Duane E. Owen v. James v. Crosby, Jr.

THE NEXT CASE IS DUANE OWEN VERSUS STATE. FOR THE BENEFIT FIT OF THOSE IN THE ARGUMENT, THE COURT WILL HAVE ITS REGULAR 15-MINUTE RECESS AFTER THE OWEN CASE, SO THAT YOU CAN PLAN YOUR TIME ACCORDINGLY, AFTER WE HEAR THE OWEN CASE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS JAMES DRISCOLL, AND I AM HERE ON BEHALF OF DUANE OWEN, WHO HAS BEFORE THIS COURT, BOTH A PETITION FOR A WRIT OF HABEAS CORPUS AND AN APPEAL FROM THE DENIAL OF HIS PRO SE MOTION. 438.50 RELIEF.

CHIEF JUSTICE: CAN YOU GIVE US SOME INDICATION OF WHAT ISSUES YOU ARE GOING TO ADDRESS THIS MORNING, IN THE LIMITED TIME WE HAVE.

IN THE LIMITED TIME, I WANTED TO CONCENTRATE ON THE DENIAL OF HIS PRO SE MOTION, AND THE APPEAL, WHICH, THROUGH COUNSEL, HE DID FILE A BRIEF, AND IN ORDER TO UNDERSTAND THE ISSUES OF MR. OWEN'S PRO SE MOTION, IT IS IMPORTANT FOR THE COURT TO UNDERSTAND WHAT, EXACTLY, HAPPENED TO MR. OWEN, AND HOW HIS CASES, HE HAD MULTIPLE CASES. THERE WERE TWO CASES. REALLY, THAT COLLIDED. ONE CASE INVOLVED A VICTIM BY THE NAME OF SLATER I. THE CASE BEFORE THE COURT INVOLVES A -- SLATERY. THE CASE BEFORE THE COURT INVOLVES A VICTIM BY THE NAME OF WARDEN.

THE COURT IS WELL FAMILIAR WITH THE UNDER LYING CIRCUMSTANCES, BUT YOU GO AHEAD, AS FAR AS PROCEDURE.

MR. OWEN WAS TRIED ON THE SLATERY CASE FIRST AND THAT WAS EVENTUALLY REVERSED. AT THE TIME HE DIDN'T RECEIVE A REVERSAL ON THE WARDEN CASE AND HE PROPOSED PROCEEDED TO POSTCONVICTION LITIGATION.

WHICH IS THIS CASE.

WHICH IS THIS CASE. BUT AT THE TIME THAT HE WENT TO GO TO THE EVIDENTIARY HEARING, HE WAS PENDING RETRIAL ON THE SLATERY CASE, WHICH WAS BROUGHT TO LIGHT. THOSE CASES COLLIDED, AND MR. OWEN, THROUGH HIS COUNSEL, PRETTY MUCH LOST ALL HIS HOPE OF ANY RELIEF DURING THE POSTCONVICTION PROCESS ON THE WARDEN CASE. WHEN THE CASE WENT TO TRIAL, BECAUSE THE SLATTERY CASE WAS PENDING, THERE WASN'T A -- THERE WAS AN ATTORNEY CLIENT PRIVILEGE PROBLEM WITH THAT CASE, AND AS MR. OWEN ALLEGED IN HIS PRO SE MOTION, IT WAS BECAUSE COUNSEL BECAME INVOLVED WITH THE SLATTERY CASE, AND IT WAS BECAUSE COUNSEL WAS INEFFECTIVE, IT LED TO THE TOTAL ABANDONMENT OF POSTCONVICTION LITIGATION FOR MR. OWEN. ISSUES OF IMPORTANT, THERE WERE ALLEGATIONS OF OF IMPORTANT CONSTITUTIONAL VIOLATIONS, WHERE MR. OWEN'S RIGHTS WERE DENIED AND HIS DEATH SENTENCE WAS ILLEGITIMATE, WERE NEVER TESTED --

COUNSEL, HOW DO WE DEAL WITH, THIS IS A SUCCESSIVE MOTION THAT WAS FILED BY MR. OWEN HERE, BECAUSE HE HAD A PREVIOUS 3.850 THAT THIS COURT HEARD ON APPEAL, AND BECAUSE HE HAD DECIDED NOT TO CONTINUE WITH THE EVIDENTIARY HEARING, MANY OF THE ISSUES THAT WERE RAISED IN THAT PREVIOUS MOTION WERE EITHER WAIVED OR PROCEDURALLY BARRED, SO HOW DO WE DEAL WITH THE FACT THAT THIS COURT HAS MADE THAT RULING IN RELATIONSHIP TO THE SUCCESSIVE MOTION?

JUSTICE, THIS COURT NEVER WOULD HAVE MADE THAT RULING, AND THIS COURT WOULD HAVE, THROUGH THE DEVELOPMENT OF THOSE ISSUES, AT A PROPER EVIDENTIARY HEARING, WOULD NOT HAVE MADE THAT RULING, HAD MR. OWEN'S COUNSEL NOT BEEN INEFFECTIVE IN THEIR REPRESENTATION. THIS IS BEYOND MERELY SUCCESSOR COUNSEL TAKING ISSUE WITH CERTAIN QUESTIONS. THIS GOES TO THE HEART OF WHAT MR. OWEN WAS ENTITLED TO AS A POSTCONVICTION LITIGANT IN THIS STATE. TO TEST HIS DEATH SENTENCE, TO TEST EVIDENCE, AND TO BE INVOLVED IN THE POSTCONVICTION PROCESS, AND ALTHOUGH ON THE RECORD, MR. OWEN SAYS THAT HE AGREES WITH HIS ATTORNEY'S ADVICE, IT IS EXACTLY THAT ADVICE WHICH WAS THE ISSUE THAT WAS THE MOST IMPORTANT ISSUE RAISED IN MR. OWEN'S PRO SE 3.850.

AND HOW DO WE DEAL WITH THE FACT THAT WE HAVE, IN PREVIOUS CASES, SAID THAT INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL IS NOT AN ISSUE THAT CAN BE, THAT IS COMINGNIZEABLE?

