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Randall Scott Jones v. State of Florida

MR. CHIEF JUSTICE

NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS JONES VERSUS STATE. JONES VERSUS MOORE. MS. WILLIAMS.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS ELIZABETH WILLIAMS, AND SEATED AT COUNSEL TABLE IS ROBERT STRAIN. WE ARE HERE, TODAY, FROME OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL IN TAMPA, ON BEHALF OF MR. RANDALL SCOTT JONES, AND HERE ON HIS APPEAL FOR THE DENIAL OF MOTION OF POSTCONVICTION RELIEF AND HIS PETITION FOR A WRIT OF HABEAS CORPUS. I WANT TO FOCUS, FIRST, TODAY, ON THE LACK OF EVIDENTIARY HEARING THAT OCCURRED IN THIS CASE. THE TRIAL COURT HELD THE HUFF HEARING ON THE 3.850 MOTION, BACK IN 1999, AND GRANTED AN EVIDENTIARY HEARING ON ONE CLAIM ONLY, AND THAT WAS THE CLAIM THAT DEALS WITH THE DELEGATION OF THE WEIGHING IN THE SENTENCING ORDER THAT WAS PREPARED IN THIS CASE FOR MR. JONES.

WHO PRESIDED OVER THAT?

OVER THE HUFF HEARING?

YES.

THAT WAS, IT WAS NOT ORIGINAL JUDGE FROM THE TRIAL. IT WAS JUDGE NICHOLS. JUDGE PERRY WAS THE ORIGINAL TRIAL JUDGE IN THIS CASE.

HE IS NOW DECEASED, IS THAT CORRECT?

THAT'S CORRECT. BOTH THE TRIAL JUDGE AND MR. JONES'S TRIAL ATTORNEY, MR. RD , ARE BOTH DECEASED.

AND DID HE PRESIDE OVER THE RESENTENCING, JUDGE PERRY?

YES. JUDGE PERRY PRESIDED OVER THE ORIGINAL GUILT AND PENALTY PHASE THAT HAPPENED IN 1988 AND PRESIDED OVER THE RESENTENCING.

JUDGE PERRY, THERE WAS A CHALLENGE TO HIM BECAUSE OF THE HONORARY SHERIFF THING IN ANOTHER CASE. WAS THAT, WAS THERE EVER AN EVIDENTIARY HEARING IN THAT CASE CASE?

IN MR. JONES'S CASE?

NO. IN, I THINK IT WAS IN ANOTHER CASE, AND WAS THERE EVER A DETERMINATION IN REGARD TO HIS ABILITY TO SIT AS A TRIAL JUDGE?

IN THIS CASE, I AM ONLY AWARE THAT THERE WAS A DETERMINATION, BECAUSE MR. PEARL, THE ATTORNEY, WAS, ALSO, AN HONORARY DEPUTY, AND IN THE APPEAL FROM HIS SECOND PENALTY PHASE, WHERE HE HAD TRIED TO HAVE MR. PEARL REMOVED FROM THE CASE, IT WAS DETERMINED THAT THAT CONFLICT DID NOT INTERFERE WITH HIS REPRESENTATION. THE SUPREME COURT HERE DETERMINED THAT.

SO YOU DON'T --

I AM NOT AWARE, IN MR., IN RELATION TO MR. JONES'S CASE, HE DID NOT EVER RAISE THAT ISSUE OF THE HONORARY DEPUTY STATUS.

BUT YOU DON'T KNOW WHETHER THAT WAS EVER RAISED IN ANOTHER CASE OR NOT THAT JUDGE PERRY SAT ON?

NOT THAT PARTICULAR ISSUE, NO. THE SENTENCING, AS YOU POINTED OUT, DID HAPPEN BACK IN 1988, IN FRONT OF JUDGE PERRY AND, AGAIN, IN 1991, AND THIS IS AN ISSUE THAT THEY HELD AN EVIDENTIARY HEARING ON. THE TRIAL COURT ISSUED A RULING, STATING THAT THEY FELT THAT THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING REGARDING THE 1988 RECORDER WAS NOT RELEVANT TO THE 1991 ORDER, AND MR. JONES WOULD OBVIOUSLY NOT AGREE WITH THAT ASSERTION. THE ASSISTANT STATE ATTORNEY FROM THE988 PENALTY PHASE, MR. McCLOUD TESTIFIED AT THE VIDENTIY, THAT HE, ALONE, PREPARED THAT INITIAL SENTENCING ORDER. THE JUDGE ASKED HIM TO DO IT, BUT DID NOT GIVE HIM ANY INSTRUCTIONS OR EVIDENCE OF WHAT WHERE HE WAS LEANING, IN TERMS OF THE WEIGHT THAT SHOULD BEGIN TO THE DIFFERENT AGGRAVATORS AND MITIGATORS. THAT OCCURRED IN 1988. WHEN THE COURT SENT IT BACK FOR A NEW PENALTY PHASE, BASED ON COMPLETELY DIFFERENT PROBLEMS WITH THE INITIAL PENALTY PHASE HEARING, THEY HAD A NEW SENTENCING PHASE IN 1991, AND THIS EVIDENCE OF MR. McCLOUD DRAFTING THE INITIAL SENTENCING ORDER OBVIOUSLY DID NOT COME TO LIGHT UNTIL THE POSTCONVICTION PROCEEDINGS, WHEN THE NOTES AND CERTAIN ITEMS IN THE STATE ATTORNEY'S FILE --

HOW IS THAT RELEVANT TO THIS CASE? SINCE WE ARE HERE ON A NEW SENTENCING, AND IF I UNDERSTAND CORRECTLY, THE PROSECUTOR INDICATED THAT HE DID NOT PREPARE THAT SENTENCING ORDER.

THAT IS CT, THAT MR. WHITSON, WHO WAS THE STATE ATTORNEY IN THE SECOND PENALTY PHASE, TESTIFIED IN THE EVIDENTIARY, THAT HE DID NOT DRAFT THE SECOND ORDER. HOWEVER, THERE WAS TESTIMONY PRESENTED THAT AN INTERIM DRAFT OF THE SECOND ORDER WAS FOUND IN THE STATE ATTORNEY'S FILES, AND IT HAD A MARK --.

THE STATE ATTORNEY SAID THAT IT WAS GIVEN TO BOTH THE DEFENSE AND THE STATE, TO LOOK AT AND MAKE CORRECTIONS OR SUGGESTIONS. IS THAT THE TESTIMONY?

I DON'T BELIEVE HIS TESTIMONY WAS THAT HE KNEW THAT TO BE A FACT, THAT IT HAD BEEN GIVEN TO BOTH SIDES. I BELIEVE THAT HE WOULD HAVE ASSUMED THAT WOULD HAVE HAPPENED AND THERE WAS TESTIMONY THAT, IN PRIOR CASES, IN FRONT OF JUDGE PERRY, HE HAD ASKED THE STATE TO DRAFT SENTENCING ORDERS, AND NEVER GIVEN IT TO THE DEFENSE. I BELIEVR. PEARL, HIMSELF, TESTIFIED --

IN THIS CASE WE DID NOT HAVE ANY TESTIMONY OR EVIDENCEAT THE STATE WAS ASKED TO DRAFT THE SECOND SENTENCING ORDER, DO WE?

NO. NOT DIRECT EVIDENCE THAT THEY DRAFTED THE SECOND SENTENCING ORDER.

