Jack Rilea Sliney v. State & Jack Rilea Sliney v. James R. McDonough, etc.
SC05-13 & SC05-1462

THE NE XT CASE ON THE COURT'S DOCKET IS SLINEY VERSU S THESTATE OF FLORIDA. IS EVERYB ODY REA DY?

GOOD MORNING. MAY IT PLEASE THE COURT . SARA DYEHOUSE ON BEH ALF OF J ACK SL INEY . MR. SLINEY 'S ATTO RNEY WAS LABOR ORG WITH V ARIED INTERESTS AND THEREBY AFFECTED MR . SLINEY'S --

JUSTICE: WAS THE ONLY TESTIMONY AT THE HEARING ABOUT THIS WAS FROM MR . SLINEY?

THAT IS CORRECT .

JUSTICE: AND THE SOLE EVIDENCE IN THE RECORD , DOCUMENTARY EVIDENCE, IS THAT MR . SLINEY REPRESENTED INVESTIGATOR'S SON IN 19 93 SHORTLY BE FORE HIS REPRESENTATION .

THE DOCUMENTS RE FLECT THAT HE REPR ESENTED ONE OF THE TWO LEAD DETECTIVES IN A CIVIL ACTION I N 1988 AND IN HIS DIVORCE PROCEEDINGS IN THE EA RLY '9 0s . BEFORE MR . SLINEY'S TRIAL. DURING MR . SLINEY 'S TRIAL , HOWEVER , HE WAS ALSO REPRESENTING SIMULTANEOUSLY THE DETECTIVE'S SON .

JUSTICE: WAS THERE ANY EVIDENCE THAT WAS PUT ON AS TO WHAT WOULD HAVE BEEN BROUGHT OUT IN CROSS-EXAMINATION AT THE SUPPRESSION HEARING , IF THAT WAS NOT B ROUGHT OUT, BUT FOR THE CONFL ICT OF INTEREST ?

THERE WAS NO TESTIMONYABOUT WHAT COULD HAVE BEEN DONE , AND THERE IN LIES THEPROBLEM , AND IT GOES BACK TO THE CUYLER V SULLIVAN CASE AND MI CKENS V TA YLOR AND IT IS ABOUT CONC URRENT REPRESENTATION, ONE LAWYER REPRESENTING WITH TWO DEFENDANTS IN THE SAME CASE , AND THE C U YLER COURT FASHIONED THE PROPHYLACTIC R ULE THAT PRESOUPS PREJUDICEUNDER THE STRICKLAND STANDARD, IF THERE IS AN ACTUAL CONF LICT OF INTERE ST. NOW , THE RU B IS , IN THESE CONCURRENT CASES , CONCURRENT REPRESENTATION CASES, THE CON FLICT IS READ ILY APP ARENT OR THE POTENTIAL FOR CONFLICT IS READILY APPA RENTTO EVERYONE INCLUDING THECLIENT. THEREFORE THE COURT HAS REQUIRED CLIENTS T O COME AFTER THE FACTS AND COMPLAIN ABOUT POTENTIAL CONFLICTS , TO SHOW SOME EVIDENCE THAT THE LAWYER DID SOMETHING OR FAILED TO DO SOMETHING HE SHOULD HAVE DONE. THE PROBLEM COMES IN WHEN YOU HAVE SUCCESSIVE REPRESENTATION CASES LIKE THIS ONE. THE FACTS ARE TOTALLY DIFFERENT. THE CLIENT, NAMELY MR . SLINEY, HAD ABSOLUTELY NO I DEA THAT HIS ATTORNEY HAD PREVIOUSLY REPRESENTED ONEOF THE LEAD DETECTIVES. BECAUSE MR . SHIRLEY SHI RKED HIS ETHI CAL D UTY TO RE VEAL THAT TO HIS CLIENT AT TRIAL --

JUSTICE: SO YOUR BURDEN AT THE HEARING WAS TO PROVETHAT THERE WAS AN ACTUAL CONFLICT THAT IMPA CTED THETRIAL. AND HOW DID YOU M EE T THAT BURDEN ? OR AS WE SAID IN HUNTER, UNTIL A DEFENDANT SHOWS THAT HIS ACTUALLY, THAT HIS COUNSEL ACTI VELY

REPRESENTED CONFLICTING INTEREST, HE HASNOT ESTABLISHED THE CONSTITUTIONAL PREDICATE FOR HIS CLAIM OF INEFFECTIVE ASSISTANCE.

