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Richard Henryard v. State of Florida

I AM REPRESENTING MR. HENYARD IN THIS CASE. YOU SEE AT COUNSEL TABLE MR. ROBERT STRAIN, CO-COUNSEL ON THIS CASE. I WOULD LIKE TO ARGUE TWO ISSUES TODAY. ONE OF THEM IS THE HABEAS ISSUE OF THE INEFFECTIVENESS OF APPELLATE COUNSEL AND THE OTHER ONE IS THE INEFFECTIVE TRIAL COUNSEL IN THE PENALTY PHASE OF THE 3.850 HEARING. NOT ABANDONING ANY OTHER ISSUES, BUT THOSE ARE THE ONES I WOULD LIKE TO TALK ABOUT HERE TODAY.

ON THE HABEAS ISSUE, YOU ARE TALKING ABOUT COUNSEL'S FAILURE TO APPEAL THE MOTION OR THE PD TO WITHDRAW. IS THAT THE ISSUE YOU WANT TO TALK ABOUT?

THE ISSUE, YES, THAT IS ONE OF THE ISSUES, AND I AM ALSO GOING TO BE CLAIMING THAT HE COULD HAVE BROUGHT A COUNT OF INEFFECTIVE ASSISTANCE OF COUNSEL, ON THE DIRECT APPEAL, AND HE DIDN'T. THOSE ARE THE TWO.

IN THIS CASE, THERE WAS AN EVIDENTIARY HEARING AND THERE IS FACTUAL FINDINGS BY THE TRIAL COURT?

WELL, IN THIS CASE, ON THE MOTION TO WITHDRAW, THERE WAS A MOTION TO WITHDRAW ASSERTING CONFLICT OF INTEREST, AND THE JUDGE BASICALLY SUMMARILY DENIED THE MOTION. THERE WAS NO HEARING OR ANYTHING LIKE THAT. BUT THE ARGUMENT --

WELL, DIDN'T, ARE YOU TALKING ABOUT THE TRIAL JUDGE SUMMARILY DENIED IT?

YES.

DIDN'T THE TRIAL JUDGE AT LEAST GO THROUGH SOME KIND OF COLLOQUY ABOUT WHETHER OR NOT THE PUBLIC DEFENDER'S OFFICE WAS STILL REPRESENTING THESE PEOPLE.

THE COLLOQUY WAS, ARE YOU STILL DEFENDING, ARE ANY OF THE CLIENTS THAT YOU SAY IS A CONFLICT WITH CURRENT CLIENTS OF THE PUBLIC DEFENDER, ARE THEY GOING TO BE CALLED, AND THE ANSWER WAS NO, THAT THEY ARE NOT CURRENTLY CLIENTS OF THE PUBLIC DEFENDER'S OFFICE. THEY WERE PAST CLIENTS, AND WHAT I AM, WELL, LET ME START MY ARGUMENT. I AM GOING TO SAY, IN ORDER TO SHOW A CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL, THE PETITIONER MUST SHOW TWO THINGS. THE FIRST ONE IS THAT THE SPECIFIC ERRORS OR OMISSIONS WHICH SHOW THE APPELLATE COUNSEL'S PERFORMANCE --

I THINK WE KNOW THE STANDARD. WHY DON'T WE GET TO WHAT THE MEAT OF YOUR CLAIM IS ON THE 3.850.

THE FATAL ERROR THAT COUNSEL MADE IN THIS CASE WAS TO, FAILURE TO KNOW THE LAW AS IT EXISTED TO PUBLIC DEFENDERS, AND THE SPECIFIC PREJUDICE TO THIS CASE WAS THAT, WELL, LET ME PUT IT THIS WAY, THE STATUTE, AS I READ IT AND AS YOU, THIS COURT HAS INTERPRETED IT, CREATES AN IRREBUTTABLE PRESUMPTION OF PREJUDICE, ONCE A PUBLIC DEFENDER AS EXISTED UNDER THE STATUTE FILES A MOTION TO RECUSE THE PD'S OFFICE, SAYING THAT THERE IS A CONFLICT. THE COURT HAS NO DISCRETION UNDER THE STATUTE AS IT EXISTED AT THE TIME, TO QUESTION THE ATTORNEY TO DO ANYTHING BUT TAKE HIS WORD FOR IT AND AUTOMATICALLY RECUSE THEMSELVES. AND IN THIS CASE, THE COURT DIDN'T DO THAT.

IS THAT WHAT THE PUBLIC DEFENDER SAID, THAT THE PUBLIC DEFENDER SAID THAT THERE WAS AN IRRECONCILABLE CONFLICT BETWEEN HIS CLIENT AND THESE PEOPLE?

IN THE MOTION, HE SAID THAT HE WOULD BE PUT INTO AN UNTENABLE POSITION OF HAVING TO CROSS-EXAMINATION A FORMER CLIENT. THAT IS WHAT HE SAID, AND THAT WAS WHAT THE ASSERTION WAS.

IS THAT THE SAME THING?

YES. THAT TO ME, MY READING OF THE STATUTE, THAT IS REALLY ALL THAT IT NEEDED.

EVEN IF IT HAD NO RELATIONSHIP WHATSOEVER, WITH THE CASE OR ANY OF THE WITNESSES OR THE ABILITY JUST SIMPLY HAVING IT ONE TIME REPRESENTED, WOULD BE ENOUGH OF A CONFLICT OF INTEREST FOR A PUBLIC DEFENDTORY WITHDRAW?

YES, YES, THAT IS IT. APPARENTLY THE LEGISLATURE RETHOUGHT ITS POSITION, BUT BEFORE THAT IN THE GUZMAN CASE AND IN SEVERAL OTHER CASES, THE DCA'S HAVE FOLLOWED THAT CASE. ONCE THE PUBLIC DEFENDER MAKES THE MOTION.

THAT IS INCORPORATED UPON AN UNDERLYING ASSUMPTION THAT THE PUBLIC DEFENDER WOULD NOT MAKE THE MOTION, ABSENT THERE BEING SOME ACTUAL CONFLICT.

YOU HAVE TO, YES, YOU --

THERE IS NO EVIDENCE OF THIS RECORD THAT THE PUBLIC DEFENDER HAD AN ACTUAL CONFLICT, IS THERE?

NO. WELL, I DON'T KNOW. I MEAN, HE SAID HE DID BECAUSE HE FILED THE MOTION AND HE CERTIFIED THE CONFLICT, BECAUSE THE SIGNATURE ON THE MOTION IS A CERTIFICATION THAT HE IS TELLING THE TRUTH, AND THERE IS A PRESUMPTION THERE, AS I AM SAYING, THAT THIS COURT HAS SAID THAT THERE IS A PRESUMPTION, THAT THERE IS A CONFLICT, AND THAT IS REALLY ALL THERE IS TO THAT, IS IT.

