Thomas Lee Gudinas v. State of Florida

MR. CHIEF JUSTICE: NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS GUDINAS VERSUS STATE, GUDINAS VERSUS MOORE, WHICH ARE CONSOLIDATED CASES, SO MS. SCALLEY.

THANK YOU. MAY IT PLEASE THE COURT. I AM LESLIE SCALLEY, AND WITH ME IS KEVIN BECK FOR TOMMY LEE GUDINAS. WE ARE HERE TODAY, APPEALING THE CIRCUIT COURT'S DENIAL OF TOMMY GUDINAS'S 3.850 MOTION FOR POSTCONVICTION RELIEF AS WELL AS HIS PETITION FOR WRIT OF HABEAS CORPUS. THE FIRST ISSUE I WOULD LIKE TO ADDRESS IS CLAIM THREE OF THE APPELLATE BRIEF THAT, THE CIRCUIT COURT ERRED, IN HOLDING THAT COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

LET ME ASK YOU THIS. I KNOW THAT THERE ARE A NUMBER OF INEFFECTIVE ISSUES HERE. DO YOU PLAN TO ARGUE, AT ALL, THE DNA ISSUE?

I WOULD LIKE TO MAKE A BRIEF NOTE REGARDING THE DNA ISSUE. THROUGHOUT TOMMY GUDINAS'S TRIAL THE PROSECUTION ARGUED THAT TOMMY GUDINAS RAPED THE VICTIM THEN TOOK HER BACK TO AN ALLY, WHERE HE COMMITTED OTHER SEXUAL ASSAULTS AND KILLED HER IN THE COURSE OF THOSE SEXUAL ASSAULTS. THE STATE OF FLORIDA, THE CIRCUIT COURT, AND THIS COURT HELD THAT THE EVIDENCE WAS SUFFICIENT TO UPHOLD THAT CONVICTION. HOWEVER, IN POSTCONVICTION, THE STATE SEEMED TO SWITCH ARGUMENTS AND URGED THE CIRCUIT COURT TO NOT GRANT TOMMY GUDINAS THE RIGHT TO TEST HIS DNA, ARGUING THAT THE VICTIM COULD HAVE HAD SEX WITH SOMEBODY ELSE THAT NIGHT AND THAT PERSON COULD HAVE LEFT THE SEMEN AND THE SALIVA. NOT ONLY IS THAT STATEMENT NOT SUPPORTED BY THE FACTS AND THE PROSECUTION'S VERY THEORY, IT IS JUST SIMPLY NOT SUPPORTED BY THE FACTS. THE PERSON WHO ATTACKED THIS VICTIM LEFT THE SEMEN ON HER THIGH AND LEFT THE SALIVA IN THE BITE MARKS, AND IT WAS IMPROPER FOR THE STATE TO SWITCH ARGUMENTS IN THE MIDDLE, IN POSTCONVICTION, AND URGE THE COURT TO ADOPT A COMPLETELY NEW THEORY, JUST TO DENY TOMMY GUDINAS THE OPPORTUNITY TO PRESENT DNA EVIDENCE, AND TOMMY GUDINAS ASKS THIS COURT NOT ONLY FOR A REMAND FOR DNA TESTING BUT ALSO, NOT TO CONDONE SUCH A PRACTICE IN POSTCONVICTION RELIEF.

WHETHER WE DENY OR GRANT RELIEF ON THAT CLAIM, WON'T THE STATUTE THAT WILL GO INTO EFFECT OCTOBER 1 GIVE YOU, YOUR CLIENT, ADDITIONAL RIGHTS, UNDER THAT STATUTE FOR DNA TESTING?

YES, YOUR HONOR. IT WOULD, AND WE PLAN TO DO THAT. THERE IS JUST ONE NOTE. I AM NOT -- I DIDN'T WATCH THE ORAL ARGUMENT YESTERDAY, BUT IF POSSIBLE, WE WOULD LIKE TO HAVE THE DNA TESTED AT AN INDEPENDENT LABORATORY, AND OUR MOTION, IN THE COURSE OF THESE POSTCONVICTION PROCEEDINGS, WOULD ALLOW THAT, AND AT THIS POINT, I AM NOT SURE WHETHER THAT WOULD BE THE PROCESS, UNDER THE STATUTE.

WHAT WOULD BE YOUR REASON FOR THAT?

JUST TO ENSURE THAT -- WE HAVE HEARD ABOUT PROBLEMS WITH THE FBI LABORATORIES IN THE PAST AND TWO TYPES OF TESTING WOULD BE GOOD, WE WOULD LIKE THAT AS WELL, BUT JUST FOR OUR OWN INDEPENDENT PEACE OF MIND, WE WOULD LIKE AN INDEPENDENT LABORATORY TESTING. TWO OF THEM.

ISN'T THAT THE KIND OF ARGUMENT THESE DEFENDANTS WOULD MAKE, IF, IN FACT, FDLE IS THE OFFICE THAT WOULD BE CHARGED WITH DOING THIS, YOU COULD PRACTICALLY HE HAVEIESIATE THE STATUTE -- EVICIATE THE STATUTE, BY MAKING THAT KIND OF ARGUMENT, COULDN'T YOU?

YES, I THINK YOU COULD. I AM NOT WELL-VERSED ON THE DNA STATUTE, AND I AM NOT PREPARED TO ADDRESS IT AT THIS POINT.

WE HAVE A VERY LIMITED TIME TO HEAR YOUR ARGUMENT TODAY, AND YOU ARE SORT OF GOING OFF ON A COLLATERAL ISSUE HERE, IN TERMS OF THE METHOD OF TESTING OR ANYTHING LIKE. THAT WE HAVEN'T EVEN CROSSED THAT BRIDGE YET. COULD YOU RETURN TO WHAT ARGUMENTS YOU ARE GOING TO MAKE NOW.

I AM DELIGHTED TO. THANK YOU. THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING PROVED THAT COUNSEL CONDUCTED A SUPERFICIAL AND INADEQUATE PRESENTATION OF MITIGATING EVIDENCE, AND THAT THAT INADEQUATE PRESENTATION LEFT THE JURY WITH THE PREJUDICIALLY-DANGEROUS PICTURE OF TOMMY GUDINAS. AT PENALTY PHASE, COUNSEL PRESENTED TESTIMONY THAT, THOUGH THE DEPARTMENT OF YOUTH SERVICES PLACED TOMMY GUDINAS 105 TIMES, COUNSEL STATED, IN HIS OWN WORDS IT IS QUESTIONABLE WHETHER THEY DID EVERYTHING TO TREAT HIM.

THAT IS SORT OF AN INCOMPLETE STATEMENT, IS IT NOT?

YES.

WASN'T THAT PART OF A BROADER STATEMENT THAT THE LAWYER MADE?

YES.

IN OTHER WORDS, AREN'T YOU TAKING SOMETHING OUT OF CONTEXT THERE?

I AM. HE STATED THAT IT WAS CLEAR THAT THE STATE OF MASSACHUSETTS DID EVERYTHING POSSIBLE TO PLACE TOMMY GUDINAS, BUT IT IS QUESTIONABLE WHETHER THEY DID EVERYTHING POSSIBLE TO TREAT HIM. AT THE EVIDENTIARY HEARING, TOMMY GUDINAS PRESENTED JAN VOGEL, WHO TALKED WITH THE DEPARTMENT OF MASS YOUTH SERVICES CASE WORKER, AND IT IS CLEAR THAT THE DEPARTMENT OF YOUTH SERVICES IN MASSACHUSETTS NEVER TREATED TOMMY GUDINAS.