WELL, THERE IS TWO-WAYS. AGAIN, IN THE BRIEF, THERE, THERE WAS UNIQUE PROCEDURAL HISTORY THAT LED TO THIS. THIS IS NOT THE COMMON, EVERYDAY CASE. SECONDLY, THE COURT HAS FOUND, UNDER A LIMITED CIRCUMSTANCES, THAT, UNDER A DUE PROCESS THEORY, THAT FOR INSTANCE, IN THE AREA OF FILING A BELATED 3.850, WHEN COUNSEL HAS LET THE TIME LAPS, THAT THAT IS -- TIME LAPSE, THAT THAT IS COMINGNIZEABLE, AND BECAUSE AN ATTORNEY DIDN'T FULFILL THEIR DUTY TO FILE THAT MOTION, THE COURT ALLOWED A BELATED 3.850. IN THIS INSTANCE, IT IS NOT SIMPLY JUST THAT THERE WERE OTHER ISSUES. THIS WAS THE TOTAL ABANDONMENT OF POSTCONVICTION LITIGATION FOR MR. OWEN. AND WE ARGUED, ALSO, THAT THIS ESSENTIALLY DENIED MR. OWEN ACCESS TO THE COURTS, BECAUSE OF THAT CONFLICT, AND BECAUSE OF THE INEFFECTIVENESS OF POSTCONVICTION COUNSEL. MR. OWEN IS ALL BUT OUT OF ISSUES, AND THE CHANCE OF EVER GETTING ANY REMEDY FOR THE UNCONSTITUTIONALITY THAT OCCURRED DURING HIS TRIAL, THAT OCCURRED, THAT LED TO HIS DEATH SENTENCE, BECAUSE OF COUNSEL'S ACTIONS OF TOTALLY ABANDONING THE 3.850 PROCESS, THIS GOES WELL BEYOND MERELY A CLAIM OF INEFFECTIVE POSTCONVICTION COUNSEL. THIS, BECAUSE OF COUNSEL'S ACTIONS, MR. OWEN WHO RELIED ON HIS POSTCONVICTION COUNSEL, AS THE COURT MAY RECALL, AND IT WAS RAISED ON THE APPEAL FROM THE DENIAL OF THE 3.850 MOTION. MR. OWEN, HIS COUNSEL WENT FORWARD ON A THEORY THAT, UNDER SIMMONS, THEY COULDN'T HAVE BEEN FORCED TO PROCEED WITH THE 3.850 HEARING. WELL, AS THIS COURT FOUND, MR. OWEN HAD AN OBLIGATION TO PROCEED IN GOOD FAITH WITH WHAT COULD HAVE BEEN PRESENTED, AND AT LEAST WE WOULD ARGUE THAT SOME MORE THAN WHAT WAS ACTUALLY PRESENTED, COULD HAVE BEEN PRESENTED, THAT MR. OWEN WOULD HAVE BEEN IN A TOTALLY DIFFERENT POSTURE OR DIFFERENT POSITION AT THAT POINT OR WHEN HE CAME FOR HIS ORIGINAL POSTCONVICTION APPEAL, BUT BECAUSE COUNSEL TOTALLY ABANDONED THE 3.850 AT THE TIME A -- AT THE TIME, AND ERRONEOUSLY ADVISED MR. OWEN AND ALLEGED THAT, BASED ON THEIR ADVISE AND NOT MR. OWEN'S OWN VIEW BUT THEIR ADVICE, HE BELIEVED THAT HE WOULD HAVE THE OPPORTUNITY TO COME BACK ON A 3.850 AND LITIGATE VERY IMPORTANT ISSUES. MR. OWEN HAS AN INCREDIBLE CASE OF 3.850 ISSUES. THINGS THAT WOULD AFFECT THE CONSTITUTIONALITY OF HIS DEATH SENTENCE, AND THAT WAS NEVER HEARD BY THE TRIAL COURT BECAUSE HIS COUNSEL ABANDONED THAT, AND IT WAS NEVER HEARD BY THIS COURT, BECAUSE THERE WAS NO DEVELOPMENT OF THOSE FACTS. THE TRUE IN JUST ADVERTISES THAT -- THE TRUE IN JUSTICES THAT MAY HAVE BEEN HEARD IN MR. OWEN'S COURT ARE A CASE THAT WERE NEVER BROUGHT BEFORE THIS COURT, AND WE CAN REALLY NOT, WITHOUT SOME POSTCONVICTION PROCESS, LOOK UPON MR. OWEN'S CASE AS A CASE WHERE THE CONVICTION IS JUSTIFIED OR WHERE THAT DEATH SENTENCE IS LEGITIMATE, AND MR. OWEN, IN HIS PRO SE MOTION, HAD A NUMBER OF THEORIES OF WHY HE SHOULD BE ALLOWED TO PROCEED, BUT ESSENTIALLY WHAT HE WAS ASKING FOR WAS THE OPPORTUNITY TO PROVE JUST EXACTLY WHAT HAPPENED BEYOND THE COLD RECORD, WHICH THIS COURT CONSIDERED IN DENYING HIS APPEAL FROM THE ORIGINAL 3.850, AND IN THIS CASE THERE WERE THINGS THAT WERE HAPPENED, THAT HAPPENED AND FACT THAT HAPPENED WHICH WOULD NOT APPEAR IN THE RECORD, AND MR. OWEN, THROUGH HIS MOTION, WANTED TO PRODUCE THAT, AND HE WANTED, JUST SO THE TRIAL COURT

OR ANY COURT WOULD UNDERSTAND JUST WHAT EXACTLY HAPPENED TO THIS MAN, WHEN HE ATTEMPTED TO, IN GOOD FAITH, LITIGATE HIS POSTCONVICTION ISSUES, BUT THROUGH THE REASON -- THROUGH THE ERRONEOUS ADVICE OF COUNSEL, TOTALLY ABANDONED THOSE ISSUES, AND WE BELIEVE THAT THERE ARE A NUMBER OF THEORIES WHICH TAKE THIS BEYOND MERELY AN ALLEGATION OF INEFFECTIVE ASSISTANCE OF COUNSEL, WHICH TAKE IT TO PRETTY MUCH WHERE THE TOTAL ABANDONMENT OF THE ENTIRE POSTCONVICTION COUNSEL DENIED MR. OWEN ACCESS TO THE COURTS OF THIS STATE AND THE COURTS OF THIS NATION, WHERE THEY WOULD NEVER -- WHERE THERE WOULD NEVER BE ANY SORT OF REVIEW FOR THE IN JUSTICES OR THE UNCONSTITUTIONALITY THAT MAY HAVE OCCURRED IN MR. OWEN'S CASE FORM HE NEVER HAD THAT. AND THAT, DESPITE WHAT AND OOENS EARS TO BE A -- WHAT APPEARS TO BE A WAIVER ON THE RECORD, THAT WAS THE FAULT OF HIS COUNSEL. THEY COULD HAVE PROCEEDED. THEY COULD HAVE CALLED AT LEAST A TRIAL COUNSEL OR THE LEAD TRIAL COUNSEL FROM THIS, FROM THE WARDEN TRIAL. THAT ATTORNEY WAS NOT EVEN CALLED. INSTEAD THESE ATTORNEYS CALLED THE LEAD COUNSEL FROM THE SLATTERY CASE, WHICH WAS BOUND TO INVOKE THE ATTORNEY/CLIENT PRIVILEGE, AND AT THAT POINT, RATHER THAN PROCEED WITH ANY OTHER WITNESSES OR MAKE A PROFFER OR DO ANYTHING THAT WOULD HAVE PROTECTED MR. OWEN'S RIGHTS, WHICH WOULD HAVE PRESENTED TO THIS COURT THAT MR. OWEN WOULD GO ON IN GOOD FAITH, RATHER THAN --

WHO WAS THE, CCR COUNSEL THAT REPRESENTED MR. OWEN PREVIOUSLY?

I BELIEVE HE STARTED HIS REPRESENTATION WITH THE OLD CCR, AND I DON'T KNOW WHO HAD THAT --

WHO WAS THE ATTORNEY, WHAT OFFICE REPRESENTED HIM WHEN THEY DID, THIS WAS THE CASE WHERE THEY ATTEMPTED TO PROFFER BARRY CRISHER'S TESTIMONY AND THEY INVOKED THE ATTORNEY/CLIENT PRIVILEGE, CORRECT?

