02-1342 and 02-2021

MARSHAL: PLEASE RISE. HEAR YE.HEAR YE.HEAR YE. THE SUPREME COURT OF THE GREATSTATE OF FLORIDA IS NOW IN SESSION.ALL WHO HAVE CAUSE T O PLEA , DRAW NEAR , AND GIVE ATTENTION. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA ANDTHIS HONORABLE COURT. LADIES AND GENTLEMEN , THE FLORIDA SUPREME COURT.PLEASE BE SEAT THE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE AND WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE EVERYBODY BEINGREADY ON THE FIRST CASE , AND WITHOUT ANY FURTHER ADO, WE WILL CALL THE CASE OF WAINWRIGHT VERSUS STATE. IF COUNSEL IS READY , YOU MAY PROCEED. IF COUNSEL WILL INTRODUCE YOURSELF ABDICATE TO US WHICH PARTICULAR POINT YOU AND KP YOU WILL INDICATE TO US WHICH PARTICULAR POINT YOU ARE GOINGTO BRIEF TO U S AT THIS POINT THIS MORNING.

MAY IT PLEASE THE COURT . MY NAME IS JOSEPH HOBSON AND I REPRESENT THE APPELLANT ANTHONY WAINWRIGHT , WHO CHALLENGES A JUDGMENT OF DEATH POSTCONVICTION , IN MAY OF 1995 , ON A TRIAL COURT BY JURY.I WOULD LIKE TO DISCUSS , TODAY , FROM MY BRIEF, SUBMITTED BY M R . ARNOLD. I WILL ARGUE THE BRIEF TODAY , BUT ISSUES ONE , TWO, FOUR AND SEVEN. I WOULD LIKE TO BEGIN BY DISCUSSING THE ISSUE OF ADDITIONAL EVIDENCE THAT WAS ADMITTED IN MR . WAINWRIGHT 'S TRIAL. BEFORE MENTIONING THAT , THE FIRST TWO ISSUES WERE ISSUES DISPOSED OF WITHOUT AN EVIDENTIARY HEARING , AND I WOULD SUBMIT IF THIS COURTFOLLOWED THE AUTHORITY OF PATTON , IT WOULD FIND A STRONG PRESUMPTION IN FAVOR OF A HEARING, SO THAT THESE ISSUES CAN BE BETTER FERRETED OUT. IT WAS LATER DISCLOSED TO MR . WAINWRIGHT'S ATTORNEY IN THIS CASE, SPECIFICALLY ON MAY 18 , 5:00 P.M., SEVEN HOURS AFTERHIS ATTORNEY MADE OPENING STATEMENTS, THERE WERE THREE ADDITIONAL DNA SLIDES THAT HAD BEEN PROCESSED BY A N FDLE LAB IN JACKSONVILLE .

THIS WAS SORT OF FLUSHED OUT AT THE TIME THAT IT WAS ACTUALLY INTRODUCED AT TRIAL , WASN'T IT?

WHAT HAD HAPPENED

DIDN'T THE JUDGE HAVE A HEARING ON THIS AT THAT TIME?

JUSTICE QUINCE, THE JUDGE GRANTED A 24-HOUR CONTINUANCE.

SO WHAT ARE YOU NOW MAINTAINING WAS ACTUALLY IMPROPER IN THAT?

WELL , I AM MAINTAINING THAT IT WAS AN ABJECT DISCOVERYVIOLATION.IT WAS EFFECTIVELY TRIAL BY AMBUSH BY THE PROSECUTOR .

WAS YOUR REQUEST FOR A RICHARDSON HEARING?

THERE WAS NOT , YOUR HONOR , AS NOTED

BUT WE ARE HERE OPPOSE THE CONVICTION. WHAT IS THE DEFICIENCY THAT YOU ARE ALONG I THINKING?

THE DEFICIENCY , YOUR HONOR , WAS THAT THE DEFICIENCY WAS NOT SUBJECTED TO A

RICHARDSON HEARING.

ARE YOU SAYING THAT IS NOT WHAT MAKES COUNSEL , WE ARE HERE ON AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM?

THAT'S CORRECT , YOUR HONOR.

SO COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A RICHARDSON HEARING?

THAT'S CORRECT, YOUR HONOR .

SO YOU ARE SAYING THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING ON THIS WHETHER HE WAS IN EFFECTIVE?

THAT IS THE WORST , JUSTICE, ARE YOU SUGGESTING THAT THE TRIAL COURT , I AM SUGGESTING THAT THE TRIAL COURT , IN DISPOSING OF THE 3.850 CLAIM , ACTUALLY SHOULD HAVE HAD A HEARING ON THE DNA HEARING, IN TERMS OF WHETHER OR NOT IT WAS DEFICIENT PERFORMANCE AND THEN PURSUE A REQUEST FROM AM NOT TO HAVE A RICHARDSON HEARING.

THE QUOTE/UNQUOTE RICHARDSON HEARING WAS, IN FACT , LITIGATED , A MOTION IN LIMINE , AND DEFENSE COUNSEL ARGUED THAT HE WAS PREJUDICED BY THIS DISCOVERY BEING PROVIDED LATE?

JUSTICE , IT DOES. HOWEVER, I SUBMIT THAT THE STRICT PROTOCOL OF THE RICHARDSON HEARING, NOT BEINGCALLED A RICHARDSON HEARING , IT BEING CALLED SOMETHING ELSE , DID NOT SATISFY THE ABJECT PREFERENCE , THAT I S THE JURY HEARING WHAT THE EVIDENCE WAS GOING TO SHOW, AND THAT JURY , WAS IMMEDIATELY DAMAGED BY THE CREDIBILITY OF WHAT WAS COMING OUT BY TRIAL , ORIGINALLY BY MR . WAINWRIGHT IN HIS STATEMENTS.

TELL US WHAT HAPPENED,AFTER THE STATE SAID THAT IT HAD THIS OTHER EVIDENCE. YOU HAVE ALREADY MENTIONEDABOUT THE 24-HOUR CONTINUANCE. ANOTHER MOTION.

GIVE US A MORE COMPLETE PICTURE OF HOW THIS CAME ABOUT AND THEN WHAT OCCURRED. ANOTHER MOTION IN LIMINE WAS DENIED, AND THEN THE EVIDENCE WAS ADMITTED. THE THREE ADDITIONAL WERE ADMITTED.

WHAT IS THE ESSENCE OF THAT?

THIS CASE HAD BEEN SET FOR MARCH AND HAD A CHANGE OF VENUE. IT WAS GUN IN MARCH AND RESETFOR MAY AND THE DEFENSE KNEW THAT THEY WERE IN THE PROCESS OF POSSIBLY OBTAIN ING THESE THREE

HOW MUCH DO W E KNOW ABOUT THAT? THAT IS REALLY WHAT I AM LOOKING FOR , IS A MORE COMPLETE PICTURE OF WHAT THE RECORD SHOWS US , AS FAR AS THE CIRCUMSTANCES HERE, REALIZINGTHERE WAS A MOTION IN LIMINE . THERE WASN'T A FORMAL RICHARDSON HEARING. BUT THINGS OBVIOUSLY WENT ON , SO TELL ME , GIVE US A COMPLETE PICTURE OF WHAT WENT ON , AND THEN YOU KNOW , WHAT THE STATE HAD TO SAY AND WHAT THE RECORD REFLECTS ABOUT THAT.

WELL, THE STATE HAD TO SAY, YOUR HONOR , THAT

YOU ARE SAYING THE STATE HAD TO SAY. I AM NOT TALKING ABOUT WHAT THE STATE HAD TO SAY. WHAT DID THE STATE SAY, ANDWHAT ACTUALLY HAPPENED?

