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## Scott Mansfield v. State of Florida

PLEASE RISE .

PLEASE BE SEATED .

NEXT CASE ON THE COURT'S DOCKET IS MANSFIELD VERSUS STATE OF FLORIDA. ARE THE PARTIES READY?

YES, YOUR HONOR.

YOU MAY PROCEED.

MAY IT PLEASE THE COURT, MY NAME IS JIM DRISCOLL ALONG WITH DAVID BASS WE ARE HERE ON BEHALF OF SCOTT MANSFIELD. WE ARE HERE BECAUSE THE PROSECUTION OF SCOTT MANSFIELD HAD NONE OF THE RELIABILITY THAT IS CRIMINAL -- A CRIMINAL CASE, LET ALONE ONE IN WHICH THE STATE IS SEEKING DEATH SHOULD HAVE. MR. MANSFIELD DID NOT HAVE THE ASSISTANCE OF EFFECTIVE ASSISTANCE OF COUNSEL, THERE WASN'T A PROPERLY SELECTED JURY, TAINTED AND ILLEGAL EVIDENCE WAS ADMITTED AGAINST MR. MANSFIELD AND KEY DECISION MAKERS IN THIS CASE. THE TRIAL COURT, THE JURY AND THIS COURT IN MAKING A DECISION THAT CERTAIN EVIDENCE WAS HARMLESS, ON DIRECT APPEAL, WERE DENIED IMPORTANT FACTS.

THOSE ARE A LOT OF ISSUES AND YOU HAVE A LOT OF ISSUES. ARE YOU GOING TO CONCENTRATE ON SEVERAL SPECIFIC POINTS IN YOUR BRIEF?

YES, YOUR HONOR. I WOULD JUST -- I WOULD BEGIN WITH WHAT'S REALLY THE ESSENCE OF OUR CRIMINAL JUSTICE SYSTEM, AND THAT, IN FACT, IS THE RIGHT TO A FAIR TRIBUNAL AND I BELIEVE WE QUOTED AT LENGTH IN OUR BRIEF.

WHICH ISSUE IS THAT?

THAT WOULD BE ARGUMENT 1, AND THAT WAS RAISED IN POST CONVICTION AS A CLAIM 14, I BELIEVE.

THIS IS THE QUESTION OF WHETHER JUDGE PERRY SHOULD HAVE BEEN RECUSED BASED ON COMMENTS THAT HE MADE ABOUT THE POSSIBLE PLEA BARGAIN?

BUT IT WAS RAISED ON POST CONVICTION AS A LOSS OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

LET'S GET TO WHAT THE ISSUE FIRST OF ALL IS THAT YOU ARE RAISING IT THAT THE ATTORNEY IN DIRECT APPEAL SHOULD HAVE MOVED TO REACCUSE JUDGE PERRY FROM THE SENTENCING PHASE OF THIS CASE?

OF THE TRIAL COUNSEL. NOT ON THE DIRECT APPEAL. WE HAVE A CLAIM IN OUR HABEAS PETITION TO THE EXTENT THAT THIS COURT FINDS THAT IT COULD HAVE BEEN RAISED ON DIRECT APPEAL, APPELLATE COUNSEL SHOULD HAVE RAISED THAT ON DIRECT APPEAL, BUT OUR ORIGINAL CLAIM IN POST CONVICTION WAS THAT TRIAL COUNSEL WAS INEFFECTIVE AFTER THE

HE COURT MADE THESE COMMENTS FOR NOT MOVING TO DISQUALIFY THAT JUDGE AT A POINT IN TIME WHERE THE JUDGE HAD YET TO HEAR THE JURY'S RECOMMENDATION AND HAD YET TO HEAR EVIDENCE THAT WOULD BE PRESENTED AT -- HERE.

WELL, SET THE CONTEXT FOR US AND GO AHEAD WITH YOUR ISSUE.

IT BEGAN AT SOME POINT WHILE THE JURY WAS DELIBERATING ON WHAT THE RECOMMENDATION WOULD BE. THERE WAS AN OFFER OF LIFE MADE BY THE STATE WITH SOME CONDITIONS, AND COUSEL WAS DISCUSSING THAT WITH MR. MANSFIELD AND IT WAS BROUGHT TO THE ATTENTION OF THE COURT, AND WHAT FOLLOWS WAS COMMENTS BY THE COURT WHICH SHOULD HAVE GIVEN ANY REASONABLE PRACTITIONER CONCERN, NOT JUST THAT MR. MANSFIELD WAS GOING TO RECEIVE A FAIR AND IMPARTIAL SPENCER HEARING OR FAIR AND IMPARTIAL PENALTY PHASE BUT, IN FACT, WHETHER HE HAD RECEIVED ANYTHING THROUGHOUT THIS TRIAL THAT WAS FAIR AND THESE COMMENTS ARE SUCH A NATURE --

WHAT DID HE SAY SPECIFICALLY THAT WOULD HAVE MADE ONE BELIEVE HE DID NOT RECEIVE A FAIR TRIAL UP TO THAT POINT?

SPECIFICALLY, YOUR HONOR, THE COURT MADE -- SHOWED %% --pp WITH THE COURT'S STATEMENTS THAT, IN FACT, IT PRESUMED OR IT ALWAYS BELIEVED WHEN %% -- pp THE STATE OF FLORIDA BROUGHT A CASE THEY DIDN'T HAVE ANY PROOF PROBLEMS. AND IN A CASE, IN A CRIMINAL CASE, EVEN TO A CERTAIN EXTENT ON WHETHER THE DEATH PENALTY IS APPROPRIATE, THE ONLY PRESUMPTION --

WAS THAT A COMMENT THAT ACTUALLY WENT TO THE NATURE OF THE CASE OR DID IT HAVE MORE TO DO WITH THIS WHOLE NOTION OF THE APPEAL AND WAIVING THE RIGHT TO APPEAL?

