James Eugene Hunter v. State of Florida

MR. CHIEF JUSTICE: GOOD MORNING AND WELCOME TO IT ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT FOR FRIDAY, OCTOBER 5. THE FIRST CASES THAT WE HAVE FOR OUR ORAL ARGUMENT ARE THE CASES OF HUNTER VERSUS STATE, HUNTER VERSUS MOORE. MR. PINKARD, YOU MAY PROCEED.

GOOD MORNING. I AM ERIC PINKARD FROM CAPITAL COLLATERAL REGIONAL COUNSEL, FOR THE MIDDLE DISTRICT, HERE ON BEHALF OF JAMES HUNTER. MR. HUNTER IS HERE THIS MORNING, ON A DIRECT APPEAL TO THE LOWER COURT DENIAL OF HIS MOTION FOR 3.8508 RELIEF, AS WELL AS A SIMULTANEOUSLY-FILED WRIT OF HABEAS CORPUS PETITION. THE FIRST ISSUE I WOULD LIKE TO ADDRESS THIS MORNING INVOLVES ISSUE NUMBER ONE OF THE APPELLATE BRIEF IN THIS CASE, AND THAT IS THAT THE OFFICE OF THE PUBLIC DEFENDER, IN AND FOR VOLUSIA COUNTY, FLORIDA, HAD AN ACTUAL CONFLICT OF INTEREST, IN REPRESENTING MR. HUNTER AT THE TRIAL LEVEL IN THIS CASE, AND THAT THE LOWER COURT ERRED IN FAILING TO GIVE MR. HUNTER RELIEF IN THAT ALLEGATION IN HIS 3.850 MOTION.

CAN YOU GIVE US A BRIEF STATEMENT OF THE UNDERLYING FACTS, AS FAR AS WHO THE LAWYER WAS AND WHAT HE KNEW ABOUT IT, AND WHO THE WITNESS WAS AND --

THE WITNESS IN THE CASE IS POSTCONVICTION INVESTIGATION REVEALED THAT IMPORTANT STATE WITNESS TORRIS COOLEY, AND I USE THAT TERM BECAUSE THAT IS HOW THE ASSISTANT PUBLIC DEFENDER REFERRED TO HIM IN THIS CASE.

THAT IS ALSO A VICTIM, CORRECT?

HE IS NOT ONLY A WITNESS, BUT HE IS, ALSO, A LISTED VICTIM IN THE INFORMATION. THAT'S CORRECT. POSTCONVICTION INVESTIGATION REVEALED THAT MR. COOLEY HAD AN EXTENSIVE CRIMINAL HISTORY, CONSISTING OF CONVICTIONS FOR FRAUD, FELONY FRAUD, FELONY POSSESSION OF COCAINE, MISDEMEANOR BATTERY, MISDEMEANOR POSSESSION OF CANNABIS, AND CONTEMPT OF COURT. POSTCONVICTION INVESTIGATION, FURTHER, REVEALED THAT, AT THE TIME HE GAVE HIS STATEMENT TO THE LAW ENFORCEMENT IN THIS CASE THE DAYTONA BEACH POLICE DEPARTMENT, HE WAS ON THE EVENING OF THE HOMICIDE IN QUESTION, HE WAS ON PRETRIAL RELEASE FOR THE TWO FELONY CHARGES. INVESTIGATION FURTHER REVEALED THAT, AT THE TIME THAT HE GAVE HIS DEPOSITION IN THE HUNTER CASE, HE WAS ON ACTIVE FELONY PROBATION FOR THE TWO FELONY CASES, AND THERE WAS AN OUTSTANDING WARRANT FOR HIS ARREST, FOR FAILING TO APPEAR ON THE BATTERY CHARGE. WITHIN THREE WEEKS OF MR. HUNTER HUNTER'S TRIAL IN THIS CASE, THIS IMPORTANT STATE WITNESS AND LISTED VICTIM, TORRIS COOLEY, WENT TO COURT AND PLED GUILTY TO THE BATTERY CHARGE, WHEREUPON HE WAS PLACED ON SIX MONTH'S PROBATION, AND HE SERVED 17 DAYS IN JAIL, AGAIN, WITHIN THREE WEEKS OF MR. HUNTER'S TRIAL, AND ALSO, SERVED 15 DAYS IN JAIL FOR CONTEMPT OF COURT.

WHAT DOES THE RECORD SHOW OF COUNCIL'S KNOWLEDGE OF THESE EVENTS? -- COUNSEL'S KNOWLEDGE OF THESE EVENTS?

COUNSEL'S PARTICULAR KNOWLEDGE, HE DENIED THAT HE HAD ANY KNOWLEDGE OF THIS CASE, OR THE PUBLIC DEFENDER OFFICE, THAT HE WAS AWARE THAT THE PUBLIC DEFENDER'S OFFICE REPRESENTED THIS VICTIM. HOWEVER, WHAT HAPPENED IN THIS CASE IS, IN NOVEMBER OF 1992,

THE PUBLIC DEFENDER'S OFFICE FOR VOLUSIA COUNTY ACKNOWLEDGED THE EXISTENCE OF THE VERY CONFLICT WHICH I AM TALKING ABOUT, WHEN THEY WERE THROUGH FROM MR. COOLEY'S CASE, SO MR. COOLEY COOLEY'S CASE ON THE TWO FELONY CHARGES. THEY DIDN'T WITHDRAW FROM THE REST OF IT, BUT FROM THAT POINT IN TIME, THE ENTIRE OFFICE OF THE PUBLIC DEFENDER WAS PUT ON NOTICE, AND THEY DID ACKNOWLEDGE THE EXISTENCE OF THIS CONFLICT, AND THAT CONFLICT PERMEATED THROUGHOUT THE ENTIRE PUBLIC DEFENDER'S OFFICE, I BELIEVE, LEGALLY AT THAT POINT, AND THAT IS WHAT TRIGGERED THE OBLIGATION ON THE PART OF THE PUBLIC DEFENDER'S OFFICE TO WITHDRAW FROM THE CASE, BECAUSE THEY IN EFFECT SAID WE RECOGNIZE AT THIS TIME THAT WE KNOW WE REPRESENT BOTH THE VICTIM IN THIS CASE AND THE WITNESS IN THIS CASE, SO WHETHER OR NOT, I THINK, FROM A LEGAL STANDPOINT WHETHER OR NOT THIS LAWYER COULD REMEMBER, AT THE EVIDENTIARY HEARING WHETHER OR NOT HE KNEW AT THE TIME THAT SOMEONE ELSE IN HIS OFFICE HAD REPRESENTED MR. COOLEY, I DON'T THINK IS THE APPROPRIATE LEGAL QUESTION, BECAUSE I THINK KNOWLEDGE --

THE CASE THAT THEY WERE THROUGH FROM OR CASES DID NOT INVOLVE THIS DEFENDANT OR DID -- I AM NOT SURE --

NO. NO. THEY WENT THROUGH FROM MR. COOLEY'S CASE. THE VICTIM -- IN OTHER WORDS THE OFFICE OF THE PUBLIC DEFENDER FILED PAPERWORK IN THIS CASE, ACKNOWLEDGING THAT THEY HAD A CONFLICT IN REPRESENTING MR. COOLEY, BECAUSE OF THE HUNTER CASE, A HOMICIDE.

