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Thomas Dewey Pope v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED.

CHIEF JUSTICE: WE ARE ALL SET ON THE CASE OF POPE VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED. GOOD MORNING.

THANK YOU, YOUR HONOR. GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS PATRICIA HOGAN FROM CCRC SOUTH. I AM HERE ON BEHALF THE APPELLANT, THOMAS DUEY POPE, ON THE AND -- THOMAS DEW I POPE, ON -- THOMAS DUEY POPE, ON.

WRIT OF SUMMARY DENIAL AND POSTCONVICTION COUNSEL. HE WAS DENIED -- THE CLAIMS PROPERLY BEFORE THE COURT IN MR. POPE'S INITIAL 3.850 MOTION, BY HIS PUBLIC DEFENDER ACTION DIRECT APPEAL ATTORNEY, WERE ESSENTIALLY ABANDONED BY VOLUNTEER COUNSEL WHO TOOK OVER A YEAR LATER.

THIS ORIGINAL, HIS FIRST 3.850 MOTION --

YES, YOUR HONOR.

-- WAS IN 1981.

'84. MR. POPE HAD --

AND THAT THE COUNSEL YOU ARE NOW SAYING DID A BAD JOB.

NO, ACTUALLY, YOUR HONOR, MR. POPE'S INITIAL 3.850 MOTION WAS FILED BY A MAN NAMED MICHAEL GILETI, ASSIGNED TO CONDUCT APPEAL UPON MR. POPE'S RECORDS. ALTHOUGH HE DID NOT HAVE TO FILE A 3.850, HE DID. HE FILED IT IN SEPTEMBER OF 1984. AT SOME POINT IN TIME, HE GOT OFF THE CASE. I DO NOT HAVE ANYTHING IN THE RECORD TO INDICATE WHY, BUT VOLUNTEER COUNSEL, ALAN WAGNER, FROM CARLSON FIELDS LAWFUL -- CARLTON FIELDS LAW FIRM, TOOK OVER, AND HE FILED A STATE HABEAS IN 1985. IN 1986, MR. POPE'S INITIAL 3.850 MOTION, WHICH WOULD ACTUALLY HAVE BEEN LABELED AS A MOTION FOR NEW TRIAL, WAS AMEND, BUT IN AMENDING THAT MOTION, CLAIMS WERE ACTUALLY TAKEN OUT OR SERIOUSLY CUT DOWN, IN TERMS OF THE SUPPORT FOR THAT MOTION. IN RESPONSE TO THAT MOTION, THE STATE ATTORNEY FILED A MOTION, RESPONSE AS WELL AS A MOTION TO STRIKE, FINDING OR CLAIMING THAT THE CLAIM THAT WERE RAISED IN THE AMENDED 3.850 MOTION IN 1986 WERE CONCLUSORY OR ACTUALLY LEGALLY INSUFFICIENT ON THEIR FACE.

YOU HAVE A VERY LIMITED AMOUNT OF TIME. YOU NEED TO PROCEED RIGHT TO THE MOST SERIOUS ISSUES THAT YOU INTEND TO ADDRESS THIS MORNING.

BASICALLY, YOUR HONOR, OUR POSITION IS, OR A POSTCONVICTION DEFENDANT IS ENTITLED TO MEANINGFUL ACCESS TO THE JUDICIAL PROCESS. THAT IS NOT AN ISSUE.

TO HELP US, IF YOU HAD TO SAY THERE IS ONE THING THAT, IF A CCR, IF YOU ARE LOOKING AT THIS AND ANY PERSON IN THEIR RIGHT MIND WOULD HAVE HAD TO RAISE AND IT WASN'T RAISED, WHAT WAS IT?

ESSENTIALLY, YOUR HONOR, EVERYTHING THAT WAS RAISED IN THE INITIAL 3.850 MOTION FILED LIE MICHAEL GILLETTE I, WHICH CONCERNED THE PRESSING STATES THAT MR. POPE HAD HAD ASKED TO BE SUPPRESSED, INVOLVING DRUG DEALS THAT MR. POPE HAD BEEN INVOLVED IN, BUT FOR TRIAL COUNSEL TO HIRE AN INVESTIGATOR TO GO TO SPEAK TO WITNESSES THAT MR. POPE HAD TOLD HIM COULD CORROBORATE HIS STORY OF WHAT HAPPENED IN THIS MURDER. HE FAILED TO --

WAS THERE, IN FACT, A ISSUE RAISED IN THE FIRST 3.850 ABOUT THE TRIAL, THE INEFFECTIVE ASSISTANCES OF TRIAL COUNSEL CLAIMS, BASED ON FAILURE TO PRESENT MITIGATING, AND THIS COURT AFFIRMED THE LOWER COURT'S DENIAL OF RELIEF, BASED ON THAT CLAIM.

THIS COURT DID AFFIRM THE SUMMARY DENIAL OF THE IAC CLAIMS. THE MAJORITY OF THE IAC CLAIMS IN THE AMENDED 3.850. BUT CONSIDERING THE FACT THAT THE TRIAL COURT, THE 3.850 MOTION WAS DISMISSED BECAUSE OF THE FACT THAT IT WAS LEGALLY INSUFFICIENT OR MOST OF IT, IN TERMS OF THAT IS WHAT THE STATE ATTORNEY --

IN ORDER TO REACH YOUR CLAIM, THIS COURT WOULD HAVE TO RECEDER DIRECTLY FROM LAMBRIX, CORRECT?

