE NAME OF THE CLIENT.

AND THE ISSUE IS WHETHER THERE SHOULD BE FURTHER INQUIRY OF THE JURY.

THAT'S CORRECT. ANOTHER ISSUE IS WHETHER THIS COURT SHOULD REVERSE FOR AN EVIDENTIARY DEVELOPMENT.

ON, BUT NOT UNDER STANDARDS OF WHETHER YOU HAVE A POSTCONVICTION EVIDENTIARY HEARING BUT WHETHER THE JURY SHOULD BE EXAMINED.

I THINK THAT IT SHOULD BE REVERSED, PURSUANT TO A POSTCONVICTION EVIDENTIARY HEARING, BECAUSE WE ALLEGED IN THE 3.850, THROUGH THE ATTACHMENT OF AFFIDAVITS THAT ARE SUFFICIENT TO WARRANT AN EVIDENCIARY HEARING, SO WHAT WE WOULD ASK IS THAT IT GO BACK FOR SOME EVIDENTIARY DEVELOPMENT AND THEN THAT BE PRESENTED BEFORE THE COURT, PURSUANT TO A 3.850 POSTCONVICTION EVIDENTIARY --

BUT THE RULE PROVIDES A VERY SPECIFIC PROCEDURE AS TO THE INQUIRY AS FAR AS JURIES ARE CONCERNED, CORRECT?

RIGHT, AND THAT PROCEDURE CAN BE UNDERTAKEN THROUGH THIS PROCESS, THROUGH THE NORMAL 3.850 PROCESS, THROUGH EVIDENTIARY HEARING AT THE TRIAL COURT.

WELL, BUT, THE EVIDENTIARY HEARING, WHAT I AM TRYING TO GET AN UNDERSTANDING OF, IS HOW THIS PROCEDURE, REALLY, WORKS IN THIS CONTEXT, WHERE WE HAVE GOT A JURY THAT WAS, BACK IN THE '80s, AND WHAT IS THE STANDARD BY WHICH WE ARE GOING TO HAVE THAT JURY FURTHER INVESTIGATED IN THE YEAR 2000 2? WHAT IS THE EVIDENTIARY HEARING GOING TO BE ABOUT?

IT IS GOING TO BE ABOUT THE EVIDENCE PRESENTED TO WHETHER OR NOT THE, WE CAN PROVE THAT THE ACTS OR, OF MISCONDUCT CONDUCTED BY THE JURORS, DID NOT IN PAIR IN THE -- IMPAIR IN THE VERDICT.

YOU WOULD CALL THE JURORS AS WITNESSES?

CORRECT. AND WE WOULD INQUIRE ABOUT THE MISCONDUCT THAT WAS ALLEGED IN MR. RONALD SMITH'S AFFIDAVIT AND THE AFFIDAVIT OF THE JURORS THAT WE, ALSO, ATTACHED TO THE 3.850, AND THEY ARE HORRENDOUS ALLEGATIONS.

YOU ARE GOING TO INQUIRE ABOUT WHAT THEY SAID AND DID, AS OPPOSED TO WHETHER OR NOT THIS WAS THE JUROR THAT CALLED THIS ATTORNEY?

WE CAN ASK ALL KINDS OF QUESTIONS THAT DON'T INHER IN THE VERDICT. OBJECTIVE ACTS, AND THIS COURT HAS BEEN VERY CLEAR AS TO WHAT ARE ACTS OF MISCONDUCT. RACIAL JOKES THAT ALLEGEDLY OCCURRED IN THIS CASE, LOOKING AT NEWSPAPERS THAT ALLEGEDLY OCCURRED IN THIS CASE. SPECIFICALLY A JUROR TOLD THE JURORS LET'S VOTE FOR MR. MARSHALL, SO HE CAN GO BACK AND KILL MORE BLACK JURORS, MORE BLACK INMATES. EXCUSE ME.

IF YOU HAD A PREREQUISITE FOR THIS TYPE OF HEARING THAT YOU ARE REFERRING TO, TO CALL

ALL OF THE JURORS BACK, WHAT WOULD YOU SAY THE MINIMUM CRITERIA WOULD BE?

IN OTHER WORDS WHAT WOULD THEY HAVE TO SAY FOR ME TO BRING THEM BACK? WE WOULD HAVE TO DO A PREEVIDENTIARY HEARING DISCOVERY PROCESS. I BELIEVE THAT WE WOULD HAVE TO GATHER THE EVIDENCE AND THEN PRESENT TO THE COURT. THIS IS THE EVIDENCE WE HAVE AND THIS IS WHAT WE WOULD LIKE TO SHOW YOU AT AN EVIDENTIARY HEARING.

BUT YOU COULD DO IT, I GATHER YOU ARE SAYING THAT YOU COULD DO IT OFF AN AFFIDAVIT, THAT SOMEBODY COULD PRESENT AN AFFIDAVIT AND SAY THAT THUS AND SUCH OCCURRED IN THE JURY ROOM, AND THAT WOULD BE SUFFICIENT TO, TEN YEARS LATER, CALL ALL THE JURORS BACK AND HAVE AN EVIDENTIARY HEARING ON THAT. IS THAT YOUR POSITION?

WE BELIEVE THAT THE CASE LAW IS SPECIFIC ABOUT WHAT HAS TO BE MET, IN ORDER TO GO BACK AND INTERVIEW THE JURORS, AND BASED ON THE ALLEGATIONS THAT WE PRESENTED, THAT STANDARD IN THE CASE LAW, WHICH SAYS THIS RISES TO ENOUGH TO QUESTION WHAT HAPPENED IN THAT JURY ROOM. THE AFFIDAVITS WE ATTACH RISES TO THAT LEVEL. WE ARE NOT TALKING ABOUT SUBJECTIVE IMPRESSIONS OF THE JURY, AS IN A CASE WHERE SOMEBODY DISCUSSES BAPTIST HOSPITAL, WHERE THEY DISCUSSED, WELL, WE FELT SORRY FOR THE CHILD, SO, YOU KNOW --

I REALIZE THE EX-DRINK SICK AND INTRINSIC -- THE EXTRINSIC AND THE IN TRINH SICK, BUT THE AFTERWARD -- AND THE INTRINSIC, BUT THE AFFIDAVIT IS --

IF THE LAWYER, HIMSELF, SAID THIS PERSON TOLD ME IN CONVERSATION THIS IS WHAT HAPPENED, WHICH IS WHY WE HAVE TO CALL THE JURORS.

WOULD THIS AFFIDAVIT BE ENOUGH? AGAIN, IN YOUR POSITION, IF THIS HAD HAPPENED WITHIN THE TIME PERIOD OF RIGHT AFTER THE TRIAL, WHERE A JUROR INTERVIEWS WOULD NORMALLY BE CONDUCTED, IS IT YOUR POSITION THAT THAT AFFIDAVIT, WHICH DOESN'T IDENTIFY THE JUROR BUT JUST SPEAKS IN THESE SPECIFIC TERMS WOULD BE ENOUGH FOR THE JUDGE TO HAVE BEEN COMPELLED TO GRANT JUROR INTERVIEWS?

