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William Gregory Thomas v. State of Florida

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. THOMAS VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU, SIR. GOOD MORNING, YOUR HONORS. IF IT PLEASE THE COURT, MY NAME IS DALE WESTLING. I AM FROM JACKSONVILLE AND REPRESENT MR. GREGG THOMAS, FOR WHOM WE FILED AN APPEAL IN DUVAL COUNTY, ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL. WE HAVE EIGHT ISSUES IN OUR BRIEF. I WOULD RESPECTFULLY LIKE TO ARGUE 1, 2, 3, 4 AND 7. 5, 6 AND 8, I WOULD STAND ON MY BRIEF. THE FIRST ISSUE THAT I WOULD LIKE TO ADDRESS TODAY IS THE WAIVER ARGUMENT PRESENTED BY THE STATE IN ITS BRIEF. I THINK THAT IT IS PROBABLY THE MOST SIGNIFICANT THAT THE GOVERNMENT RAISES. BEFORE ADDRESSING THAT, IT IS IMPORTANT TO UNDERSTAND A FEW OF THE FACTS THAT WERE IN EXISTENCE AT THE TIME. THE DEFENDANT WAS CHARGED WITH TWO MURDERS. HE WAS CHARGED WITH MURDERING HIS MOTHER AND MURDERING HIS WIFE. THE CASES WERE FILED SEQUENTIALLY, RIGHT BEHIND THE OTHER, AND THE STATE ELECTED TO GO TO TRIAL ON THE MURDER CASE INVOLVING HIS WIFE.

COULD YOU, AS A PART OF THIS, TELL US HOW THEY CAME TO SUSPECT THE DEFENDANT OF THE WIFE MURDER?

THERE WERE FOLKS THAT CAME FORWARD AND TOLD THE POLICE, YOUR HONOR, THAT HE HAD COMMITTED THE MURDER AND THAT HE HAD CONFESSED TO THEM. IT WAS WELL OVER A YEAR, BEFORE HE WAS CHARGED WITH THAT MURDER, HOWEVER.

WAS THERE A PLEA BARGAIN IN THE MOTHER'S DEATH?

THERE WAS A PLEA AGREEMENT SIGNED. THAT'S CORRECT, SIR.

AND WHAT WERE THE TERMS OF THAT PLEA AGREEMENT?

JUDGE, THE PLEA AGREEMENT SIGNED IN THE MOTHER'S CASE, WHICH TOOK PLACE AFTER THE DEFENDANT WAS CONVICTED AND A JURY RECOMMENDATION OF DEATH WAS MADE IN THE WIFE'S CASE, THE PLEA AGREEMENT WAS THAT HE RECEIVED LIFE IN PRISON. MOST IMPORTANTLY, THERE WAS LANGUAGE IN THE PLEA AGREEMENT, WHICH THE STATE HAS RELIED UPON, THAT SAID THAT, AS A RESULT OF THE STATE NOT SEEKING THE DEATH PENALTY, HE WAS PRECLUDED FROM RAISING ANY APPEAL FOR THE GUILT PHASE OF HIS PRIOR CONVICTION IN THE CASE INVOLVING HIS WIFE. AND THAT IS WHAT THEY BASE THEIR ARGUMENT ON. AGAIN, JUST TO GIVE YOU THE SEQUENCE, HE WAS TRIED ON THE CASE INVOLVING HIS WIFE, CONVICTED. THE JURY, THEN, RECOMMENDED, IN A 11-TO-1 RECOMMENDATION, THAT HE BE SENTENCED TO DEATH. THE TRIAL COURT DID NOT SENTENCE THE DEFENDANT. RATHER THE STATE AND THE DEFENSE COUNSEL, WHO WAS THE SUBJECT OF OUR MOTION, THEN, ENGAGED IN NEGOTIATIONS WHICH RESULTED IN HIS PLEA OF GUILTY TO THE CASE WHERE IN HE WAS CHARGED WITH KILLING HIS MOTHER.

WAS THE DEFENDANT, WAS THERE A COLLOQUY WITH THE DEFENDANT, ABOUT THE TERMS OF THAT PLEA AGREEMENT?

YES, SIR, THERE WAS.

AND INCLUDING THIS TERM?

YES, SIR, THERE WAS.

DID HE WAIVE THE RIGHT TO APPEAL THE GUILT PHASE IN THE WIFE'S MURDER CASE?

YES, SIR.

SO THE JURY MR. CHIEF JUSTICE

BOTH OF YOU. JUSTICE SHAW.

AND WHAT WOULD BE THE CONSTITUTIONAL PRINCIPLES THAT WOULD BE VIOLATED IN SUCH A WAIVER?

JUSTICE SHAW, I CAN ANSWER IT THAT WAY.

AND IS THERE ANY CASE LAW IN SUPPORT OF YOUR POSITION?

TO ANSWER YOUR SECOND QUESTION, THERE IS NO CASE LAW, EITHER WAY, THAT RELATE TO THE FACTS OF THIS CASE. BUT LET ME ANSWER THE FIRST QUESTION THAT YOU ASKED. TRIAL COUNSEL, AS WE SAW CONTINUOUSLY THROUGHOUT THE STATE'S BRIEF, WAS A VERY EXPERIENCED TRIAL LAWYER. HE ALREADY HAD A DEFENDANT WHO HAD BEEN CONVICTED WITH A 11-TO-1 RECOMMENDATION. HE KNEW OR SHOULD HAVE KNOWN THAT, UNDER THE FACTS OF THAT CASE, AND THIS INVOLVED HIS WIFE HIS CLIENT WAS GOING TO RECEIVE THE DEATH PENALTY. YET HE, THEN, WENT IN THE SUBSEQUENT CASE AND AGREED OR ADVISED HIS CLIENT TO ENTER A PLEA OF GUILTY TO KILLING HIS MOTHER. HE KNEW OR SHOULD HAVE KNOWN, AT THAT TIME, THAT THAT SUBSEQUENT CONVICTION WOULD BE AN AGGRAVATING CIRCUMSTANCE FOR THE TRIAL COURT TO USE IN THE SENTENCING INVOLVING THE KILLING OF HIS WIFE. MOST IMPORTANTLY, AND THIS IS PERHAPS MOST TROUBLING TO ME --

BUT I THOUGHT YOU SAID THAT THAT SENTENCING, THAT PENALTY PHASE HAD ALREADY TAKEN PLACE.

HE HAD NOT BEEN SENTENCED, MA'AM. THE TRIAL JUDGE HAD NOT --

BUT THE PENALTY PHASE, WHERE EVIDENCE IS PRESENTED BY AGGRAVATING CIRCUMSTANCES, HAD TAKEN PLACE.

YES, MA'AM, BUT ONE OF THE AGGRAVATING CIRCUMSTANCES THAT THE JUDGE HAD FOUND WAS THAT THE DEFENDANT HAD COMMITTED A PRIOR VIOLENT FELONY. THAT PRIOR VIOLENT FELONY WAS THE MURDER OF HIS MOTHER, WHICH HE PLED GUILTY TO AFTER THE CONVICTION.

BUT THE JURY DIDN'T HEAR IT.