THE STATE SAID , AS I INDICATED EARLIER , YOUR HONOR , THAT DEFENSE HAD BEEN O N NOTICE.

IS THERE SOME INDICATION OF THAT , IN THE RECORD? IS THAT JUST A BEAR STATEMENT OR IS THAT

I BELIEVE THERE IS SOME INDICATION IN DIRECT , YOURHONOR.

WOULDN'T THAT BE IMPORTANTFOR US TO KNOW?

IT WOULD , YOUR HONOR .

WHAT D O WE KNOW ABOUT THAT?

I CAN ONLY SAY I BELIEVE, IF I CAN HAVE A MOMENT , AS INDICATED

IN OTHER WORDS WAS THE STATE TAKING THE POSITION THAT THIS, THAT IT WAS REALLY NOT A SURPRISE TO THE DEFENSE. THAT THE DEFENSE WAS AWARE THAT THE STATE WAS WORKING ON THIS?

THAT WAS THE POSITION OF THE STATE , YOUR HONOR .

DOES THE RECORD BEAR THAT OUT?

IT DOES, YOUR HONOR.

WAS THAT THE CLAIM OF INEFFECTIVE NESS, THEN , THAT MR . SANDCASTLE KNEW WHAT WAS COMING OUT, THEN GIVE A N OPENING STATEMENT. IS THAT HOW THE CLAIM WAS PHRASED? IT IS A LITTLE DIFFERENT FROM NOT REQUESTING A RICHARDSON HEARING. IF HE WAS INEFFECTIVE BECAUSEHE KNEW THIS INFORMATION WASCOMING OUT AND HE GAVE AN OPENING STATEMENT SAYING YOU ARE ONLY GOING TO HEAR THERE ARE THREE OF THESE MATCHES . YOU REALIZE , I GUESS , YOU ARE A SUCCESSOR COUNSEL , SO YOU DIDN'T FRAME THE ORIGINAL 3.850 , BUT CAN YOU TELL US IF IT IS BROAD ENOUGH TO HAVE CONCLUDED THAT PART OF THE ISSUE, THAT IS THAT THE DEFENSE KNEW OR SHOULD HAVE KNOWN AND THEREFORE WAS IMMEDIATELY , THE CREDIBILITY WAS DESTROYED BY MAKING SUCH AN OUTRIGHT STATEMENT THAT THEY ARE ONLY GOING TO HEAR THERE ARE THREE LOCI OR WHATEVER.

THAT PART , YOUR HONOR , AND ALSO THE FAILURE OF THE STATE , THE FAILURE OF DEFENSE COUNSELAFTER THE STATE HAD PREVAILEDUPON THE MOTION IN LIMINE, TO MOVE FOR FORMAL RICHARDSON HEARING AND ALSO TO MOVE FOR SOME SORT OF MISTRIAL , BASED ON PROSECUTORIAL

SEE, THE PROBLEM WITH THOSEKINDS O F THINGS IS THAT, REALLY, THAT IS , AGAIN , A LOT OF 20/20 HINDSIGHT AND WHAT THE JUDGE WOULD HAVE DONE , BUT IS THE PLEADING THAT WAS FILED ON BEHALF OF MR . WAINWRIGHT , BROAD ENOUGH TO INCLUDE THE ALTERNATIVE ALLEGATION THAT THE DEFENSE COUNSEL KNEW AND THEREFORE WAS RENDERED DEFICIENT PERFORMANCE BY MAKING A REPRESENTATION ON SOMETHING THAT H E SHOULD HAVE KNOWN WASN'T GOING TO BE BORNE OUT?

THE ORIGINAL 3.850, YOUR HONOR , I BELIEVE IT IS , ANDNOT ONLY THAT BUT , AGAIN, A FAILURE TO NOT MOVE FOR THE MISTRIAL AND THE FAILURE , ONCE HE HAD NOT PREVAILED ON THAT MOTION. ANOTHER PROBLEM WITH THOSECLAIMS, SAYING FAILURE, THATHE COULD HAVE MOVED FOR A MISTRIAL, IS THAT THAT GOES BACK TO WHAT JUSTICE CANTERO WAS RAISING. IT LOOKS LIKE MOST OF THAT WAS RAISED ON DIRECT APPEAL , ABOUT THAT IT WAS REMEDIED AND SO FORTH . BUT IF SOMEBODY SAYS SOMETHING , LIKE YOU ARE GOING TO HEAR THIS TESTIMONY, AND THE PERSON SHOULD KNOW THAT TESTIMONYTHEY WON'T HEAR ABOUT I T , THEN THERE IS, MAYBE , A DEFICIENCY . THE QUESTION IS, THEN , WHETHER THERE IS PREJUDICE , AND YOU WANT TO ADDRESS

THAT IS NOT HOW THE PLEADING WAS FORMULATED , IS IT , ABOUT THE OPENING STATEMENTS AND INEFFECTIVE ASSISTANCE IN THE WAY THAT OPENING STATEMENTWAS MADE?

NOT EXACTLY , YOUR HONOR .

THAT IS WHAT I WAS ASKING YOU.I THOUGHT I ASKED WAS IT BROAD ENOUGH TO INCLUDE THAT, BECAUSE THAT IS AN ALTERNATIVE ALLEGATION. YOU KNOW, REALIZING YOU ARE NOT THE ORIGINAL COUNSEL , PLEASE BE FORTHRIGHT IF THAT IS NOT THE WAY IT WAS , THEN

I BELIEVE , I GUESS IT IS A TERM OF ART TO FIGURE IS THE PLEADING BROAD ENOUGH TO ARGUE THAT THERE WERE ADDITIONAL INFERENCES FROM IT .

WELL , WHAT , YOU KNOW, YOU SAY INFERENCES FROM IT. DO YOU UNDERSTAND THE QUESTION THAT WE ARE POSING?

YES, YOUR HONOR.

I AM NOT SURE THAT YOU DO. THE QUESTION, I THINK , THAT IS BEING POSED HERE , IS , IS THERE AN ALLEGATION HERE , THAT COUNSEL , OKAY , HAVING SOME KNOWLEDGE THAT THIS OTHER EVIDENCE MAY BE PRESENTED , WENT BEFORE THE JURY AND MADE THIS BOLD STATEMENT THAT THE ONLY EVIDENCE WOULD BE THUS AND SO. EVEN THOUGH COUNSEL KNEW OR SHOULD HAVE KNOWN THAT THIS OTHER EVIDENCE WAS BEING WORKED ON AND PREPARED , AND THEREFORE HE REALLY DAMAGED HIS OWN CREDIBILITY AND THE CREDIBILITY OF THE DEFENSE , BY MAKING THAT BOLD STATEMENT , WHEN HE SHOULD HAVE BEEN MORE CAUTIOUS YOU KNOW , HAVING BEEN AWARE OF WHAT WAS , YOU BELIEVE THE ALLEGATIONS IN THE POSTCONVICTION MOTION ABOUT INEFFECTIVENESS OF COUNSEL ABOUT THEIR EW , ARE BROADENOUGH TO INCLUDE AN INEFFECTIVENESS AS TO THAT POINT?

JUSTICE , THEY ARE NOT AS SPECIFIC AS YOU JUST ARTICULATED.

RIGHT.

I APPRECIATE CLARIFYING THAT.

ALL RIGHT.