WEREN'T THERE EXPERTS IN PRESENTING THE DEFENSE, IN EVALUATING THE DEFENDANT AND PRESENTING MITIGATION?

THERE WERE A NUMBER OF EXPERTS FOR THE DEFENDANT.

WEREN'T THEY GIVEN THESE RECORDS?

DR. UPSON WAS GIVEN THESE RECORDS, AND HE REVIEWED THEM AND BROUGHT OUT CERTAIN PARTS OF THEM DURING HIS PRESENTATION OF MITIGATING EVIDENCE. HOWEVER, DR. UPSON ASSUMED THAT TOMMY GUDINAS NEVER RECEIVED TREATMENT FROM THIS DEPARTMENT OF YOUTH SERVICES, BECAUSE THERE WAS AN ABSENCE OF ANY RECORD OF TREATMENT IN THE DOCUMENTS. ON CROSS-EXAMINATION, THE PROSECUTION FORCED DR. UPSON THAT HE REALLY DID NOT KNOW THAT TOMMY GUDINAS NEVER RECEIVED TREATMENT, AND HE DID NOT KNOW WHETHER TOMMY GUDINAS DID, IN FACT, EVER RECEIVE TREATMENT, AND THE PROSECUTION USED THIS IN CLOSING ARGUMENT, WHEN HE ARGUED TO THE JURY THAT TOMMY GUDINAS, AS WE SAID, YOU KNOW, THE DEFENSE DOESN'T KNOW WHETHER HE RECEIVED TREATMENT, BUT EVEN IF -- THEY DON'T KNOW WHAT HAPPENED. IF HE RECEIVED TREATMENT, HE NEVER TOOK IT. AND THAT PREJUDICED TOMMY GUDINAS, BECAUSE THE JURY WAS LEFT WITH A PICTURE OF A

YOUNG MAN WHO HAD BEEN PLACED 105 TIMES AND WHO THE DEPARTMENT OF YOUTH SERVICES OBVIOUSLY TOOK CARE IN PLACING, AND PROBABLY TREATED, BUT IN FACT, THAT IS NOT THE CASE. JAN VOGEL STEEN TESTIFIED, IN TERMS OF EVERYONE OF THESE PROGRAMS, THERE WAS ABSOLUTELY NO PSYCHIATRIC TREATMENT. THAT THEY WERE ALL DETENTION UNITS. THE FACT THAT THEY HAVE A NAME LIKE SHELTER CARE. THE FACT THAT THEY HAVE A NAME LIKE KEY. THE FACT THAT THEY HAVE A NAME LIKE LADY OF PROVIDENCE MAKES NO DIFFERENCE. THEY ARE ALL DETENTION UNITS. HAD COUNSEL CALLED TOMMY GUDINAS GUDINAS'S CASE WORKER OR HIRED A SOCIAL WORKER TO DO THAT FOR HIM COUNSEL COULD HAVE PRESENTED EVIDENCE THAT TOMMY GUDINAS WAS NOT A PERSON WHO PEOPLE HAD TRIED TO HELP BUT HE REFUSED THAT HELP. TOMMY GUD I KNOW AS WAS A -- GUDINAS WAS A PERSON WHO HAD NEVER, EVER BEEN TREATED FOR THE FIRST 12 YEARS OF HIS LIFE.

HOW DID THE TRIAL COURT RESOLVE THAT ISSUE?

THE TRIAL COURT, IN ITS ORDER HELD THAT TOMMY GUDINAS PRESENTED NO, HE STATED THE DEFENDANT DID NOT DEMONSTRATE WHAT FURTHER EVIDENCE WAS AVAILABLE TO SUPPORT THE DOCTOR'S OPINION REGARDING THE LACK OF LONG-TERM TREATMENT, NOR WAS THERE ANY SHOWING OF PREJUDICE NECESSARY TO ESTABLISH A SHOWING OF INEFFECTIVE ASSISTANCE. FIRST, JAN VOGELSTEIN DID TALK WITH LEWIS ALVAREZ AND DID DETERMINE THAT THERE WAS NOT ANY LONG-TERM TREATMENT. SECOND, I WOULD LIKE TO POINT OUT THAT THROUGHOUT HIS ENTIRE ORDER DENYING RELIEF ON THIS ISSUE AND ALL INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES, THE DEFICIENCY WAS DETERMINED PIECEMEAL AND IT WAS DETERMINED THAT IT DID NOT OUTWEIGH THE AGGRAVATION OR BECAUSE IT WAS CUMULATIVE. THIS WAS WRONG. THE UNITED STATES SUPREME COURT STATED, IN STRICKLAND AND MOST RECENTLY REITERATEED IN WILLIAMS VERSUS TAYLOR THAT DETERMINING WHETHER THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AS A DEFENSE, THE COURT MUST CONSIDER THE RECORD AS A WHOLE AND CUMULATIVE EVIDENCE PRESENTED ORIGINALLY, WHETHER IT RAISES A REASONABLE PROBABILITY THAT THE RESULT OF THE SENTENCING PROCEEDING WOULD HAVE BEEN DIFFERENT, IF COMPETENT COUNSEL HAD EXPLAINED THE SIGNIFICANCE OF ALL AVAILABLE EVIDENCE, AND WE SUBMIT THAT, HAD THE CIRCUIT COURT MADE THAT PREJUDICE ANALYSIS, HE WOULD HAVE FOUND NOT ONLY DEFICIENT PERFORMANCE BUT PREJUDICE AS WELL. AT TOMMY GUDINAS'S PENALTY PHASE COUNSEL ALSO PRESENTED TOMMY GUDINAS'S MOTHER, WHO TESTIFIED THAT SHE CARED FOR TOMMY. SHE NURTURED TOMMY, AND SHE DID EVERYTHING SHE COULD TO GET HIM TO TREATMENT NECESSARY. HOWEVER, THROUGH JAN VOGELSTEIN AND ELLEN EVANS, AT THE EVIDENTIARY HEARING, WE ESTABLISHED THAT TOMMY GUDINAS WAS VIRTUALLY ABUSED FROM THE TIME HE WAS CONCEIVED UNTIL HE LEFT HIS MOTHER'S CARE. TOMMY GUDINAS'S MOTHER ABUSED DRUGS AND ALCOHOL, EVEN THROUGHOUT HER PREGNANCY, HE HAVE TONE THE POINT OF PASSING OUT SEVERAL TIMES A WEEK. THIS WAS THROUGHOUT HIS LIFE IT CONTINUED. TOMMY GUDINAS'S MOTHER SAVAGELY BEAT HIM AND TOMMY GUDINAS'S FATHER, FOUR OR FIVE PHYSICAL INSTANCES SUFFERED AT HIS FATHER'S HAPPENED, BUT TOMMY GUDINAS'S BEATINGS SUFFERED AT HIS MOTHER'S HANDS, EVEN AT THREE YEARS OLD IT WAS EVIDENCED. THIS CONTINUED THROUGHOUT TOMMY GUDINAS'S LIFE AND AFTER TOMMY GUDINAS'S PARENTS DIVORCED, TOMMY GUDINAS'S MOTHER TESTIFIED THAT SHE WOULD ORDER HER BOYFRIEND OR HUSBAND TO BEAT TOMMY FOR HER.