IS IT YOUR POSITION THAT, ANY TIME THERE IS THAT KIND OF REPRESENTATION, WITHOUT ANYTHING MORE, THAT YOU SHOULD WITHDRAW.

IT WOULD DEPEND UPON THE WITNESS. IT WOULD DEPEND UPON THE IMPORTANCE OF THE WITNESS, BUT I BELIEVE THAT, ONCE THE PUBLIC DEFENDER ACKNOWLEDGES ON THE ONE CASE, THE COOLEY CASE, THEN CERTAINLY IT WOULD APPLY TO THE HUNTER CASE.

IF THEY WITHDREW FROM THE COOLEY CASE, WHEN WAS THE HUNTER CASE, AFTER IT WAS COMPLETEED?

NO. THEY WENT THROUGH FROM THE COOLEY CASE IN NOVEMBER OF 1992, WHICH IS ROUGHLY ONE MONTH AFTER MR. HUNTER WAS CHARGED. IT WAS WHILE THE CASE WAS STILL PENDING.

THEY WEREN'T, THEN, REPRESENTING THE WITNESS, AT THE TIME OF THE HUNTER TRIAL T.

THEY WERE NOT ACTIVELY ACTUALLY REPRESENTING THE WITNESS AT THE TIME OF THE HUNTER TRIAL, BUT I THINK THIS COURT MAKES IT CLEAR IN THE GUZMAN CASE, THAT ONE CLIENT CANNOT BE CALLED TO TESTIFY AGAINST ANOTHER, EVEN WHEN THEIR REPRESENTATION HAS ENDED. I THINK THE CASE LAW IS VERY CLEAR THAT, THE ENDING OF THE REPRESENTATION PRIOR TO THE TRIAL DOESN'T ELIMINATE THE CONFLICT, BECAUSE YOU ARE STILL CALLING ONE CLIENT TO TESTIFY AGAINST ANOTHER.

ISN'T THAT THE ISSUE IN GUZMAN? WASN'T THAT THE ISSUE? THE PUBLIC DEFENDER, IN THIS CASE, SEEING THAT THEY HAD PREVIOUSLY REPRESENTED COOLEY, HAD MOVED TO WITHDRAW, ASSERTING THAT THEY FELT THEY HAD A CONFLICT, THEN THE COURTS AREN'T GOING TO INQUIRE INTO WHETHER THAT IS, IN EFFECT, WAS IN FACT A CONFLICT, BUT AS TO WHETHER IT MANDATES, IF HE ARE THOUGH LONGER REPRESENT -- IF THEY ARE NO LONGER REPRESENTING THE WITNESS, MANDATES WITHDRAWAL, AS A MATTER OF LAW, A DIFFERENT ISSUE. WOULD YOU AGREE WITH THAT?

I THINK IT IS SOMEWHAT A DIFFERENT ISSUE, ALTHOUGH THIS COURT DID GO FURTHER AND TALK ABOUT THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST IN THE GUZMAN CASE, BECAUSE THIS COURT STATED WE CAN THINK OF FEW INSTANCES WHERE CONFLICT OF INTEREST IS MORE

PREJUDICIAL THAN WHEN ONE CLIENT IS CALLED TO TESTIFY AGAINST ANOTHER, AND SO IT IS NOT GIVING COMPLETE DEFERENCE TO THE PUBLIC DEFENDER DEFENDERS OFFICE TO COME FORWARD AND WITHDRAW AT ANY TIME, BECAUSE I THINK THERE IS MORE APPELLATE REVIEW THAN THAT.

WHAT IS THE EVIDENCE IN THIS CASE, INSOFAR AS THE DEFENSE LAWYER HERE? DID HE TESTIFY?

THE DEFENSE LAWYER IN THIS CASE --

WAS HE AWARE, IN OTHER WORDS, DID HE TESTIFY WHETHER HE WAS AWARE OR NOT, THE PUBLIC DEFENDER'S OFFICE? FIRST OF ALL, HE DIDN'T REPRESENT THIS WITNESS, IS THAT CORRECT?

HE DIDN'T, ALTHOUGH THE PUBLIC DEFENDERS OFFICE DID.

BUT THERE IS NO DISPUTE THAT HE DIDN'T HAVE ANY -- HE DID NOT REPRESENT THIS WITNESS.

RIGHT. HE PERSONALLY DID NOT REPRESENT MR. COOLEY. THAT'S CORRECT.

ALL RIGHT. WAS HE AWARE THAT THE OFFICE HAD REPRESENTED THE WITNESS?

WELL, HE TESTIFIED A BIT INCONSISTENTLY ON THAT POINT. HE SAYS THAT --

DID THE TRIAL JUDGE MAKE ANY FINDINGS ABOUT THAT?

THE TRIAL JUDGE MADE A FINDING THAT HE WAS UNAWARE OF IT.

WAS THERE EVIDENCE TO SUPPORT THAT FIND SOMETHING.

WELL, HE TESTIFIED AT ONE POINT, HE SAID, WELL, IF OUR OFFICE WENT THROUGH, I CANNOT BELIEVE THAT SOMEONE WOULDN'T HAVE TOLD ME ABOUT THAT, BUT HE MAINTAINED THAT HE DIDN'T KNOW ABOUT THE CONFLICT OF INTEREST. THAT'S CORRECT.

IF THAT BEING THE CASE, HAS THERE BEEN ANY SHOWING HERE, THAT THIS CONFLICT AFFECTED THE LAWYER'S WORK IN THE CASE?

I THINK THAT, AS A MATTER OF LAW, FIRST OF ALL, I AM ARGUING THAT IN NOVEMBER OF 1992, IT IS THE PUBLIC DEFENDERS OFFICE WHO HAS A CONFLICT IN THIS CASE. THIS CONFLICT PERMEATES THE ENTIRETY OF THE PUBLIC DEFENDERS OFFICE.

YOU ARE SAYING THAT THERE DOESN'T HAVE TO BE ANY SHOWING THAT IT AFFECTED ANYTHING IN THE CASE.

WELL, I THINK IT AFFECTED SOMETHING IN THE CASE, BECAUSE TORRIS COOLEY WAS NEVER CROSS-EXAMINED ABOUT ALL OF HIS RECENT IMPENDING CHARGES.

IS IT YOUR POSITION THAT HE DID NOT CROSS-EXAMINATION THIS WITNESS BECAUSE HE HAD REPRESENTED THIS WITNESS BEFORE?

