Anthony Neal Washington v. State of Florida

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS WASHINGTON VERSUS MOORE. MAY IT PLEASE THE COURT. I AM ROBERT LANDRY, AND I -- MAY IT PLEASE THE COURT. I REPRESENT THE APPELLANT, ANTHONY NEAL WASHINGTON HERE BEFORE THE COURT TODAY. I WOULD LIKE TO TIE IN ISSUE ONE THAT APPELLATE COUNSEL WAS INEFFECTIVE. IN FAILING TO RAISE THIS ISSUE, THE TRIAL COURT ERRED IN NOT CONDUCTING A FRYE HEARING PERTAINING TO DNA PROBABILITIES AND THEREBY ADMITTING DNA EVIDENCE OVER PETITIONER'S OBJECTION, IN VIOLATION OF PETITIONER'S FOURTH, FIFTH, SIXTH, 18th AND 14th AMENDMENTS TO THE CONSTITUTION. IF TIME PERMITS, I WOULD ALSO LIKE TO ARGUE ARGUMENT ONE IN REGARD TO COUNSEL'S FAILURE TO PRESENTING MITIGATING WITNESSES AT THE HEAING AND COUNSEL'S FAILING TO PRESENT DR. MARIN WITH ADEQUATE BACKGROUND WITH THE DEFENDANT'S BACKGROUND INFORMATION, THE EFFECT OF HIS DRUG USE AND THE EFFECT IT MAY HAVE HAD ON HIM AT THE TIME OF THE CRIME. YOUR HONORS, AT THE MOTION TO COMPEL HEARD ON FEBRUARY 25, 1992, THE TRIAL COUNSEL DETAILS PROBLEMS WITH THE DATA BASE. THAT IS IN THE RECORD 2764 THROUGH 2769. TRIAL COUNSEL SHOULD HAVE ASKED FOR A FRYE HEARING, LISTENING BEFORE THE TRIAL BEGAN, ON AUGUST 14, 1992. IN HIS MOTION TO COMPEL, TRIAL COUNSEL HAD INDICATED HE HAD EXPERTS WHO COULD HAVE DISPUTED THE VALIDITY OF THE FBI DATA BASE. ALSO COULD HAVE DISPUTED THE VALIDITY OF THE FBI PROTOCOL TESTING. HE HAD PROVIDED THE COURT WITH THE NATIONAL RESEARCH COUNSEL REPORT AND THE FBI PROTOCOL, YET HE FAILED TO PROCEED ON THIS ISSUE.

IS THIS A SPECIFIC ISSUE THAT YOU RAISED IN THE POSTCONVICTION MOTION BEFORE THE TRIAL COURT?

YES. YES.

HOW WAS IT ARTICULATED IN THE POSTCONVICION MOTION? IN OTHER WORDS INEFFECTIVENESS OF COUNSEL AND SPECIFICALLY TRIAL COUNSEL FAILED TO ASK FOR A FRYE HEARING?

YES, SIR.

IF HE ASKED FOR A FRYE HEARING, HE WOULD HAVE BEEN SUCCESSFUL. IN OTHER WORDS WHAT WERE THE ALLEGATIONS OF YOUR CLAIM IN THAT REGARD? JUST WHAT I SAID?

YES. JUSTICE ANSTEAD, WE WERE NOT GRANTED OR THEY WERE NOT GRANTED A HEARING ON THAT ISSUE.

AN EVIDENTIARY HEARING.

CORRECT, SIR.

OKAY. BUT THAT WAS ARTICULATED IN THE POSTCONVICTION MOTION PRETTY MUCH IN THE WAY THAT I JUST STATED IT?

YES, SIR.

OKAY.

NOW, YOUR HONORS, THERE WAS ABSOLUTELY NO TACTICAL ADVANTAGE BY LETTING THIS DNA

EVIDENCE IN TO THE DETRIMENT OF MR. WASHINGTON. FURTHERMORE, AGENT AAMS WAS NEVER QUALIFIED AS AN EXPERT IN STATISTICAL PROBABILITIES AND SHOULD NOT HAVE BEEN ALLEGED ALLOWED TO RENDER AN OPINION ON STATISTIC -- SHOULD NOT HAVE BEEN ALLOWED TO RENDER AN OPINION ON STATISTICAL PROBABILITIES. TRIAL COUNSEL LETTING THE AGENT RENDER OPINION ON DATA BASE CALCULATIONS, YOUR HONOR, ON JULY 14, 1992, A MOTION IN LIMINE WAS ARGUED. PARAGRAPH THREE OF THE MOTION IN LIMINE, THE POPULATION DATABASE IS SPECIFICALLY ADDRESSED. MR. WASHINGTON CONTENDS THAT, PURSUANT TO STEINHORSE, THIS ISSUE WAS FURTHER PRESERVED FOR APPELLATE REVIEW. STEINHORSE, YOUR HONOR, STANDS FOR THE PROPTION THAT, IN ORDER TO AN ARGUMENT TO BE AGO ZANDT ON APPEAL THERE, MUST BE A SPECIFIC ASSERTION ACCEPTED FOR THE MOTION BELOW. APPELLATE COUNSEL WAS ON NOTICE THT THIS WAS A VIABLE ISSUE WHICH SHOULD HAVE BEEN ADDRESSED ON APPEAL YET IT WAS NOT ADDRESSED ON APPEAL. IN CONSIDERING THE OPINIONS RENDERED BY THIS COURT IN BRIM, VARGAS AND HEYS, OTHER APPELLATE ATTORNEYS WERE ATTACKING AD -- AND HAZE, OTHER APPELLATE ATTORNEYS WERE ATTACKING -- AND HAYES, OTHER APPELLATE ATTORNEYS WERE ATTACKING ON THE DATA BASE ISSUE, EVEN AT THE TIME OF THE APPEAL.