YOUR HONOR, WE BELIEVE WHILE THE STATEMENTS SPEAK FOR THEMSELVES, WHAT IT WAS IN REFERENCE TO WAS WHEN THE STATE OF FLORIDA AND BRINGS A CASE, THEY MAKE AN ANNALS IS THAT THERE AREN'T ANY PROOF PROBLEMS. IN A CRIMINAL CASE THE STATE OF FLORIDA ALWAYS HAS PROOF PROBLEMS BECAUSE THEY HAVE THE BURDEN OF PROVING THE CASE BEYOND AND TO THE EXCLUSION OF --

MR. DRISCOLL, BUT YOU'VE GOT -- DON'T WE HAVE TO LOOK AT THIS IN THE CONTEXT OF HOW THIS WAS UNFOLDING AT THE TIME OF THIS TRIAL, AND THAT WHAT WE HAD WAS THAT THE GUILT PHASE HAD BEEN CONCLUDED OF THIS TRIAL, CORRECT?

YES, YOUR HONOR. >> AND, IN FACT, THE PENALTY PHASE HAD BEEN PRESENTED TO THE JURY AND THE JURY WAS OUT DELIBERATING?

THAT'S CORRECT.

AND THEN THERE WERE THESE NEGOTIATIONS APPARENTLY OR %% --pp DISCUSSIONS BETWEEN THE STATE AND THE DEFENSE COUNSEL, AND THEN THEY TOOK THAT INFORMATTION IN BEFORE JUDGE PERRY, AND THAT WAS THE CONTEXT IN WHICH THE DISCUSSION CAME UP, CORRECT?

THAT IS CORRECT, YOUR HONOR.

AND SO INSTINCTUALLY A FAIR INTERPRETATION OF WHAT WAS THEN GOING ON, WAS THAT THE JUDGE WAS SAYING, YOU KNOW, THE STATE HAS MADE A DETERMINATION TO ASK THIS %% --pp JURY TO SENTENCE THIS DEFENDANT TO DEATH, WHICH IS AN AWE-SOME DECISION ON THE PART OF THE STATE TO MAKE THAT DECISION, AND SO THAT'S %% --pp THE

CONTEXT THAT I LOOK AT THIS IN , AND I SN'T THAT BASICALLY WHAT WAS BEING SAID?

YOUR HONOR , I BELIEVE THAT'S ONE OF THE THINGS THAT WAS BEING SAID , BUT IT WAS ALSO SAYING AT A TIME WHERE THE JURY HADN'T SPOKEN AND THE EVIDENCE , MENTAL HEALTH EVIDENCE HADN'T BEEN PRESENTED AT A SPECIAL HEARING, IT WAS ALSO IN THAT CONTEXT, HER E'S THE COURT % --ppBECOMING, AND I BELIEVE A FAIR READING OF THIS IS I RATE OR ANGRY OVER THE FACT THAT MR. MANSFIELD AT THIS POINT MAY NOT RECEIVE THE DEATH PENALTY.

BUT YOU'RE LOOKING AT THE COLD RECORD AND WHAT YOU HAVE ACTUALLY TOLD US IS THAT WE ARE LOOKING AT THIS OR MUST LOOK AT IT AS AN INEFFECTIVE ASSISTANCE CLAIM SO FIRST YOU'VE GOT TO PROVE THAT NO REASONABLE LAWYER WOULD EVER HAVE FAILED TO IMMEDIATELY MOVE TO HAVE RECUSED JUDGE PERRY BASED ON THE STATEMENTS THAT HE MADE WHICH AS JUSTICE WELLS POINTED OUT, WERE MADE IN THE CONTEXT, THE VERY SPECIFIC CONTEXT OF THE ISSUE OF THE PLEA ARGAIN . SECOND OF ALL, AND I THINK THIS IS A GREATER BURDEN FOR YOU , BECAUSE IT IS ON POST CONVICTION OUR CASE LAW SAYS THAT YOU MUST SHOW ACTUAL BIAS, AND WHERE , OTHER THAN THIS COMMENT WHICH IS SUSCEPTIBLE TO AT LEAST AN % --ppINTERPRETATION AS GIVEN BY JUSTICE WELLS , DO YOU HAVE EVIDENCE THAT JUDGE PERRY WAS ACTUALLY BIASED IN THE ADJUDICATION OF THE DEATH CASE?

YOUR HONOR, I MEAN , WE % --ppBELIEVE THROUGH JUST THE STATEMENTS ALONE THAT IT SHOWS THAT BUT WE WANTED TO BRING THAT EVIDENCE, WHETHER IT WAS BEFORE A FAIR % --ppTRIBUNAL IN POST CONVICTION OR BEFORE THIS COURT , BUT THE COURT DENIED OUR MOTION TO DISQUALIFY SO THAT WE COULD, IN FACT , CALL JUDGE PERRY AS A WITNESS.

DO YOU HAVE OTHER EVIDENCE THAT HE WAS ACTUALLY BIASED?

WELL , YOU WOULD HAVE TO LOOK AT THE CASE. AS A WHOLE THIS IS A CASE , IN FACT, WHERE MR. MANSFIELD % --ppRAISED AN ISSUE ABOUT THE ILLEGAL INTERROGATION AND THIS COURT FOUND THAT WAS IN ERROR WHILE HARMLESS , BUT THAT WAS DENIED. OVERALL, HOW THE CASE WAS HANDLED, WE WOULD HAVE LIKED TO HAVE THAT EVIDENCE TO BRING IT HERE AND WE BELIEVE WE COULD HAVE GOT TEN THAT THROUGH CROSS-EXAMINATION AS WE WOULD WITH THE WITNESS.