LET ME ASK YOU ABOUT THAT , THE PREJUDICE RESULTINGING FROM THIS , BECAUSE WASN'T THERE OTHER RESULTING FROM THIS , BECAUSE WASN'T THERE OTHER TESTIMONY OF SEVERAL WITNESSES , THAT WAINWRIGHT ADMITTED T O SEXUALLY ASSAULTING THE VICTIM , ISN'T THAT WHAT THE DNA EVIDENCE WENT TO?

THAT'S CORRECT , YOUR HONOR , AND I , WITH MANY OF THESE ISSUES , OF COURSE , IT IS KIND OF DIFFICULT T O DECIPHER OUT JUST WHAT DEGREE OR WHAT MEASURE THIS PARTICULAR ISSUE HAD, BUT I WOULD LIKE TO ADDRESS THE ISSUE RAISED BY YOU , JUSTICE , AND I WOULD LIKE TO TALK ABOUT BOTH ISSUES, TWO AND SEVEN , AND THAT WAS THE ISSUE OF THE STATEMENTS THAT WERE ELICITED FROM MR . WAINWRIGHT.

BEFORE YOU GO ON.

CERTAINLY.

WAS THE DNA EVIDENCE , WAS THAT INTRODUCED TO PROVE THATTHERE WAS SEMEN OR SPERM IN THE VICTIM FROM THE DEFENDANT?

YES, YOUR HONOR. THE BACKSEAT OF THE BRONCO.

SO THE OTHER WITNESSES ESSENTIALLY TESTIFIED THE SAME THING , IT WAS MORE THAN ONE WITNESS THAT SAID HE ADMITTED TO SEXUALLY ASSAULTING THE VICTIM , RIGHT?

WELL , I MEAN, I F YOU COUNTHIM AS A WITNESS , THAT WOULD BE CORRECT, YOUR HONOR.

SO HE ADMITTED THIS , TOO.

WELL , ACCORDING TO THE STATEMENTS THAT ARE ELICITED , I REFERENCE IN ISSUES TWO AND SEVEN , ISSUE TWO I S , RELATES TO STATEMENTS THAT ARE ELICITED FROM MR . WAINWRIGHT , WHEN HE WAS DEDAND IN DETAINED IN MISSISSIPPI BY SHERIFF READ, WHO HAD SHERIFF REED, WHO HAD TRAVELED OUT THERE TO QUESTION HIM , AND ALSO THE CLAIM BY HIS ORIGINAL ATTORNEY , THE LATE VICTOR AFRIKANO : THERE WERE THREE STATEMENTS SHERIFF REED TESTIFIED TO , ATTRIBUTED TO MR . WAINWRIGHT. ONE GIVEN ON MAY 11 , '94 , WAS REPLANNED TO KILL HER. WE DIDN'T WANT ANYTHING LIKE JEWELRY TO BE FOUND ON HER BODY. THE OTHER , GIVEN ON MAY 20 , WAS A PUNITIVE ADMISSION OF M R . WAINWRIGHT, OF HAVING SEXUALLY ASSAULTED THE VICTIM, AND THE THIRD WAS THAT , A STATEMENT ON MAY 10 OF '94 , THECONVERSATION BETWEEN THE CODEFENDANT , MR . HAMILTON , AND WAINWRIGHT, IN WHICH

WER E THESE STATEMENTS THE SUBJECT OF MOTIONS TO SUPPRESS IN THE TRIAL COURT?

NO , THEY WERE NOT, YOUR HONOR . NONE OF THESE STATEMENTS CAME UP I N THE DEPOSITION O F SHERIFF , O F DEPUTY REED , ANDTHEY WERE MENTIONED FOR THEFIRST TIME A T TRIAL. THERE WAS AN ALLEGED DEAL BETWEEN SHERIFF REED AND MR . WAYNE WRIGHT, THAT IF HE COULDPASS A POLYGRAPH , COULD SHOW HE DIDN'T ACTUALLY MURDER THE VICTIM

THERE WAS NO OBJECTION AT THE TIME OF THE INTRODUCTION OF THIS STATEMENT ?

THERE WAS AN OBJECTION TO IT , YOUR HONOR, BUT THERE WASN'T , AND THERE WAS A MOTION FOR MISTRIAL , BUT THE PROBLEM WAS MR . AFRICAN-, AND THIS - - MR . AFRIKANO , AND THIS INVOLVES ISSUE SEVEN

CAN YOU JUST STICK ON ISSUE TWO FOR A SECOND .

CERTAINLY. ISSUE TWO IS THAT THE STATEMENTS MADE BY MR . WAINWRIGHT, WERE NOT PROVIDED TO THE DEFENSE COUNSEL, UNTIL SHERIFF READ TOOK THE STAND , SO , AGAIN, AS WITH THE DNA EVIDENCE, YOU EFFECTIVELY HAVE DISCOVERY CONTINUING AFTER TRIAL HAD BEGUN, AFTER THE OPENING STATEMENTS HAD BEGUN.

AND, AGAIN, DIDN'T TRIAL COUNSEL ARGUE THAT THE DEFENSE WAS PREJUDICED AND T HAT THE STATE HAD COMMITTED A DISCOVERY VIOLATION?

HE DID, YOUR HONOR, BUT WE FEEL THAT, AND I THINK THIS IS MENTIONED IN THE BRIEF , THE PARTICULAR MOTION FOR MISTRIAL,HE ARGUED , SHOULD HAVE BEEN MORE AFTER CUMULATIVE.

SO YOU ARE NOT ARGUING THAT HE FAILED TO ARGUE. YOU ARE ARGUING THAT HE FAILED TO ARGUE WELL ENOUGH?

YES, YOUR HONOR .

BEFORE YOU RUN OUT OF TIME, I NEED T O ASK YOU A QUESTION ABOUT THE HABEAS , AND THAT IS WOULDN'T THE APPRENDI AND RING ISSUES THAT YOU RAISE IN THE HABEAS , BE PROPERLY IN A 3.851?

WELL

MY QUESTION , REALLY , GOES TO WHY SHOULD IT BE IN THE HABEAS. THE STATE RESPONDS THAT , REALLY , HABEAS ES ARE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL , AND YOU ARE NOT CLAIMING INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.YOU ARE JUST CLAIM AGO STRAIGHT UP CONSTITUTIONAL ISSUE , CORRECT?

YES, SIR.

AND THAT WOULD B E PROPERLY IN A 3.851.

YES. AT THE TRIAL COURT LEVEL . YES, SIR.

I HAVE A QUESTION. YOU REALIZE YOUR GENERAL SUCCESSOR COUNSEL, WHEN LOOKING AT, WHEN YOU TOOK OVER THE CASE, DID YOU LOOK OVER THE ENTIRE TRIAL RECORD? THERE IS, REALLY YOU ARE NOT ARGUING ANY INEFFECTIVE ASSISTANCE IN THE PENALTY PHASE OR ARE YOU ARGUING THAT?

THAT IS MAINTAINED IN THE BRIEF , YOUR HONOR , BUT THAT IS NOT ONE OF THE ISSUES I A M DEVELOPING ON TODAY .

OKAY .