IF YOU DON'T HAVE A BASIS IN THE RECORD IN THE FORM OF A FRYE HEARING, HOW CAN THAT POSSIBLY BE RAISED ON APPEAL AND CONSTITUTE REVERSIBLE ERROR, IF THERE IS NOTHING IN THE RECORD TO SUPPORT OR REFUTE THE ORDER?

THERE WAS ALLEGATIONS. ATTACKING THE FBI PROTOCOL AND AT ATTACK THE FBI -- AND ATTACKING THE FBI DATABASE IN THE MOTION IN LIMB HE. -KNOW LIMINE. THEY DON'T SAY "FRYE HEARING". THEY SAY MOTION IN LIMINE AND THIS IS WHY IT SHOULD BE HEARD. THE FBI TESTING METHODS WERE ADDRESSED IN THE MOTION IN LIMINE AND THEREBY PURSUANT TO APPEAL IN THE PROGENY MacDONALD AND STEINHORSE. YOUR HONORS, HAD THIS EVIDENCE BEEN SUBMISSIBLE, WE WOULD HAVE SUBMITED TO THIS COURT BECAUSE WHAT DID THEY HAVE? THEY INCONCLUSIVE HAIRS. THEY HAD TWO QUESTIONABLE ID'S. HE LOOKED LIKE THE MAN THAT SOLD HIM A WATCH TAKEN FROM THE VICTIM. ONE INDIVIDUAL WHO TESTIFIED, I BELIEVE IT WAS LAYCOCK, WHEN SHOWN A SUGGESTED PHOTOGRAPH AT THE, DURING THE INVESTIGATION, SAID, NO, NO, NO, THE GUY THAT SOLD ME THE WATCH WAS SHORT AND FAT. NOW, WASHINGTON WAS 5-9, 160 POUNDS. FURTHERMORE --

GO BACK FOR A MINUTE, THOUGH, BECAUSE I AM NOT CERTAIN THAT I UNDERSTAND THE ARGUMENT YOU ARE MAKING, WITH REFERENCE TO YOUR ANSWER TO JUSTICE PARIENTE'S QUESTION. THAT IS THAT YOU SAY THAT THERE WAS A SUFFICIENT RECORD ON THE MOTION IN LIMINE.

YES, SIR.

TO ALLOW APPELLATE COUNSEL TO MAKE A FRYE ARGUMENT ON APPEAL.

YES, SIR.

AND YET YOU SAID THAT THERE WAS NOT A FRYE HEARING BELOW, AND YOU ARE ATTACKING THE INEFFECTIVENESS OF TRIAL COUNSEL BY NOT ASKING FOR A FRYE HEARING AND HAVING A FRYE HEARING. YOU NEED TO HELP US THROUGH THAT BECAUSE ARE YOU CLAIMING, NOW, THAT THE HEARING ON THE MOTION IN LIMINE WAS INEFFECTIVEED --

THE DEFECTS AND THE EXPERTS THAT CHALLENGED THE DATA BASE AND THE PROTOCOLORADO WERE -- THE PROTOCOL WERE BROUGHT TO THE APARTMENT EVENINGS OF THAT COURT NOT THIS -- TO THE ATTENTION OF THAT COURT. NOT THIS COURT. THAT COURT. AND THEY WERE EFFECTIVELY ON NOTICE THAT THIS WAS SUFFICIENT TO APPELLATE REVIEW PURSUANT TO STEINHORSE. IN OUR BRIEF, THE POSSIBLE MITIGATION OF THE PENALTY PHASE, DR. MARIN WAS UNAWARE OF WASHINGTON'S DRUG HISTORY AND WAS UNABLE TO DO AN ADEQUATE

EVALUATION OF MR. WASHINGTON. AT THE NOVEMBER 18, 1999, EVIDENTIARY HEARING, DEFENDANT'S MOTHER WAS CALLED. SHE TESTIFIED THAT NO ONE ASKED HER ABOUT HER SON'S DRUG ATTICS AT THE -- ADDICTION AT THE PENALTY PHASE. FRIENDS AND NEIGHBORS OF MR. WASHINGTON, TWIT, PALACE WILLIAMS, ERIC BRYANT, REGINA BATISTE AND DEXTER WASHINGTON WERE CALLED BY CCRC AND THEY WERE NEVER CONTACTED BY TRIAL COUNSEL BUT THEY TESTIFIED THAT THEY WOULD HAVE APPEARED IF THEY WERE CALLED. THEY WOULD HAVE DETAILED WASHINGTON'S DRUG PROBLEMS WHICH BEGAN IN HIS EARLY TEENAGED YEARS AND CONTINUED EVEN AS HE WAS CONFINED AT THE LARGO WORK RELEASE CENTER AND AT THE PINELLAS COUNTY JAIL WAITING FOR TRIAL ON THIS CASE. NOW, THE CASE CITED IN THE BRIEF INDICATE THAT COUNSEL HAS A DUTY TO INVESTIGATE AND PREPARE AVAILABLE MITIGATING EVIDENCE. TRIAL COUNSEL WAS INEFFECTIVE. HE DID NO INVESTIGATION OMIT GAITING WITNESSES IN THIS CASE -- ON MITIGATING WITNESSES IN THIS CASE.

WHY COULD THAT HAVE NOT BEEN TRIAL TACTIC NOT TO PUT IN EVIDENCE RELATIVE TO HIS DRUG USE? THIS WAS GOING TO LEAD TO SOME VERY DAMAGING EVIDENCE IN REGARDS TO HIS PERSONAL HABITS OF STEALING TO SUPPORT HIS HABITS.