THIS COURT HAS ALREADY RECEDED FROM LAMBRIX, IN WILLIAMS VERSUS STATE.

THE MAJORITY OF THIS COURT HAS NEVER SAID THAT IT RECEDED FROM LAMBRIX. I MEAN, I SAID, IN AN OPINION THAT, WHAT THE COURT DID IN WILLIAMS WAS IN CONFLICT WITH LAMBRIX, BUT THIS COURT HAS NEVER RECEDED FROM IT,

IF YOU LOOK AT WILLIAMS VERSUS STATE, DEMARIA VERSUS STATE, ALL OF THOSE CASES HAVE ESSENTIALLY OVERTURNED THE HOLDING IN LAMBRIX.

NOW, WHEN WE LOOK AT THOSE CASES, ALL OF THOSE CASES ARE ABOUT EITHER THE UNTIMELY FAILURE TO FILE THE MOTION THAT IS A VERY LIMITED AREA THAT WE ALLOWED THE COUNSEL TO COME IN AND SAY, LOOK, I TOLD MY COUNSEL I WANTED THIS MOTION FILED OR THIS APPEAL FILED, AND WE SAY, LOOK, YOU HAVE A RIGHT TO DO THAT, BUT IN A LIMITED AREA WITH THIS IN MIND, YOU DON'T SERIOUSLY LOOK AT THIS AND SAY IT IS OVERRULING LAMBRIX.

I THINK IF YOU LOOK PROCEDURALLY AT THE CASES AND COMPARE IT TO TOM POPE'S, BUT TOM POPE'S, YOU CAN CONCEDE THAT BUT IF YOU LOOK AT WHAT OCCURRED AFTERWARD, YOU SEE THAT VOLUNTEER COUNSEL WAGNER WITHDREW THE 3.850 AND AFTER THE 3.850 MOTION WAS CUT DOWN BY THE COURT, AND IF YOU LOOK AT IT, IT IS CONCLUSORY INNATE T COULD BE THAT IT WAS DENIED LEGALLY SUFFICIENT ON ITS CASE FACE AND THE ONLY THINGS THAT THE TRIAL -- ON ITS FACE, AND THE ONLY THING THAT THE TRIAL, THERE IS NO DIFFERENCE SUBSTANTIVELY BETWEEN SOMEONE WHO HAS NOT HAD AN OPPORTUNITY TO FILE A 3.850 BECAUSE OF A MISSED DEADLINE AND SOMEONE THAT, BECAUSE OF HIS COUNSEL'S ERRORS, HIS FIRST BITE AT THE APPLE --

WE REALLY FAIRLY WOULD HAVE TO SAY THAT THOSE CASES OVERRULE LAMBRIX, IN ORDER FOR YOU TO EVEN BOOE BE HERE TODAY, BECAUSE THESE ISSUES WERE, IN FACT, RAISED IN THE SECOND 3.850 MOTION, WASN'T IT?

THE SECOND 3.850 THAT WAS FILED, I BELIEVE IN 1990, 1995, WERE BASED ON ISSUES THAT HAD BEEN UNEXHAUSTED IN THE FEDERAL COURT. A MAJORITY OF THOSE ISSUES, EVEN THOUGH THEY HAVE, IN FACT, BEEN EXPANDED IN TERMS OF FACTUAL DETAIL, WERE RAISED IN THAT INITIAL

3.850 MOTION OR WERE RAISED IN THAT 1986 MOTION. YOU KNOW, THAT IS MUCH MORE OF A CONCLUDE OTHER FASHION. -- CONCLUSORY FASHION. OUR POSITION IS THAT WILLIAMS DOES OVERRULE LAMBRIX, AND IF YOU LOOK AT THE CASE LAW THAT THIS COURT HAS COME OUT WITH AND EVEN WHAT THE LEGISLATURE HAS SAID, IN TERMS OF ESTABLISHING THE RIGHT TO POSTCONVICTION COUNSEL IN FLORIDA, BUT LAMBRIX HAS BEEN ERODED OVER A PERIOD OF TIME.

LET'S ASSUME THAT THE COURT LOOKS AT IT AND DETERMINES THAT THEY HAVE NOT OVERRULED LAMBRIX AND YET THEY HAVE CREATED CERTAIN NARROW EXCEPTIONS TO LAMBRIX. WHAT IS YOUR POSITION THEN, HERE INSOFAR AS IF THAT IS THE GEOGRAPHY OF THE TOPOGRAPHY OUT THERE? LAMBRIX IS IN PLACE. CERTAIN NARROW EXCEPTIONS ECONOMIST IN THE CASES -- EXIST, IN THE CASES THAT YOU HAVE DESCRIBED. WHERE DOES YOUR CASE FIT IN, THEN, TO THAT LANDSCAPE?