IT IS REALLY NOT ALL THERE IS. I MEAN, WE ARE HERE OPPOSE THE CONVICTION RELIEF. FOR YOU TO DEMONSTRATE THE STRICKLAND REQUIREMENTS, DON'T YOU HAVE TO SHOW THAT THERE WAS SOME EFFECT ON TRIAL COUNSEL'S PERFORMANCE IN THE ACTUAL TRIAL OF THE CASE, SUCH AS THAT THERE WAS A WITNESS THAT SHOULD HAVE BEEN EXAMINED OR CROSS-EXAMINED THAT WASN'T. YOU HAVEN'T MADE ANY OF THOSE ALLEGATIONS.

NO. BECAUSE I AM RELYING UPON THE PRESUMPTION THAT I AM SAYING THAT THE STATUTE CREATED.

AND WHAT CASE DO WE HAVE THAT HAS INDICATED THE STANDARD, WHEN THERE IS AN ALLEGATION OF A CONFLICT IN POST-CONVICTION RELIEF, THAT WE DON'T EXAMINE THE ISSUE OF PREJUDICE?

OH, GOSH. I AM GOING TO SUPPLEMENT THE RECORD WITH ADDITIONAL AUTHORITY. THE PRESUMPTION OF THE STATUTE IS THAT THERE IS A CONFLICT, IF THE PUBLIC DEFENDER CERTIFIES THAT THERE IS A CONFLICT. FLOWING FROM THAT PRESUMPTION IS, IS IF THE TRIAL JUDGE FORCES THE ATTORNEY TO GO TO TRIAL, HE IS PRESUMPTIVELY BIASED, COMPROMISED ADVOCATE, AND THAT IS A SIXTH AMENDMENT VIOLATION RIGHT THERE, AND THAT IS A FUNDAMENTAL ERROR, AND YOU DON'T HAVE TO GET INTO THE SPECIFICS. IN FACT YOU CAN'T.

SO YOU ARE ONLY RAISING THIS IN CONNECTION WITH THE HABEAS.

YES.

THERE WAS NO CLAIM MADE THAT SOMEHOW THIS CONFLICT, IN TERMS OF THE 3.850, RENDERED TRIAL COUNSEL'S PERFORMANCE ACTUALLY INEFFECTIVE, FLOWING FROM THE CONFLICT.

THAT IS ONE OF THOSE QUESTIONS, YOUR HONOR, WHICH YOU CAN'T REALLY ANSWER, BECAUSE I WOULD HAVE TO -- TIME ASKING YOU THE QUESTION AS TO WHAT --

WHEN I ASKED ABOUT THE EVIDENTIARY HEARING, IT SAID THAT WE ARE LOOKING AT HOW TRIAL COUNSEL ACTUALLY PERFORMED. THERE WAS AN EVIDENTIARY HEARING THAT THE TRIAL JUDGE IN THIS POSTCONVICTION MOTION, HEARING GRANTED, AND THERE WAS A CHANCE TO PUT ON EVIDENCE, AS TO HOW TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT.

RIGHT.

THERE WAS NO CLAIM WITH REGARD TO THE DEFICIENCY THAT SOME DEFICIENCY FLOWED FROM THE CONFLICT, CORRECT?

THERE WASN'T, NO, THE ANSWER, THE QUICK ANSWER IS, NO, THERE WASN'T.

ALL RIGHT. SO WE ARE ONLY TO LOOK AT IT AS IF WHETHER APPELLATE COUNSEL, IN TERMS OF THE HABEAS, WAS INEFFECTIVE IN FAILING IT TO RAISE THE GUZMAN ISSUE ON DIRECT APPEAL.

YES, YOUR HONOR. THAT IS IT.

BUT EVEN THERE, THERE HAS TO BE A SECOND PRONG. THERE HAS GOT TO BE, THAT IT IS NOT SIMPLY THE QUESTION AS TO WHETHER THERE WOULD HAVE BEEN MAYBE AN ISSUE ON DIRECT APPEAL, BUT WHAT, WHEN WE ARE IN POSTCONVICTION, THERE HAS GOT TO BE A FURTHER SHOWING, DOESN'T THERE, BEFORE THERE WOULD BE A REVERSAL ON AN ISSUE SUCH AS THAT?

NO. THERE DOESN'T HAVE TO BE A FURTHER SHOWING. I HATE TO SOUND LIKE JOHNNY ONE NOTE UP HERE, BUT I AM RELYING ON THE POSITION THAT THERE IS A CONFLICT.

AS I UNDERSTOOD YOUR ARGUMENT ON THIS HABEAS, ANYWAY, IS THAT HE WAS IN IT, THAT THE FIRST PRONG IS DEFECTIVE CONDUCT, BECAUSE HE DIDN'T FILE THE ISSUE ON DIRECT APPEAL, AND THAT YOUR SECOND ISSUE, THE SECOND PRONG OF PREJUDICE, IS THAT IT WOULD HAVE BEEN GRANTED RELIEF ON DIRECT APPEAL, BECAUSE GUZMAN SAYS THAT YOU DON'T HAVE TO LOOK BEHIND IT, AND ISN'T THAT WHAT YOU ARE ARGUING OR ISN'T IT? IS THERE SOMETHING ELSE THAT I AM MISSING HERE?

I THINK I AM ARGUING THAT. YES.

YOU ARE ARGUING, IN EFFECT, THAT THERE WAS A PER SE RULE THAT APPELLATE COUNSEL SHOULD HAVE SEEN, SHOULD HAVE APPEARED ON THE FACE OF THE RECORD WHEN THE RECORD WAS EXAMINED, IS THAT RIGHT?

THAT'S RIGHT. THAT'S RIGHT. YOU ARE, THIS COURT, IN DEJILL YO VERSUS STATE VERSUS STATE, FORCING THE COUNSEL TO GO TO TRIAL WITH A COMPROMISED ATTORNEY IS A REVERSIBLE AND FUNDAMENTAL ERROR, AND THAT IS --

YOU WERE GOING TO ARGUE AN ISSUE OF INEFFECTIVENESS WITH REFERENCE TO YOUR 3.851 IN THE TRIAL COURT, TOO, SO YOUR TIME IS FLYING.