I BELIEVE THAT IS ABSOLUTELY CORRECT, THAT THAT IS ENOUGH, AND, ALSO, THE AFFIDAVITS OF THE TWO JURORS THAT WERE INTERVIEWED IN 1996, AMOUNTS TO ENOUGH TO WHERE THE COURT SHOULD HAVE TAKEN --

BUT THOSE JURORS MENTION NOTHING ABOUT THESE OVER EARTH ACTS. NOW -- ABOUT THESE OVERT ACTS. NOW, THOSE JURORS DO SPEAK ABOUT ISSUES THAT ARE INHERENT IN THE VERDICT.

ACTUALLY, YOUR HONOR, I DO DISAGREE WITH THAT AND THIS IS WHY. THEY STATED, IN THEIR AFFIDAVITS, A THAT WE DIDN'T BELIEVE MR. MARSHALL WAS NECESSARILY GUILTY OF FIRST-DEGREE PREMEDITATED MURDER BUT THE JURY DECIDED WE ARE GOING TO MAKE A DEAL. IF WE ALL AGREE TO CONVICT HIM OF FIRST-DEGREE PREMEDITATED MURDER, THEN WE WILL ALL AGREE TO VOTE FOR AN UNANIMOUS LIFE RECOMMENDATION, AND AGAIN IN BAPTIST HOSPITAL THE CASE IS CLEAR. IF A JURY OUTWARDLY AGREES WITH EACH OTHER TO MAKE A DEAL TO DISREGARD THEIR OATH TO FOLLOW THE LAW, IT IS AN OVERT ACT, AND I BELIEVE THAT THAT, IN AND OF ITSELF, RISES TO A LEVEL TO SHOW THEIR DISREGARDING THE OATH AND DISREGARDING THE LAW, TO MAKE A DEAL TO JUST DECIDE FIRST-DEGREE MURDER, AND THEN YOU TAKE THE OTHER AFFIDAVIT ON TOP OF THAT, AND THE MISCONDUCT IS HORRENDOUS HORRENDOUS. REALLY THAT HAS BEEN ALLEGED.

WELL, YOU HAVE SORT OF SHIFTED, NOW, TO ANOTHER ISSUE. I WOULD LIKE YOU TO RETURN TO THE FIRST ISSUE, IN TERMS OF THE ENTITLEMENT TO AN EVIDENTIARY HEARING YET, BECAUSE I AM HAVING DIFFICULTY UNDERSTANDING WHETHER OR NOT YOU HAVE ACTUALLY STATED A CLAIM YET, BUT THEN PRESUMABLY THE WAY WE SET THESE THINGS UP IS THAT YOU STATE A

CLAIM, WHICH IF YOU CAN PROVE THAT CLAIM, IT IS GOING TO ENTITLE YOU, PRIMA FACIE, AT LEAST, TO SOME RELIEF, UNLESS THE CIRCUMSTANCES COME OUT AT THE HEARING AND THE JUDGE MAKES -- HERE, THOUGH, YOU HAVE ADVANCED A CLAIM, BASED ON AN AFFIDAVIT OF A LAWYER, WHO SAYS HE TALKS, THAT HE TALKED TO SOMEBODY THAT KNEW ONE OF HIS CLIENTS, AND HE DOESN'T KNOW WHO THAT PERSON WAS, AND PRESUMABLY YOU ALL THAT SECURED THE AFFIDAVIT FROM THE LAWYER, HAVE A LIST OF THE JURORS' NAMES.

CORRECT.

AND YOU WOULD HAVE THE INVESTIGATORY TOOLS, IN OTHER WORDS, TO PRESENT TO THAT LAWYER. WELL, HERE, IT WAS A WOMAN, IF I UNDERSTAND IT CORRECTLY. IS THAT CORRECT?

IT SEEMS TO BE. I AM MAKING THAT ASSUMPTION AS WELL.

DIDN'T THE LAWYER SAY IT WAS A FEMALE?

RIGHT. CORRECT. I AM SORRY.

SO THERE WERE A LIMITED NUMBER OF FEMALES ON THE JURY, BUT YET THE AFFIDAVIT DOESN'T GO ANY FURTHER THAN SAYING, WELL, I HAVE BEEN TOLD WHO THE FEMALE JURORS WERE, AND IF I CAN SAFELY RULE THIS ONE OUT OR SAY THAT THAT WAS ONE OF THEM, SO WE HAVE GOT SORT OF A HEARSAY SITUATION.

THAT'S CORRECT.

IT IS QUESTIONABLE WHETHER OR NOT THE STATEMENTS OF THE LAWYER WOULD BE ADMISSIBLE, OTHER THAN TO POSSIBLY IMPEACH AN IDENTIFIED PERSON AFTER THAT PERSON TESTIFIED TO SOMETHING, SO I AM HAVING A LITTLE DIFFICULTY SEEING THE SORT OF LEGAL CLAIM AND PRIMA FACIE CASE THAT IS MADE OUT, UP TO THIS POINT, WITH REFERENCE TO THAT CLAIM. AS OPPOSED TO THIS OTHER ISSUE THAT HAS BEEN ALLUDED TO IN THE QUESTIONS ABOUT ASKING THE COURT TO ALLOW THE FEMALE JURORS TO BE INTERVIEWED, PERHAPS, OR SOME OTHER INVESTIGATION THERE, SO THAT THIS LAWYER COULD IDENTIFY WHO THE PERSON WAS OR ATTEMPT TO THE PERSON WAS THAT HE TALKED TO. DO YOU SEE THE DIFFICULTY THAT I AM HAVING WITH YOUR --.

SORT OF. I THINK, FUNDAMENTALLY, INITIALLY, THE CLAIM IS A DENIAL OF HIS FUNDAMENTAL RIGHT, AND I THINK THAT IS CLEAR WHEN YOU DON'T HAVE A FAIR JURY, AND IT IS CONSTITUTIONAL RIGHT THAT YOU HAVE BEEN DENIED THE FUNDAMENTAL RIGHT TO A FAIR JURY. THE NEXT QUESTION WOULD BE TO SEE WHY THE QUESTION BEFORE THE COURT IS DID WE PRESENT ENOUGH TO GO BACK AND HAVE THIS EVIDENTIARY HEARING. I SEE WHAT YOU ARE SAYING, BUT THAT RAISES THE QUESTION THAT THIS NEEDS TO BE INVESTIGATED. ALL THE QUESTIONS THAT ARE BEING ASKED, THE QUESTIONS TO ME, WHAT THEY MEAN IS THAT THIS NEEDS EVIDENCIARY DEVELOPMENT. YOUR LAW FROM THIS COURT, FROM THE ELEVENTH CIRCUIT, FROM THE OTHER COURTS, IT HAS BEEN CLEAR. WE HAVE RAISED ENOUGH IN THE 3.850, THE ALLEGATIONS OF WHAT HAPPENED, THE ALLEGATIONS ARE HORRIBLE, AND WE SHOULD BE DENIED --

ARE THE ALLEGATIONS HORRIBLE?

THEY ARE.

IT LOOKED TO ME LIKE THE LAWYER'S AFFIDAVIT WAS SORT OF BARE BONED. TELL ME WHAT THE MOST HORRIBLE, QUOTE, PART OF THE LAWYER'S AFFIDAVIT IS.