IN FACT, ISN'T THERE ACTUALLY EVIDENCE, AND AS YOU SAY, THIS IS AN EVIDENTIARY HEARING, THAT, IN FACT, JUDGE PERRY HAD HIS LAW CLERK PREPARE THE SENTENCING ORDER? WHAT ABOUT ALL THAT EVIDENCE THAT THIS TRIAL COURT RELIED ON IN FINDING THAT THERE WAS, THAT, IN FACT, THE STATE DID NOT DRAFT THE SENTENCING ORDER?

I BELIEVE THAT THE ISSUE, THOUGH, IS WHETHER AN INDEPENDENT WEIGHING THE AGGRAVATORS AND MITIGATORS EVER OCCURRED FOR MR. JONES. IT WAS TESTIFIED TO THAT THE FIRST ORDER WAS NOT A PRODUCT OF JUDGE PERRY'S THINKING. IT WAS PREPARED BY THE

STATE ATTORNEY. IT HELD THEIR VIEWS, AS FAR AS THE WEIGHT THAT SHOULD BE GIVEN TO THESE DIFFERENT FACTORS, AND THEN, WHEN WE HAVE THE NEW SENTENCING ORDER IN 1991, HIS LAW CLERK PULLS OUT THAT 1988 ORDER, WHICH SHE TESTIFIED TO, TO USE AS A STARTING POINT, AND IF YOU COMPARE THE TWO ORDERS, PORTIONS OF THE DESCRIPTION OF THE AGGRAVATORS AND MITIGATORS ARE VERBATIM FROM THE 1988 ORDER WHICH JUDGE PERRY HAD NO HAND IN PREPARING.

BUT WOULDN'T YOU HAVE THE AGGRAVATORS ARE CERTAINLY CREATURES OF STATUTE, AND YOU WOULD HAVE THE LANGUAGE, IF IT IS AN AGGRAVATOR, IT IS AN AGGRAVATOR, IT IS AN AGGRAVATOR, WHETHER IT IS IN THIS CASE OR IN SHALL -- OR IN SOME OTHER CASE. WOULD YOU NOT HAVE THE STATUTORY AGGRAVATORS WHICH WOULD BE STATUTORY WORDING?

THE TERM IS A TERM OF STATUTORY INTERPRETATION. IF YOU READ THE ACTUAL WORDING OF THE SENTENCING ORDERS, THERE WOULD BE WHAT I WOULD CONSIDER TO BE EDITORIAL COT, IN TERMS OF RAISING THE LEVEL, IF YOU WILL, WHICH GOES TOWARD THE FACT THAT THE STATTO, WHO IS AN ADVOCATE IN THIS AND IN A PERSUASIVE RULE, WAS PREPG THIS ORDER, SO NATURAL NATURALLY IT IS GOING TO REFLECT THE STATE ATTORNEY'S VIEW OF THESE FACTORS.

WE ARE GOING TO GET, IN EVERY CASE, HOW THE JUDGE PREPARES THE SENTENCING ORDER, ISN'T THIS A LITTLE BIT OR SHOULDN'T THIS BE SOMEWHAT LIKE JURY DELIBERATIONS DELIBERATIONS? UNLESS WE HAVE GOT THE GROSS SITUATION OF THE STATE PREPARING THE SENTENCING ORDER AND THEN GIVING THAT TO THE JUDGE, THAT, REALLY, THE ISSUE OF HOW THE SENTENCING ORDER, WHAT, JUDGE PERRY IS NOT THERE TO SAY I WEIGHED IT INDEPENDENTLY, THAT WE HAVE GOT TO PRESUME THAT THAT INDEPENDENT WEIGHING OCCURRED, AND THAT WE HAVE GOT THIS COURT THAT IS, THERE IS A REVIEWING COURT TO MAKE SURE THAT THE SENTENCE IS PROPORTIONAL. I WOULD BE VERY CONCERNED ABOUT WHERE WE WOULD BE GOING DOWN THE ROAD, IF WE WERE TO SAY THAT THIS WASN'T AN INDEPENDENT WEIGHING, THAT THERE IS A PRESUMPTION IT WASN'T, AND THAT IT WOULD LEAD EVERY SENTENCING ORDER TO BE SUBJECT TO AN EVIDENTIARY HEARING ON HOW DID THE JUDGE PREPARE IT.

WELL, YOUR HONOR, I BELIEVE THIS COURT HAS ALREADY STARTED DOWN THAT ROAD IN THE RECENT MORTON CASE, WHERE IT WAS RAISED AGAIN, THAT A SECOND JUDGE, IN THAT CASE, THAT WAS TWO SEPARATE JUDGES, RELIED ON A SENTENCING ORDER ON A RESENTENCING, FROM THE INITIAL JUDGE, AND BASICALLY ADOPTED WHOLE PORTIONS OF IT, AND WHILE THIS COURT DID NOT FIND THAT THAT, PER SE, MEANT THERE WAS NO INDEPENDENT WEIGHING, YOU DID CAUTION JUDGES NOT TO DO THAT, BECAUSE OBVIOUSLY IT GIVES THE APPEARANCE THAT YOU HAVE NOT INDEPENDENTLY WEIGHED THE EVIDENCE, WHEN YOU JUST CUT AND PASTE SOMETHING FROM ANOTHER JUDGE'S ORDER. OBVIOUSLY IN THIS CASE IT WASN'T EVEN ANOTHER JUDGE. IT WAS THE STATE ATTORNEY WHO PREPARED THE INITIAL ORDER.

FOR EXAMPLE, THWER, APPARENTLY, IT SEEMS TO ME, AND PLEASE CORRECT ME IF I AM WRONG ON IT, BUT THE PECUNIARY GAIN AND ROBBERY WERE THEN MERGED AND TREATED TOTALLY DIFFERENTLY THAN UNDER THE INITIAL ORDER, AND THE NEW ORDER BECAME INVOLVED IN NONSTATUTORY MITIGATION, WHICH IS THE WEIGHING KIND OF PROCESS. THAT DID NOT IN THE FIRST. WEREN'T THOSE SIGNIFICANT DIFFERENCES, OR AM I MISTAKEN?

I BELIEVE THOSE AGGRAVATORS WERE MERGED IN THE INITIAL SENTENCING ORDER, ALSO.

HOW ABOUT THE NONSTATUTORY MITIGATION DISCUSSION?

THERE WAS NO NONSTATUTORY MITIGATION FOUND BY THE JUDGE IN EITHER SENTENCING PROCEEDING.

BUT DID HE DISCUSS ANYTHING?

YOUR HONOR, I WOULD HAVE TO LOOK AT THE SENTENCING ORDER AGAIN, TO CONFIRM THAT.

WELL, THE SENTENCING ORDER, THOUGH, IS NOT IDENTICAL.

NO, I WOULDN'T SAY THAT.