JUDGE, IT WOULD BE TRIAL TACTICS, IF COUNSEL KNEW ABOUT IT. HE DIDN'T DO ANY INVESTIGATION AS TO THE DEFENDANT'S DRUG USE. I WOULD SUBMIT TO THE COURT THAT AFTER HEARING IN THE PENALTY PHASE THAT WASHINGTON WAS CONVICTED OF A CIVIL ROBBERY AND WAS CONVICTED OF RAPE, THE EVIDENCE OF DEFENDANT'S DRUG USE WOULD GO TO EXPLAIN WASHINGTON'S ACTIONS AND MITIGATE THE CRIME.

ARE YOU SAYING COUNSEL DIDN'T KNOW OF HIS DRUG PROBLEMS?

ABSOLUTELY. COUNSEL DID NOT AND QUITE FRANKLY TESTIFIED AT THE EVIDENTIARY HEARING, THAT IT WAS HIS PRACTICE TO GO TO MIAMI OR TO GO AND DO HIS OWN INVESTIGATION. IN WASHINGTON'S CASE, HE DID NEITHER. HE DIDN'T SEND AN INVESTIGATOR. HE DIDN'T GO DOWN THERE. HE DIDN'T TALK TO ANYBODY ABOUT MR. WASHINGTON. NOW, JUDGE, THIS WAS AN OVERRIDE CASE. THIS IS A JURY OVERRIDE CASE. TRIAL COUNSEL DEVELOPED THIS MITIGATION AND PRESENTED THIS AT TRIAL OR AT THE SENTENCING HEARING. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CONDUCTOR THE PERFORMANCE OF HIS CONDUCT, AS REQUIRED BY LAW TO BE SUBSTANTIALLY IMPAIRED, WOULD HAVE BEEN FOUND BY JUDGE SPRAYING. ADDITIONAL, NONSTATUTORY --

HOW DO YOU RECOLLECT ONECILE, THE TRIAL -- HOW DO YOU RECOLLECTCILE, THE TRIAL JUDGE, IF I UNDERSTAND IT COLLECTLY, THE TRIAL JUDGE FOUND THAT TRIAL COUNSEL DID AN EFFECTIVE JOB OF PRESENTING MITIGATION. IS THAT CORRECT? I AM TRYING TO ASK THAT, REALLY AS A PREDICATE, AS MUCH AS ANYTHING ELSE. THEN THE TRIAL JUDGE, ON THE PREJUDICE SIDE, SAID THAT THE EVIDENCE OF THE DRUG USE AND AS A SELLER OF DRUGS, WAS A TWO-EDGED SWORD. THAT IS THAT THERE WAS A LOT OF NEGLIGENT TO BE BROUGHT OUT -- A LOT OF NEGATIVE TO BE BROUGHT OUT AT THE SAME TIME THAT THERE MIGHT BE SOME MITIGATION HERE. IS THAT CORRECT?

JUDGE, LET ME ADDRESS THIS.

I AM TRYING TO ADDRESS THE TRIAL JUDGE'S BASIS. THERE WAS AN EVIDENTIARY HEARING ON THIS ISSUE. IS THAT RIGHT?

YES, SIR.

WHAT DID THE TRIAL LAWYER SAYS PHI TO, AS FAR AS WAS IT A MALE? AS FAR AS HIS INVESTIGATION FOR MITIGATION PURPOSES?

HE DID NO MITIGATING INVESTIGATION IN REGARD TO HIS DRUG USE.

WHAT DID HE TESTIFY TO THAT HE DID, IN TERMS OF MITIGATION, INVESTIGATION, AND THEN PRESENTATION OF MITIGATION? IN OTHER WORDS WHAT DID HE SAY HE DID HERE? HE DID TESTIFY, DID HE NOT?

HE DID.

YOU ARE FOCUSING ON THE DRUG USE, AND I APPRECIATE THAT.

YES.

THAT THAT IS, BUT WHAT DID HE SAY HE DID? THAT HE WAS AN EXPERIENCEED CAPITAL DEFENSE LAWYER. IS THAT CORRECT?

YES, YOUR HONOR.

WHAT WAS HIS EXPLANATION THAT HE DID IN THIS CASE?

HE HAD NO EXPLANATION FOR NOT INVESTIGATING THE DRUG MITIGATION WITNESS.

THAT IS NOT MY QUESTION, SIR. IF YOU COULD TELL US WHAT HIS TESTIMONY WAS. IN OTHER WORDS, DID HE SAY I GOT THE CASE, AND I WAS THE ONE RESPONSIBLE FOR DEVELOPING MITIGATION, BUT I DIDN'T DO ANYTHING. DID HE TESTIFY HERE IS WHAT I DID, OR WHAT DID HE TESTIFY TO?

HE TESTIFIED IT WAS HIS USUAL PRACTICE TO DO HIS OWN INVESTIGATION AND INTERVIEW MITIGATING WITNESSES. HE DID NOT DO THIS IN WASHINGTON'S CASE. BECAUSE WASHINGTON'S MITIGATING WITNESSES WERE IN MIAMI. HE DID NOT DWO -- HE DID NOT GO TO MIAMI TO INTERVIEW.

SO YOU ARE SAYING THE RECORD WAS FOR A CONCLUSION THAT HE DID NOTHING TO INVESTIGATOR PRESENT MITIGATION IN THIS CASE.

I WOULD RESPECTFULLY SUBMIT THAT THIS COURT IS CORRECT ON THAT POINT. MR. CHIEF JUSTICE

JUSTICE LEWIS, YOU HAD A QUESTION.

BUT -- I THOUGHT YOU SAID -- I AM SORRY. MR. CHIEF JUSTICE

GO AHEAD.