I HAVE BROKEN DOWN THE AFFIDAVIT INTO THE FOUR SECTIONS THAT HE LISTS, AND FIRST OF

ALL, HE SWEARS THAT SOME JURORS DECIDED, BEFORE TRIAL WAS OVER, THAT MR. MARSHALL WAS GUILTY.

HE DOESN'T SWEAR TO THAT. HE SWEARS THAT SOMEBODY THAT HE DOESN'T KNOW WHO IT IS TOLD HIM THAT OVER THE PHONE.

GRANTED CORRECT. SECOND, SOME JURORS TOLD RACIAL JORX. THAT IS ONE OF THE WORST OVER EARTH ACTS OF JUROR MISCONDUCT THAT THIS COURT HAVE FOUND THAT CLEARLY HAVE BEEN CONSIDERED OVER EARTH ACTS OF MISCONDUCT, WHEN JURIES TELL RACIAL JOKES IN THE JURY ROOM.

DOES IT SAY ANYTHING LIKE THE DEFENDANT IS A MINORITY AND THEN THE JURY DISCUSSED THE DEFENDANT AND THEN TOLD JOKES ABOUT THE DEFENDANT OR HIS RACE.

AS I HAVE TOLD THE COURT IS EXACTLY WHAT IS IN HIS AFFIDAVIT. THE NEXT ONE, THOUGH, IS, I THINK, ONE OF THE MORE EGREGIOUS ONES, IS THAT SOME JURORS VOTED GUILTY AND A LIFE SENTENCE, SO THAT MR. MARSHALL WOULD GO BACK TO PRISON AND KILL MORE BLACK INMATES. AND FINALLY, SOME JURORS READ ARTICLES ABOUT THE TRIAL AND DISCUSSED THEM WITH EACH OTHER, BEFORE BEING ADMONISHED, AFTER BEING ADMONISHED NOT TO, AND IF THERE WERE ARTICLES ABOUT THE CASE, THEN IT CERTAINLY NEEDS TO BE LOOKED INTO. IF THERE ARE NO MORE QUESTIONS ABOUT THE JURY MISCONDUCT ISSUE, I WOULD LIKE TO MOVE ON TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, AND SINCE I DON'T HAVE TOO MUCH TIME, THE LOWER COURT ERRED IN DENYING MR. MARSHALL'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS. AGAIN, BECAUSE THERE WAS AN EVIDENTIARY HEARING ON THIS ISSUE, AND LET ME REMIND THE COURT THIS WAS A LIFE RECOMMENDATION WITH A JUDGE OVERRIDE, OF COURSE, IT IS, THE LAW IS SUBSECRETARY TO PLENARY REVIEW, WHILE GIVING DEFERENCE TO THE TRIAL COURT'S FACTUAL FINDINGS.

WHY ISN'T THE TESTIMONY -- THE LAWYER TESTIFIED, IS THAT CORRECT?

YES, HE DID.

TESTIFIED THAT HE HAD EXHAUSTIVE CONVERSATIONS WITH HIS CLIENT AND HIS CLIENT PROVIDED HIM WITH BACKGROUND INFORMATION, DENIED ANY ABUSE AS A CHILD, AND THEN EVENTUALLY THE LAWYER TALKED TO THE FATHER OF THE DEFENDANT, AND THE FATHER OF THE DEFENDANT, TOO, DENIED THAT HE WAS ABUSED AS A CHILD, AND THAT THE LAWYER WROTE LETTERS TO OTHER FAMILY MEMBERS AND GOT NO RESPONSES?

THE LAWYER WROTE ONE LETTER TO ONE OTHER FAMILY MEMBER BY THE NAME OF AUNT BARBARA, AND GOT NO RESPONSE FROM THAT LETTER.

BASED ON THE INTERVIEW WITH THE CLIENT AND THEN BASED ON THE INTERVIEW WITH THE FATHER, WHY WASN'T THAT SUFFICIENT DILIGENCE ON THE PART OF THE LAWYER?

OF COURSE.

THAT IS WHAT THE TRIAL COURT FOUND.

AND LET ME REMIND THE COURT THAT THE CREDIBILITY ORDER MAKES NO FINDINGS ON ANY OF THE WITNESSES. BASICALLY THE TRIAL COURT GOES OVER THE TESTIMONY AND THEN SAYS MR. BARNES WAS NOT DEFICIENT.

CLEARLY THE TRIAL COURT DID NOT FIND OR SEND THE CREDIBILITY OF THE LAWYER, IN ORDER TO COME TO THAT CONCLUSION.

IT IS INTERESTING TO READ THE LAWYER'S TESTIMONY, BECAUSE THE LAWYER IN MANY WAYS ADMITS THAT HE WAS DEFICIENT AND SAYS THAT HE HAD THE NAMESANT AGES OF ALL OF MR. MARSHALL'S BROTHERS. HE NEVER BOTHERED TO LOOK FOR THEM. HE DIDN'T DO A SIMPLE DEPARTMENT OF CORRECTIONS CHECK, TO SEE IF ANYBODY WAS INCARCERATED TO TALK TO THEM. HE DIDN'T HAVE AN INVESTIGATOR, IF YOU READ THE TESTIMONY OF THE LAWYER, HE SAID, HE WAS THE CHIEF ASSISTANT OF THE FOUR COUNTIES OF INDIAN RIVER, STEWART, THOSE COUNTIES UP THERE. HE SAYS IN HIS TESTIMONY IT WAS A MASH UNIT. HIS EXACT WORDS. THEY HAD NO FUNDS AND THEY HAD NO TIME, AND HE WAS RUNNING NUMEROUS CAPITAL CASES AT THE SAME TIME. MR. CHIEF JUSTICE

YOU ARE INTERESTING YOUR REBUTTAL TIME.

THANK, YOUR HONOR. MR. CHIEF JUSTICE

THANK YOU.

MAY IT PLEASE THE COURT. DEBORAH RESCIGNO, REPRESENTING THE STATE OF FLORIDA. I WOULD LIKE TO, FIRST, ADDRESS THE ISSUE, POINT ONE, AND PROVIDE THE COURT WITH A TIME LINE OF HOW THESE ALLEGATIONS AND AFFIDAVIT CAME TO LIGHT. THE TRIAL WAS HELD IN 1990, AND MR. SMITH, HIS ATTORNEY, DID NOT PROVIDE AN AFFIDAVIT UNTIL SIX YEARS LATER, IN JUNE OF 1996.