THAT I S THE POINT I AM T RYING TO MAKE . IN REPRESENTATION OF A CASE LIKE THIS ONE UNLIKE I N CUYLER, IT IS VIRTUALLY IMPOSSIBLE TO SHOW WHAT COULD HAVE B EEN DONE , BEC AUSE MR. SHIRLEY STILL HAS A PRIVILEGE.

JUSTICE: YOU COULDN'T BRING MR . SISK IN OR HIS SONOR THE ATTORNEY AND ASK HIM THE NATU RE OF THE REPRESENTATION, THE SCOP E OFIT, THE INTEREST AND BRINGOUT THE FACTS?

BUT WHAT WE ARE LOOKING FOR , W HAT THE BURDEN IS U PON THE DEFEND ANT , IS TO SHOW THAT THERE IS SOME EVIDENCE , S OME INFORMATION THAT MR. SHIRLEY COULD HAVE USED TO I AM PEEP MR . SIS K ON THE WITNESS STAND. MR . SISK, DETECTIVE SISK HAS NO INC ENTIVE TO COME TO COURT AND TELL THE COURT OR ANYBODY ELSE THE SKELETONS IN HIS C L OSET THAT MR . SHI RLEY KNEW ABOUT AND COULD HAVE USED T O IMPEACH HIM. THERE IS A PRIV ILEGE OF COMMUNICATION BETWEEN MR . SHIRLEY AND DETECTIVE SISK THAT CONTIN UES IN PERPETUITY .

JUSTICE: BUT HE RE IT WASN'T EVEN TRI ED. THE RECORD IS SILENT ON THIS .

THE RECORD IS SILENT, AND PERHAPS WE SHOULD HAVE PUTTHE WITNESSES ON TO SA Y WE F IND THE PRIVILEGE. BUT I CAN TELL THE COURT THAT --

JUSTICE: IT SEEMS TO ME THAT IN ORDER TO REACH WHERE YOU WANT TO REAC H HERE , WEWOULD HAVE TO COME OUT WITH SOME PER SE RULE THAT WOULD SAY THAT , BY REASON OF SUCCESSIVE REPRESEN TATIONTHAT THAT ABSOLUTELY IS A PREJUDICIAL MA TTER , AS FARAS THE DEFENDANT WASCONCERNED.

NO, SIR. I DISAGREE THAT WE ARELOOKING FOR A PER SE RULE.IT IS A VERY FACT-DRIVEN SITUATION IN A SUCCESSIVE REPRESENTATION CASE. YOU HAVE TO LOOK AT WHETHER THE CLIENT KNEW THAT THERE WAS EVEN A CONFLI CT. MR . SHIRLEY HAD AN ET HICAL DUTY TO INF ORM HIS CLIENT. HE FA ILED TO DO IT , AND WHEN HE FAILED TO DO IT, HE FAILED TO GIVE HIS CLIENT THE OPPORTUNITY TO SEEK ADDITIONAL CONFLICTS OF COUNSELING, SO THEN IT BECOME AS MATTER THAT THEDEFENDANT NOW HAS A HUGE BURDEN TO COME FORWARD AND TRY THIS PROOF BASICALLY AND N INGT I F EEL , AND -- NEGATIVELY, AND THE PROB LEM IS WHEN THE CUYLER COURT CREATED THIS RULE THAT CREATES PREJUDICE, WHAT THE COURTS ARE NOW DOING , AND WITH ALL DUE RESPECT WHAT THIS COURT IS DOING IS APPLYING THIS CONCURRENT MULTIPLE REPRESENTATION CASE LAW TO SUCC ESSIVE REPRESENTATION CASES THAT ARE VERY FACT -SPECIFIC , ANDYOU ARE REQUIRING BASICALLY TO PROVE PREJUDICE , WHEN IN FACT PREJUD ICE IS PRESUMED UNDER THE CUYLER STANDARD. I MEAN , FOR US TO COME IN AND TELL YOU OR TELL THE TRIAL COURT IN AN EVIDENTIARY HEARING , WHAT MR . SHIRLEY COULD HAVE DONE IN CROSS-EXAMINATION, WHAT HEFAILED TO DO, WHAT --

CHIEF JUSTICE: NOW , THERE IS MAYBE ONE THING ABOUT THAT YOU CAN'T TALK ABOUTTHE NATURE OF THAT REPRESENTATION BECAUSE IT WAS A PRIVIL EGE , BUT IN EVERY POSTCONVICTION PROCEEDING, WHEN YOU AREREQUIRED TO SHOW PREJUDICE , YOU PUT ON THIS IS THE EVI DENCE THAT I WOULD HAVE USED, SO I AM NOT SURE I UNDERSTAND HOW YOU WOULD HAVE BEEN IMP EDED IN THE EVIDENTIARY HEARING FROM SAYING THIS WAS THE WE ALTH OF CROSS-EXAM INATION THAT EXISTS . NONE OF IT WAS USED .