NO EVIDENCE WAS PRESENTED AT PENALTY PHASE?

AT PENALTY PHASE, THERE WERE FIVE OCCASIONS THAT TOMMY GUDINAS SUFFERED AT HIS FATHER'S HANDS. IT INCLUDED A HAND BURNING, HE FORCED HIM TO STAND OUTSIDE ON TO STAND OUTSIDE WEARING ONLY HIS UNDER WANTS AND -- UNDERPANTS AND ALSO MADE HIM STAND ON HIS AHEAD. IT WAS ESTABLISHED THAT NOT ONLY DID THEY BEAT HIM, THEY SAVAGELY FOUGHT WITH EACH OTHER.

DID HIS ATTORNEY TALK WITH, THIS IS THE AUNT WHO NOW HAS OFFERED THIS TESTIMONY,

CORRECT?

CORRECT.

AND DID THE DEFENSE ATTORNEY TALK TO THIS PERSON PRIOR TO THE ORIGINAL PENALTY PHASE?

AT THE PENALTY, AT THE EVIDENTIARY HEARING, ROBERT Le BLANK COULD NOT REMEMBER HIS CONVERSATION WITH ELLEN EVANS. HE REMEMBERED HE SPOKE WITH HER. THERE WAS A NOTE FOUND IN HIS BOX THAT SAID THAT HE SPOKE WITH ELLEN EVANS, AND SHE NOTED, AND HE NOTED THAT SHE HAD GOOD INSIGHT AS TO HOW TOMMY GUDINAS WAS RAISED AS CHILD. HOWEVER, COUNSEL NEVER, DID NOT TESTIFY AS TO WHY SHE WAS NOT CALLED, AND COUNSEL DID NOT TESTIFY THAT IT WAS A STRATEGIC DECISION. HOWEVER, THE CIRCUIT COURT FOUND MERELY FROM THE FACT THAT SHE SPOKE OR HE SPOKE WITH ELLEN EVANS AND THAT SHE DID NOT TESTIFY, THAT THAT WAS A STRATEGIC DECISION. THERE IS NO EVIDENCE THAT SUPPORTS THAT. AND SO IT IS NOT, EVEN IF IT CAN BE A REASONABLE STRATEGIC DECISION TERMED -- DETERMINED FROM A TOTAL LACK OF EVIDENCE, IT IS NOT REASONABLE. COUNSEL PRESENTED EVIDENCE THAT TOMMY GUDINAS WAS ABUSED AS CHILD. HE TRIED TO PRESENT EVIDENCE OF FIVE OCCASIONS OF ABUSE, AND COUNSEL URGED THE JURY TO RECOMMEND A LIFE SENTENCE FOR TOMMY GUDINAS, BY ASKING THE COURT WHERE DOES A TEN-YEAR-OLD LEARN TO BECOME HOSTILE, AGGRESSIVE AND DIFFICULT WITH EVERYONE? HOW CAN A 12-YEAR-OLD BE DEPRESSED, WITHDRAWN, IMPULSIVE AND AGGRESSIVE, WITHOUT LEARNING IT FROM SOMEWHERE ELSE? THIS EVIDENCE, THE EVIDENCE OF THE CONSTANT PHYSICAL, EMOTIONAL AND SEXUAL ABUSE TOMMY GUDINAS SUFFERED THROUGHOUT HIS LIFE, THAT EVIDENCE PROVIDES AN ANSWER TO THESE QUESTIONS. IT IS CONSISTENT WITH COUNSEL'S THEORY OF THE CASE THAT TOMMY GUDINAS WOUND UP SO EMOTIONALLY DISTURBED AND INVOLVED WITH THE DEPARTMENT OF YOUTH SERVICES, BECAUSE SOMETHING HAPPENED AT HOME, BUT COUNSEL DID NOT PRESENT WHAT HAPPENED, TO ANSWER THOSE QUESTIONS FOR THE JURY. AND THIS, ALL THE EVIDENCE OUTLINED IN THE BRIEF, CONSIDERING COUNSEL'S INEFFECTIVE ASSISTANCE AND FAILING TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE, IS COMPOUNDED BY COUNSEL'S PERFORMANCE DURING THE PENALTY-PHASE CLOSING ARGUMENT. THROUGHOUT THE PROSECUTION'S PENALTY PHASE CLOSING ARGUMENT, WAS RIDDLED WITH IMPROPER REMARKS DESIGNED TO DEMONIZE TOMMY GUDINAS, DEHUMANIZE TOMMY GUDINAS. IT IMPROPERLY TOLD THE JURY THAT NONMITIGATING STATUTORY CIRCUMSTANCES WEREN'T MITIGATING MITIGATING. IT URGED THE JURY TO CONSIDER A WRONG STANDARD, WHEN DECIDING WHETHER TOMMY GUDINAS WAS EXTREMELY EMOTIONALLY DISTURBED. HE ASKED THE JURY TO CONSIDER ACTIONS TAKEN AFTER THE VICTIM'S DEATH, WHEN DETERMINING WHETHER THE AGGRAVATING CIRCUMSTANCE IS HEINOUS, ATROCIOUS AND CRUEL APPLIED IN THIS CASE, AND FINALLY HE URGED THE JURY TO DISREGARD THE LAW, WHEN RENDERING THEIR ADVISORY VERDICT AND NOT ONCE THROUGHOUT THIS ENTIRE PENALTY PHASE CLOSING ARGUMENT, DID COUNSEL OBJECT, AND COUNSEL'S ABSOLUTE FAILURE TO OBJECT, ALONG WITH THE CIRCUIT COURT'S FAILURE TO GIVE A CURETIVE INSTRUCTION TO CORRECT THESE MISSTATEMENTS OF LAW AND PATENTLY IMPROPER MISCONDUCT, PROBABLY PREJUDICE THE JURY, IN THE ABSENCE OF AN OBJECTION OR CURETIVE INSTRUCTION, THE JURORS LIKELY BELIEVED THAT THE PROSECUTION, WHO REPRESENTS THE STATE OF FLORIDA AND HOLDS A SEMIJUDICIAL POSITION IN THE STATE, WAS ARGUING TO THEM PROPERLY, AND JUSTLY, WHEN HE TOLD THEM THAT THE NONSTATUTORY MITIGATION IN THIS CASE ISN'T MITIGATING. HE DID THE SAME THING IN HITCHCOCK, AND THIS COURT HELD THAT IT WAS ERROR. IT IS ALSO LIKELY THAT THE JURY DECIDED THAT TOMMY GUDINAS WAS NOT EXTREMELY EMOTIONALLY DISTURBED AT THE TIME OF THE CRIME, BECAUSE TOMMY GUDINAS'S NORMAL STATE IS ONE OF EXTREME MENTAL AND EMOTIONAL DISTURBANCE. ALSO LIKELY THAT THE JURY CONSIDERED ACTIONS THE WAY THE VICTIM WAS PLACED, IN DETERMINING WHETHER THE CRIME WAS HEINOUS, AT ATROCIOUS AND CRUEL, AND IT IS LIKELY THAT THE JURY WAS INFLAMED BY THE PROSECUTION'S ARGUMENT THAT CALLED TOMMY GUDINAS A MONSTER, EVIL, A MONSTER, EVIL, A MANIAC, BAD TO THE