I WOULD SAY THAT THE COURT WOULD ALSO HAVE TO LOOK AT THE OTHER CASES THROUGHOUT THE PAST DECADE, THAT THIS COURT HAS COME OUT WITH. WHEN YOU LOOK AT, THERE ARE NOT JUST LIMITED PROCEDURAL ISSUES, YOU KNOW, THAT THE COURT HAS SAID THAT, YOU KNOW, PERHAPS WILLIAMS AND STEELE APPLY TO, AND THE FILING OF A BELATED 3.850 APPEAL OR MOTION. YOU ALSO HAVE YOUR CASES IN TERMS OF, LIKE, FOTOPoulos VERSUS STATE, WHERE YOU DID HAVE A PROPERLY FILED 3.850 MOTION, THE DEFENDANT WAS BEFORE THIS COURT ON APPEAL, AND YET BECAUSE ISSUES WERE NOT PROPERLY SUBMITTED BEFORE THE COURT, THE TRIAL COURT, AND WERE BEING ARGUED IMPROPERLY BEFORE THIS COURT, THE DEFENDANT WAS ALLOWED TO GO BACK TO THE TRIAL COURT TO AMEND HIS MOTION, AND --

WELL, HELP US HERE, AS IN SORT OF AS JUSTICE PARIENTE ASKED YOU SORT OF AT THE OUTSET, TO GO FOR THE JUGULAR. THAT IS THAT, WHERE IS THE TERRIBLE MISCARRIAGE OF JUSTICE OR SOME DRAMATIC DEMONSTRATION HERE, THAT, REALLY, JUSTICE HAS NOT BEEN DONE IN THIS CASE? IN OTHER WORDS WHAT IS THE CLAIM THAT YOU CAN POINT TO THAT WOULD MOST ILLUSTRATE THAT YOU FEEL THAT YOUR CLIENT HAS BEEN DENIED FUNDAMENTAL RIGHTS?

I THINK, WELL, ONE, I THINK IT IS ALL ENCOMPASSING, IN TERMS OF THE INEFFECTIVE ASSISTANCE OF COUNSEL, THAT TRIAL COUNSEL PROVIDED HERE.

YOU ARE GOING TO HAVE TO DO BETTER THAN THAT, BECAUSE LAMBRIX HASN'T BEEN OVERRULED, SO YOU ARE HERE. YOU HAVE A FEW MINUTES. WHAT IS IT THAT SHOULD SO OUTRAGEOUS TO SAY, YOU KNOW, I MEAN, IF YOU HAD AN APPELLATE COUNSEL WHO SLEPT THROUGH THE WHOLE THING AND WE STILL SAID THAT YOU ARE NOT ENTITLED TO INEFFECTIVE ASSISTANCE, IT WOULD BE MAYBE LUDICROUS. WHAT IS IT HERE THAT IS SO OUTSIDE THE NORM THAT IS JUST GOING TO JUMP OUT AT US, IF WE LOOK BACK AND SAY HOW COULD THAT NOT HAVE BEEN LITIGATED?

WELL, IF YOU LOOK AT TRIAL COUNSEL OBSERVER, WHEN HE -- TRIAL COUNSEL EBER, WHEN HE CAME ON TO THIS CASE, I DIDN'T HAVE ANY EXPERIENCE WHATSOEVER. HE ONLY HAD FOUR CRIMINAL TRIALS UNDER HIS BELT AT ALL. HE HAD BEEN A CIVIL ATTORNEY WHEN HE HAD GRADUATED FROM LAW SCHOOL. HE WORKED AT A CIVIL FIRM, UNTIL HE WENT OUT TO PRACTICE ON HIS OWN IN '7. HE WAS OUT OF -- IN '79. HE WAS OUT OF LAW SCHOOL FOR TWO YEARS, I BELIEVE, AND HE TOOK ON THIS CASE IN IS THE 82. HE DIDN'T HAVE A SECOND ---IN '82. HE DIDN'T HAVE A SECOND CHAIR AVAILABLE TO HIM. HE HAD ILLUSTRATIONS IN THE TRIAL COURT, HE WAS NOT ABLE TO SUBPOENA HIS WITNESSES UNTIL THE DAY AFTER TRIAL STARTED. IT IS CLEARLY ON THE RECORD THAT HE SIMPLY WAS NOT PREPARED, AND THE ONE PERSON, I THINK, WHO WAS THE MOST IMPORTANT PERSON IN THIS CASE, TO CONVICT TOM POPE, WAS HIS EX-GIRLFRIEND, WHO WAS GIVEN IMMUNITY, IN MATERIALS OF HER TESTIMONY. SHE -- IN TERMS OF HER TESTIMONY. SHE CONSISTENTLY STATED, BEFORE SHE WAS GIVEN IMMUNITY, THAT THOMAS POPE DID NOT DO THIS CRIME, AND ONCE, BASICALLY, IF YOU LOOK AT THE FACTUAL