BECAUSE MR . SHIRLEY I S NOT ALLO WED TO, BECAUSE IT IS A PRIVILEGE, TO REVEAL ANY INFORMATION THAT HE OBTAINED ABOUT MR . C IVIC -- MR . SISK DURING HIS REPRESENTATION.

CHIEF JUSTICE: ANOTHERLAWYER. YOU ARE SAYING IS A CONFLICT-FREE LAWYER WOULDN'T HAVE ACCESS TO THAT INFORMATION BECAUS E IT IS PRIVILEGED, S O THERE FOR - -

THAT'S RIGHT.

CHIEF JUSTICE: WHAT WOULD A CONFLICT -FREE LAWYER USED TO FIND OUT IN CREATION? SO WHAT DID YOU FIND OUT COULD HAVE BEEN USED IN CROSS-EXAMINATION?

THAT INFORMATION WAS NOTPROVIDED IN THE TRIA L COURT AND I UNDERSTAND THE COURT'SCONCERN IN THAT LAR. WE -- IN THAT RE GARD. WE DIDN'T PURSUE THAT ISSUE ABOUT HOW MR. SISK COULD HAVE BEEN IMPE ACHED . HOWEVER --

CHIEF JUSTICE: WHY NOT? THERE IS NO INABILITY TO G ETTHAT INFORMATION. POSTCONVICTION COUNSEL ALL THE TIME D E VELOP THE REC ORD OF WHAT SHOULD HAVE BEEN PUT O N. AND SO I HAVE GOT TO AS SUME , YOU STARTED WITH ALL OF THIS , EVERYTHING WITH THE ME NTAL HEALTH MITIGATION , THAT YOU COULDN'T FIND AN YTHING ELSE TO IMPEACH THESE WITNESSESWITH.

I UNDERSTAND THE COURT'S CONCERN.WE DIDN'T PUT WITNESSES O WE DIDN'T PROVIDE EVIDENCE THAT COULD HAVE BEEN USED TO IMPEACH, BUT THE PROBLE M IS THIS. HE HAD AN ATTORNEY WHO WAS LABORING UNDER THIS CONFLICT. BECAUSE OF HIS SUCCESSIVE REPRESENTATION, YOU HAVE GOT --

CHIEF JUSTICE: YOU THINKTHAT IS ALL YOU NEED TO ESTABLISH TO GET POST-CONVICTION RELIEF?

UNDER CUYLER V SULLIVAN AND ITS APPLICATION OF CASES.

JUSTICE: DID YOU VIEW ANY DOCUMENTARY EVID ENCE OF REPRESENTATION OF E ITHER THE DETECTIVE OR HIS SON? PRESUMABLY IF HE REPRESENTED HIM IN A DIV ORCE PROCEEDING,THERE WOULD HAVE BEEN DOCUMENTS FILED IN COURTTHAT YOU COULD USE TO VER IFY THAT HE REPRESENTED HI M AND THE SAME WITH THE SON?

THEY WERE ATTACHED TO THE A MENDED SUPPLEMENTAL 3.851MOTION. AND THOSE DOCUMENTS --

JUSTICE: THAT TRUE AS FAR AS THE SON AS WE LL?

Y ES. I AM PRETTY SURE , Y ES, SIR. YES.

JUSTICE: AND DO THOSE SHOW THAT HE WAS REPRESENTING HIM AT THE SAMETIME OF THE TR IAL?

YE S. YES.A T THE TIME OF TRIAL.

JUSTICE: WELL , AS FAR AS THE SON IS CONCERNED .

SO RRY SORRY ? -- I AM SORRY ?

JUSTICE: AS FAR AS THE SON WAS CONCERNED.

H E REPRESENTED AT THE TIME OF THE TRIAL , BUT THE DETECTIVE CAME PRE VIOUS. THAT IS CORRECT.

CHIEF JUSTICE: DO YOUWANT TO ADDRESS THE SE COND ISSUE?

YES, MA' AM, I SURE WOULD.