BONE. IT IS LIKELY THAT THIS INFLAMED THE JURY AND THEY CONSIDERED IT, WHEN THE PROSECUTION TOLD THEM THAT THEIR DEATH RECOMMENDATION, AND THAT IS AN ISSUE, THEIR ADVISORY VERDICT, THAT THAT IS A MORAL ISSUE. IT IS A ISSUE OF WHAT IS RIGHT. IT IS AN ISSUE OF WHAT IS FAIR. IT IS NOT ABOUT LEGAL PRINCIPLES PRINCIPLES. IN FACT THIS IS AN ISSUE OF LEGAL PRINCIPLES. THE ONLY THING THAT SEPARATES A STANDARD LESS WEIGHING OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND A STANDARD LESS DEATH SENTENCE, IS THE LEGAL PRINCIPLE, THE CONSIDERED WEIGHING OF VALID AGGRAVATING CIRCUMSTANCES AND VALID NONSTATUTORY AND STATUTORY MITIGATING CIRCUMSTANCES. I KNOW THAT I AM INTO MY REBUTTAL TIME, AND IF THERE ARE NO FURTHER QUESTIONS, I WOULD LIKE TO SAVE IT.

THANK YOU, MISS SCALLEY.

THANK YOU.

MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS APPEAL. THE ARGUMENT PRESENTED BY MR. GUDINAS'S COUNSEL PROVES, UNEQUIVOCALLY HAD, THAT HINDSIGHT IS 20/20. THIS COURT'S OPINIONS AND THE OPINIONS OF EVERY COURT TO CONSIDER AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, SINCE STRICKLAND, SAY THAT HINDSIGHT AND THE WAY CURRENT COUNSEL WOULD HAVE REPRESENTED THIS DEFENDANT AT THE PENALTY PHASE IS NOT THE STANDARD. THE STANDARD BY WHICH INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS ARE JUDGED IS STRICKLAND VERSUS WASHINGTON. IT IS THE TWO-PART DEFICIENT PERFORMANCE PREJUDICE STANDARD. WE ALL KNOW WHAT IT IS, AND I DON'T NEED TO ARGUE IT EXTENSIVELY. HOWEVER, NO CASE, NO CASE REQUIRES DEFENSE COUNSEL TO PRESENT ALL POSSIBLE MITIGATION, IN ORDER TO AVOID A CLAIM OF INEFFECTIVENESS BEING UPHELD. NO CASE HAS EVER SAID THAT.

AS I UNDERSTAND IT, THE DEFENDANT'S ARGUMENT IS THAT THE DEFENSE COUNSEL WAS TRYING TO PORTRAY HIM AS HAVING HAD THIS TERRIBLE CHILDHOOD, WHERE HE WAS CONSTANTLY ABUSED BY BOTH HIS MOTHER AND HIS FATHER, AND THAT THERE WAS A WITNESS WHO WAS AVAILABLE TO BRING THAT INFORMATION TO THE JURY AND DEFENSE COUNSEL FAILED TO DO SO, AND DEFENSE COUNSEL KNEW ABOUT THE WITNESS.

WELL, THIS IS ELLEN EVANS, THE AUNT THAT YOU ARE TALKING ABOUT. LET'S MAKE ONE POINT ABOUT HE WILL ENEVANS -- ABOUT ELLEN EVANS, BEFORE I GO INTO FURTHER DISCUSSION. ELLEN EVANS TESTIFIED AT THE EVIDENTIARY HEARING. THE DEFENSE COUNSEL NEVER CONTACTED HER. RIGHT OUT OF THE SHOOT -- RIGHT OUT OF THE CHUTE, WE HAVE A PROBLEM WITH THAT WITNESS. CO-COUNSEL, MR. Le BLANC, DECEMBERFIED THAT HE INTERVIEWED MS. EVANS. DEFENSE COUNSEL NOW, OF COURSE, ADOPTS AND SAYS THAT HE INTERVIEWED HER BUT HE DIDN'T CALL HER, AND BECAUSE HE DOESN'T RECALL WHY HE DIDN'T USE HER AS A WITNESS, WE HAVE TO PRESUME DEFICIENT PERFORMANCE. THAT IS WHAT THE DEFENSE ARGUMENT IS, AND THAT IS NOT THE LAW. COUNSEL'S DECISIONS, ESPECIALLY ABOUT A WITNESS, OF WHETHER OR NOT TO CALL A WITNESS THAT, IS THE QUINTESSENTIAL TRIAL TACTICAL DECISION, CAN'T BE SECOND-GUESSED. THEY ARE PRESUMPTIVELY REASONABLE. THIS COURT MUST, AT THE OUTSET, LOOK AT THAT DECISION NOT TO PRESENT ELLEN EVANS AS A REASONABLE DECISION. THE DEFENDANT HAS THE BURDEN OF PROVING OTHERWISE, AND HE HAS UTTERLY FAILED TO DO SO. THE EVIDENCE THAT THEY ARE ARGUING WAS NOT PRESENTED WAS, FOR THE MOST PART, BEFORE THE JURY, TO THE TESTIMONY OF DR. UPSON AND DR. O'BRIEN, DR. UPSON BEING THE SKYOLOGIST, AND DR. O'BRIEN -- THE PSYCHOLOGIST AND DR. O'BRIEN BEING THE MEDICAL PHARMACOLOGIST THE. HE TALKED ABOUT THE DRUG AND WHOLE ABUSE THAT THEY DIDN'T TALK ABOUT AND SO I DON'T WANT TO GO INTO IT, BUT IT IS IN THE RECORD AND IN THE BRIEF. THE BOTTOM LINE IS YOU CAN'T -- MONDAY MORNING QUARTERBACK, THE WAY COUNSEL TRIED A CASE, WHEN WE HAVE EVIDENCE THAT HE, I TALKED TO THE WITNESS, YEAH, BUT I DIDN'T CALL

HIM. THAT IS A PRESUMPTIVELY REASONABLE DECISION, AND THE DEFENDANT HAS THE BURDEN OF PROVING OTHERWISE.

WHAT ABOUT ADDRESSING SPECIFICALLY HERE, BECAUSE WHILE THESE ARE APPROPRIATE GENERAL RULES, WE, ALSO, I ASSUME, ON THE OTHER END OF THAT, WOULD AGREE THAT, IF YOU HAD, FOR INSTANCE, DURING THE GUILT PHASE AN EYEWITNESS THAT WAS THE LOCAL BISHOP AND HAD THE MOST CREDIBILITY OF ANYBODY AT ALL AND COULD EXONERATE THE DEFENDANT, JUST SAYING THAT THE DEFENSE LAWYER INTERVIEWED THE BISHOP AND THEN DIDN'T CALL HIM WOULDN'T HACK IT. YOU KNOW THAT, IS OBVIOUSLY AN EXTREME EXAMPLE SO. WOULD YOU DEAL WITH THE SPECIFICS OF THE CASE THAT WE HAVE HERE.