NO. HE DID NOT COME INTO COURT AND STATE THAT --

ISN'T THAT THE CONCERN IN THE CASE, THAT IS THAT A LAWYER, HAVING REPRESENTED SOMEBODY BEFORE, WOULD NOT FEEL FREE TO CROSS-EXAMINE HIM? THAT IS REALLY THE ULTIMATE CONCERN THAT YOU HAVE. IS THAT NOT CORRECT?

I BELIEVE THAT THE ULTIMATE CONCERN THAT YOU HAVE IN THIS CASE IS TO GO BACK TO THAT

POINT IN TIME AND ASK THE QUESTION, CAN ANYBODY FROM THE PUBLIC DEFENDERS OFFICE IN VOLUSIA COUNTY, WHETHER IT BE THIS PARTICULAR PUBLIC DEFENDER OR ANYONE ELSE IN THAT OFFICE, EFFECTIVELY CROSS-EXAMINATION TORRIS COOLEY, AND THEY EFFECTIVELY CANNOT, BECAUSE THEY REPRESENTED MR. COOLEY, AND IF THEY START TO ASK THE QUESTIONS, THEN THEY ARE GOING TO UNCOVER THE CONFLICT, AND IF THEY DON'T ASK THE QUESTION, THEN IT NEVER COMES FORT FORWARD. THIS IS A MAN --

HAS THIS COURT EVER DEALT WITH THIS SITUATION BEFORE?

I DON'T BELIEVE THIS COURT HAS ADDRESSED THE SITUATION WHERE THE PUBLIC DEFENDERS OFFICE ACKNOWLEDGES THE CONFLICT AS OCCURRED IN THIS CASE, WHERE THEY FILED PAPERWORK, WHICH IS CLEAR IN THE RECORD, IN NOVEMBER OF 1992, ACKNOWLEDGING THIS VERY CONFLICT, THEY HAVE AN OBLIGATION AT THAT POINT, BECAUSE THEY CANNOT, NO ONE FROM THAT OFFICE, FROM THAT POINT, FORWARD, CAN REPRESENT MR. HUNTER PROPERLY.

WHAT WAS THAT CONFLICT BASED ON?

THIS VERY CONFLICT THAT I AM TALKING ABOUT.

YOU ARE TALKING ABOUT THE '92.

'92.

THEY WITHDREW FROM A CASE OF MR. COOLEY'S.

BECAUSE OF THE HUNTER CASE.

BECAUSE OF THE HUNTER CASE. YES. SO THEY KNEW THEY REPRESENTED BOTH HUNTER AND COOLEY.

WELL, DOESN'T THAT HAPPEN IN A LOT OF SITUATIONS, WHERE THERE ARE MULTIPLE PERPETRATORS OF A CRIME, AND THE PUBLIC DEFENDERS OFFICE IS APPOINTED TO REPRESENT SEVERAL OF THEM, AND THEN ALONG THE LINE, THEY REALIZE THEY HAVE GOT THESE MULTIPLE DEFENDANTS, AND THEY, DO THEY HAVE TO WITHDRAW FROM ALL OF THEM?

IT WOULD DEPEND ON WHETHER OR NOT THE EXTENT OF THEIR REPRESENTATION OF THE MULTIPLE CODEFENDANTS AND WHETHER THAT CODEFENDANT IS GOING TO BE CALLED IN THE CASE OR NOT, AND THEY HAVE TO CROSS-EXAMINE THEIR FORMER CLIENT.

WHAT DOES THAT ESTABLISH ABOUT THE REPRESENTATION OF COOLEY AND WHAT KNOWLEDGE WAS GAINED? IT SEEMS TO ME WHAT YOU ARE SAYING IS THAT, BY SOMEHOW REPRESENTING COOLEY, THEY GAINED KNOWLEDGE ABOUT THESE CRIMES, AND THAT IS THE REASON THAT THE DEFENSE LAWYER DIDN'T CROSS-EXAMINE COOLEY ABOUT THE CRIMES. IS THAT THE SORT OF RELIEF THAT YOU ARE --

WHATEVER REASON THE LAWYER HAD, NO LAWYER IT FROM THAT OFFICE WAS IN ANY POSITION TO CROSS-EXAMINE THE WITNESS VICTIM IN THIS CASE.

DON'T WE REALLY HAVE A PRESUMPTION THAT HAS BEEN REBUTED BY THE LAWYER SAYING I DIDN'T EVEN ABOUT THE REPRESENTATION, AND IT CERTAINLY DIDN'T AFFECT ME, BECAUSE I DIDN'T KNOW ABOUT IT AT THE TIME.

THE LAWYER MAY NOT HAVE KNOWN. HOWEVER, THE OFFICE OF THE PUBLIC DEFENDER WHERE HE WORKED KNEW AND ACKNOWLEDGED THIS CONFLICT. THEREFORE THEY HAD THE OBLIGATION TO WITHDRAW. THEY COULD NOT CONTINUE REPRESENTING THE VICTIM.

BUT PER SE DISABILITY, OR IS IT A PRESUMPTION THAT CAN BE REBUTTED, BY ACTUAL TESTIMONY THAT THE JUDGE HEARS THAT IT DID NOT AFFECT THE LAWYER'S PERFORMANCE IN THIS CASE?

NO MATTER WHAT THE LAWYER IN THIS CASE SAYS, ABOUT WHY HE DIDN'T CROSS-EXAMINE TORRIS COOLEY, THE FACT REMAINS, NO MATTER WHAT WAS GOING THROUGH HIS MIND AT THE TIME OF THIS TRIAL, HE COULD NOT CROSS-EXAMINE TORRIS COOLEY. HE WAS IN A POSITION WHERE IT WOULD BE LEGALLY IMPOSSIBLE FOR THAT TO TAKE PLACE, AS ANY OTHER LAWYER IN THE SAME PUBLIC DEFENDERS OFFICE WOULD BE. ONCE THEY WITHDREW, THEY WITHDREW FOR THE ENTIRE OFFICE. YOU CAN'T SAY, WELL, ONE LAWYER KNOWS ABOUT THIS CONFLICT, SO WE ARE GOING TO APPOINT ANOTHER LAWYER WHO DOESN'T KNOW ABOUT THE CONFLICT. IT PERMEATES THROUGHOUT THE ENTIRE PUBLIC DEFENDERS OFFICE, AND UNDER THE LAW, THE KNOWLEDGE OF ONE PUBLIC DEFENDER EXTENDS TO ALL THE PUBLIC DEFENDERS.

LET'S TAKE A HYPOTHETICAL. LET'S ASSUME THAT THIS REPRESENTATION HADN'T TAKEN PLACE. WHAT WOULD THIS LAWYER HAVE DONE OR SHOULD THIS LAWYER HAVE DONE DIFFERENTLY, IN CROSS-EXAMINATION OF COOLEY?

WELL, MR. COOLEY WAS ON FELONY PROBATION WHEN HE TESTIFIED.

IS THAT, WOULD THAT BE AN ADMISSIBLE TYPE OF CROSS-EXAMINATION?