TEMPEST FUGATE. JUDGE PARIENTE, YOU KNOW THE LAW. I WON'T TELL YOU THE STANDARD. YOU HAVE WRITTEN IT ABOUT 200 TIMES. THE ARGUMENT THAT I AM MAKING BEFORE THE COURT

TODAY IS THE TRIAL COURT'S DECISION TO PREMATURELY CEASE INVESTIGATING THE DEFENDANT'S BACKGROUND WHEN IT DID, AS UNREASONABLE UNDER THE PRECEPTS OF STRICKLAND VERSUS WASHINGTON, AND A COMPETENT ATTORNEY WOULD HAVE REALIZED THAT IN A CASE SUCH AS THIS ONE, PURSUING EVERY POSSIBLE LEAD WITH REGARD TO THE MITIGATING EVIDENCE WAS NECESSARY, TO MAKE AN INFORMED CHOICE ON POSSIBLE DEFENSES. AS WE KNOW, COUNSEL HAS A STRICT DUTY. WHAT I AM SAYING IS COUNSEL FAILED TO INVESTIGATE MITIGATING EVIDENCE IN THIS CASE.

AGAIN, YOU ARE TALKING IN GENERALITIES HERE. WE HAVE GOT A SPECIFIC CASE HERE WITH SPECIFIC INFORMATION. OKAY. WHAT IS IT --

THERE WERE FOUR WITNESSES THAT THE DEFENSE ATTORNEY DID NOT FIND AND COULD HAVE FOUND THROUGH A REASONABLE INVESTIGATION. WE HAD A WOMAN NAMED LILY BELL DAVIS WHO TESTIFIED THAT SHE HAD KNOWN RICHARD HENYARD SINCE HE WAS SIX YEARS OLD AND THAT HE WANDERED THE NEIGHBORHOOD AND SO FORTH AND THAT HIS MOTHER ULTIMATELY DIED OF AIDS.

WHAT NEW OR CRITICAL INFORMATION WAS THERE REFERENCE TO THIS THESE WITNESSES THAT - - TO THESE WITNESSES, THAT COULD HAVE MADE THIS CRITICAL DIFFERENCE, IN TERMS OF COUNSEL'S CONDUCT. IN OTHER WORDS, AGAIN, LET'S GET DOWN TO THE NITTY-GRITTY.

OKAY, YOUR HONOR. LET ME --

WHAT YOU ARE SAYING IS THAT HERE IS THIS WITNESS OR WITNESSES OUT THERE THAT WERE STANDING.

THERE WERE TWO CRITICAL ISSUES HERE THAT SHOULD HAVE BEEN FOUND AND SHOULD HAVE BEEN BROUGHT UP IN MITIGATION AND THEY WEREN'T. THE FIRST ISSUE WAS THE CHILD WAS SEXUALLY ABUSED WHEN HE WAS A LITTLE BOY, BY A STRANGER. WE HAD HIM SAY THAT TO HIS SISTER, NOT HIS SISTER, THE GIRL THAT HE GREW UP WITH WHEN HE WAS SEVEN YEARS OLD, AND HE REPEATED IT SEVERAL TIMES WHEN HE WAS IN JAIL. THAT WAS THE CRITICAL MITIGATOR, WHICH SHOULD HAVE BEEN FOUND AND COULD HAVE BEEN FOUND BUT IT WASN'T, BY THE DEFENSE ATTORNEY.

WAS THERE ANY OTHER INFORMATION IN, PRESENTED AT THE EVIDENTIARY HEARING, ON THIS POINT, OTHER THAN THE FACT THAT HE SAID THIS TO A COUPLE OF PEOPLE? I MEAN, WAS THIS STYLE OR FOUND OR ANYTHING?

NO, YOUR HONOR. THERE WAS NO EVIDENCE PRESENT HAD IN THIS BECAUSE THEY DIDN'T KNOW ABOUT THE EVIDENCE {ICHT} TAKE THAT BACK. NO. THE QUICK ANSWER TO YOUR QUESTION IS, NO, THERE WASN'T ANY EVIDENCE BROUGHT UP ABOUT THAT IN THE EVIDENTIARY HEARING, EXCEPT THE TESTIMONY OF THESE TWO WITNESSES. NOW, WHEN THE HEAD COUNSEL WAS BROUGHT BEFORE THE COURT AND TESTIFIED IN 3.850, HE ACKNOWLEDGED THAT THERE WERE NOTES IN HIS RECORD THAT SHOWED THAT MR. HENYARD HAD TOLD DEFENSE COUNSEL THAT HE HAD BEEN ABUSED, BUT THEY COULDN'T REMEMBER EVER HAVING SEEN THOSE NOTES. TWO ATTORNEYS TESTIFIED TO THAT.

YOU SAID THE SPECIFICS WAS HE TOLD BRUCE KYLE THAT THEY HAD FOND EACH OTHER WHEN THEY WERE NINE BUT THERE WERE OTHER RECORDS IN THE FILE WHERE THE CLIENT TOLD THE PSYCHIATRIST THAT HE HAD NEVER BEEN SEXUALLY ABUSED AND THAT THE DEFENDANT HAD ACTUALLY DENIED IT. NOW, WHAT EVIDENCE DID YOU PRESENT AS TO DIRECT EVIDENCE THAT THE DEFENDANT, IN FACT, WAS SEXUALLY ABUSED AS A YOUNG BOY AND LINK THAT UP TO THE ACTUAL CRIME THAT WAS COMMITTED IN THIS CASE.

IF YOU MEAN BY DIRECT EVIDENCE THAT HE TESTIFIED AT ANY OF THE HEARINGS --

HOW, WHAT WOULD BE PRESENT ODD A RETRIAL TO SHOW, IN FACT, THAT THIS DEFENDANT WAS SEXUALLY ABUSED AND WHAT, HOW WOULD THAT HAVE BEEN MITIGATING, IN TERMS OF THE NATURE OF THIS CRIME, HOW WOULD THAT HAVE BEEN LINKED TOGETHER, TO YOU KNOW, MAKE THAT COMPELLING MITIGATING EVIDENCE THAT OTHERWISE HAD NOT BEEN PRESENTED.

HOW IT WOULD HAVE BEEN PROPERTY UP, I SUPPOSE THEY WOULD HAVE SUBPOENAED THE SEXULE ABUSER AND ASKED HIM TO TESTIFY AS TO WHETHER HE DID IT. NOW, WHETHER THAT FLEW OR NOT I DON'T KNOW, BUT THE POINT I AM MAKING HERE IS IT NEVER HAD A CHANCE TO FLY BECAUSE THERE WAS NEVER AN INVESTIGATION.