SO WHY WOULDN'T WHAT YOU JUST REFERRED TO IN THE OTHER CASE, THAT IS A CAUTION, BE APPROPRIATE? THAT IS CLEARLY A CAUTION WOULD BE APPROPRIATE. CAUTION THE JUDGE IF THE EARLIER SENTENCING ORDER WAS PREPARED BY THE STATE, IN THE STATE'S ANALYSIS OR WHATEVER, AND NOW THERE IS A RESENTENCING THAT OBVIOUSLY THE TRIAL COURT BE CAUTIONED. FIRST OF ALL THE NOTE NOT TO ALLOW THE STATE TO REPAIR -- TO PREPARE IT. ALL RIGHT. BUT, ALSO, IF THE PREVIOUS ONE HAD BEEN PREPARED BY THE STATE THAT, ALTHOUGH THERE MAY BE MATTERS IN THERE THAT COULD BE REFLECTED IN A NEW SENTENCING ORDER DONE BY THE JUDGE, THEY SHOULD BE CAREFUL NOT TO GIVE THE APPEARANCE THAT THEY JUST CARRIED FORWARD THE SAME IMPROPER SENTENCING ORDER, AND THAT SO LONG AS IT APPEARS THAT THEY DID NOT MAKE THE SAME MISTAKE, IN THAT IT WAS THE JUDGE'S SENTENCING ORDER, THAT CAUTION WOULD BE SUFFICIENT, AND SO THAT THE OUTCOME, THIS IS NOT THE IDENTICL ORDER THAT WHAT IS ENTERED -- THAT WAS ENTERED AND, APPARENTLY, DRAFTED INITIALLY, BY THE STATE, AND SO AGAIN, I SAY WHY SHOULDN'T THIS, ESPECIALLY AFTER YOU HAVE HAD AN EVIDENTIARY HEARING, IN WHICH A TRIAL COURT NOW PRESIDING HAS CONCLUDED THAT THE STATE DID NOT PARTICIPATE IN THE DRAFTING OF THIS ORDER, AND THAT IT WAS DONE BY THE JUDGE AND WITHIN THE JUDGE'S OFFICE, APPARENTLY WITH SOME HELP FROM THE LAW CLERK, AND APPARENTLY THERE WAS SOME USE MADE OF THE PREVIOUS SENTENCING ORDER, BUT HAVING MADE THAT CAUTION, THIS DOES NOT HAVE THE SAME ILL EFFECT AS THE PREVIOUS SENTENCING ORDER. IS THAT NOT CORRECT?

I WOULD AGREE, IF I AGREED WITH, THAT THAT IS WHAT THE EVIDENCE AT THE EVIDENTIARY HEARING SHOWED. I DON'T AGREE THAT IT SHOWED THAT THE STATE ATTORNEY, IN THE SECOND PROCEEDING, DIDN'T, ALSO, PARTICIPATE, WHEN THEY WERE DRAFTING THIS ORDER. IT IS MR. JONES'S CONTENTION THAT THE EVIDENCE DOES KNOW SHALL. NO -- DOES SHOW THAT. NO, MR. WHITT SON WAS NOT TOLD BY THE JUDGE, AS MR. McCLOUD WAS GO DRAFT THE ORDER AND GIVE IT TO ME, BUT THERE WAS A COPY OF THE INTERIM DRAFT IN THE STATE ATTORNEY'S FILE.

BUT THE TRIAL JUDGE WHO SET AT THE HEARING HAS TO RESOLVE THOSE KINDS OF AMBIGUITIES AND CONFLICT. AS LONG AS THERE IS IN EVIDENCE THAT THE TRIAL COURT COULD RELY ON, WE HAVE TO ACCEPT THAT CONCLUSION, DO WE NOT? WE CAN'T GO BACK AND LOOK, OURSELVES, AND SAY, WELL, NOW, WE, BECAUSE THAT COPY OF AN ORDER OR THAT FORM WAS IN THERE, WE ARE GOING TO OVERRULE THE TRIAL JUDGE NOW AND SAY THAT, NO THE STATE DID PREPARE IT. WE ARE NOT IN ANY POSITION TO DO THAT, ARE WE?

WELL, I BELIEVE THAT YOU ARE, IF YOU LOOK AT THE REICHMAN CASE THAT WAS DECIDED RECENTLY IN THE YEAR 2000. IN THAT CASE, YOU ACTUALLY DID GO THROUGH THE EVIDENCE THAT WAS PRESENTED AT AN EVIDENTIARY HEARING, AND IT WAS NOT A DEATH PENALTY CASE, THOUGH. IT HAD GONE THROUGH AN APPELLATE APPELLATE-LEVEL COURT.

CLEARLY, THOUGH, HERE THERE CONFLEVIDEAT MOST. IS THAT NOT CORRECT? THERE IS EVIDENCE TO SUPPORT THE CONCLUSION OF THE POSTCONVICTION JUDGE HERE AT THE EVIDENTIARY HEARING, ISN'T THERE?

THE CONCLUSION THAT THE JUDGE --

-- THAT THE STATE ATTORNEY DID NOT PREPARE. FIRST YOU HAVE TESTIMONY FROM THE PARTICIPATING STATE ATTORNEYS, DO YOU NOT? AND THEY SAID THEY DID NOT PARTICIPATE IN THE PREPARATION OF THIS SECOND SENTENCING ORDER. IS THAT CORRECT?

NO. I BELIEVE THAT'S NOT CORRECT. I BELIEVE THAT MR. WHITSON SAID THAT HE HAD APPARENTLY -- HE WAS TRYING TO REFRESH HIS OWN MEMORY BUT BASED ON WHAT WAS PRESENTED TO HIM AT THE EVIDENTIARY HEARING, HE HAD APPARENTLY SEEN A DRAFT PRIOR TO THE FINAL DRAFT BEING ISSUED BY THE JUDGE. THERE WAS A MARK ON IT THAT HE INDICATED WAS A MARK MADE BY HIM. THAT MARK WAS ON THAT DRFT DRAFT AT THE PRECISE -- -- WAS ON THAT DRAFT AT THE PRECISE PLACE WHERE THE LAW CLERK HAD WRITTEN A NOTE THAT IT WAS TO BE INCORPORATED INTO THE FINAL ORDER.

AOU SAYING THAT HE SAID, YES, I DID PARTICIPATE IN THE DRAFTING OF. THAT I DRAFTED THE ORDER FOR THE TRIAL COURT JUDGE?

I AM NOT SAY HAS GONE THAT HE DRAFTED THE ORDER. I WOULD SAY THAT --

DID HE SAY WHETHER HE DID OR DID NOT?

NO. HE SAID THAT IT APPEARED THAT HE DID SEE IT AND MAKE A COMMENT ON IT IN THE COURSE OF THE DRAFTING OF IT.

HOW DID THE TRIAL JUDGE HANDLE YOUR CLAIM THAT JUDGE NICKELS SHOULD HAVE, I MEAN JUDGE PERRY SHOULD HAVE BEEN DISQUALIFIED BECAUSE OF HIS INVOLVEMENT WITH THE, AS AN HONORARY SHERIFF?

I SEE THAT I AM INTO MY REBUTTAL TIME. SO.

VERY WELL.

I DON'T BELIEVE HE ADDRESSED IT, AS FAR AS JUDGE PERRY. I MEAN I KNOW HE DIDN'T ADDRESS, IT REGARDING JUDGE PERRY.

WHAT CAN YOU ACHIEVE BY AN EVIDENTIARY HEARING?

REGARDING THE HONORARY SHERIFF STATUS? <$$?.

YES.

WE DID NOT REQUEST AN EVIDENTIARY HEARING REGARDING THE JUDGE'S STATUS AS AN HONORARYRRI.