BUT YOU AGREE THAT ACTUAL BIAS IS THE HIGHER THRESHOLD THAN WHAT WOULD HAVE HAD TO BE SHOWN TO ORIGINAL IF A MOTION TO REACCUSED BEEN MADE AT THE TIME OF THE - - AT THE TIME THE STATEMENTS WERE MADE?

AT THE TIME THE STATEMENTS WERE MADE --

DO YOU AGREE WITH THAT , THAT'S IT IS A DIFFERENT STANDARD?

FOR RECUSAL IN A POST CONVICTION SETTING , YES .

FOR INEFFECTIVE ASSISTANCE YOU HAVE TO SHOW THERE WAS ACTUAL BIAS BEFORE THERE CAN BE PREJUDICE?

YOUR HONOR, I BELIEVE WE WOULD HAVE TO SHOW THAT, IN FACT, THE COUNSEL WAS NOT MEETING WHAT THE SIXTH AMENDMENT DEMANDS.

THAT'S THE FIRST PRONG. AND THE SECOND THERE HAS TO BE A SHOWING OF ACTUAL BIAS.

WELL , THE PREJUDICE WAS % --ppMR. MANSFIELD WAS DENIED A % --ppFAIR TRIBUNAL THROUGHOUT THE PROCEEDINGS.

ANOTHER WAY OF SAYING IT IS YOU WOULD HAVE TO SHOW ACTUAL BIASES? -- pp

YES, YOUR HONOR.

WOULD YOU RESTATE? I'M STILL NOT SURE THAT I UNDERSTAND THE CONTEXT HERE. DID DEFENSE COUNSEL AND THE PROSECUTOR ASK TO SPEAK TO THE COURT AND THEN TELL -- ADVISE THE COURT OF THE STATE OF NEGOTIATION OR JUST EXACTLY HOW WAS THIS PRESENTED TO THE COURT IN TERMS OF THIS THEN PROMPTING --ppTHE RESPONSE THAT JUDGE PERRY HAD?

I BELIEVE IT CAME UP IN THE CONTEXT OF WHETHER IT WOULD HAVE WITHIN PROPER FOR THE STATE TO -- FOR --ppMR. MANSFIELD TO RECEIVE A LIFE SENTENCE AT THAT POINT AND IT WAS COUNSEL'S IMONY AT THE POST CONVICTION HEARING THAT, IN --ppFACT, IT WAS JUST TO BUY SOME MORE TIME FOR MR. MANSFIELD TO DECIDE TO TAKE THIS.

DEFENSE COUNSEL WANTED THE OPPORTUNITY TO HAVE THE JUDGE INFORMED OF THIS PLEA NEGOTIATION?

YES. WELL, THE OTHER THING THAT HAD TAKEN PLACE WHEN THIS WAS ON THE TABLE I BELIEVE THEY WOULD HAVE HAD TO ASK PERMISSION OF THE COURT FOR FAMILY MEMBERS OF --ppMR. MANSFIELD COULD SPEAK TO HIM ABOUT THIS -- THE OFFER THAT WAS ON THE TABLE.

SO WAS THERE A REQUEST FOR THERE TO BE A RECROSS OR JUST FOR A CERTAIN SPECIFIC AMOUNT OF TIME FOR THIS OFFER TO BE CONSIDERED AND WAS IT CLEAR THAT THE OFFER WAS MADE?

THE OFFER, FROM THE RECORD AND WE HAD A CLAIM REGARDING THAT, BUT THE OFFER WAS MADE THAT THE PARTICULARS I DON'T KNOW ARE NECESSARILY HERE, BUT --ppMR. MANSFIELD WAS TO ENTER A PLEA OF GUILTY, WAIVE HIS APPEALS, AND RETURN FOR A LIFE SENTENCE.

SO THAT'S PART OF IT. THE OFFER WAS MADE FROM THE STATE.

THE STATE MADE THE OFFER.

SO WHAT WAS BEING ASKED OF THE COURT?

THE COURT, I BELIEVE, THAT THE COURT, THE ATTORNEYS INFORMED THE COURT ABOUT WHAT WAS GOING ON, AND THEY ALSO, I BELIEVE, JUST TO HAVE PERMISSION, FOR THE FAMILY MEMBERS TO COME SINCE MR. MANSFIELD WAS --ppINCARCERATED AT THE TIME TO SPEAK WITH HIM, AND JUST APPRISE THE COURT OF WHAT WAS GOING ON.

AND WAS THE PLEA THEN WITHDRAWN?

THE PLEA WAS WITHDRAWN.

THE OFFER?

THE OFFER WAS WITHDRAWN. THERE WAS SOME DEBATING BACK AND FORTH OVER WHETHER, IN FACT, THIS COULD BE DONE AT THAT TIME. --pp

CLARIFY FOR ME AT WHAT POINT HAD THE GUILTY VERDICT ALREADY BEEN MADE, THE GUILTY PHASE?

THE GUILTY VERDICT HAD BEEN RETURNED.

SO IT WAS THE PENALTY PHASE. THE JURY WAS OUT IN THE PENALTY PHASE?

AND IF THEY RECOMMENDED LIFE ALL MR. MANSFIELD COULD RECEIVE WAS LIFE.

AND BASED ON THE VERDICT ALL HE COULD HAVE RECEIVED WAS LIFE UNLESS THEY RECOMMENDED DEATH?

IF THEY RECOMMENDED DEATH THEN WE WOULD MOVE ON TO THE SPENCER HEARING.

