David Snelgrove v. State of Florida

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: THE NEXT CASE THIS MORNING, IS SNELGROVE VERSUS STATE OF FLORIDA. ARE THE PARTIES READY?

YES, YOUR HONOR.

CHIEF JUSTICE: ALL RIGHT. AS I UNDERSTAND, YOU ARE GOING TO BE DIVIDING YOUR TIME. ALL RIGHT. JUST BE MINDFUL OF THE DIVISION. YOU MAY PROCEED.

THANK YOU, YOUR HONOR. GOOD MORNING. MY NAME IS JAMES WULCHAK, ASSISTANT PUBLIC DEFENDER FROM DAYTONA BEACH, AND SEATED AT COUNSEL TABLE IS LARRY HENDERSON, ALSO ASSISTANT PUBLIC DEFENDER, AND WE REPRESENT MR. SNELGROVE ON TWO COUNTS OF ARMED BURGLARY AND WITH AN ASSAULT. WITH TIME RESTRAINTS, I WOULD LIKE TO FOCUS AND ARGUE ON POINTS 1, 2 AND 5, AND MR. HENDERSON WILL BE ARGUING POINT 6 REGARDING BURDEN SHIFTING. JUST A VERY BRIEF STATEMENT OF THE FACTS. THIS WAS A DOUBLE HOMICIDE OF MR. AND MRS.^FOWLER IN THEIR HOME. THE EVIDENCE REVEALED THAT THE DEFENDANT WAS IN THE HOUSE AND TOOK MONEY AND JEWELRY. HE HAD CUT HIS HAND ON THE WINDOW GLASS, UPON ENTRY INTO THE HOME AND BLED PROFUSELY THROUGHOUT THE HOUSE, WITH A TRAIL OF BLOOD GOING TO THE DRESSER WHERE IT WAS RIFLED THROUGH AND VARIOUS LOCATIONS IN THE HOUSE, BUT SAVE FOR A SMALL BLOOD SMEAR ON MRS.^FOWLER'S ANKLE, WHICH WAS LEFT, ACCORDING TO THE EXPERTS, WHEN HER BODY WAS MOVED, NONE OF THE DEFENDANT'S BLOOD WAS ON ANY OF THE VICTIMS, AND NONE OF THE VICTIMS' BLOOD WAS FOUND ON THE DEFENDANT, THUS IT WAS URGED BY THE DEFENSE BELOW AND ON APPEAL, THAT THE DEFENDANT WAS NOT THE ACTUAL KILLER. HE WAS IN THE HOUSE AND PARTICIPATED IN THE STEALING OF ITEMS THERE BUT WAS NOT THE ACTUAL KILLER AND WAS ONLY IN THE HOUSE AFTER THE KILLINGS HAD TAKEN PLACE FORM THE ONLY EVIDENCE POINTING THE FINGER AT THE DEFENDANT AS THE ACTUAL KILLER WAS THE TAINTED EVIDENCE AFTER JAILHOUSE SNITCH, WHO CLAIMED THAT THE DEFENDANT ADMITTED TO THE KILLING. THE FIRST POINT WE WOULD LIKE TO ADDRESS IS POINT ONE. WHETHER THE DEFENDANT WAS DENIED HIS RIGHT TO CONFLICT-FREE COUNSEL HE WILL, WHERE THE STATE INTERVIEWED OTHER CLIENTS OF THE PUBLIC DEFENDER WHO WERE HOUSED WITH THE DEFENDANT, AS TO CONVERSATIONS THEY HAD HAD WITH THE DEFENDANT REGARDING HIS CASE, REGARDING WHAT HIS ATTORNEY FELT ABOUT THE CASE, AND FDLE SPECIFICALLY ASKED THESE PUBLIC DEFENDER CLIENTS, WHAT THE DEFENSE STRATEGIC WAS GOING TO BE AT TRIAL.

THAT IS A BROADER ASSERTION THAN I UNDERSTAND THE ISSUE ON APPEAL, BEING SPECIFICALLY, RELATING TO MR. MATTHEWS.

THERE IS MR. MATTHEWS, WHO WAS ACTUALLY CALLED AS A WITNESS BY THE STATE. PRIOR TO HIS BEING CALLED AS A WITNESS, THE STATE ATTORNEY HAD AFFIRMATIVELY INFORMED DEFENSE COUNSEL THAT MR. MATTHEWS HAD PRIVATE COUNSEL AT THE TIME OF THESE CONVERSATIONS.

CHIEF JUSTICE: BUT I AM SAYING YOU START BY MAKING AN ASSERTION THAT THIS THERE WAS THIS BLANKET QUESTIONING OF ALL OF THESE WITNESSES.

YES, YOUR HONOR.

CHIEF JUSTICE: THAT WERE REPRESENTED BY -- YES, YOUR HONOR, AND WE ARE CONTENDING IT IS A TWO-FOLD CONFLICT, ONE IN CONFLICT WITH GARY MATTHEWS, WHO WAS CALLED TO TESTIFY AND ALSO A CONFLICT WITH THESE OTHER POTENTIAL WITNESSES THAT WERE LISTED BY THE STATE AND INTERVIEWED BY THE STATE, AS TO DEFENSE TACTICS.

CHIEF JUSTICE: IS THERE A RECORD EVIDENCE OF THESE OTHER --

YES, YOUR HONOR. WHAT HAPPENED WAS TWO WEEKS, APPROXIMATELY TWO WEEKS PRIOR TO TRIAL, A CASSETTE TAPE APPEARED ON COUNSEL'S DESK THAT WAS AN INTERVIEWED WITH ONE OF HIS FORMER CLIENTS BY FDLE AND HE IMMEDIATELY FILED A NOTICE OF POTENTIAL CONFLICT, AND A FEW DAYS LATER A SLEW OF TAPES ARRIVED FROM OTHER FORMER OR CURRENT PUBLIC DEFENDER CLIENTS THAT WERE INTERVIEWED. SOME OF THESE TAPES INDICATE ADD THAT DAVID SNELGROVE WAS VERY QUIET AND KEPT TO HIMSELF AND TIGHT-LIPPED AND DIDN'T DISCUSS HIS CASE WITH ANYONE.

WHEN YOU SAY THESE JUST APPEARED, FROM WHOM? UNDER WHAT CIRCUMSTANCES? ANOTHER STATE ATTORNEY PROVIDED THEM TO DEFENSE. LIKE I SAID, APPROXIMATELY TWO WEEKS BEFORE TRIAL, AND THEN THE STATE ATTORNEY HAD THE NERVE, DURING ARGUMENTS, TO SAY THAT TRIAL COUNSEL DELAYED IN THIS MOTION TO WITHDRAW AND WAS BRINGING THIS MOTION TO WITHDRAW ON THE EVE OF TRIAL. IT WAS BECAUSE OF THE STATE ATTORNEYS' ACTION INS THIS CASE THAT THAT HAPPENED. DEFENSE ATTORNEY MOVED TO WITHDRAW, ONCE HE FOUND OUT THAT THE PUBLIC DEFENDERS OFFICE DID REPRESENT GARY MATTHEWS BUT ALSO MOVED TO WITHDRAW BECAUSE OF THESE OTHER WITNESSES THAT HAD BEEN INTERVIEWED, SOME OF WHICH HAD EVIDENCE THAT MAY HAVE TURNED OUT TO BE MR. SNELGROVE. THEY SAID THAT SOME OF THESE INTERVIEWS THAT WERE ON TAPE WERE SUBMITTED WITH THE MOTION TO WITHDRAW AS APPENDIX. I DON'T KNOW IF THEY MADE IT INTO THE APPELLATE RECORD. IF THEY HAVEN'T, WE WOULD BE HAPPY TO SUPPLEMENT WITH THOSE TAPES, BUT THE SUBSTANCE OF THOSE TAPES WERE INCLUDED IN DEFENSE COUNSEL'S NOTICE OF POTENTIAL CONFLICT AND MOTION TO WITHDRAW, WHERE HE SAID --

HOW LONG DID HE KNOW ABOUT MATTHEWS AS A POSSIBLE WITNESS?

HE KNEW ABOUT MATTHEWS AS A POSSIBLE WITNESS, EARLIER THAN THESE TWO WEEKS. HOWEVER, THE STATE ATTORNEY DURING DEPOSITIONS, AFFIRMATIVELY INFORMED DEFENSE COUNSEL, THAT HE WAS NOT REPRESENTED BY THE PUBLIC DEFENDERS OFFICE. ON THE DEPOSITION OF MR. MATTHEWS, MR. MATTHEWS INDICATED THAT HE WAS REPRESENTED BY PRIVATE COUNSEL. IT WAS ONLY LATER, I BELIEVE, THE BEGINNING OF MAY, THAT THE DEFENSE COUNSEL FOUND OUT THAT, INDEED THE PUBLIC DEFENDERS OFFICE HAD REPRESENTED MR. MATTHEWS AT THE TIME OF THESE CONVERSATIONS, AND HE IMMEDIATELY WENT BACK UP TO THE COURTROOM, UPON DISCOVERING THIS IN THE CLERK'S FILE, AND INFORMED THE JUDGE, INFORMED THE STATE ATTORNEY, AND MADE A MOTION TO WITHDRAW AGAIN.

BUT THE PUBLIC DEFENDERS OFFICE KNEW ABOUT THE REPRESENTATION, BECAUSE THEY WITHDREW FROM REPRESENTING MATTHEWS, AS SOON AS THEY FOUND OUT THAT HE MIGHT BE A WITNESS IN THE, IN THIS CASE, CORRECT.

CHIEF JUSTICE: WHETHER, BEYOND THE DELAY ISSUE, ISN'T THE PROBLEM SOLVED WHEN MR. MATTHEWS AFFIRMATIVELY WAIVES ANY CONFIDENTIAL COMMUNICATION, AND THE ONLY ISSUE IN WHICH THERE MIGHT HAVE BEEN PREJUDICE TO MR. SNELGROVE, WOULD HAVE BEEN IN NOT VIGOROUSLY QUESTIONING HIM ABOUT WHETHER HE WAS FACING MORE SERIOUS CHARGES, AND THAT THAT IN FACT, THERE WAS NO LIMITATION ON THAT QUESTIONING, SO I AM HAVING, IN TERMS OF THIS, I CERTAINLY DON'T KNOW ABOUT THIS BLANKET QUESTIONING OF ALL PUBLIC

DEFENDER CLIENTS, BUT JUST ON THE MATTHEWS SITUATION, DIDN'T THAT CURE ANY POTENTIAL CONFLICT, ONCE THE TRIAL COURT FOUND OUT WHAT THE NATURE OF THE PROBLEM WAS? THERE WAS REALLY NO, THERE WAS NEVER ANY COMMUNICATION ABOUT, FROM MATTHEWS TO HIS LAWYER ABOUT WHAT HE WAS, KNEW ABOUT SNELGROVE, AND THEN THAT HE WAIVED ANY, YOU KNOW, CONFIDENTIALITY ABOUT WHAT THE PUBLIC DEFENDERS KNEW OR MIGHT COMMUNICATE?