SCENARIO SHE POTENTIALLY COULD HAVE BEEN PROSECUTED FOR THIS CRIME WITH HIM AS WELL. I MEAN, SHE HAD MOTIVE, IN TERMS OF YOU KNOW, WORKING WITH THE STATE OUT OF FEAR OF JEOPARDY FOR HERSELF OF, AND -- FOR HERSELF, AND OBSERVER'S -- AND EBER'S LACK OF PREPARATION PUT THE JURY IN THE POSITION TO BELIEVE THAT SHE HAD ACCURATE INFORMATION, HE HAVE THEN HE HAD EVERYTHING -- EVEN THOUGH HE HAD EVERYTHING AVAILABLE TO IMPEACH HER, AND EVEN THOUGH LOOKING AT OTHER AREAS IN WHICH HE WAS INEFFECTIVE, FAILING TO SUPPRESS INFORMATION, FAILING TO LOCATE WITNESSES THAT MR. TOLBERT TOLD HIM ABOUT, FAILING TO CROSS-EXAMINATION WITNESSES. THERE ARE INSTANCES IN THE RECORD WHERE HE WILL BE CROSS-EXAMINING. THERE WOULD BE AN OBJECTION FROM THE STATE. HE COMPLETELY STOPPED AND DROPPED THE QUESTION. I MEAN, OVERALL, HE WAS JUST COMPLETELY INEFFECTIVE, AND THEN MR. POPE HAS VOLUNTEER COUNSEL IN 1985, '86, WHO I AM SURE HAD THE BEST INTENTIONS AT HEART BUT HE, HIMSELF, WAS ONLY OUT OF LAW SCHOOL FOR A YEAR WHEN HE STARTED WORKING ON THIS CASE. HE DIDN'T HAVE ANY EXPERIENCE IN CRIMINAL LAW. HE WAS A CIVIL ATTORNEY, AND IN TERMS OF AS HE WAS WORKING ON THIS CASE, HE AND THIS OTHER GROUP OF PEOPLE HAD TO LOOK TO OUTSIDE HELP, IN TERMS OF EVEN PINPOINTING THE ISSUES THAT SHOULD BE RAISED ON APPEAL. I MEAN, JUST IN THE OVERALL SCHEME OF THINGS, YOU KNOW, HAD HE -- HE HAD INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. HE LOST HIS ONE CHANCE TO PROVE THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, BY NOT HAVING ADEQUATE POSTCONVICTION COUNSEL AVAILABLE TO HIM. AND IF THIS COURT LOOSE NOT ONLY TO THE ISSUE OR THE CASES OF -- IF THIS COURT LOOKS NOT ONLY TO THE ISSUE OR THE CASES OF WILLIAMS AND STEELE, KEHOE, DeMARIA, IF YOU ALSO LOOK AT THE OTHER CASES WHERE THIS COURT HAS FOUND THAT A DEFENDANT HAS BEEN ENTITLED TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, THERE ARE NO DIFFERENT SITUATIONS THAN MR. POPE. I WOULD, ALSO, ARGUE THAT THE FLORIDA LEGISLATURE, IN CREATING CCR AND ESTABLISHING RIGHT TO MEANINGFUL ACCESS TO THE COURTS, THEY HAVE, EVEN THOUGH THE INTENTION WAS TO MAKE SURE THE STATE RECEIVED COLLATERAL PROCESS, IT IS TIMELY AND EFFECTIVE, THEIR GOAL WAS ALSO TO MAKE SURE THAT POSTCONVICTION DEFENDANTS HAVE ADEQUATE REPRESENTATION.

WELL, THE LEGISLATURE SPECIFICALLY SAID, IN 277.0023, THIS CHAPTER DOES NOT -- IN 277.002, THIS CHAPTER DOES NOT CREATE A RIGHT OF ANY PERSON PROVIDED COUNSEL, PURSUANT TO THIS PROVISION, TO CHALLENGE IN ANY FORM OR MANNER, THE QAES ADEQUACY OF COUNSEL -- THE ADEQUACY OF COUNSEL. THAT IS SPECIFICALLY IN THE LEGISLATION, AND I DON'T KNOW HOW WE CAN IGNORE THAT PROVISION OF THE STATUTE, ONCE WE HAVE RECOGNIZED THE U.S. SUPREME COURT'S DETERMINATION THAT THERE IS NO CONSTITUTIONAL RIGHT TO COUNSEL.

EVEN THOUGH THAT IS PART OF THE STATUTE, IF YOU LOOK TO OTHER THINGS THAT THE LEGISLATURE HAS DONE, BY ESTABLISHING, YOU KNOW, THE RIGHT TO HAVE POSTCONVICTION COUNSEL, TO, AS THIS COURT HAS STATED TO ASSIST CAPITAL DEFENDANTS IN OBTAINING MEANINGFUL REVIEW IN THE POSTCONVICTION PROCESS, BY AMENDING YOU KNOW, RULE 27, IN TERMS OF REQUIRING THAT THE COURT LOOKED TO ENSURE THAT CAPITAL DEFENDANTS RECEIVE ADEQUATE REPRESENTATION. YOU KNOW, BY, IT, ONCE THE COURT AND ONCE THE LEGISLATURE ESTABLISHED THAT THERE WAS EITHER RIGHT TO MEANINGFUL ACCESS AND THAT AN ATTORNEY TO ASSIST IN GAINING THAT MEANINGFUL ACCESS, IT JUST FLIES IN THE FACE OF REASON THAT THAT MEANS THAT COUNSEL DOES NOT HAVE TO BE EFFECTIVE IN DOING SO.

WHAT HAPPENED ON THE PENALTY, THE PENALTY PHASE, YOU HAD THE MOTHER TESTIFY ON BEHALF OF THE SON, CORRECT?

CORRECT.

AND THEN WAS THERE AN EVIDENTIARY HEARING IN THE POSTCONVICTION, ON INEFFECTIVE ASSISTANCE OF COUNSEL PHASE?

THE ONLY THING TO WHICH MR. POPE WAS GIVEN AN EVIDENTIARY HEARING WAS ON WHETHER THE COURT OR WHETHER COUNSEL IMPROPERLY USED THE VIETNAM DEFENSE SYNDROME IN THE GUILT PHASE, AS WELL AS AN ISSUE OF WHETHER OR NOT IT WAS APPROPRIATE TO USE A VIDEOTAPE TO EFFECTUATE TESTIMONY FOR ONE OF THE WITNESSES.