ABSOLUTELY. THE DEFENSE HAS COMPLETE FREEDOM TO CROSS-EXAMINE, BASED ON THE BIAS AND PREJUDICE OF THE WITNESS AND THEIR MOTIVATION TO APPEASE THE STATE, AND WE ARE TALKING ABOUT A WITNESS VICTIM WHO IS PROSECUTED BY THE SAME STATE ATTORNEYS OFFICE AND INVESTIGATED BY THE SAME DAYTONA BEACH POLICE DEPARTMENT WHO IS INVESTIGATING HUNTER.

SO WOULDN'T THE STANDARD, THEN, FOR THE SECOND PRONG BE THE SAME -- AREN'T YOU REALLY SAYING THAT THIS IS AN ACTUAL CONFLICT OF INTEREST THAT HE WAS INEFFECTIVE OF NOT DISCOVERING THIS AND IN FAILING TO CROSS-EXAMINE? IS IT REALLY TAKING ASIDE THE KNOW OR SHOULD HAVE KNOWN OF THE CONFLICT, ISN'T YOUR ARGUMENT THAT HE WAS INEFFECTIVE IN NOT KNOWING THIS AND THEN NOT CROSS EXAM HAD GONE? I MEAN, IF HE WAS -- EXAMINING? I MEAN IF HE WAS JOE BLOW, THEN WHY WOULDN'T THAT HAVE THE SAME ANALYSIS?

BECAUSE, NUMBER ONE, IN THE CONFLICT OF INTEREST ANALYSIS, NO PREJUDICE NEED BE ESTABLISHED. IF YOU ARE TALK ABOUT THE RULE OF AUTOMATIC REVERSAL, THEN THAT SHOULD BE APPLIED TO MR. HUNTER HUNTER'S CASE AND HE SHOULDN'T HAVE TO PROVE THE SECOND PRONG OF STRICKLAND. THERE IS NO INEFFECTIVE CONFLICT OF COUNSEL. ONCE COUNSEL IS INEFFECTIVE, AS HE WAS HOPELESSLY AND IRRETRIEVABLY, AS HE WAS AFTER HE ACKNOWLEDGED THE CONFLICT, THEN HE CANNOT REPRESENT MR. HUNTER.

HELP ME OUT. WE HAD ALL OF THESE CASES INVOLVING THE ASSISTANT PUBLIC DEFENDER PEARL, AND I THOUGHT THERE WAS A SECOND PRONG THAT HAD TO BE ESTABLISHED, THAT IT WASN'T JUST WHETHER THERE WAS A CONFLICT OF INTEREST, OR IS THAT A DIFFERENT TYPE OF CASE?

IT DEPENDS AT WHAT POINT IN TIME IT MANIFESTS ITSELF IN THE PROCEEDING. YOU HAVE THE AUTOMATIC REVERSAL, WHEN IT IS BROUGHT TO THE ATTENTION AT THE TRIAL OR APPELLATE LEVEL AND THERE IS NO SHOWING OF ANY PREJUDICE WHATSOEVER, WHICH IS WHAT I BELIEVE HAPPENED IN GUZMAN, BUT IF YOU MOVE INTO THE TYLER V SULLIVAN CASES, THEN YOU ARE TALKING ABOUT INEFFECTIVE AGENCY OF COUNSEL, NOT THE SECOND PRONG OF STRICKLAND AND OUTCOME OF REASONABLE ANALYSIS, WHICH THE OUT COULD, IT CAN BE DETERMINED,

WOULD HAVE BEEN DIFFERENT, WHICH IS NOT APPLYING TO THIS CASE, WHERE HE APPLIED THE OUTCOME STANDARD TO THE CONFLICT OF INTEREST CASE, AND UNDER TYLER V SULLIVAN, THAT IS NOT APPROPRIATE. ONE OF THE REASONS THAT THE AUTOMATIC REVERSAL SHOULD BE APPLIED TO MR. HUNTER'S CASE IS THAT THE SAME CONFLICTED PUBLIC DEFENDERS OFFICE WHO HAD A CONFLICT AT THE TRIAL LEVEL DID MR. HUNTER'S APPEAL. IT IS THE SAME LAWYER, MR. BURTON, SO HE COULD NOT, HE HAD ANOTHER CONFLICT, BECAUSE HE COULD NOT RAISE HIS OWN CONFLICT OF INTEREST AT THE TRIAL LEVEL, ON THE APPELLATE LEVEL, SO MR. HUNTER SHOULD NOT BE PUNISHED AND HAVE TO GO TO THE HIGHER STANDARD OF INSUFFICIENCY OF COUNSEL, BECAUSE HE NEVER DID AN APPEAL THIS. IS THE FIRST OPPORTUNITY MR. HUNTER HAS HAD TO PRESENT TO THIS COURT THE CONFLICT OF INTEREST, OR ANY OTHER COURT.

WHEN DID THE ATTORNEY FIND OUT THAT THERE HAD BEEN MISREPRESENTATION? NOT UNTIL THE POSTCONVICTION STAGE? IN OTHER WORDS WAS THERE ANY EVIDENCE THAT HE KNEW ABOUT THIS CONFLICT IN THE APPELLATE STAGE?

IF YOU ARE TALKING ABOUT PERSONAL KNOWLEDGE OF THE ATTORNEY?

YES. I AM TALKING ABOUT PERSONAL KNOWLEDGE.

ALL RIGHT. HE SAID HE COULDN'T BELIEVE HE WOULDN'T HAVE KNOWN IT AND THAT SOMEONE WOULDN'T HAVE TOLD HIM, BUT THEN HE SAID HE DIDN'T RECALL IT AND HE DIDN'T REMEMBER IT. SO UNTIL POSTCONVICTION, IT WASN'T REVEALED TO HIM, UNTIL POSTCONVICTION, BUT ONCE AGAIN, THE PUBLIC DEFENDERS OFFICE WITHDREW FROM REPRESENTING THE WITNESS VICTIM IN THIS CASE, AND YOU HAVE TO QUESTION ABOUT THE EXTENT OF THE REPRESENTATION OF THE PUBLIC DEFENDERS OFFICE AND MR. COOLEY'S CASE, AND THE RECORD REVEALS THAT, ON THE FELONY CASES, BETWEEN APRIL 1992 UNTIL NOVEMBER OF 1992, FOR PARED OF EIGHT MONTHS, THEY REPRESENTED HIM ON THE FELONY CHARGES, AND THAT CASE WAS SET FOR TRIAL AND THEY HAD PRETRIAL CONFERENCE IN THAT CASE, AND THEY DEMANDED DISCOVERY IN THAT CASE. THEY WERE EXTENSIVELY INVOLVED AND ALSO IN THE TWO MISDEMEANOR CASES. THEY TOOK THOSE ALL THE WAY UP TO THREE WEEKS BEFORE THE TRIAL. I SEE I AM IN MY REBUTTAL TIME. MR. CHIEF JUSTICE: THANK YOU. MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING. THE RECORD FROM THE EVIDENTIARY HEARING IS THAT MR. BURTON TESTIFIED THAT HE DID NOT KNOW ABOUT THE PUBLIC DEFENDER'S REPRESENTATION OF TORRIS COOLEY, AT RECORD 149. THE, JUST AGAIN SO THE COURT IS CLEAR, MR. BURTON HAD NO CONTACT WHATSOEVER WITH WITNESS COOLEY. AS FAR AS REPRESENTATION BY THE PUBLIC DEFENDER, MR. BURTON DID NOT KNOW ABOUT THE REPRESENTATION, AND THE TRIAL COURT MADE THAT FINDING OF FACT THAT MR. BURTON DID NOT KNOW. THAT IS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE FROM THE TESTIMONY AT THE EVIDENTIARY HEARING. IT IS THE FINDING MADE BY THE FINDER OF FACT, WHO WAS IN THE POSITION TO OBSERVE THE WITNESS, EVALUATE HIS CREDIBILITY, AND MAKE CREDIBILITY DETERMINATIONS.