NO, MA'AM, BUT THE JUDGE HEARD THAT, AND MR. NICHOLS SHOULD HAVE ADVISED HIS CLIENT THAT THAT WOULD HAVE BEEN AN AGGRAVATING CIRCUMSTANCES IN THE SITUATION. THE TROUBLING PART IS THAT, BY ADVISING YOUR CLIENT TO NOT GIVE UP YOUR -- TO GIVE UP YOUR RIGHT TO APPEAL, YOU ARE REMOVING ANY AVENUE --

LET'S STOP FOR A MINUTE NOW, BECAUSE YOU SAID YOU WANTED TO ADDRESS THIS WAIVER ISSUE POSED BY THE STATE, BUT NOW, HOW ABOUT BRINGING US IN CONTEXT, NOW, AS TO WHAT ISSUE THAT WAS INVOLVED IN YOUR POSTCONVICTION MOTION BELOW AND WHAT ISSUE THAT YOU ARE RAISING HERE, TODAY, THIS ISSUE OF WAIVER APPLIES TO, SO THAT WE UNDERSTAND

THE POINT THAT YOU ARE ULTIMATELY GOING TO MAKE. ANOTHER TRIAL JUDGE, IN THE BEGINNING OF HIS OPINION, DENYING OUR MOTION IF, UNDER RULE 3.850, ESSENTIALLY SAID WE ARE NOT ENTITLED TO RAISE ANY ISSUES, BECAUSE HE HAD --

WITH REFERENCE TO THE CONVICTION OR THE USE OF THIS?

THE CONVICTION, YES, SIR, AND AGAIN, AS I WAS ABOUT TO SAY, IF BY ADVISING HIS CLIENT TO DO THAT, MR. NICHOLS, ALSO, COMPLETELY REMOVED, THEORETICALLY, MR. THOMAS'S RIGHT TO APPEAL OR TO GAIN REVIEW BY THIS COURT OF A 3.850 MOTION.

SO ARE YOU TALKING NOW, ABOUT COMPETENCY OF COUNSEL?

NO LAWYER WOULD EVER ADVISE HIS CLIENT TO ABSOLUTELY GIVE UP YOUR RIGHT TO APPEAL IN A CASE WHERE YOU ARE GOING TO BE SENTENCED TO DEATH, AND NO LAWYER SHOULD EVER ADVISE HIS CLIENT TO GIVE UP YOUR RIGHT TO SEEK A 3.850 MOTION, WHICH INSIDE LUTZ THE -- WHICH INSIDE YOU LATES THE MOTION. IT -- WHICH INSULATES THE MOTION. WHICH IS ETHICAL -

BY ALLOWING HIM TO ENTER SUCH A PLEA THAT, IS A DEFINITION THAT YOU HAD.

ON CLIENT MAY CONSTITUTIONALLY WAIVE RIGHTS AND THAT DOES NOT NECESSARILY INDICATE INEFFECTIVE ASSISTANCE OF COUNSEL. HOWEVER, YOUR CASES DID NOT DEAL WITH DEATH CASES AND MOST IMPORTANTLY YOUR CASES AND THE UNITED STATES SUPREME COURT IN FLEMING SAID, THAT IF A SENTENCE IS ILLEGAL, THEN THE THE WAIVER ARGUMENT CANNOT BE USED. I WOULD SUGGEST TO YOU THAT --

BUT THAT DOES NOT AFFECT THE DEATH SENTENCE, DOES IT? I THOUGHT THE GUILT PHASE OF THIS CASE, HE WAS WAIVING HIS RIGHT TO APPEAL IN POSTCONVICTION ON THAT BUT NOT AS FAR AS ANY OF THE SENTENCING MAY BE CONCERNED.

I WOULD SUGGEST TO YOU THAT, IF HE LOSES HIS RIGHT TO APPEAL THE GUILT PHASE, THEN THAT, IF HE LOSES HIS RIGHT TO ATTACK THE COMPETENCY OF COUNSEL IT FROM THE GUILT PHASE, THEN HE LOSES HIS RIGHT TO ATTACK, AND THIS GOES TO YOUR QUESTION, JUSTICE SHAW, THE CONSTITUTIONALITY OF HIS CONVICTION. IF HE LOSES THE RIGHT IT ATTACK THE CONSTITUTIONALITY OF HIS CONVICTION, THEN HIS SENTENCE CANNOT BE LEGAL, AND IT MUST BE OPEN TO REVIEW.

YOU HAVE INDICATED THAT YOU WERE GOING TO ADDRESS FIVE ISSUES HERE, AND HEAR WE ARE ALREADY ALMOST HALFWAY THROUGH YOUR ORAL TIME, AND I AM NOT CLEAR, YET, WHICH ISSUE YOU KNOW OF THOSE FIVE, YOU ARE ADDRESSING. ANOTHER NEXT ISSUE WAS OUR ALLEGATION THAT MR. NICHOLS FAILED TO PROPERLY INVESTIGATE THE CASE. A CURSORY REVIEW OF THE DEFENDANT'S DIVORCE FILE INDICATED THAT HE HAD ALREADY PAID, TO HIS DIVORCE LAWYER, THE MONEY THAT WAS REQUIRED TO BE PAID TO HIS WIFE, PURSUANT TO THE TERMS OF HIS DIVORCE JUDGMENT. THAT MONEY HAD ALREADY BEEN PAID OVER TO MRS. THOMAS'S DIVORCE LAWYER. YES, MA'AM. A YOU ARE RAISING A POINT THAT, BY THE PLEA AGREEMENT, YOU --

YOU ARE RAISING A POINT THAT, BY THE PLEA AGREEMENT, YOU ALREADY ATTACKED THE COMPETENCY OF COUNSEL IN THE PLEA AGREEMENT AND THIS PROCEEDING AND YOU ARE ALREADY ARGUING ON APPEAL. THE PLEA ON THE GUILT PHASE HAS ONE-PLUS ISSUE. I AM TRYING TO FIGURE THE WHOLE THING. YOU ARE RAISING EXACTLY WHAT YOU SAID YOU COULDN'T RAISE, BY WAY OF THE PLEA AGREEMENT.

I AM SUGGESTING THAT WE CAN'T RAISE IT SHOULD NOT HOLD MUSTER, THAT WE SHOULD BE ALLOWED TO RAISE THESE.

OKAY. BUT THE JUDGE ALLOWED YOU TO PRESENT EVIDENCE ON IT, AND THERE WAS A FINDING THAT THE DEFENSE ATTORNEY WAS NOT INEFFECTIVE, IN THE WAY THAT HE INVESTIGATED THE CASE.

THE FINDING WAS, MA'AM, THAT WE COULD NOT RAISE IT, AND THAT HAS BEEN AN ISSUE THAT IS PRESENTED TO YOU, BUT GOING BACK TO WHAT I WAS SAYING ABOUT THE MOTIVE, IN DISCUSSING THE CASE WITH THE DIVORCE LAWYER --

SO YOU AGREE, BUT LET ME, SO THIS POINT, IF WE AGREE THAT THE PLEA AGREEMENT IS VALID, THEN THIS POINT THAT YOU ARE RAISING IS BARRED BY THE TERMS OF THE PLEA AGREEMENT.

IF YOU AGREE THAT A DEFENDANT CANNOT ATTACK THE COMPETENCE OF HIS COUNSEL, THAT HE CAN WAIVE THAT, THEN I WOULD GUESS SO, BUT I WOULD SUGGEST TO YOU HOW COULD THAT EVER PASS A CONSTITUTIONAL MUSTER, BECAUSE THE SENTENCE, ITSELF, WOULD BE ILLEGAL. HOW CAN A DEFENDANT BE BARRED FROM SEEKING CONSTITUTIONAL PROTECTION, WHICH HE IS GUARANTEED TO HAVE COMPETENT COUNSEL. GOING BACK TO THE MOTIVE, THE FIRST SENTENCE OF YOUR OPINION.