IS THERE ANY EXPLANATION IN THE RECORD AS TO THE CIRCUMSTANCES THAT THAT AFFIDAVIT CAME ABOUT OR HOW --

NO. ALL HE SAYS IS AFTER TRIAL, AND HE DOESN'T GIVE ANY DATE AS TO WHEN IT WAS THAT HE RECEIVED THIS TELEPHONE CALL FROM THIS WOMAN. AT THAT POINT, DEFENSE COUNSEL FILED A NOTICE OF INTENT TO INTERVIEW THE JURORS, AND THE STATE FILED AN OBJECTION TO THAT BUT DEFENSE COUNSEL WENT AHEAD AND INTERVIEWED FIVE JURORS WITHOUT HAVING A COURT HEARING AND WITHOUT PROVING, AS HE WOULD HAVE TO, PURSUANT TO A MOTION, HIS RIGHT TO CONDUCT THAT INTERVIEW, AND HE INTERVIEWED THE FIVE JURORS. THEY, THEN, HAD A HEARING, AND AT THE HEARING, HE WAS ASKED WHY HE WENT AHEAD AND DID THAT, AND DISCUSSION WAS HELD AS TO WHETHER THAT WAS AN ETHICAL VIOLATION. THE HEARING ENDED ABRUPTLY, AND DEFENSE COUNSEL NEVER TOLD THE JUDGE, WELL, THIS IS WHAT I GOT FROM THESE AFFIDAVITS, OR I NEED TO SPEAK TO THE REST OF THE JURORS FOR ANY OTHER REASON. THE MATTER JUST SORT OF DIED. AND NOW WE HAVE THREE YEARS LATER, WITH THE 3.850 BEING FILED, THE SAME ALLEGATION COMING UP, BUT THERE WAS NOTHING DONE IN THAT INTERIM TIME.

BETWEEN 1996?

RIGHT. BETWEEN 1996 AND 1999, WHEN THE 3.850 AMENDED ONE WAS FILED.

WHAT WAS THE PURPOSE OF THE HEARING? I THOUGHT THE PURPOSE OF THE HEARING IN 1996 WAS BECAUSE THERE WAS A CLAIM OFATHYICAL VIOLATION. WASN'T THAT THE PURPOSE OF THAT HEARING?

THE PURPOSE OF THAT HEARING WAS THAT AND, ALSO, FOR HIM TO PRESENT TO THE JUDGE, IF HE WANTED TO INTERVIEW ANY OF THE OTHER JURORS, AND FOR HIM TO MAKE THAT SHOWING, AS HE WOULD BE REQUIRED TO IN ORDER TO BE ENTITLED TO A JUROR INTERVIEW, BUT DURING THE HEARING, HE NEVER BROUGHT UP ANYTHING ABOUT THAT, AND HE NEVER, THEREAFTER, WENT AND FILED A MOTION SEEKING FURTHER JUROR INTERVIEWS.

WHY ISN'T THERE ENOUGH, THOUGH, IN THE AFFIDAVIT, TO REQUIRE SOME KIND OF AN EVIDENTIARY HEARING? THAT IS THAT NOW SOMEBODY HAS SWORN, UNDER OATH ON, THAT

THEY HAVE -- UNDER OATH THAT, THEY HAVE TALKED TO A PERSON WHO HAS IDENTIFIED THEMSELVES AS A JUROR IN THE CASE, AND THAT THE JUROR DESCRIBES SUBSTANTIAL MISCONDUCT ON THE PART OF THE JURORS, UNNAMED JURORS IN THE CASE, AND SO WHY ISN'T THAT ENOUGH TO REQUIRE THAT THERE BE A FACTUAL INVESTIGATION, NOW, TO SEE IF THERE IS ANYTHING TO THIS?

IT IS NOT ENOUGH. THE STATE'S POSITION IS THAT IT IS NOT ENOUGH, BECAUSE IT IS LEGALLY INSUFFICIENT FOR SEVERAL REASONS. FIRST OF ALL, BECAUSE HE WASN'T A JUROR, AND HE DOESN'T HAVE ANY FIRSTHAND KNOWLEDGE OF WHAT WENT ON. AS THE COURT HAS ALREADY NOTED, HE DIDN'T PRESENT THE NAME OF THE WOMAN WHO WAS THE JUROR THAT HE ALLEGEDLY SPOKE TO. HER NAME IS NOT IN THERE.

IF IT ALL TURNED OUT TO BE TRUE, THAT IS THAT IF THE LAWYER NOW SAYS NOW I REMEMBER, AND IT WAS MARY BROWN, AND MARY BROWN WAS THE CHAIRWOMAN OF THE JURY, AND SO NOW WE HAVE A NAME, AND IT IS A PERSON THAT WAS ON THE JURY, AND THAT SHE HAS IS HE THESE THINGS THAT -- HAS SAID THESE THING THAT IS THE LAWYER HAS PUT IN THE AFFIDAVIT. WOULDN'T THAT REQUIRE AN EVIDENTIARY HEARING?

WELL, I DON'T THINK SO HERE, BECAUSE INTERESTINGLY ENOUGH HERE, YOU HAVE TWO JUROR AFFIDAVIT THAT WERE,, ALSO, FILED, AND THEY DON'T CORROBORATE ANYTHING THAT THIS MAN HAD TO SAY.

AREN'T YOU SORT OF HAVING AN EVIDENTIARY HEARING, WITHOUT ONE BY LOOKING TO THE OTHER TWO AFFIDAVITS, NOW, THAT DON'T HAVE ANYTHING IN THEM ABOUT THE ALLEGATIONS THAT ARE IN THE LAWYER'S AFFIDAVIT, AND SO NOW WE ARE SORT OF TRYING TO EVALUATE THOSE IN THE MANNER THAT WE ORDINARILY WOULD EVALUATE, IF WE HAD SOME KIND OF A HEARING, AND NOW EVERYBODY HAS GOT IN EVERYTHING THEY HAVE GOT.

I DON'T THINK YOU ARE HAVING AN EVIDENTIARY HEARING WITH THAT. I THINK YOU HAVE TO, IN ORDER FOR HIM TO BE ENTITLED TO AN EVIDENTIARY HEARING, THEY HAVE TO PRESENT LEGALLY-SUFFICIENT AFFIDAVITS, AND ON THE FACE OF THIS LAWYER'S AFFIDAVIT, IT IS NOT SUFFICIENT.

THEY ARE NOT REQUIRED TO SUBMIT AFFIDAVITS, ARE THEY? THEY ARE JUST REQUIRED TO SUBMIT A PRIMA FACIE CLAIM. HERE, REALLY, THE AFFIDAVIT IS REALLY SOMETHING EXTRA, BECAUSE THERE IS REALLY NO REQUIREMENT THAT THEY SUBMIT --

NO. HERE IN SUPPORT OF THEIR CLAIM THEY HAVE ATTACHED THESE THREE AFFIDAVITS TO SUPPORT THEIR CLAIM THAT THEY ARE ENTITLED TO THIS EVIDENTIARY HEARING, BUT RELYING UPON THE ATTORNEY'S AFFIDAVIT, WHAT YOU HAVE IS YOU HAVE TWO JURORS WHO HAVE COME FORTH AND THEY HAVE FILED AFFIDAVITS THAT DO NOT SUPPORT AT ALL WHAT THE ATTORNEY HAS TO SAY, WHICH IS ALL HEARSAY IN HIS SO THE STATE'S POSITION IS THAT THAT SHOWS A LEGAL IN SUFFICIENCY OF HIS AFFIDAVIT, ALSO. HIS AFFIDAVIT IS INHERENTLY INSUFFICIENT, BECAUSE IT IS BASICALLY JUST HEARSAY, WHICH WOULD BE INADMISSIBLE AT AN EVIDENTIARY HEARING, AND THAT IS ALSO, ANOTHER STANDARD THAT THEY HAVE. THEY HAVE TO SHOW ADMISSIBLE EVIDENCE. SO --