WE RESPECTFULLY WOULD DISAGREE WITH. THAT FIRST OF ALL, HE DID NOT WAIVE ANY CONFLICT, UNTIL THE MIDDLE OF TRIAL. SECONDLY, WE MAY NOT OBTAIN THAT, UNDER THE FLORIDA BAR RULES, CONFLICT WAIVER MUST BE OBTAINED, NOT ONLY FROM THE FORMER CLIENT BUT ALSO FROM THE CURRENT CLIENT. MR. SNELGROVE FELT THAT HIS COUNSEL WAS CONFLICTED, BECAUSE OF THIS PRIOR REPRESENTATION IN THE OFFICE.

AS FOR THESE OTHER PEOPLE THAT YOU ARE TALKING ABOUT HERE TODAY, YOU SAID YOU GOT, THE TAPES WERE RECEIVED A COUPLE OF WEEKS BEFORE TRIAL, BUT WAS THERE ANY INDICATION EARLIER THAN THAT, THAT THESE PEOPLE HAD, IN FACT, BEEN INTERVIEWED? ANY STATEMENTS --

NO, YOUR HONOR.

-- ANY LISTING OF THEM AS WITNESSES OR ANYTHING?

NO, YOUR HONOR. IT WAS APPROXIMATELY TWO WEEKS PRIOR TO TRIAL, THAT THE DEFENSE HAD ANY NOTICE OF THIS.

THAT THEY WERE STILL PUBLIC DEFENDER CLIENTS.

SOME OF THEM WERE FORMER PUBLIC DEFENDER CLIENTS AT THAT TIME. SOME OF THEM WERE STILL CURRENT PUBLIC DEFENDERS CLIENTS. OUR APPELLATE DIVISION WAS CURRENTLY REPRESENTING THEM, AS WELL. IN ADDITION TO THE CONFLICT WITH MR. MATTHEWS, WE MAINTAIN THAT A CONFLICT SITUATION EXISTED, BECAUSE THESE OTHER INMATES, CLIENTS, HAD INFORMATION THAT THE DEFENSE ATTORNEY, BECAUSE OF HIS, THE OFFICE'S REPRESENTATION OF THOSE CLIENTS, FELT ETHICALLY CONSTRAINED TO NOT GO INTERVIEW THEM, TO NOT INVESTIGATE THEM. HE WOULD BE IN A POSITION WHERE --

THE STATE AGREED NOT TO CALL ANY OF THOSE WITNESSES BUT MATTHEWS, CORRECT?

THAT'S TRUE, YOUR HONOR. HOWEVER --

DOES THE DEFENSE IN RECIPROCAL DISCOVERY, LIST ANY OF THOSE CLIENTS AS WITNESSES FOR THE DEFENSE?

NO, BECAUSE HE FELT CONSTRAINED. HE COULD NOT GO TALK TO THEM BECAUSE OF THE REPRESENTATION. HE WAS IN A POSITION WHERE, IF HE HAD GONE TO TALK TO THOSE CLIENTS, HE IS THEIR, THE PUBLIC DEFENDERS OFFICE IS THEIR COUNSEL, AND HE WOULD BE IN A POSITION OF TELLING THEM, YOU HAVE TO WAIVE ANY CONFLICT, IN ORDER TO HELP MY CURRENT CLIENT, AND THAT IS UNTENABLE SITUATION.

YOUR BRIEF REFERRED TO THOSE WITNESSES AS ALL FORMER CLIENTS OF THE PUBLIC DEFENDERS OFFICE, SO IS YOUR BRIEF CORRECT OR YOUR REPRESENTATION NOW THAT IT HIS FORMER AND CURRENT CLIENTS OF THE PUBLIC DEFENDERS OFFICE?

FORMER AND CURRENT CLIENTS. SOME OF THEM WERE STILL REPRESENTED BY THE PUBLIC DEFENDERS OFFICE.

WAS THIS SPECIFIC QUESTION RAISED WITH THE TRIAL COURT?

YES. I BELIEVE IT WAS DISCUSSED, THEIR CURRENT, IN THE MOTION TO WITHDRAW, DEFENSE COUNSEL GAVE DETAILS ON THEIR REPRESENTATION BY THE PUBLIC DEFENDERS OFFICE, WHEN IT OCCURRED, HOW IT WAS STILL OCCURRING.

WHEN THE STATE SAID, JUDGE, WE ARE NOT GOING TO CALL ANY OF THESE WITNESSES, WHAT WAS TRIAL COUNSEL'S RESPONSE?

TRIAL COUNSEL'S RESPONSE IS, WELL, ACCORDING TO THESE TAPES, SOME OF THESE WITNESSES COULD BE FAVORABLE TO MR. SNELGROVE, BUT I AM IN AN ETHICAL BIND. I CANNOT GO COUNSEL THESE CLIENTS TO WAIVE ANY CONFLICT, TO HELP MY CURRENT CLIENT MR. SNELGROVE, BECAUSE THAT PLACES HIM IN AN UNTENABLE POSITION. HOW CAN HE COUNSEL THESE FOLKS TO GIVE UP THEIR RIGHTS, WHEN THEY COULD POSSIBLY BE AFFECTED BY THIS? THEY COULD BE CHARGED WITH PERJURY. THEIR CASES WERE STILL PENDING ON APPEAL, MAY HAVE A RETRIAL. THERE WERE ETHICAL CONSTRAINTS ON HIM THAT HE COULD NOT GO AND INTERVIEW THESE WITNESSES, SOME OF WHICH AS I SAID, THE INTERVIEW APPEARED FAVORABLE AND WAS CONTRARY TO WHAT MR. MATTHEWS WAS SAYING.

YOU DIDN'T CLAIM, NOW, ON THAT, YOU DIDN'T CLAIM A BRADY VIOLATION ABOUT THOSE TAPED INTERVIEWS, DID YOU?

NO, YOUR HONOR. THOSE WERE DISCLOSED PRIOR TO TRIAL. NOW, POINT NUMBER TWO IS A DISCOVERY BRADY VIOLATION, CONCERNING A LETTER WRITTEN BY MR. MATTHEWS.

CHIEF JUSTICE: I WANT TO MAKE SURE I UNDERSTAND. MAYBE I JUST DIDN'T HEAR YOUR ANSWER TO JUSTICE QUINCE'S QUESTION, ABOUT HOW THESE OTHER TAPES, JUST, DID THE STATE PROVIDE THEM?

YES. THROUGH DISCOVERY.

CHIEF JUSTICE: SO THEY DIDN'T JUST APPEAR.

NO. NO. I AM SORRY. WHEN I SAY THEY APPEARED, THAT IS THE PROCEDURE. THE DISCOVERY CAME FROM THE STATE AND WAS FOUND --

WERE THOSE TAPES PUT INTO THE RECORD AT THE HEARING?

THEY WERE ATTACHED TO THE MOTION TO WITHDRAW, AS APPENDIX A. AGAIN, I APOLOGIZE. I DON'T KNOW IF THEY WERE INCLUDED AND SENT UP TO THIS COURT OR NOT, BUT THE SUBSTANCE OF THOSE TAPES WERE DETAILED BY DEFENSE COUNSEL, IN HIS MOTION TO WITHDRAW, WHERE IT INDICATED THAT SOME WITNESSES SAID THAT, WHO ACTIVELY SOUGHT DEALS FROM THE STATE, SAID THAT HE WAS FORTHCOMING WITH DETAILS.

BEFORE YOU LEAVE THIS ISSUE, WOULD YOU FOCUS ON THE MATTHEWS CONFLICT ISSUE AND GIVE --

AS TO GARY MATTHEWS, THE STATE ATTORNEY AFFIRMATIVELY AND FALSELY INFORMED THE DEFENSE THAT HE WAS NOT A PUBLIC DEFENDER CLIENT AND IT WAS ONLY AFTER THE INITIAL DENIAL OF THE MOTION, DID DEFENSE COVER THAT THE OFFICE DID REPRESENT MATTHEWS AT THE TIME THESE STATEMENTS WERE ALLEGELY OBTAINED FROM MR. SNELGROVE. HE IMMEDIATELY, THEN, RENEWED HIS MOTION TO WITHDRAW, ADDING MR. MATTHEWS ONE OF THE CONFLICTS. AND FELT CONSTRAINED TO INVESTIGATE, AS I SAID, MR. MATTHEWS DID NOT WAIVE ANY CONFLICT, UNTIL THE MIDDLE OF TRIAL. THIS COMES TOO LATE FOR DEFENSE COUNSEL TO DO ANYTHING, TO DO ANY INVESTIGATION, AND ADDITIONALLY, MR. SNELGROVE, WHO HAS THE

RIGHT TO CONFLICT-FREE COUNSEL, WOULD NOT WAIVE THE CONFLICT, FELT THAT COUNSEL WAS CONSTRAINED IN HIS REPRESENTATION, BECAUSE OF THIS REPRESENTATION. AT THE OUTSET, WE WOULD LIKE TO INDICATE THERE ARE TWO STANDARDS WHEN YOU ARE DEALING WITH CONFLICT. ONE STANDARD, WHERE THERE IS NO MOTION TO WITHDRAW FILED AND THE ISSUE OF CONFLICT IS RAISED ONLY IN A COLLATERAL ATTACK. THE DEFENSE MUST PROVE THAT THERE WAS ACTUAL INEFFECTIVE ASSISTANCE OF COUNSEL AND MUST AFFIRMATIVELY SHOW THAT THE CONFLICT ACTUALLY IMPAIRED THE PERFORMANCE. THOSE WERE THE CASES CITED BY THE STATE BELOW. THOSE ARE THE CASES CITED BY THE STATE ON APPEAL. THOSE WERE THE CASES RELIED ON BY THE TRIAL JUDGE. HOWEVER, THERE IS A DIFFERENT STANDARD FOR THIS CONTEXT, WHERE DEFENSE COUNSEL BELIEVES HE HAS A CONFLICT PRIOR TO TRIAL, FILES A MOTION TO WITHDRAW. THERE IS REVERSIBLE ERROR, THE CASES HOLD, WHERE THERE IS A RISK OF CONFLICTING INTERESTS THAT EXIST.

WHAT WAS THE STATUS OF REPRESENTATION, AT THE TIME THE MOTION TO WITHDRAW WAS FILED, VIS-A-VIS MATTHEWS? WAS THE OFFICE STILL HEALTHING MATTHEWS AT THE TIME?

THE PUBLIC DEFENDERS OFFICE HAD BEEN RELIEVED OF HER REPRESENTATION OF MR. MATTHEWS.

HAD BEEN RELIEVED OR WITHDRAWN?

HAD WITHDRAWN.

CHIEF JUSTICE: AFTER IT BECAME KNOWN THAT MATTHEWS HAD INFORMATION THAT WOULD BE HELPFUL TO THE STATE, THE PUBLIC DEFENDERS OFFICE WITHDREW FROM REPRESENTATION, SO HOW COULD THE PUBLIC DEFENDERS OFFICE FEEL CONSTRAINED IN, WHEN THERE WAS NO LONGER ANY REPRESENTATION AND THERE WAS NO, EVER ANY COMMUNICATION REGARDING THE INFORMATION THAT HE HAD ON SNELGROVE?