WAIT A MINUTE. BEFORE YOU LEAVE THAT, THOUGH, I AM STILL CONCERNED, BECAUSE WE HAVE SAID, AND OTHER COURTS HAVE SAID THAT A DEFENDANT WHO VOLUNTARILY AND KNOWINGLY CAN WAIVE ANY CONSTITUTIONAL RIGHT, PRACTICALLY, SO WHY IS THE COMPETENCY OF COUNSEL ANY DIFFERENT FROM WAIVING THE RIGHT TO A JURY TRIAL, AND THOSE OTHER KINDS OF CONSTITUTIONAL RIGHTS?

WELL, THERE ARE TWO POINTS. FIRST OFF, NONE OF YOUR CASES THAT YOU HAVE DECIDED RELATE TO A DEATH-PENALTY CASE, AND I WOULD SUGGEST THAT THIS CASE MUST BE EXAMINED MUCH MORE CLOSELY, AND SECOND --

IN DEATH PENALTY CASES, YOU CAN WAIVE THE RIGHT TO HAVE AN ADVISORY JURY. YOU CAN PLEA, YOU CAN WAIVE YOUR RIGHT TO A JURY TRIAL, JUST AS YOU CAN IN A NONDEATH-PENALTY CASE.

MA'AM, THE RECORD IN THIS CASE DOES NOT REFLECT THAT MR. NICHOLS EVER OR THAT MR. THOMAS EVER KNEW THAT HE WAS GIVING UP HIS RIGHTS AS MR. NICHOLS SUGGESTED, OR AS IT IS SUGGESTED IN THE PLEA AGREEMENT. HE DID NOT UNDERSTAND THE SIGNIFICANCE.

IN ANSWER TO JUSTICE ANSTEAD APARTMENTS QUESTION, YOU -- ---JUSTICE ANSTEAD'S QUESTION, YOU INDICATED THAT IT WAS A DISCUSSION ABOUT THE PLEA AGREEMENT, AT THE TIME THAT HE ENTERED INTO IT.

IT IS WRITTEN INTO THE PLEA AGREEMENT, ITSELF. THAT'S CORRECT.

I ASKED YOU WHETHER THERE WAS A COLLOQUY AND WHETHER YOUR CLIENT PARTICIPATE INDEED IT AND INDICATED HE UNDERSTOOD THE TERMS OF THAT AND ALL OF THAT, AND YOU INDICATED THAT, YES, THERE WAS, SO I AM A LITTLE CONFUSED, NOW. WAS THERE OR WAS THERE NOT, WHEN THAT PLEA AGREEMENT WAS ENTERED INTO, WAS THERE THE LEGALLY-REQUIRED COLLOQUY ABOUT UNDERSTANDING THE TERMS AND KNOWING THEM AND WHERE HE IS IN OPEN COURT AND HE IS QUESTIONED BY THE COURT? IN OTHER WORDS DID ALL THAT OCCUR?

YES, BUT HE DID NOT UNDERSTAND. IT WAS NEVER MENTIONED THAT THE CONVICTION IN HIS MOTHER'S CASE COULD BE USED AS AN AGGRAVATING CIRCUMSTANCE IN HIS WIFE'S CASE. THAT WAS NEVER REFERENCED, NOR WAS IT EVER MENTIONED TO HIM THAT HE WOULD LOSE HIS RIGHT TO ATTACK THE COMPETENCY OF COUNSEL DURING THE GUILT PHASE OF THE FIRST TRIAL.

THAT WAS NEVER MENTIONED. NATURALLY MR. NICHOLS WOULD NEVER MENTION THAT, BECAUSE THE PLEA AGREEMENT INSULATED MR. NICHOLS FROM ATTACK. GOING BACK TO THE MOTIVE IN THE FIRST SENTENCE OF YOUR OPINION, THE MARCH 20, 1997, THE VERY FIRST SENTENCE, THOMAS PLANNED THE KIDNAPING AND MURDER OF HIS WIFE, RACHEL, IN ORDER TO AVOID PAYING HIS PART OF A SETTLEMENT AGREEMENT IN A PENDING DIVORCE. WEEKS BEFORE THE TRIAL, THE RECORD REFLECTS HARRY MAHAN, WHO IS A LAWYER IN JACKSONVILLE, WENT TO MR. NICHOLS AND TOLD HIM THE MONEY CAME TO ME FROM MR. THOMAS. HE PAID HIS SETTLEMENT. I SENT THAT MONEY TO WIFE'S COUNSEL. HE HAD POSSESSION OF THE MONEY. MR. NICHOLS NOVEMBER CALLED MR. MAHAN AS A WITNESS. WHEN HE QUESTIONED HIM AT TRIAL WHY HE DIDN'T, HE SAID BECAUSE I DIDN'T THINK IT WAS RELEVANT. I DIDN'T THINK IT WOULD MATTER. MY RESPONSE WAS, WELL, IT CERTAINLY MATTERED TO THE SUPREME COURT. IT WAS THE VERY FIRST SENTENCE IN THEIR OPINION. THIS CASE EVOLVED SOLELY AROUND --

YOU DID GET TO PUT ON EVIDENCE IN THE EVIDENTIARY HEARING, ON INEFFECTIVENESS IN THE GUILT PHASE, BECAUSE YOU JUST SAID THAT YOU PUT ON EVIDENCE THAT, AS TO WHY HE WAS NOT CALLED.

YES, MA'AM. WE WERE PERMITTED TO PUT ON THE EVIDENCE. THAT'S CORRECT. THE TRIAL COURT PERMITTED THAT. BUT I DID NOT KNOW WHAT WEIGHT HE WOULD GIVE TO THE ARGUMENT THAT THE STATE HAS RAISED THAT WE HAVE WAIVED THE RIGHT. THAT IS WHY I WANTED TO ADDRESS IT FROM THE BEGINNING. BUT MOST IMPORTANTLY HE, AND, AGAIN, MR. NICHOLS FAILED TO PRESENT ANY EVIDENCE AT TRIAL, CONCERNING THE LACK OF MOTIVE. MR. MAHAN COULD HAVE CLEARLY SAID HE HAS PAID ALL HIS MONEY. THEREFORE THERE COULD BE NO MOTIVE AS TO WHY THIS MURDER TOOK PLACE. THE NEXT POINT --

WAS THERE, AFTER THE MURDER TOOK PLACE, DID THE DEFENDANT GO TO THE ATTORNEY AND TRY TO GET THE MONEY BACK, OR SOMETHING --

THERE IS NO EVIDENCE TO THAT, MA'AM. THERE IS A POINT IN YOUR OPINION THAT THE DEFENDANT COULD HAVE ASKED FOR THE MONEY, BUT AT THAT POINT MRS. THOMAS HAD DISAPPEARED AND WE HAVE NO IDEA WHAT HER LAWYER WOULD HAVE DONE WITH THE MONEY, WHETHER HE WOULD HAVE TURNED IT OVER OR SAVED IT FOR THE ESTATE, BUT THAT IS NOT A POINT IN THE RECORD. THE NEXT POINT IS, DURING THE CLOSING ARGUMENT, THE PROSECUTOR MADE SEVERAL STATEMENTS WHICH THIS COURT HAS PREVIOUSLY FOUND TO BE PREJUDICIAL. MR. NICHOLS MADE NO OBJECTION TO THOSE STATEMENTS.