I BELIEVE THE ATTORNEYS ARE LISTED IN MY BRIEF. I DON'T RECALL EXACTLY WHO I THINK.

I GUESS WE COULD GO BACK. I THOUGHT THIS WAS MR. OWEN'S REQUEST THAT THIS WAS THE STRATEGY THAT WAS SELECTED.

YOUR HONOR, THAT, I DON'T BELIEVE THAT COULD BE GLEANED FROM THE RECORD, AND THAT IS PRECISELY WHY WE WANTED AN EVIDENTIARY HEARING. IT WOULD BE WRONG OF THIS COURT TO HOLD MR. OWEN TO THE STANDARD OF KNOWING THE LAW AS AN ATTORNEY. LIKE ANY CRIMINAL DEFENDANT, HE RELY ON THE ADVICE OF HIS ATTORNEYS, AND THAT WAS WOEFULLY WRONG IN THIS CASE, BECAUSE IT PRETTY MUCH FORECLOSED ANY SORT OF RELIEF. THE ONLY THING THAT WOULD HAVE BEEN PENDING WOULD HAVE BEEN THE HABEAS, WHICH --

THE ONLY WAY THAT WE COULD REACH THE ISSUES THAT YOU ARE TALKING ABOUT, IS BY HOLDING THAT THERE IS A REVIEW BY THIS COURT OF THE EFFECTIVENESS OF POSTCONVICTION COUNSEL. WOULDN'T YOU AGREE WITH THAT?

YOUR HONOR, I WOULD RESPECTFULLY DISAGREE TO A POINT. WITH THIS CASE, IT WENT BEYOND JUST MERE INEFFECTIVENESS.

OKAY. I UNDERSTAND THAT THE ARGUMENT HERE IS THAT THIS IS AN EXTREME CASE OF INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL, BUT STILL, IT IS A REVIEW OF THE EFFECTIVENESS OF POSTCONVICTION COUNSEL, ISN'T IT?

BUT YES. TO AN EXTENT, YES, YOUR HONOR, BUT IT WOULD BE MORE SIMILAR TO THE REVIEW THAT A COURT WOULD PROVIDE, THIS COURT WOULD UNDERTAKE FOR, IN A CASE WHERE AN ATTORNEY, WHERE IT WOULD BE INEFFECTIVE TO NOT FILE A BRIEF WITH, I AM SORRY, A 3.850, WITHIN THE ONE-YEAR OR TWO-YEAR TIME FRAME, AND THIS COURT HAS FOUND, IN THE CASES

CITED IN THE BRIEF, THAT UNDER A LOSER, DUE PROCESS STANDARD -- A LOSER DUE PROCESS -- A LOOSER DUE PROCESS STANDARD, THAT MR. OWEN WOULD BE ENTITLED TO --

BUT IN KENNY, WE REVIEWED THE POSTCONVICTION AND DECIDED THAT IT WAS GOING TO FOLLOW THE U.S. SUPREME COURT IN MURRAY AND THAT THERE WAS NO REVIEW. ISN'T THAT RIGHT? SO WE WOULD REALLY HAVE TO RECEDE FROM KENNY.

I WOULDN'T BELIEVE YOU WOULD HAVE TO, I BELIEVE THAT YOU WOULD HAVE TO FIND THIS CASE MORE AKIN TO THE CASES INVOLVING A BELATED 3.850, AND WHAT YOU WOULD HAVE TO DO, THROUGH THIS COURT'S INHERENT POWER TO DO JUSTICE, IS BECAUSE OF THEIONIQUE SITUATION -- OF THE UNIQUE SITUATION THAT MR. OWEN WAS IN, PROVIDE RELIEF IN THIS PARTICULAR CASE.

SO YOU REALLY ARE ASKING THIS COURT TO, UNDER WHAT YOU SAY IS OUR INHERENT POWER, TO SEND THIS BACK TO THE CIRCUIT COURT FOR A HEARING ON ALL OF THOSE ISSUES THAT WE PREVIOUSLY RULED WERE WAIVED AND PROCEDURALLY BARRED. ISN'T THAT IN ESSENCE WHAT YOU ARE ASKING US TO DO?

ESSENTIALLY THROUGH THE MOTION, I BELIEVE WE WOULD ASK THAT. SOME OF THOSE ISSUES WERE FOUND TO BE PROCEDURALLY BARRED, BECAUSE THEY WERE RAISED ON A 3.850, AND THEY WERE MORE APPELLATE ISSUES. THERE WAS OTHER THINGS THAT WERE PROPERLY ON A 3.850 THAT WASN'T SO MUCH THAT THEY WERE PROCEDURALLY BARRED AS THEY WERE JUST OUTRIGHT WAIVED.

BUT THEY, I JUST WANT TO MAKE SURE THE RECORD IS CLEAR. YOU ARE HERE AS A REPRESENTATIVE OF CCR MIDDLE?

YES.

I AM LOOKING AT OUR 2000 OPINION, AND IT IS CCR MIDDLE THAT WAS, THE SAME OFFICE THAT REPRESENTED HIM BEFORE. HOW CAN YOU EVEN, ISN'T THERE A CONFLICT? WHAT YOU ARE SAYING IS YOUR OWN OFFICE WAS TOTALLY INCOMPETENT IN WHAT THEY DID IN 2000. IS THAT WHAT YOU ARE, IS THAT WHAT YOU ARE ASSERTING?

I BELIEVE IT WILL BE NARROWED TO THE SPECIFIC ATTORNEYS, AND I WASN'T THERE AT THE TIME.

THAT, TO ME, THAT IS A CONFLICT. YOU ARE INDICTING THE OFFICE. I MEAN, THAT IS WHAT YOU ARE SAYING. YOU ARE SAYING THAT THESE, THE PEOPLE, THE PERSON THAT PROCEEDED AND GO BACK AND LOOK AT THE HEARING, BECAUSE I REMEMBER THIS CASE, I WAS A CONSCIOUS DECISION, A STRATEGIC DECISION, AND I THINK THAT WAS EVEN VERIFIED ON THE RECORD BACK IN 2000.

YOUR HONOR, WE, I DIDN'T BELIEVE THAT I HAD AN ACTUAL CONFLICT IN ARGUING IT, BECAUSE I DON'T BELIEVE THERE WAS ANYTHING ELSE THAT I COULD HAVE ARGUED FOR MR. OWEN, AND I BELIEVE THAT AN IN JUSTICE WAS DONE. THE AGENCY HAS CHANGED SINCE THEN, BUT THE REAL IMPORTANT PART IS WHAT HAPPENED TO MR. OWEN, AND THE CLAIM OF STRATEGY OR WHATEVER, WHICH MAY BE CLAIMED BY THESE ATTORNEYS, IF THERE WAS AN EVIDENTIARY HEARING, ON WHETHER MR. OWEN SHOULD GET A NEW 3.850, I MEAN, THAT IS SOMETHING WHICH WE WOULD NEED TO FACT FIND. MERELY STATING --

YOU DIDN'T TALK TO MR. CROOKS AND MS. McDERMOTT ABOUT WHY THEY CHOSE TO DO WHAT THEY DID?