IT SEEMS LIKE WE ARE MIXING TWO THINGS, WHICH IS WHAT WOULD NORMALLY BE ENOUGH FOR AN EVIDENCIARY HEARING UNDER A 3.850, BUT THIS TO ME IS, STILL, MORE LIKE A NEWLY-DISCOVERED EVIDENCE AS ERLTION, BECAUSE THIS DOESN'T -- ASSERTION, BECAUSE THIS DOESN'T COME IN AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. IF THIS AFFIDAVIT, IF THIS WAS SOMETHING THAT WAS PRESENTED TO THE TRIAL COURT, AS WOULD NORMALLY BE PRESENTED RIGHT AFTER THE JURY VERDICT BY A LAWYER, WOULD OUR CASE LAW AND THE RULES THAT GOVERN JAR INTERVIEWS, WOULDN'T THIS BE ENOUGH TO ALLOW FOR JUROR INTERVIEWS?

YES, IT WOULD.

OKAY. SO WHAT IS THE REASON THAT, WHERE DO WE DEVELOP THE LAW THAT THE STANDARD IS DIFFERENT, BECAUSE THIS OCCURS SIX YEARS AFTER THE VERDICT? DO WE NEED A HIGHER THRESHOLD BECAUSE OF THE FACT THAT IT IS A POSTCONVICTION ATTACK, AND WHERE IS THE LAW THAT GIVES US THAT DEMARCATION?

I THINK BECAUSE OF THE NATURE OF THIS AND THE PROCEDURAL POSTURE OF THIS BEING A POSTCONVICTION CASE, YOU ARE COMING IN, YOU KNOW, SIX YEARS LATER, AFTER THE FACT. NOW WE ARE UP TO A DECADE. YOU KNOW, TO HAVE AN EVIDENTIARY HEARING NOW, WE WOULD BE BRINGING BACK IN JURORS FROM TEN YEARS AGO, IF THEY COULD EVER EVEN BE FOUND TO COME IN FOR THIS EVIDENTIARY HEARING, AND I THINK THAT THIS SITUATION PRESENTS SOMETHING DIFFERENT. YOU KNOW, IF HE HAD FILED THAT AFFIDAVIT, LIKE YOU SAID JUSTICE PARIENTE RIGHT AFTER TRIAL, THAT WOULD BE A DIFFERENT SITUATION THEN. NOW YOU HAVE HIM COMING FORWARD, AND I THINK YOU CAN'T IGNORE THE TWO JUROR AFFIDAVIT THAT DON'T SUPPORT ANYTHING THAT HE HAS TO SAY, SO THEY ARE THE TWO JURORS WHO WERE THERE, AND THEY DON'T SAY THAT ANY RACIAL JORX WERE MADE OR -- ANY RACIAL JOKES WERE MADE OR THAT ANY RACIAL INFORMATION WAS CONSULTED, AND SO THAT LENT TO NOT BEING ABLE TO HAVE AN EVIDENTIARY HEARING.

AT THIS INITIAL HEARING IN 1996, IT WAS FOR THE PURPOSE OF ALLOWING OR DETERMINING WHETHER OR NOT THE ATTORNEYS SHOULD INTERVIEW THE JURORS. IS THAT CORRECT? OR WAS IT -- THERE WAS A MOTION MADE TO DO IT, AND THERE WAS AN OBJECTION TO THAT.

AN OBJECTION.

THE ATTORNEY FOR THE DEFENDANT WENT AHEAD AND INTERVIEWED THE JURORS. YOU HAD THE HEARING, AND YOU SAID IT AN AND BRUTELY STOPPED -- AND YOU SAID IT AND ABRUPTLY STOPPED.

THE JUDGE DENIED THE HEARING.

BUT HE DID NOT DENY NOR GRANT THE JUROR INTERVIEWS.

HE WAS NEVER ASKED. THAT THE HEARING SORT OF VEERED OFF INTO WHETHER THERE HAD BEEN AN ETHICAL VIOLATION, AND THEN HE WAS NEVER ASKED TO ACTUALLY CONDUCT A HEARING AS TO WHETHER THE DEFENSE COUNSEL SHOULD BE REQUIRED TO OR BE ALLOWED TO INTERVIEW THE JURORS.

IS THERE A RULE, UNDER THE RULES OF CRIMINAL PROCEDURE, WHERE THEY INTERVIEW A JUROR?

THERE IS A RULE, AND THERE IS A RULE UNDER THE RULES OF CIVIL PROCEDURE.

THERE IS A RULE UNDER THE RULES OF CIVIL PROCEDURE, BUT IS THERE A RULE UNDER THE RULES OF CRIMINAL PROCEDURE?

I AM NOT POSITIVE AT THIS TIME, YOUR HONOR. I BELIEVE AT THIS TIME THE RULES OF CIVIL PROCEDURE WAS FOLLOWED, AND THAT IS WHAT HE DID WHEN HE FILED HIS MOTION.

WHEN HE FILED HIS MOTION. ' FILED A NOTICE OF INTENT WITH REGARD TO THE JURORS, BUT WHEN THE STATE FILED ITS OBJECTION, BEFORE THEY COULD CALL IT UP FOR A HEARING, HE HAD ALREADY GONE OUT AND INTERVIEWED FIVE USERS JURORS.

WHAT HAPPENED -- INTERVIEWED FIVE JURORS.

WHAT HAPPENED -- YOU WERE TRYING TO TELL US THE SEQUENCE OF EVENTS, BUT THE JUDGE SENT THIS TO THE BAR AS AN ETHICAL VIOLATION FORM THE JUDGE RECUSED HIM -- AS AN ETHICAL VIOLATION. THE JUDGE RECUSED HIMSELF, AND AT THAT POINT WHAT HAPPENED TO THE ATTORNEY? DID THE ATTORNEY CONTINUE ON WITH THIS CASE, THE DEFENSE ATTORNEY WHO, IN FACT, HAD INTERVIEWED THE JURY, OR WAS THERE A DIFFERENT ATTORNEY APPOINTED TO THE CASE AT THAT POINT?

I CANNOT TELL YOU BUT WHAT I CAN TELL YOU IS THAT NO ATTORNEY SOUGHT TO INTERVIEW THE JURORS OR FILED A MOTION TO INTERVIEW THE JURORS OR DID ANYTHING IMPROPERLY, AND WHEN THEY HAD ATTACHED THESE AFFIDAVITS TO THE 3.850 MORX THE STATE MOVED TO STRIKE THEM BECAUSE THEY WERE IMPROPERLY GARNERED.

IF THIS WAS AN AFFIDAVIT OF THE JUROR WHO SAID THIS OCCURRED AND THAT WAS VERIFIED IN AN EVIDENTIARY HEARING, WOULD IT BE ENOUGH TO GRANT A NEW TRIAL?

IF A JUROR MADE AN AFFIDAVIT, AND AN EVIDENTIARY HEARING WAS HELD?

YES.