WELL, YOUR HONOR, WE WOULD SUBMIT THAT AN ATTORNEY MAINTAINS CERTAIN RESPONSIBILITIES TO FORMER CLIENTS, ATTORNEY/CLIENT PRIVILEGE MATTERS, WHICH THERE WAS AN IN CAMERA HEARING HERE, WHERE DEFENSE COUNSEL INFORMED THE JUDGE THAT MR. MATTHEWS HAD BEEN, AT THE TIME THAT THESE CONVERSATIONS WITH MR. SNELGROVE ALLEGEDLY TOOK PLACE, THERE WAS JOINT REPRESENTATION, AND THE EVIDENCE WAS THAT MR. MATTHEWS WAS FACING MUCH MORE SEVERE CHARGES THAN HE WAS CHARGED WITH, AND HE INDICATED THAT HE HAD SOME INFORMATION AND DEFENSE COUNSEL, TRIAL COUNSEL MOVED TO WITHDRAW FROM HIS CASE, BUT AT THE TIME THAT THESE CONVERSATIONS TOOK PLACE, HE WAS REPRESENTED BY THE PUBLIC DEFENDERS OFFICE, JUST AS MR. SNELGROVE WAS.

WHERE DOES THE, KIND OF MELDING THE SECOND ISSUE AS TO THIS LETTER, WHERE DOES THIS COME INTO, HOW DOES THIS --

WHAT HAPPENED WAS, DURING THE SPENCER HEARING, GETTING TO THE ISSUE TWO, THE STATE, DURING THE SPENCER HEARING, DEFENSE COUNSEL [TECHNICAL DIFFICULTIES.] OF THE PD WITHDRAWING --

THIS LETTER WAS WRITTEN TO THE STATE ATTORNEYS OFFICE WHILE THE PUBLIC DEFENDER WAS STILL REPRESENTING MR. MATTHEWS.

OKAY, AND WHEN, BUT WHEN IT BECAME, SURFACED AND EVERYONE BECAME AWARE OF THE LETTER, WHERE WERE WE IN THE REPRESENTATION STAGE OF MATTHEWS?

MR. MATTHEWS HAD PRIVATE COUNSEL AT THAT TIME FOR APPOINTED. THE --

SO THEY HAD ALREADY HAD THAT ARGUMENT THAT YOU SAY WAS IN THE MIDDLE OF THE TRIAL,

ABOUT THE FACT THAT --

RIGHT.

-- THERE WAS AN ATTEMPT TO WITHDRAW, THAT HAD ALREADY OCCURRED.

YES.

IT WAS ONLY AT SENTENCING, AS YOU SAY AT THE SPENCER HEARING, BEFORE THE TRIAL JUDGE, THAT THIS LETTER WAS --

WHEN THE STATE ATTORNEY PRODUCED THIS LETTER THAT THEY HAD IN THEIR POSSESSION.

ALL OF THE TRIAL WAS OVER, THE JURY'S PARTICIPATION IN SENTENCING WAS OVER AND IT WAS THE JUDGE'S SPENCER HEARING.

RIGHT. THE STATE HAD POSSESSION OF THIS LETTER DURING THE TRIAL.

YOU SAID THAT IT WOULD CONSTITUTE SUBSTANTIAL IMPEACHMENT OF MATTHEWS'S TRIAL TESTIMONY.

YES.

WOULD YOU GO FURTHER NOW AND ARTICULATE TO US WHAT WAS HIS TESTIMONY THAT IT WOULD HAVE IMPEACHED?

HIS TESTIMONY AT TRIAL, I GUESS TRYING TO MAKE HIMSELF SOUND BELIEVABLE TO THE JURY THAT SOMEBODY WOULDN'T IMMEDIATELY OPEN UP TO HIM, WELL, IT TOOK HIM A FEW DAYS TO REALLY FEEL COMFORTABLE WITH ME BEFORE I REALLY GOT ANY DETAILS OF THE CASE. THIS LETTER WAS WRITTEN A DAY AND-A-HALF AFTER MR. SNELGROVE WAS IN MR. MATTHEWS'S CELL.

CHIEF JUSTICE: DIDN'T THE PUBLIC DEFENDERS HAVE A LETTER THAT WAS WRITTEN EARLIER THAN THAT, SAYING THE EXACT SAME THING? IN OTHER WORDS THE LETTER THAT MATTHEWS WROTE TO THE PUBLIC DEFENDER AND THEY HAD THAT IN THEIR POSSESSION.

THIS JUNE 28 LETTER REFERENCED A JUNE 27 LETTER THAT MR. MATTHEWS SAID HE WROTE TO HIS ATTORNEY, SAYING HE HAD INFORMATION IN ANOTHER CASE. THE LETTER IS NOT IN THE RECORD. I AM NOT AWARE THAT IT INDICATED, EVEN, WHO THIS OTHER CLIENT WAS. IN HIS JUNE 28 LETTER TO THE STATE ATTORNEYS OFFICE, HE SAID SPECIFICALLY I HAVE INFORMATION REGARDING MR. SNELGROVE'S CASE. I HAVE WRITTEN TO MY ATTORNEY BUT I HAVEN'T HEARD BACK FROM HIM. WELL, IT WAS ONLY A DAY LATER THAT HE WROTE THIS LETTER TO THE STATE ATTORNEYS OFFICE. IN THIS LETTER, AS I INDICATED, IT CONFLICTED WITH HIS TRIAL TESTIMONY. THIS LETTER INDICATED THAT HE HAD INFORMATION THE NEXT DAY AFTER MR. SNELGROVE WAS IN HIS CELL WITH HIM, WHEREAS HIS TRIAL TESTIMONY WAS, IT TOOK SEVERAL DAYS FOR HIM TO OPEN UP.

DID THE PUBLIC DEFENDER HAVE THAT LETTER THE DAY AFTER?

THERE IS NO INDICATION OF THAT, YOUR HONOR, AND I DO NOT KNOW WHEN THAT WAS RECEIVED BY THE TRIAL PUBLIC DEFENDERS OFFICE. I BELIEVE IT WAS RECEIVED BY THE, HIS TRIAL PUBLIC DEFENDER, WHO WAS IN FLAGLER COUNTY, AN OUTLYING COUNTY.

BUT THE LETTER ITSELF, REALLY, DOESN'T INDICATE ANY REAL INFORMATION, DOES IT? IT JUST SAYS HE HAS INFORMATION.

NO. NO. AND WHAT I SAY, AGAIN, IT SAYS HE ALREADY HAD THIS INFORMATION. WHEN HIS TRIAL

TESTIMONY WAS HE DIDN'T HAVE THIS INFORMATION YET. THE STATE ATTORNEYS OFFICE KNEW ABOUT THIS LETTER. THEY HAD IT IN THEIR POSSESSION. THEY HAD IT IN MR. MATTHEWS'S FILE. GEE, WHAT A STRANGE PLACE FOR IT TO BE.

COULD I GET A CLARIFICATION ON YOUR ARGUMENT? FACTUALLY, MATTHEWS RECEIVES INFORMATION AND THE PUBLIC DEFENDER WITHDRAWS IMMEDIATELY. IS THAT CORRECT?

YES, YOUR HONOR.

SO I AM HAVING SOME TROUBLE, THEN, ON THIS CONFLICT ISSUE, WE WOULD, ANY TIME THAT AN INDIVIDUAL THAT IS REPRESENTED BY THE PUBLIC DEFENDERS OFFICE, ACQUIRES INFORMATION, YOU HAVE AN AUTOMATIC CONFLICT.

NO, YOUR HONOR.

IT SEEMS THAT IT MUST BE, BECAUSE YOU HAVE SAID THAT THEY WITHDREW AS SOON AS THEY HAD THE INFORMATION FROM REPRESENTATION OF MR. MATTHEWS, SO IT MUST BE, BECAUSE THAT IS THE, NOTHING ELSE COULD HAVE HAPPENED.

WHAT HAPPENED WAS MR. MATTHEWS ALLEGEDLY OBTAINED INFORMATION FROM MR. SNELGROVE, WROTE TO HIS ATTORNEY, ACCORDING TO HIS JUNE 28 LETTER, SAYING I HAVE INFORMATION CONCERNING ONE OF YOUR OTHER CASES AND YOU NEED TO WITHDRAW.

HE WITHDREW. HE WITHDREW SOMETIME LATER, YES.

IT MUST AUTOMATICALLY BE A CONFIRMATION OF THE CLIENT HAS INFORMATION. WITHDRAWS. SO IT MUST BE JUST AN ACT OF RECEIVING INFORMATION, BECAUSE HERE, NOTHING ELSE HAS HAPPENED.

HERE, THERE COULD BE INFORMATION THAT COULD BE USEFUL TO MR. SNELGROVE THAT MR. MATTHEWS DID GET A BENEFIT FROM HIS TESTIMONY WITH THE STATE THIS. INFORMATION IS KNOWN ONLY TO HIS TRIAL COUNSEL, HIS PUBLIC DEFENDER, BECAUSE AS ASSISTANT PUBLIC DEFENDER HAD MET WITH MR. MATTHEWS AND MR. MATTHEWS DENIED THIS.

I AM TALKING ABOUT THE ISSUE OF CONFLICT. YOU ARE BRINGING THE LETTER IN.

WHAT I AM TALKING ABOUT IS MR. MATTHEWS'S PUBLIC DEFENDER HAD BEEN TO MR. MATTHEWS AND HAD DISCUSSED, YOU COULD FACE, YOU ARE FACING A LIFE FELONY HERE. THIS SHOULD BE ROBBERY RATHER THAN A SIMPLE ASSAULT AND A THEFT. THIS INFORMATION WAS RELEVANT TO MR. SNELGROVE'S CASE, TO SHOW THAT MR. MATTHEWS DID, INDEED, RECEIVE SOME BENEFIT. HE DENIED IT HERE AT THE TRIAL, THAT HE RECEIVED ANY BENEFIT WHATSOEVER. IT WAS IMPERATIVE FOR A CONFLICT-FREE COUNSEL TO EXAMINE THIS.

CHIEF JUSTICE: WITH OUR HELP, YOU ARE SUBSTANTIALLY IN MR. HENDERSON'S TIME. I DIDN'T KNOW IF YOU WERE GOING TO TOUCH ON YOUR ISSUE FIVE, WHICH HAS TO DO WITH THE SINGLE VERDICT --

JUST VERY BRIEFLY AND I APOLOGIZE, MR. HENDERSON. POINT FIVE, THE TWO DEATH SENTENCES ARE CONSTITUTIONALLY INFIRM, WHERE THE --

WHO SUBMITTED THE FORMS?

THE STATE ATTORNEYS OFFICE, DID YOUR HONOR.

ANY OBJECTION AT ANY POINT, BY -- THERE WAS NO OBJECTION, PRIOR TO THE SUBMISSION OF

THE FORMS. THEY HAD DISCUSSION ABOUT THEM. THE DEFENSE ATTORNEY HAD INDICATED AND HAD REQUESTED THE SPECIFIC FINDINGS BE REQUIRED AND BE MADE ON THE VERDICT FORMS.

SPECIFIC FINDINGS OF WHAT?

AGGRAVATING AND MITIGATING CIRCUMSTANCES.

FOR EACH VICTIM?

FOR THESE KILLINGS, HE SAID, I DON'T RECALL THE EXACT LANGUAGE THAT HE USED. THIS, ALSO, TIES IN WITH POINT FOUR, THE MOTION FOR CONTINUANCE. DEFENSE COUNSEL INDICATED HIS TOTAL EXHAUSTION. IT IS OBVIOUSLY MR.^CHIEF JUSTICE

I JUST WANT TO GET, YOU ARE SAYING THERE WAS, AND WHETHER IT IS NEEDED OR NOT, THERE IS SOME INDICATION THAT THE DEFENSE LAWYER WAS NOT AGREEING TO THIS VERDICT FORM.