OKAY. THANK YOU, MS. WILLIAMS. MS. DITTMAR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE APPELLEE, THE STATE OF FLORIDA, AND RESPONDENT MOORE IN THESE PROCEEDINGS. WITH REGARD TO THE SENTENCING ORDER, THIS COURT NEEDS TO BE EXTREMELY CAUTIOUS ABOUT GETTING INTO ANALYZING THE JUDICIAL THOUGHT PROCESSES THAT GO INTO THE SIGNING OR THE DRAFTING OF A SENTENCING ORDER. I THINK THIS COURT HAS MADE CLEAR THAT THOSE THOUGHT PROCESSES ARE NOT SOMETHING WHICH ARE AVAILABLE FOR US TO SCRUTINIZE. IN THE STATE V LEWIS CASE, WHERE YOU TALK ABOUT THE ABILITY TO DEPOSE A TRIAL JUDGE FOR A POSTCONVICTION EVIDENTIARY HEARING, THAT IS MENTIONED AS ONE OF THE THINGS THAT YOU CAN'T QUESTION A JUDGE ABOUT IT. IT IS JUST PART OF THE PROCESS. IN THIS CASE, WE HAVE SOME INDICATION OF WHAT THAT PROCESS WAS, BECAUSE WE DO HAVE THIS EVOLUTION OF SEVERAL DRAFTS, BEFORE WE GET TO THE FINAL ORDER ORDER. WE HAVE CLEARLY SIGNIFICANT DIFFERENCES THAT WERE MADE, NOT ONLY BETWEEN THE 1988 ORIGINAL SENTENCING ORDER AND THE DRAFTS THAT WERE FOUND IN THE STATE ATTORNEYS FILE. THE UNSIGNED DRAFTS. WE, ALSO, HAVE SIGNIFICANT DIFFERENCES BETWEEN THOSE DRAFTS AND WHAT WAS ULTIMATELY SIGNED BY JUDGE PERRY.

DO WE HAVE ANY EVIDENCE? AS I UNDERSTAND THE PROSECUTOR SAID THAT HE BELIEVED THAT THIS DRAFT SENTENCING ORDER WAS GIVEN TO NOT ONLY HIM BUT TO THE DEFENSE ATTORNEY. DO WE HAVE ANY EVIDENCE IN THE RECORD CONCERNING THAT?

THE ONLY THING WE HAVE WITH REGARD TO THAT IS WHAT IS IN THE PROSECUTOR'S TESTIMONY, AND HE DID NOT SPECIFICALLY RECALL THAT. HE STATED HE DIDN'T KNOW WHERE HE GOT THIS DRAFT FROM. HE DIDN'T KNOW HOW THE DRAFT APPEARED IN THE STATE ATTORNEYS FILE. HOWEVER, THERE WAS, ON THERST PAGE OF ONETE WORD "WRONG" WAS WRITTEN, AND HE SAID THAT LOOKS LIKE MY WRITING, AND JUST FROM LOOKING AT THAT WRITING, LEADS ME TO BELIEVE THAT I SAW THIS DRAFT COPY AT SOME TIME. I DON'T KNOW WHEN. I DON'T KNOW HOW. I DON'T HAVE ANY MEMORY OF IT. I CAN TELL YOU, AND THE WORDS HE USED, WAS IT WOULD NOT BE UNUSUAL FOR JUDGE PERRY TO PROVIDE COPIES TO BOTH SIDES. BUT HE COULD NOT SAY THAT THAT HAD OCCURRED IN THIS CASE. THAT WAS JUST EXPLANATION THAT WAS PROVIDED.

AND WAS DEFENSE ATTORNEY CALLED AS A WITNESS IN THIS CASE?

NO. HE HAD DIED PRIOR TO THE HEARING.

PEARL.

RIGHT.

WHAT IS INTERESTING, AND I THINK MOST TELLING, IS YOU CAN SEE THAT THERE WAS THE INDEPENDENT WEIGHING ANALYSIS THAT IS REQUIRED BY THE EVOLUTION OF THE ORDERS, PARTICULARLY IF YOU LOOK AT THE DRAFT ORDER, AND THE DRAFT ORDER'S FINDING WITH REGARDING REGARD TO NON-- WITH REGARD TO NONSTATUTORY MITIGATING EVIDENCE. IN THE DRAFT ORDER, IT SAYS THAT THERE IS NO MITIGATION FOUND WITH REGARD TO THE NONSTATUTORY EVIDENCE WHICH WAS PROVIDED BY DR. CROPP AT THE RESENTENCING. IN THE FINAL ORDERS, WHICH ARE SIGNED BY JUDGE PERRY, THAT IS CHANGED TO SAY THERE IS LITTLE MITIGATION VALUE, WHICH IS WHY IN THIS COURT'S OPINION FROM THE RESENTENCING, YOU RECOGNIZED THAT THERE WAS NONSTATUTORY MITIGATION WHICH WAS FOUND AND WEIGHED. THAT IS A SIGNIFICANT DIFFERENCE A FINDING OF NO MITIGATION, TO FINDING THE MITIGATION AND GIVING IT LITTLE WEIGHT, AND THAT CLEARLY SHOWS THAT, AFTER THE DRAFT DOCUMENTS THAT WERE LOCATED IN THE STATE ATTORNEY'S OFFICE FILE, WERE CONSIDERED, THERE WERE FURTHER CHANGES MADE, AND ACCORDING TO THE LAW CLERK'S TESTIMONY, SHE IS THE ONE THAT ACTUALLY DRAFTED THESE DOCUMENTS DOCUMENTS. SHE LOOKED AT THEM. SHE SAID THIS IS THE FONT OFF MY COMPUTER. I RECOGNIZE T I RECOGNIZE MY NOTES IN THE MARGINS.

DID SHE TESTIFY ABOUT ANYTHING CONCERNING ANY CONSULTATIONS WITH THE DEFENSE R THE STATE? BECAUSE AS I UNDERSTAND THEIR ARGUMENT, IS THAT, BECAUSE OF THESE CHANGES, EVIDENTLY THE STATE MUST HAVE SAID SOMETHING ABOUT THESE ORIGINAL DRAFTS, AND THESE CHANGES WERE MADE. I MEAN, THAT SEEMS TO BE THE ESSENCE OF THEIR ARGUMENT.

WELL, THE ONLY HANGS THAT ARE ACTUALLY INCORPORATED -- THE ONLY CHANGES THAT ARE ACTUALLY INCORPORATED FROM THE NOTES, THE PLACE WHERE THE PROSECUTOR, THE ONLY THING THAT HE RECOGNIZED AS HIS WAS THE WORD "WRONG" IN THE MARGIN. IT SAID "WRONG" AND IT HAD A CIRCLE AROUND THE STATEMENT INDICATING THAT THE ORIGINAL SENTENCING JURY RECOMMENDED A DEATH SENTENCE BY A VOTE OF 11-TO-1, AND THAT WAS CIRCLED AND SAID WRONG. IN FACT, THAT WAS NOT WRONG. IT WAS TRUE. IT WAS A 11-1 RECOMMENDATION AT THE ORIGINAL SENTENCING, AND IN THE FINAL ORDER WHICH IS SIGNED, IT SAYS THE SAME THING THAT IT SAYS IN THE DRAFT, SO THE ONLY THING THAT HE CAN EVEN RECALL, THIS IS MY WORD THAT IS WRONG OUT HERE, WAS NOT INCORPORATED INTO THE FINAL ORDER, BECAUSE

THEY DIDN'T CHANGE THAT, BECAUSE IN FACT IT WASN'T WRONG. THE OTHER NOTES THAT ARE ON THE DRAFT ORDER, PAM KOHLER, WHO WAS THE LAW CLERK, TESTIFIED DIRECTLY THAT IS MY HANDWRITING. I MADE THOSE NOTES, AND THE ONLY PERSON I GOT INPUT FROM IN DRAFTING THE ORDER WAS JUDGE PERRY. SHE RECALLED HAVING CONVERSATIONS WITH JUDGE PERRY ABOUT DRAFTING SENTENCING ORDERS IN GENERAL. SHE DID NOT SPECIFICALLY RECALL THIS CASE IN PARTICULAR, BUT SHE SAID IT WAS JUST PART OF HER COMMON, PART OF HER JOB RESPONSIBILITIES, AND THAT TYPICALLY SHE WOULD START WITH AN ORDER AND THERE WOULDE SOME EXCHANGE WITH THE JUDGE IN DRAFTING THE ORDER AND THERE WOULD BE SEVERAL DRAFTS, AND SHE SAID THAT THE OTHER WRITING THAT YOU SEE ON THE DRAFT THAT THE PROSECUTOR SAID WAS NOT HIS WAS HER WRITING, AND THOSE ARE HIJTED, AND THEN THERE IS OTHER LANGUAGE THAT THERE ARE NO NOTES BUT OBVIOUSLY IT CHANGES FROM THE DRAFT TO THE FINAL ORDER.