FOR ADD EVIDENTIARY HEARING, ISN'T THERE A REQUIREMENT THAT WE KNOW THAT THIS EVIDENCE ACTUALLY EXISTS. THE IDEA IS YOU DON'T SAY, WELL, GEE, THERE IS MORE THAT THE DEFENSE LAWYER SHOULD HAVE DONE AND WE WANT ANOTHER CHANCE TO DO A MORE THOROUGH INVESTIGATION, AND THEN WE WOULD REVERSE OR VACATE A DEATH SENTENCE, TO GIVE COUNSEL SOME MORE OPPORTUNITY TO INVESTIGATE. WHAT I AM ASKING YOU, ARE YOU SAYING THERE IS NO EVIDENCE IN THIS RECORD TO SHOW THAT THE DEFENDANT WAS ABUSED?

WELL, THE EVIDENCE, HIS STATEMENTS TO TWO PEOPLE, WELL, ACTUALLY THREE PEOPLE. THE TWO LADIES THAT HE GREW UP WITH, AND HE TOLD THAT TO THE DEFENSE ATTORNEY WHO WROTE IT DOWN AND MADE A LETTER, A NOTE OF IT IN HIS FILE. SO THEY COULD HAVE INVESTIGATED.

HOW WOULD WE DEAL WITH THE FACT THAT HE ALSO TOLD SOMEONE ELSE THAT THIS NEVER HAPPENED?

SO THAT IS WHY YOU HAVE TO INVESTIGATE, TO SEE IF IT IS A OR B, AND HE NEVER INVESTIGATED, AND THAT WAS PRETTY POWERFUL MITIGATING. THE OTHER MITIGATION IS THAT HE TRIED TO COMMIT SUICIDE IN THE JAIL. NOW, THEY DIDN'T EVEN KNOW ABOUT THAT. SOME OF THE DEFENSE TEAM, ONE OF THEM DID, AND THEY CHOSE TO BELIEVE THE JAIL GUARD THAT BASICALLY SAID, WELL, THAT WAS JUST A FLUKE. HE WASN'T REALLY SERIOUS ABOUT THAT. HE JUST WANTED TO GO TO THE MEDICAL WARD, BUT MY CLAIM IS THAT, HAD THAT MITIGATING EVIDENCE BEEN BROUGHT TO THE JURY'S AT {THAENKS} HE HAD COMMITTED SUICIDE, THAT SHOWS A PRETTY POWERFUL SIGN OF SELF LOATHING AND WE MORSE, AND THAT WOULD HAVE BEEN SOMETHING THAT THEY COULD HAVE CONSIDERED AND, IN MITIGATION, AND THEY PROBABLY WOULD HAVE GIVEN A GREAT DEAL OF WEIGHT TO THAT.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THAT YOU ARE INTO YOUR REBUTTAL TIME, SO IF YOU WANT TO PAUSE NOW, IT WOULD BE A GOOD TIME.

I YIELD TO MY COLLEAGUE.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS STEPHEN AKE ON BEHALF OF THE STATE OF FLORIDA. I WILL BEGIN BY DISCUSSING THE ALLEGATION IN THE PETITION FOR HABEAS, REGARDING THE PUBLIC DEFENDER'S MOTION TO WITHDRAW. A COUPLE OF THINGS NEED TO BE APPOINTED OUT ABOUT FACTULELY, IS THAT AT THE TIME THAT THIS MOTION WAS MADE, THE CONTROLLING LAW WAS BOUIE VERSUS STATE, AND THE PUBLIC DEFENDER WHEN HE MADE HIS MOTION TO WITHDRAW, PRESENTED THAT CASE LAW TO THE TRIAL JUDGE AT THE TIME. HE SAID HERE IS MY MOTIONS AND HERE IS THE CONTROLLING LAW, AND THE PUBLIC DEFENDER WENT ON TO DETAIL WHAT WAS CONTAINED IN THE MOTION. WHAT WAS WAS THE PUBLIC DEFENDER INITIALLY FILED A MOTION TO WITHDRAW THAT SAID THAT THEY HAD PREVIOUSLY REPRESENTED ONE WITNESS, ANNIE KNEEL, AND AT THE HEARING, THE -- ANNIE NEAL, AND AT THE HEARING THE PUBLIC DEFENDER SAID THAT T MICHAEL JOHNSON, THE TRIAL ATTORNEY FOR HENYARD, REPRESENTED THIS PERSON IN THE PAST, AND IT SAYS IN THE MOTION THAT IT PUTS THEM IN AN UNTENABLE POSITION, HAVING TO CROSS-EXAMINATION A FORMER CLIENT, THEN

THEY ADDED AN ADDENDUM AND SAID HERE IS NINE OTHER POTENTIAL WITNESSES ON THEIR WITNESS LIST THAT WE HAVE ALSO REPRESENTED. AT THE HEARING THE STATE ATTORNEY HAD NOT REALLY HAD TIME TO LOOK AT THESE NINE OTHER WITNESSES BUT HAD LOOKED AT THE FIRST WITNESS CONTAINED IN THAT MOTION AND SAID THAT IS A CLOSED CASE, YOUR HONOR. I HAVEN'T HAD TIME TO LOOK AT THESE OTHER NINE, BUT THAT ONE IS A CLOSED CASE SO THERE IS NO CONFLICT, AND THE TRIAL COURT INQUIRED OF THE PUBLIC DEFENDER, WELL, YOU MAY BE IN A BETTER POSITION THAN THE STATE TO KNOW ABOUT THESE OTHER NINE CASES. ARE THEY ALSO PENDING OR CLOSED, AND THE PUBLIC DEFENDER SAID OF ALL OF THOSE NINE WITNESSES, THOSE CASES ARE CLOSED, TOO, AND THE TRIAL JUDGE DENIED THE MOTION.

I GUESS THE REAL QUESTION HERE IS WHAT WAS THE STATE OF THE LAW AT THE TIME THAT THIS MOTION WAS MADE?

COULD YOU, IN FACT -- WAS MADE? COULD YOU, IN FACT, INQUIRE WHETHER OR NOT TO MAKE THIS KIND OF INQUIRY, OR WHETHER OR NOT THE PUBLIC DEFENDER'S ACTUAL MOTION CERTAIN - - ACTUAL MOTION CERTIFYING THAT THERE WAS AN ACTUAL CONFLICT OR NOT?