YES, YOUR HONOR. WE WOULD RELY ON PANGBORNE VERSUS STATE FOR THIS SOURCE AND THE STATE HAS CITED THE MARYLAND COURT CASE, BIRCH VERSUS MARYLAND WHERE, IN THE MARYLAND COURT REDUCED BY ONE OF TWO SENTENCES. THIS IS NOT CONTROLLING. THE JURY MAKES ACTUAL SENTENCING AND MAKES ACTUAL FINDINGS OF AGGRAVATING AND MITIGATING CIRCUMSTANCES, SO THE MARYLAND COURT COULD EXAMINE THE JURY SINGLE VERDICT IN THIS CASE AND DETERMINE WHAT THE SPECIFIC FINDINGS WERE. IN FLORIDA WE ARE NOT ALLOWED TO HAVE SPECIFIC FINDINGS. DEFENSE COUNSEL ASKED FOR IT AT TRIAL, IT TO HAVE SPECIFIC FINDINGS OF AGGRAVATORS AND MITIGATORS, AND IF WE HAD HAD THAT, MAYBE WE WOULDN'T BE IN THE SAME POSTURE HERE, BUT WE DO NOT KNOW WHAT THE JURY DECIDED AND THIS COURT IN PANGBOURNE, SAID THAT WHERE THERE IS ONLY A SINGLE RECOMMENDATION THAT UNDERMINES THE SENTENCING PROCEDURE BY ARBITRARY AND IRRATIONAL RESULTS AND GIVEN THE ARBITRARY PENALTY PROCEEDINGS AND SUCH A SUBSTANTIAL RIGHT, A NEW PENALTY PHASE PROCEEDING IS REQUIRED. THANK YOU, YOUR HONOR.

CHIEF JUSTICE: MR. HENDERSON, HOW MUCH TIME IS LEFT TOTAL? SIX MINUTES. SO THERE ARE SIX MINUTES TOTAL, SO WHATEVER YOU TAKE, YOU ARE TAKING OUT OF THE REBUTTAL TIME.

I UNDERSTAND. GOOD MORNING. MAY IT PLEASE THE COURT. I AM LARRY HENDERSON, ASSISTANT PUBLIC DEFENDER. I HAVE TO CORRECT ON THIS STATEMENT, I DON'T BELIEVE MR. WULCHAK IS AWARE OF IT. IN REFERENCE TO THE LETTER THAT MR. MATTHEWS WROTE TO ASSISTANT PUBLIC DEFENDER KILEY, IT SHOULD BE IN THE RECORD. I HAD IT SEALED AND MADE IT A PART OF THE RECORD. IT IS UP HERE AND WHETHER IT MADE IT INTO THE FULL PHYSICAL RECORD OR IS UP HERE, WE CAN GET IT INTO THE COURT FILE.

THAT IS THE FIRST LETTER?

THAT IS THE FIRST LETTER.

CHIEF JUSTICE: THAT IS THE LETTER THAT CAUSED THE PUBLIC DEFENDERS OFFICE TO --

TO WITHDRAW. CORRECT. BUT THE PROBLEM IS MR. IRWIN REPRESENTED MR. MATTHEWS PRIOR TO DAVID SNELGROVE, SO THEY HAD AN ONGOING RELATIONSHIP WITH MANY DISCUSSIONS ABOUT LET'S WORK A DEAL WITH THE STATE, SO THAT IS A COMPONENT.

THESE LETTERS WERE WRITTEN IN 2000, AND THE MOTION TO WITHDRAW WAS NOT FILED UNTIL THE EVE OF TRIAL TWO YEARS LATER, CORRECT?

THE MOTION TO WITHDRAW ENCOMPASSES NOT JUST MATTHEWS BUT NUMEROUS DEFENDANTS AND THAT IS CORRECT, YOUR HONOR. AS SOON AS I FOUND OUT THAT OUR OFFICE REPRESENTED

MATTHEWS DURING THAT PERIOD OF TIME, I LOOKED IN THE COURT FILE IN FLAGLER COUNTY AND WENT UPSTAIRS TO THE JUDGE AND SAID WE HAVE GOT A PROBLEM AND IT WAS IMMEDIATELY DISCLOSED AND THAT IS THE WAY IT CAME B IN REFERENCE TO POINT 6 THE BURDEN-SHIFTING ARGUMENT. I DON'T HAVE TIME TO GET INTO IT BUT THIS IS CLEARLY A PURE QUESTION OF LAW THAT HAS NOT BEEN DEALT WITH BY THIS COURT SUBSTANTIVELY SINCE 1981, IN DURANGO VERSUS STATE, AND THAT CASE IS FACTUALLY DISSIMILAR. I HAVE ASKED THIS COURT TO TAKE NOTICE OF THE BRIEFS FILED IN ARANGO. THE TRIAL JUDGE IN THAT CASE SAID THE AGGRAVATING CIRCUMSTANCES HAVE TO OUTWEIGH THE MITIGATING CIRCUMSTANCES. THAT WAS MORE THAN THE STANDARD JURY INSTRUCTION, TWICE AND FOUR TIMES IN THE STANDARD SAY THE TEST IS WHETHER IT OUTWEIGHS MITIGATING CIRCUMSTANCES. THAT IS WHAT THIS COURT SAID IN ARANGO VERSUS STATE, BUT FOR THE TRIAL JUDGE THERE FORTUITOUSLY SAID THAT THE AGGRAVATING HAVE TO OUTWEIGH THE MITIGATING CIRCUMSTANCES, AND IF TAKEN AS A WHOLE, IT DOES NOT VIOLATE MULLANEY VERSUS WILBUR.

CAN YOU DISTINGUISH GRIFFIN VERSUS STATE, WHERE WE HAVE HELD THAT WE HAVE REPEATEDLY REJECTED CLAIMS WHERE THE BURDEN IS SHIFTED TO THE DEFENSE TO PROVE THAT THE DEATH SENTENCE IS NOT APPROPRIATE?

WHAT I ASKED THIS COURT TO DO IS LOOK AT THIS CASE AND ALL OF THE CASES, I WENT THROUGH 48 OF THEM, WHERE THIS COURT REJECTS THE BURDEN-SHIFTING ARGUMENT, THIS COURT IDENTIFIES IT AS A BURDEN-SHIFTING ARGUMENT AND PROVIDES A "SEE" CITE OR "IG" CITE, AND THERE IS NO ANALYSIS. JUST SEE THIS CASE AND THIS CASE. THE TWO PRIMARY CASES IN FRONT OF THIS COURT, ARE THE WALTON CASE AND THE ARANGO CASE. AND WALTON IS NOT LAW ANYMORE IN FLORIDA. BUT IF THIS COURT WOULD ANALYZE ARANGO AND WALTON, IF THIS ISSUE HAS COME UP BEFORE THE COURT 48 TIMES, THEN THERE IS SOMETHING THERE TO BE EXAMINED. THE BENCH AND BAR WOULD APPRECIATE A THOROUGH EXAMINATION OF THIS, BECAUSE I DO IT PURSUANT TO MULLANEY VERSUS WILBUR, AND IF THIS COURT COULD EXPLAIN TO THE TRIAL ATTORNEY THAT RAISED THIS ISSUE AND TO THE JUDGES THAT ARE RULING BELOW ON IT, WHY THE STANDARD JURY INSTRUCTIONS IN THE STATUTE DID NOT VIOLATE MULLANEY VERSUS WILBUR, THIS ISSUE WILL NOT GO AWAY, BUT UNTIL THEN IT IS GOING TO KEEP COMING UP. I NEED TO RESERVE WHAT TIME I HAVE LEFT, FOR REBUTTAL. THANK YOU.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA. I WOULD LIKE TO START, YOUR HONORS, BY FIRST OF ALL, CLARIFYING THE RECORD. THE APPELLANT'S ATTORNEY INSIST THAT IS THE STATE ATTORNEY AFFIRMATIVELY HID OR MISLED THE PUBLIC DEFENDERS, AS TO WHO INITIALLY REPRESENTED MATTHEWS, AND THE ONLY CITE THAT HE HAD IN HIS BRIEF AND THE ONLY CITE THAT THE STATE CAN FIND IS A DEPOSITION WHERE THE STATE SAYS, IN RESPONSE TO YOUR QUESTION WHO REPRESENTED HIM, THE STATE CORRECTLY NOTES IT WAS PRIVATE COUNSEL MR. SAPIENZO AND THAT HE WASN'T WITH THE OFFICE, SO THERE WAS NO MISREPRESENTATION BY THE STATE IN THIS RECORD, AS TO WHO INITIALLY REPRESENTED MATTHEWS. SECONDLY, THE DEFENSE HAS NOT CITED ANY CASES FROM THIS COURT OR THE SUPREME COURT, WHERE YOU RAISE A POTENTIAL FOR CONFLICT AND THAT IS IT. YOU GET A NEW TRIAL. THAT IS NOT THE STANDARD. IN FACT, WE KNOW FROM A 2002 CASE OUT OF THIS SUPREME COURT, MICKENS VERSUS TAYLOR, THAT YOU HAVE GOT TO SHOW AN ADEQUATE MISREPRESENTATION

CHIEF JUSTICE: DO YOU AGREE THAT THERE IS A DIFFERENT STANDARD IN POSTCONVICTION CASES, THAN THERE IS WHEN A TRIAL JUDGE IS PRESENTED WITH A MOTION TO WITHDRAW, AT THE TIME, OR BEFORE THE TRIAL? IS THERE, WOULD YOU AGREE THERE IS A DIFFERENT STANDARD?

I WOULD AGREE PRIOR TO MAKING THIS THEORY BUT I AM NOT SURE THERE IS NOW, BECAUSE

POSTCONVICTION CASE, OBVIOUSLY HAVE THE ABILITY TO LOOK AT COUNSEL'S CONDUCT AND ANALYZE IT UNDER STRICKLAND, BUT UNDER FLORIDA STATUTE 27.33, IT IS NOT THE DEFENSE SIMPLY STATING I HAVE GOT A CONFLICT AND THAT IS IT, END OF INQUIRY. THAT IS NOT TRUE. IN FACT --

WHY ISN'T THAT THE CASE? IN OTHER WORDS, IF YOU GO INTO COURT AND YOU SAY, NOW, I HAVE BEEN REPRESENTING JOE, AND I HAVE BEEN, AND I REPRESENT SAM, OKAY, AND JOE, WE ARE ABOUT READY TO GO TO TRIAL, AND, SAM, WE ARE ABOUT READY TO GO TO TRIAL, AND HE FILES THE MOTION, NOW SETTING OUT THAT THERE IS THIS CONFLICT, BECAUSE SAM IS GOING TO BE A WITNESS IN JOE'S TRIAL. AND THAT IS IT. SO WHY ISN'T THAT A PRIMA FACIE CASE OF THE STATE HAS GOT A WITNESS THAT THEY INTEND TO USE. THAT WITNESS IS REPRESENTED BY THE SAME PERSON THAT IS REPRESENTING THE DEFENDANT IN THE CASE, AND SO ISN'T THAT A SITUATION WHERE THE TRIAL COURT WOULD BE COMPELLED TO RELIEVE COUNSEL, BECAUSE OF THAT CONFLICT? I CAN'T, I CAN HARDLY CROSS-EXAMINATION MY OWN CLIENT, YOU KNOW, JUDGE, AND THERE IT IS. THOSE FACTS GIVE RISE TO A CONFLICT, AND THAT IS ALL I HAVE TO DO IS SET THAT OUT, AND IF I MAY SAY, THAT IS A DIFFERENT SITUATION THAN WE HAVE HERE.