WHAT CONCLUSION DID THE POSTCONVICTION JUDGE COME TO ON THIS ISSUE, AFTER THAT EVIDENTIARY HEARING?

THE CONCLUSION, THE FACTS, AS HE FOUND, WAS THAT THERE HAD BEEN NO IMPROPER EXPARTE COMATIONWEEN THE JUDGE AND THE STATE ATTORNEY'S OFFICE, THAT THIS ORDER HAD BEEN DRAFTED BY THE LAW CLERK, AND THAT SHE RECEIVED INPUT ONLY FROM THE JUDGE.

AND WAS THAT BASED PARTIALLY ON THE PROSECUTOR'S TESTIMONY THAT HE DID NOT DRAFT THE SECOND SENTENCING ORDER, OR WAS THERE EQUIVOCATION ABOUT THAT? I AM NOT --

NO. HE, THE PROSECUTOR TESTIFIED DIRECTLY THAT HE DID NOT DRAFT THIS ORDER. HE SAID THAT HE MAY HAVE SEEN THE ORDER, BECAUSE HE THOUGHT HE WROTE THAT WORD "WRONG", SO AT SOME POINT HE THOUGHT HE MAY HAVE SEEN IT, JUST FROM LOOKING AT IT AND RECOGNIZING HIS HANDWRITING, BUT HE DID NOT HAVE ANY RECOLLECTION ABOUT WHAT THAT MENTOR HOW IT CAME TO BE OR WHAT THE CONSEQUENCES OF THAT WERE.

BUT HE WAS UNEQUIVOCAL IN SAYING THAT HE DID NOT DRAFT IT.

HE DID NOT DRAFT IT, AND PAM KOHLER WAS UNEQUIVOCAL IN SAYING SHE DID DRAFT IT, AND SHE RECOGNIZED THE PARTICULAR FONT ON THE COMPUTER AND CERTAIN THINGS THAT WERE PARTICULAR TO THE ORDER AS BEING HER WORK.

AND DID SHE TESTIFY THAT SHE DID THAT UNDER THE DIRECTION OF JUDGE PERY?

YES AND WITH INPUT FROM JUDGE PERRY, AND JUDGE PERRY WAS THE ONLY PERSON THAT SHE RECEIVED INPUT FROM.

COULD YOU ADDRESS THE DENIAL OF THE EVIDENTIARY HEARING AS TO CLAIM FOUR, THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE, AND SPECIFICALLY THERE IS ABOUT SEVEN PAGES, EIGHT PAGES IN THE BRIEF OF THE APPELLANT, FROM 37-TO-46, DETAILING A GREAT DEAL OF LAY TESTIMONY THAT THEY CLAIM SHOULD HAVE BEEN PRESENTED AT THE RESENTENCING THAT WASN'T, AND HOW DO WE EVALUATE THIS, THAT IS MR. PEARL'S POTENTIAL INEFFECTIVENESS, IN LIGHT OF THIS EVIDENCE, WITHOUT AN EVIDENTIARY HEARING?

THE EVIDENCE WHICH THEY ARE NOW ALLEGING SHOULD HAE BEEN PRESENTED TO THENTENG JURY PRIMARILY CONSISTS OF EVIDENCE THAT RELATES TO THE TIME BEFORE JONES WAS FIVE OR SIX YEARS OLD. AT THAT, WHEN HE WAS ABOUT FIVE OR SIX YEARS OLD, HE WENT TO LIVE WITH HIS FATHER AND HIS STEPMOTHER.

LET ME STOP YOU THERE. AT THIS RESENTENCING.

YES.

DR. CROPP TESTIFIED.

RIGHT.

HE TESTIFIED AT THE FIRST SENTENCING.

YES.

HE, WERE THERE ANY LAY WITNESSES THAT TESTIFIED AT THE SECOND PENALTY PHASE?

NO.

SO WHAT THEY ARE ARGUING IS THAT THERE SHOULD HAVE BEEN LAY WITNESSES TESTIFYING, SO THAT, BECAUSE A JURY JUST HEARING FROM A MENTAL HEALTH EXPERT ISN'T REALLY ENOUGH TO GIVE THE FLAVOR OF WHAT SEEMS TO BE A VERY TRAUMATIC, TROUBLED, LENGTHY CHILDHOOD, AND COUPLED WITH MR. PEARL, HIMSELF, WANTING TO GET OFF OF THIS CASE, AND FEELING LIKE HE DIDN'T HAVE MUCH OF A A RAPPORT, THAT THIS IS -- MUCH OF A RAPPORT, THAT THIS IS EXACTLY THE KIND OF THING THAT WE SHOULD LOOK AT THROUGH AN EVIDENTIARY HEARING, RATHER THAN JUST IN THIS CON INCLUDES --CONCLUSORY WAY?

IAGREE THAT IFR. CROPP HAD NOT GOTTEN A LOT OF THAT INFORMATION TO THE JURY, IT MIGHT BE AN EVIDENTIARY HEARING N THIS CASE, DR. CROPP RELATED ALL OF THAT INFORMATION. THEY DON'T CITE ANY INFORMATION. WHAT THEY ARE SUGGESTING IS THE PROCEDURE THAT COUNSEL USED TO PUT THIS INFORMATION BEFORE THE JURY WAS WRONG. HE SHOULD HAVE DONE IT THROUGH OTHER TYPES OF WITNESSES.

BUT WE KNOW, AS A MATTER OF COMMON KNOWLEDGE, THAT A MENTAL HEALTH EXPERT WHO IS HIRED AFTER A CASE, AND SIMPLY RECOUNTS HIS IMPRESSION, IS SUBJECT JUST TO LOTS OF CROSS-EXAMINATION. THEY ARE TESTIFYING BASED ON HEARSAY, AND THAT IF YOU HAVE GOT COMPELLING LAY WITNESSES, SURELY YOU ARE NOT NG T A DECISION TO ONLY PUT ON A MENTAL HEALTH EXPERT WHEN YOU HAVE GOT LOTS OF COMPELLING LAY WITNESSES IS SOMETHING THAT WILL ALWAYS BE REASONABLE OR ALWAYS BE UNREASONABLE. I GUESS THATIS MY QUESTION. HOW DO YOU KNOW THIS, WITHOUT HAVING A JUDGE EVALUATE WHAT THIS LAY WITNESS TESTIMONY WOULD HAVE BEEN?