THE TRIAL JUDGE SAID YOU ARE NOT SUPPOSED TO INQUIRE AND REALLY THE TRIAL JUDGE DIDN'T INQUIRE IN THIS CASE. ALL HE SAID WAS, BECAUSE THIS HAD BEEN GIVEN AT THE LAST MINUTE WAS, YOU ARE IN A BETTER POSITION TO KNOW. HE WASN'T INQUIRING AS TO THE DETAILS OF THEAL {ENGED} CONFLICT, AND -- OF THE ALLEGED CONFLICT, AND WHAT YOU HAVE, THE REASON THAT APPELLATE COUNSEL WOULD NOT BRING UP THIS ISSUE ARE NUMEROUS. ONE IS THE CASE LAW AT THIS TIME SAY THAT THESE MOTIONS HAVE TO BE CERTIFIED AND HAVE A CERTIFICATE OF CONFLICT, AND THAT WAS NOT DONE IN THIS CASE. THE ONLY THING THAT WAS CERTIFIED IN THIS CASE WAS A CERTIFICATE OF SERVICE, BUT THE PUBLIC DEFENDER NEVER SAID, NEVER CERTIFIED THAT HE HAD AN ACTUAL ADVERSE CONFLICT, BASED ON THE PRIOR REPRESENTATION, AND THE OTHER THING THAT HAS TO BE REMEMBERED IS THAT, OF THESE TEN POTENTIAL WITNESSES THAT THEY LISTED IN THEIR MOTION, ONLY ONE OF THEM TESTIFIED AT TRIAL AND THE INDIVIDUAL'S NAME WAS WILLIAM PEW. THERE IS NO EVIDENCE -- WILLIAM POUGH. THERE IS NO EVIDENCE THAT HE HAD REPRESENTED AM IN THE PAST. THERE WAS EVIDENCE THAT THE PUBLIC DEFENDER HAD REPRESENTED HIM IN THE PAST IN I BELIEVE, A BURGLARY CASE AND A VOP CASE. BUT AT TRIAL, THEY CROSS-EXAMINED WILBERT PUGH, ON ALL OF THE DETAILS THAT THEY COULD CROSS-EXAMINATION HIM. HE WAS NOT A CRITICAL WITNESS TO THE STATE.

IN TERMS OF THE STATE OF THE LAW, LET'S ASSUME THAT, AT THE TIME THAT THEY HAD MADE THE CERTIFICATION, AND THAT YOU KNOW, WILLIAM PUGH WAS SOMEBODY THAT THE PUBLIC DEFENDERS OFFICE HAD REPRESENTED, IS IT YOUR CONTENTION, AS I WAS ASKING PREVIOUSLY, THAT SOMETHING MORE HAS TO BE SHOWN, THAT IS THAT, IN POSTCONVICTION, THERE HAS GOT TO SHOW AN ADVERSE EFFECT ON REPRESENTATION. YOU CAN'T JUST RAISE IT IN HABEAS AND JUST GET --.

CORRECT, YOUR HONOR. IN THE POSTCONVICTION SETTING, DEFINITELY THEY HAVE TO SHOW SOME, AND I WOULD ALSO SUBMIT THAT AT DIRECT APPEAL THEY ALSO HAVE TO SHOW PREJUDICE, AND IN ORDER TO SHOW A CLAIM OF ACTUAL CONFLICT OF INTEREST, YOU HAVE TO SHOW THAT IT ADVERSELY AFFECTED YOUR LAWYER'S PERFORMANCE AND OBVIOUSLY OPPOSE THE CONVICTION, THEY WOULD HAVE TO ESTABLISH PREJUDICE UNDER STRICKLAND.

SO YOU ARE SAYING GOING BACK TO THE STATE OF THE LAW AT THE TIME, THAT IF THE MOTION WAS LEGALLY S.U.V. {IRBT}, IT WOULDN'T HAVE BEEN -- WAS LEGALLY S.U.V. {IRBT}, IT -- WAS LEGALLY SUFFICIENT, IT WOULDN'T BE ON THIS ORDER?

GUZMAN CAME OUT PRIOR TO HIS APPEAL. GUZMAN, THEY CITE THE LAW SAYING THE TRIAL COURT SHOULDN'T INQUIRE OR ANYTHING BUT THEY ALSO ANALYZE THE PREJUDICE PRONG IN

GUZMAN, LOOKING TO SEE IF THERE WAS ACTUALLY SOME ADVERSE EFFECT ON THE LAWYER'S PERFORMANCE AND INTAKE CASE THERE CLEARLY WAS -- AND IN THAT CASE THERE CLEARLY WAS. YOU HAVE ACTIVE REPRESENTATION OF THE PUBLIC DEFENDERS OFFICE AGAINST THE STATE'S KEY WITNESS, AND BASICALLY IN GUZMAN YOU HAD THE PROBLEM OF THE PUBLIC DEFENDER PUT IN A POSITION WHERE HE WOULD HAVE HAD TO TESTIFY TO STATEMENTS THAT WERE MADE BY THE STATE'S WITNESS.

WAS GUZMAN A DIRECT APPEAL?

YES, IT WAS, YOUR HONOR. SO --

THE WAY I UNDERSTAND GUZMAN IS IN GUZMAN, THE PUBLIC DEFENDER WAS REPRESENTING GUZMAN, THE DEFENDANT.

CORRECT.

AND ALSO WAS REPRESENT AGO STATE'S KEY WITNESS IN THAT CASE.

RIGHT. RIGHT. A JAILHOUSE SNITCH TYPE OF WITNESS THAT HAD SAID THAT HE CONFESSED TO IT.

WAS THERE ANY CASE AT THE TIME THAT WAS MORE SIMILAR TO THE FACTS HERE, WHERE THE PUBLIC DEFENDER WAS REPRESENTING THE DEFENDANT IN THE CASE AND, ALSO, HAD, IN THE PAST, REPRESENTED A WITNESS.

BOOIE. I THINK THERE WAS THREE WITNESSES IN BOUIE THAT THE COURT LOOKED AT THE RECORD AND SAID THERE IS NO CONFLICT HERE. I WOULD SUBMIT THAT THAT CASE WAS VERY MUCH ON BOYANT POINTE WITH WHAT WAS HAPPENING -- VERY MUCH ON POINT, WITH WHAT WAS HAPPENING IN THIS CASE, AND THAT IS THE REASON THE PUBLIC DEFENDER BROUGHT IT TO THE ATTENTION OF THE TRIAL JUDGE. NEEDLESS TO SAY --

WILL HIM -- WILLIAM PUGH, YOU SAID, DID TESTIFY. WHAT WAS HIS --

WILLIAM PUGH TESTIFIED THAT HE SMOKED, ON THE DAY OF THE INCIDENT, THAT HE SMOKED MARIJUANA WITH THREE PEOPLE AND HENYARD HAD A GUN AND SHOWED IT TO HIM AND SAID I AM GOING TO GO OUT AND JACK SOMEBODY AT THE WINN-DIXIE OR AT THE HOSPITAL THAT, HE WAS GOING TO GO AND STEAL THE CAR AND KILL AN OWNER. BUT THAT WAS NOT THE FIRST PERSON HE TOLD THIS TO. HENYARD HAD BEEN BRAGING FOR A WEEK OR SO, SHOWING THE GUN AND TELLING WHAT HE WAS GOING TO DO.