DID HE OBJECT TO ANY PART OF THE PENALTY PHASE CLOSING ARGUMENT?

NO, MA'AM.

AND WHAT WAS HIS EXPLANATION?

HIS EXPLANATION WAS THAT THAT WAS A TACTIC. NOW, WE HAVE ALL UNDERGONE THAT TACTIC BEFORE IN FRONT OF A JURY. WE DON'T LIKE TO JUMP UP AND DOWN SOMETIMES. IT HAS TWO RESULTS. THEY GET MAD AT YOU BECAUSE THIS EVENING YOU ARE DISTRACTING, OR NUMBER TWO, IT SEEMS LIKE THEY ARE TRYING TO HIDE SOMETHING. WHAT DOES HE NOT WANT THEM TO HEAR, BUT A LAWYER WILL ALWAYS COUPLE THAT TACTIC WITH SITTING DOWN WHAT SINGLE OBJECTION. YOUR HONOR, I OBJECT TO THAT LINE OF QUESTIONING. YOU PRESERVE YOUR OBJECTION. MR. NICHOLS MADE NO OBJECTION. HE JUST SAT THERE. SO WE HAVE A FLOOD OF COMMENTS COMING IN BY THE PROSECUTOR. DON'T GIVE HIM MERCY LIKE HE DIDN'T GIVE HER. SWINGING A HANGING NOOSE BACK AND FORTH. WE SEEK TACTIC ALL THE TIME, RAISED BY THE STATE IN THESE SITUATIONS, TO USE THE WORD COOKTIC AS THE DEFENSE TO A MOTION, YOU MUST CLEARLY SHOW THAT THE TACTIC IS REASONABLE. I UNDERSTAND NOT JUMPING UP AND DOWN. I HAVE DONE IT MANY TIMES, MYSELF, BUT I AM GOING TO PUT THAT OBJECTION INTO THE RECORD, AND I THINK EVERY REASONABLE TRIAL LAWYER WOULD. MR. NICHOLS HAD NO

RESPONSE. HE JUST SAID --

WERE ANY OF THESE UNOBTAINED TO-COMMENTS RAISED ON APPEAL, AS CONSTITUTING FUNDAMENTAL ERROR?

YES, MA'AM, AND THIS COURT'S RESPONSE WAS THE REMAINDER OF THOMAS'S CLAIMS EITHER WERE NOT PRESERVED OR ARE WITHOUT MERIT. THE CLAIM THAT I AM RAISING AS TO THE COMMENTS OF THE PROSECUTOR WERE NOT PRESERVED, BECAUSE HE DIDN'T OBJECT. WE THINK THAT THOSE WOULD HAVE, IF THEY HAD BEEN PRESERVED, OR RESERVED, THEN I THINK THAT THIS COURT MAY HAVE LOOKED AT IT VERY DIFFERENTLY. MR. NICHOLS, ALSO, DIDN'T, EXCUSE ME, DIDN'T OBJECT TO THE CCP INSTRUCTION, WHICH WAS LATER REVERSED BY THIS COURT IN JACKSON. WE UNDERSTAND THAT THE REVERSAL CAME SUBSEQUENT TO, WELL, I SEE THAT MY TIME, BUT --

YOU ARE INTO YOUR REBUTTAL TIME.

I WILL SIT DOWN IN JUST A MOMENT, SIR, IF I COULD. WE UNDERSTAND THAT IT WAS LATER REVERSED BY JACKSON, BUT IF YOU WOULD HAVE HAD THE BENEFIT OF AN OBJECTION, AGAIN HE MADE NO OBJECTION, IF THIS CASE CAME TO YOU, IF HE WOULD HAVE OBJECTED TO THE INSTRUCTION, I BELIEVE YOU WOULD HAVE REMANDED, AS YOU DID JACKSON. I HOPE THIS IS NOT TAKEN HUMOROUSLY, BUT IT IS GOOD PRACTICE TO OBJECT TO EVERYONE OF THESE AGGRAVATING CIRCUMSTANCES. YOU MAY EVERY OBJECTION. YOU NEVER KNOW WHAT IS GOING TO HAPPEN DOWN THE LINE. THIS SUBJECT UP FOR REVIEW, AGAIN, MR. NICHOLS SAT, AND WE THINK IF HE HAD OBJECTED, THEN IT WOULD HAVE BEEN REMANDED. I WILL OBJECT NOW -- I WILL END NOW. THANK YOU, SIR.

MAY IT PLEASE THE COURT. MY NAME IS CURTIS FRENCH, APPEARING HERE, TODAY, ON BEHALF OF THE STATE OF FLORIDA IN THIS CASE. I WOULD LIKE TO ADDRESS THE WAIVER ISSUE FIRST. BEFORE I DO THAT, I WOULD JUST LIKE TO POINT OUT THAT THE JUDGMENT IN THIS CASE DOES NOT STAND OR FALL ON HOW THIS COURT RESOLVES THAT WAIVER ISSUE, BECAUSE THERE WAS A FULL HEARING BELOW AND A FULL OPPORTUNITY FOR MR. WESTLING TO PRESENT EVIDENCE ON HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE. THERE WERE RULINGS BY THE COURT. FIRST OF ALL, THERE WAS A PROCEDURAL BAR RULING, CONCERNING TRIAL COUNSEL'S, THE TRIAL PROSECUTOR'S GUILT PHASE CHRESING ARGUMENT, WHICH WE THINK -- CLOSING ARGUMENT, WHICH WE THINK IS VALID. THERE WAS, ALSO, A MERITS RULING ON THE QUESTION OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES.

IN THIS INDIVIDUAL ORDER, THE JUDGE DID RULE ON THE GUILT PHASE. SO WE ARE LOOKING --

YES, MA'AM.

-- AT ALTERNATIVES, IF THE JUDGE, DESPITE THE PLEA AGREEMENT, ALLOWED, THERE WAS NO RESTRICTION ON WHAT COULD BE PRESENTED AT THIS EVIDENTIARY HEARING.

RECTCOUNTER.

AND THERE WAS A RULING ON IT, BASED -- CORRECT.

AND THERE WAS A RULING ON IT, BASED IN AN EVIDENTIARY HEARING.

THE STATE DID OBJECT AT THE OUTSET BUT NEVER OPPOSED AT THE EVIDENTIARY HEARING AND LET THE OUT OF THE WAY PROFFER, AND IT REMAINS TO BE SEEN, OF COURSE, HOW THIS COURT IS GOING TO RULE ON THAT, SO WE THOUGHT IT WOULD BE APPROPRIATE TO GO AHEAD AND HAVE A HEARING.

SIMILAR QUESTION ON IT, THERE WAS ONE GUILT-PHASE ISSUE ADDRESSED BY THIS COURT ON DIRECT APPEAL, THE CORPUS DELICTI.