THAT IS WHAT I REALLY --

BUT ALSO, YOUR HONOR, MORE THAN THAT, BECAUSE I THINK BY STATUTE, AND THE CASE LAW FROM THE SUPREME COURT AND THIS COURT IS ABUNDANTLY CLEAR, YOU CAN'T GET OFF, UNLESS YOU SHOW THAT THERE IS A ACTIVE CONFLICT OF INTEREST.

WAIT A MINUTE. WHEN YOU LOOK AT THE ACTUAL ALLEGATIONS THAT WERE MADE BY THE PUBLIC DEFENDER IN THE MOTION, THEY TALK ABOUT THE FACT THAT THESE CLIENT HAD, WERE, THE STATE CAME AND INTERVIEWED ALL OF THESE PEOPLE ABOUT MR. SNELGROVE, CORRECT? AND THEN THEY TALK ABOUT HOW NOW THEY NEED TO BE EFFECTIVE COUNSEL, THEY NEED TO GO AND DEPOSE THESE PEOPLE, AND INVESTIGATE THEM, SO, I MEAN, THAT IS MORE THAN JUST SAYING THAT THIS, THAT THERE IS A POSSIBLE CONFLICT OF INTEREST. THEY ARE ACTUALLY DEMONSTRATING, AREN'T THEY, WHY THERE WOULD BE A CONFLICT OF INTEREST?

ABSOLUTELY NOT, YOUR HONOR. IN FACT, THE ONLY INDIVIDUAL THAT IS PROPERLY EVEN DISCUSSED BEFORE THIS COURT, IS THE ALLEGED CONFLICT WITH MATTHEWS, BECAUSE WE KNOW, FROM A LONG LINE, FROM CUYLER V SULLIVAN, FROM MICKENS V STATE OUT OF THIS COURT AND BUOY V STATE, THAT YOU DON'T RELEASE A CONVICTION, BASED ON CONJECTURE, BASED ON HYPOTHETICAL INFORMATION.

CHIEF JUSTICE: LET ME GO BACK, BECAUSE WE AREN'T SURE WHAT TRIAL JUDGES ARE DOING, AND IT IS CONFUSING WHEN YOU HAVE GOT PUBLIC DEFENDERS OFFICES REPRESENTING A LOT OF CLIENTS OR HAVE IN THE PAST, BUT IF YOU HAD A SITUATION WHERE MATTHEWS WAS THE KEY WITNESS AGAINST SNELGROVE, AND AT THAT POINT THE JUDGE APPOINTED AND WAS REPRESENTED BY THE PUBLIC DEFENDERS OFFICE, AND THE JUDGE APPOINTED THE PUBLIC DEFENDERS OFFICE TO REPRESENT SNELGROVE, AND AT THAT POINT, THEY MOVED TO WITHDRAW FROM THE SNELGROVE AND SAID WE CAN'T. THERE IS A CONFLICT OF INTEREST. WE ARE REPRESENTING MR. MATTHEWS. WOULD THERE NOT BE AN OBLIGATION, JUST ALLEGATION THAT HE IS THE PRINCIPAL WITNESS BEING REPRESENTED BY THE PUBLIC DEFENDERS OFFICE, WHERE YOU WOULD NOT HAVE A SITUATION WHERE THE PUBLIC DEFENDERS OFFICE REPRESENTS SNELGROVE? THE RISK IS APPARENT THERE. YOU ARE SAYING NO?

NO, YOUR HONOR. I WOULD SAY THAT THE FACTS THAT HAPPENED IN THIS CASE, WHAT HAPPENED WAS EXACTLY WHAT SHOULD HAVE HAPPENED, BECAUSE RECALL THAT MATTHEWS VERY EARLY ON, WROTE A LETTER TO HIS DEFENSE COUNSEL, HIS PUBLIC DEFENDER AND SAID, LOOK, I HAVE SOME INFORMATION AGAINST MR. SNELGROVE. THE PUBLIC DEFENDER MR. CONNALLY, DIDN'T EVEN HAVE THAT INFORMATION AGAINST MATTHEWS. HE MOVED TO

WITHDRAW IMMEDIATELY. ONE OR THE OTHER. YOU DON'T GET OFF BOTH CASES AND APPOINT PRIVATE COUNSEL, SO IN THIS CASE IT IS IMPORTANT TO KNOW THE FINALITY.

CHIEF JUSTICE: THE SIGNIFICANT FACTOR HERE IS THAT, BEFORE THE DEFENSE LAWYER LEARNED THIS IS ANYTHING ABOUT WHAT WAS BEING DISCUSSED, PUBLIC DEFENDERS WITHDREW FROM SNELGROVE, I MEAN FROM MATTHEWS.

EXACTLY.

CHIEF JUSTICE: SO NOW WE ARE STARTING TO LOOK AND SAY THAT HAPPENED AND THAT IS DIFFERENT. HOWEVER, NOW WE HAVE THE ALLEGATION THAT THERE WAS INFORMATION THAT PUBLIC DEFENDERS HAD ABOUT THE NATURE OF THE CHARGES THAT MATTHEWS WAS FACING, AND THEREFORE, AND THE REDUCED CHARGES, THAT THEY ALONE, KNEW, AND THAT SNELGROVE'S COUNSEL FELT CONSTRAINED TO QUESTION MATTHEWS ABOUT IT, BECAUSE THEY HAD GAINED THIS INFORMATION WHEN THEY REPRESENTED MATTHEWS. NOW, HOW DO YOU, AND THAT WAS WHAT WAS BEFORE THE TRIAL JUDGE.

THAT'S CORRECT, YOUR HONOR. NOW, I URGE THIS COURT, AND I AM SURE THIS COURT WILL, TO EXAMINE THE ACTUAL CROSS-EXAMINATION OF MATTHEWS, AND I PUT THAT IN MY BRIEF, BECAUSE IF THE CONCERN IS THE PUBLIC DEFENDERS OFFICE HAD SOME CONFIDENTIAL INFORMATION, WHICH THEY SOUGHT OUT ONCE THEY KNEW THERE WAS A CONFLICT. THEY IMMEDIATELY WENT TO CONNALLY AND TRIED TO GET SOME DIRT ON MATTHEWS, TO HELP THEIR CLIENT SNELGROVE, SO THAT ALONE, SHOWS YOU THESE ATTORNEYS, MR.^HENDERSON IS NOT CONFLICTED IN ANY WAY, SHAPE OR FORM. HIS LOYALTY LIES WITH THE APPELLANT NOT MATTHEWS, AND HE VIGOROUSLY CROSS-EXAMINATIONS HIM, BUT THE CLAIM THAT HE LEARNS CONFIDENTIAL INFORMATION, HE USED THAT DURING CROSS-EXAMINATION. THE JURY HEARD THAT. THE JURY HEARD, DIDN'T YOUR ATTORNEY TELL YOU THAT YOU COULD BE FACING UP TO A LIFE SENTENCE? SO, IN REALITY HERE, MR. SNELGROVE WAS IN A MUCH BETTER POSITION THAN HAD A PRIVATE COUNSEL BEEN APPOINTED RIGHT AWAY ON MATTHEWS, BECAUSE HE WOULDN'T HAVE HAD ACCESS TO THAT INFORMATION, SO --

COULD MR. SNELGROVE'S ATTORNEY HAVE, ETHICALLY, CALLED MR. CONWAY OR CONROY TO THE STAND, AND SAID ISN'T IT A FACT THAT YOU NEGOTIATE ADD PLEA OR REDUCED CHARGES OR SOMETHING LIKE THAT, HE COULD DO THAT WITH ANOTHER ATTORNEY IN THE PUBLIC DEFENDERS OFFICE?

YOUR HONOR, HE WAIVED ANY CONFLICT, SO IF IT CAME TO THAT, I THINK THEY NEVER ASSERTED OR TRIED TO.

CHIEF JUSTICE: HE, BEING MATTHEWS, WAIVED IT.

MATTHEWS WAIVED IT AND SAID, IF THEY WANT TO COME IN, WHATEVER. I DON'T CARE. AND REMEMBER, MATTHEWS PLED GUILTY A YEAR AND-A-HALF PRIOR TO TRIAL. HE HAD ALREADY PLED GUILTY. HE DIDN'T GET A DEAL. HE WAS UNHAPPY WITH HIS NONDEAL WITH THE STATE, AND HE WAS RELUCTANT TO COOPERATE. SO YOU HAVE VERY EARLY, MATTHEWS PLEADS GUILTY WITH THE BENEFIT OF PRIVATE COUNSEL, AND YOU HAVE TRIAL A YEAR AND-A-HALF LATER, AND MR. SNELGROVE'S ATTORNEY USED THAT ONE MONTH PRIOR TO TRIAL, TO TRY TO GET OUT OF A CAPITAL MURDER CASE.

WHAT POSITION DO YOU THINK IS THE CLOSEST TO THE STATE'S POSITION HERE THAT, ONCE THERE IS A REPRESENTATION OF THE TWO CLIENTS, THAT, AND THERE IS AN ISSUE RAISED AS TO THE WITHDRAWAL OF ONE, AND THEY ACTUALLY WITHDRAW FROM THE OTHER, THAT THERE CAN BE A CONTINUED REPRESENTATION? DO WE HAVE A CASE THAT SAYS THAT?

I THINK THERE IS A CASE THAT IS ALMOST DIRECTLY ON POINT. I WOULD SAY ACTUALLY FOR

OUR PURPOSES, IT IS DIRECTLY ON POINT, BUOY V STATE, WHERE A PUBLIC DEFENDERS OFFICE REPRESENTED PEOPLE WHO, LIKE MATTHEWS, HEARD INFORMATION FROM THE DEFENDANT. THIS COURT DIDN'T ANALYZE --

DIDN'T THIS COURT VERY SHORTLY AFTER THAT, IN GUZMAN, COME ALONG WITH A PRETTY BRIGHT-LINE TEST, THE FACT THAT THE TRIAL COURT COULDN'T EVEN INQUIRE INTO THE BASIS OF THE ALLEGED CONFLICT, IF THE PUBLIC DEFENDER RAISED IT?