LET ME TALK ABOUT -- LET ME QUOTE FROM JUDGE PERRY'S ORDER AND, OF COURSE, JUDGE PERRY HEARD THE EVIDENCE AND THE VALUE OF THE CREDIBILITY OF THE WITNESSES AND DID ALL OF THE THING THAT IS TRIAL JUDGES DO. LET ME READ WHAT HE SAID. MR. Le BLANC. I AM PICKING UP AT THE TOP OF 1406, MOVER OVER MR. Le BLANC TESTIFIED THAT THE TESTIMONY THAT ELLEN EVANS COULD HAVE PROVIDED WOULD BE WHAT TYPE OF STRAT EDGE TOY DEVELOP FOR THE PENALTY PHASE OF THE CASE AND HE GIVES A CITE TO THE RECORD TRANSCRIPT. HE GOES ON AND SAYS, IN LIGHT OF MR. Le BLANC'S TESTIMONY, WHICH I SUMMARIZED, THE DEFENDANT COULD NOT SATISFY EITHER PRONG OF THE INEFFECTIVE ASSISTANCE ANALYSIS. HOWEVER, EVEN IF MS. EVANS'S TESTIMONY HAD BEEN PRESENTED DURING THE SENTENCING PHASE OF THE TRIAL, IT IS CLEAR THAT VERY LITTLE WOULD HAVE BEEN ADDED TO THE DEFENSE TABLE OF DEFENSE COUNSEL. THE ABUSE BY THE DEFENDANT'S FATHER AND THAT THE DEFENDANT'S FATHER CROSS-DRESSED WERE PRESENTED AND ULTIMATELY THE DEFENDANT'S CHILDHOOD AND HIS LACK OF TREATMENT BY THE MASSACHUSETTS YOUTH SERVICES, ANY ADDITIONAL INFORMATION THAT COULD HAVE BEEN PROVIDED BY MS. EVANS WOULD NOT HAVE ALTERED THE OUTCOME. THAT IS THE POSTURE OF THIS CLAIM. THAT IS THE POSTURE OF THE EVIDENCE. SHE HAD NOTHING TO ADD THAT WOULD HAVE HELPED THIS DEFENDANT. IT WAS ALREADY BEFORE THE JURY. IT WAS ALREADY FOUND AS A MITIGATING, AS A NONSTATUTORY MITIGATOR BY JUDGE PERRY, WHO ALSO, BY THE WAY, FOUND THE EXTREME MENTAL OR EMOTIONAL AGGRAVATING CIRCUMSTANCE WHICH THIS COURT ULTIMATELY UPHELD ON DIRECT APPEAL. WITH RESPECT TO THE CLOSING ARGUMENT ISSUES, I WOULD, AGAIN, DIRECT TO JUDGE PERRY'S ORDER. JUDGE PERRY SET OUT FIVE CLAIMED ERRORS IN CLOSING ARGUMENT. HE, THE FIRST TWO, BEING, IN REFERENCE TO THE DEFENDANT AS A MANIAC AND A REFERENCE THOMAS A MONSTER. -- REFERENCE TO HIM AS A MONSTER. JUDGE PERRY FOUND THAT THOSE REFERENCES WERE INAPPROPRIATE AND CONCLUDED, AFTER ANALYZING THE FACTS OF THE CASE, WHICH I BELIEVE THE COURT WOULD AGREE ARE MONSTROUS, THAT THERE WAS NO PREJUDICE. THAT, AGAIN, THE SORT OF FINDING BASED UPON THE EVIDENCE, THAT THIS COURT SHOULD NOT DISTURB. THERE WAS NO PREJUDICE, BASED UPON THOSE COMMENTS, AND WITH RESPECT TO THE OTHER THREE ENUMERATED DEFICIENCIES, JUDGE PERRY FOUND THAT, NOT ONLY DID THEY NOT EXCEED, WERE NOT OBJECTIONABLE, THEY WERE PROFFERED WITHIN THE CONTEXT OF THE CASE, AND THIS IS WHAT-THOUGH IS THE WAY INEFFECTIVENESS CLAIMS FREQUENTLY SEEM TO WORK. WHEN DEFENSE COUNSEL HAS THE TIME TO GO THROUGH A MADE RECORD ONE CAN ALWAYS IDENTIFY SHORTCOMINGS. THERE ARE LEGIONS OF CASES THAT SAY THAT. BUT THE FACT THAT PRESENT COUNSEL CAN GO BACK, YEARS AFTER THE TRIAL, OUTSIDE OF THE COURTROOM, WITH THE BENEFIT OF A MADE RECORD AND IDENTIFY SOME SORT COMING, DOES NOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL. NOT ONLY MUST DEFENDANT ESTABLISH DEFICIENT PERFORMANCE BUT, ALSO, HE MUST ESTABLISH PREJUDICE. UNDER THESE FACTS WHICH ARE THE ONLY FACTS THAT MATTER, NONE OF THESE CLAIMED INEFFECTIVE ASSISTANCE EVER COUNSEL SPECIFICS AMOUNT TO PREJUDICIAL -- SUPERVISIONS -- SPECIFICATIONS AMOUNT TO PREJUDICIAL ERROR. AGAIN, WITH RESPECT TO THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATOR, THAT AGGRAVATOR WAS FOUND AND UPHELD BY THIS TRIAL COURT, AND THAT SHOULD BE A SURPRISE TO NO ONE, GIVEN THE FACTS. IF I COULD COME BACK AND TOUCH UPON MY OPPONENT'S ORIGINAL COMMENTS ABOUT THE DNA ISSUES, MR. GUDINAS IS CERTAINLY, AS OF OCTOBER 1, GOING TO HAVE THE OPPORTUNITY

TO SEEK THE BENEFIT OF NEW FLORIDA RULE OF CRIMINAL PROCEDURE 3.853, IN WHATEVER T. IS ENACTED, AND THE STATUTE THAT GOES ALONG WITH THAT. WHETHER HE CAN MEET THE BURTON -- THE BURDEN OF PLEADING AND PROOF IS A MATTER FOR THE CIRCUIT COURT, AT SUCH TIME AN APPROPRIATE MOTION IS FILED. IT IS NOT SOMETHING I CAN ARGUE HERE TODAY. IT IS NOT SOMETHING I WOULD EVEN PRESUME TO ARGUE TO YOUR HONORS, BECAUSE I DON'T KNOW WHAT HIS PLEADING IS GOING TO SAY.

AS FAR AS THE COMPETENCY OF COUNSEL ASPECT OF THAT, THOUGH, IF I UNDERSTAND IT CORRECTLY, THE DEFENSE LAWYER TESTIFIED, AT THE EVIDENTIARY HEARING HERE THAT, HE CONSIDERED THAT, AND BECAUSE OF THE EVIDENCE THAT HIS OWN CLIENT GAVE HIM ABOUT HIS IMPLICATION IN THE CRIME, DECIDED AGAINST HAVING ANY FURTHER TESTING DONE. IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

HE DID TESTIFY EXPLICITLY AS TO THAT.

ACTUALLY BOTH OF THEM DID THE. IF I RECALL, BOTH OF THEM DID, JUDGE.