ON PAGE 19 OF THE JUDGE'S ORDER, JUDGE SHAFER GOES THROUGH QUESTIONS AND ANSWERS TO THE DEFENSE COUNSEL, WHERE HE SAYS THAT HE WAS TOLD HE UNDERSTOOD HE HAD A DRUG PROBLEM. HE THOUGHT AT ONE TIME THAT THAT WOULD AND MITIGATING FACTOR, BUT OVER TIME IT WAS NEGATIVE, COULD BE A REAL NEGATIVE, AND HE SAID IT IS SOMETHING THAT YOU WOULD NOT WANT TO WAIVE IN FONT OF A PINELLAS COUNTY JURY, SO WHY ISN'T THAT, DOESN'T THAT SUPPORT THE JUDGE'S FINDING THAT THIS IS A STRATEGIC DECISION NOT TO PRESENT FURTHER, TO PURSUE DRUG ABUSE DEFENSE IN THIS CASE?

THE DRUG ABUSE CAME FROM MRS. WASHINGTON, DEFENDANT'S MOTHER, WHO TESTIFIED THAT SHE WAS AWARE THAT HE HAD A DRUG PROBLEM 17 YEARS AGO. NOW, THE DEFENSE, AT THE EVIDENTIARY HEARING, CALLED SEVERAL WITNESSES THAT INDICATED THAT MR. WASHINGTON'S DRUG USE WAS CONTINUING AND REMAINED CONTINUING, UP UNTIL THE TIME OF HIS TRIAL ON THESE CHARGES.

BUT WHETHER HE DIDN'T KNOW THE EXTENT OF HIS DRUG USE OR HE MADE A DECISION THAT, PURSUING THAT LINE OF DEFENSE IN THE PENALTY PHASE, BEGIN THE PINELLAS COUNTY, WOULD BE A NEGATIVE, NOT A, COME ABOUT AS A POSITIVE, AND WE, AS A JUDGE -- AND WE, THE JUDGE MADE A FINDING THAT THIS IS STRATEGIC. NOW, WHY ISN'T THAT A REASONABLE VIEW OF WHAT THIS DEFENSE LAWYER DID, THAT FACED WITH THIS EVIDENCE, THAT HE WOULDN'T PUT ON THAT KIND OF EVIDENCE, EVEN IF HE DIDN'T KNOW THE EXTENT OF IT?

JUDGE, HE WASN'T AWARE OF THE EXISTENCE OF THE EVIDENCE. THE TRIAL COURT ERRONEOUSLY PRESUMED THAT JUDGE McCOMB HAD INTERVIEWED REGINA BATISTE. NOW, TALKING ABOUT THE DOUBLE DOUBLE-HEADED SWORD RISES FROM THE FACT THAT REGINA BATISTE TESTIFIED THAT HE WAS HER BOYFRIEND. THEY HAD ENGAGED IN DRUG USE. THEY HAD SEPARATED AFTER A WHILE AND ANTHONY BATISTE GOT TREATMENT. ANTHONY WASHINGTON DID NOT. JUDGE, I HIM INTO MY REBUTTAL TIME, BUT I WILL FINISH THIS. ANTHONY WASHINGTON DID NOT. AT ONE TIME HE ROBBED HER OF A JACKET AND DIDN'T EVEN KNOW WHO SHE WAS. TRIAL COUNSEL WAS UNAWARE OF THESE PEOPLE. WAS UNAWARE OF THE EXTENT OF THIS DRUG USE.

CHIEF, COULD I? WHEN YOU PAUSE, WOULD YOU LOOK FOR US AND BE ABLE TO CITE TO US WHICH NUMBER OF THE CLAIM IN THE POSTCONVICTION MOTION, THAT ADDRESSED THE FRYE, THE FAILURE TO ASK FOR A FRYE HEARING, AND WHEN YOU COME BACK UP ON REBUTTAL.

YOU CAN LOOK AND SEE IF YOU HAVE IT, FAN YOU DON'T, YOU CAN TELL US THAT, TOO.

MAY IT PLEASE THE COURT. MY NAME IS BOB LANDRY REPRESENTING THE STATE IN THIS APPEAL. WITH RESPECT TO THE CLAIM RAISED IN THE HABEAS PETITION AS TO APPELLATE COUNSEL'S INEFFECTIVE INEFFECTIVENESS OR FAILURE TO RAISE A QUESTION OF THERE SHOULD HAVE BEEN A FRYE HEARING ON THE DNA MATTER, AS WE HAVE ARGUED IN OUR RESPONSE, IT WAS PROCEDURALLY BARRED, THE DEFENSE COUNSEL DID NOT ASK FOR A FRYE HEARING. WHAT APPELLATE COUNSEL DID DO WAS LITIGATE ISSUE THAT HAD BEEN PRESERVED, THAN IS WHETHER OR NOT IT WAS ERROR TO DENY BOMSTOCK'S DEPOSITION AT TRIAL, THAN COURT RULED ON THAT AND IT WAS ULTIMATELY PRESERVED, SO CONSEQUENTLY COUNSEL COULD NOT HAVE FAILED FOR RAISING THAT ISSUE.

WAS THAT IN RESPECT TO THE MOTION IN LIMINE? IN OTHER WORDS YOUR OPPONENT SAYS THAT ALL OF THESE THINGS WERE RAISED BY MOTION IN LIMINE, AND THE RULING ON THE MOTION IN LIMINE THAT PRESERVED THE ISSUE YOU THAT -- THE ISSUE THAT, THEN COULD HAVE BEEN RAISED ON APPEAL HAVE YOU LOOKED AT THAT?

HE WAS PRIMARILY TALKING ABOUT THE MOTION IN LIMINE THAT THE COURT SHOULD NOT HAVE ALLOWED DWIGHT ADAMS TO TESTIFY AND SHOULD HAVE INTIS SISTED UPON -- SHOULD HAVE INSISTED ON BOMSTOCK BEING MADE AVAILABLE TO TESTIFY. THAT IS WHAT THE COURT SHOULD HAVE LOOKED AT. NOW, WITH REGARD TO TRIAL COUNSEL'S INEFFECTIVENESS FOR FAILING TO REQUEST A FRYE HEARING BELOW, AS WE HAVE ARGUED IN OUR BRIEF, FIRST OF ALL, I DON'T THINK THIS ISSUE WAS PRESENTED TO JUDGE SHAFER IN THE 3.850 MOTION TO VACATE. THE CLAIM MADE TO HER WAS THAT TRIAL COUNSEL DID NOT GET HIS OWN INDEPENDENT DNA EXPERT. THAT WAS INCORRECT. THEY USED DR. LIPPMAN.