SO WHAT WAS THE MOTIVATION EXPRESSED TO THE TRIAL COURT AS TO WHY THE STATE WAS NOW GOING TO TAKE IT AWAY FROM THE JURY AND MAKE THAT RECOMMENDATION?

I BELIEVE THAT THE STATE WOULD HAVE THEIR POSITION. THERE WAS TALK ABOUT HOW AS WAIVING AN APPEAL, WHETHER IT WOULD HAVE PREVENTED THIS. POST CONVICTION I'M UNCLEAR OF, BUT THEY HAD THEIR POSITION AND IT WAS SUCH THAT MR. MANSFIELD WOULD WAIVE HIS APPEAL.

WELL, WHEN WAS THE OFFER WITHDRAWN BY THE STATE?

WHILE THIS WAS AFTER THE COURT MADE THESE STATEMENTS WHICH WE FOUND SO -- WE WERE SO CRITICAL OF -- THEN THERE WAS BACK AND FORTH AND THEY SAID, FINALLY, WE WILL REMOVE THAT OFFER.

BACK AND FORTH BETWEEN -- I'M SORRY. THE BACK AND FORTH WAS BETWEEN THE STATE AND THE DEFENDANT, NOT THE STATE AND THE COURT?

THE COURT -- THE COURT WAS, I THINK, BY READING WHAT OCCURRED WITH THE STATEMENTS WAS APPARENTLY VERY UPSET WITH THE STATE, TOO, AND --

BUT THE FACT AND FOR THY YOU WERE TALKING ABOUT WAS BETWEEN WHO?

WAS BETWEEN THE STATE AND THE COURT AND THEN THERE WAS SOME DEBATE OR GOING BACK AND FORTH BETWEEN ALL OF THE PARTIES OVER WHETHER AFTER THE JURY HAD RETURNED THE GUILTY VERDICT, WHETHER, IN FACT, A LIFE SENTENCE COULD BE IMPOSED.

YOU ARE NOT CONCERNING AS PART OF THE PREJUDICE THAT MR. MANSFIELD WAS DEPRIVED OF THE OPPORTUNITY TO PLEAD TO LIFE, WITH YOU? BECAUSE I DIDN'T SEE THAT AS BEING PART OF GETTING INTO THIS ISSUE ABOUT WHEN THE PLEA WAS WITHDRAWN, BUT I DIDN'T UNDERSTAND THAT TO BE PART OF YOUR ARGUMENT.

URPS, THAT WAS ONE -- YOUR HONOR, THAT WAS ONE OF THE CLAIMS. THERE WAS A CONFLICT IN EVIDENCE AT THE POST CONVICTION HEARING ON WHETHER MR. MANSFIELD HAD, IN FACT, DECIDED TO TAKE THE PLEA OR NOT AND WE DIDN'T PROCEED ON APPEAL ON THAT.

ALL RIGHT. SO THAT'S THE NON ISSUE AS FAR AS WHETHER THE PREJUDICE IF JUDGE PERRY WAS AS WRONG IN WHAT HE SAID, THAT IS THERE WASN'T ANY BARR TO A PLEA -- BEING ENTERED AT THAT STAGE, THAT SOMEHOW HIS COMMENTS THWARTED A PLEA AGREEMENT FROM BEING REACHED?

WE ARE NOT ARGUING THAT BUT ALSO WE ASK THAT THIS COURT TAKE A LOOK AT THE ENTIRE CASE AS YOU DO, AND CONSIDER ALL OF THE INEFFECTIVENESS THAT MR. MANSFIELD SUFFERED FROM, AND A VERY IMPORTANT ISSUE THAT AROSE IN THIS CASE, JUST IN FACT HOW THAT JURY WAS DENIED VERY IMPORTANT FACTS.

JUST BACK TO THE FIRST POINT , WOULD YOU , YOU KNOW , THE IDEA THAT AN ATTORNEY IN THE MIDDLE OF NEGOTIATIONS HEARS A COMMENT FROM THE JUDGE, YOU SEE THAT COMMENT ON THE COLD RECORD , THE ATTORNEY IS THERE , AND EVALUATES WHETHER ALL ALONG , BASED ON HOW THE JUDGE HAS BEEN HANDLING HIMSELF OR HERSELF, THAT THE JUDGE CAN BE FAIR AND IMPARTIAL , ISN'T THERE THAT SUPERIOR VANTAGE POINT AS TO THAT ISSUE ? THAT IS THAT JUST THE FACT THAT YOU LOOK AT A COLD RECORD AND SAY THE COMMENTS SHOULD BE INDICATIVE OF PARTIALITY , YOU KNOW , INABILITY TO BE FAIR, THAT THE TRIAL ATTORNEY IS THERE AND ABLE TO SEE THAT IT IS BEING MADE IN THE CONCEPT - - CONTEXT OF , YOU KNOW, THAT IS NOT OUT OF THE BLUE BUT IN RESPONSE TO SOMETHING THAT IS BEING DISCUSSED.

WELL, IT WAS JUST ON THE %% --ppC OLD RECORD, IT WAS APPARENT THAT COUNSEL SHOULD HAVE MOVED TO DISQUALIFY THE COURT , BECAUSE THERE WAS STILL A SPENCER HEARING TO HAPPEN.

BUT IS ONE OF YOUR CLAIMS HERE THAT FOR THAT REASON JUDGE PERRY THEN SHOULD HAVE BEEN RECUSED AND THERE HAVE BEEN AN EVIDENTIARY HEARING ON THAT CLAIM AND ONE WASN'T HAD?

THERE WAS AN EVIDENTIARY HEARING.WE WERE GRANTED AN EVIDENTIARY HEARING.

ON THIS CLAIM?