ON THE RACIAL SLURS AND THE NONRECORD INFORMATION?

CORRECT.

IF THE JUDGE FOUND THE TESTIMONY CREDIBLE.

SO THERE IS REALLY NO LIMIT, UNDER THE RUSE, TO, COULD A JUROR COME FORTH 20 YEARS AFTER THE FACT, BEFORE A DEATH WARRANT OR AFTER A DEATH WARRANT SIGNED, AND JUST SWEAR THAT THAT IS WHAT HAPPENED DURING JURY DELIBERATIONS, AND THAT WOULD BE ENOUGH TO STOP THE PROCESS AND GRANT A NEW TRIAL?

WELL, NO, I DON'T THINK THAT --

IT IS MORE AFTER FRIENDLY QUESTION. I AM JUST CONCERNED ABOUT THIS, THE POSTURE THAT THIS IS IN, AND YET THIS ALLEGATION IS VERY SERIOUS, AND SO HOW WE BALANCE THOSE, YOU KNOW, THE SANCTITY OF THE VERDICT, THE FINALITY, VERSUS A VERY TROUBLING ALLEGATION.

RIGHT. AND IT IS, AND IN BALANCING IT, AND THAT IS THE STATE'S POSITION IS THAT AT THIS TIME, A DECADE LATER, AND THIS COURT HAS ALWAYS BEEN RELUCTANT TO DELVE INTO THE JURY DELIBERATIONS ANYWAY, BUT AT THIS POINT IN TIME IT SEEMS VERY SUSPECT, TO BRING THEM BACK IN AT THIS POINT, FOR AN EVIDENTIARY HEARING.

DO WE HAVE ANY CASES WHERE THAT HAS BEEN DONE, WHERE THERE HAS BEEN A NEW TRIAL?

NOT THAT I AM AWARE OF.

I AM THINKING OF THE PORTER CASE, WHERE THERE WAS THE ISSUE OF THE JUDGE'S PARSIALITY, AND WE GRANTED WE LEAVE IN THAT CASE BUT I CAN'T THINK OF ANYTHING THAT OTHERWISE IS ANALOGOUS.

NOT THAT I AM AWARE OF, AND ACTUALLY THE STATE'S OTHER SPTION THAT THE DELIBERATIONS THAT WERE MADE WERE IN ERROR, BECAUSE IT WAS THE SUBJECT OF DELIBERATION, SO ACTUALLY ALL THREE AFFIDAVITS THAT WERE ATTACHED TO SUPPORT THIS CLAIM WERE THUS ONE, AND AN EVIDENTIARY --

YOU ARE NOT SAYING THAT THE RACIAL ALLEGATIONS INURE TO THE VERDICT.

THE RACIAL ALLEGATIONS AND THE NONCONSULTATION OF RECORD INFORMATION, WE ARE SAYING THAT IS ONLY CONTAINED IN THE ATTORNEY'S AFFIDAVIT, WHO HAS NO NEXT US TO THIS CASE. HE WAS NOT INVOLVED.

BUT THE JURY AFFIDAVITS DON'T ACTUALLY NEGATE OR SUPPORT IT, IS THAT CORRECT? THEY DON'T TALK ABOUT THAT PARTICULAR ASPECT OF IT AT ALL FORM.

THEY DON'T SAY IT WENT ON.

BUT THEY DON'T SAY IT DID NOT GO ON.

WE ASSUME THAT, HAD IT GONE ON, IT WOULD HAVE BEEN ASKED OF THEM, SINCE THEY HAD THE ATTORNEY'S AFFIDAVIT, WHICH IS WHAT PROMPTED THEM TO GO INTERVIEW THE JURORS, SO WE ARE ASSUMING THAT THEY WERE ASKED WHETHER THAT WENT ON. THAT IS NOT IN EITHER OF THEIR AFFIDAVITS. NEITHER OF THEIR AFFIDAVITS SUPPORT THE ALLEGATIONS THAT ARE MADE IN THE ATTORNEY'S AFFIDAVIT AFFIDAVIT. MR. CHIEF JUSTICE

DO YOU WANT TO RESPOND TO YOUR OPPONENT'S SECOND POINT?

YES. THERE IS COMPETENT SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S DECISION THAT A REASONABLE INVESTIGATION WAS CONDUCTED BY THE ATTORNEY INTO MITIGATION. HE TOOK AN EXTENSIVE LIFE HISTORY OF THE APPELLANT. THE APPELLANT DENIED ANY ABUSE TO HIS ATTORNEY. HE PRESENTED FAMILY LIFE THAT WAS SOLID AND STABLE AND DESCRIBED HIS PARENTS AS LOVING AND THAT THEY MOTIVATED HIM. HE ORDERED ALL OF HIS SCHOOL RECORDS, MEDICAL RECORDS, PRISON RECORDS, INCLUDING ANY MENTAL HEALTH RECORDS.

WHAT WAS HIS STRATEGY, THEN, FOR THE PENALTY PHASE, IF, YOU KNOW, HE WASN'T GOING TO HAVE HIS CLIENT TESTIFY, THE LAWYER --

IT WAS TO HUMANIZE.

THE LAWYER, WHAT DID HE DO, EVEN, TO SECURE -- THE FATHER, WAS HE PUTTING ALL HIS EGGS IN THE BASKET THAT THE FATHER WAS GOING TO TALK ABOUT WHAT A GREAT CHILDHOOD --

PROBLEM THE DEFENSE COUNSEL HAD IN THIS CASE IS THAT EVERYTHING THE APPELLANT TOLD HIM WAS CORROBORATED BY THE ONLY FAMILY MEMBER THAT HE SPOKE TO, WHICH WAS THE FATHER.

EXCEPT THAT HE HAD NOTICED THAT THE GRADES, HE GOT FAILING GRADES, THE FATHER TELLS HIM THAT DESPITE THIS FINE UP STANDING CHILDHOOD, THAT ALL THESE CHILDREN HAD, THAT ALL OF THEM WENT INTO LIVES OF CRIME, AND DOESN'T THAT SEND UP SOME SIGNAL THAT SOMETHING MAY HAVE BEEN GOING ON IN THIS FAMILY THAT A REASONABLE INVESTIGATION MIGHT HAVE REVEALED? I GUESS I AM TROUBLED BY THE FACT THAT THE REASONS HE SAYS HE DOESN'T SEND THE INVESTIGATOR INTO TO FIND THE FAMILY MEMBERS, THAT THAT SEEMS LIKE A TERRIBLE REASON TO SAY THAT, WELL, IT WAS A DANGEROUS AREA, SO I WASN'T GOING TO SEND MY FEMALE INVESTIGATOR INTO THAT.

THE AGAIN, THE STANDARD IS NOT WHAT HE COULD HAVE DONE BUT WHAT WAS REASONABLE AND BASED ON THE INFORMATION THAT HE HAD AT THAT TIME. HE WAS BOUND -- NOT BOUND BUT HE COULD ONLY RELY UPON WHAT HIS CLIENT TOLD HIM, SO HIS CLIENT DIDN'T TELL HIM ANYTHING TO GIVE HIM ANY LEADS TO EVEN GO TO LIBERTY CITY. I THINK THAT HE DESCRIBED IT AS BEING ON A FISHING EXPEDITION.