THE SUFFICIENCY OF THE EVIDENCE, YES, MA'AM, AND I WAS COUNSEL FOR THE STATE ON THAT APPEAL, ALSO. WHAT I SAID IN THE OUTSET OF MY BRIEF WAS I ACKNOWLEDGED THAT THERE WAS THIS WAIVER, BUT IT IS ALSO, THIS COURT'S POLICY TO REVIEW THE SUFFICIENCY OF THE EVIDENCE. WHETHER OR NOT THAT ISSUE IS RAISED, AND THAT IS A PART OF THIS COURT'S AUTOMATIC APPEAL FUNCTION, THERE FOR WE DIDN'T, WHAT WE SAID WAS WE DIDN'T NEED TO GET INTO THE WAIVER ISSUE AT THIS TIME, AND WE ARGUED THE SUFFICIENCY OF THE EVIDENCE. NOW, MR. THOMAS IS PRESENTING ADDITIONAL GUILT PHASE ARGUMENTS AND WE DO OBJECT TO THAT. WE THINK HE SHOULD BE BOUND BY HIS WAIVER.

WHAT WAS HE, WHAT WAS HE EXPLAINED, RELATIVE TO HIS WAIVER? WAS IT THAT HE WAS JUST WAIVING HIS RIGHT TO APPEAL, OR WAS HE EXPLAINED IN DETAIL, WHAT RIGHTS WERE BEINGING WAIVED? OR IS THAT CLEAR?

YOUR HONOR THERE, IS A FULL GUILTY PLEA COLLOQUY CONCERNING HIS PLEA OF GUILTY TO THE MURDER OF HIS MOTHER. THAT IS CONTAINED IN THIS RECORD. I BELIEVE IT IS IN VOLUME 17 OF THE ORIGINAL TRIAL TRANSCRIPT, AND THE JUDGE, BASICALLY, WENT THROUGH THE USUAL GUILTY PLEA COLLOQUY AND ADVISED HIM OF HIS RIGHTS. THE TRIAL JUDGE OR THE CIRCUIT JUDGE BELOW FOUND THAT THAT COLLOQUY WAS SUFFICIENT AND THAT IT WAS DEMONSTRATED THAT THE RECORD DEMONSTRATES THAT MR. THOMAS DID MAKE A KNOWING, INTELLIGENT AND VOLUNTARY WAIVER OF HIS RIGHTS, INCLUDING HIS RIGHT TO CONTEST ANY OR TO APPEAL ANY GUILT PHASE ISSUES ARISEING OUT OF THE CASE IN WHICH HE HAD PLED GUILTY TO THE MURDER OF HIS MOTHER, AND --

WAS HE TOLD THAT THAT COULD BE USED AS AN AGGRAVATOR?

YOUR HONOR, THERE IS TESTIMONY. THE TRIAL COUNSEL, MR. NICHOLS, TESTIFIED IN THIS CASE THAT HE DID TELL THE DEFENDANT THAT THAT COULD BE USED AS AN AGGRAVATOR AND THAT THE DEFENDANT UNDERSTOOD THAT, AND THE TRIAL JUDGE BELOW, THE CIRCUIT JUDGE BELOW, IN HIS ORDER, I BELIEVE AT PAGE 38 AND 39 OF HIS ORDER, I AM NOT SURE, PAGE 26 OF HIS ORDER SAYS TRIAL COUNSEL REFUTED THIS CLAIM AT THE EVIDENTIARY HEARING, THE CLAIM THAT HE HAD NOT BEEN INFORMED OF THIS. COUNSEL TESTIFIED THAT HE AND THE DEFENDANT HAD A DISCUSSION, WHERE THE DEFENDANT WAS INFORMED THAT THE MURDER OF HIS MOTHER COULD BE UTILIZED AS AN AGGRAVATING CIRCUMSTANCE IN THE OFFENSE IN THE INSTANT CASE. HE TESTIFIED THAT HE DISCUSSED THE MATTER WITH THE DEFENDANT AND WANTED TO GO FORWARD WITH IT ANYWAY. THE REASON HE DID THAT, FIRST OF ALL, THE STATE HAD VERY, VERY STRONG, IF NOT OVERWHELMING EVIDENCE OF GUILT AS TO THE MURDER OF HIS MOTHER. I MEAN, HE WAS IN THE HOUSE WHEN THAT CRIME OCCURRED. HIS SISTER CAUGHT HIM THERE BECAUSE THEY HAD BEEN THERE EARLIER. SHE LEFT AND CAME BACK AND HE WAS IN THE HOUSE, AND WHAT HAPPENED WAS THAT HE HAD PLANNED TO KILL HER AND MAKE IT LOOK LIKE A BURGLARY/ROBBERY GOT INTERRUPTED IN THE PROCESS AND THEN TRIED TO CLAIM THAT IT WAS A SUICIDE. THE PROBLEM WITH THAT THEORY WAS THAT SHE WAS SHOT IN THE BACK OF THE HEAD IN A POSITION THAT SIMPLY IT COULD NOT HAVE BEEN SUICIDE. FURTHERMORE, HER BODY HAD BEEN MOVED AFTER IT WAS SHOT, AND THERE WAS EXPERTS THAT COULD HAVE TESTIFIED TO THAT EFFECT.

HOW LONG AFTER THE MURDER OF THE WIFE?

TWO YEARS. AND THE MOTIVATION, AT LEAST THE STATE ALLEGED, FOR THE MURDER OF THE MOTHER WAS BECAUSE THE MOTHER WAS GOING TO BE A WITNESS IN THE MURDER CASE?

POTENTIALLY. WHAT CAME OUT DURING THE PLEA HEARING, THE STATE ASSERTED THAT THE

DEFENDANT HAD MADE COMMENTS TO OTHER PEOPLE THAT HE HAD INFORMED HER THAT HE WAS RESPONSIBLE FOR HIS WIFE'S DEATH AND SHE HAD INITIALLY AGREED TO BE AN ALIBI WITNESS BUT NOW SHE WAS HAVING SECOND THOUGHTS AND WAS URGING HIM TO COME CLEAN ON THIS ISSUE, AND HE FELT LIKE HE HAD TO KILL HER. THERE WERE ALSO PECUNIARY REASONS FOR HIM TO DO IT. HE WAS ADOPTED. HIS ADOPTIVE PARENTS WERE APPARENTLY QUITE WELL OFF. HIS ADOPTIVE FATHER HAD BEEN VERY GENEROUS WITH HIM, BUT AFTER HE MURDERED RACHEL BUT BEFORE HE MURDERED HIS MOTHER, HIS FATHER PASSED AWAY AND HIS MOTHER STARTED TIGHTENING THE PURSE STRINGS AND FOR ONE EXAMPLE HIS FATHER WAS GOING TO SET HIM UP WITH A GYM, AND AFTER THE FATHER'S DEATH, HIS MOTHER DECIDED THAT WOULDN'T BE A GOOD IDEA FINANCIALLY. SECOND AVOID ARREST AND CCP AND ALSO PECUNIARY GAIN. COUNSEL, MR. NICHOLS' THEORY OF WHY HE PURSUED THIS IS BECAUSE IT GOT THE DEFENDANT OUT OF THE DEATH SENTENCE THAT HE WAS ALMOST SURE TO GET. AND IN EXCHANGE, PLUS HE, ALSO, EXPLICITLY RESERVED, THE DEFENDANT EXPLICITLY RESERVED THE RIGHT TO CONTEST SENTENCING ISSUES ARISING OUT OF THE CASE INVOLVING THE DEATH OF HIS WIFE. THOMAS SIGNED AN AGREEMENT WHICH SAYS I AGREE TO WAIVE MY RIGHTS TO APPEAL ANY MATTER WHATSOEVER, ARISING OUT OF THE CASE IN WHICH HE MURDERED HIS WIFE, WHETHER DIRECT, COLLATERAL OR APPEALS UNDER RULE 3.850, THEN HE SPECIFICALLY RESERVED THE RIGHT TO CONTEST SENTENCING ISSUES. I AGREE WITH MR. WESTLING. I HAVEN'T FOUND A CASE THAT INVOLVES EXACTLY THIS KIND OF WAIVER. I HAVE CITED A NUMBER OF FEDERAL CASES. THEY SAY THINGS BASICALLY, GENERALLY, WE DO NOT CONSIDER ISSUES THAT A DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED IN A PLEA AGREEMENT. THE MAJORITY OF CIRCUITS SUPPORT THE WAIVER OF COLLATERAL REVIEW IN A PLEA AGREEMENT, IF IT IS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY MADE, HE EXCEPT WHEN THE INEFFECTIVE ASSISTANCE OF HE WILL CLAIMS RELATE DIRECTLY TO THE PLEA OR TO THE WAIVER.