WE WERE UNABLE TO CALL JUDGE PERRY BECAUSE , IN FACT , HE WAS PRESIDING OVER THIS.

DID THE LAWYERIFY?

THE LAWYER TESTIFIED.

WHAT DID THE LAWYER SAY?

THE LAWYER SAID THAT SHE SAW NO REASON TO DISQUALIFY %%-- ppTHE COURT.

JUST WHAT I AM SAYING IS WHAT THE LAWYER SAID IN THE CONTEXT OF THE WAY HE SAID IT DID NOT GIVE HER ANY CONCERN ABOUT HIS ABILITY TO BE FAIR AND IMPARTIAL , CORRECT?

THAT WAS JUST THE EXTENT OF HER COMMENTS. I THINK IT COULD ONLY GET WORSE WHEN IT IS CONSIDERED THAT THE JUDGE, IN FACT , THIS IS THE COLD RECORD. THE JUDGE FROM THIS WOULD APPEAR TO BE VERY UPS ET AND ANGRY AT THIS POINT , SO I THINK THE COLD RECORD IS MOST FAVORABLE TO TRIAL COUNSEL.

YOU HAVE MANY OTHER POINTS BUT YOU HAVE THE BRIEF.WOULD YOU LIKE TO RESERVE THE REST OF YOUR TIME FOR REBUTTAL?

I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

MR. AKE?

MY NAME IS STEPHEN AKE AND I REPRESENT THE STATE OF FLORIDA IN THIS CASE. THE STATE WOULD SUBMIT THAT THE TRIAL COURT RIGHTLY MADE THE RIGHT DECISION ON THE COMMENTS WE HAVE BEEN TALKING ABOUT.

HOW CAN THE JUDGE WHO MADE THE COMMENTS PREPARE OVER THE CLAIM AS TO WHETHER

THE COMMENTS THEMSELVES RISE TO THE LEVEL OF THE ACTION OF THE ATTORNEY NOT RECUSING THE JUDGE?

COUNSEL RAISES IT, IT IS KIND OF A TWO-FOLD ISSUE HERE AND THE FIRST ISSUE IS HE FIRST MADE A MOTION TO DISQUALIFY THE JUDGE FROM HEARING THE EVIDENTIARY HEARING AND THAT JUDGE, JUDGE PERRY, DENIED THAT MOTION. HE TOOK A WRIT UP TO THIS COURT.

IS THAT A TIMELY ISSUE THERE? IN OTHER WORDS, THAT SINCE THE COMMENTS HAD BEEN MADE THAT THEY DID NOT TIMELY MOVE?

CERTAINLY THAT'S PART OF %% --ppHIS RULING WAS THAT IT WAS UNTIMELY. HIS RULING WAS IT WAS LEGALLY INSUFFICIENT BUT PART OF THAT HAS TO BE THE TIMING. YOU CAN'T COME BACK FOUR YEARS LATER AND SAY O. THEY WERE OBVIOUSLY AWARE OF THE COMMENTS FROM 1998 AND THEY DON'T EVEN RAISE IT UNTIL 2002.

BUT I GUESS MY QUESTION IS: IF HE WAS GRANTED AN %%-- ppEVIDENTIARY HEARING ON THIS POINT.

RIGHT.

HOW CAN THE JUDGE, WHO MADE THE COMMENTS, PRESIDER OVER WHETHER THE COMMENTS WERE SUCH THAT --

THAT'S NOT WHAT HE IS MAKING A RULING ON IN AN EFFECTIVE CLAIM. ALL HE IS RULING ON IS WHETHER REASONABLE COUNSEL WOULD HAVE BEEN -- HE IS NOT MAKING A RULING ON THE MERITS LIKE I KNOW THIS COURT HAS A PROBLEM WITH TRIAL JUDGES ARE NOT ALLOWED TO DISCUSS THE MERITS OF THE MOTION TO DISQUALIFY WHEN IT WAS MADE BUT IN THE EVIDENTIARY HEARING HE WAS SIMPLY RULING ON THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

HOW COULD HE SEPARATE THAT OUT? THAT IS, IF, FOR INSTANCE, IF HE SAYS, WELL, I KNOW I WASN'T ANGRY, AND THAT I DIDN'T -- I WASN'T UPS ET WITH THEM NOW MAKING A DEAL AFTER EVERYTHING HAD BEEN DONE OR WHATEVER, AND SO I THINK I THINK IT IS PERFECTLY REASONABLE FOR THE DEFENSE COUNSEL THAT I FIRED TO SAY THAT SHE DIDN'T PERCEIVE THERE WAS ANY PROBLEM, YOU KNOW, AND DIDN'T FILE A MOTION TO REACCUSE AS OPPOSE -- RECUSE AS OPPOSED TO %% --ppA NOTHER JUDGE LISTENING TO THIS AND SAYING, WELL, I MAY NOT AGREE WITH DEFENSE COUNSEL'S DECISION, NOT TO MOVE TO RECUSE BECAUSE AS I READ, YOU KNOW, WHAT WAS SAID HERE, BOY, I TAKE IT THAT THE JUDGE WAS SAYING, MY GOSH, YOU MEAN, WE SAT THROUGH THIS WHOLE TRIAL AND THE STATE ASKED FOR THE DEATH PENALTY AND NOW IT IS CHANGING ITS MIND AND GIVING THIS FELLOW A DEAL IN THE %% --ppFACE OF ALL OF THIS EVIDENCE? AND I WAS ANGRY OR I, YOU KNOW, THE OTHER JUDGE %% -- ppFORESEES THAT HE WAS ANGRY AND THAT THERE MAY BE AN ISSUE THERE.

ALL OF THAT STUFF IS ALL TIED TOGETHER?