HAVE YOU ATTACHED ANY OF YOUR PLEADINGS IN THIS CASE, EVIDENCE THAT YOU HAVE UNCOVERED THAT SHOWS, THAT SAYS, FOR EXAMPLE, WE HEARD FROM THE LAST THAT HE WAS MENTALLY RETARDED AND NO ONE BROUGHT THAT OUT. ANY TYPE OF THAT COMPELLING TESTIMONY THAT HAS NEVER BEEN PUT FORTH IN THE RECORD?

NO, YOUR HONOR. IN TERMS OF THE REASON WHY THIS IS FILED UNDER A 3.850, WAS BECAUSE, IN TERMS OF THE FACT FINDING ISSUE, TO GET AN EVIDENTIARY HEARING TO WHICH WE WOULD BE ABLE TO SHOW, ONE, YOU KNOW, THAT POSTCONVICTION OR I AM SORRY, VOLUNTEER COUNSEL WAS, IN FACT, INEFFECTIVE, AND AT THAT POINT ALSO BE ABLE TO EITHER, IN ANOTHER HEARING OR AT THAT HEARING, TRY TO ESTABLISH OR ESTABLISH THAT THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

COULD YOU RESPOND? I THINK WHAT SHE IS ASKING YOU TO DO IS TO SHARE WITH US WHAT ARE THE, RATHER THAN JUST SAYING INEFFECTIVE ASSISTANCE OF COUNSEL, WHAT DIDN'T COME OUT? WHAT WERE THE WITNESSES GOING TO SAY? WAS HE SOMEWHERE ELSE? WAS THERE A MINISTER? THAT IS WHAT I THINK THE QUESTION IS TRYING TO GET YOU TO SHARE WITH US.

I SEE.

TO GO FURTHER NOT JUST TO SAY IT IS INEFFECTIVE. WHAT IS THE NATURE OF IT, I THINK IS WHAT WE ARE STRUGGLING WITH.

I THINK IT IS TWO-PART. IT IS TWO-PRONE. I THINK THAT COUNSEL WAS INEFFECTIVE AND DEFICIENT IN NOT PREPARING ADEQUATELY FOR THIS TRIAL, AND THAT THE PREJUDICE TO THAT IS BY NOT HAVING THESE RESOURCES AVAILABLE --

YOU ARE JUST TALKING AGAIN IN CONCLUSIONS, AND WE CAN'T, THIS IS A CASE THAT HAS BEEN FINAL FOR A LONG TIME. IF WE WERE EVER TO RECONSIDER SOME TYPE OF A CLAIM, IT WOULDN'T BE TO SAY THAT A CCR COULD COME IN AND JUST SAY, WELL THE PRIOR COUNSEL WAS INEFFECTIVE AND WE SHOULD HAVE AN EVIDENTIARY HEARING ON THAT. THERE WOULD JUST HAVE TO BE SOMETHING THAT WOULD JUST JUMP OUT, LIKE AGAIN, MAYBE THIS MENTAL RETARDATION THAT NOBODY, WE NOW HAVE SCHOOL RECORDS TO SHOW HE WAS MENTALLY RETARDED, AND THIS WAS READILY AVAILABLE TO BOTH ORIGINAL COUNSEL AND POSTCONVICTION COUNSEL, AND THE GUY DID NOTHING. I MEAN, SOMETHING THAT WOULD JUST JUMP OUT AT YOU, BUT YOU ARE JUST, WITH ALL DUE RESPECT, JUST TALKING, KEEP ON TALKING ABOUT CONCLUSORY STATEMENTS. HE DIDN'T INVESTIGATE AND THEREFORE, YOU KNOW, THIS IS NOT GOING TO GET YOU THROUGH A, TO HAVE US REcede FROM LAMBRIX. I MEAN,, IN ALL DUE RESPECT TO YOUR ARGUMENT.

I THINK THE PREJUDICE THAT WOULD BE SHOWN WOULD BE DEVELOPED AND PUT FORTH AT AN EVIDENTIARY HEARING, BUT I ALSO BELIEVE THAT THE PREJUDICE IN THIS PARTICULAR CASE, IF YOU HAD WITNESSES WHO COULD TESTIFY THAT THERE WAS MUSIC PLAYING AFTER THE VICTIM HAD SUPPOSEDLY BEEN KILLED. YOU HAVE, MY POINT BEING, IF EBER HAD THE IMPEACHING EVIDENCE THAT WAS AVAILABLE WITH HIM AT THE TIME AND USED IT, THE JURY WOULD NOT HAVE BELIEVED WHAT THE KEY WITNESSES WERE SAYING.

CHIEF JUSTICE: ALL RIGHT. WE HAVE USED UP A CONSIDERABLE AMOUNT OF YOUR REBUTTAL TIME, TOO, SO IF YOU PAWS AT THIS TIME YOU WILL SAVE SOME OF -- IF YOU PAUSE AT THIS TIME, YOU WILL SAVE SOME OF THAT. GOOD MORNING.

GOOD MORNING. LESLIE CAMPBELL ON BEHALF THE STATE, ATTORNEY GENERAL'S OFFICE. THIS IS THE SECOND TIME THAT WE ARE HERE ON A STATE HABEAS AND THE THIRD TIME HERE ON AN APPEAL

REFRESH US IN TERMS OF GIVING US A BRIEF CHRONOLOGICAL LISTING OF THE PROCEEDINGS. WHEN WAS THE ORIGINAL CONVICTION AND THEN HELP US BY HIGHLIGHTING YOU KNOW, WHAT HAPPENED AFTER THAT.