YOU EXAMINED THE MOTION FOR POSTCONVICTION RELIEF?

I HAVE LOOKED AT IT. AS A MATTER OF FACT, I THINK I HAVE QUOTED FROM IT.

AND YOU FOUND NO ALLEGATION IN THERE THAT THE TRIAL COUNSEL WAS NEGLIGENT IN FAILING TO ASK FOR A FRYE HEARING?

THAT'S CORRECT. I DON'T THINK HE MENTIONED FRYE HEARING AT ALL ANY PLACE IN THERE, SO,

AND IF YOU LOOK AT JUDGE SHAFER'S ORDER, IN WHICH SHE SUMMARILYDENIED RELIEF ON THE GUILT PHASE INEFFECTIVE COUNSEL CLAIMS, SHE WENT INTO GREAT DETAIL, AS TO THE CLAIMS RAISED BY THE DEFENDANT IN HIS MOTION, AND POINTED OUT WHY COUNSEL WOULD NOT HAVE BEEN DERELICT OR DEFICIENT IN FAILING TO, FOR EXAMPLE, HAVE A DIFFERENT OR OTHER EXPERT DNA WITNESS TESTIFY, THAT THE, HE UTILIZED, HE HAD HIS OWN EXPERT, DR. LIPPMAN. HE CROSS-EXAMINED DWIGHT ADAMS, THE WITNESS WHO DID TESTIFY, AND MR. ADAMS ADMITTED, IN HIS CROSS-EXAMINATION, AS TO THE LIMITATIONS OF THE DNA STATUS AT THAT TIME, AND AS JUDGE SHAFER FOUND OUT, FOUND COUNSEL DID, CERTAINLY, AN ADEQUATE AND COMPETENT JOB IN TREATMENT OF THAT ISSUE. THERE WAS NO CONTENTION OR SUGGESTION MADE IN EITHER THE 3.850 MOTION OR IN JUDGE SHAFER'S ORDER, RELATEING TO A FRYE HEARING. WITH RESPECT TO --

WHAT DO YOU SAY IN RESPONSE TO OPPOSING COUNSEL'S ARGUMENT THAT TRIAL COUNSEL DIDN'T KNOW OF A DRUG PROBLEM, HE DIDN'T PROPERLY INVESTIGATE IT, SO HE COULD NOT HAVE MADE A VALUE JUDGMENT IN PRESENTING IT OR NOT?

THAT IS A LITTLE BIT INACCURATE. WHAT THE TESTIMONY OF THE TWO TRIAL ATTORNEYS AT THE EVIDENTIARY HEARING, MR. LAUDERBOCK AND MR. COWIN. MR. LAUDERBOCK INDICATED THAT HE DIDN'T INDICATE ANY USE OF DRUG THAT IS CERTAINLY MADE AN IMPRESSION UPON HIM. MR. McCOWIN INDICATED THAT CERTAINLY IT WAS HIS PRACTICE TO INTERVIEW WITNESSES, YOU KNOW, SO THAT HE COULD FORMULATE HIS OWN JUDGMENT AS TO THEIR DESIRABILITY, IN TERMS OF BEING WITNESSES. FOR MITIGATION PURPOSES. BOTH OF THEM TESTIFIED THAT THEY HAD PROBLEMS WITH THE MOTHER, MRS. WASHINGTON. SHE ENDED UPCOMING UP TO TESTIFY AND ESSENTIALLY SHE TESTIFIED THAT THERE WERE RUMORS ON THE STREET THAT THE DEFENDANT TOOK DRUGS, BUT SHE HAD NEVER SEEN IT BUT THOSE WERE JUST RUMORS, AND, OF COURSE, DEFENSE COUNSEL DID UTILIZE THAT SOMEWHAT MILDLY IN TERMS OF THEIR MITIGATION ARGUMENT THAT THEY DID MAKE. IN TERMS OF, YOU KNOW, LAUDER BOCK TESTIFIED AT THE EVIDENTIARY HEARING, THAT WHEN HE GOT HIS FILES BACK FROM CCR, IT WAS ONLY ABOUT ONE-QUARTER OF THE PAPER THAT WAS IN THERE AT THE BEGINNING. MR. McCOWIN TESTIFIED THAT HE HAD, FROM HIS NOTES, REFLECTED THAT THERE WERE A NUMBER OF PEOPLE THAT THEY CONTACTED OR TRIED TO CONTACT. ONE WAS A FOOTBALL COACH WHO WAS DECEASED, SO THEY COULDN'T USE HIM. WITH RESPECT TO THE DRUG KNOWLEDGE OR INFORMATION, ONE OF THE INTERVIEWS THAT THE DEFENDANT HAD GIVEN TO MR. McCOWIN, INDICATED THAT HE HAD TAKEN MARIJUANA, COCAINE, AND QUAALUDES, BUT HE SAID IT WAS NOT SOMETHING OF NATURE THAT WOULD, HE THOUGHT THAT REALLY MERITED FURTHER PURSUIT. THEY HAD A PURSUIT DEFENSE IN THIS CASE THAT THE DEFENDANT WAS INNOCENT. HE WAS ON WORK RELEASE, AND HE WAS, THEY WANTED TO PRESENT, THEY WANTED TO PRESENT A DEFENSE THAT THIS MAN HAD POTENTIAL, THAT HE HAD A LOVING FAMILY, THAT WITH THE LOVING SUPPORT OF HIS FAMILY, THAT HE COULD, HE WOULD ADJUST IN PRISON AND LIFE IMPRISONMENT WOULD HAVE BEEN THE BETTER SENTENCE, AND THEY PURSUED THAT AND GOT A SUCCESSFUL LIFE RECOMMENDATION.