I DON'T THINK IT IS INHERENT IN THIS JUDGE'S RULING ON THE INEFFECTIVE CLAIM TO PASS ON THE MERITS. %%-- pp

I THINK, AGAIN, YOU ARE MIXING TWO THINGS UP. WHETHER THE STATE HAS A MOTION TO RECUSE, THE JUDGE DOESN'T EVALUATE THE MERITS. BUT WHEN IT IS AN INEFFECTIVE ASSISTANCE CLAIMS ONE OF THE THINGS THAT HAS TO BE ESTABLISHED IS THAT, WELL, EITHER, THE COUNSEL WAS INEFFECTIVE IN NOT MOVING TO RECUSE AND SECOND THERE IS ACTUAL BIAS AND HOW DOES THE JUDGE WHO IS THE JUDGE WHO IS THE OBJECT OF THIS MAKE A DETERMINATION THAT THERE WAS NO BIAS OR THAT SOMEBODY WASN'T EFFECTIVE

VE I N N OT MOVING F OR R EC USAL B AS ED ON C OMMENTS HE MADE? I'M HAV ING A HARD TIME W ITH HAVING SOM EO NE E VA LU AT E T HAT SINCE THEY ARE A PLAYER IN IT.

RIGHT, AND O BV IOUS LY H E WOULD I GUESS IN SOME S EN SE HAVE TO DO THAT.

NOT IN S OME SEN SE, IN EVERY SENSE.

BECAUSE HE COULD DEN Y IT ON JUST THE F IR ST P RO NG WITHOUT EVEN GETTING TO THAT. HE COULD DENY IT ON DEFICIENT PERFORMANCE.

BUT THE DEFICIE NT % % --ppPERFO RMANCE DEPENDS, I GUE SS WE COULD LOOK AT T HIS C OL D RECORD AND SAY EVEN O N THI S COLD RECORD I T IS NOT LEGALLY SUFFICIENT AND SO IF WE AGREE WITH Y OU O N THA T I T % %-- ppPROBABLY DOESN'T GO ANY FURTHER.IN OTHER WORDS, EVEN IF SOMEBODY HAD M OV ED T O R EC US E AT THE TIME THERE IS N O BASIS A ND THAT'S PRO BA BLY WHERE YOU W OULD RATHER WE G O ON THIS.

CORRECT. AND THAT'S PART AND P AR CEL OF IT IS T HA T I N T HE ANALYZING INEFF ECTIVE ASSISTANCE EVEN HAD C OUNSEL RAISED THIS AT T HE T IM E THA T THE C OMMENTS HAPPENED T HE JUDGE WOULDNT HAVE GRANTED IT.

BUT YOU WOULD R Ather STILL -- I F W E S TA Y I T T HE RE % % --ppWE DON'T HAVE TO G O TO THE NEXT LEVEL.

AND THIS COURT H AS DON E THIS IN OTHER C AS ES . ASAY COMES TO M IN D AND T HE S AME PROCEDURE TOOK PLACE. THE SAME JUDGE D ENIED IT AND FOUND THAT IT W AS , YOU KNO W , NOT INE FF EC TIVE ASSIS TA NCE BECAUSE IT WAS INS UFFI CI EN T. SO IT HAS B EE N D ON E B EFORE AND AS I MENTIONED B RIEFLY THIS COURT, THEY BROUGHT IT UP TO THI S C OURT O N A W RI T OF P ROHI BITI ON.

WE DIDN' T D EN Y I T O N T HE MERITS.

NO, BUT YOU STI LL S EN T I T BACK TO JUDGE P ERRY .

BUT Y OU A GR EE I F W E G OT PAST THAT AND SAI D T HOSE A RE COMMENTS THAT COULD BE CONSTRUED TO PERHAPS INDICATE LACK OF IMP AR TIAL IT Y THEN THERE MIGHT BE PROBLEMS.

I STILL DON'T THINK YOUWILL EVER G ET TO THAT PHASE BUT EVEN IF YOU DID I STILL DON'T THINK THERE ARE ANY PROBLEMS WITH T HIS JUDGE RULING ON THAT.

LET ME ASK YOU THIS : I N O RDER TO D ET ERMINE WHETHER THE JUDGE SHOULD H AV E S AT ON THE INE FF ECTIVE A SS IS TA NCE OF COUNSEL CLAIM WE HAVE T O HOLD THAT THERE WAS A TIM EL Y MOTION TO D IS QUALIF Y THE JUDGE AT T HE POS T C ON VI CTIO N HEARING, CORRECT?

AS TO THE I N EF FE CTIV E A SSISTANCE OF COU NSEL C LAIM?

IN ORDER TO REACH THA T ISSUE OF WHETHER THE J UD GE SHOULD HAVE SAT O N T HE POS T CONVICTION HEARING, WE F IRST HAVE TO DETERMINE THAT THE RE WAS A TIMELY M OT ION T O D ISQUALIFY HIM FROM SITTING IN THAT HEARING, C ORRECT?

BUT THEY DID R AI SE T HAT MOTION IN POST CONVICTION , RIGHT.

YES, BUT WAS IT A T IMEL Y MOTION?

RIGHT, A ND IT WAS D ENIED.

SO IF WE HOL D I T W AS NOT A TIMEL Y MOTION WE D ON'T GET TO THE ISSUE OF WHETHER H E

SHOULD HAVE SAT BECAUSE THERE IS NO TIMELY MOTION TO REACCUSE HIM FROM - - RECUSE HIM FROM SITTING?

HE IS BRINGING IT UP IN TWO PRONGS, HE IS ALSO BRINGING IT UP THAT TRIAL COUNSEL WAS INEFFECTIVE FOR NOT BRINGING IT UP. HE IS TAKING THREE BITES OF THE APPLE.