WELL, THE LAY WITNESS TESTIMONY WOULD HAVE BEEN THE SAME THING THAT DR. CROPP TESTIFIED TO, BECAUSE HE, IN A -- HE DISCUSSED HOW HE INTERVIEWED EACH OF THESE LAY WITNESSES, INDEPENDENTLY, AND HE DIDN'T JUST TAKE THE STAND AND TALK ABOUT HIS CONCLUSIONS. HE TALKED EXTENSIVELY ABOUT JONES'S BACKGROUND AND THE INFORMATION THAT HAD BEEN MADE AVAILABLE TO HIM, AND HE COMMENTED THAT HE HAD BEEN FORTUNATE IN THIS CASE, TO HAVE A GREAT DEAL OF BACKGROUND INFORMATION. AND THE LAY WITNESSES THAT HE IS TALKING ABOUT PRESENTING, WERE IN JONES'S LATER YEARS. THE ONES WHO KNEW HIM WHEN HE WAS IN PUTNAM COUNTY. THEY WERE NOT EYEWITNESSES. THEY WOULD DO KNOW MORE THAN WHAT THE MENTAL HEALTH EXPERT COULD DO TO TALK ABOUT THE EARLY YEARS OF HIS LIFE. THERE HAS NEVER BEEN A SUGGESTION THAT THE STEPMOTHER, WHO, I GUESS, IS THE ONLY ONE THAT COULD TESTIFY IN FIRST PERSON ABOUT THE EARLY YEARS AFTER AGE FIVE, FROM FIVE TO ABOUT THE AGE OF ELEVEN, IN HER EXPERIENCE WAS THERE HAS NEVER BEEN AN ALLEGATION. THAT SHE IS AVAILABLE. THAT SHE WOULD HAVE COME TO THE RESENTENCING. IN FACT DR. CROPP SAID HE WOULD HAVE LIKED TO TALK TO HER BUT SHE WASN'T AVAILABLE TO HIM, SO HOW THEY COULD HAVE GOTTEN HER THERE IS A MYSTERY, AND THEY HAVEN'T EVEN ALLEGED THAT THAT SHOULD HAVE HAPPENED. WHAT THEY FOCUSED PRIMARILY ON WITH INEFFECTIVE ASSISTANCE OF PENALTY-PHASE COUNSEL IS NOT SO MUCH THE LAY WITNESSES. THEY FOCUS ON THE EARLY YEARS BEFORE HE WAS FIVE YEARS OLD, AND MORE THAN THAT THEY FOCUSED ON HIS MOTHER'S LIFE, AND HIS MOTHER'S LIFE IS NOT

MITIGATING. THEY TALK ABOUT HER POOR BACKGROUND, HOW SHE DIDN'T HAVE A GOOD EDUCATION AND HOW SHE WAS ON DRUGS AND HOW SHE WAS MISTREATED BY HER PARENTS, AND NONE OF THAT IS MITIGATING FOR MR. JONES. TO THE EXTENT THEY SAY, AND THEY ALSO, DON'T MAKE ANY SHOWING THAT COUNSEL IS DEFICIENT FOR NOT FINDINGIT OUT ABOUT THOSE FIRST FIVE YEARS OF HIS LIFE OR ABOUT HIS MOTHER'S LIFE, BECAUSE THEY CAN'T. WHAT HAPPENED IS, WHEN HE WAS FIVE OR SIX YEARS OLD, HE GOES TO LIVE WITH HIS DAD AND HIS STEPMOM. THEY HAVE A TREMENDOUS AMOUNT OF HAVE A NUMBER OF PROBLEMS WITH HIM FROM THE BEGINNING. ALL OF WHICH IS FULLY EXPLAINED TO BOTH PENALTY PHASE JURIES, ABOUT THE CONDITION THAT HE WAS IN WHEN HE CAME TO LIVE WITH THEM.

WAS THERE A SISTER?

THEY DID NOT DISCUSS THEIR THEIR BEING A SISTER. WHAT HAPPENED IS THAT MUCH LATER IN FACT ACCORDING TO WHAT DR. CROPP WAS ABLE TO SAY, JONES REALLY DIDN'T HAVE MUCH MEMORY OF HIS LIFE THOSE FIRST FIVE YEARS, OTHER THAN HE RECALLED BEING LEFT UNSUPERVISED AND OUT IN THE STREETS, BUT HE OTHERWISE COULDN'T TELL THEM ANYTHING. WHAT HAPPENED LATER IS THAT, AFTER THE RESENTENCING, SOMETIME AFTER 1991, AND THE RECORD DOESN'T CLEARLY REFLECT WHEN, HE HAD AN OLDER SISTER WHO DECIDES, ON HER OWN, SHE WANTS TO FIND HER LONG LOST BROTHER, WHO SHE HASN'T SEEN FOR ALL THESE YEARS. SHE HIRES A PRIVATE INVESTIGATOR AND LO AND BEHOLD LOCATES MR. JONES ON DEATH ROW IN FLORIDA. IT WAS THAT ACTION THAT GETS COLLATERAL COUNSEL TO GET INTO ALL OF THIS MITIGATION FROM THOSE FIVE YEARS WHICH IS SHE IS NOW ABLE TO PROVIDE. THERE HAS NEVER BEEN ANY KIND OF ALLEGATION THAT COUNSEL IS DEFICIENT FOR NOT FINDING THE SISTER, FOR NOT KNOWING ABOUT THE SISTER, FOR NOT FOLLOWING UP WITH THE SISTER BACK THEN. TO THE EXTENT THAT THE SISTER SAYS, GEE, THOSE FIRST FIVE YEARS WERE HORRIBLE, WE ALREADY KNEW. THAT DR. CROPP CERTAINLY KNEW THAT. IT IS CERTAINLY CLEAR FROM THE DESCRIPTION OF JONES GIVEN BY THE FATHER AND THE STEPMOTHER AND ALL OF HIS PSYCHIATRIC RECORDS FROM WHEN HE WAS A CHILD ALL OF HIS SCHOOL RECORDS, ALL OF WHICH DR. CROPP NOT ONLY HAD BUT RELATED TO THE JURY --

BUT THERE IS NO CLAIM THAT SHE WAS AVAILABLE --

NO.

-- AND SIMPLY NOT USED BY THE LAWYER. NO CLAIM IN OPEN COURT.

NO, THEREO CTHAT ANYBODY EVEN EVER KNEW ABOUT HER AND IT IS NOT CLEAR THAT JONES EVEN REMEMBERED THAT HE HAD A SISTER, UNTIL SHE COMES BACK INTO HIS LIFE, SO THERE IS NOTHING, I DON'T KNOW WHETHER THE STEPMOM EVER COULD HAVE PROVIDED THIS INFORMATION, BUT THERE IS NO SHOWING THAT, HOW YOU GET THERE FROM HERE. SO THERE REALLY WAS NO REASON TO GO BACK AND HAVE A HEARING ON INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL PENALTY PHASE, BECAUSE THERE IS NO DEFICIENCY SHOWN, WITH REGARD TO THE LATER LAY WITNESSES WHO DO MORE THAN OFFER THE SAME INFORMATION THAT WAS PROVIDED BY DR. CROPP, IT IS CERTAINLY CUMULATIVE WITH WHAT DR. CROPP HAD TO SAY, AND THEY ARE NO MORE CREDIBLE IN WHAT THEY ARE TALKING ABOUT, BECAUSE THEIR INFORMATION COMES FROM JONES, AND AT LEAST DR. CROPP WAS ABLE TO VERIFY, THROUGH ALL OF THE SCHOOL RECORDS AND HOSPITAL RECORDS AND PSYCHIATRIC RECORDS, A, CERTAINLY A MORE COMPLETE AND ACCURATE PICTURE THAN ANY LAY WITNESS COULD COME ALONG LATER AND OFFER. THERE IS, ALSO, NO BASIS FOR HE HAVE IN HE -- NO BASIS FOR INEFFECTIVE ASSISTANCE OF COUNSEL AT GUILT PHASE, BECAUSE THERE IS NO DEFICIENCY OR PREJUDICE WHICH SHOWS ANYTHING THAT COULD HAVE MADE AN IMPACT ON THIS TRIAL. THEIR MAIN ARGUMENT IS THAT COUNSEL CONCEDED GUILT IN CLOSING ARGUMENT, YET THIS COURT IN ATWATER AND MORE RECENTLY IN THE STATE V WILLIAMS CASE SAID THAT IS NOT SOMETHING YOU NEED TO HAVE AN EVIDENTIARY HEARING ON, WHERE IN THE FACTS OF THIS

CASE IT IS CLEARLY A REASONABLE STRATEGIC DECISION.