ARE THERE ANY OTHER CLAIMS BY THE DEFENDANT IN THE OTHER MURDER CASE, IT TO WITHDRAW HIS PLEA?

NO, MA'AM, THERE HASN'T, AND IT IS OUR POSITION, IF HE WANTED TO SET ASIDE THAT PLEA, WHAT HE HAS TO DO IS FILE A 3.850 IN THAT CASE AND MOVE TO SET IT ASIDE, TRIAL COUNSEL WAS INEFFECTIVE OR THE AND VOLUNTARILY OR INTELLIGENTLY, SO AT THIS POINT WHAT WE HAVE IS A PLEA. AND THE ONLY DIFFERENCE SO CONTRARY TO OUR JURISPRUDENCE AND SO TO APPEAL, THAT YOU SHOULDN'T TO JUST SO FUNDAMENTAL THAT YOU HAVE A, YOU HAVE GOT ME OVER THE BARREL, WILL WAIVE MY RIGHT TO APPEAL, ERROR MIGHT BE. WHY DOESN'T THAT FUNDAMENTAL RIGHTS?

FIRST OF, HERE, AND A DEFENDANT CERTAINLY, HE GOT AN APPEAL IN AID OF HIS AND HAS THE RIGHT TO ATTACK THEM REALLY, BUT PLUS HE GOT THE SUPPORTIVE CONVICTION, AND HE ATTEMPTED TO RAISE NO OTHER GUILT-PHASE ISSUES IN THAT CASE. OUR SPECIES IS A COLLATERAL EQUITABLE AGREEMENT IN WHICH HE IS OBLIGATED TO CARRY OUT HIS END OF THE BARGAIN, IN WHICH HE HAS NOT PRESENTED THESE GUILT-PHASE THAT THE JUDGE WAS BIASED, HE WOULD HAVE WAIVED THAT. YES. OUT SUBSEQUENTLY THAT THE JUDGE WAS COUSIN OF THE VICTIM AND HADN'T DISCLOSED THAT, THAT WAS SOMETHING HE WOULD HAVE WAIVED, IS THAT CORRECT? HE COULDN'T RAISE IT.

HE WAIVES ANY GUILT, HE COULD HAVE PLED GUILTY AND WAIVED ANY GUILT-PHASE ISSUES ARISING OUT OF HIS ORIGINAL TRIAL, AND THERE WOULDN'T HAVE BEEN ANY REVIEW OF THE SUFFICIENCY OF THE EVIDENCE OR ANY JUDGE BIAS ISSUES OR ANYTHING ELSE. IF IT IS A JUDGE BIAS THAT INVOLVES THE GUILTY PLEA AT WHICH HE ENTERED THIS WAIVER, THEN I THINK THAT IS A CLAIM THAT HE COULD RAISE AN ATTACK ON THAT GUILTY PLEA, WHICH HE HASN'T DONE. ALSO I WOULD LIKE TO POINT OUT CONCERNING THE ARGUMENTS, FIRST OF ALL, GENERALLY SPEAKING, THE ARGUMENT ISSUE IS SOMETHING THAT COULD AND SHOULD HAVE BEEN RAISE ODD DIRECT APPEAL. IN FACT, ALL OF THE PENALTY-PHASE ARGUMENTS THAT HE IS RAISING NOW WERE RAISED ON DIRECT APPEAL.

LET ME, NOW YOU ARE GOING ON TO THE INEFFECTIVE ASSISTANCE?

YES, MA'AM.

ON THE FAILURE TO OBJECT TO ANY CLOSING ARGUMENT REMARKS IN THE PENALTY PHASE.

AT THE PENALTY PHASE.

YOU ARE SAYING, WELL, THAT COULD HAVE BEEN AND WAS RAISED ON DIRECT APPEAL, BUT WHEN SOMETHING IS RAISED, IT IS UNPRESERVED. WE SAY AND THE STATE ARGUES IT IS PROCEDURALLY BARRED. MY QUESTION ON THESE CASES, BECAUSE THIS COMES UP, UNFORTUNATELY, YOU KNOW, SOMEWHAT FREQUENTLY, THAT YOU HAVE GOT A LAWYER, EXPERIENCED LAWYER, IN THIS CASE THERE ARE NO OBJECTIONS TO ANY PENALTY PHASE ARGUMENTS. SOME OF THEM ARE, HAVE -- ARGUMENTS. SOME OF THEM ARE, HAVE BEEN RECOGNIZED TO BE CLEARLY IMPROPER, AND LET'S JUST ASSUME WE HAD A CASE WHERE THERE IS NO PENALTY PHASE OBJECTIONS, AND YOU HAVE GOT FOUR ARGUMENTS THAT WOULD BE REVERSEABLE ERROR, IF THEY HAD BEEN RESERVED. -- PRESERVED. CAN A DEFENSE ATTORNEY JUST GET UP AND SAY THERE WAS A TACTICAL REASON, BECAUSE I DIDN'T WANT TO UPSET THE JURY, AND THAT THAT IS GOING TO BE ENOUGH, EVEN THOUGH ANOTHER DEFENSE ATTORNEY WOULD HAVE OBJECTED AND HAVE GOTTEN HIS OR HER CLIENT A NEW TRIAL? I MEAN, IS THERE ANY PLACE WHERE THIS THING IS WE HAVE GOT YOU BOTH WAYS. YOU DON'T OBJECT, SO IT IS NOT RESERVED SO WE DON'T REVIEW IT, AND IF IT WAS INEFFECTIVE, HIS TACTICAL REASON WAS HE DIDN'T WANT TO UPSET THE JURY.