THIS ISN'T A CASE WHERE THE CLIENT SAYS DON'T DO THIS. RIGHT?

NO.

WE HAVE CASES WHERE THEY SAY, LISTEN, I DON'T WANT YOU TALKING TO ANY OF MY FAMILY MEMBERS. THAT DIDN'T HAPPEN IN THIS ONE.

NO. HE WAS ASKED WHO IS THE RELATIVE WHO KNOWS YOU BEST, WHO COULD PROVIDE ME ABOUT THE BEST INFORMATION. THAT WAS HIS AUNT BARBARA, AND HE GAVE HIM HER ADDRESS AND TELEPHONE NUMBER, AND THE DEFENSE COUNSEL WAS TRYING TO CONTACT HER TO NO AVAIL, AND THE DEFENSE COUNSEL THEN TALKED TO THE FATHER AND SAID I WORKED ALL MY LIFE AND TRIED TO RAISE MY SONS AS BEST I COULD. HE WAS LED INTO A LIFE OF CRIME CRIME BY HIS OLDER -- INTO A LIFE OF CRIME BY HIS OLDER BROTHER, BRINLEY, AND THAT HE WAS TOLD BY THE MOTHER THAT HE WOULDN'T HAVE TO ANSWER TO THEM. HE WASN'T TOLD THE WHEREABOUTS ABOUT THE BROTHERS, AND DEFENSE COUNSEL, HE DIDN'T HAVE A LEAD TO GO ON, AND THAT IS WHY HE DIDN'T SEND AN INVESTIGATOR TO LIBERTY CITY, BECAUSE HE DIDN'T KNOW WHERE HE WOULD START, AND HE DIDN'T HAVE ANYTHING THAT WOULD PROMPT HIM TO GO DOWN THERE.

THERE WAS A MENTAL HEALTH EXPERT CALLS INTO THIS CASE AS -- CALLED INTO THIS CASE AS WELL. WAS THERE ANY DISCLOSURE TO THE MENTAL HEALTH EXPERT OF ANY ABUSE?

THE MENTAL HEALTH EXPERT DID NOT TESTIFY. DR. CLASS WAS EMPLOYED, AND HE DIDN'T PUT HIM ON BECAUSE HE DIDN'T HAVE ANYTHING GOOD TO SAY FOR THE DEFENDANT E DENIED STATUTE -- HE DIDN'T DO A STATUTORY INVESTIGATION. THE DEFENDANT DENIED THAT HE SUFFERED ANY HEAD INJURIES OR HAD ANY ABUSE, AND THE BEST POSSIBILITY WAS A THOUGHT DISORDER POSSIBILITY OR PARANOID SCHIZOPHRENIA. DEFENSE COUNSEL TESTIFIED THAT THE POTENTIAL BENEFIT FROM PUTTING THAT ON WASN'T WORTH THE RISK OF WHAT WOULD HAVE HAPPENED ON CROSS-EXAMINATION, BECAUSE HE THOUGHT ON CROSS-EXAMINATION IT WOULD HAVE BEEN, OR THE DEFENSE COUNSEL WOULD HAVE BEEN IMPEACHED, BECAUSE HE ONLY SPENT AN HOUR WITH THE CLIENT, AND THAT WAS ONE OF THE REASONS THAT HE DIDN'T PUT HIM ON. HE, ALSO, DIDN'T WANT THE FACTS, THE HORRIBLE FACTS OF THE APPELLANT'S PRIOR CRIMES TO COME OUT, WHICH INCLUDED LITERALLY DRAGGING A 13-YEAR-OLD CHILD OFF THE STREETS OF MIAMI TO BE GANG RAPED, AND HE KNEW THAT THAT WOULD COME OUT ON CROSS-EXAMINATION, WHEN HE WAS ASKED ABOUT ANY BACKGROUND MATERIALS THAT HE HAD RELIED UPON, SO THAT WAS THE DEFENSE COUNSEL'S REASONS WHY HE DIDN'T PUT ON DR. GLASS.

ON THE ISSUE OF THE INEFFECTIVE ASSISTANCE OF THE FAILURE TO PUT ON MITIGATION, IF THERE WAS THE FIRST PRONG WERE MET, SINCE THIS IS A TETTER JURY OVERRIDE SITUATION, WOULD THE TESTIMONY CONCERNING THE CHILDHOOD ABUSE, BASED ON OUR PRIOR CASE LAW, BE ENOUGH TO HAVE SUSTAINED THE LIFE RECOMMENDATION?

I THINK IT WOULD HAVE BEEN ENOUGH TO SUSTAIN THE LIFE RECOMMENDATION, BECAUSE EVEN WITH THE MITIGATION TESTIMONY OF CHILD ABUSE, AGAIN, ON CROSS-EXAMINATION AT THE POSTCONVICTION HEARING --

SUSTAIN. THERE WOULD NOT HAVE BEEN ENOUGH TO SUSTAIN THE OVERRIDE?

I AM SORRY. NO.

WITH THE CHILDHOOD ABUSE.

RIGHT. IT WOULD HAVE BEEN, THE JUDGE'S OVERRIDE WOULD STILL HAVE BEEN PROPER. I AM SORRY. THE JUDGE'S OVERRIDE WOULD STILL HAVE BEEN PROPER. I AM SORRY. BECAUSE WITH

THE MITIGATION TESTIMONY ON CROSS-EXAMINATION OF HIS BROTHERS AT THE POSTCONVICTION HEARING, THEY WERE ABLE TO BRING OUT ALL OF THESE HORRIBLE FACTS ABOUT APPELLANT'S PAST CRIMES, SO THAT WOULD HAVE COME IN TO BE BALANCED AGAINST THE MITIGATION OF THE CHILD ABUSE, SO THAT WOULD NOT HAVE CHANGED THE BALANCE OF THE AGGRAVATING --

BUT WE WOULDN'T BE LOOKING AT WHETHER THERE WAS A REASONABLE LIKELIHOOD OF A DEATH RECOMMENDATION. WOULDN'T WE LOOK AT WHETHER, UNDER TETTER, THERE WOULD HAVE BEEN A BASIS FOR THE JURY HAD TO HAVE MADE A LIFE -- FOR THE JURY TO HAVE MADE A LIFE RECOMMENDATION.

I THINK THE JUDGE'S OVERRIDE, WHETHER THE RECOMMENDATION OF DEATH OVER THE JURY'S LIFE RECOMMENDATION, AND THE MITIGATION HERE OF THE CHILD ABUSE WOULD NOT HAVE CHANGED THAT FACT.

WHY WOULDN'T IT HAVE CHANGED THE FACT? BECAUSE HAVEN'T WE DEFINED THE REASONABLE JUROR CONCEPT IN THE CONTEXT THAT THERE IS ANY REASONABLE BASIS PRESENTED IN EVIDENCE, FOR INSTANCE, THE EVIDENCE OF MITIGATION FOR A JUROR TO HAVE MADE A LIFE RECOMMENDATION, THAT THEN THE LIFE RECOMMENDATION SHOULD BE SUSTAINED. ISN'T THAT THE WAY WE HAVE DEFINED IT, AND WOULDN'T THE EVIDENCE OF CHILD ABUSE, THEN, HAVE PROVIDED THAT REASONABLE BASIS FOR THE JURY TO DO WHAT THEY DID?