BUT THE ABILITY OF THE JUDGE TO SIT AS WHETHER HE IS PARTIAL OR IMPARTIAL IN SITTING CAN'T BE RAISED IF THE MOTION WAS NOT BROUGHT IN A TIMELY WAY TO RECUSE HIM ON THIS CONVICTION.

RIGHT. I THINK I UNDERSTAND WHAT YOU ARE SAYING, YES, I THINK THAT'S CORRECT. >> IT SOUNDED LIKE A FRIENDLY QUESTION, RIGHT?

I THINK SO. YOU HAD ME CONFUSED. I MUST SAY. >> WOULD YOU RESET THE TABLE FOR US AS FAR AS WHAT WENT ON?

AS FAR AS DOWN BELOW WHAT WENT ON IS AS WE DISCUSSED THE GUILT PHASE WAS OVER. HE WAS A DJUDICATED, FINGERPRINTED OR WHAT HAVE YOU AND THEN THEY WERE IN THE PENALTY PHASE. THEY HAD ALL OF THE IMONY. I BELIEVE THEY TOOK A LUNCH RECESS AT WHICH POINT IN TIME THE STATE TALKED WITH THE DEFENSE ATTORNEY.

THE JURY WAS OUT, RIGHT?

THE JURY WAS OUT AT LUNCH.

HAD THEY BEEN INSTRUCTED?

NO, NOT YET.

HAD HEARD WHATEVER THEY WERE GOING TO HEAR BUT THEY HAD NOT YET BEEN INSTRUCTED?

THEY WERE ON THE LUNCH BREAK AND THEY BROUGHT IT UP BRIEFLY WITH THE JUDGE AND HE HAD A QUESTION AS TO THE LEGALITY OF HIM WAIVING HIS APPELLATE RIGHTS AND --ppADMITTING GUILT AFTER HE HAD ALREADY BEEN A DJUDICATED GUILTY SO HE SAID FOR THEM TO GO RESEARCH IT AND THEN THEY CAME BACK AFTER THE LUNCH BREAK AND HAD MORE DISCUSSION AND IT WAS AT --ppTHAT TIME THAT THE STATE WITHDREW THE PLEA DEAL AT THAT TIME, BUT THE COMMENTS, EVEN JUST READING THE OLD RECORD AND THEY STILL HAVE YET TO POINT TO ANY SPECIFICS WHERE THE JUDGE HAS SAID ANYTHING WHICH SHOWS ANY KIND OF BIAS OR --ppPREDISPOSITION TO IMPOSE THE DEATH PENALTY IN THIS CASE AND THEY WERE GRANTED AN OPPORTUNITY AT THE EVIDENTIARY HEARING TO INTRODUCE EVIDENCE ON THIS.

I THINK I GOT WHERE YOU WERE CONFUSED, BECAUSE THE ISSUE OF WHETHER JUDGE PERRY COULD SIT IN HEARING THE CLAIM OF INEFFECTIVE ASSISTANCE WOULD BE THE ISSUE OF WHETHER THERE WAS A TIMELY MOTION TO RECUSE, BUT --ppIF WE ESTABLISH ON ITS FACE IT HAD NO MERITS THEN THE --ppINEFFECTIVE ASSISTANCE, HE WOULD HAVE SAT ON THE INEFFECTIVE ASSISTANCE. THAT GOES AWAY BECAUSE WE DON'T HAVE TO REACH ANYTHING ABOUT THAT.

I'M STILL --

I THINK I FIGURED IT OUT.

OKAY. WE'LL SEE. IN OTHER WORDS, THE MOTION WAS UNTIMELY.

RIGHT.

THE ONLY THING WE NEED TO DETERMINE AFTER FINDING THE MOTION WAS UNTIMELY IS THAT -- IS WHETHER THE TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO MOVE TO -- DISQUALIFY?

RIGHT.

AND THAT IF WE SHOW THAT THERE WAS NO LEGAL MERIT TO IT TO BEGIN WITH WE DON'T GET INTO WHETHER THERE WAS ACTUAL BIAS.

RIGHT.

AND THE FACTS ARE VERY SIMILAR TO THAT CASE I MENTIONED, AND I WOULD URGES THIS COURT TO LOOK AT THAT AND FIND IT IS VERY SIMILAR IN THAT REGARD. SINCE COUNSEL DIDN'T DISCUSS ANY OF THE OTHER ISSUES I WILL RELY ON MY BRIEFS FOR THOSE ISSUES IF THERE ARE NO FURTHER QUESTIONS.

THANK YOU.

THANK YOU.

JUST ON THE TIMELINES, AND IT WAS NEVER -- IN THE DENIAL OF OUR MOTION TO DISQUALIFY, IT WAS NEVER FOUND TO BE UNTIMELY AND I BELIEVE IT WOULD HAVE BEEN FILED WITHIN TEN DAYS OF WHEN THE NEED TO DISQUALIFICATION FROM POST CONVICTION AROSE.

WHEN WAS THE FIRST TIME THAT YOU KNEW THAT JUDGE PERRY WAS GOING TO SIT ON THE POST CONVICTION MOTION?

WELL, JUDGE PERRY, IF THERE WAS A DIFFERENT TIME FRAME IT WAS BECAUSE THERE WAS A SIGN -- IT WAS ASSIGNED TO A DIFFERENT JUDGE.

WHEN WAS THE FIRST TIME THAT YOU KNEW THAT JUDGE PERRY WAS THE FIRST ONE ASSIGNED TO THIS CLAIM?