I WILL SAVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MEREDITH CHARBULA FOR THESTATE OF FLORIDA. JUSTICE QUINCE, MAY I PLEASE ADDRESS YOUR QUESTION, REGARDING WAS THERE A MOTION FOR SUPPRESS THE STATEMENTS MADE FROM MAY 9 TO MAY 20. THE ANSWER TO YOUR QUESTION IS YES. COUNSEL FILED A MOTION TO SUPPRESS ALL OF THOSESTATEMENTS, ON THE BASIS O F TWO THINGS. NUMBER ONE, THAT THEY WERE MADE IN CONNECTION WITH A PLEA AGREEMENT . THIS COURT ADDRESSED THAT ISSUE ON DIRECT APPEAL AND RULED THAT THOSE STATEMENTS , MADE TO LAW ENFORCEMENT, WERE MADE IN THE PERFORMANCE PHASEOF THE PLEA AGREEMENT AND WERE NOT PROTECTED BY THE PLEA PRIVILEGE . THAT WAS , ALSO , THE RULING BY THE TRIAL COURT. ADDITIONALLY , IT WAS DURING THE MOTION TO SUPPRESS , ACTUALLY , SHERIFF REED DID TESTIFY ABOUT A MAY 10 O 11 STATEMENT MADE BY - - MAY 10 OR 11 STATEMENT MADE PIE MR . WAINWRIGHT THAT THEY PLANNED TO KILL HER AND THAT IS WHY THEY THREW THE JEWELRY OUT . IT WAS DETECTED , BASED ON DISCOVERY.

IT WAS NOT DISCUSSED , DURING THE COURSE OF THE SHERIFF'S DEPOSITION THAT WAS ACTUALLY INTRODUCED AND GIVEN TO DEFENSE ATTORNEY, I ASSUME, ON THE VERY DAY THAT HE WAS TESTIFYING.

THAT'S CORRECT.ON THE MOTION TO SUPPRESS, NOT BEFORE THE JURY . IS M Y RECOLLECTION OF THE RECORD. AND THE DEFENSE COUNSEL OBJECTED. THE TRIAL JUDGE CONDUCTED , THOUGH HE DIDN'T USE THE TERM A RICHARDSON HEARING, HE INQUIRED OF TRIAL COUNSEL OF THE REASON FOR THE LATE DISCOVERY OR THE LATE DISCOVERY. TRIAL COUNSEL EXPLAINED THAT IT WAS INADVERTENT . THE COURT FOUND THAT.

WHAT DOES THAT MEAN THAT , IT WAS IN VERYENT ? INADVERTENT ? WHAT DOES THAT MEAN ? THE PROBLEM THAT WE ARE HAVING HERE IS THE FIRST RICHARDSON KIND OF ISSUE, WITH FAILURE TO DISCLOSE, THE INFORMATIONABOUT THE DNA , AND THEN WE GETTO THE SECOND RICHARDSON KIND OF PROBLEM WITH THE FAILURE TO DISCLOSE THE STATEMENT ALLEGEDLY THAT WAS MADE BY THE DEFENDANT , AND SO YOU KNOW , WE ARE GETTING TO A SITUATION WHERE THE DEFENDANT IS PUT IN THE POSITION OF HAVING TO YOU KNOW , SORT OF DEFEND

THESE THINGS ON THE SPUR OF THE MOMENT.

WELL , ONE THINKT TRIAL COURT FOUND WAS THAT THE STATEMENT THAT WAS MADE ON THE TENTH OF MAY AND WELL , ONE THING THAT THE TRIAL COURTFOUND WAS THAT THE STATEMENTTHAT WAS MADE ON THE 10th OF MAY AND THE 11th OF MAY WERE NOT SIMILAR , SO THERE WAS ONE CONVERSATION BETWEEN THE SHERIFF AND MR. WAINWRIGHT BETWEEN THE 9th AND 11th OF MAY, AND MR . WAINWRIGHT MADE A STATEMENT THAT HAD BEEN DISCLOSED , CONCERNING A PLAN OR DISCUSSING BETWEEN MR . HAMILTON AND MR . WAINWRIGHT THAT THEY INTENDED TO KILL HER , SO MR . , THE TRIAL COUNSELFOUND THAT - - SO THE TRIALCOURT FOUND THAT COUNSEL WASN'T PREJUDICED BY THIS LATEST DISCLOSURE.

NOW, ON THE FIRST ISSUE OF THE DNA, WHAT DOES THE RECORD REVEAL AS TO WHETHER DEFENSE COUNSEL KNEW THAT THE STATE WAS CONTINUING TO ATTEMPT TO GET SOME MORE DNA MATCHES?

IF I MIGHT ANSWER THAT QUESTION IN TERMS OF WHAT THE RECORD SHOWS , IN ANSWERING , TRYING TO ADDRESS YOUR CONCERNS TO JUSTICE ANSTEAD , DURING THE PRELIMINARY HEARINGS AND PRIOR TO THE TIME THAT THE PARTIES WERE UNABLE TO SELECT THE JURY IN HAMILTON COUNTY , OCCURRED IN MARCH, A HEARING WAS HELD ON A MOTION FOR CONTINUANCE , AND THAT IS IN THE RECORD IN VOLUME 10 O F THE TRIAL RECORD. COUNSEL NOTIFIED THE COURTTHAT HE HAD BEEN DISCLOSED T O LOSY I , AND THAT TO LOCI, AND THAT PUT THE PROBABILITY OF ONE IN 10,000. THE STATE STOPPED AT THAT MOMENT , PRIMARILY BECAUSE THEY HAD THE ADMISSION BY MR. WAINWRIGHT TO SHERIFF REED THAT HE HAD RAPED CARMEN GAY HEART IN THE BACK O F THE BRONCO , SPECIFICALLY BECAUSE HE TOLD THE SHERIFF THAT HE WAS NAKED WHEN HE RAPED HER. THE STATE OFFERED TO STOP TESTING AND THE DEFENSE COUNSEL FOR MR . WAINWRIGHT SAID THAT IS A GREAT IDEA , AND THE DEFENSE COUNSEL SAID NO, I WANT TO CONTINUE TESTING , BECAUSE IF THAT IS EXCULPATORY TO MY CLIENT, THEN I WANT TO FIND IT. HE GOT IT REDUCED TO ONE IN A MILLION CHANCES IT WAS SOMEONE ELSE. AFTER A JURY WAS UNABLE TO B E SELECTED IN MA'AM ILTON TOUNT COUNTY IN HAMILTON COUNTY BECAUSE OF PRETRIAL PUBLICITY , TESTING CONTINUED , BUT AS OF THE DAY OF MAY 18 , THE DAY HE GAVE OPENING STATEMENTS, THE RESULTS HAD NOT COME FORWARD .

ISN'T , I GUESS, I MEAN, THAT IS, TO ME , EITHER , IT IS A PROBLEM , ISN'T IT? I MEAN, IT IS A PROBLEM, IN THAT SOMEBODY MAKES AN OPENINGSTATEMENT , BASED ON THE STATEOF THE RECORD THAT THEY ARE ENTITLED TO RELY ON , ON THE DAY THAT TRIAL STARTS, AND MAKES, I MEAN, IT IS A PRETTY YOU KNOW , AGAIN , THERE MAY NOT BE PREJUDICE IN TERMS OF THE SECOND PRONG , BUT HE PUTS HISCREDIBILITY ON THE LINE BY SAY YOU ARE ONLY GOING TO HEAR THERE ARE THREE. NOW, I MEAN, STILL AS YOU SAY, ONE IN A MILLION AND HE HAS GOT THE ADMISSIONS.MAYBE IT JUST DOESN'T MATTER,BUT I T SEEMS LIKE H E REALLY STAKES HIS CREDIBILITY ON MAKING THAT STATEMENT , AND THEN IT JUST IS TOTALLY UNDERMINED, SO I DON'T KNOW WHETHER IT , WE HAVE DEALT WITH IT ON DIRECT APPEAL , BUT I T DOES SEEM DISCONCERTING AND JUST SORT OF FOLLOWING UP ON WHAT JUSTICE QUINCE SAYS , IF THESE TWO ISSUES YOU KNOW , AGAIN , WHAT IS THE REASON THAT THE STATE IS DOING THIS , AFTER THE TRIAL BEGINS ?