WHY SHOULD THAT MAKE A DIFFERENCE, IN A SITUATION WHERE THE PUBLIC DEFENDER HAS ALREADY SAID THAT THERE IS A CONFLICT OF INTEREST? ISN'T THE PUBLIC DEFENDER DOING THAT ON BEHALF OF ALL OF THE ASSISTANT PUBLIC DEFENDERS? SO WHY SHOULD IT MAKE ANY DIFFERENCE THAT THIS PARTICULAR PUBLIC DEFENDER DIDN'T KNOW THAT THAT HAD BEEN DONE?

LET ME ANSWER YOUR QUESTION IN THIS WAY, JUSTICE QUINCE, AND I AM NOT TRYING TO AVOID YOUR QUESTION, BUT YOU HAVE TYLER VERSUS SULLIVAN REQUIRES, IS A TWO-PART, TWO-PRONG TEST. THE FIRST REQUIRES ACTIVE REPRESENTATION OF COMPETING INTERESTS, AND JUSTICE PARIENTE ALLUDE TO DO THAT IN THE HOWARD PEARL CASES, THE HEARING CASE THAT IS CITED IN THE BRIEF IS ONE EXAMPLE.

WE HAVE THAT, DON'T WE? I MEAN, YOU HAVE GOT SOMEONE ACCUSED OF THE CRIME AND THE VICTIM.

WELL, YOU DON'T HAVE -- WELL, THE STATE'S POSITION WOULD BE THAT YOU DON'T HAVE THE ACTIVE REPRESENTATION AND YOU CANNOT HAVE THE ACTIVE REPRESENTATION, BECAUSE YOU DO NOT HAVE ACTUAL KNOWLEDGE, AND THE SECOND PART OF TYLER REQUIRES AN ADVERSE EFFECT ON THE REPRESENTATION. LET ME BACK UP. THE ACTIVE REPRESENTATION OF CONFLICTING INTEREST COMPONENT OF TYLER VERSUS SULLIVAN, AS THIS COURT HAS TALKED ABOUT IN HEARING, I BELIEVE IT IS, OR MAYBE IT IS ROMANO, ONE OF THE TWO, THAT THE LAWYER TOOK SOME ACTION ON BEHALF OF ONE CLIENT, AT THE EXPENSE OF ANOTHER, AND MR. BURTON DIDN'T DO. THAT HE CAN'T HAVE DONE THAT, BECAUSE HE DIDN'T KNOW ABOUT THE PUBLIC DEFENDER'S REPRESENTATION OF WITNESS COOLEY. THE SECOND COMPONENT OF KYLER, TAN IS A TWO-PART TEST, JUST LIKE IT IS TWO PRONGS. YOU HAVE GOT TO HAVE BOTH, JUST LIKE THE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD, IS AN ADVERSE EFFECT ON THE REPRESENTATION, AND IT IS ONE OF THOSE THING THAT IS IS SOMEWHAT DIFFICULT TO VERBALIZE, BUT YOU CAN'T HAVE AN ADVERSE EFFECT, YOU CAN'T HAVE AN ADVERSE EFFECT THAT IS BROUGHT ABOUT BY SOMETHING THAT YOU DID NOT KNOW ABOUT.

COULD YOU, IF HE HAD KNOWN ABOUT IT AT THE TIME, AND HAD MOVED TO UNDER GUZMAN, WOULD THE TRIAL COURT HAVE BEEN REQUIRED TO GIVE MR. HUNTER CONFLICT-FREE COUNSEL COUNSEL?

I AM NOT SURE. THEY WOULD HAVE TO FOLLOW THE LAW, AS ANNOUNCED BY THIS COURT. I BELIEVE, UNDER GUZMAN, AND I AM NOT SURE ABOUT THE PRECISE TIMING OF IT, BUT GUZMAN, AS I RECALL IT BASICALLY, IF THE PUBLIC DEFENDER GOES IN AND WISH TOES WITHDRAW, BASED UPON AN ASSERTED CONFLICT, YOU DON'T GO BEHIND THEIR ASSERTION OF CONFLICT, SO PROBABLY SO. I MEAN, IT WOULD BE A TECHNICAL, TECHCALLY, IT WOULD BE A BASIS, PERHAPS, TO GRANT A MOTION TO WITHDRAW, BUT IN THIS CASE I WOULD ADD WHAT YOU MIGHT CALL THE ULTIMATE FIREWALL THAT MR. GUZMAN DIDN'T -- THERE I GO. I AM SORRY. THAT MR. BURTON HAD NO KNOWLEDGE OF ANY REPRESENTATION OF WITNESS COOLEY.

I WOULD STILL LIKE TO MAKE SURE I UNDERSTAND THE GUZMAN SITUATION. ANY TIME THERE ARE INSTANCES WHERE THERE IS WITHDRAWAL AND WE FIND OUT IT WAS TWENTY YEARS AGO THE PUBLIC DEFENDER HAD REPRESENTED THE WITNESS AND YOU SORT OF SAY WE, YOU KNOW, YOU KIND OF LOOK AND SAY, REALLY, WOULD IT AFFECT THE PERFORMANCE, BUT HERE, IF WHAT I AM UNDERSTANDING IS THE CASE, COOLEY IS, WAS BEING PLED OUT TO SOME CHARGES, FELONY PROBATION, THERE IS DEALS. THERE ARE AREAS OF CROSS-EXAMINATION, POTENTIALLY ABOUT, THIS, SO WOULDN'T THAT NOT JUST SORT OF A SPECULATIVE CONFLICT. DOESN'T THAT, REALLY, ARISE TO AN ACTUAL CONFLICT OF INTEREST, SINCE MR. BURTON WAS GOING TO BE -- IF HE KNEW ABOUT IT, WAS GOING TO BE CALLED UPON TO CROSS-EXAMINE THIS WITNESS?