THEN HE ENTERED INTO A STIPULATION WITH THE STATE, AT THE PREVIOUS TRIAL, THAT THE STATE HAD DONE SOME TESTING THAT WAS INCONCLUSIVE, AND AS A RESULT OF THAT, THAT NEITHER PARTY WAS GOING TO DO ANYTHING FURTHER WITH REFERENCE TO DNA TEST SOMETHING.

YES, YOUR HONOR.

IS THAT DEFENSE OF THAT?

THAT IS THE GIST OF THAT. -- IS THAT THE GIST OF THAT?

THAT IS THE GIST OF THAT. I AM NOT REALLY FAMILIAR WITH WHAT THAT STIPULATION IS, BEYOND THE FOUR CORNERS OF THIS RECORD. ANOTHER DEFENSE DID TESTIFY THAT HE CONSIDERED HAVING DNA TESTING DONE, BUT THAT THE RISK WAS HIGHER THAT IT WOULD TURN UP NEGATIVE EVIDENCE AGAINST HIS CLIENT. IS THAT IT?

THAT IS CORRECT. HE FELT THAT --

AND THAT WAS THE BASIS OF THE JUDGE'S DENIAL OF RELIEF, IN SO FAR AS THE PRESENTATION OF THIS CLAIM AS AN INADEQUATE COUNSEL CLAIM.

YES.

OKAY.

AS TO THE INEFFECTIVENESS FOR -- AS TO INEFFECTIVE ASSISTANCE SPECIFIC THAT -- SPECIFICS THAT RELATES TO FAILURE TO SEEK DNA TYPE OF TESTING. THAT IS THE CIRCUIT COURT'S BASIC DECISION IS BOTH TRIAL LAWYERS TESTIFIED THAT, BASED UPON THEIR CONVERSATIONS WITH THE DEFENDANT AND WHAT WAS KNOWN TO THEM, THAT THEY FELT LIKE DNA EVIDENCE WOULD BE DEVASTATING TO THEIR CLIENT. AND YOU HAVE TO -- YOU, ALSO, HAVE TO FACTOR INTO THIS, THE FACT THAT DR. DANZINGER, WHO IS A MENTAL STATE PSYCHOLOGIST, I BELIEVE, WHO ALSO EVALUATED THE DEFENDANT AND DID NOT TESTIFY, HAD INFORMED DEFENSE COUNSEL THAT, IN HIS OPINION, MR. GUDINAS WAS THE MOST EVIL PERSON HE HAD EVER MET AND MADE THE COMMENT, AND I HOPE THERE AREN'T ANYMORE SHALLOW GRAVES OUT THERE. SO YOU HAD A DEFENSE COUNSEL, WITH RESPECT TO THE DNA ISSUE, HAD AN AWFUL LOT OF EVIDENCE PILING UP THAT THEY DIDN'T WANT TO DISTURB. AND I GUESS IT RAISES A QUESTION

THAT WE WILL DEAL WITH ON ANOTHER DAY, DEFICIENT PERFORMANCE TO SEEK DNA TYPING, WHEN THE RESULT IS UNFAVORABLE TO THE DEFENDANT IN THE FINAL ANALYSIS, AND I DON'T KNOW THE ANSWER TO THAT. I DON'T THINK ANY OF US DO.

MR. NUNNELLEY, BEFORE YOU CAN MOVE ON TO ANOTHER SUBJECT, IN RESPONSE TO JUSTICE ANSTEAD'S QUESTION WITH REGARD TO COUNSEL AND PENALTY PHASE, YOU PROCEEDED INTO THE PREJUDICE PRONG, AND I UNDERSTAND YOUR POSITION ON THAT. WOULD YOU DISCUSS WITH US, HOWEVER, YOUR VIEW WITH REGARD TO A RECORD, BECAUSE THIS IS NOT UNCOMMON, WHERE DEFENSE COUNSEL WILL HAVE A NOTATION "I TALKED WITH X WITNESS" BUT NOT REALLY HAVE A GREAT DEAL OF RECOLLECTION, AND THAT THAT WITNESS IS NOT CALLED, AND THEN THAT WITNESS APPEARS IN POSTCONVICTION AND PRESENTS A LENGTHY DESCRIPTION THAT IS FAIRLY COMPELLING. OR TREMENDOUSLY COMPELLING. WOULD YOU DISCUSS, WITH US, YOUR VIEW OF THE LAW, WITH REGARD TO HOW, WHAT ARE THE LEGAL PRINCIPLES THAT WE APPLY UNDER THOSE CIRCUMSTANCES? A LAWYER OR INVESTIGATOR MAKES CONTACT WITH THAT SPECIFIC WITNESS, HAS SOME NOTATIONS ABOUT IT, BUT THEN THE WITNESS COMES ON AND WOULD BE A DEVASTATING WILTNESS -- WITNESS, POSTCONVICTION. DO YOU UNDERSTAND WHERE I AM GOING ON THAT?

YES, I DO, JUSTICE LEWIS, AND I THINK MY AUNS TO YOUR QUESTION WOULD BE -- MY ANSWER TO YOUR QUESTION WOULD BE THERE. LIKE I SAID BEFORE, AND I AM NOT TRYING TO BACK UP. BUT LIKE I SAID BEFORE, THE DEFENDANT HAS THE BURDEN OF PROOF. COUNSEL'S PERFORMANCE IS PRESUMPTIVELY FUNDAMENTALLY ADEQUATE. THAT IS THE FUNDAMENTAL STARTING BLOCK OF THE INEFFECTIVE ANALYSIS THAT THIS COURT HAS TO UNDERTAKE. WHEN YOU GET INTO THE ISSUE OF WHAT WE HAVE HERE, WHICH IS, TO SOME DEGREE, A HE SAID/SHE SAID, WHERE YOU HAVE MS. EVANS SAYING COUNSEL NEVER TALKED TO ME. I WOULD HAVE BEEN GLAD TO TESTIFY IF THEY HAD. DEFENSE COUNSEL SAYS I TALKED TO HER AND DECIDED NOT TO CALL HER. YOU HAVE GOT CONFLICTING TESTIMONY RIGHT THERE, AND THAT IS WHEN YOU GET BACK AND IT COMES BACK DOWN TO THE FACTO FINDING FUNCTION OF THE CIRCUIT COURT. IF YOU HAVE, WHERE HE HAS TO WEIGH, HE SEES THESE WITNESSES TESTIFY. HE HAS TO WEIGH THE CREDIBILITY. I MEAN SPAZIANO. MILLS. THAT IS WHAT CIRCUIT COURTS ARE CHARGED WITH DOING THE UNDERLYING CIRCUMSTANCES, DE NOVO, IT IS STILL FACT FINDING, HISTORICAL FACT, HOWEVER YOU WANT TO PUT IT, THAT IS A CIRCUIT JUDGE DOING CIRCUIT JUDGE THINGS, MAKING THOSE FINDINGS AND WEIGHING THE CREDIBILITY OF THE WITNESSES, WHICH IS WHAT YOU HAVE IN THIS CASE. THE DEFENDANT, LIKE I SAID AT THE BEGINNING, HAS THE BURDEN OF PROOF, AND I DON'T MEAN, I AM NOT SAYING, WELL, JUST BECAUSE -- WELL, HE CAN'T PROVE COUNSEL WAS DEFICIENT, AND HE CAN'T PROVE PREJUDICE. THIS COURT DOESN'T HAVE TO REACH BOTH PRONGS, AND I KNOW IN CERTAIN INSTANCES, IN HIS ORDER, JUDGE PERRY, I DON'T BELIEVE, ADDRESSED BOTH PRONGS OF THE INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD. IF IT IS EASIER TO DECIDE THE CASE ON THE PREJUDICE PRONG, YOU DON'T HAVE TO DECIDE THE PERFORMANCE PRONG.