I THINK THAT YOU HAVE HIT IT, FIRST OF ALL , YOU HAVE HIT THE NAIL ON THE HEAD THATTHERE IS NO PREJUDICE IN HERE BASED ON THE STATEMENTS, BUT ITHINK YOU HAVE TO LOOK AT THEFACT THAT, AS OF THE MORNING OF TRIAL , THESE THREE LOCI HAD NOT BEEN TURNED OVER. MR . TAYLOR WAS AN EXPERIENCED COUNSEL AND THAT WAS FLUSHED OUT AT THE EVIDENTIARY HEARING, AND I THINK IT WAS PROBABLY REASONABLE ON HIS PART TO BELIEVE THAT HE WAS NOT GOINGTO GET THIS ADDITIONAL EVIDENCE.

THE ISSUE HERE, WHICH I S , WAS COUNSEL INEFFECTIVE , SO AFTER OPENING STATEMENT, WHERE

HE TALKS ABOUT THREE LOCI, AND THE STATE PRESENTS THE OTHER LOCI, THE DEFENSE COUNSEL OBJECTED AND SAID I JUST GAVE OPENING STATEMENTS SAYING THREE?I AM PREJUDICED?

OF COURSE HE DID. IN FACT, HE FILED A MOTION IN LIMINE ON MAY 22 , WHICH WAS FOUR DAYS AFTER THE EVIDENCE WAS DISCLOSED . A HEARING WAS HELD ON MAY 24. AND , AGAIN , THOUGH THE COURT DIDN'T SAY IT WAS A RICHARDSON INQUIRY , THE COURT INQUIRED INTO THE LATE DISCLOSURE . HE DETERMINED THAT, IN FACT HE DETERMINED THAT THE DEFENSE WAS NOT PREJUDICED DURING THIS SAME HEARING THAT THE PROSECUTOR SAID THAT , DUE TO THE FACT THAT THIS TRIAL ENDED UP , OPENING STATEMENTS WAS MAY 18 , AND I THINK THE VERDICTCAME IN AROUND MAY 30. HE SAID I WON'T MAKE A COMMENT DURING CLOSING STATEMENT , ON THE FACT THAT YOU PROMISED SOMETHING THAT DIDN'T COME TRUE, SO I WON'T EMPHASIZE IT , AND TRIAL COUNSEL STILL VIGOROUSLY ATTACKED THE DNA , SHOWING DURING CLOSING STATEMENTS, SAYING THAT THE DNA DID NOT SHOW THERE WAS A SEXUAL BATTERY. AND HE, ALSO , MOVED FOR A MISS STRIL A MISTRIAL , BY THE WAY , CONTRARY TO COUNSEL'S REPRESENTATIONS , HE MOVED FORA MISTRIAL TWICE , SUBSEQUENT TO THE ADMISSION O F THE DNA AND OBJECTED AGAIN , AT THETIME IT WAS ADMITTED THROUGHDR . POLLACK, INQUIRING DURING VOIR DIRE OF DR . POLLACK , PRIOR TO THE TIME THAT HE TESTIFIED BEFORE THE JURY , ABOUT THE LATE DISCLOSE YOOERYOUR AND RENEWED DISCLOSE YOUR AND RENEWED HIS OBJECTION, AND SHORT OF TYING HIM UP AND PUTTING HIM IN THE BROOM CLOSET, HE DID EVERYTHING HECOULD TO GET THIS EVIDENCE OUT.

WHEN YOU SAID IN THE OPENING STATEMENT , WHY NOT FOUR, FIVE OR SIX , YOU WILL NOT HEAR FROM ANY EXPERT FROM THE STATE THAT THEY CAN ASSERT WITH ANY DEGREE OF ASSERTIVE NESS THAT ANTHONY WAINWRIGHT IS THE DONOR OF THE SAMPLE.AT THAT POINT , FIRST OF ALL , THERE WAS ALREADY A THIRDPROBE THAT SAID ONE IN A MILLION .

THAT'S CORRECT.

AND YOU ARE SAYING HE WAS NOT AWARE , DIDN'T HAVE BASIS TO BE AWARE THAT THERE WAS PROBABLY GOING TO BE MORE PROBES THAT WERE GOING TO BE OFFERED, AT THE TIME HE MADE THAT STATEMENT?

I THINK THAT , BASED UPON HIS CONTINUED DEMANDS FOR CONTINUOUS TESTING IT, THAT HE WAS AWARE, UP UNTIL THE TIME OF TRIAL , THAT TESTING WAS CONTINUED. IN FACT , HE STATED AT THE MARCH 27 HEARING THAT , HE UNDERSTOOD TESTING WOULD TAKE AT LEAST SIX WEEKS , BUT ON THE MORNING OF TRIAL, HE DIDN'THAVE THOSE RESULTS, AND I THINK PROBABLY A REASONABLE TRIAL COUNSEL WOULD BELIEVE THAT THE STATE WASN'T GOING TO GET THAT DONE ON TIME . AND THEN , WHEN THE STATE DID PROVIDE THAT, I MEAN, THE STATE PROVIDED THAT AS SOON AS IT GOT, IT AND THERE WAS NO EVIDENCE THAT THE STATE HAD KNOWN THE TESTING WAS COMING IN ON THAT DAY. AND THE COURT, THEN , HELD A HEARING , CONSIDERED THE REMEDY THE STATE SAID IT WOULD MAKE SURE IT DIDN'T MENTION THAT DURING CLOSING. AND , REALLY, I T DIDN'T CHANGE MR . TAYLOR'S APPROACH TO THEDNA EVIDENCE , BECAUSE THERE WAS SOME EVIDENCE INTRODUCED AT TRIAL FROM A LAB CALLED GENETIC TESTING DESIGN , WHICHONLY COULD PUT HIM IN THE BACK OF THE BRONCO , ONE IN 17,000 OR SO BECAUSE THEY DID A DIFFERENT TYPE OF TESTING, AND HE STILL ARGUED THAT THERE WERE INCONSISTENCIES IN THE DNA AND EVEN IF THE DNA DID SHOW THAT HE WAS IN THE BACK OF THE BRONCO , MS. GAYHEART'S BODY WAS S O BADLY DECOMPOSED , THAT IT COULDN'T SHOW . CANDIDLY HE DIDN'T CONTESTTHAT THE DNA WAS THERE , PRIMARILY BECAUSE HE ALSO HAD CONFESSION TOSS IN MATES AND TO SHERIFF REED SPECIFICALLY, WHICH WAS ADMITTED AT TRIAL , THAT HE HAD RAPED HER IN THE BACK OF THE BRONCO .

HOW MANY OR WITNESSES BESIDES THE DEFENDANT , TESTIFIED THAT HE SAID HE HAD SEXUALLY ASSAULTED THE VICTIM?

WELL , THE DEFENDANT DIDN'T TESTIFY AT TRIAL .

BUT HIS STATEMENTS WERE INTRODUCED.

HIS STATEMENTS WERE INTRODUCED IN EVIDENCE. I BELIEVE HE ADMITTED T O INMATES GUNTHER AND MURPHY , HIS INVOLVEMENT IN THE MURDER AND THE RAPE.HE , ALSO , ADMITTED TO SHERIFFREED THAT HE HAD RAPED HER. FOR CERTAIN, HE ADMITTED TO GUNT TEHRAN GUN TEHRAN MURPHY THAT HE TO GUNTHER AND TO SHERIFF REED THAT HE HAD KILLED HER, SHOTER IN THE HEAD WITH A .22 CALIBER RIFLE.