IN, BETWEEN JANUARY 16 AND JANUARY 16 OF 1981 AND 1981, THREE PEOPLE WERE -- OF 1981, THREE PEOPLE WERE MURDERED, A MR. DURAN, MISS WALTERS AND MR. POPE WAS CONVICTED OF THESE THREE MURDERS IN 1982. THE JURY RECOMMENDED LIFE FOR MR. RUSSO AND MR. DURANT, AND THEY RECOMMENDED DEATH BY A VOTE OF 9-TO-3 FOR MISS WALTERS.

WAS THIS A DRUG SITUATION?

YES, IT WAS. THE INFORMATION THAT CAME OUT AT TRIAL WAS THAT MR. POPE AND MR. OCCURANTS AND MR. RUS --- AND MR. DURANT AND MR. RUSSO WERE WORKING ON A DEAL TO SELL COCAINE TO MR. POPE, AND WHAT HAPPENED WAS MR. POPE KILLED BOTH MALE VICTIMS IN MS. WALTERS APARTMENT. AT THE SAME TIME, HE HAD SECRETED AWAY MS. WALTERS, TO A HOTEL DURING THAT WEEKEND, AND KEPT HER DRUGGED AND DRUNK FOR THE WEEKEND, AND THEN SUBSEQUENTLY KILLED HER. HE TOOK HER BACK, HE TOOK HER INTO PALM BEACH COUNTY FOR THE WEEKEND AND THEN BROUGHT HER BACK TO BROWARD COUNTY, WHERE HE SHOT HER. HE BLUDGEONED HER AND THEN THREW HER INTO A CANAL TO DROWN. THE JURY, AS I SAY, CONVICTED ON ALL THREE COUNTS OF FIRST-DEGREE MURDER. THE AGGRAVATORS THAT WERE FOUND WERE PRIOR VIOLENT FELONY, AND THAT WENT TO MR. DERUSSO AND MR. OCCURANTS'S MURDERS AND -- AND ALSO MR. DURANT'S MURDERS AND ALSO THE AVOID ARREST FOR MS. WALTERS MURDER AND ALSO ADVANCED MITIGATION AND CCP. THE HONORABLE DISCHARGE WAS THE MITIGATOR, AND HIS MARINE SERVICE. BUT FIRST DIRECT APPEAL WAS AFFIRMED IN 1983. IN 1984, SEPTEMBER 17, 1984, THE FIRST 3.850 WAS FILED. BEFORE THE STATE, BEFORE ANYTHING TRANSPRIRED ON THAT 3.850, A STATE HABEAS WAS FILED. AND THIS COURT RULED ON THE STATE HABEAS IN 1986. SUBSEQUENT TO THAT --

A STATE HABEAS?

A HABEAS PROCEEDING --

A PETITION --

A PETITION FOR HABEAS CORPUS, INSTEAD OF A FEDERAL. IT WAS FOR THIS COURT. I AM SORRY.

ALL RIGHT.

BUT WASN'T THIS A LITTLE STRANGE, PROCEDURALLY, BECAUSE THEY SEEMED TO HAVE GONE INTO FEDERAL COURT PRIOR TO THE PROSECUTION OF THE 3.850 MOTION.

I AM SORRY I, YOUR HONOR.

WASN'T THERE A FEDERAL HABEAS FILE PRIOR TO A DETERMINATION ON THE 3.850 MOTION?

NO. THERE WAS, AFTER THE, THIS COURT DECIDED THE HABEAS CORPUS PROCEEDING, THEY WENT BACK TO STATE COURT, AND IN 1986 AND '87 THE, AN AMENDED, 1986, AN AMENDED HABEAS, I MEAN EXCUSE ME AN AMEND 3.850 WAS FILED. AND EVENTUALLY THAT WAS DECIDED BY THIS COURT, IN I BELIEVE IT WAS 1987. I DON'T HAVE THE EXACT DATE.

YOU MEAN A DENIAL WAS AFFIRMED.

DENIAL WAS AFFIRMED. THEN THEY WENT TO FEDERAL COURT, AND IT WAS DURING THAT PERIOD OF TIME WHEN THE FEDERAL COURT SAID THIS IS A MIXED PETITION. YOU HAVE CERTAIN CLAIMS RAISED THAT HAVEN'T BEEN RAISED BEFORE, AND YOU HAVE CERTAIN PROPER CLAIMS, SO THEY DISMISSED THAT AS A MIXED PETITION THAT CAME BACK DOWN TO THE STATE COURT, WHERE A SECOND HABEAS, EXCUSE ME A SECOND 3.850 WAS FILED.

IN ORDER TO EXHAUST --

IN ORDER TO EXHAUST FOR FEDERAL COURT, AND IT IS AT THAT POINT THAT MR. POPE STARTS TO COMPLAIN ABOUT MR. WAGNER. WHO WAS HIS COUNSEL AND HAS BEEN HIS COUNSEL FOR APPROXIMATELY TEN YEARS AT THAT POINT. THE, EXCUSE ME, THE APPEAL OF THE FIRST 3.850 WAS IN 1990, AND THAT WAS AFFIRMED ON OCTOBER 10, OCTOBER 11, 1990.

HAD THERE BEEN AN EVIDENTIARY HEARING?

THERE HAD BEEN ON TWO CLAIMS. THE FIRST ONE WAS WHETHER OR NOT A VIDEOTAPE SHOULD BE ADMITTED INTO EVIDENCE, BECAUSE A WITNESS WAS UNAVAILABLE.