NO, YOUR HONOR, I DID NOT. I DIDN'T.

CHIEF JUSTICE: OKAY. THE MARSHAL HAS REMINDED YOU THAT YOU ARE INTO YOUR REBUTTAL TIME. SO YOU MIGHT PAUSE NOW.

GOOD MORNING. MAY IT PLEASE THE COURT. ASSISTANT ATTORNEY GENERAL CELIA TERENZIO, ON BEHALF OF THE PEOPLE OF FLORIDA. THIS MOTION IS THE SECOND MOTION. HE IS SIMPLY TRYING TO REARGUE WHAT WAS RAISED IN THE FIRST MOTION, AND THAT IS THAT HIS WAIVER WAS INCORRECT, SIMPLY BECAUSE HE GAMBLED AND LOST, DOES NOT ENTITLE HIM TO A REDO. NOT ONLY DOES HE HAVE THAT HURDLE, HE, ALSO, HAS THE HURDLE, AS JUSTICE WELLS POINTED OUT, THAT YOU ARE NOT ENTITLED TO EFFECTIVE POSTCONVICTION COUNSEL, AND THIS IS NOT A CASE OF STEELE VERSUS KEHOE, AND WE KNOW THAT FROM WHAT THIS COURT SAID IN OPPOSING THE WAIVER BEFORE.

CAN I ASK YOU ONE QUESTION IN THAT AREA, RECOGNIZING ALL OF THE LAW THAT WE HAVE BEEN DISCUSSING. IS THERE EVER A DECISION WHERE THIS KIND OF CIRCUMSTANCE THAT ONE IS ASSIGNED COUNSEL FOR THE POSTCONVICTION PROCESS, AND THAT COUNSEL, REALLY, JUST DOESN'T FUCHS FUNCTION AS COUNSEL -- DOESN'T FUNCTION AS COUNSEL, LIKE A CHRONIC KIND OF PROBLEM, JUST DOESN'T SHOW UP FOR THE HEARING, JUST LET'S IT GO ON THROUGH, FILES, FACIALLY, YOU KNOW, TOTALLY INSUFFICIENT. IS THERE ANY KIND OF MECHANISM? DO WE RECOGNIZE THAT THAT SHOULD NOT HAPPEN IN SOME WAY?

WELL, I THINK IN AN EXTREME CIRCUMSTANCE, WHAT THIS COURT SAID IN STEELE VERSUS KEHOE, FOR INSTANCE, AND CASES LIKE IT, WAS WHERE THERE WAS AN AFFIRMATIVE PROMISE BY A DEFENSE ATTORNEY TO FILE A NOTICE, AND THEY DID NOT, WHICH WOULD KIND OF BE ANALOGOUS TO WHAT YOU ARE SAYING.

THIS CASE IS NOT WITHIN THAT CATEGORY, IS WHAT WE ARE SAYING HERE.

ABSOLUTELY, AND AS A MATTER OF FACT, I WOULD JUST LIKE TO READ TO REMIND THIS COURT WHAT IT SAID IN THE 2000 OPINION ON THAT. AND THIS WAS0L ON THE FERRET AN ISSUE. THIS COURT SAID THAT THOSE PRINCIPLES ARE APPLICABLE HERE, WHERE OWEN FREE CHOSE TO BE REPRESENTED BY COUNSEL AT THE PROCEEDING BELOW, REGISTERED NO OBJECTION TO COUNSEL'S PERFORMANCE. THIS WAS THE POSTCONVICTION COUNSEL. THE RECORD SHOWS THAT COLLATERAL COUNSEL AND OWEN, JOINTLY, AND THIS COURTITEAL SIZED THE WORD -- THIS COURT ITALICIZED THE WORD, AND ALSO IN THOSE PROCEEDINGS THE RECORD SHOWED THAT SITTING AT COUNSEL TABLE WITH MR. OWEN WAS CARRY HOUWIT, WHO WAS REPRESENTING MR. OWEN ON THE OTHER CASE. THE JUDGE MADE IT VERY CLEAR TO HIM. HE TOLD HIM THAT, IF WE END THIS AND THE FLORIDA SUPREME COURT UPHOLDS THIS WAIVER, YOU WILL NEVER HAVE THESE ISSUES LITIGATED IN STATE COURT. DO YOU UNDERSTAND THAT, MR. OWEN? YES, I DO. I AM GOING ON THE ADVICE OF COUNSEL. YES. YOU HAVE A QUESTION?

NO. I GUESS I AM JUST CONCERNED, I MEAN, AND I UNDERSTAND WE DON'T WANT TO REVISIT THIS, AND I UNDERSTAND THIS ISN'T A SITUATION WHERE COUNSEL JUST DIDN'T SHOW UP FOR A HEARING, WHICH MIGHT BE --

RIGHT.

-- WHEN WE SAY THERE IS NO INEFFECTIVE ASSISTANCE, WE DON'T WANT TO TALK ABOUT WE DON'T WANT TO KEEP RELITIGATING AND RELITIGATING, BUT AT THE TIME OF THIS INITIAL 3.850, THE SLATTERY CASE WAS STILL PENDING.

YES, MA'AM.

WHAT I AM REMEMBERING ABOUT THIS CASE IS THE QUESTION WAS WHY DID MR. OWEN EVEN NEED TO CALL THE ATTORNEY IN THE SLATTERY CASE.

CORRECT.

SO THAT IF WE WENT BACK AND LOOKED TO THIS WHOLE HEARINGING -- HEARING, WE MIGHT BE SEEING THAT THERE WAS GAME-PLAYING, NOT BY COUNSEL BUT BY MR. OWEN. IS THAT WHAT, IF WE GO BACK TO EVIDENTIARY, AND A JUDGE WHO WAS THERE SEEMED TO, MUST HAVE ASCERTAINED THAT.

AS A MATTER OF FACT, JUSTICE PARIENTE, THERE WERE TWO THINGS REQUESTED BY CAREY HOUGHITT, THE RETRIAL COUNSEL, AND PAM IZACOWITZ, AND WE ASKED THE JUDGE TWO THINGS, NUMBER ONE STAY THE 8 -- STAY THE 3.850, OR BAR THE RETRIAL. SO THE JUDGE DID THE LATTER. HE SAYS I WILL BAR ANYTHING, ANY INFORMATION REGARDING THE SLATTERY RETRIAL, SO LET'S PROCEED. SO WHO IS THE ONLY PERSON THEY CALL? IS THE ATTORNEY, WHO ONLY KNEW ANYTHING ABOUT THE SLATTERY CASE! AND SAID THAT ON THE RECORD. HE HAD NO KNOWLEDGE OF THE WARDEN CASE. WHICH IS WHAT THE HEARING WAS SUPPOSED TO BE ABOUT, AND THIS COURT MADE THAT FINDING, THAT THERE WAS A DELIBERATE ATTEMPT OR RATHER THERE WAS NOT A GOOD FAITH ATTEMPT TO GO FORWARD WITH THE WARDEN HEARING.