THIS IS GOING OUT ON SOMETHING DIFFERENT , WHICH IS, WHAT , THESE ARE JAILHOUSE INMATES THAT TESTIFIED?

THAT'S CORRECT, AND MR . TAYLOR VIGOROUSLY ATTACKED THEIR CREDIBILITY A T TRIAL, AND THE JURY KNEW THAT THEY WERE INMATE INFORMANTS , AND , BUT , SHERIFF REED, ALSO, TESTIFIED THAT , ON THE 20th , WHEN MR . WAINWRIGHT SUBMITED FOR ANOTHER INTERVIEW AND WAS ACTUALLY DUE TO TAKE THE POLYGRAPH , HE ADMITTED THAT HE HAD RAPED MS. GAYHEART.

HELP ME WITH THE RECORD , WHEN COUNSEL FOR THE DEFENDANTWAS MAKING HIS OPENING STATEMENTS, WHAT WAS HIS UNDERSTANDING AS TO THE NATURE OF THE DNA EVIDENCE AND WHAT ADDITIONAL TESTING WAS BEING DONE?

MR . WAINWRIGHT DIDN'T, OR DIDN'T PUT ON ANY SPECIFIC TESTIMONY ABOUT IT, HIMSELF , BUT MR . , DURING THE HEARINGS OF MARCH 27 , MR . TAYLOR ACKNOWLEDGED THAT HE HAD HAD THREE OR ULTIMATELY THAT SAME DAY HE HAD THREE LOCI AND THAT HE EXPECTED THE TESTING TO LAST SIX AND-A-HALF WEEKS , BUT UP TO THAT POINT , THE MORNING HE MADE OPENING STATEMENTS , HE HAD NOT RECEIVED ANY RESULTS AND THERE WAS NO INDICATION THAT EITHER THE STATE OR DEFENSE KNEW THAT THE , THAT D R . POLLACK WAS GOING TO SUBMIT HIS REPORT THAT DAY.

SO THE REPORT WAS RECEIVED THE DAY OF OPENING STATEMENTS, LATER IN THE DAY.

THAT'S CORRECT. AND DEFENSE COUNSEL SOUGHT TO EXCLUDE THE LATE DISCLOSED LOCI , BASED ON THAT LATE DISCLOSURE.

BUT COUNSEL KNEW THAT THE TESTING WAS CONTINUING?

AS OF MARCH 27, H E ANNOUNCED HE KNEW T.

THIS IS A QUESTION I A M BASICALLY TRYING TO GET TO. THERE IS AN ANOTHER THEREIS ANOTHER WAY TO LOOK AT I T AS EXCELLENT DEFENSE STRATEGY , TO MAKE A REPRESENTATION TO THE JURY THAT THIS IS THE ONLY EVIDENCE, IF, IN THE BACK OF THE MIND, HE KNEW THE TESTING WAS CONTINUING . BECAUSE THEN IT STRENGTHENS THE ARGUMENT AS HAS BEEN DISCUSSED HERE, THAT IT WOULD BE PREJUDICIAL TO ALLOW THE SUBSEQUENT RESULTS IN , SO I AM TRYING TO PLACE , MYSELF, WHAT DID COUNSEL KNOW , AT THE TIME HE WAS MAKING THE STATEMENT?

I THINK THAT, BASED O N HIS EXPERIENCE , COUNSEL WAS VERY AWARE OF WHAT WAS GOING ON IN THIS CASE, BUT THERE IS NOTHING IN THE RECORD THAT I CAN FLESH OUT ABOUT HIS PARTICULAR TACTICAL REASONS, EXCEPT THAT HE DIDN'T HAVE THE RESULTS AT THAT POINT.

BUT HE KNEW THAT THE TESTING WAS CONTINUING?

HE INDICATED AT THE MOTION TO SUPPRESS, THAT HE DID NOT KNOW THAT THEY WERE GOING

TO CONTINUE TO TEST THREE LOCI. THAT WAS SOMEWHAT INCONSISTENT WITH HIS DEMAND FOR TESTING ON MARCH 27 , BUT HE DID TESTIFY , WHEN HE SOUGHT TO EXCLUDE THE EVIDENCE, THAT HE WAS UNAWARE , AT THE TIME HE GAVE OPENINGSTATEMENT, THAT THE REPORT WOULD BE RECEIVED.

THERE WAS NO EVIDENTIARY HEARING HERE, TO QUESTION COUNSEL ABOUT THINGS LIKE THAT , IS THAT RIGHT?

THAT'S CORRECT.

COULD YOU MOVE ON TO ISSUE SEVEN.

ISSUE SEVEN , COUNSEL OR COLLATERAL COUNSEL CLAIMEDTHAT MR . AFRICAN -BLOW AFRI THAT MR . AFRICANO , WHO WAS TERMINALLY ILL AT THE TIME OF THE EVIDENTIARY HEARING , WAS CLEAR I N MISREPRESENTATION WHEN HE ARGUED IN THE PLEA AGREEMENT . AND THAT WAS IF HE TESTIFIED AGAINST MR. HAMILTON , IT WAS MADE CLEAR TO MR . WAINWRIGHT THAT, IF HE TOOK AND PASSED THE POLYGRAPH THAT HE WAS NOT THE TRIGGERMAN , THAT THEY WOULD ENTER INTO A PLEA WITH HIM , WHERE HE WOULD GET A LIFE SENTENCE. MR. WAINWRIGHT , THIS WAS THE ONLY ISSUE THAT MR. WAINWRIGHT TESTIFIED ABOUT THE EVIDENTIARY HEARING, AND HE TESTIFIED THAT MR . AFRIKANO COMMUNICATED THIS PLEA AGREEMENT. IT WAS HIS UNDERSTANDING INITIALLY THAT HE HAD TO PASS A POLYGRAPH REGARDING RAPING HER AND KILLING HER BURKES THAT ON MAY 10 , SPECIFICALLY MAY 10 , HE REALIZED, AND HE UNDERSTOOD, WHEN HE WAS TALKING TO THE POLICE OFFICERS, THAT HE HAD A PLEA AGREEMENT , SUBSEQUENTLY ON MAY 20, HE WENT TO THE HAMILTON COUNTY , BELIEVE THEY DID IT IN A CONFERENCE ROOM OF THE HAMILTON COUNTY SHERIFFS OFFICE, AND REVEALED TO SHERIFF REED THAT H E HAD RAPED MISS GAYHEART IN THE BACK OFTHE BRONCO AND THEN REFUSE ADD POLYGRAPH.MR. WAINWRIGHT CLAIMS THAT HE REQUESTED FOR A WRITTEN PLEA AGREEMENT AND THAT NONE WAS FORTHCOMING , THOUGH NONE, HE NEVER TESTIFIED ONE WAS REFUSED , EITHER. SHERIFF REED TESTIFIED AT THE EVIDENTIARY HEARING , THAT WHEN ASKED BY COLLATERAL COUNSEL , ISN'T IT TRUE THAT HE ASKEDYOU FOR A PLEA AGREEMENT , HE SAID H E DIDN'T RECALL IT HAPING THAT WAY AND TESTIFIED IT HAPPENING THAT WAY ANDTESTIFIED THAT NO MENTION AFTER WRITTEN PLEA AGREEMENT , WAS, TO HIS RECOLLECTION, CAME FROM WAINWRIGHT OR MR. AFRIKANO. WAINWRIGHT CANNOT SHOW PREJUDICE.HE HAS TAKEN A POLYGRAPH. HE HAS NOT PASSED A POLYGRAPH. HE HAS NOT DEMONSTRATED THAT HE COULD MEET THE PLEA AGREEMENT. THEREFORE HE CAN SHOW NO PREJUDICE.