THAT WOULD COME BACK, I BELIEVE, JUSTICE PARIENTE, TO THE QUESTION OF WHETHER YOU CAN SEGREGATE THE DIFFERENCE BETWEEN THE WAY WE HANDLE CASES UNDER GUZMAN AND THE TECHNICALLY, THE TECHNICAL, ETHICAL VIOLATION. TECHNICALLY, MR. BURTON COULD BE FIRE-WALLED OFF. ETHICALLY, WITH THE CHINESE WALL, SO TO SPEAK, AND NOT BE EXPOSED TO IT, AND IT WOULDN'T BE A BASIS FOR WITHDRAWAL. NOW, IN GUZMAN, MORE GOES TO THE PD COMING IN AND SAYING, WELL, YOU KNOW, I WANT TO WITHDRAW, AND WE DON'T GO BEHIND THE REASONS IF THAT. WE LET THEM DO IT. BUT I WOULD, ONE OTHER MATTER OR CASE I WOULD POINT OUT, IF YOU WILL, WOULD BE THE LEO JONES CASE, WHERE WE GOT INTO THE ISSUE OF JUDGE SOUD AND HIS PRIOR REPRESENTATION OF THE DEFENDANT, I BELIEVE, AND THIS COURT HELD THAT, BECAUSE HE DIDN'T REMEMBER, THERE WAS NO ERROR, AND I MAY NOT BE GETTING THAT EXACTLY RIGHT, BUT WE, ALSO HAVE THE McCRAE CASE IN THIS COURT, WHERE THIS COURT HELD --

THAT WAS WHETHER JUDGE SOUD SHOULD HAVE RECUSED HIMSELF, IF HE DIDN'T KNOW THAT HE HAD REPRESENTED THIS DEFENDANT.

IT CAN'T HAVE AFFECTED HIM. IT CAN'T HAVE RENDERED HIM IMPARTIAL, AND IT IS ANALOGOUS TO THE SITUATION WHERE WE HAVE HERE, WHERE MR. BURTON DID NOT KNOW ABOUT IT AND TOOK NO ACTION OR, LET ME SEE IF I CAN SAY THIS SOMEWHAT ARTFULLY. MR. BURTON TOOK NO ACTION OR COMMITTED NO IN ACTION, BASED UPON THE PUBLIC DEFENDER'S REPRESENTATION OF TORRIS COOLEY.

BASED UPON THE FACT THAT HE SAID HE DIDN'T KNOW ABOUT THE REPRESENTATION.

YES, MA'AM.

THE FACT THAT THERE WAS NO CROSS-EXAMINATION IN THIS WHOLE AREA, WHAT DO WE DO WITH THAT INFORMATION?

THAT IS WHERE YOU COME BACK AND YOU STEP BACK TO THE ADVERSE EFFECT COMPONENT.

HOW IS THAT ADVERSE EFFECT, UNDER COOLEY, DIFFERENT THAN THE STRICKLAND SECOND PRONG?

I AM NOT SURE IT IS. THERE IS NO -- I AM NOT SURE THERE IS ANY DIFFERENCE AT ALL, BETWEEN THE ADVERSE EFFECT UNDER KYLER, HOWEVER IT IS PRONOUNCED, AND STRICKLAND, AND WHAT YOU HAVE HERE, YOU HAVE THE OTHER TWO, TWO OTHER WITNESSES OR VICTIM WITNESSES, AND THIS IS ALL IN THE DIRECT APPEAL BRIEF AND ALL IN THE DIRECT APPEAL, YOU HAVE MR. POPE WHO, IDENTIFIED THE SHOOTER, MR. HUNTER, AND YOU HAVE THE EXPERT WITNESS THAT HE WAS THE TRIGGERMAN, AND YOU HAVE HIS STATEMENT TO THE DRIVER OF THE GETAWAY VEHICLE THAT HE WAS THE SHOOTER. IT IS DIRECT APPEAL RECORD 718, 752, 817, 787, 682 AND 1424.

WHAT WAS MR. BURTON'S EXPLANATION ABOUT WHY HE DIDN'T EXAMINE MR. BURTON ABOUT HIS CRIMINAL RECORD?

HE WAS NEVER ASKED.

IN OTHER WORDS IN THIS INQUIRY?

NO, SIR. IT WAS NOT ASKED WHY HE DID NOT DO THAT, AND THAT, I WOULD SUBMIT, A FAILURE OF PROOF BY THE DEFENDANT.

SO I GUESS THE FOLLOW-UP QUESTION IS, SO THERE WAS NO PART OF THE CLAIM THAT ACTUALLY DEALT WITH WHAT MIGHT BE A STRICKLAND PART OF THIS, THAT IS THAT HE WAS INEFFECTIVE IN NOT CROSS-EXAMINING A KEY WITNESS.

NO, MA'AM. I BELIEVE IT IS ARGUED IN THAT CONTEXT, BUT IT WAS NOT DEVELOPED AT THE EVIDENTIARY HEARING.

SO WHAT DID WE GET OUT OF COOLEY'S TESTIMONY THAT WASN'T BEFORE THE COURT OTHERWISE?

THE TRIAL COURT FOUND THAT YOU HAD -- THIS IS MY WORDS, AND I AM NOT TRYING TO PARAPHRASE JUDGE ORFINGER, THAT HE HAD OTHER TESTIMONY IDENTIFYING HIM AS THE SHOOTER.

IS THAT ALL WE HAVE GOT IN THE IDENTIFICATION OF MR. HUNTER? EYE BELIEVE THAT IS

CORRECT. THIS WAS THE ONLY TESTED COMPONENT HERE. THIS WAS THE ISSUE FROM THE VICTIM WITNESSES OR THE TESTIMONY FROM THE VICTIM WITNESSES WAS ABOUT, CONCERNED THE CIRCUMSTANCES OF THE ROBBERY ROBBERY. THEY WERE APPROACHED BY MR. HUNTER, IN THREE OR FOUR OF HIS --

WELL --

-- COHORTS.

WAS THERE ANY TESTING, BY THIS DEFENSE ATTORNEY, OF MR. COOLEY'S ABILITY TO SEE, WHAT --

YES, MA'AM, THERE WAS. THERE WAS EXTENSIVE CROSS-EXAMINATION. THIS IS NOT A CIRCUMSTANCE WHERE DEFENSE COUNSEL DID NOT CROSS-EXAMINE THIS WITNESS. IT IS QUITE TO THE CONTRARY. THIS WITNESS WAS CROSS-EXAMINED EXTENSIVELY ABOUT HIS ABILITY TO PERCEIVE, REPORT AND RECOUNT THE EVENTS SURROUNDING THE ROBBERY.

WHO REPRESENTED THE CODEFENDANT?

THE --

WAS IT A PRIVATE LAWYER?

CODEFENDANT BOYD, YOUR HONOR, WAS REPRESENTED --

THIS WAS A TRIAL OF TWO DEFENDANTS.