YOUR HONOR, THAT WAS BASED ON THE STATUTE PRECEDING FLORIDA STATUTE 27.33, WHICH ALLOWS, THE PRIOR STATUTE DIDN'T ALLOW AN INQUIRY, AND WE KNOW THAT THE STATUTE WAS CHANGED IN CONS NANCE WITH THE SUPREME COURT PRECEDENT, WHICH MAKES IT ABUNDANTLY CLEAR THAT, UNLIKE A SITUATION IN HOLLOWAY, WHERE YOU PRESUME PREJUDICE WHEN A DEFENDANT IS FORCED TO GO ON TRIAL WITH HIS TWO CODEFENDANTS, AND THE ATTORNEY STANDS UP AND SAYS, I CAN'T CROSS-EXAMINE THESE TWO, THAT IS THE ONLY PROVINCIAL RULE, SO THE STATUTE 27.33 WAS CHANGED, IN, I BELIEVE, 1995, TO ALLOW INQUIRY, SO I THINK WHAT YOU HAVE HERE IS BOWIE IS DIRECTLY ON POINT. MOREOVER IF YOU LOOK AT THE RECORD HERE, LOOK AT THE CROSS-EXAMINATION OF MATTHEWS IN THIS CASE, IT WAS HE FELT HE WAS BEING HARASSED. THE DEFENSE ATTORNEYS CROSS-EXAMINED HIM ON EVERYTHING FROM HIS PRIOR CONVICTIONS, IN CONSISTENT STATEMENT, TO WHAT CHARGES HE WAS FACING, THAT THEY COULD HAVE BEEN JERKED UP, TO, AND IT WAS A BRUTAL CROSS-EXAMINATION, SO AS IN BOWIE, THIS COURT LOOKED AND SAID THE PUBLIC DEFENDERS SHOWED NO DEGREE OF LOYALTY WHATSOEVER, TO THE FORMER CLIENT, AND IN MICKENS V TAYLOR, I AM NOT EVEN SURE YOU CAN RAISE A CONFLICT NOW, BASED ON MISREPRESENTATION, BASED ON A PD'S OFFICE, BECAUSE IF THIS COURT HAD APPLIED IT, THERE IS SIMPLY NO REASON TO REVERSE A CONVICTION, WHEN THERE IS NO ADVERSE REACTION UPON REPRESENTATION, AND THAT IS WHAT WE HAVE HERE.

CAN YOU ADDRESS ISSUE NUMBER FIVE ON THE JURY'S RECOMMENDING UNDIFFERENTIATED DEATH PENALTY, AND ARE WE BOUND BY PANGBOURNE ON THAT ISSUE?

I WOULD SUGGEST TO YOU THAT PANGBOURNE ON THAT ISSUE, YOU DID REVERSE FOR A NEW PENALTY PHASE, BASED ON A RECOMMENDATION. THE STATE CONTENDS IT IS NOT FUNDAMENTAL ERROR IN THIS CASE AND THIS ARE THE REASON FOR THAT IS IT WAS NOT OBJECTED TO EITHER WHEN THE VERDICT FORM WAS SENT TO THE JURY OR WHEN THE VERDICT FORM CAME BACK.

IN PANGBOURNE, WAS THERE OBJECTION?

IT DID COME OUT, AND DEFENSE COUNSEL, PRIOR TO ACTUAL SENTENCING, DID OBJECT TO IT AND SAID, NO --

CHIEF JUSTICE: IT WAS NOT OBJECTED TO BEFORE THE VERDICT.

NO,YOUR HONOR. IT WAS NOT PRIOR TO THE VERDICT, BUT IT WAS DISCUSSED AND DEFENSE ATTORNEY DID OBJECT TO A SINGLE RECOMMENDATION FOR THE TWO MURDERS, SO IT WAS DISCUSSED BELOW. WE DON'T HAVE THAT SITUATION HERE.

CHIEF JUSTICE: BUT THEY ACTUALLY CAME UP IN PANGBOURNE, WITH, SAYING ONE WILL GET LIFE AND ONE WILL GET DEATH, SO IT DOESN'T LOOK LIKE WE WOULD BE APPLYING A HARMLESS-ERROR ANALYSIS, BECAUSE BY GETTING LIFE ON ONE AND DEATH ON THE OTHER WITH A RECOMMENDATION TO THE JURY FOR DEATH, WHAT, DIDN'T, I MEAN, YOU COULD HAVE ARGUED THAT WOULD HAVE MADE IT HARMLESS. ANOTHER CONCERN THAT THIS COURT EXPRESSED IN PANGBOURNE IS, WHEN YOU HAVE TWO SEPARATE MURDERS, YOU ARE GOING TO HAVE TWO SEPARATE AGGRAVATORS THAT ARE GOING TO APPLY TO EACH MURDER, AND THE STATE'S POSITION IS THIS MAYBE THE ONLY CASE OF DOUBLE MURDERS OR ONE OF THE VERY FEW WHERE

IT IS NOT ERROR OR REVERSIBLE ERROR, BECAUSE THE SAME AGGRAVATORS THAT APPLIED TO THE MURDER OF MR. FOWLER, APPLIED TO THE MURDER OF MRS.^FOWLER.

DIDN'T THE DEFENSE ASK FOR SPECIFIC FINDINGS ON AGGRAVATORS? HOW DO WE KNOW THE JURY FOUND THE SAME, AND MY CONCERN IS THIS. I HAVE ALWAYS THOUGHT THAT, FOR A DOUBLE MURDER THERE SHOULD BE SOME AGGRAVATOR THAT JUST IS IT IS A DOUBLE MURE. IT IS TWO -- DOUBLE MURDER, TWO VICTIMS, THREE VICTIMS, BUT WE ALWAYS REQUIRE FOR THERE TO BE DIFFERENTIATED VERDICT, AND WITH THE 7-TO-5 JURY FINDING, HOW DO WE KNOW THAT THE JURY DIDN'T, IN DECIDING ON ONE, SAY, WELL, WE HAVE TWO TOGETHER. THEREFORE WE WILL DO 7-5. IT MAY HAVE BEEN DIFFERENT, IF EACH VICTIM WAS PRESENTED TO THEM SEPARATELY, AS WE REQUIRE THAT IT BE DONE AND AS THE STATUTE REQUIRES IT.

WELL, YOUR HONOR, I WOULD APPRECIATE THAT ARGUMENT, AND, IF THERE WAS SOME LOGICAL OR RATIONAL BASIS TO DISTINGUISH BETWEEN THE TWO MURDERS IN THE EVIDENCE, AND THERE IS NONE. THESE WERE TWO ELDERLY VICTIMS WHO WERE ATTACKED AT THE SAME TIME, MURDERED IN THE SAME EXACT MANNER. HAC APPLIES TO BOTH.

HOW DID THE STATE ACTUALLY ARGUE, THEN, THE AGGRAVATING CIRCUMSTANCES, AND COUNTERACT THE MITIGATING CIRCUMSTANCES?

YOUR HONOR, I HAVE REVIEWED THE CLOSING ARGUMENT, AND THERE IS NO DISTINGUISHING, AS FAR AS OR BY EITHER THE STATE OR DEFENSE, SAYING ONE AGGRAVATOR DIDN'T APPLY TO THE OTHER. WE HAVE A SITUATION WHERE THEY BOTH WERE ARGUING, THE STATE WAS ARGUING FOR A DEATH SENTENCE. THE DEFENSE WAS ARGUING FOR LIFE, AND THE SAME AGGRAVATOR, I DON'T KNOW HOW YOU RATIONALLY SEPARATE THE TWO. IN FACT, IF YOU HAD A MURDER, SAYING A HALF AN HOUR EARLIER AND THERE IS SOME CONTENTION THAT ONE AGGRAVATOR MIGHT NOT APPLY TO ONE OR THE OTHER OF THE MURDERS, THEN HOW DO WE CONCEDE AT THAT POINT?

SAY THERE WAS ONLY ONE VICTIM IN THIS CASE, HOW DO WE KNOW THAT THE JURY WOULD HAVE COME BACK WITH A 7-TO-5 DEATH RECOMMENDATION?

YOU HAD ONLY ONE VICTIM, THEN THIS WOULD HAVE JUST BEEN FOR THE SINGLE VICTIM, BUT IN THIS CASE, YOUR HONOR, I AM NOT TRYING TO PARSE WORDS HERE OR NITPICK. I AM SAYING THERE IS NO WAY TO NITPICK. IF YOU FIND AGGRAVATORS FOR ONE, YOU HAVE TO FIND FOR THE OTHER. THEY WERE BOTH ELDERLY AND WERE ATTACKED AND KILLED IN A SIMILAR MATTER. BOTH AGGRAVATORS WERE HAC AND EVERY SINGLE ISSUE THAT APPLIES TO MR. FOWLER, APPLIES TO MRS.^FOWLER. THERE IS NO DISTINCTION, YOUR HONOR.

HOW IS IT THAT YOU WOULDN'T HAVE A SEPARATE VERDICT IN THIS DAY AND AGE, SO HOW DID IT ESSENTIALLY HAPPEN HERE? WHO PREPARED THE VERDICT FORM?

THE STATE PROVIDED IT, YOURSELF.

DID THE DEFENSE OBJECT TO THE VERDICT FORM?

NEW YORK CITY YOUR HONOR, NOT WHEN THE STATE PRESENTED IT NOR WHEN THE RECOMMENDATION WAS MADE.

WAS THERE BENCH COUNSEL WITH DEFENSE COUNSEL WHERE BOTH THE STATE, THE TRIAL JUDGE NORMALLY SAYS DO YOU AGREE WITH THE VERDICT FORM AND THEY SAY, YES, WE DO? DID THEY CONFIRM ACCEPTANCE, I THINK IS MY QUESTION.

I THINK, IF MY MEMORY SERVES, THE JUDGE ASKED PROSECUTOR AND DEFENSE COUNSEL, DO WE HAVE A VERDICT FORM, AND THE STATE PROVIDED ONE, SO I THINK CLEARLY THERE WAS AN

OPPORTUNITY FOR THE DEFENSE TO OBJECT. MOREOVER, CLEARLY WHEN THE VERDICT WAS REACHED, THERE WAS NO OBJECTION BY THE DEFENSE ATTORNEY AT THAT POINT, AND I AM NOT SURE WHAT THEY COULD HAVE DONE TO REMEDY THE ERROR AT THAT POINT, BUT IT IS CLEAR THAT THIS WAS NOT AN ERROR THAT WAS PRESERVED BELOW, AND UNDER THESE LIMITED FACTS, IT IS NOT FUNDAMENTAL ERROR.

DO YOU KNOW IF, IN PANGBOURNE, THERE WERE AGGRAVATING CIRCUMSTANCES THAT DID NOT ADHERE IN THE VERDICT OF GUILT, BECAUSE HERE WE HAVE PRIOR FELONY CONVICTIONS, WHICH ARE NECESSARILY FOUND BY THE FACT THAT HE COMMITTED THE TWO MURDERS, AND WE, ALSO, HAVE COMMITTED IN THE COURSE OF A ROBBERY AND THE JURY FOUND THE DEFENDANT GUILTY OF ARMED ROBBERY, SO WE HAVE THOSE AUTOMATIC, ALMOST, IN ADDITION TO SOME OF THE OTHER ONES. DO YOU KNOW IF THAT WAS THE CASE IN PANGBOURNE OR WAS IT ALL THINGS LIKE HAC AND CCP?

YOUR HONOR, THERE WAS HAC AND CCP, AND I BELIEVE IN PANGBOURNE, THE MURDERS WERE SET, THE BODIES WEREN'T DISCOVERED FOR A LENGTHY PERIOD OF TIME, AND I BELIEVE THERE WAS SOME QUESTION IN THE STATE'S MIND AS TO WHETHER THE MURDERS OCCURRED SIMULTANEOUSLY, BUT HERE, CLEARLY THEY DO.