THERE WAS AN EVIDENTIARY HEARING ON THIS , ASSURE INDICATING.

DID HE, INDEED.

DID THE HE DID , INDEED.

DID THE TRIAL COURT MAKE ANY FINDINGS OF FACT, IN OTHER WORDS GIVING US A PICTURE , AS FOUND BY THE TRIAL COURT AT LEAST , O F WHAT WAS OF WHATHAPPENED HERE, AS FAR AS WHAT THE UNUSUAL PLEA ARRANGEMENTWAS AND WHETHER IT EXISTED ANDWHAT THE TERMS OF IT WERE AND , IN OTHER WORDS, THE TRIAL JUDGE TAKE A STAB AT , AFTER THIS EVIDENTIARY HEARING , OF GIVING US A VIEW OF WHAT HE BELIEVED ACTUALLY HAPPENED?

YOU MEAN.

CAN WE TELL?

YES OF WHAT HE BELIEVED ACTUALLY HAPPENED ? CAN WE TELL?

YES, HE DID. HE FOUND IT CREDIBLE. SECOND, HE FOUND THAT THE PLEA AGREEMENT WAS BREACHED O R TERMINATED . THE PLEA NEGOTIATED A BREACH, BECAUSE HE FOUND THE TERMS COULD NOT BE MET.

SO HE NORB IATED SO H E NEGOTIATE ADD PLEA AGREEMENT, AT LEAST THE CRITICAL PART OF IT , TAKING A POLYGRAPH AND PASSING IT AS TO WHETHER ORNOT HE WAS THE ACTUAL SHOOTER, SO THE TRIAL COURT FOUND THAT SUCH A PLEA AGREEMENT DID EXIST, BUT THAT THE DEFENDANT IS THE ONE THAT BREACHED THEPLEA AGREEMENT. IS THAT , I AM TRYING TO , IS THAT

EXACTLY RIGHT. HE FOUND THAT THE ONLY REASON THE PLEA AGREEMENT WAS BREACHED, WAS NOT BECAUSE ANY INEFFECTIVE ASSISTANCE OF COUNSEL OF MR . AFRI CONFORM ANO, BUT AFRIKANO , BUT IT WAS BECAUSE THE DEFENDANT REFUSED THE POLYGRAPH BECAUSEHE KNEW HE COULDN'T PASS IT , AND THAT WAS POINTED OUT I N STATEMENTS BY JERRY GUNTHER AND MURPHY. HE SAID THAT HE COULD NOT MEET THE CONDITIONS OF THE AGREEMENT.HE COULD NOT PASS A POLYGRAPH TO DEMONSTRATE THAT HE DID NOT RAPE AND KILL THE VICTIM, WERE JUST WHAT HIS WORDS WERE.

AND HE ULTIMATELY ENDS UP BEING TRIED IN ANY CASE , IS THAT CORRECT?

SIR?

HE GETS A TRIAL , WHERE HIS GUILT AND PUNISHMENT ARE DETERMINED.

ARE FULLY LITIGATED BEYOND, TO THE EXCLUSION OF A REASONABLE DOUBT. WITH AN EXPERIENCE ED TRIALCOUNSEL , WHO HAS TRIED MANY , MANY CASES.

SO YOUR, THE STATE 'S BOTTOM LINE ABOUT THIS IS THAT , REGARDLESS OF WHAT THE SCENARIO WAS , THAT THERE CAN BE NO DEMONSTRATION OF PREJUDICE.

ABSOLUTELY NONE. IF THE COURT HAS N O FURTHERQUESTIONS , THANK YOU VERY MUCH FOR YOUR TIME.THE STATE WOULD ASK THAT THIS COURT AFFIRM THE DENIAL OF POSTCONVICTION LEAVE AND DENY MR . WAINWRIGHT 'S HABEAS PETITION.

LET ME ASK YOU ONE OTHERQUESTION, AND IT IS ABOUT THE HABEAS PETITION.WE HAVE FOUND THAT THE HABEAS PETITIONS WHICH USUALLY ARE ADDRESSED TO THE CONDUCT O F APPELLATE COUNSEL IN THESE CAPITAL CASES , INVARIABLY NOW , INCLUDE RING CLAIMS, AND JUSTICE WELLS HAS ASKED A QUESTION ABOUT WOULDN'T IT BE MORE APPROPRIATE FOR THOSE CLAIMS , AFTER RING WAS DECIDED , TO HAVE BEEN FILED AS PART OF THE POST-CONVICTION RELIEF , IN A TRIAL COURT PROCEEDING , AS OPPOSED TO BEING FILED DIRECTLY IN THIS COURT? THE STATE , IN MOST OF THE RESPONSES TO THESE , HAS NOT SAID ANYTHING ABOUT THAT . DO YOU HAVE A VIEW ABOUT THAT?

I DO. I BELIEVE THAT IT IS APPROPRIATELY RAISED IN THE TRIAL COURT. IN FACT , BECAUSE THE ISSUE IS NOT SO NEW AND NOVEL, I BELIEVE COUNSEL SHOULD RAISE IT IN THE TRIAL COURT AT TRIAL . THIS ISSUE ABOUT JURY SENTENCING AND FINDINGS OF FACT , THE JURY HAS BEEN AROUND IN SPAZIANO AND HILDWIN, SO I THINK FIRST OF ALL IT SHOULD BE RAISED IN THE TRIAL COURTAND THEN SHOULD BE RAISED ON DIRECT APPEAL.

BUT AS FAR AS THOSE CASESTHAT ARE IN THE POSTURE OF ALLOF THAT , IT HAS ALREADYHAPPENED, IF IT IS GOING TO BE RAISED , IT WOULD BE MORE APPROPRIATE FOR IT TO BE RAISED IN THE TRIAL COURT , IN A POSTCONVICTION SUCCESSIVE POSTCONVICTION MOTION , IS THAT THE STATE'S

I CERTAINLY THINK THAT PUTTING IT TO THE TRIAL COURT INITIALLY, I THINK , I S PREFERABLE ,

AND , OF COURSE, THIS COURT CAN GIVE SOME GUIDE ABS ON THAT . SOME GUIDANCE ON THAT , THAT WILL GIVE COLLATERAL COUNSELGUIDANCE ON WHERE THIS COURTBELIEVES IT IS APPROPRIATE TO BE RAISED .

CHIEF JUSTICE: THANK YOU. 4 COUNSEL , WOULD YOU ADDRESS CLAIM SEVEN , A S ADDRESSED BY THE STATE HERE. THAT IS ISN'T THE BOTTOM LINE OF THAT CLAIM , THAT IT IS VIRTUALLY IMPOSSIBLE FOR YOUR CLIENT TO SHOW PREJUDICE ?

JUSTICE, I WOULD SUBMIT THAT , HAD ATTORNEY AFRIKANO BEEN MORE PIVOTALLY INVOLVED IN THE INITIAL PHASE OF THE CASE, WHICH IS IN MANY CRIMINAL CASES THE MOST IMPORTANT PHASE , HE WOULD HAVE HAD MORE AFTER HAND IN PUTTING TOGETHER THE AGREEMENT THAN HE DID.IT IS INDICATED IN SOME PARTS OF RECORD, THAT THE DEAL WAS ACTUALLY PUT TOGETHER BY SHERIFF REED AND MR . WAINWRIGHT, AND THAT ALL, THEONLY ROLE THAT MR . AFRIKANO PLAYED , WAS JUST TO , OR COUNSELED HIS CLIENT TO COOPERATE FULLY . ANOTHER DEFENDANT DOESN'T ARGUE THAT THE DEAL ITSELF , WAS UNJUST OR NOT GOOD ENOUGH THAT , COUNSEL DIDN'T NEGOTIATE A PROPER DEAL , ASSUMING THE DEAL INCLUDED NO DEATH PENALTY AND A CONDITIONTHAT HE TESTIFY TRUTHFULLY ON A POLYGRAPH , HE DOESN'T ARGUE THAT THOSE CONDITIONS WERE UNJUST CONDITIONS, DOES HE?