JUSTICE: LET ME ASK ONEQUESTION ON THIS. I AM TRYING TO GET TO THEHEART OF WHAT YOU ARE TRYING TO SAY , AND IS IT THAT BECAUSE THE ATTORNEY HAD REPRESENTED HIM IN THE P AST , WE , AND STILL HAS AN ATTORNEY CLIENT PRIVILEGE , YOU CANNOT SAY WHAT KIND OF INFORMATION HE COULD HAVE USED TO CROSS-EXAMINE HIM? IS THAT THE ESSENCE OF YOUR ARGUMENT?

THAT'S RIGHT.THAT'S RIGHT. MR. SHIRLEY WOULD NOT BE ABLE TO COME TO COURT AND SAY THIS IS WHAT I LEARNED F ROM MY REPRESENTATION OF DETECTIVE SISK THAT I COULD HAVE USED TO IMPEAC H. HE IS NOT ALLOWED TO .

CHIEF JUSTICE: BUT THAT IS THE OPPOSITE OF WHAT NORMALLY HAPPENS. WHAT IT IS , THE REASON IT ISA CONFLICT IS SOME ONE KN OWS SOMETHING OUTSIDE OF THE REPRESENTATION AND DO ESN'T USE IT BECAUSE OF THE REPRESENTATION, SO, A GAIN, I SAY TO YOU THAT YOU CAN GO ON TO THE SECOND ISSUE, THAT AS TO THE FIRST ISSUE , YOU WOULD HAVE T O ESTABLISH THAT THERE WAS SOME INFORMATION KNOWN TO A REASONABLY OBJECTIVE LAWYER NOT LABORING UNDER A CONFLICT OF INT EREST , THAT COULD HAVE BEEN USED TO IMPEACH THESEWITNESSES.

OK AY . WE DIDN'T ESTABLISH WHAT CONFLICT-FREE COUN SEL COULD HAVE DONE.ALL WE ARE ARGUING IS THAT THE ATTORNEY THAT HE HAD , LABORING UNDER A CONFLICT, AND THAT BECAUSE THERE IS NO PREJUDICE REQUIREMENT, BECAUSE PREJUDICE IS PRESUMED WHEN THERE IS AN A CTUAL CONFLICT , AND THIS CASE PRESEN TS AN ACTUAL CONFLICT. YOU HAVE GOT HIM REPRESENTING A PA YING CLIENT. AND ON THE WITNES S STAND , HE IS CHARGED WITH THE DUTY OF V ISION SLY CROSS-EXAMINING -- VIGOROUSLY CROSS-EXAMINING ANOTHER , A REP EAT PAYING CLIENT, WHOSE SON IS A C URRENT PAYING CLIENT , AND --

JUSTICE: A SO WHAT YOU S EEM TO BE ASSERTING IS THAT COUNSEL DID NOT USE HIS POTENTIAL CONFLICT OF INTEREST TO YOUR CLIENT'S ADVANTAGE BY REVEALING INFORMATION THAT HE RECEIVED, BY REPRESENTATION OF THE DETECTIVE .

THAT'S RIGH T, AND THEREIS NO WAY FOR US TO DISCOVER WHAT INFORMATION HE COULD HAVE USED, BECAUSE HE IS NOT ALLOWED TO REVEAL THOSE PRIVILEGED COMMUNICA TIONS.

CHIEF JUSTICE: A LAWYER THAT HAD A CONFLICT OF INTEREST WOULD NOT HAVE BEEN INVOLVED IN THIS CASE AND ANOTHER LAWYER WOULD HAVE COME IN WHO WOULDN'T HAVE ACCESS TO THAT INFORMATION , WHO COULD ONLY CROSS-EXAMINATION BASED ON WHAT GENERALLY WOULD BE AVAILABLE.

I DO UNDERSTAND WHAT YOU ARE SAYING.