COUNSEL, IT SEEMS AS THOUGH THERE IS A VERY SPECIFIC FINDING BY THE TRIAL JUDGE HERE, AND I THINK THAT IS REALLY WHAT THESE QUESTIONS ARE DIRECTED TO, AND THAT IS THE DEFINEDING -- THE FINDING THAT, WITH REGARD TO DEFENSE COUNSEL, HE KNEWABOUT THE DEFENDANT'S DRUG USE. HE SIMPLY EX-HE ELECTED NOT TO EXPLORE AND EXPLOIT IT, BECAUSE HE DID NOT WANT TO GO THERE. I THINK THAT IS REALLY THE --

I THINK, RIGHT, I THINK JUDGE SHAFER WAS SAYING THAT HE WAS AWARE OF IT, AND THEY DECIDED NOT TO PURSUE IT, KNOWING WHAT THE REACTION AMONG JURIES IN PINELLAS COUNTY. BOTH McCOWIN AND LAUDER BOCK TESTIFIED THAT CERTAINLY THEY WOULD NOT HAVE USED A WITNESS LIKE REGINA BATISTE. SHE SAID THAT WHEN DEFENDANT WAS TAKING DRUGS, HE ACTUALLY STOLE A COAT OR STOLE MONEY FROM HER AND DIDN'T SEEM TO RECOGNIZE HER AT THE TIME. LOUDER BOCK, WHEN ASKED ABOUT THAT, SAID ABSOLUTELY I

WOULD NOT WANT TO PRESENT THIS KIND OF TESTIMONY OR THE JURY.

DID THEY TESTIFY THAT THEY WERE AWARE OF THAT AND BECAUSE OF THE NEGATIVE THAT WOULD ALSO COME OUT, THAT WAS HIM SELLING DRUGS. I UNDERSTAND THAT HE, ALSO, STOLE FROM HIS MOTHER IN ORDER TO SUPPORT HIS DRUG HABIT AND STOLE FROM OTHERS, AS THE INFORMATION CAME OUT, BUT DID THEY, DID THE DEFENSE LAWYERS TESTIFY THEY WERE AWARE OF ALL OF THIS, BUT THEY CHOSE NOT TO USE IT, BECAUSE OF THE NEGATIVE SIDE OF IT.

I DON'T KNOW THAT THE ATTORNEYS TESTIFIED THAT THEY WERE AWARE OF THE PARTICULAR PEOPLE WHO TESTIFIED AT THE EVIDENTIARY HEARING. LAUDERBOCK TESTIFIED THAT HE DIDN'T HAVE MUCH RECOLLECTION OF THE DETAILS, NOW WITH HIS FILE IN DISARRAY. MR. McCOWIN INDICATED THAT PRETTY MUCH WHAT HE RECALLED WAS FROM THE INTERVIEWS WITH HIM, WITH THE CLIENT, IN WHICH THE DEFENDANT MENTIONED HIS DRUG USE AND MENTIONED, YOU KNOW, A NUMBER OF PEOPLE THAT THEY COULD CONTACT, AND THAT HE, HIS, HE TESTIFIED THAT HIS PRACTICE WAS TO CONTACT. THEY WOULD NOT HAVE HELD UP NOT TALKING TO PEOPLE, FROM PEOPLE THAT HAD BEEN MENTIONED TO THEM. NOW, AS TO WHETHER OR NOT A PARTICULAR WITNESS WHO TESTIFIED AT THE EVIDENTIARY HEARING WAS KNOWN TO COUNSEL, I AM NOT CERTAIN ABOUT. THAT I DON'T KNOW IF THERE WAS TESTIMONY ALONG THAT LINE.

BUT THEY DID TESTIFY THAT THEY WERE AWARE OF THE NEGATIVE SIDES OF THIS AND THAT THEY WOULD NOT PRESENT THE CAUSE OF THE NEGATIVE SIDE.

ABSOLUTELY. THEY BOTH SAID, McCOWIN, FOR EXAMPLE, STARTED OUT BY TESTIFYING THAT, IN HIS EARLY DAYS AS A LAWYER, CERTAINLY HE THOUGHT THAT DRUG USE HAD POTENTIAL MITIGATING VALUE, BUT AS TIME WENT ON, THAT WAS VERY MUCH NOT THE CASE, AND HE CERTAINLY WOULD NOT WANT TO PRESENT TO THE JURY, IF YOU COULD AVOID IT, DRUG USAGE, BECAUSE OF THE TWO-EDGED SWORD.

AND THAT IS WHY THEY DIDN'T PRESENT IT IN THIS CASE.