YES, SIR. I AM SORRY. I WAS -- YES, SIR, MR. BOYD WAS REPRESENTED BY PRIVATE COUNSEL. MY MEMORY IS THAT IT WAS PATENT QUARLES.

-- WAS PATON QUARLES.

DID THAT LAWYER EXAMINE THIS WITNESS ABOUT HIS CRIMINAL BACKGROUND?

I DON'T KNOW. I WOULD BE MORE THAN HAPPY TO REVIEW THE RECORD AND LET THE COURT KNOW ABOUT. THAT IT HAS BEEN, QUITE HONESTLY SINCE I READ THE DIRECT APPEAL RECORD IN THIS CASE, AS TO THE DOE K CODEFENDANT, WHO DID NOT -- AS TO THE CODEFENDANT, WHO DID NOT GET A DEATH SENTENCE AND WAS NOT OF PARTICULAR INTEREST, AT THE TIME THAT I READ IT. I SIMPLY DON'T REMEMBER. I WILL REVIEW THE RECORD AND AT LEAST PROVIDE THE COURT WITH SOME CITATION TO IT. I DON'T RECALL THAT.

DO YOU RECALL OF ANY OTHER VICTIM WITNESSES THAT WOULD HAVE BEEN EYEWITNESSES TO THE EVENT WERE CROSS-EXAMINED ABOUT ANY CRIMINAL BACKGROUND?

I DO NOT RECALL THAT THEY WERE.

WHAT WOULD, IF YOU HAD THIS INFORMATION, WHAT COULD HE HAVE CROSS-EXAMINED COOLEY ON? WHAT WOULD HE HAVE BEEN ABLE TO SKRTION UNDER OUR CASE LAW ON IMPEACHMENT?

I BELIEVE HE CERTAINLY WOULD HAVE BEEN ABLE, AS MY OPPONENT SAID, TO GO INTO THE FACT OF THE CONVICTED, PERHAPS GO INTO THE FACT OF THE CONVICTIONS, YOU KNOW, AND CERTAINLY INTO THEIR, CERTAINLY INTO THE EXISTENCE OF THEM, I SUPPOSE. BUT ONCE AGAIN, THE VALUE OF THAT, AND THIS IS WHERE WE COME BACK TO THE ADVERSE EFFECT OR PREJUDICE, IF YOU WILL, EITHER ONE, IT IS THE SAME THING. THERE IS NOT ANY, BECAUSE OF THE OTHER INDEPENDENT, UNCHALLENGED WITNESS OF THE SHOOTER.

IS THERE SUPPOSED TO BE, UNDER THE COOLEY STANDARD, AN ADVERSE EFFECT ON REPRESENTATION REPRESENTATION? IT DOESN'T HAVE TO BE THE PROBABILITY OF OUTCOME. WOULD YOU AGREE WITH THAT?

YES, MA'AM, I WOULD AGREE WITH THAT, BUT UNDER THESE CIRCUMSTANCES, YOU CANNOT, AND, AGAIN, I HAVE A GREAT DEAL OF DIFFICULTY IN EXPRESSING THIS, BUT YOU CAN'T LINK UP AN ADVERSE EFFECT TO AN ACTUAL CONFLICT, WHEN THERE IS NO KNOWLEDGE OF THE CONFLICT. YOU CAN'T MAKE THAT, ALSO, LINKAGE.

NOW, YOUR OPPONENT SAYS THAT THERE IS A PER SE RULE THAT THE FIRST INGREDIENT OF THAT IS THAT THERE IS A PUBLIC DEFENDERS OFFICE, AND THAT ANY KNOWLEDGE OF THE PUBLIC DEFENDERS OFFICE HAS TO BE IMPUTED TO THE LAWYER, AND THEN ONCE THE KNOWLEDGE IS IMPUTED TO THE LAWYER, THAT THERE ISN'T EVEN A REQUIRING OF, A REQUIREMENT OF A SHOWING OF ANY ADVERSE IMPACT ON THE LAWYER THAT WITH THAT KIND OF A CONFLICT, THAT THERE IS A PER SE RULE. IS THERE A CASE THAT HOLDS THAT?

I WOULD SUGGEST THE CASES HOLD TO THE CONTRARY. THIS COURT DEALT WITH THE ISSUE IN McCRAE. WE HAVE DEALT WITH IT ON NUMEROUS OCCASIONS, WHEN I HAVE BEEN UP HERE, AND WE HAVE ARGUED ABOUT HOWARD PEARL. I THINK THE TED HARING CASE WAS THE MOST RECENT ONE, THAT IF THERE IS NO ADVERSE EFFECT, THERE IS NO BASIS FOR REVERSAL.

WAS McCRAE PRETTY MUCH ANALOGOUS TO THE CIRCUMSTANCES WE HAVE HERE? REFRESH MY MEMORY ABOUT THAT.

YOUR HONOR, McCRAE DEALT WITH AS I RECALL THE CASE, A CIRCUMSTANCE VERY SIMILAR TO THIS, AND THIS COURT FOUND, IN A FOOTNOTE THAT IS CITED IN THE STATE'S BRIEF, THAT YOU CAN'T HAVE -- LET ME JUST FIND IT, JUSTICE ANSTEAD. THAT WOULD MAKE ME FEEL --

DOES THAT APPEAR TO BE THE CLOSEST CASE ON POINT?

THE CLOSEST ONE I COULD FIND, YOUR HONOR. BUT IN McCRAE, THIS COURT HELD APPELLANT'S COUNSEL AT TRIAL WAS NOT EVEN AWARE OF THE STATE'S WITNESS BEING REPRESENTED BY THE SAME PUBLIC DEFENDER OFFICE, SO THERE COULD NOT HAVE BEEN AN ACTUAL CONFLICT, AND THAT, JUSTICE ANSTEAD, IS FOOTNOTE ONE TO McCRAE. AND I WOULD SUGGEST McCRAE IS DISPOSITIVE OF THE ISSUE HERE.

THE PUBLIC DEFENDER HERE TESTIFIED EXPLICITLY THAT HE WAS NOT AWARE THAT HIS OFFICE HAD REPRESENTED THIS VICTIM WITNESS.

YES, YOUR HONOR.

AND THE TRIAL COURT MADE A SPECIFIC FINDING.

THE TRIAL COURT MADE A SPECIFIC FINDING, AND I WOULD SUGGEST THAT, UNDER MILLS, HUGGINS AND SPAZIANO, AS YOU ALL HAVE TOLD ME REPEATEDLY, THAT FINDING IS ENTITLED TO GREAT, GREAT DEFERENCE.

WAS THERE ANY HINT, HERE, OR EVIDENCE PRESENTED, THAT THE DISPOSITION OF MR. COOLEY'S FELONY CASES WAS ANY PART OF THE DEAL WITH THE STATE, CONCERNING THE HUNTER CASE?

KNOBS, YOUR HONOR THERE. IS NO EVIDENCE TO -- NO, YOUR HONOR, THERE IS NO EVIDENCE TO SUGGEST THAT. IT WAS NOT EXPLORED AT THE EVIDENTIARY HEARING.