BUT DON'T YOU, DOESN'T THE MERE FACT THAT YOU WOULD CALL SOMEONE WHO WOULD CALL INTO QUESTION THE FACTS OF THE SLATTERY TRIAL, ISN'T THAT IN EFFICIENT COUNSEL THERE?

NOT IF HE WAS SUCCESSFUL.

NOT IF HE WAS SUCCESSFUL WHAT?

NOT IF HE WAS SUCCESSFUL IN HAVING THAT WAIVER OVERTURNED BY THIS COURT. HE GAMBLED ON THAT STRATEGY AND HE LOST IN THIS COURT, AND THAT IS WHAT HE IS COMPLAINING ABOUT IS BECAUSE IT DIDN'T WORK. THAT DOESN'T ENTITLE HIM TO A REDO.

HOW WOULD THAT HAVE HELPED MR. OWEN? I MEAN, EITHER WAY, WHY WOULD THAT BE IN MR. OWEN'S BENEFIT?

YOU KNOW, THAT IS A GOOD QUESTION, BECAUSE I THINK THE OBVIOUS ANSWER TO THAT IS IT CERTAINLY WOULD HAVE DELAYED THE WARDEN CASE, AND IF YOU GO BACK TO WHAT WE HAD ARGUED IN THE FIRST CASE, IN OUR BRIEFS, WHEN THEY ONLY CALLED MR. KRISHER, WHEN THEY WERE TALKING ABOUT THIS STAY, HOW LONG ARE WE TALKING ABOUT THE JUDGE SAID, AND THE COURT INQUIRED OF COUNSEL AT WHAT POINT IN TIME WOULD THERE BE A WAIVER OF ATTORNEY/CLIENT PRIVILEGE IN THE SLATTERY CASE. IN RESPONSE COLLATERAL COUNSEL STATED, QUOTE, WHEN HIS CONVICTION IS FINAL, WHEN HIS PETITION HAS BEEN DENIED, AND HE HAS NO LONGER ANY RELATIONSHIP WITH HIS TRIAL ATTORNEYS, AND THE JUDGE SAID, WHAT DOES THAT MEAN? YOU MEAN UNDER THAT SCENARIO, THE STATE WOULD NEVER, COULD NEVER BE LIFTED, BECAUSE HE HAS THE OPPORTUNITY OF NOT EVER WAIVING THE ATTORNEY/CLIENT PRIVILEGE, SO WHAT WAS THE TRIAL JUDGE SUPPOSED TO DO? SO I MEAN, I THINK THE ADVANTAGE HE WAS HOPING FOR THERE WAS TO GET THE COURT TO AGREE TO THE STAY, AND THEN NOW THE COURT, SO HOW LONG IS THE COURT GOING TO WAIT? FIVE, SIX YEARS? AS A MATTER OF FACT THE RETRIAL, THIS COURT IS FINE REALLY -- FINALLY GOING TO HEAR THE DIRECT APPEAL OF THAT NEXT MONTH. NOW, WE ARE TALK ALREADY FOUR YEARS AGO, SO THIS WARDEN CASE --

OF THE SLATTERY.

YES, SIR. THE RETRIAL.

LET ME ASK ABOUT THIS WHOLE SEQUENCE IN THIS CASE. THIS WAS A 1984 MURDER. WHEN DID THIS TRIAL TAKE PLACE?

THIS TRIAL TOOK PLACE IN 1986 OR '87.

OKAY. THEN THIS COURT CAME OUT WITH ITS OPINION ON DIRECT APPEAL, IN 1992.

YES, SIR.

THEN THERE WAS A 3.850.

YES, SIR. WE ARE TALKING WARDEN NOW, RIGHT?

TALKING ABOUT THE CASE UNDER CONSIDERATION TODAY.

YES, SIR.

THEN THIS COURT, THAT 3.850 MADE IT UP HERE, AND THIS COURT ENTERED A DECISION IN 2000.

YES, SIR.

NOW, WAS THIS MOTION THAT WE ARE HERE, HEARING TODAY, WAS FILED SUBSEQUENT TO THIS COURT'S 2000 OPINION?

YES, SIR, IT WAS. IT WAS FILED PRO SE BY MR. OWEN, IN 2001. THE COURT STRUCK IT. WELL, DISMISSED IT. MR. OWEN FILED A PRO SE NOTICE OF APPEAL. THE STATE ASKED THIS COURT TO EITHER DISMISS UNDER DAVIS, BECAUSE HE HAD COLLATERAL COUNSEL IN THE HABEAS, AND LET ME BACK UP A LITTLE. THAT HABEAS WAS FILED TWO YEARS AGO FROM NOW. I THINK THAT WAS IN '99. NO FORM EXCUSE ME. 2 -- NO. EXCUSE ME. 2000, THE HABEAS THAT IS PROPERLY BEFORE THE COURT NOW WAS FILED BY CCR, SO WE HAD ASKED THIS COURT AT THAT TIME, TO EITHER DISMISS AND NOT ALLOW MR. OWEN TO GO PRO SE ON THE SUCCESSIVE MOTION OR IN THE ALTERNATIVE, ASK COUNSEL TO REVIEW THAT PRO SE MOTION, AND IF COUNSEL FELT THERE WAS ANYTHING THERE MERITORIOUS, TO GO AHEAD, AND THAT IS WHAT THIS COURT DID. COUNSEL, CCR HAD ASKED TO WITHDRAW FROM THE 3.850.

SO ESSENTIALLY THIS IS A SUCCESSIVE 3.850 THAT WE ARE FOCUSING ON.

YES, SIR.

AND THE HABEAS GOES BACK TO THE ORIGINAL APPEAL.

CORRECT. WHICH IS PROPERLY BEFORE THE COURT.

FROM YOUR INSIGHT INTO THIS PROCEDURAL MORE AS, AND -- MORASS AND THE LONG HISTORY OF THIS CASE, YOU HAVE HAD A COUPLE OF QUESTIONS BY A COUPLE OF OTHER JUSTICES, ABOUT, WELL, YOU KNOW, WON'T THERE BE SITUATIONS WHERE, LIKE STEELE VERSUS KEHOE OR JUSTICE PARIENTE ASKED YOU ABOUT A LAWYER JUST DOESN'T SHOW UP, SO WE MAY HAVE A SITUATION WHERE THEY HAVE LINED UP DNA EVIDENCE AND YOU KNOW, IN A WEAK CASE THAT HAD BEEN AFFIRMED BUT NOW THEY HAVE EYEWITNESSES, AND THEY ARE ALL READY TO GO ON A POSTCONVICTION HEARING, TO PROVE ACTUAL INNOCENCE OR WHATEVER, AND THE LAWYER GOES OUT AND GETS DRUNK THE NIGHT BEFORE AND DOESN'T SHOW UP, AND THE JUDGE DISMISSES IT, AND YOU KNOW, WHATEVER, SO, BUT, HERE WHAT I HAVE NOT BEEN ABLE TO SEE, AND I WILL ASK THE PETITIONERS AS WELL, DO YOU SEE IN HERE, ANYWHERE, ANY SUBSTANTIVE CLAIM OF A MISCARRIAGE OF JUSTICE? THAT IS THAT IS WHAT I HAVE BEEN LOOKING TO SEE, WHERE THERE WAS SOMETHING LIKE WHAT I JUST DESCRIBED TO YOU, THAT IS WHERE MY GOSH, THEY HAVE LINED UP A HEARING ON A CLAIM THAT IS JUST 100 PERCENT WINNER. OVERWHELMING PROOF OF INNOCENCE, AND AS I SAY, DN A OR SOMETHING, AND THE LAWYER, YOU KNOW, NOW, IS THERE ANYTHING ABOUT THIS CASE THAT HAS ANY EARMARKS LIKE THAT,

THAT YOU HAVE SEEN HERE?