HIS TACTICAL REASONS WERE -- REASONS WERE MORE THAN THAT, BUT LET ME SAY FIRST, BECAUSE IT SHOULD AND COULD HAVE BEEN AND WAYS RAISED ON DIRECT APPEAL, WE DON'T GET TO THE MERITS OF IT. WE ONLY GET TO IT VIA THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AND THE ATTORNEY PERFORMANCE AND PREJUDICE. CONCERNING ATTORNEY PERFORMANCE IN THIS CASE, THE TRIAL COUNSEL TESTIFIED THAT, AND I DISAGREE THAT ANY OF THE OBVIOUS WERE OBJECTIONABLE, EXCEPT FOR THE ONE ABOUT SHOWING THE VICTIM THE SAME MERCY HE SHOWED THE DEFENDANT. COUNSEL ACKNOWLEDGED THAT HE KNEW THAT ARGUMENT WAS OBJECTIONABLE, BUT HE DIDN'T OBJECT, BECAUSE IT GAVE HIM THE CHANCE TO, BECAUSE HE DIDN'T WANT TO OBJECT JUST TO BE OBJECTING ALSO, BECAUSE SOMETIMES HE THOUGHT WHEN A PROSECUTOR ARGUED IT PROPERLY, THAT THE JURY WAS OFFENDED BY IT AND IT WAS BETTER NOT TO OBJECT TO IT. ALSO SOMETIMES GAVE HIM AN OPPORTUNITY TO REPLY IN HIS ARGUMENT, AND THAT IS WHY HE DIDN'T OBJECT IN THIS PARTICULAR CASE. THE JUDGE --

DID HE REPLY IN THAT ARGUMENT?

THAT SPECIFIC ARGUMENT? I DON'T THINK HE REPLIED TO THAT SPECIFIC ONE. HE CERTAINLY MADE AN ARGUMENT AT THE PENALTY PHASE, ADDRESSING ALL OF THE CLAIMS THAT THE DEFENDANT MADE AND THAT HE WAS ELIGIBLE FOR MERCY AND WOULD ARGUE IT AND A DEATH SENTENCE. I WOULD ALSO POINT OUT THAT, IN TERMS OF PREJUDICE ON THESE ARGUMENTS, THAT NOT ONLY WAS THE EVIDENCE OF GUILT OVERWHELMING BUT THE JURY RETURNED A 11-TO-1 FOR THE MURDER, WITHOUT EVEN KNOWING ABOUT THE MURDER OF THE MOTHER. THE OTHER WAS COLD, CALCULATED, PREMEDITATED, HEINOUS, AT ATROCIOUS AND CRUEL, PECUNIARY GAIN AND COMMITTED DURING KIDNAPING. SO THERE WAS EVIDENCE IN THE CASE.

WHAT WAS THE EVIDENCE OF HEINOUS, ATROCIOUS AND CRUEL?

THE TESTIMONY HAD ATTACKED AND BEATEN UP THE VICTIM AND THROWN HER IN THE TRUNK OF THE CAR, AND THERE IS ALSO SIGNS, SIDE OF THE TRUNK. APPARENTLY THAT BELONGED TO THE VICTIM. IT WAS THE SAME BLOOD TYPE. THEN THE FACT THAT SHE WAS STILL ALIVE AND

THE COMMENTS MADE THAT HE WENT TO HIS OWN HOUSE BUT SHE WAS TAKEN THERE, AND THEN SHE WAS TRANSPORTED DEAD, SO SHE WAS TRANSPORTED THERE WHILE TIED UP AND, WE THINK, HAVING BEEN BEATEN, AND WHICH THIS COURT CONFIRMED ON HAC AND WHICH HE DIDN'T CONTEST ON FINDING AND ON APPEAL. SO AS FAR AS THE REFERENCE TO A ARGUMENT. THAT WAS A GUILT PHASE,, COUNSEL EXPLAINED THIS. ALL,, BECAUSE THE PROSECUTOR'S ARGUMENT WORD NOOSE. HE REFERS TO IT. THAT IS NEWLY-DISCOVERED. IN FACT, MR. THOMAS DID NOT FILE HIS AMENDED CLAIM RAISE HAD GONE THIS ISSUE, UNTIL SOME THREE YEARS AFTER THE MANDATE ISSUED IN THIS CASE ON DIRECT APPEAL. THE TRIAL JUDGE, IN THIS CASE, IN HIS ORDER, EXPLICITLY FOUND THAT THAT CLAIM WAS TIME-BARRED. IT WASN'T RAISED IN A TIMELY MANNER. IN THE CLARENCE JONES CASE WHICH I CITE IN MY BRIEF, THE SAME THING HAPPENED, AND JUDGE IN THE SAME THING HAPPENED AND IT, THE COURT CAN ALSO DISALLOW IT, THAT AT THE OUTSET OF THE TRIAL, DURING THE OPENING STATEMENT, HE COMPARED AND SAID WHAT THE STATE'S EVIDENCE IS GOING TO DO THIS AND THAT AND FINE AND IT IS GOING TO LOOK LIKE A VERY SECURE KNOT, AND WHAT HE HAD WAS A SLIP KNOT, AND IN ESSENCE WHAT HE IMPLIED THEN WHAT HE PLANNED TO DO LATER WAS TO ANALOGIZE THE STATE'S EVIDENCE TO A SLIP KNOT, WHICH YOU PULL ON IT A LITTLE BIT AND IT FALLS APART. THE PROSECUTORS TESTIFIED IN THIS CASE THAT THIS WAS A POWERFUL ANALOGY AND THEY THOUGHT THEY HAD TO ADDRESS IT, AND THEY CONCLUDED THAT THE BEST ANALOGY OR THE BEST REBUTTAL TO THAT WOULD BE TO COMPARE, IF WE ARE GOING TO TALK ABOUT WHAT KIND OF KNOT THE STATE'S EVIDENCE WAS, WOULD BE A NOOSE, BECAUSE A NOOSE IS SOMETHING, BY DEFINITION, IS A KNOT THAT IS, BECOMES TIGHTER IF YOU PULL ON IT, BECOMES TIGHTER RATHER THAN LOSER, SO IT IS THE ANTIETH I SEE OF A SLIP KNOT, SO THAT -- AND IT IS THE ANTIETHIESIES OF A - - THE ANTHISIS OF A SLIP KNOT, AND COUNSEL FIGURED THAT HE HAD OPENED THE DOOR TO THAT, WHICH I SAID IN MY REPLY BRIEF, AND AT THAT TIME TRIAL COUNSEL WAS STILL PLANING TO USE HIS OWN LITTLE ROPE TRICK AND IN HIS CLOSING ARGUMENT, HE LATER DECIDED NOT TO DO. THAT HE DID, HOWEVER, LATER RESPONDED TO THE ARGUMENT IN HIS CLOSING ARGUMENT, AND I WOULD JUST REFER THE COURT TO PAGES 1210, 1212, AND 1218 OF THE ORIGINAL TRIAL TRANSCRIPT. JUST FOR ONE EXAMPLE ON PAGE 1210, TRIAL COUNSEL SAID DOESN'T MATTER HOW MANY TIMES MR. DAY WAGS A NOOSE IN FRONT OF YOUR FACE AND IT DOESN'T MATTER HOW MANY TIMES HE SAYS RACHEL IS DEAD, HE CANNOT AVOID THE CONCLUSION THAT THERE IS REASONABLE DOUBT AS TO EVERY MATERIAL WITNESS AND EVERY ALLEGATION IN THIS CASE. HE MADE REFERENCE TO IT ON PAGE 1212. IN OTHER WORDS HE TOOK THAT AND TRIED TO TURN IT ON THE STATE AND MADE WHAT I THINK IS A POWERFUL ARGUMENT UNDER THE CIRCUMSTANCES AND IN BASICALLY PRESENTING A REASONABLE DOUBT DEFENSE, WHICH WAS ALL THAT HE HAD IN THE CIRCUMSTANCES OF THIS CASE. THERE WERE SIMPLY NO WITNESSES TO REBUT THE STATE'S EVIDENCE. TRIAL COUNSEL TESTIFIED THAT THERE WERE NONE. THE DEFENSE HAS NOT PRESENTED ANY WITNESSES WHO COULD HAVE TESTIFIED. WE DON'T KNOW, ALTHOUGH THERE IS SOME VAGUE REFERENCE TO THERE WERE SIX WITNESSES WHO COULD HAVE IMPEACHED THE THREE INMATE WITNESSES WHO TESTIFIED IN THIS CASE. IN FACT --.