AND THAT IS WHY THEY ADOPTED, CERTAINLY, THE STRATEGY THAT THEY DID GO WITH, AND IT WAS A SUCCESSFUL ONE. THEY USED -- YOU CAN'T REALLY SAY THAT THEY WERE UNPREPARED AND THEY DIDN'T INVESTIGATOR ANYTHING ELSE. THEY USED DR. MARIN. DR. MARIN TESTIFIED AS AN EXPERT WITNESS, IN TERMS OF THE PSYCHOLOGICAL ASPECT OF THE DEFENDANT'S MAKEUP. HE BASICALLY SAID HE WAS A BULLY A WEAK PERSONALITY, BECAUSE HE HAD GROWN UP IN THE LIBERTY CITY AREA, WHICH REQUIRED GOING TO EITHER PRETEND TO BE TOUGH AND ALL OF THAT, IN ORDER TO SURVIVE TYPE OF THING, SO THEY USED DR. MARIN. THEY USED MRS. WASHINGTON. AND IN ESSENCE, SHE KIND OF ALLUDED TO THE POSSIBLE DRUG USE BUT THAT SHE DIDN'T HAVE TOO MUCH FIRSTHAND KNOWLEDGE OF T COUNSEL PURSUED. IN ADDITION, AFTER GETTING THE LIFE RECOMMENDATION, THEY SUBMITTED TWO MEMORANDA, ONE BY EACH COUNSEL, BACHINGLY INFORMING THE COURT THAT, UNDER THE TETTER STANDARD -- BASICALLY INFORMING THE COURT THAT, UNDER THE TETTER STANDARD THERE WAS OBVIOUSLY A REASONABLE BASIS TO GIVE THE RECOMMENDATION, IN LIGHT OF DR. MARIN'S TESTIMONY AND OBVIOUSLY IN LIGHT OF THE TESTIMONY OF THE MOTHER AND ALSO THEY ARGUED THAT DR. JOAN WOODS' TESTIMONY SUPPORTED THE ARGUMENT THAT THIS WASN'T REALLY A HAC CASE, AND, OF COURSE, IN ADDITION TO THAT, THEY ALLUDED TO POSSIBLE DRUG USE AND MRS. WASHINGTON HAD TESTIFIED TO. SO CONSEQUENTLY, WE WOULD RESPECTFULLY SUBMIT THAT TRIAL COUNSEL WAS NOT INEFFECTIVE. TRIAL COUNSEL MADE A JUDGMENT JUDGMENT CHOICE -- A JUDGMENT CHOICE THIS. IS A CASE LIKE A LOT OF CASES THAT WE HAVE HANDLED, I GUESS, GLOCK AND PORTER ARE CASES IN WHICH DEFENSE COUNSEL WAS FACED WITH THE POSSIBILITY OF POSSIBLY USING SOME DRUG INFORMATION AND THE JUDGMENT CALL HAS TO MABD THAT IT CAN SOMETIMES BE MADE THAT IT IS MORE DAMAGING, BECAUSE IT LEADS TO FURTHER EVIDENCE OF CRIMINAL ACTIVITY, WHICH THE JURY WOULD NOT OTHERWISE BE AWARE OF, SO CONSEQUENTLY WHAT COUNSEL DID HERE WAS EFFECTIVE, WITHIN THE SIXTH

AMENDMENT STRICKLAND STANDARD. AS TO THE OTHER ISSUES, WE WOULD REST ON OUR BRIEF, UNLESS THE COURT HAS ANY PARTICULAR QUESTIONS.

ONE QUESTION ON THE ATTACK ON THE CAPITAL SENTENCING SCHEME. THIS WAS RAISED, I DON'T KNOW THAT THERE WAS A BASIS FOR AN EVIDENTIARY HEARING, BUT YOU WOULD AGREE, NOW, BASED ON OUR PRECEDENT IN MILLS AND THE OTHER CASES THAT HAVE COME UP ON WARRANT, THAT AT THE VERY LEAST, THAT IT CAN BE COLLATERALLY ATTACKED AND SUBSEQUENT TO APRENDI, AND SHOULD AT LEAST BE PRESERVED, IT IN CASE THE U.S. SUPREME COURT DOES MAKE A CHANGE IN THE WAY THEY LOOK AT FLORIDA SENTENCING, ESPECIALLY HERE, WITH THE JURY OVERRIDE.

WELL, IF YOU ARE ASKING ME ABOUT AN APRENDI ISSUE THAT HASN'T BEEN LITIGATED HERE AT ALL.

WAS IT RAISED IN THE -- I THOUGHT ONE OF THE CLAIMS WAS THE CAPITAL SENTENCING SCHEME WAS UNCONSTITUTIONAL.

I THINK WHAT HE WAS TALKING ABOUT WAS ELECTROCUTION BEING UNCONSTITUTIONAL OR SOMETHING OF THAT NATURE. I DON'T THINK HE MENTIONED ANYTHING AT ALL ABOUT APRENDI. OBVIOUSLY NO APRENDI-TYPE ARGUMENT WAS RAISED ON DIRECT APPEAL. WE WOULD ARGUE IT IS PROCEDURALLY-BARRED. HE HANS HASN'T RAISED IT -- HE HASN'T RAISED IT IN HIS MOTION FOR POSTCONVICTION RELIEF OR HASN'T RAISED IT IN HIS APPEAL. OBVIOUSLY IF THE COURT NEEDS OR DESIRES FURTHER BRIEFING ON THAT --

I GUESS IT WAS ISSUE SEVEN. MAYBE THE APRENDI CASE WASN'T MENTIONED. I WILL HAVE TO GO --

YOU KNOW, I DON'T KNOW THAT IT WAS CERTAINLY NO INDICATION, FROM WHAT I CAN RECALL OF THE PLEADINGS, THAT ANYTHING ABOUT WHAT AN APRENDI CLAIM WOULD BE, WOULD BE INCLUDED WITHIN THAT. I MEAN, IT MIGHT JUST HAVE BEEN A THROW AWAY SENTENCE OR SOMETHING OF THAT NATURE. BUT IN LIGHT OF THAT, WE CERTAINLY WOULDN'T CONCEDE OR ADMIT THAT IT HAS BEEN PROPERLY PRESERVED OR MAINTAINED HERE, IN THIS COURT. THANK YOU. MR. CHIEF JUSTICE

THANK YOU, MR. LANDRY. MR. KILEY.