OKAY. WELL, IN TERMS OF WHAT EVIDENCE THEY ARE TALKING "B" THERE CERTAINLY IS NOT A SMOKING GUN IN TERMS OF THAT HE IS NOT GUILTY OF THIS CRIME. I MEAN, THAT IS THE UNDERLYING ALLEGATIONS HAD NOTHING TO DO WITH THAT. MATTER OF FACT, THERE WAS A FULL CONFESSION TO THIS MURDER. THE OTHER THING, THOUGH, I THINK, FOR INSTANCE, USING YOUR ANALOGY TO A LAWYER NOT SHOWING UP. HE HAS GOT 50 WITNESSES OUTSIDE AND HE IS DRUNK, I THINK IF THAT WERE THE CASE, THIS COURT WOULD HAVE SAID THE LAST TIME, THAT THERE WAS NOT A PROPER WAIVER. BUT THAT IS NOT WHAT WE HAVE HERE. THIS IS SO FAR FROM THAT SITUATION. YOU HAVE THREE COUNSELS SITTING WITH MR. OWEN, FROM THE SLATTERY, WHO WERE PROTECTING HIS INTERESTS IN THAT CASE, AND TWO PROTECTING HIS INTEREST IN THE WARDEN CASE, SITTING THERE WITH HIM, AND CONSCIOUSLY, EYES WYATT OPEN, AND TAKING THE --

IS WIDE OPEN AND TAKING THE GAMBLE, AND IT IS A GAMBLE, BUT ALL STRATEGY IS A GAMBLE AND HE LOST. THAT IS WHAT THIS IS ABOUT. I DON'T THINK THIS IS ANYWHERE NEAR WHAT YOU DESCRIBED OR WHAT JUSTICE LEWIS DESCRIBED, IN TERMS OF THE --

OF SOME UNDERLYING CLAIM THAT DEMONSTRATES SOME MISCARRIAGE OF JUSTICE THAT HAS TAKEN PLACE.

WHICH HAS NOT BEEN PRESENTED ANY WAY IN THE PLEADINGS HERE.

BEFORE THE FIRST 3.850, WAS THERE ANY EXCHANGE OF WITNESSES? IN OTHER WORDS JUST SORT OF FOLLOWING UP AND MAKE SURE THAT, WAS THERE, WAS THE STATE MADE AWARE OF ANY TESTIMONY, YOU KNOW, SAY THAT THERE SHOULD HAVE BEEN EXPERT MITIGATION PRESENTED?

SURE. ABSOLUTELY. AS A MATTER OF FACT, JUSTICE PARIENTE, WE CONCEDED A HEARING ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. EXCUSE ME. OF TRIAL COUNSEL. I MEAN, THAT WAS, I MEAN, HE GOT A HEARING ON EIGHT CLAIMS, FOUR OF WHICH WE CONCEDED. YES. WE WERE, I MEAN, I AM NOT GOING TO LIE. WE WERE PREPARED TO GO FORWARD. THERE WERE WITNESSES IN THE COURTROOM FOR BOTH SIDES.

LET ME ASK YOU THIS. YOU MADE A MISSTATEMENT JUST A MINUTE AGO ABOUT INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, BUT THERE IS IN THE HABEAS, AND I KNOW THAT IT WAS NOT ARGUED BY OPPOSING COUNSEL, BUT I WILL ASK HIM THE SAME SORT OF QUESTION.

SURE.

THERE IS AN ALLEGATION HERE OF INEFFECTIVE APPELLATE COUNSEL.

YES.

BASED ON THE FACT THAT APPELLATE COUNSEL FAILED TO RAISE AN ISSUE CONCERNING A SPECIAL JURY INSTRUCTION THAT WOULD HAVE --

ON THE SEXUAL BATTERY?

SEXUAL BATTERY, THE WITNESS WAS ALIVE, AND I NOTE THAT, IN THE SLATTERY CASE, AN ISSUE CONCERNING THAT WAS, IN FACT, RAISED, AND THIS COURT SAID THAT SEXUAL BATTERY NECESSARILY INCLUDES THE FACT THAT THE VICTIM IS ALIVE.

RIGHT.

SO WHY WAS, AND THIS WAS PRESERVED.

YES, MA'AM. IT WAS.

THERE WAS A SPECIAL JURY INSTRUCTION REQUESTED. SO YOU WOULD AGREE THAT IT WAS PRESERVED FOR APPELLATE REVIEW.

YES. YES.

SO WHY WAS IT NOT INEFFECTIVE ASSISTANCE OF COUNSEL NOT TO RAISE THAT, BECAUSE FROM THE EVIDENCE IN THIS CASE, I THINK IT IS PRETTY CLEAR THAT THE MEDICAL EXAMINER COULDN'T SAY WHETHER THE VICTIM WAS ALIVE OR NOT.

THAT IS NOT TRUE, JUSTICE QUINCE. OKAY. AS A MATTER OF FACT, THE MOST THAT THE ME WOULD SAY WAS THAT SHE WAS NEAR DEATH BUT SHE WAS CERTAINLY ALIVE DURING THIS ASSAULT. HE SAID, AS A MATTER OF FACT, DEATH WAS NOT INSTANT AND IIOUS AS TO ANY -- INSTANT AS TO ANY OF THE FIVE BLOWS THAT SHE SUSTAINED. SHE WAS ALIVE ANYWHERE FROM 5 MINUTES TO 30 MINUTES TO AN HOUR AFTER THE ATTACK AND THERE WERE LACERATIONS AFTER THE SEXUAL ASSAULT, TO THE VAGINAL AREA, AND THE ME SAID, AND DEAD PEOPLE DON'T HEMORRHAGE.

I THOUGHT THERE WAS NO HEMORRHAGING IN THOSE LACERATIONS.

YES, THERE WERE. THAT WOULD BE AN INCORRECT, THERE WAS HEMORRHAGING, AND THAT IS WHY I SIGNIFICANTLY REMEMBER THE M.E. SAYING "AND DEAD PEOPLE DO NOT HEMORRHAGE, AND THERE WAS HEMORRHAGING THERE. HE SAID, AT BEST, HE WOULD SAY THAT, BEGIN THAT, HE FELT THE BLOWS TO THE HEAD WERE FIRST AND THAT THE BLOOD PRESSURE WAS DROPPING, HE WOULD SAY THAT, AT MOST, SHE WAS NEAR DEATH BUT ALIVE, AND THAT IS ON 3092 OF THE RECORD. AS A MATTER OF FACT, ALL OF THE FACTS I JUST RECOUNTED, YOU CAN START AT 3068 UP TO 3092, SO THERE WAS NO QUESTION THERE WAS NO EVIDENCE THAT SHE WAS DEAD, BUT THEY WANTED, THEY WANTED THE INSTRUCTION, BECAUSE THEY FELT LIKE THE INSTRUCTION, I MEAN THE STANDARD INSTRUCTION DID NOT ADEQUATELY ADDRESS THAT.