YOU TALKED ABOUT THIS EXTENSIVE CHILDHOOD THAT WAS MIRED BY CONFLICT AND THAT HE WAS, LIKE, AN ANIMAL BY THE TIME HE WAS ELEVEN, YET THE TRIAL JUDGE IN THE SENTENCING ORDER THAT WE HAVE UNDER, FROM THE SECOND SENTENCING ORDER, TALKS ABOUT, PUTS THIS UNDER ONE PARAGRAPH AND DOESN'T REALLY DETAIL ANY OF THIS, TALKS ABOUT DR. CROPP AND THEN DOES HE GIVE IT LITTLE WEIGHT?

GIVES IT LITTLE WEIGHT. YES. HE DO-

SO HE DOESN'T TALK ABOUT HIS PSYCHIATRIC BACKGROUND AT ALL?

HE LUMPS THAT TOGETHER, B ALL OF THAT CAME OUT OF DR. CROPP'S TESTIMONY.

I MEAN, AGAIN, AND I GUESS THAT IS WHY I HAVE TROUBLE SAYING ANYTHING THAT IS, WHEN A MENTAL HEALTH EXPERT TESTIFIES AND THERE ISN'T LAY TESTIMONY THAT REALLY GIVES THE FLAVOR FOR IT, I DON'T SEE HOW THAT CAN JUST SIMPLY BE CUMULATIVE, WITHOUT KNOWING WHAT THE QUALITY OF THAT ADDITIONAL LAY WITNESS TESTIMONY IS, AND I DON'T KNOW HOW YOU EVALUATE THAT, WITHOUT AN EVIDENTIARY HEARING.

I THINK YOU ARE LOOKING AT TWO DIFFERENT THINGS, BECAUSE IF YOU ARE LOOKING AT WHAT THE SENTENCING ORDER SAYS WITH REGARD TO THE TESTIMONY THAT, IS MORE A CAMPBELL QUESTION. DID THE SENTENCING ORDER, DID THE JUDGE PROPERLY ASSESS AND WEIGH THE MITIGATION THAT WAS BEFORE HIM FROM THE TESTIMONY? IF YOU ARE GOING TO LOOK AT THE CUMULATIVE EFFECT OF PRESENTING THESE LAY WITNESSES, YOU HAVE TO LOOK AT THE EVIDENCE THAT WAS ACTUALLY BEFORE THE JURY, NOT WHAT THE JUDGE SAID ABOUT IT IN HIS SENTENCING ORDER. WHAT HE SAID ABOUT IT IN HIS SENTENCING ORDER IS AN ISSUE FOR DIRECT APPEAL. IF HE DIDN'T PROPERLY ANALYZE THE MITIGATION THAT WAS BEFORE HIM, THAT IS A QUESTION TO BE RAISED ON THE DIRECT APPEAL. THE EVIDENCE WAS THERE TO THE JURY, AND THE EVIDENCE WHICH HAS BEEN OFFERED DOESN'T EXPAND OR GIVE ANYMORE WEIGHT TO THE EVIDENCE THAT DR. CROPP ALREADY PRESENTED, SO IT WOULD HAVE TO BE, NUMBER ONE, A PROBLEM WERE SHOWING DEFICIENCY, BECAUSE CLEARLY COUNSEL WAS AWARE OF ALL OF THIS, SO IT IS A STRATEGIC DECISION AS TO HOW HE IS GOING TO PRESENT IT TO THE JURY, AND YOU CAN'T HAVE THE A DEFICIENCY I, IF THE JURY HAD THIS INFORMATION BEFOREHAND. ALL YOU ARE GOING TO DO IS DISAGREE WITH COUNSEL'S STRATEGY IN USING A MENTAL HEALTH EXPERT AS OPPOSED TO LATER LAY WITNESS EXPERTS WHO COULD PROBABLY BE CROSS-EXAMINED BY VERY DAMAGING INFORMATION THAT THEY KNOW THAT, IS A STRATEGIC DECISION BY COUNSEL, AND SO FOR THE SAME REASON THAT HE IS MAKING A STRATEGIC DECISION WITH HIS CLOSING ARGUMENT, IT IS NOT SOMETHING THAT WOULD NEED TO GO TO AN EVIDENTIARY HEARING. IT IS CLEAR THAT COUNSEL KNEW ABOUT THIS BECAUSE DR. CROPP TESTIFIED. HE INTERVIEWED THESE PEOPLE THE BOYS' HOME AND FROM THE SHERIFF'S OFFICE THAT WOULD PROVIDE THIS INFORMATION, AND THAT IS HOW HE WAS ABLE TO CORROBORATE A LOT OF WHAT JONES WAS TELLING HIM IN THESE INTERVIEWS AND WHAT JONES WAS REPORTING TO HIM. HE WAS ABLE TO CORROBORATE IT NOT ONLY THROUGH THE WRITTEN DOCUMENTS AND RECORDS FROM EARLIER IN LIFE BUT WITH THESE LATER LAY WITNESSES WHO COULD VERIFY THE SAME THING. SO ON THE FACTS OF THIS CASE, THERE HAS NOT BEEN ANY BASIS OFFERED FOR AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL. THIS WAS NOT A MOTION WHICH WAS SUMMARILY DENIED BECAUSE THERE WASN'T AN EVIDENTIARY HEARING GRANTED, WITH REGARD TO THE ONLY CLAIM THAT RAISED A REASONABLE BASIS TO HAVE A HEARING, WHERE THERE WERE DISPUTED FACTS, AND THAT WAS WITH REGARD TO THE SENTENCING ORDER.

THERE WAS NO REQUEST FOR AN EVIDENTIARY HEARING ON THE ISSUE ABOUT THE JUDGE BEING --

NO. NO. IN FACT, I DON'T BELIEVE THAT WAS RAISED AS AN ISSUE USE -- AS N ISSUE, WITH REGARD TO JUDGE PERRY, SO FOR THAT REASON I WOULD ASK THIS COURT TO AFFIRM THE DENIAL OF POSTCONVICTION RELIEF. THANK YOU. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL.

THANK YOU, YOUR HONOR. JUST A FEW POINTS REGARDING THE IAC CLAIM IN THE PENALTY PHASE. I BELIEVE MUCH OF WHAT THE STATE WAS PRESENTING HERE TODAY ARE EXACTLY THE TYPES OF ISSUES AND CLARIFICATION THAT CAN HAPPEN AT AN EVIDENTIARY HEARING. WHAT WAS THE EVIDENCE THAT COULD HAVE BEEN PRESENTED? WHY WAS IT NOT PRESENTED? OBVIOUSLY THIS ISSUE CAME UP PRIOR TO THAT SENTENCING PHASE, WHEN MR. JONES SOUGHT TO HAVE MR MR. PEARL DISMISSED AS HIS COUNSEL, RAISING AS ONE OF HIS ISSUES WITH MR. PEARL THE FACT THAT HE WAS GIVING HIM NAMES OF LAY WITNESSES, AND MR. PEARL WAS NOT CONTACTING THEM.