HOW MANY OF THEM TESTIFIED TO IT?

NONE OF THEM TESTIFIED AS TO THAT PARTICULAR DAY, BECAUSE I BELIEVE IT WAS IN THE AFTERNOON OF THE MURDER, BUT THERE WERE OTHER WITNESSES AT TRIAL THAT SAID THAT HENYARD WAS SAYING THAT HE WAS GOING TO DO THIS CRIME. BASICALLY WILBERT PUGH WAS NOT AN IDENTIFYING WITNESS.

YOU SAY PUGH HAD CROSS-EXAMINATION?

HE WAS CROSSED AS TO VARIOUS, YOU KNOW, THEY TRIED TO IMPEACH HIM, BUT THERE REALLY WASN'T MUCH THEY COULD DO WITH HIS TESTIMONY. THEY TALKED ABOUT HIS USE OF DRUGS AND THAT HE WAS, HENYARD WAS TRYING TO SOLICIT PUGH TO JOIN HIM IN THIS CRIME AND PUGH ABANDONED HIM AND LEFT, BASICALLY.

DID HE HAVE A CRIMINAL RECORD?

PUGH? YES. THE PD'S --

WAS THAT BROUGHT OUT ON CROSS-EXAMINATION?

I AM NOT SURE ON THAT, YOUR HONOR, BUT I BELIEVE IT WAS.

REFRESH MY RECOLLECTION. I KNOW WE HAVE HAD CASES WHERE THE ISSUE OF WHETHER THERE WAS AN ACTUAL CONFLICT AT TRIAL, HAS COME UP, AND MY RECOLLECTION IS THAT NORMALLY, THERE HAS BEEN SOME RECORD THAT HAS BEEN DEVELOPED, SO THAT YOU WERE ABLE TO ACTUALLY ASSESS, WELL, WAS THERE ACTUAL REPRESENTATION, WHEN DID IT END, YOU KNOW, WAS THERE --

RIGHT. THEY NEVER MADE SUCH REPRESENTATION INS THIS CASE. THEY NEVER RENEWED THE MOTION WHEN WILBERT PUGH TESTIFIED AND NEVER PUT ANYTHING ON THE RECORD REGARDING HIM AND BASICALLY THERE WASN'T ANY CONFLICT TO SPEAK OF AND THAT IS WHY IT WASN'T ON THERE AND BASICALLY TRIAL COUNSEL BEING INEFFECTIVE BASED ON CONFLICT.

INEFFECTIVE PERFORMANCE.

RIGHT, YOUR HONOR, AND SO THERE WERE A NUMBER OF REASONS WHY APPELLATE COUNSEL WOULD NOT HAVE RAISED THIS, EVEN IF IT HAD BEEN SUCCESSFUL ON DIRECT APPEAL. WITH REGARD TO THE INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE, THE 3.850 CLAIM, THE STATE WOULD ALSO SUBMIT THAT APPELLANT HAS FAILED TO DEMONSTRATE ANY RELIEF FOR THAT. THE TWO ISSUES THAT HE DISCUSSED HERE THIS MORNING WERE THE CLAIM THAT COUNSEL DID NOT INVESTIGATOR PRESENT EVIDENCE REGARDING THE CHILDHOOD SEXUAL ABUSE, AND THE PUBLIC DEFENDER, T MICHAEL JOHNSON, THAT WAS THE MAIN COUNSNECESSARILY THIS CASE, TESTIFIED THAT HE HAD, IN HIS FILE, A PHASE II ASSESSMENT FORM THAT WAS FILLED OUT BY THE PUBLIC DEFENDERS MITIGATION INVESTIGATOR, WHERE THAT INVESTIGATOR, A GENTLEMAN NAMED JT WILLIAMS, ASKED HEN {YARED} HAVE -- ASKED HENYARD HAVE YOU EVER BEEN SEXUALLY ABUSED AND HE SAID NO, AND ALSO THE PSYCHIATRIST IN THE JAIL ASKED HIM AND HE SAID NO, SO THEY HAD THAT EVIDENCE IN THEIR FILE AND THEY HAD ALSO BEEN TOLD TOLD BY, I BELIEVE, JACQUELINE TURNER THAT, WHILE IN PRISON AWAITING TRIAL, THAT HE ADMITTED THAT HE HAD BEEN SEXUALLY FONDLED AT A YOUNG AGE, BY THIS BRUCE KYLE INDIVIDUAL, BUT THEY BASICALLY HAD IN THEIR FILES DIRECT EVIDENCE FROM HENYARD, MAKING STATEMENTS THAT HE HAD NEVER BEEN SEXUALLY ABUSED, SO OBVIOUSLY THAT WOULD MAKE A STRATEGIC REASON FOR NOT PRESENTING THAT TYPE OF EVIDENCE, AND EVEN IF IT HAD BEEN PRESENTED, IT WOULD NOT HAVE CHANGED THE OUTCOME IN THIS CASE WHATSOEVER. YOU HAD FOUR AGGRAVATORS IN THIS CASE, AND GIVEN THE FACTS AND THE OVERWHELMING EVIDENCE IN THIS, THAT WOULD NOT HAVE CHANGED ANYTHING WHATSOEVER.

WAS THERE ANY EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING THAT IT WOULD HAVE HAD A DRAMATIC IMPACT?

NO, YOUR HONOR.

WAS THERE A MENTAL HEALTH EXPERT THAT TESTIFIED OR SOMETHING? AND KNOWING THAT HE WAS SEXUALLY ABUSED AS A CHILD, HAS A DIRECT CONNECTION, NOW, TO WHAT HE HAS DONE LATER?

NO, YOUR HONOR. THAT WAS NEVER TIED IN IN ANY WAY, SHAPE OR FORM INTO ANYTHING THAT HAPPENED IN THIS CASE OR HOW IT HAD AN EFFECT ON HIS GROWING UP OR WHAT HAVE YOU.

ALL RIGHT. WHAT ABOUT THE SUICIDE?