IF THE DEFENDANT'S THEORY OF DEFENSE, AT LEAST AS FAR AS THE SEXUAL BATTERY WAS CONCERNED, IS THAT THE VICTIM WAS DEAD AT THE TIME OF THE SEXUAL ASSAULT, THEN WHY WAS NOT HE ENTITLED TO AN INSTRUCTION CONCERNING THAT THEORY OF DEFENSE?

BECAUSE THERE WAS NO NOT ONE SHRED OF EVIDENCE TO SUPPORT IT. THAT WAS HIS ARGUMENT, BUT AT NO TIME DID HE PRESENT EVIDENCE, NOT EVEN IN THE CROSS-EXAMINATION OF THE M.E.. THE M.E. NEVER SAID THAT SHE WAS DEAD. CITE TO THE CONTRARY, SO HE -- QUITE TO THE CONTRARY, SO HE NEEDED SOME EVIDENCE TO SUPPORT THAT INSTRUCTION AND THERE SIMPLY WASN'T ANY TO SUPPORT IT, SO MAYBE IT WAS PRESERVED FOR APPEAL, MUCH AS THERE WAS EVIDENCE IN THE OTHER CASE, BUT THERE WAS NO EVIDENCE TO SUPPORT, AND CONTRARY TO THAT THIS COURT FOUND THAT THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE TO PROVE THAT, IN FACT, SHE WAS ALIVE. NOW, SAY THERE WASN'T. AT MOST --

WHAT THE COURT SAID WAS THERE WAS EVIDENCE TO SUBMIT, THIS WAS ON A MOTION FOR A JUDGMENT OF ACQUITTAL, CORRECT?

CORRECT.

AND THE COURT SAID THAT THERE WAS EVIDENCE TO SUBMIT IT TO THE JURY. ISN'T THAT BASICALLY WHAT WAS SAID THERE?

THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING. MEANING THAT SHE WAS ALIVE. IN THE SEXUAL BATTERY. BUT, OKAY, WORST CASE SCENARIO. SAY THAT THERE WASN'T. SAY THAT THERE REALLY IS SOME EVIDENCE IN HERE TO SAY THAT IT IS A CLOSE CALL.

AT MOST, THEN, WHAT WOULD MR. OWEN BE ENTITLED TO? ENTITLED TO AN ATTEMPTED SEXUAL BATTERY RATHER THAN A SEXUAL BATTERY, THAT CERTAINLY DOES NOT NEGATE THE AGGRAVATING FACTOR OF THAT YOU DON'T NEED A COMPLETED ACT FOR THE AGGRAVATING FACTOR. ALL YOU NEED IS AN ATTEMPT TO THE FELONY.

SO CAN YOU ATTEMPT ON A DEAD BODY?

NO. WHAT I AM SAYING IS HE WAS ATTEMPTING, BUT THE FACT THAT HE COULDN'T COMPLETE IT, IT WAS STILL AN ATTEMPT: AS A MATTER OF FACT, I, I THINK EVEN IN THE 560 OPINION, I THINK THIS COURT EVEN SAID THAT, THAT THE WORST CASE SCENARIO WOULD BE AN ATTEMPTED SEXUAL BATTERY, BUT, AGAIN, THERE WAS ABSOLUTELY NO EVIDENCE TO SUPPORT THE GIVING OF THAT INSTRUCTION. IT WAS HIS THEORY BUT HE HAD NO EVIDENCE TO BACK IT, AND JUST ONE OTHER POINT ON THAT, IS IF YOU LOOK AT THE STANDARD JURY INSTRUCTIONS, THAT WERE BEGIN IN THIS CASE, ONE, GEORGEANNE WARDEN HAD TO BE OVER THE AGE 11. TWO, THAT THE SEXUAL ORGAN, THAT DUANE OWEN, WITH HIS SEXUAL ORGAN OR WITH A BLUNT INSTRUMENT, PENETRATED THE VAGINA OF GEORGEANNE WARDEN. THREE, IN THE PROCESS, DUANE OWEN USED OR THREATENED TO USE DEADLY FORCE OR USED ACTUAL PHYSICAL FORCE LIKELY TO CAUSE SERIOUS PERSONAL INJURY, AND, FOUR, IT WAS DONE WITHOUT THE CONSENT OF GEORGEANNE WARDEN. WELL, FOR THOSE LAST TWO, ISN'T IT IMPLICIT IN THERE THAT THE VICTIM HAS TO BE ALIVE? THAT THERE WAS NO CONSENT AND YOU DO NEED FORCE? SO I MEAN, IN TERMS OF WHETHER OR NOT HE WAS ENTITLE ODD TO THE SPECIAL JURY INSTRUCTION, EVEN IF IT WAS RAISED, I DON'T THINK THAT IT WOULD HAVE BEEN MERITORIOUS, AND SECONDLY AND MORE IMPORTANTLY, THERE WAS ABSOLUTELY NO EVIDENCE THAT SHE WAS DEAD. ALL THE EVIDENCE WAS TO THE CONTRARY.

WOULD YOU, FROM YOUR PERSPECTIVE, FROM THE STATE'S PERSPECTIVE, SHARE WITH US WHAT YOU BELIEVE TO BE THE DEFENSE POSTURES, BEST POSITION WITH REGARD TO HOW THIS INSANITY KIND OF CLAIM, VERY BIZARRE FACTORS WE ARE DEALING WITH, HOW THAT HAS ANY IMPACT WITH REGARD TO ANY OF THE ISSUES WE ARE TALKING ABOUT TODAY.

> HE WANTED TO PRESENT, AT THE LAST EVIDENTIARY HEARING, THE GENDER IDENTITY DISORDER. HE WAS CLAIMING THAT COUNSEL WAS INEFFECTIVE FOR NOT PRESENTING THAT.

HOW WAS THAT DEALT WITH AT THE ORIGINAL TRIAL? WAS THAT USED? WAS THAT PART OF THE PROCESS.

NO. THAT WAS NOT USED.

NO.

NO, IT WASN'T USED. THEY FOCUSED ON THE VOLUNTARINESS OF THE CONFESSION, BECAUSE QUITE FRANKLY, THE CONFESSION IS IN THIS CASE, WAS IT. I MEAN, THERE WAS HIS FINGERPRINT ON A BOOK AT THE SCENE, AND THERE WAS SEMEN, AND IN THOSE DAYS IT WASN'T AS ADVANCED AS IT IS NOW, AND THE SCIENTISTS SAID THAT IT WAS, HE COULD NOT BE RULED OUT AS A SUSPECT, SO THEIR STRATEGY WAS TO FOCUS IN ON THAT CONFESSION. 21 HOURS OF VIDEOTAPED CONFESSION, AND THAT THE STATE TOOK ADVANTAGE OF HIS MENTAL STATE AND DISORDERS, BUT IT WAS NEVER FULLY FLUSHED OUT, LIKE HE IS TRYING TO DO NOW.