WELL, THE EVIDENCE OF THE MITIGATION, YOU WOULD STILL HAVE TO LOOK AT THE AGGRAVATING FACTORS THAT WERE HERE. THAT IS HOW THE JUDGE OVERRODE THAT, AND WE HAVE FOUR AGGRAVATING FACTORS HERE, UNDER --

I UNDERSTAND, BUT WE DON'T DO A BALANCING EVALUATION OF THE THING, DO WE? WE JUST LOOK TO SEE WHETHER THERE WAS SOME REASONABLEARTIC REASONABLEARTICABLE BASIS -- REASONABLE, ARTICULABLE BASIS FOR THE JURY TO MAKE ITS RECOMMENDATION.

BUT THAT WOULD HAVE WEAKENED THE MITIGATION THAT WAS PRESENTED, THE HORRIBLE FACTS, AND WOULDN'T HAVE SUPPORTED, BECAUSE THE JURY WOULDN'T JUST HEAR ABOUT THE CHILD ABUSE. THEY WOULD HAVE HEARD WHAT THE DEFENSE COUNSEL SOUGHT TO KEEP OUT, BECAUSE HIS STRATEGY WAS --

YOUR TIME IS UP. MS. DONOHO, IS IT CORRECT THAT HERE YOU ARE PROCEEDING UNDER THE RULES OF CIVIL PROCEDURE?

THAT'S CORRECT. IT WAS A NOTICE OF INTENT NOT A MOTION --

YOU WOULD AGREE THAT THERE IS NO RULE OF CRIMINAL PROCEDURE.

CORRECT. CRIMINAL PROCEDURE.

AND OTHER THAN THE RULE OF CIVIL PROCEDURE, THERE ISN'T ANY AUTHORITY FOR THE TRIAL JUDGE TO GO AND ORDER THERE TO BE AN INTERVIEW OF THE JURORS. IS THAT CORRECT?

THAT'S CORRECT. AND IN THIS CASE, THE JUROR, THE JUDGE, JUDGE FINLEY, IF YOU READ THE RECORD OF THAT, HE STORMED OFF THE BENCH. THERE WAS NO CHANCE FOR DISCUSSION. HE SAID REPORT THAT PERSON TO THE BAR. STORMED OFF THE BENCH. I RECUSE MYSELF, AND THAT WAS THE END OF THE HEARING, SO THERE WAS NO CHANCE TO DISCUSS ANYTHING.

BUT WHAT TROUBLES ME IS THAT I JUST WONDER WHAT AUTHORITY THE TRIAL JUDGE WOULD HAVE IN THIS CRIMINAL MATTER THAT MUCH LATER. I MEAN, IF YOU WERE PROCEEDING UNDER THE RULES OF CIVIL PROCEDURE, YOU WOULD HAVE TO DO IT WITHIN TEN DAYS OF THE

VERDICT, OR YOU WOULD HAVE TO SHOW GOOD CAUSE AS TO WHY IT COULDN'T HAVE BEEN DONE WITHIN THAT PERIOD OF TIME.

THERE IS A RULE THAT SAYS THAT YOU CAN FILE THE NOTICE OF INTENT TO INTERVIEW JURORS, IN MY UNDERSTANDING CAN BE DONE AT ANY POINT WHEN THERE IS A FUNDAMENTAL ISSUE. YOU CAN ACT -- YOU KNOW, YOU HAVE A FUNDAMENTAL ERROR HERE IN A CRIMINAL TRIAL, WHEN THERE ARE NO CRIMINAL RULES APPLY, THE CIVIL RULES APPLY. THE CIVIL RULES OF PROCEDURE APPLY, AND SO SINCE THERE ISN'T ANYTHING, YOU HAVE TO GO, FILING A NOTICE OF INTENT TO INTERVIEW JURORS, AND THERE IS SO MUCH THAT GOES ON BACK IN THAT CASE, BUT THAT LAWYER WAS UNDER INVESTIGATION WITH THE BAR FOR OVER SIX MONTHS, AND THE REASON WHY NOTHING HAPPENED WAS BECAUSE THE STATE USED THE SAME PROCEDURE IN ANOTHER CASE TO INTERVIEW JURORS, AND THE BAR SAYS, WELL, THE STATE DOES THIS. YOU DO THAT. IT HAPPENS. AND SO NOTHING HAPPENS. THE STATE CAN STAND HERE AND SAY THEY WERE WRONG. THEY DIDN'T NOTICES US AND THIS AND THAT, BUT THE REASON THAT LAWYER WAS, NOTHING WAS FOUND TO HAPPEN TO HIM WAS BECAUSE THE STATE USES THAT PROCEDURE, THEMSELVES, SO THAT IS HOW IT WENT. AS FAR AS THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM GOES YOUR HONORS, IT, IF YOU READ, IT IS SO IMPORTANT TO READ THE TESTIMONY OF THE LAWYER IN THIS CASE, WHO TESTIFIED AT THE EVIDENTIARY HEARING, AND THE INCREDIBLE ABUSE THAT MATTHEW MARSHALL SUFFERED AS A CHILD IS INCREDIBLE. THERE IS NO COUNSEL, I AM SORRY, WITH ALL DUE RESPECT IS WRONG ABOUT WHAT THIS COURT IS TO WEIGH. THERE IS NO AGGRAVATING, MITIGATING WEIGHING TO GO ON WITH A LIFE RECOMMENDATION. WHAT YOU DO IS TAKE THE STRICKLAND TEST AND PERFORMANCE OF WHETHER THERE WAS PREJUDICE. WITH REGARD TO PREJUDICE, YOU LOOK TO THE TETTER STANDARD, NOT WHETHER REASONABLE PEOPLE CAN DIFFER, NOT WHETHER REASONABLE PEOPLE CAN DIFFER FROM THE TRIAL JUDGE. THE TRIAL JUDGE --

HOW DO YOU CLAIM THAT THE LAWYER WAS INEFFECTIVE AND THE LAWYER WAS EFFECTIVE. HE GOT A LIFE RECOMMENDATION FROM THE JURY BY HIS STRATEGY.

I HAVE READ THAT IN MANY CASES, BUT HE NEEDED TO PRESENT THAT EVIDENCE TO THE JUDGE. YOU DON'T JUST STOP THERE. YOU PRESENT THE EVIDENCE TO THE JUDGE, IF THE JUDGE IS THE FINAL SENTENCE OR. SO HE GOT A LIFE RECOMMENDATION. HE SHOULD HAVE PRESENTED HIS EVIDENCE TO THE JUDGE, IF THAT WAS HIS STRATEGY. HE DIDN'T HAVE A STRATEGY. HE DIDN'T DO AN INVESTIGATION. AND THERE WAS PLENTY OF WAY TO SAY DO THAT. MR. CHIEF JUSTICE

THANK YOU. THANK YOU, KOUNTION HE WILL, FOR YOUR ASSISTANCE.