DID THE STATE ARGUE THAT THE WAY THE MURDER WAS COMMITTED AGAINST ONE VICTIM, IT WAS HAC, AND BECAUSE IT WAS COMMITTED IN THIS WAY AGAINST THE OTHER, IT WASN'T HAC? THERE IS NO DIFFERENTIATION AT ALL?

NO. CLEARLY IF IT WAS HAC FOR ONE, IT WAS CLEARLY HAC FOR BOTH. IT IS CLEAR THESE WERE HEINOUS, ATROCIOUS MURDERS. THEY WERE BRUTALLY BEATEN AND STABBED AND CHOKED. IN FACT THE EVIDENCE SHOWED THAT HE WAS CHOKING THEM AND BOTH VICTIMS HAD BONES BROKEN IN THE NECK.

WOULDN'T IT BE DIFFERENT IF ONE WAS DONE AT ONE TIME AND THE OTHER IS DONE -- I CAN'T IMAGINE THAT THIS ONE MAN OR THE STATE ALLEGED THAT HE WAS DOING THIS TO BOTH VICTIMS AT THE SAME TIME AND THE FACT THAT ONE WOULD BE POSSIBLY WATCHING WHILE THE OTHER WAS GOING THROUGH THIS, WOULDN'T THAT MAKE SOME DIFFERENCE? IT IS HARD TO IMAGINE THAT THE STATE COULD MAKE ANY DIFFERENTIATION BETWEEN THESE TWO MURDERS.

REALLY, THAT IS THE POINT THAT THE STATE IS MAKING, IS THAT THAT IS WHY YOU CAN AFFIRM TWO DEATH SENTENCES UNDER THESE VERY NARROW SET OF CIRCUMSTANCES.

BUT WE DO HAVE CASES IN WHICH, SACRUSKY COMES TO MIND, IN WHICH IT IS VERY HARD TO UNDERSTAND WHY THE JURY WOULD HAVE FOUND ONE OF THE CHILDREN, THERE SHOULD BE A DEATH PENALTY AND THE OTHER, NOT, BUT THAT WAS A PREROGATIVE OF THE JURY, UNDER OUR STATUTE, TO MAKE THAT RECOMMENDATION. ISN'T THAT RIGHT?

THAT'S CORRECT, YOUR HONOR.

I WANT TO -- I AM SORRY.

GO AHEAD.

IF I MAY JUST BRIEFLY ANSWER, BUT WE EXPECT THE JURIES TO GO ON THE EVIDENCE, AND THE ARGUMENT IN THIS CASE WAS THERE WAS NO ARGUMENT FROM THE DEFENSE THAT, WELL, THE EVIDENCE AFFORDS HAC ON MR. FOWLER BECAUSE HE WAS MURDERED INSTANTANEOUSLY. HE MADE THE SAME ARGUMENT, BASICALLY, FOR BOTH OF THE VICTIMS, AND THE STATE ESSENTIALLY MADE THE SAME ARGUMENT.

CHIEF JUSTICE: I WANT TO ASK, THE TRIAL JUDGE DIDN'T FIND ANY MENTAL MITIGATORS THAT

HE FOUND IN HIS CONDUCT, THAT HE HAD DECREASED LEVEL OF BRAIN FUNCTION AND INTELLIGENCE BUT SAID IT DIDN'T RISE TO THE LEVEL OF A STATUTORY MENTAL MITIGATOR, AND THEN HE GOES AND HE LISTS TWELVE OTHER FACTORS THAT HAD BEEN ESTABLISHED AND MUST BE WEIGHED, AND WEIGHS NONE OF THEM. INCLUDING HIS LONG HISTORY OF DRUG ADDICTION, HIS LOSING HIS PARENTS IN FIVE YEARS, THAT THE CRIMINAL HISTORY DOESN'T EVIDENCE PREVIOUS VIOLENT OFFENSES, THAT HIS EDUCATIONAL LEVEL, HIS ABNORMAL BRAIN FUNCTION, WHY ISN'T THIS A PROBLEM UNDER CAMPBELL, OF THERE NOT BEING ANY TYPE OF INDIVIDUALIZED ASSESSMENT OF THE MITIGATION BY THE TRIAL JUDGE? I MEAN, I AM HAVING A HARD TIME, WITH, AGAIN, A 7-TO-5 AND TRYING TO UNDERSTAND THIS ALL, HOW WE KNOW THAT THE JUDGE THOUGHTFULLY WEIGHED THIS AND DETERMINED THAT THE AGGRAVATING FACTORS OUTWEIGHED THE MITIGATION?

YOU ARE CORRECT, YOUR HONOR, AND THIS COURT FOUND IN FENNEY V STATE WHERE, AS IN THIS CASE, THE TRIAL COURT SPECIFICALLY LISTS MATTERS OF MITIGATION AND THEN WEIGHS THEM AT THE END. IT IS NOT FUNDAMENTAL ERROR, BUT, NO, THE COURT DID NOT DEAL --

CHIEF JUSTICE: HOW, I MEAN, SOME OF THESE ARE JUST, LIKE HE HAS THE CAPACITY TO FORM A LOVING RELATIONSHIP WITH HIS FAMILY, THAT NOBODY EVER DOES MUCH WITH AND THE OTHERS ARE, COULD BE VERY WEIGHTY AGGRAVATORS, YOU KNOW, HE IS A CRACK COCAINE ADDICT. HE WAS IN, THIS IS THE PERSON THAT WAS, HAD JUST GOTTEN OUT OF, BEEN THROWN OUT OF THE SALVATION ARMY ADDICTION CENTER, WHERE HE WAS UNDER ACTIVE TREATMENT, AND SO, I MEAN, I, IF CAMPBELL IS SUPPOSED TO MEAN SOMETHING, I AM NOT SURE HOW THE JUDGE COMPLIED WITH IT IN THIS CASE.

WELL, YOU ARE RIGHT, YOUR HONOR. THE BETTER PRACTICE IS YOU PROVIDE INDIVIDUAL WAYS. NOW, YOU INDICATED EARLIER THAT HE DIDN'T FIND STATUTORY MENTAL MITIGATOR. THAT IS INCORRECT. HE DID FIND THAT HE WAS UNDER EXTREME EMOTIONAL CONFLICT AT THE TIME OF THE OFFENSE. YOU HAVE ABUNDANT EVIDENCE THAT HE WASN'T SO IMPAIRED.

ACTUALLY ON THAT, HE SAYS HE HAD SOME IMPACT ON HIS THINKING AND FIND THE MITIGATOR HAS BEEN ESTABLISHED AND MUST WEIGH THE MITIGATOR AND ITS DECISION, AND THEN NEVER GIVES IT ANY WEIGHT.

FOR WHATEVER REASON, HE DID NOT ASSIGN ANY INDIVIDUAL WEIGHT, AND THAT IS CERTAINLY NOT THE PREFERRED METHOD, BUT I DON'T BELIEVE IT IS FUNDAMENTAL ERROR.

IF YOU LOOK AT FEENEY, I THINK IT SAYS "CONTAINED PROPER WEIGHING ANALYSIS", AND ARGUE HOW THE ORDER OF THIS TRIAL JUDGE CONTAINED A PROPER WEIGHING ANALYSIS, EVEN IF WEIGHTS WERE NOT ASSIGNED?

WELL, YOUR HONOR, I THINK, BECAUSE HE WENT THROUGH ALL OF THE MITIGATION AND THE AGGRAVATION, LISTED THEM INDIVIDUALLY, AND THEN AT THE BOTTOM, HE SAID THAT THE AGGRAVATION SUBSTANTIALLY OUTWEIGHS MITIGATION PRESENTED, SO I THINK THERE IS A COHERENT ENOUGH ORDER, ALTHOUGH IT IS NOT A MODEL, IT IS NOT WHAT THIS COURT REQUIRES. I THINK THERE IS A SUFFICIENT ANALYSIS. YOUR HONOR.

LET ME GO BACK TO THE WAY YOUR OPPOSING COUNSEL STARTED, AND, ALSO, THE POINT IN THE BRIEFS, AS TO THE FACT THAT THERE WAS, IN ESSENCE, AN ABSENCE OF BLOOD ON THE VICTIMS. NOW WHAT, ASIDE FROM THIS JAILHOUSE EVIDENCE, WHAT WAS THERE, AS FAR AS PHYSICAL EVIDENCE, AS TO THE MURDERS THAT LINK SNELGROVE TO THEM?

ABSOLUTELY OVERWHELMING EVIDENCE, YOUR HONOR. WE HAVE A CUT ON HIS HAND. WE HAVE CUTS AT THE POINT OF ENTRY.

ALL RIGHT. WHICH MAKES IT, REALLY, VERY PUZZLING AS TO WHY THERE WASN'T ANY BLOOD

ON THESE VICTIMS.

WELL, YOUR HONOR, THERE WAS, HIS BLOOD WAS ON THE ANKLE OF MRS.^FOWLER. WE HAVE A BLOOD TRAIL LEADING FROM THE POINT OF ENTRY, ALL AROUND THE VICTIMS. WE HAVE A BLOODY FINGERPRINT, HANDPRINT OF HIS ON THE MIRROR. WE HAVE HIM CLEANING UP IMMEDIATELY AFTERWARD, AND THE MEDICAL EXAMINER TESTIFYING THAT THE DEEP CUT WOUND THAT HE HAD ON HIS HAND, IS WHAT, A KNIFE FOUND 75 YARDS FROM THE MURDER SCENE, WOULD HAVE INFLICTED ON HIM. AND WAS CONSISTENT WITH HIM RAMMING THE KNIFE INTO ONE OF THE VICTIMS. IN FACT, I SUGGEST IT WAS MRS.^FOWLER, AND BENDING THE TIP, SO WE HAVE A BLOOD TRAIL THROUGHOUT THE HOUSE. WE HAVE --

WAS THE BLOOD TRAIL, ANY OF THE BLOOD ON THE BLOOD TRAIL, ANALYZED TO SEE IF IT MATCHED WITH MR. SNELGROVE?

YES. THE BLOOD TRAIL WAS ABSOLUTELY, THE DNA WAS HIM TO THE EXCLUSION OF ONE IN 330 QUADRILILLION. YOU DON'T HAVE ANY BLOOD TRAIL FROM HIS COUSIN. HE RUMMAGED THROUGH THE ENTIRE HOUSE AFTER MURDERING THE VICTIMS, TAKING ITEMS OF VALUE AND GETTING MONEY, AND THE DOG FOLLOWED HIM THE VERY NEXT DAY, TO HIS HOUSE AND ALIGHTED DIRECTLY ON HIM AND ALERTED, SO IT FOLLOWED HIM. WE HAVE A BLOOD TRAIL FROM THE BACK OF THE HOUSE WHERE HE GAINED STEALTHFUL ENTRY TO THE BACK OF THE HOME, AND THIS IS IN DIRECT CONFORMANCE TO THE COMPLIANCE WITH THE REQUIREMENT OF THE LAW. THEY LOANED HIM MONEY. HE KNEW THAT THEY HAD MONEY. HE TARGETED THEM. AFTER MURDERING THEM IN THEIR OWN MASTER BEDROOM, HE RUMMAGED THROUGHOUT HOUSE, LOOKING FOR AND TAKING INDIVIDUAL ITEMS OF VALUE, THEN HE FOLLOWED THROUGH ON HIS PLAN, BY GOING TO GET CRACK COCAINE, SO I THINK THE FACTS IN THIS CASE ARE SIMILAR TO JOHNSON V STATE, WHERE THE DEFENDANT SAID HE WAS GOING TO GO OUT AND COMMIT MURDER, TO GET MORE MONEY TO BUY DRUGS. IT WAS A SELF-IMPOSED DISABILITY IN THIS CASE, AND THE JUDGE PROPERLY REJECTED THAT TRIAL MITIGATOR. IF I CAN GO BACK TO THE LETTER, FIRST OF ALL I KNOW I HAVE VERY LITTLE TIME LEFT, BUT THAT LETTER WAS CUMULATIVE TO THE LATER LETTER SENT BY THE PROSECUTOR AND THAT THE DEFENSE HAD. ALL IT SAID WAS, LOOK, I HAD SOME INFORMATION. SNELGROVE OPENED UP AND TOLD ME ABOUT WHAT HAPPENED DURING THE OFFENSE AND AFTER THE OFFENSE. NOW, HE DIDN'T GET INTO ANY OF THE DETAILS.