CHIEF JUSTICE: OKAY. THANK YOU VERY MUCH.

THANK YOU VERY MUCH. SO NO MORE QUESTIONS, WE WOULD ASK THE COURT TO DENY THE HABEAS AND AFFIRM THE TRIAL COURT'S DENIAL OF THE SUCCESSIVE 3.850. FANGS THANKS.

JUST IF -- THANKS.

JUST IF I COULD FOLLOW-UP, THE HABEAS IN THIS CASE WAS FILED, AND I WROTE IT. IT WAS FILED, I BELIEVE, THE END OF SEPTEMBER 2001. I BELIEVE THE ACTUAL PRO SE MOTION WAS FILED BEFORE THAT, IN TIMING. IT JUST GOT TO THIS COURT LATER SOMEHOW. WHEN, BEFORE WE FILED THIS BRIEF, WE WERE PENDING AN ARGUMENT ON THE HABEAS, AND WHEN THIS, THE BRIEFING SCHEDULE CAME OUT, I BELIEVE THE RECORD WILL SHOW THE CURRENT CAPITAL COLLATERAL COUNSEL, THROUGH ME AND MR. PINKARD, FILED A MOTION TO DETERMINE COUNSEL, AND I BELIEVE THAT THE COURT SENT BACK AN ORDER SPECIFICALLY APPOINTING ME, JAMES L DRISCOLL, AS COUNSEL FOR MR. OWEN, ALONG WITH CCRC MIDDLE.

ON THE 3.850.

ON THE DENIAL OF THE BELATED APPEAL, YES, AND SO CERTAINLY I MEAN, MR. OWEN HAD A BRIEF DUE, AND THE BRIEF HAD TO BE DONE, BUT WE DID, IN FACT, FILE THAT, AND IT IS, I CAN STATE THAT THE COURT THERE WASN'T ANY, I DIDN'T HOLD BACK OR DIDN'T FAIL TO RAISE ANYTHING ON BEHALF OF MR. OWEN. I BELIEVE VERY STRONGLY IN MR. OWEN'S CASE. I BELIEVE VERY SERIOUS IN JUSTICE WAS DONE, AND JUSTICE ANSTEAD HAD MENTIONED YOU HAVEN'T SEEN THE SMOKING GUN, AND THE EVIDENCE OF IN JUSTICE YET, BUT THAT IS BECAUSE PRIOR POSTCONVICTION COUNSEL TOTALLY ABANDONED IT.

CAN I ASK, HAVE YOU HAD ANY DISCUSSIONS WITH THE PRIOR POSTCONVICTION COUNSEL, OR HAVE YOU SIMPLY ADOPTED THE ARGUMENT OF YOUR CLIENT?

UNLESS MR. OWEN TELLS ME OTHERWISE, I AM GOING TO ALWAYS ADOPT THE ARGUMENT OF MR. OWEN. I REPRESENT HIM, AND SO I HAVEN'T SPOKEN WITH HIM SPECIFICALLY, BUT WE WERE IN A HABEAS STAGE AT THE POINT THAT I BECAME INVOLVED IN THE CASE.

NO, BUT, HE FILED A PRO SE MOTION, AND THIS COURT DIRECTED YOU TO LOOK AT IT, EXAMINE IT, AND IT IS MY UNDERSTANDING OF THE RULES THAT YOU HAVE SOME OBLIGATION TO THE COURT, TO MAKE A GOOD FAITH BASIS, BUT WHAT YOU ARE TELL ME GO NOW, IS YOU SIMPLY TOOK THE PRO SE MOTION AND ADOPTED IT AND HAVE DONE NOTHING SINCE THERE, TO DETERMINE THE REASONABLENESS OF YOUR CLIENT'S POSITION, BY TALKING TO EITHER THE PRIOR POSTCONVICTION COUNSEL OR THE OTHER DOWNS HE WILL -- COUNSEL INVOLVED IN THE PROCEEDING BEFORE THE TRIAL JUDGE. IS THAT CORRECT?

I WOULDN'T SAY I ADOPTED IT. I APPEALED IT BASED ON THE ISSUES THAT WERE RAISED. THE ESSENCE OF THE MOTION WAS TO HAVE A HEARING, SO THAT MR. OWEN COULD PRODUCE THIS.

BUT DID YOU DO ANYTHING TO ASCERTAIN THE FACTUAL VALIDITY OF YOUR CLIENT'S CONTENTIONS, OTHER THAN HIS CONTENTION?

HONESTLY NO. I MEAN, I KNOW THIS CASE, I DON'T WANT TO SAY INFAMOUS, BUT IT IS KNOWN, KIND OF, WHAT HAPPENED. I AM SURE THERE IS GOING TO BE VARYING ACCOUNTS, BUT WHAT WE NEEDED WAS THE HEARING, WHERE WE COULD PRODUCE 2. IF I, IN -- WHERE WE COULD PRODUCE IT. IF I, IN FACT, HAD SPOKEN PRIOR TO ANY OF THE COUNSEL, THAT IS NOT IN THE RECORD, AND I COULD PROFFER THAT, BUT THAT IS NOT REALLY WHAT WE ARE ASKING THIS COURT TO DETERMINE. IT IS BASED ON THE MOTION.

AT THE VERY LEAST, IF WE WERE EVEN TO CONSIDER, SAY THIS WAS THE KIND OF SITUATION WHERE WHAT COUNSEL DID KNOW, NOBODY IN THEIR RIGHT MIND COULD EVER DO. YOU HAVE GOT WITNESSES THERE. HOW COULD YOU JUST ABANDON THIS 3.850. AT THE VERY LEAST, BEFORE THERE WOULD BE A CONSIDERATION OF ALLOWING A CLAIM TO GO FORWARD, THERE WOULD HAVE TO BE A THRESHOLD EVIDENTIARY, SHOWING THAT THIS LAWYER, YOU KNOW, REALLY, THAT THAT WAS THERE. THE LAWYER'S DECISION, MR. OWEN, OR SOMETHING, WOULDN'T YOU AGREE TO THAT? I MEAN, WE COULDN'T JUST ALLOW THIS TO GO FORWARD.

I WOULD AGREE THAT THAT IS PRECISELY WHAT MR. OWEN SOUGHT IN HIS MOTION, AND IT WAS SUMMARILY DENIED, AND THAT IS WHAT WOULD HAVE BEEN PRESENTED.

I THOUGHT YOU WERE SEEKING RELIEF OF JUST GOING AHEAD WITH THE 3.850, AS IF IT WASN'T SUCCESSIVE.

THAT WAS, THAT WAS AN OPTION THAT HE BE ALLOWED TO AMEND IT. IT MAY JUST, I SEE THAT MY TIME IS UP, BUT WE WOULD ASK WHATEVER RELIEF THAT THIS COURT COULD FASHION, BECAUSE WE BELIEVE MR. OWEN WAS WRONGED IN THIS CASE.

CHIEF JUSTICE: OKAY. THANK YOU. THANK YOU, ALL THREE. THE COURT WILL STAND IN RECESS FOR 15 MINUTES BEFORE HEARING THE NEXT CASE.

MARSHAL: PLEASE RISE.]/>