I UNDERSTAND THAT. BUT WE ARE TALKING, NOW, TO THE INEFFECTIVENESS. THAT IS WHERE I WOULD LIKE SOME ASSISTANCE FROM. SHOULD THE COURT DECIDE THAT, WELL, THIS IS PREJUDICIAL. DO WE HAVE TO LOOK AT THE PERFORMANCE OF COUNSEL? DO WE NOT? SO JUST ASSUME THAT, FOR -- INDULGE ME FOR THAT, JUST FOR A MOMENT, JUST SO WE CAN UNDERSTAND WHAT THE LAW IS.

COUNSEL IN THIS CASE, BASED UPON THE TESTIMONY, MADE A DECISION NOT TO CALL THE WITNESS. AND I AM NOT TRYING TO INVENT STRATEGY FOR MR. Le BLANC. I WAS NOT AT THE HEARING. I DON'T KNOW. I READ THE RECORD, JUST LIKE YOU ALL DID, BUT WHEN YOU HAVE COUNSEL WHO IS OTHERWISE, AS FAR AS THE RECORD INDICATES, CLEARLY COMPETENT, SAYING I INTERVIEWED THIS WITNESS. WHAT SHE HAD TO SAY WOULD HAVE AFFECTED MY DECISION, AND THEN HE DIDN'T CALL THE WITNESS, ONE MUST ASSUME, AND I BELIEVE THIS IS LANGUAGE OUT OF STRICKLAND, BUT I CAN'T QUOTE IT OFF THE TOP OF MY HEAD, BUT THE ASSUMPTION IS

THAT THAT WAS A REASONABLE STRATEGIC DECISION.

BUT THE RECORD IN THIS CASE DOESN'T REVEAL CONTACT WITH THE WITNESS, BUT DOESN'T REVEAL WHETHER IT WAS JUST OVERLOOKED THAT SHE WASN'T CALLED OR THAT THEY ACTUALLY MADE A DECISION NOT TO CALL HER. YOU ARE JUST SAYING WE SHOULD INFER THAT IT WAS AN OVERSIGHT, THAT IT WAS A STRAT EDGE I CAN DECISION -- A STRATEGIC DECISION DECISION?

I DON'T MEAN TO KEEP THROWING IT BACK, BUT I DO. IF THE RECORD SAYS, AS JUDGE PERRY FOUND, AND A COMPONENT OF THE RECORD, IF, AS JUDGE PERRY FOUND, THE DEFENSE COUNSEL HAD CONTACT WITH THE WITNESS AND NOTED THAT SHE HAD GOOD TIGHT SIGHT AND -- HAD GOOD INSIGHT AND MADE THE DECISION NOT TO CALL HER, YOU CAN'T TURN THAT INTO A DECISION TO NOT CALL HER, IN THE ABSENCE OF SOME AFFIRMATIVE PROVE BY THE DEFENSE OF INEFFECTIVE ASSISTANCE.

SHE TESTIFIED TO SOME OF THE THINGS THAT HER SISTER DID, CORRECT?

THAT IS THE SISTER/AUNT.

MICHELLE. BUT SHE, ALSO, BUT ELLA EVANS TESTIFIED TO SOME OF THE SAME THING THAT IS MICHELLE GUDINAS DID, AND MICHELLE GUDINAS IS CALLED AND THEN IMPEACHED, OR THERE IS EVIDENCE THAT COMES IN ABOUT HIM HAVING ATTACKED HIS OWN SISTER, SO IN TERMS OF TRYING TO EVALUATE THE QUALITY OF THE STRATEGY, IT HAD TWO WITNESSES, ONE WHO WAS A CREDIBLE GOOD WIT THEY SAY THAT HAD SOME DEAF AS TATH MITIGATION AND ANOTHER THAT WOULD BRING IN A LOT OF NEGATIVE THINGS. WOULD THAT STILL BE HIS CALL AND SAY THAT WAS A GOOD STRATEGY?

WELL, I THINK WITH RESPECT TO MICHELLE GUDINAS, THE DEFENDANT'S SISTER, YOU HAD, YOU IN THAT SITUATION, THE NEGATIVE EVIDENCE OR THE IMPEACHMENT EVIDENCE WITH RESPECT TO HER HAD ALREADY COME IN THROUGH DR. UPSON, IN CROSS-EXAMINATION.

I MEAN, AGAIN, SHE IS SIT -- I UNDERSTAND THE THING WITH 20/20 HINDSIGHT. YOU ARE A LAWYER. YOU ARE THINKING I HAVE GOT TWO PEOPLE, ONE WHO CAN TELL ALL OF THIS VERY, VERY DEVASTATING MITIGATION ABOUT THE CHILDHOOD AND THE OTHER, WHO, THE DOWN SIDE, WE ARE GOING TO EMPHASIZE THAT THIS GUY REALLY IS A MONSTER AND ATTACKS HIS OWN SISTER, THE REASONABLE STRATEGY WOULD BE THAT YOU CALL THE AUNT NOT THE SISTER, RIGHT?

NOT NECESSARILY. BECAUSE WHAT THE AUNT HAD TO SAY WITH MINOR EXCEPTION THAT I CAN'T IDENTIFY, OFF THE TOP OF MY HEAD, WAS ALREADY BEFORE THE JURY, THROUGH DR. UPSON, SO, AND YOU DON'T --

BUT I GUESS WE HAVE BEEN THROUGH THIS IN OTHER CASES. THIS IS NOT THE SAME WITH A JURY THAN GOES BACK TO JUSTICE ANSTEAD'S QUESTION ABOUT THE BISHOP AND THE COMMUNITY. THE QUALITY OF THE MITIGATION IS WHAT YOU LOOK AT, BECAUSE AN EXPERT TALKING ABOUT IT, BASED UPON WHAT OTHER PEOPLE TELL HIM, IS NEVER THE SAME THING AS ACTUAL CREDIBLE WITNESSES TALKING ABOUT WHAT THEY SAW, DURING A, YOU KNOW, OVER A 12-YEAR PERIOD OF TIME.

BUT JUSTICE PARIENTE, IT IS, WHEN YOUR STRATEGY, WHICH IS WHAT THEY WERE TRYING TO DO, WHAT IS TO DOWNPLAY IS BACKGROUND. THEY WERE TRYING TO DOWNPLAY ALL OF THE YOUTH SERVICES AND THIS AND THAT, BECAUSE IT HADN'T DONE HIM ANY GOOD. THEIR STRATEGY WAS TO USE DR. UPSON TO PRESENT THIS, AND THAT IS, WHILE WE CAN ARGUE THAT IT MAY BE PREVIOUS ABLE TO USE A FAMILY MEMBER AS OPPOSED TO AN EXPERT, AN EXPERT GIVES YOU A TWO FOR ONE, BECAUSE IT ALLOWS YOU NOT ONLY TO PRESENT THE TESTIMONY OR PRESENT

EVIDENCE FROM THE FAMILY MEMBER, IT, ALSO ALLOWS YOU TO BLEND IN THE MENTAL STATE IMPACT OF THAT TESTIMONY IN ONE SHOT. IT AVOIDS THE POSSIBILITY OF THE FAMILY MEMBER, IN THIS CASE MS. EVANS, HAVING BEEN IMPEACHED, I AM OUT OF TIME. I WOULD ASK THE COURT TO AFFIRM THE DENIAL OF THE 3.850 MOTION AND TO DENY ALL RELIEF ON THE HABEAS MOTION. THANK YOU.