CHIEF JUSTICE: I THOUGHT THEY SAID IT WOULD HAVE BEEN HELPFUL AT THE TIME, BECAUSE IT WOULD HAVE IMPEACHED HIM, ON THE QUESTION OF WHEN HE GOT THE INFORMATION FROM SNELGROVE.

THAT IS THE POINT I MADE IN MY BRIEF. ABSOLUTELY NOT. THAT LETTER WAS, THE FIRST LETTER, AS I BELIEVE JUSTICE PARIENTE YOU RECOGNIZED, WAS THE FIRST LETTER TO DEFENSE COUNSEL CONNALLY, WAS IN MR. HENDERSON'S POSSESSION, THAT WAS THE FIRST INDICATION THAT MATTHEWS HAD ANY INFORMATION FROM SNELGROVE REGARDING THE MURDERS, AND THAT IS WHY THAT LETTER WAS IMPORTANT, AND HE USED IT DURING CROSS-EXAMINATION, AND THE SECOND LETTER WRITTEN THREE DAYS LATER, SHOWS THAT MATTHEWS YOU WAS TESTIFYING TRUTHFULLY, THAT SNELGROVE DID NOT IMMEDIATELY OPEN UP, BECAUSE WE KNOW THAT THE APPELLANT WAS ARRESTED AT 8:30 ON JUNE 25. THE JUNE 28 LETTER IS PERFECTLY CONSISTENT WITH MR. MATTHEWS'S TESTIMONY THAT IT MUST HAVE BEEN A COUPLE OF DAYS BEFORE SNELGROVE OPENED UP TO HIM AND STARTED DISCUSSING DETAILS OF THE OFFENSE, AND I BELIEVE THERE WAS A MISREPRESENTATION FROM DEFENSE COUNSEL. THE RECORD IS PRETTY CLEAR THAT MATTHEWS DID SAY A FEW DAYS LATER OR SEVERAL DAYS LATER. HE SAID A COUPLE OF DAYS LATER, MUST HAVE BEEN A COUPLE OF DAYS LATER. SO, NUMBER ONE, THERE WAS NO FALSE TESTIMONY. THIS LETTER WAS VOLUNTEERED BY THE STATE DURING THIS SPENCER HEARING. IT WAS NOT HIDDEN FROM THE DEFENSE PURPOSELY. IT WAS CUMULATIVE, AND THERE WAS ABSOLUTELY NO REASONABLE POSSIBILITY OF A DIFFERENT

RESULT IN THIS CASE, GIVING THE OVERWHELMING EVIDENCE, HAD THIS LETTER SIMPLY BEEN DISCLOSED TO THE DEFENSE.

CHIEF JUSTICE: ARE YOU GOING TO JUST BRIEFLY, WHY ISN'T THERE BURDEN SHIFTING, WHEN THE JURY IS TOLD THAT THEY HAVE GOT TO FIND OUT WHAT, THEY HAVE TO DETERMINE WHAT THE MITIGATORS OUTWEIGH THE AGGRAVATORS, VICE VERSA?

FIRST OF ALL, BEFORE THEY ARE EVEN TOLD THAT, THEY HAVE TO DETERMINE WHETHER OR NOT THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES, SO IT IS THE STATE'S POSITION THAT WE HAVE HAD THE BURDEN, AND TO EVEN GET TO THAT POINT, WE HAVE HAD TO MEET THAT THERE ARE SUFFICIENT AGGRAVATING CIRCUMSTANCES. ONLY THEN DOES THE DEFENSE ASSESS OR THE JURY TOLD YOU NEED TO DETERMINE WHETHER OR NOT THOSE ARE OUTWEIGHED BY THE MITIGATING CIRCUMSTANCES.

ARE THEY TOLD THAT? OR ARE THEY REVERSED, THAT ONCE THEY FINDING AGGRAVATORS, THEN THEY MUST FIND, DETERMINE THE MITIGATION, THEN IS IT THAT THE MITIGATION HAS TO OUTWEIGH THE AGGRAVATION OR THE AGGRAVATION HAS TO OUTWEIGH --

WHETHER OR NOT THE MITIGATION OUTWEIGHS ESTABLISHED AGGRAVATION.

CHIEF JUSTICE: THAT IS THE QUESTION HE IS RAISING, IS THAT A BURDEN SHIFT SOMETHING.

NO, YOUR HONOR, THERE IS NOT, AND THERE IS A LONG LINE OF CASES, THE STATE HAS GONE BACK TO, EVEN, PROPHET, WHERE THE COURT HAS UPHELD THAT AND TRACKED THE STATUTE FOUND CONSTITUTIONAL, AND I SEE I AM OVER TIME, BUT THIS COURT HAS, IN A LENGTHY PERIOD OF TIME, REPEATEDLY AND CONSISTENTLY REJECTED IT, AND THIS COURT RELIES ON THE STATE'S PRIOR PRECEDENT. THANK YOU.

CHIEF JUSTICE: REBUTTAL. TWO AND-A-HALF MINUTES.

AS QUICKLY AS I CAN, AND THESE MAY BE DISJOINTED AS A RESULT. THEY SAY THAT THIS LETTER WAS NOT HIDDEN PURPOSEFULLY BY THE STATE ATTORNEYS OFFICE. IT WAS IN THEIR POSSESSION. IT WAS IN MR. MATTHEWS'S STATE ATTORNEY TRIAL FILE, AND THERE WAS NO RICHARDSON HEARING HERE. THERE WAS NO INQUIRY WHATSOEVER, SO WE DON'T KNOW WHETHER IT WAS WILLFUL OR INADVERTENT, AND FOR THE STATE TO SAY THAT IT WAS NOT PURPOSELY, THERE IS NO RECORD EVIDENCE OF THAT. AS FAR AS THE BURDEN SHIFTING, HE SAYS THAT PROPHET APPROVES THIS. PROPHET DOES NOT APPROVE. THAT PROPHET VERSUS FLORIDA SAYS THAT THE AGGRAVATORS MUST OUTWEIGH THE MITIGATORS AND VICE VERSA, AND THE STATE ARGUES THAT THE DEFENSE HAS TO SHOW AN ADVERSE EFFECT. THIS IS NOT THE STANDARD WHERE CONFLICT IS RAISED PRIOR TO TRIAL. WHY? BECAUSE WHEN IT IS RAISED PRIOR TO TRIAL, THE TRIAL DEFENSE LAWYER BELIEVES HE HAS AN ETHICAL CONFLICT, BELIEVES HE CANNOT DO CERTAIN THINGS. THIS TEST IS ONLY USED IN POSTCONVICTION, WHERE THE TRIAL LAWYER DID NOT FEEL ANY CONSTRAINT BY THE ETHICAL CONSTRAINTS.

CHIEF JUSTICE: DO YOU AGREE WITH THE STATUTE SINCE GUZMAN, THAT THE STATUTE, THEN, ALLOWS THE TRIAL JUDGE TO INQUIRE INTO --

YES, YOUR HONOR. YES.

CHIEF JUSTICE: SO THAT WAS DONE HERE, SO WOULDN'T IT BE MORE LIKE AN ABUSE OF DISCRETION?

YES, YOUR HONOR, AND WE ADMIT THERE WAS AN ABUSE OF DISCRETION HERE. THE STANDARD TO BE USED, IS NOT WHETHER THERE IS A ADVERSE EFFECT, BECAUSE YOU CAN'T TELL WHAT COUNSEL DID NOT DO FROM THE RECORD. THE CASES SAY THIS. LEE VERSUS STATE OR TEES

VERSUS STATE, THOMAS VERSUS STATE, GLASSER VERSUS UNITED STATES AND HOLLOWAY VERSUS ARKANSAS, ALL OF THESE SAY YOU CANNOT TELL AFTER THE FACT WHAT THE HARM WAS.

CHIEF JUSTICE: THE TRIAL JUDGE SAID, AT THE TIME THAT HE ALLOWED COUNSEL TO WITHDRAW, DETERMINED THAT THERE WAS NOT ENOUGH THERE TO SHOW WHETHER DEFENSE COUNSEL COULD ACTIVELY CROSS-EXAMINATION THIS WITNESS.

YES, YOUR HONOR.

CHIEF JUSTICE: AND YOU AGREE THAT WE CAN LOOK AMONG OTHER THINGS, AT THE NATURE OF THE CROSS-EXAMINATION AS WELL.

WELL, YOU CAN LOOK AT THE STATEMENTS THAT DEFENSE COUNSEL MADE TO THE JUDGE, WHY HE FELT CONSTRAINED, AND THE EVIL IS WHAT THE ADVOCATE FINDS HIMSELF COMPELLED TO REFRAIN FROM DOING. HENCE THE SCOPE OF ERROR IS NOT READILY IDENTIFIABLE, FROM THE REVIEW OF THE TRIAL TRANSCRIPTS.

CAN WE LOOK AT THE TIMING OF THE MOTION? THAT IS GOING BACK AGAIN, AND YOU ARE FREE TO CLARIFY, IF I UNDERSTAND IT CORRECTLY, THIS MOTION WAS FILED JUST TWO WEEKS BEFORE THE START OF TRIAL, AND YET THE DEFENSE LAWYER HAD KNOWN, TWO YEARS BEFORE, ABOUT THIS POTENTIAL CONFLICT.

NO, YOUR HONOR.

OKAY. WELL, HELP ME WITH THAT. IN OTHER WORDS, I AM GETTING A PICTURE OF --

THE STATE SAYS --

IN DOING THAT, BE MINDFUL OF THE TIME AND THAT IT EXPIRED, SO RESPOND TO THE QUESTION.

IT WAS CERTAINLY MISLEADING. I UNDERSTAND. THE ASSISTANT STATE ATTORNEY SPECIFICALLY INFORMED DEFENSE COUNSEL THE PUBLIC DEFENDERS OFFICE DOES NOT REPRESENT MR. MATTHEWS. THEY QUESTIONED MR. MATTHEWS IN DEPOSITION AND THEY SAID, NO, THE PUBLIC DEFENDERS OFFICE DOESN'T REPRESENT ME. TO IMPEACH FROM MR. MATTHEWS --

CHIEF JUSTICE: YOUR TIME IS UP. THANK YOU. THANK YOU BOTH, FOR YOUR TIME AND A VERY INFORMATIVE ORAL ARGUMENT.