NO. HE DOES NOT

SO SINCE THOSE ARE NOT UNJUST CONDITIONS , THEN HOW IS THERE PREJUDICE WE AGREED THAT A CONDITION OF THE PLEA AGREEMENT WAS THAT HE WOULDTAKE AND PASS A POLYGRAPH AND THEN HE , LATER , REFUSES TO TAKE THE POLYGRAPH , THUS ASSURING THAT ONE OF THE CONDITIONS CANNOT BE MET.

WELL , I THINK THE REASON, JUSTICE , HE LATER ON REFUSED TO TAKE THE POLYGRAPH , IS H E DIDN'T UNDERSTAND, AND THAT WAS BECAUSE ATTORNEY AFRIKANO WASN'T INVOLVED ENOUGH AND WASN'T, SHORTLY THEREAFTER , HE GOT OFF THE CASE AND ALLOWED THE STATEMENTS TO BE ELICITED THAT WERE S O DAMAGING TO HIM.

DOES THIS CLAIM SEVEN ARGUE THAT THE DEFENDANT DID NOT UNDERSTAND AND THAT COUNSEL DID NOT ARTICULATE TO HIM THAT HE WOULD HAVE TO TAKE AND PASS POLYGRAPH EXAMINATION, AS PART OF THE PLEA AGREEMENT?

THERE IS THAT INFERENCE , JUSTICE THERE.IS A SUGGESTION

I AM NOT TALKING ABOUT INFERENCE. I AM TALKING ABOUT A STATED CLAIM S THERE A STATED CLAIMTHAT THAT WAS PART OF THE INEFFECTIVENESS OF COUNSEL?

I DON'T KNOW IF I CAN CALL IT A SPECIFIC CLAIM, YOUR HONOR. MIGHT HAVE TO , IT , I KNOW YOU HAVE A DISTASTE FOR AN INFERENCE , BUT THAT MIGHT BE THE WAY

I WANTED, FIRST, TO SEE IFTHERE WAS A SPECIFIC CLAIM. IF YOU NOW SAY THERE IS NO SPECIFIC CLAIM, WHAT, IN THE CLAIM THAT WAS STATED , CAN IMPLY THE CLAIM THAT YOU NOW SUGGESTION?

WELL , YOUR HONOR , JUSTICE , IF YOU LOOK AT THE BREVITY OF MR . AFRICAN-'S INVOLVEMENT , THE DEGREE TO WHICH H E ALLOWEDLAW ENFORCEMENT TO KIND OF HAVE AT HIS CLIENT WITHOUT HIM THERE , THERE IS , I THINK , A FAIR SUGGESTION THAT ONE OF THE REASONS MR . WAYNE WRIGHT MIGHT HAVE REFUSED TO HAVE TAKEN THE POLYGRAPH, WHICH IT IS INDICATED HERE, IS IT JUST WASN'T FULLY EXPLAINED TO HIM.

W E DON'T NEED TO RELY ON THE PLEADINGS NOW , BECAUSE MR . WAYNE WRIGHT TESTIFIED AT THE EVIDENTIARY HEARING , CORRECT?

YES , HE DID.

DID HE TESTIFY AT THE EVIDENTIARY HEARING THAT, WHEN COUNSEL TOLD HIM ABOUT THEPLEA AGREEMENT, HE HAD NO IDEA THAT IT INCLUDED TAKING A POLYGRAPH EXAMINATION? DID HE SAY THAT?

HE DID ACKNOWLEDGE IT WITH SOME MENTION OF THE POLYGRAPH AGREEMENT .

I MEAN , DID HE MAKE ANY CLAIM , DURING HIS TESTIMONY, THAT IF HE TOOK A POLYGRAPH , THAT IT WOULD EXONERATE HIM AS THE SHOOTER?

NO, BUT

WOULDN'T HE HAVE TO DO THAT, AS PART OF A DEMONSTRATION OF PREJUDICE , THEN ? IN TERMS OF THE LATER CESSATION OF THE PLEA AGREEMENT.

I THINK THE DEMONSTRATION OF PREJUDICE IS MET BY THE KIND OF STATEMENTS THIS AFTERNOON ELICITED FROM H IMAND THE STATEMENTS THAT HE GAVE ON THE TENTH AND 12th , THAT HAD H E HAD A MORE PROACTIVE ATTORNEY RELATIONSHIP, THAT THOSE STATEMENTS

SURELY STATEMENTS HAD TO BE MADE, IF HE WAS GOING TO TAKE A POLYGRAPH EXAMINATION. THAT IS THAT , IF THAT IS WHAT THE DEAL WAS , AND I DON'T SEE HOW ANY REASONABLE PERSON COULD CONCLUDE THAT HE IS NOTGOING TO HAVE TO BE MAKING STATEMENTS, IF HE IS GOING TO BE GIVEN A POLYGLAF.

BUT CERTAINLY , AND IF WE HAD HAD ATTORNEY AFRIKANO REDUCE THAT TO WRITING, THEN WE WOULD HAVE TOOL TO GAGE WHAT WAS EXPECTED .

BUT EVEN IF HE GAINED WHAT THE PLEA AGREEMENT WAS , HOW COULD THERE BE A DEMONSTRATION OF PREJUDICE?

I THINK IF YOU FACTOR IN, AS I SAID, THE BREVITY OF MR . AFRIKANO'S REPRESENTATION AND THE OTHER CUMULATIVE EFFECTIVE CIRCUMSTANCES , THERE IS A CLAIM.

ISN'T ONE WAY TO VIEW THIS , THAT GIVEN THE BREVITY OF MR . AFRIKANO'S REPRESENTATION, HE DID AN EXCELLENT JOB IN OBTAINING A PLEA AGREEMENT FOR THE DEFENDANT , AND ALL HE HAD TO DO WAS COMPLY WITH THE CONDITIONS. THE DEFENDANT AGREED WITH THE CONDITIONS AND THEN HE REFUSED TO COMPLY WITH THEM.

I THINK HE WOULD HAVE DONE A BETTER JOB, JUSTICE , IF HE HAD PUT IT IN WRITING, AND IF HE HADN'T

WE ARE NOT HERE TO DETERMINE WHETHER COUNSELCOULD HAVE DONE A BETTER JOB. WE ARE HERE TO SEE WHETHER HIS PERFORMANCE WAS DEFICIENT , TO THE EXTENT THAT HE WAS NOT PERFORMING AS THE DEFENDANT'S COUNSEL , AND WHAT IS THERE IN MR . AFRIKANO'S REPRESENTATION THAT WOULD LEAD T O THAT CONCLUSION?

I WOULD SUBMIT , JUSTICE , THAT IN A CAPITAL CASE , POTENTIAL CAPITAL CASE AT THIS POINT, IT WAS TO HAVE AN AGREEMENT LIKE THIS AND NOT TO HAVE IT REDUCED TO WRITING , ITWOULD BE A DEFICIENT PERFORMANCE AS TO STRICKLAND.

THANK YOU AND WE APPRECIATE YOU BOTH RESPONDING TO OUR INQUIRIES AND QUESTIONS. THANK YOU.