FOR INEFFECTIVE ASSISTANCE OF COUNSEL?

THAT'S CORRECT, YOUR HONOR, AND ALSO WHETHER OR NOT PARTICULAR INFORMATION WITH REGARD TO MR. POPE'S VIETNAM EXPERIENCE SHOULD HAVE BEEN BROUGHT OUT DURING THE GUILT PHASE.

THERE WASN'T AN EVIDENTIARY HEARING ON THE TRIAL COUNSEL'S FAILURE TO IMPEACH? I MEAN, THAT WAS RAISED AS CLAIM.

THAT WAS RAISED.

AS WAS THE FAILURE TO INVESTIGATE THAT OTHER PEOPLE HAD KILLED THESE VICTIMS.

THAT'S CORRECT.

AND THAT WAS SUMMARILY DENIED AND THIS COURT AFFIRMED THAT.

THAT'S CORRECT, YOUR HONOR.

WHICH WE DO ON, HAVE DONE MANY TIMES IN THE PAST.

THAT'S CORRECT. AFTER THE FEDERAL HABEAS WAS DISMISSED AS A MIXED PETITION, AND THAT WAS IN 1994, WE COME BACK TO STATE COURT ON THE SECOND HABEAS, A SECOND 3.850, AND THAT WAS APRIL OF '95. AND SEVERAL CLAIMS, AGAIN, OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE RAISED. DURING THAT PROCEEDING, A PRO SE MOTION WAS FILED, AND AN ADDITIONAL CLAIM WAS ADDED. ALSO THERE WAS A CLAIM THAT COLLATERAL COUNSEL, MR. WAGNER, WAS INEFFECTIVE. THERE WAS A CONFLICT THAT HE HADN'T RAISED CERTAIN ISSUES IN HIS FIRST 3.850 AND ALSO THAT HE WASN'T ABLE TO ARGUE THAT HE WAS INEFFECTIVE FOR NOT HAVING RAISED THOSE ISSUES. THE STATE RESPONDED THAT IT STILL WAS A SUCCESSIVE MOTION, WAS OUT OF TIME, AND IT WAS DENIED AS SUCCESSIVE. AND ALSO PROCEDURALLY BARRED BEFORE THIS COURT. MR. POPE TRIED TO GET AROUND THE PROCEDURAL BAR, BY CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL. THIS COURT WAS, IT WAS ARGUED TO THIS COURT THAT LAMBRIX APPLIED, AND THIS COURT FOUND THAT THERE WAS NO ERROR IN THE SUMMARY DENIAL OF THE SECOND 3.850. WE ARE NOW BEFORE THE COURT AGAIN, ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, MERELY ON THE BASIS THAT LAMBRIX HAS BEEN OVERRULED BY WILLIAMS AND DeMARIA. OF COURSE THAT IS INACCURATE. THIS COURT HAS, AS OF JUST THIS LAST JANUARY, REAFFIRMED THAT THERE IS NO CLAIM OF INEFFECTIVE ASSISTANCE OF

COUNSEL, HA REAFFIRMED LAMBRIX, NO -- HAS REAFFIRMED LACK BRICKS, NO INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL, AND THAT LAMBRIX IS STILL THE LAW IN THE STATE OF FLORIDA. IT IS THE STATE'S POSITION THAT THIS PETITION IS, BOTH THE PETITION AND THE 3.850 THAT IS BEFORE THE COURT, IS PROCEDURALLY BARRED. IT IS AN ISSUE THAT HAS ALREADY BEEN DECIDED BY THIS COURT, AS A SUCCESSIVE MOTION, AND THE TRIAL COURTS' DENIAL OF THE 3.850 SHOULD BE AFFIRMED AND THIS COURT SHOULD, ALSO, AFFIRM OR DENY ANY RELIEF ON THE STATE HABEAS.

IN THE PROCEEDINGS THAT WERE HELD AT THE TRIAL LEVEL, THE SUBSTANCE RATHER THAN THE PROCEDURE, WAS IT EVER, DID ANYONE EVER COME TO THE SURFACE WITH ARGUMENTS AS TO WHAT THE SUBSTANCE WAS, OF THE INEFFECTIVENESS, AND WE HAVE WITNESSES OR THE RETARDATION? WHAT IS THE SUBSTANCE OF THE CLAIM, RATHER THAN THE TALKY TALK?

THERE HAVE BEEN NO, THEY POINTED TO NO CLAIMS OR NO NEW EVIDENCE THAT SHOULD HAVE BEEN RAISED. SO WE ARE JUST, WE ARE BASICALLY JUST ARGUING WHETHER OR NOT LAMBRIX HAS BEEN OVER RECALLED. -- OVERRULED.

COULD YOU JUST, AS THE OTHER CLAIM ON THE RING ISSUE, AND REALIZING THAT THERE IS A QUESTION AS TO WHETHER IT SHOULD APPLY AT ALL IN FLORIDA, WHETHER IT APPLIES IN POSTCONVICTION, WHAT IS YOUR, ASSUMING IT APPLIED AND ASSUMING WE HAVE DEALT WITH IT, WHAT IS ARE THERE OTHERS THAT WERE DONE PRIOR TO MR. RUSSO?

THERE WERE TWO.

THAT WAS PRIOR VIOLENT FELONIES.