WHAT ABOUT IF WE DECIDE THAT WE ARE GOING TO LISTEN TO, DECIDE ON THE MERITS, THE GUILT PHASE ISSUES, THE DEFENDANT IS MAKING THIS ARGUMENT THAT COUNSEL WAS INEFFECTIVE, BECAUSE HE NEVER ADDRESSED THE MOTIVE ISSUE OF THIS CASE, AND THAT THERE WAS EVIDENCE THAT HE HAD ALREADY PAID THE DEBT.

THAT COULD HAVE BEEN REBUTTED BY THE STATE. WHAT HAPPENED, THE DEFENDANT, A FEW DAYS OR A FEW WEEKS, I AM NOT SURE EXACTLY THE TIME, HAD PAID A \$2350 DIVORCE SETTLEMENT TO RACHEL'S DIVORCE COUNSEL, COUNSEL, OKAY, NOT BEEN DELIVERED TO RACHEL. GET THAT MONEY. THE DAY HER,, ALSO AFTER SHE DISAPPEARED AND OF HIS DEFENSE IS THAT SHE IS NOT REALLY DEAD, BUT AT THE SAME TIME HE TRIED TO TERMINATE HIS CHILD SUPPORT PAYMENTS. HE GOT SOCIAL SECURITY BENEFITS ON BEHALF OF HIS CHILD, AND SO ANY THEORY, ANY DEFENSE PRESENTATION THAT, WELL, HE DIDN'T HAVE A PECUNIARY MOTIVE FOR KILLING HER BECAUSE HE HAD ALREADY TURNED OVER THE MONEY, COULD HAVE BEEN REBUTED IN THIS RESPECT, NOT TO MENTION THE NUMEROUS OTHER WITNESSES WHO TESTIFIED

THAT THE DEFENDANT HAD HAD TOLD THEM THAT HE WANTED HIS CHILD. HE WANTED CUSTODY OF HIS CHILD AND WAS PREPARED TO USE ANY MEANS TO GET IT, AND HE ALSO ACCUSED THE VICTIM OF ADULTERY AND CONSORT AND HAD MANY OTHER MOTIVES TO DECIDE, AND COUNSEL DECIDED AFTER DISCUSSION WITH HIS DEFENDANT NOT TO PURSUE IT, BECAUSE HE DIDN'T WANT TO LOSE ANYTHING HELLS IN CLOSING ARGUMENT. THANK YOU -- ANYTHING ELSE IN CLOSING ARGUMENT. THANK YOU.

WHAT ABOUT SETTING ASIDE THE PLEA AGREEMENT IN THE MOTHER'S DEATH AS COMING UP? WHY WOULD THAT NOT BE APPROPRIATE, BEFORE WE CONSIDER THE ISSUES YOU RAISE IN THIS CASE?

JUDGE, JUSTICE HARDING, EXCUSE ME, I CAME INTO THE CASE APPROXIMATELY SEVEN YEARS AFTER THE CONVICTION HAD NOT BEEN RAISED BY THAT TIME. I BELIEVE THAT IT MAY WELL BE BARRED BY NOW. ON THE LAST ISSUE LAYSED BY JUSTICE QUINCE, WHAT ABOUT THE MOTIVE, MR. FRENCH SAID, WELL, THERE WERE NO WITNESSES PRESENTED AND THE TESTIMONY COULD ZOO BEEN REBUTTED. -- COULD HAVE BEEN REBUTTED. UNNORTH NATALIE WE WILL NEVER KNOW, WILL WE, BECAUSE MR. NICHOLS DID NOT CALL THE ONE WITNESS, A PROMINENT LAWYER IN JACKSONVILLE, WHO COULD SAY I HAD THE MONEY. THE MONEY WAS DELIVERED. WE DON'T KNOW IF THE STATE COULD HAVE REBUTED THAT OR NOT AND WE WILL NEVER KNOW WHAT EFFECT THAT TESTIMONY WOULD HAVE HAD ON THE JURY, WHEN THE ONLY MOTIVE GIVEN FOR THIS CRIME WAS PECUNIARY GAIN, AS REFERENCED BY THIS COURT. YES, MA'AM.

WHAT DID MR. NICHOLS SAY WAS HIS REASON FOR NOT CALLING THIS PARTICULAR --

HE SAID HE DIDN'T THINK IT WOULD MATTER, AND I SAID, WELL, WE WILL NEVER KNOW, WILL WE, AND HE SAID NO.

WHAT DID THE JUDGE RULE ON THAT ISSUE?

THE TACTIC WORK. SAID IT WAS A TACTIC. WOULD HAVE THEN ALLOWED THE DEFENSE TO MAINTAIN OPEN AND CLOSE.

AND WHY ISN'T, I MEAN, IN TERMS OF OUR REVIEW, ALTHOUGH THERE ARE, WE HAVE FACTUAL FIND FINDINGS AND THEN -- FINDINGS AND THEN WE ULTIMATELY LOOK AT STRICKLAND CLAIMS. WHY ISN'T THAT A PROPER FACTUAL FINDING SUPPORTED BY THE RECORD?

I BELIEVE TACTIC IS ALSO CONSIDERABLE FOR THIS COURT, BUT YOU MUST ALSO FIND THAT TACTIC IS REASONABLE, AND THE ONLY EVIDENCE PRESENTED AGAINST THE DEFENDANT, PLEASE REMEMBER THERE WAS NO BODY FOUND. THE EVIDENCE FOR MOTIVE COULD BEEN TOTALLY AND COMPLETELY REFUTED. HOW COULD IT POSSIBLY HAVE BEEN SAID THAT IT WAS REASONABLE NOT TO GO BACK AND EVEN SEE THAT MAN. DURING THAT TESTIMONY, MR. NICHOLS ACKNOWLEDGED THAT HE HAD MET MR. MAHAN IN THE HALL. THEY NEVER EVEN INVESTIGATED IT.

IS IT TRUE THAT THERE IS RECORD BEFORE THIS COURT THAT ALTHOUGH HE GAVE THE 2000 OR \$2500 ONE DAY, THAT THE NEXT MONEY HE ASKED FOR IT BACK.

NOT AFTER IT WAS DELIVERED ARE DELIVERED. THE MONEY WAS PAID AND DELIVERED TO THE LAWYER.

THAT WAS HIS UNDERSTANDING OF THE OBLIGATION?

YES, MA'AM. LIKE I SAY, MR. NICHOLS ADMITED IN THE CROSS-EXAMINATION TAKE WAS A BRIEF CONVERSATION IN THE -- THAT IT WAS A BRIEF CONVERSATION IN THE HALL. WHAT DID YOU DO? WHAT DID YOU FOLLOW-UP? NOTHING. I DIDN'T THINK IT MATTERED, AND THAT IS BIZARRE TO

ME. WE WOULD ASK YOU, OF COURSE, TO REMAND. I THANK YOU FOR YOUR TIME.

CHIEF JUSTICE: THANKS AND THANK YOU TO YOU BOTH.