WELL, DO YOU DISPUTE THAT DR. CROPP REALLY WENT INTO THE DETAILS OF THIS REALLY TROUBLED LIFE? I MEAN, DESCRIBING THE BEHAVIOR AS ANIMALISTIC, AND THAT THE INDIVIDUAL HAD CERTAINLY NO EATING HABITS AND HAD NOT BEEN TOILET TRAINED. AND THE TESTIMONY THAT THIS, REALLY, THAT THIS IMPACTED THE REST OF HIS LIFE AND HAD NEVER COMPENSATED FOR IT, ALL OF THE PSYCHIATRIC ADMISSIONS WHEN HE WAS ELEVEN, THE DIAGNOSIS. WHAT IS MISSING THAT THEY DID NOT HAVE?

I DON'T DISAGREE THAT DR. CROPP DID GO INTO GREAT DETAIL ABOUT CERTAIN PORTIONS OF MR. JONES'S LIFE. HOWEVER, HE DID NOT HAVE MUCH INFORMATION REGARDING THAT PERIOD OF TIME WHEN HE LIVED WITH HIS MOTHER.

I UNDERSTAND THAT, BUT WHAT IS MISSING? THAT IS A CONCLUSION, WHICH WE UNDERSTAND. WHAT IS MISSING?

WHAT IS MISSING IS TESTIMONY THAT WOULD COME FROM SOMETHING BESIDES MR. JONES, WHO OBVIOUSLY CAN'T REMEMBER PERIODS OF TIME BEFORE HE WAS FIVE.

WHAT ISAL END IN THE 3.850 THEN -- WHAT IS ALLEGED IN THE 3.850, THEN, THAT YOU SAY IS MISSING, THAT IS A REASON TO EVEN VERY, VERY A HEARING ON? -- THAT IS A REASON TO EVEN HAVE A HEARING ON?

THE TESTIMONY THAT WAS MISSING.

WHAT IS THE EVIDENCE?

THE EVIDENCE OF THE WAY HE WAS TREATED WHILE HE LIVED WITH HIS MOTHER UP TO AGE FIVE. THE IMPACT OF HEARING THAT EVIDENCE FROM FAMILY MEMBERS THAT COULD HAVE ON A JURY AND A SENTENCING JUDGE. THAT WAS NOT DONE IN THIS CASE. THEY DIDN'T GET TO HEAR THAT. THEY HEARD IT FROM A MENTAL HEALTH EXPER.

IS IT BECAUSE IT CAME FROM A MENTAL HEALTH AS OPPOSED TO ALLAY WITNESS, OR DID THE MENTAL HEALTH EXPERT GIVE YOU THE RESULT OF WHAT HAD HAPPENED BY AGE FIVE, IT THAT IT WAS IRREVERSIBLE BY AGE FIVE?

I DON'T THINK THAT THE MENTAL HEALTH EXPERT WAS ADEQUATELY PREPARED BY MR. PEARL TO PRESENT THE FULL PICTURE OF WHAT HAPPENED BEFORE MR. JONES WAS FIVE YEARS OLD. BECAUSE HE DIDN'T CONTACT THOSE WITNESSES.

WHAT WAS HE NOT GIVEN? CAN YOU ANSWER THE QUESTION? WHAT WAS HE NOT GIVEN? THAT IS WHERE WE KEEP REACHING FOR.

WE DON'T EVEN KNOW WHAT HE WAS NOT GIVEN, IN TERMS OF BECAUSE MR. JONES, LIKE YOU SAID GAVE THE NAMES TO HIM AND HE DIDN'T CONTACT THEM. THAT IS EVIDENCE THAT WE WOULD ANTRET AT AN EVIDENTIARY HEARING AND HAVE IT DEVELOPED. WEAL EJDZ THE FACTS AS WE KNOW THEM. WE WOULD WANT THEM TO BE CONFIRMED WITH THE LAY WIES IN FRONT OF A JUDGE AT AN EVIDENTIARY HEARING.

WHAT LAY WITNESSES HAD FIR KNOWLEDGE OF WHAT WENT ON BEFORE AGE FIVE? OTHER THANTRUED I. I UNDERSTAND THAT THE SISTER LATER DECIDES SHE IS GOING TO FIND HER BR AND NOW HE IS SOMEPLACE, BUT WHO, OTHER THANTRUED I, COULD TALK ABOUT FROM FIRST -- OTHER THAN TRUDI, COULD TALK ABOUT FROM FIRSTHAND KNOWLEDGE, MR. JONES'S FIRST FIVE YEARS?

THERE WERE SEVERAL PEOPLE THAT WERE PART OF HIS LIFE BESIDES HIS MOTHER UP TO THAT POINT. THERE WERE NAMES GIVEN OF THE PEOPLE THAT SHE HAD LIVED WITH DURING THAT PERIOD OF HIS LIFE, AND THE 3.850 DID NOT, IT WAS NOT REQUIRED THAT THE NAMES BE LISTED IN THERE AS TO WHO WOULD PROVIDE WHAT EVIDENCE.

I UNDERSTAND. BUT WAS THE SUBSTANCE OF THEIR TENY?

IN THE 3.850? YES.

AND WHAT WAS THAT TESTIMONY ULDE BEEN GIVEN?

YOUR HONOR, IT IS --

THAT IS WHAT WE ARE INTERESTED IN.

IT IS SO VOLUME YOU MEANNESS -- VOLUMINOUS.

BUT YOU COULDENSE IT INTO A COUPLE OF SENTENCES OF WHAT THIS IS GOING TO SHOW.

YOUR HONOR, I BELIEVE THAT IT WOULD SHOW THE SEVERE DEVELOPMENTAL ISSUES THAT MANIFESTED ITSELF THE REST --

THAT HE WAS BEATEN EVERYDAY FOR A YEAR. I MEAN WHAT? YOU KNOW.

YOUR HONOR, I DON'T KNOW THAT I CAN ANSWER THAT QAE QUESTION TO YOUR SATIS-- THAT QUESN TO YOUR SATISFACTION TODAY. THAT IS THE TYPE OF EVIDENCE THAT WE WANTED TO PRESENT AT AN EVIDENTIARY HEARING, TO HAVE THE TRIAL JUDGE MAKE THAT DETERMINATION.

SO WOULD YOU ASK THE TRIAL JUDGE TO LET US EXPLORE AND SEE F THERE IS THAT KIND OF EVIDENCE?

TO HAVE THE TRIAL JUDGE EXPLORE THAT?

NO. IS THA WHAT YOU WANTED AN VIDENTIARY HEARING FOR, TO SEE IF THERE WAS A KIND OF TESTIMONY AS OPPOSED TO ASSERTINGHAT THES THAT KIND OF TESTIMONY > NO. I BELIEVEHAT THERE IS THAT TESTIMONY. WE WOULD PRESENT IT AT AN EVIDENTIARY HEARING. I MEAN, ALL OF THIS IS TIED TR WH THE PERFORMANCE BY MR. PEARL IN THIS CASE, WHICH IS OUTLINED IN GREAT DETAIL IN E BRIEF, AND THE LACK OF EFFECTIVE AS ANSWER OF -- ASSISTANCE OF COUNSEL. THAK YOU. MR. CHUSTICE

THANK YOU. THOU, COUNSEL.