THE SUICIDE ATTEMPT WAS BASICALLY HENYARD LAYING FLAT ON HIS BUNK IN PRISON AND

USING THE LAUNDRY CORD TO TIE AROUND HIS NECK, AND HE SCOOTED DOWN THE BENCH UNTIL IT LEFT A MARK ON HIS NECK AND PRE{TEBD}ED -- AND PRETENDED TO BE UNCONSCIOUS WHEN THEY CAME TO CHECK ON HIM. THE JAIL PSYCHIATRIST LOOKED AT HIM AND SAID HE WAS FORCING HIS EYELIDS CLOSED AND PRETENDING TO BE UNCONSCIOUS, SO THEY PASSED THAT ON TO THE DEFENSE TEAM AND THE DEFENSE TEAM KNEW ABOUT IT AND THEY KNEW HE WANTED TO GET TO THE MEDICAL WING BECAUSE IT WAS EASIER ON HIM AND HIS DAILY ACTIVITIES IN THE JAIL TO BE IN THE MEDICAL WING, AS OPPOSED TO THE GENERAL POPULATION OR WHAT HAVE YOU, BUT HE WAS MAKING A MANIPULATIVE ATTEMPT TO GET INTO THE MEDICAL WING, AND THAT WAS NOT A SUICIDE ATTEMPT AND THEY INVESTIGATED THAT AND THEY WERE AWARE OF THE CHOICE NOT TO PRESENT THAT EVIDENCE, AND EVEN IF THEY HAD PRESENTED EVIDENCE OF THE SUICIDE ATTEMPT AND THE JURY SOMEHOW BELIEVED IT WAS A REAL ATTEMPT, IT WOULDN'T HAVE SWAYED THE TWO UNANIMOUS VERDICTS OR RECOMMENDATIONS.

HAVE LAWYERS TESTIFIED THAT THEY WERE AWARE OF IT AND MADE A CONSCIOUS DECISION?

CORRECT. T MICHAEL JOHNSON WAS AWARE OF IT. NOW, THE OTHER ATTORNEY THAT TESTIFIED AT THE EVIDENTIARY HEARING, MR. MacY WAS NOT AWARE OF IT, BUT T MICHAEL JOHNSON WAS AWARE OF THAT, BUT THE ONE ATTORNEY, MR. NACKE WAS BROUGHT IN AS THE THIRD ATTORNEY. T MICHAEL JOHNSON AND WILLIAM STONE WERE THE TWO PRIMARY ATTORNEYS IN THIS CASE. I THINK THEY BROUGHT IN MR. NACKE LATER.

THE DIRECT APPEAL, IN THE SENTENCING ORDER, SAYS THAT THE TRIAL COURT IN THE ORIGINAL CASE FOUND STATUTORY MITIGATOR OF EXTREME EMOTIONAL DISTRESS OR UNDER DISTURBANCE.

MENTAL MITIGATORS AND A NUMBER OF NONSTATUTORY MITIGATION.

AND THAT HE FUNCTIONS AT AN EMOTIONAL LEVEL OF 13 AND LOW INTELLIGENCE. MY UNDERSTANDING IS THAT, SOME OF THIS MITIGATION THAT WAS NOW, SO-CALLED MITIGATION PRESENTED, REALLY WAS A TWO-EDGED SWORD, THAT THERE WAS CONCERN ABOUT BRINGING SOME OF THIS OUT, THAT THERE WOULD HAVE BEEN MORE ABOUT THIS DEFENDANT'S PAST HISTORY OF YOU KNOW, BEHAVIOR, THAT THE JURY WOULDN'T HAVE BEEN SYMPATHETIC TO.

RIGHT. A NUMBER OF THE ITEMS THAT THEY RAISED AT THE EVIDENCIARY HEARING FALL INTO THAT CATEGORY, YOUR HONOR, WHERE THE TRIAL TEAM INVESTIGATED AND KNEW THERE WAS A REASON BEHIND NOT PRESENTING A LOT OF THIS EVIDENCE, BECAUSE THE BEHAVIOR THAT {LEED} UP TO, FOR EXAMP-- THAT LED UP TO, FOR EXAMPLE, THE SO-CALLED EVIDENCE BY THE MOTHER, EDITH HILL, SHE SPANKED HIM TWICE BECAUSE HE STOLE A GUN FROM HER AND A VCR FROM HER, AND THOSE WERE THE TWO INCIDENTS OF PHYSICAL ABUSE THAT, BASICALLY TRIAL COUNSEL AT THE EVIDENTIARY HEARING, TESTIFIED THAT, BECAUSE OF THE EVIDENCE WE HAD TO FOCUS ON THE PENALTY PHASE. THERE WAS SO MUCH EVIDENCE AS TO THE GUILT PHASE THAT OUR MAIN FOCUS WAS ON THE PENALTY PHASE. WE HAD THREE ATTORNEYS AND THREE INVESTIGATORS WORKING ON THIS, AND THEY WERE INVESTIGATING HIS BACKGROUND COMPLETELY AND I THINK IT BEARS IT OUT AT THE EVIDENTIARY HEARING THAT YOU SEE THAT BASICALLY IT IS A CARBON COPY OF WHAT WAS PRESENTED AT THE PENALTY PHASE FOR THE MOST PART, AND THE STATE WOULD SUBMIT THAT NONE OF THIS EVIDENCE WOULD HAVE CHANGED THE VERDICT OR THE RECOMMENDATIONS IN ANY WAY. IF THERE ARE NO FURTHER QUESTIONS, THE STATE WOULD JUST REQUEST THAT THIS COURT AFFIRM THE LOWER COURT'S ORDER DENYING POST-CONVICTION RELIEF, APPELLATE'S MOTION.

CHIEF JUSTICE: COUNSEL, REBUTTAL. HOW MUCH TIME, MR. MARSHAL?

YOUR HONOR, I WOULD REBUT THAT MR. AKE HAS BEEN MAKING A LOT OF PRONOUNCEMENTS HEAR, SAYING WHAT WOULD HAVE HAPPENED AND WOULDN'T HAVE HAPPENED, IF THE JURY HAD HEARD THIS STUFF, BUT LET ME POINT OUT TO THE COURT THAT THIS WAS A HAIL MARY

DEFENSE, BASED ENTIRELY ON MITIGATION, AND IN A SITUATION LIKE THIS, YOU HAVE TO PULL OUT ALL STOPS AND FIND EVERYTHING!

BUT YOU ARE SAYING IT THAT THERE WAS NO SUBSTANTIAL INVESTIGATION?

THERE WASN'T.