NO CLAIM WAS MADE.

NO CLAIM TO THAT EFFECT WAS MADE. WITH RESPECT TO THE CONFLICT OF INTEREST CLAIM, I WOULD SUBMIT TO THE COURT THAT THERE WAS NO ACTUAL CONFLICT. THERE CANNOT BE AN ACTUAL CONFLICT, IN THE ABSENCE OF KNOWLEDGE ON THE PART OF A PUBLIC DEFENDER N THE ABSENCE OF THAT KNOWLEDGE -- DEFENDER. IN THE ABSENCE OF THAT KNOWLEDGE THERE CAN BE NO ADVERSE EFFECT, AS REQUIRED BY THE GOVERNING EFFECT OF CONFLICT OF INTEREST CLAIMS. I WOULD SUGGEST THAT THE TRIAL COURT CORRECTLY RESOLVE THE FACTUAL ISSUES, FIND THE FACTS AS ARE SUPPORTIVE OF THE EVIDENCE AND DECIDE THE CASE, WITH RESPECT TO THE CLAIMS IN THE APPEAL FOR DENIAL OF 3.850 RELIEF AND WITH RESPECT TO THE HABEAS PETITION, THE STATE WILL STAND ON ITS BRIEF, WITH RESPECT TO ANY, UNLESS THERE ARE QUESTIONS FROM THIS COURT. I WOULD ASK THE COURT TO AFFIRM. THANK YOU. ACHIEVE. MR. CHIEF JUSTICE: THANK YOU. REBUTTAL?

COUNSEL, WOULD YOU ADDRESS THE McCRAE CASE.

YES. I WOULD LIKE TO ADDRESS THE McCRAE CASE. AT LEAST SUPERFICIALLY IT SEEMS TO BE THE CLOSEST CASE ON POINT.

THERE ARE SEVERAL DISTINCTIONS IN THE FACTS WE HAVE BEFORE US. NUMBER ONE, THE WITNESS IN THE McCRAE CASE WAS CHARACTERIZED AS NOT AN IMPORTANT WITNESS, SO WE HAVE AN UNIMPORTANT WITNESS IN THE McCRAE CASE REPRESENTED BY THE PUBLIC DEFENDERS OFFICE, WHEREAS HERE WE HAD A VERY IMPORTANT AND VICTIM, MR. COOLEY. IN THE McCRAE CASE --

WHY IS HE AN IMPORTANT WITNESS, AT LEAST AS FAR AS THIS IS CONCERNED? THE ALLEGATION HERE IS HE WAS REALLY JUST IDENTIFYING THIS PERSON AND THERE WERE OTHER PEOPLE WHO IDENTIFIED HIM.

I WOULD INVITE THE COURT TO READ THE RECORD IN THIS CASE ABOUT ALL OF THE WITNESSES' TESTIMONY WHO IDENTIFIED THE SHOOTERS IN THIS CASE, BECAUSE EVERY OTHER WITNESS, OTHER THAN MR. COOLEY, PROFESSED DOUBT ABOUT THE IDENTITY OF THE SHOOTER IN THIS CASE, AND THEY ALL SAID THEY DID NOT GET A LOOK AT THE SHOOTER'S FACE. MR. COOLEY IS THE ONLY WITNESS WHO TESTIFIED IN THIS CASE THAT HE COULD IDENTIFY THE SHOOTER BY THE FACE OF THE SHOOTER. ALL THOSE OTHER WITNESSES, IF YOU READ THEIR TESTIMONY, AND IT IS IN MY BRIEF, EXPRESS PROVEES, GRAVE DOUBTS ABOUT BEING ABLE TO DO THAT IN THIS CASE, AND AS A MATTER OF FACT --

WAS THAT TESTED, THROUGH CROSS-EXAMINATION?

IT WAS REVEALED THROUGH CROSS-EXAMINATION OF THE OTHER WITNESSES.

HIS IDENTIFICATION, HIS POSITIVE IDENTIFICATION OF MR. HUNTER TESTED BY THE DEFENSE ATTORNEY CROSS EXAMINING HIM ABOUT HIS ABILITY TO PROCEED? YOU KNOW, THOSE KINDS OF MATTERS.

YES.

IS THERE ANY CASE LAW THAT SAYS THAT ACTUAL CONFLICT IS NOT A REQUIREMENT TO SUPPORT A CONFLICT CLAIM?

I BELIEVE YOU HAVE TO HAVE AN ACTUAL CONFLICT OF INTEREST, WHERE THE LAWYER IS REPRESENTING ADVERSE INTERESTS, AS I BELIEVE OCCURS IN THIS CASE. I DON'T THINK YOU CAN HAVE A GREATER ONE THAN REPRESENTING THE DEFENDANT AND THE VICTIM IN THE SAME LITIGATION.

WELL, DO YOU HAVE ACTUAL CONFLICT, WHERE YOU DON'T HAVE KNOWLEDGE, AND NO

SHOWING THAT AN IMPACT UPON?

I BELIEVE THAT THERE WAS ACTUAL KNOWLEDGE, BECAUSE THE PUBLIC DEFENDERS OFFICE, IN THIS CASE, ACKNOWLEDGED THIS CONFLICT BY WITHDRAWING FROM THE CASE. SO --

OKAY. YOU STAY WITH YOUR PREMISE. OKAY.

I BELIEVE THAT IS THE CORRECT PREMISE.

THIS IS A LAW FIRM PREMISE THAT YOU ARE GOING ON. THAT IS THAT KNOWLEDGE BY ONE IS KNOWLEDGE BY ALL.

THAT IS, ALSO, NOT PRESENT IN THE McCRAE CASE. THE PUBLIC DEFENDERS OFFICE DID NOT MOVE TO WITHDRAW FROM THE WITNESS IN THE McCRAE CASE. THEY DIDN'T ACKNOWLEDGE THE EXISTENCE OF THE CONFLICT IN THAT CASE.

SO THERE WAS NO ESTABLISHMENT IN THE McCRAE CASE THAT THE PUBLIC DEFENDERS OFFICE HAD REPRESENTED THE WITNESS?

THEY HAD REPRESENTED THE WITNESS, BUT THEY HAD NOT WITHDRAWN FROM THAT REPRESENTATION, DUE TO A CONFLICT OF INTEREST WITH McCRAE SO THEY DIDN'T ACKNOWLEDGE THE CONFLICT.

BUT IT WAS UNDISPUTED THAT THEY HAD REPRESENTED THE WITNESS.

YES. IT WAS UNDISPUTED, NOT AN IMPORTANT WITNESS, AS WE HAVE HERE.

DIDN'T THE COURT RELY ON McCRAE AS TO THE IMPORTANCE OF THE WITNESS? ISN'T THAT THE DISCUSSION?

YES. IF YOU WILL READ THE BRIEF BY THE ATTORNEY GENERAL. MR. CHIEF JUSTICE: THANK YOU. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.