REBUTTAL, SIR, JUST TO ANSWER YOUR QUESTION, A FOOTNOTE FOUR OF THE INITIAL BRIEF, AND I DIDN'T WRITE THE INITIAL BRIEF OR THE 3.850, STATES THAT THIS WAS CLAIM 1-B, SUBSECTION A, IN THE AMENDED 3.850, WHICH, AND IT STATES SPECIFICALLY THAT COUNSEL WAS INEFFECTIVE IN THE GUILT-PHASE PORTION OF MR. WASHINGTON'S TRIAL FOR FAILING TO ADEQUATELY INVESTIGATE AND ARGUE THAT THE DNA EVIDENCE WAS UNRELIABLE. PC RECORD 12.

OKAY. BUT YOU -- IF YOU RECALL MY EARLIER QUESTION TO YOU WAS I ACTUALLY ARTICULATED A CLAIM, WHETHER A CLAIM WAS FILED THAT SAID COUNSEL WAS INEFFECTIVE FOR FAILING TO ASK FOR A FRYE HEARING, AND TO PUT ON EVIDENCE ABOUT THE, IN THAT REGARD, AND YOU SAID IT WAS STATED JUST THAT WAY. AT LEAST THAT IS MY RECOLLECTION OF THE WAY YOU RESPONDED TO MY QUESTION.

AT NOWHERE DO THEY SAY WE WANT A FRYE HEARING, JUDGE, BUT WHAT THEY ARE SAYING --

IN OTHER WORDS, ARE YOU SAYING IN YOUR MOTION FOR POSTCONVICTION RELIEF, THERE WAS NO ASSERTION THAT COUNSEL WAS INEFFECTIVE FOR NOT ASKING FOR A FRYE HEARING?

FOR NOT ASKING FOR A FRYE HEARING?

RIGHT.

IN THE MOTION? JUDGE, IT STATES HERE THAT FOR FAILING TO ADEQUATELY INVESTIGATE AND ARGUE THAT DNA EVIDENCE WAS UNRELIABLE. JUDGE, I WOULD SUBMIT THAT IS A FRYE HEARING. HOWEVER, SIR, GOING ON TO REBUT COUNSEL'S ASSERTITIONS ABOUT THE JURY AND THIS BEING A DOUBLE-EDGED SWORD IN FRONT OF THE JURY, YOUR HONOR, WE ARE SUBMITTING THE PROPOSITION THAT THIS EVIDENCE, THESE MITIGATION WITNESSES SHOULD HAVE BEEN PRESENTED AT THE SPENCER HEARING. AT THE TIME MR. WASHINGTON RECEIVED THE RECOMMENDATION OF LIFE, JUDGE SHAFER INVITED COUNSEL TO PRESENT ADDITIONAL EVIDENCE AT THE SPENCER HEARING. SHE DIDN'T CALL IT A SPENCER HEARING, BECAUSE SPENCER WASN'T DECIDED THEN, BUT SHE DID SAY SHE WOULD LIKE ADDITIONAL EVIDENCE OR ANY WITNESSES THAT EITHER THE STATE OR THE DEFENSE WANTS TO CALL. NOW, TRIAL COUNSEL SHOULD HAVE CALLED REGINA BATISTE. SHOULD HAVE CALLED DR. SPRAYING. SHOULD HAVE DONE EVERYTHING -- DR. SPRAIING. SHOULD HAVE DONE EVERYTHING THAT HE IS AL -- DR. SPRAGUE, SHOULD HAVE DONE EVERYTHING THAT -- SHOULD HAVE CALLED WITNESSES AT THE HEARING. IF THE JURY HAD A QUESTION ABOUT THE DEFENDANT'S DRUG USE, AND I CAN'T IMAGINE WHY, BECAUSE THE JURY HEARD ABOUT HIS RAPE. IT HEARD ABOUT HIS ROBBERY AND STILL CAME BACK WITH LIFE. NOW, HE SHOULD HAVE, TRIAL COUNSEL SHOULD HAVE BEGIN THE TRIAL COURT SOMETHING TO HANG THEIR HAT ON, OTHER THAN REASONS PRESENTED IN CLOSING ARGUMENT OF COUNSEL AT THE TRIAL. BUT HE DIDN'T!

I DON'T THINK YOU REALIZE WHY WE KEEP ASKING THE QUESTION. THE TRIAL JUDGE HAS MADE A FINDING HERE, THAT SAYS THAT THERE WAS AN INTELLIGENT CHOICE MADE, AND THIS EVIDENCE WAS NOT PUT IN, BECAUSE IT WOULD HAVE LED TO SOME VERY HARMFUL EVIDENCE, AND WHAT WE ARE ASKING YOU IS THERE, ARE YOU SAYING THERE IS NOED EVIDENCE TO SUPPORT THIS FINDING BY THE JUDGE?

JUDGE, I AM SAYING AT THE TRIAL IT MAY, BEFORE THE JURY, IT MAY HAVE BEEN A DOUBLE-EDGED SWORD. HOWEVER, AT THE SENTENCING HEARING, IT WAS ENTIRELY APPROPRIATE, NOT ONLY APPROPRIATE BUT NECESSARY AND PROPER, THAT THESE TRIAL COUNSEL COUNSELS PROVIDE THE COURT WITH REASONS TO SUSTAIN THE RECOMMENDATION OF LIFE BY THE JURY! THEY DIDN'T! THEY DIDN'T HAVE TO PUT THIS ON IN FRONT OF THE JURY. THEY COULD HAVE, AND WERE INVITED TO BY JUDGE SHAFER, TO PUT ON ADDITIONAL EVIDENCE AT THE SENTENCING HEARING. AND THAT IS WHY I AM OUT OF TIME BUT THAT IS OUR CONTENTION THAT THIS SHOULD HAVE BEEN PRESENTED AT THE SENTENCING HEARING. THANK YOU FOR THE DOCKET TIME, GENTLEMEN AND LADIES. MR. CHIEF JUSTICE

THANK YOU, MR. KILEY. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE. THE COURT WILL BE IN RECESS FOR 15 MINUTES.