THANK YOU, MR. NUNNELLEY. MS. SCALLEY.

AT THE EVIDENTIARY HEARING, THOMAS LEE GUDINAS PROVED BOTH DEAF IRBLT PERFORMANCE AND PREJUDICE -- DEFICIENT PERFORMANCE AND PREJUDICE. THE UNITED STATES SUPREME COURT SET THE STRICKLAND STANDARD, WHEN IT UPHELD THAT, IN A CAPITAL CASE, COUNSEL HAS AN OBLIGATION TO CONDUCT A THOROUGH INVESTIGATION OF THE DEFENDANT'S BACKGROUND FOR MITIGATION, THAN DID NOT HAPPEN HERE. MR. NUNNELLEY POINTED OUT THAT COUNSEL TESTIFIED THAT HE MADE A STRATEGIC DECISION NOT TO INVESTIGATE TOMMY GUDINAS'S BACKGROUND, HOWEVER, UNDER STRICKLAND VERSUS WASHINGTON, A STRATEGIC IS MADE, ONE, AFTER INVESTIGATION, AND THAT COUNSEL HAS A DUTY TO CONDUCT A THOROUGH INVESTIGATION. THAT IS NOT A STRATEGIC DECISION. COUNSEL TESTIFIED, AT THE EVIDENTIARY HEARING, I FELT HIS PAST, REGARDING HIS PAST WITH THE DEPARTMENT OF YOUTH SERVICES "I FELT HIS PAST WAS A DOUBLE-EDGED SWORD. THERE WERE CERTAINLY THINGS TO PRESENT TO A JURY WHICH WE TRIED TO PRESENT, AND THERE WERE THINGS THAT I REALLY DID NOT WANT TO LEAVE THE JURY ABOUT -- THE JURY WITH, THE FACT THAT HE HAD PRACTICALLY EVERY INSTITUTION IN THE STATE OF MASSACHUSETTS, PSYCHIATRIC HELP, PSYCHOLOGICAL HELP, AND APPARENTLY MR. GUDINAS JUST CONTINUED ON A PATH WHERE HE BECAME WORSE AND WORSE." IN FACT, IF COUNSEL HAD CONTACTED TOMMY GUDINAS'S MASSACHUSETTS DEPARTMENT OF YOUTH SERVICES CASE WORKER, HE WOULD HAVE FOUND OUT THAT THAT WAS NOT THE CASE. TOMMY GUDINAS NEVER RECEIVED PSYCHIATRIC HELP AND PSYCHOLOGICAL HELP AND CONTINUED ON A PATH THAT MADE HIM WORSE AND WORSE. THE DETENTION FACILITIES IN WHICH THE DEPARTMENT OF YOUTH SERVICES PLACED TOMMY GUDINAS DETAINED HIM. THEY WAREHOUSED HIM. THEY PUNISHED HIM. THEY SUBJECTED HIM TO CONDITIONS IN WHICH HE WAS RAPED WHILE IN THEIR CUSTODY, AND THEY CONTINUALLY RETURNED HIM TO HIS VIOLENTLY ABUSIVE AND ALCOHOLIC MOTHER AND STEPFATHER. MR. NUNNELLEY ALSO SUGGESTED THAT THIS EVIDENCE OF THE ABUSE, THE SAVAGE PHYSICAL, EMOTIONAL AND MENTAL ABUSE TOMMY GUDINAS SUFFERED AT HIS MOTHER'S HANDS AND AT THE HANDS OF HIS MOTHER'S BOYFRIEND WAS PRESENTED TO THE JURY. THAT IS ABSOLUTELY NOT TRUE. COUNSEL PRESENTED THE OPPOSITE PICTURE, THAT TOMMY GUDINAS'S MOTHER CARED FOR HIM AND TREATED HIM AND TRIED TO GET HIM HELP AND THAT WAS NOT THE CASE. ELLEN EVANS TESTIFIED TO THAT, AND SHE TESTIFIED SHE WOULD HAVE TESTIFIED TO THAT AT TRIAL. MOREOVER, COUNSEL --

WHAT DO WE DO WITH THAT FIRST STEP, THOUGH, BECAUSE, AGAIN, LET ME ASK THE REVERSE TO YOU OF THAT SAME THING WE WERE TALKING ABOUT. DOES ONE JUST PRESUME, THEN, IF WE HAVE GOT NOTES THAT THE LAWYER TALKED TO THIS WITNESS, INTERVIEWED THE WITNESS, AND DOES NOT CALL HIM, DO WE, THEN, JUST PRESUME, BECAUSE NOW WE HAVE ELABORATE TESTIMONY, POSTCONVICTION, THAT, WELL, THEN THAT WAS THE SAME THING THAT SHE TOLD THAT LAWYER THAN LAWYER, AND THAT THAT IS INEFFECTIVE ASSISTANCE.

ENING IN CASE, WITH THE OTHER EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING, THAT MR. DEBLANC, THE ATTORNEY WHO SPOKE TO ELLEN EVANS, THIS WAS HIS FIRST EVER CAPITAL CASE. THIS WAS HIS FIRST PENALTY PHASE. HE HAD NO PREVIOUS PENALTY PHASE EXPERIENCE. ADDITIONALLY, YOU HAVE TO LOOK AT MR. Le BLANC'S PERFORMANCE THROUGHOUT THE PENALTY PHASE. HE DID NOT OBJECT ONCE, THROUGHOUT THE PROSECUTION'S HORRIBLE, CLEARLY-PREJUDICIAL CLOSING ARGUMENT. ALL THE EVIDENCE IN THIS CASE, ASIDE FROM THE MERE FACT THAT I THINK IN THIS CASE, GIVEN THE TESTIMONY THAT, AND THE EVIDENCE THAT ELLEN EVANS PRESENTED, WHICH DIDN'T BRING IN BAD PARTS WITH IT, LIKE MICHIGAN -- LIKE MICHELLE GUDINAS'S, YOU HAVE TO ASSUME THAT THAT WAS NOT A STRATEGY. THAT WAS AN

ERROR. COUNSEL, THROUGH LACK OF EXPERIENCE, LACK OF, MAYBE HE WAS RUSHED. HE DIDN'T KNOW WHAT TO DO. IT JUST DIDN'T HAPPEN IN THIS CASE. AND GIVEN COUNSEL'S PERFORMANCE THROUGHOUT THE PENALTY PHASE, I THINK IF YOU HAVE TO MAKE A CONCLUSION EITHER WAY, IN THIS CASE, THE EVIDENCE OVERWHELMINGLY GOES TOWARDS INEFFECTIVE ASSISTANCE AND NOT STRATEGY.

THANK YOU, MS. SCALLEY.

THANK YOU.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.