WHAT ABOUT THE TRIAL COURT'S FINDING? APPARENTLY OF SUBSTANTIAL MITIGATION, WHERE DID, WHAT WAS THE BASIS OF THE TRIAL COURT FINDING THIS SUBSTANTIAL MITIGATION?

YOUR HONOR, AS I READ THE TRIAL COURT'S ORDER AND I WOULD LIKE YOU TO READ IT AGAIN VERY CAREFULLY, BECAUSE IT SEEMS TO ME THAT THE TRIAL COURT WAS PRETTY PREJUDICE AGAINST THIS GUY AND THE WAY THAT HE WAS WRITING THE RECORDS. THEY BASICALLY ACCUSED OUR OFFICE OF, I CAN'T REMEMBER WHAT IT WAS, OUTRAGEOUS CONDUCTOR SOMETHING LIKE THAT, FOR EVEN BRINGING THIS STUFF, THAT IT WAS FOOLISH.

YOU ARE TALK ABOUT, NOW, THE ORDER DENYING POST-CONVICTION RELIEF.

YES.

I AM TALKING ABOUT THE ORIGINAL JUDGMENT AND SENTENCING ORDER THAT --

YES. A LOT OF THINGS --

-- APPARENTLY FOUND SUBSTANTIAL MITIGATION. FIRST OF ALL, IS THAT NOT CORRECT, THAT THE TRIAL JUDGE DID --

YES. THERE WERE SEVERAL MITIGATORS, NOT STATUTORY MITIGATORS THAT HE FOUND AND GAVE SOME WEIGHT TO IT OR SLIGHT EVIDENCE OR WEIGHT OR WHAT HAVE YOU.

THERE WAS FINDINGS HERE, STATUTORY MENTAL MITIGATION, WAS THERE NOT?

YES.

DIDN'T THE TRIAL COURT GIVE SUBSTANTIAL WEIGHT TO MANY OF THESE MITIGATORS?

HE GAVE SLIGHT WEIGHT TO THEM. THE BEST THAT SOME OF THEM GOT WAS SOME WEIGHT. I THINK THAT IS WHAT IT WAS. BUT THE POINT NAME MAKING HERE, AS THIS COURT HAS SAID IN THE RAGSDALE CASE AND THE UNITED STATES SUPREME COURT SAID IN THE WIGGINS CASE, THESE ARE PRECISELY THE TYPE OF MITIGATING CIRCUMSTANCES AND THEREFORE SHOULD BE CONSIDERED IF THEY ARE AVAILABLE.

THAT IS THE PROBLEM THERE THOUGH, IS THAT IT SEEMS THAT THERE WAS PRETTY GOOD MITIGATION TO VERY GOOD, THAT WAS PRESENTED AT THE ORIGINAL TRIAL, AND I {STHIL} HAVEN'T HEARD ANYTHING THAT -- AND I STILL HAVEN'T HEARD ANYTHING THAT SHOWS ME WHAT WEALTH OF MITIGATION YOU HAVE UNCOVERED, TO SHOW THAT THIS WOULD UNDERMINE OUR CONFIDENCE IN THE VERDICT OF THIS VERY, VERY TERRIBLE CRIME WITH ALL OF THESE AGGRAVATING CIRCUMSTANCES.

THERE WAS NOTHING IN THIS CASE THAT WAS GOING TO PRESENT US WITH A PERRY MASON MOMENT, WHERE SOMEBODY JUMPS UP AND CONFESSES OR SOMETHING LIKE THAT. THIS WAS A BRICK BY BRICK DEFENSE, AND YOU NEEDED TO HAVE A WHOLE BUNCH OF BRICKS, TO GET OVER THE FENCE.

THE LAST PART HERE, WHAT BRICK? YOU ARE SAYING THERE WERE SOME MORE BRICKS THAT

SHOULD HAVE BEEN BUILT.

WE TRY TO PRETEND THAT THIS GUY TRIED TO COMMIT SUICIDE IN JAIL. THE PEOPLE IN JAIL SAID IT WASN'T A REAL SUICIDE. MAYBE IT WAS AND MAYBE IT WASN'T, BUT THE DEFENSE ATTORNEY HAD AN OBLIGATION TO INVESTIGATE AND TELL IT --

IF THEY WERE ABLE TO CROSS-EXAMINATION THAT THIS -- CROSS-EXAMINE THAT THIS GUY WAS TRYING TO DO THIS TO GET INTO THE MEDICAL WING --

THAT WAS THE OPINION OF THE JAILER.

THAT WOULD HAVE BEEN PRESENTED TO THE JURY, ALSO, AND THEY KNEW ABOUT THAT.

I DON'T BELIEVE THAT THAT WAS, YOUR HONOR.

BUT DIDN'T THEY HAVE THE EVIDENCE OF THE PSYCHOLOGIST IN THE JAIL? IS IT NOT UNREASONABLE FOR TRIAL COUNSEL TO RELY ON THE --

HE WASN'T A PSYCHOLOGIST. HE WAS THE HEAD OF THE, I DON'T KNOW, THE NURSING STAFF. HE WAS A NURSE AND HE WASN'T A PSYCHOLOGIST AT ALL.

DID HE NOT INFORM TRIAL COUNSEL THAT IT WAS NOT A SERIOUS ATTEMPT?

THAT IS, THAT WAS HIS OPINION. I AM SAYING THAT THE TRIAL COUNSEL SHOULDN'T HAVE ACCEPTED THAT OPINION. HE HAD AN OBLIGATION AND A DUTY TO CONDUCT A REASONABLE INVESTIGATION TO SEE WHETHER IT WAS, AND IF IT WAS, THAT WAS SOMETHING THAT COULD HAVE BEEN PUT BEFORE THE JURY. I MEAN, THE JURY COULD STAND UP THERE AND SAY, LOOK, GEEZ, THIS GUY --

IS THERE ANY EVIDENCE OF THE RECORD THAT IT WAS A SERIOUS, NOW THAT YOU HAVE HAD TIME TO LOOK AT IT OVER THE YEARS, IS --

NO, BECAUSE IT WASN'T INVESTIGATED.

THERE WERE NO JAIL RECORDS SAYING HE WAS ON WATCH OR SUICIDE WATCH?

YES. HE WAS ON SUICIDE WATCH.

SO THERE WAS NO EVIDENCE THAT THEY WOULD HAVE FOUND, IF THEY WOULD HAVE RESEARCHED IT FURTHER THEN.

I DON'T KNOW, BECAUSE IT WASN'T DONE.

CHIEF JUSTICE: ALL RIGHT. WITH THAT, WE ARE GOING TO HAVE TO CLOSE. THANK YOU VERY MUCH. THANK YOU ALL VERY MUCH.