THEY WERE BEFORE THIS CONVICTION, BUT THEY WERE AND COULD BE COUNTED AS PRIOR VIOLENT FELONIES FOR THIS PARTICULAR CASE.

THEY KILLED TWO OTHER INDIVIDUALS.

YES. BECAUSE HE DIDN'T KILL THEM ON THE SAME DAY. IT MAY HAVE BEEN PART AND PARCEL OF THE WHOLE CRIMINAL EPISODE, BUT THEY WERE NOT THE SAME AT THE SAME TIME. THEY WERE PRIOR TO MS. WALTERS' DEATH, SO THAT TAKES IT OUTSIDE OF RING. AND RECENTLY THIS COURT HAS REAFFIRMED BOTTOSON, KING, PORTER, SPENCER, ANDERSON, FOTOPoulos, AS THAT THE STATUTORY MAXIMUM IN FLORIDA IS DEATH, AND THAT, A DEFENDANT IS DEATH-ELIGIBLE, UPON THE TIME OF CONVICTION, AND ALSO THAT THE UNITED STATES SUPREME COURT HAS NOT OVERRULED ANY OF THE CASES AFFIRMING OR UPHOLDING FLORIDA'S CONSTITUTIONALITY OF THE DEATH PENALTY STATUTE, AND AS I SAID, THERE ARE TWO PRIOR VIOLENT FELONY CONVICTIONS. SO WHETHER, SO IN ANY CASE, THIS PARTICULAR DEATH PENCIL, THIS DEATH SENTENCE IS CONSTITUTIONAL. IF THE COURT DOESN'T HAVE ANY OTHER QUESTIONS, WE RELY ON OUR BRIEF AND ASK THAT YOU AFFIRM THE DENIAL OF 3.850 AND DENY ANY HABEAS RELIEF. THANK YOU.

CHIEF JUSTICE: REBUTTAL. MR. MARSHAL, HOW MUCH TIME IS LEFT ON REBUTTAL? OKAY.

YOUR HONORS, A DEFENDANT IS ENTITLED TO THE MEANINGFUL ACCESS OF THE COURTS AND TO JUDICIAL REVIEW OF HIS COLLATERAL PROCEEDINGS, AND THE PURPOSE OF PROVIDING COLLATERAL COUNSEL TO THE POSTCONVICTION DEFENDANTS, IS MEANINGLESS, IF ONE ONLY LOOSE TO THE PROCEDURAL NATURE OF THE REPRESENTATION AND NOT TO THE SUBSTANCE.

WOULDN'T YOU WANT, THAT IF WE WERE EVER TO SAY THERE HAD TO BE SOME SAFEGUARD, THAT THE THRESHOLD SHOWING WOULD HAVE TO BE MORE THAN JUST AN ALLEGATION OF, THAT THEY WERE INEFFECTIVE, AND WOULD HAVE TO BE MORE THAN JUST SAYING THAT THEY WERE CIVIL LAWYERS RATHER THAN CRIMINAL LAWYERS, TO GET PAST THE FACT THAT THIS HAS

BEEN THROUGH EVERY HAS BEEN THROUGH AN APPEAL, HAS BEEN THROUGH SEVERAL POSTCONVICTIONS, THAT, WHICH HAS TO BE SOMETHING IN THE NATURE OF A MOTION THAT YOU WOULD RAISE AS NEWLY-DISCOVERED EVIDENCE, ALMOST, TO HAVE, GET PAST THIS. OTHERWISE WE WILL BE BACK IN LOOKING AT EVERY CASE THAT OCCURRED ALL THROUGHOUT THE '80s AND THE EARLY '90s, WHEN THINGS WERE JUST SOMEWHAT DIFFERENT IN HOW THESE THINGS WERE LITIGATED. THERE WOULD BE NO FINALITY. AND I DON'T THINK, IN FAIRNESS, I WOULD JUST HAVE TO BE, IT WOULD HAVE TO BE SOMETHING THAT WOULD BE PRETTY APPARENT, IN ORDER TO GET PAST WHAT REALLY LAMBRIX IS SAYING, NOT THAT PEOPLE AREN'T ENTITLED TO GOOD POSTCONVICTION LAWYERS. OF COURSE WE WANT THAT. BUT THAT IN ORDER TO ACTUALLY LITIGATE A SUCCESSIVE SUCCESSIVE CLAIM, THAT IT WAS JUST WOULD HAVE TO BE SOMETHING LIKE THERE WAS IN WILLIAMS, WHERE SOMEONE MISSES A DEADLINE OR SOMETHING OF THAT NATURE, TO REALLY COMPEL THIS COURT TO HAVE TO GIVE SOME TYPE OF RELIEF, AND SO FAR THERE HASN'T BEEN ANYTHING IN THIS CASE THAT RISES, AT LEAST FROM MY POINT OF VIEW, TO THAT LEVEL.

BUT I THINK, IN TERMS OF THE FACT THAT A POSTCONVICTION DEFENDANT ONLY HAS ONE CHANCE TO RAISE AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THEIR FIRST OPPORTUNITY AT POSTCONVICTION REVIEW, AND IF YOU DO NOT REQUIRE THAT THAT COUNSEL BE EFFECTIVE, THEN THAT RIGHT IS MEANINGLESS, BECAUSE THERE ARE NO SAFEGUARDS TO PROTECT THEM.

THANK YOU VERY MUCH.

THANK VERY MUCH.

CHIEF JUSTICE: THANK YOU BOTH.