WHEN WE FOUND THAT JUDGE PERRY WAS ASSIGNED TO IT KNOWING THE TEN-DAY RULE WE FILED THE MOTION TO DISQUALIFY AS SOON AS WE HEARD THAT JUDGE PERRY WAS SITTING ON IT.

MY QUESTION WAS WHEN DID YOU FIND OUT?

I DON'T HAVE THE DATE.

WASN'T IT IN SEPTEMBER OF 2001 WHEN JUDGE PERRY DISMISSED THE INITIAL POST CONVICTION MOTION. WEREN'T YOU PUT ON NOTICE AT THAT TIME?

AT THAT TIME I'M NOT SURE.

WHY SHOULDN'T YOU MOVE TO RECUSE WITHIN TEN DAYS OF JUDGE PERRY SIGNING THAT ORDER?

WE HAVEN'T, IN FACT, RAISED THE ISSUE OF JUDICIAL BIAS AT THAT POINT. IT IS AN ISSUE WHERE THE COURT WOULD HAVE TO RULE ON WHETHER THAT WOULD HAVE GIVEN REASON TO DISQUALIFY TO A REASONABLE ATTORNEY. THAT WASN'T UNTIL WE ACTUALLY FILED THE

S W O R N 3.851 MOTION.

WEREN'T YOU PUT ON NOTICE THAT THE SAME JUDGE WHO --ppPRESIDED OVER THE TRIAL AND WHO RECALLED THE SEVERAL CASES WAS THE JUDGE WHO WAS NOW GOING TO HEAR THE POST CONVICTION MOTION WHEN THE JUDGE SIGNED THE INITIAL ORDER DISMISSING THE POST CONVICTION MOTION?

THE REASON FOR MOVING TO QUALIFY JUDGE PERRY WAS AFFAIR WE FILED A POST CONVICTION MOTION. JUDGE PERRY, THE WAY THE CLAIM WAS WORDED, JUDGE PERRY WAS NEEDED TO BE A WITNESS OR VERY WELL COULD HAVE BEEN A WITNESS AND JUDGE PERRY WAS GOING TO PRESIDE OVER THE CASE. UNTIL WE ACTUALLY WENT AND FILED -- DETERMINED THAT THAT WAS THE PROPER ISSUE FOR MR. MANSFIELD AND FILED THE MOTION ON THAT, THE TIME -- THE TEN DAY SHADN'T STARTED TICKING AT THAT POINT.

DOESN'T THAT CONTRADICT WHAT YOU ARE SAYING ABOUT WHEN YOU HAVE TO REMOVE THE JUDGE AND IMPOSE CONVICTION?

I'M NOT CERTAIN ON THAT BUT I BELIEVE THE STATE HAS THE POSITION THAT IT WAS --ppUNTIMELY BECAUSE IT SHOULD HAVE BEEN MOVED WITHIN TEN DAYS FROM WHEN THE EVENTS OCCURRED THAT GAVE RISE TO IT AND THAT WOULD HAVE BEEN WHEN THE COURT ACTUALLY SAID THAT, AND THE POINT IS. >> THAT'S WHAT YOU ARE SAYING THAT THE ATTORNEY IS INEFFECTIVE?

FOR NOT DOING IT.

AS FAR AS WINNING POST CONVICTION YOU HAVE TO FIRST MOVE TO RECUSE A JUDGE. --ppASAY DOES SPEAK TO THAT, DOESN'T IT?

I'M UNSURE OF THAT, BUT I BELIEVE REGARDLESS OF WHETHER THE MOTION, MR. MANSFIELD THEN POST CONVICTION IS STILL ENTITLED TO A FULL AND FAIR EVIDENTIARY HEARING AND HE WAS DENIED THAT BECAUSE HE COULDN'T CALL A WITNESS THAT WAS NEEDED IN HIS CASE AND WE BELIEVE THAT THAT BIAS AND PREJUDICE IN FAVOR OF THE STATE CONTINUED ON.

BUT YOU DO AGREE THAT IF WE LOOK AT THESE COMMENTS ON THE COLD RECORD AND DON'T AGREE THAT THERE WOULD HAVE BEEN A LEGALLY SUFFICIENT BASIS FOR RECUSAL THEN EVERYTHING YOU ARE ARGUING ON THIS ONE POINT FAILS?

WE WOULD DISAGREE WITH THAT, BUT THE POINT IS, AND I WOULD JUST LIKE TO POINT OUT THAT AT THE TIME --

WHAT PART DO YOU DISAGREE WITH? IN OTHER WORDS, IF WE DECIDE THAT EVEN IF IT HAD BEEN TIMELY RAISED, THERE WAS NO MERIT TO THE RECUSAL THEN YOUR CLAIM GOES OUT THE WINDOW?

WELL, IT WASN'T LIKE THE COURT WOULDN'T HAVE BEEN ABLE TO WHEN THE COMMENTS WERE MADE TO GET INTO THE TRUTH OR THE FALSITY OR WHAT WAS INTENDED BY THAT. THEY WOULD HAVE TO TAKE IT BY FACE VALUE SO LEGALLY.

AND IF WE DECIDED IT WASN'T HAVE BEEN LEGALLY SUFFICIENT BY OUR CASE LAW THEN YOU HAVE NO BASIS FOR ARGUING AN INEFFECTIVE ASSISTANCE CLAIM, CORRECT?

YOUR HONOR, IF YOU DO THAT YOU ARE NOT GOING TO FIND THE ESSENCE OF OUR CLAIM IS YOU ARE NOT GOING TO FIND THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RECUSE. I SEE THAT I AM OUT OF TIME. THERE ARE A NUMBER OF ISSUES AND WE JUST ASK

THIS COURT TO REVERSE.

THANK YOU VERY MUCH . BOTH COUNSEL.