CHIEF JUSTICE: LET'S GO TO THE SECOND ISSUE , BECAUSE I THINK YOU ARE ALMOST INTO YOUR REBUTTAL. ANOTHER SECOND ISSUE RELATESTO THE INEFFECTIVE ASSISTANCE IN THE PENALTYPHASE , IN THAT M R . CO OPER WAS PREV ENTED BY A NUMBER OF CIRCUMSTANCES FROM ADEQUATELY REPRESENTING THE DEFENDANT AND PREVENT -- PRESENTING MITIGATION , NAMELY , AND THIS IS BECAUSE IN THE BEGINNING MR . COO PER, THE ASSISTANT P U BLIC DEFENDER WHO FILED A MOTION AND CLAIMED HE WAS OPERATING U NDER A CONFLICT AS WELL , DUE TO LIMITATIONS WITHIN HIS OFFICE , S PENT A REPORTED 15 HO UR S PREPARING FOR THEDEFENSE PRET RIAL BE FORE MR . SHIRLEY TO OK OVER.MR. SHIRLEY, THE N, DID NOTHING BY WAY OF MIT IGATION FOR THE PENALTY P HASE. HE BE LIEVED IN THE TESTIMONYTHAT HE WAS GOING TO GET A VERDICT OF SECOND-DEGREE M URDER SO HE DID NOT HING FOR PENALTY PHASE. MR . SLINEY THEN FI RED FROM SHIRLEY, AF TER THE GUILTY VERDICT AND ASSI STANT PUBLIC DEFENDER MA RK COOP ER WAS PUT BACK ON THE CASE. HE SPENT A GRAND TOTAL OF 59 HOURS, HE REPO RTS , TO PREPARE FOR MITI GATION AND HE HAD 30 D AYS TO DO IT. HOWEVER, SINCE HE HADN'T SATTHROUGH THE TRIAL, HE HAD TO READ 1300 PA GES OF TRANSCRIPT IN THOSE 3 0 DA YS WHICH HE DIDN'T GET UNTILTWO WEEKS BEFORE TRIAL. SO HE HAS NO IDEA

WHAT THE T RIAL WAS ABOUT, WHAT THE GUILT PHASE WAS B HE SPENT 30 DAYS TO PREP ARE. HIS MOTION TO CON TINUE WASDENIED. HIS MOTION FOR A MITIGATION EXPERT WAS DENIED. HE HAS GOT TO READ THIS RECORD, UNDERSTAND THE CASE.

CHIEF JUSTICE: LET'S GO BACK TO WHAT IS IT THAT YOUPUT ON THAT WOULD HAVE BEEN COMPELLING MITIGATION .

PREPARE FOR L I TIGATION.

CHIEF JUSTICE: WHAT WOULDHAVE BEEN COMPELLING MITIGATION ? IN THIS CASE WE HAD TWO M ENTAL HEALTH EXPERTS THAT WERE HIRED AND THEY WOULDHAVE BEEN INCREDIBLY UNFAVORABLE . THERE WASN'T A QUESTION ABOUT WHETHER IT SH OULD HAVE BEEN PUT ON OR NOT . TO SHOW A PREJUDICE --

FIRST OF ALL DR . SPELMAN WAS NOT QUALIFIED AND HE ADMITTED IN HIS LETTER T O COUNSEL , T O COUNSEL 'S SUPERTHAT HE WAS NOT QUALIFIED IN LITIGATION. HE U RGED COUNSE L TO GET ANOTHER EX PERT, SO WHEN MR. COOPER TOOK OV ER IN THE F INAL PENALTY PHASE, HE HIRED DR. S I LVER OR DR . S ILVER WAS APPOINTED , RAET E RKTS ---RATHER.

CHIEF JUSTICE: SO HE HAD ONE EXPERT AND SAID DON'T USE ME. GET SOMEONE EL SE. HE GOT SO MEONE ELSE.

DON'T USE ME , NOT NECESSARILY BECAUSE I HAVE BAD INFORMATION TO PROV IDE. I T IS JUST THAT I AM NOT QUALIFIED TO PROVIDE THEINFORMATION OR TO PERFORM THE EVAL UATION NECESSARY IN THIS TYPE OF CASE. THAT WAS D R . SPEL MAN. DR. SILVER , ON THE OTHER HAND, IT IS OUR CONT ENTION THAT MR . COOPER SHOULD HAVE PUT DR . SILV ER ON THE STAND. NOW , JUST BECAUSE HE HAD SOME NE GATIVE INFORMATION DOESN'T ME AN HE SHOULDN'THAVE BEEN PUT ON THE STAND. HE HAD SOME VERY POSITIVE INFORMATION.

CHIEF JUSTICE: H OLD ON FOR A SE COND. DR . SILVER THOUGHT THAT THEDEFENDANT MADE A LIFE OUT OF CREATING NECESSARY APPEARANCES THAT WOULD CAUSEOTHERS TO BELIEVE IN HIM. HE NOTED THAT THE DEFENDANT WAS HEED ONE ISTIC , EXPLOITIVE , MAN -- HEDONISTIC, EXPLOITIVE , MANIPULATIVE, IMMORAL . T ELL M E WHAT COULD HE COULDHAVE PUT ON.

HE LIVED AT HOME , DR ANK ALCOHOL EXCESSIVELY, HIS PARENTS DRANK AL COHOL EXCESSIVELY , HIS FATHER DIED OF CIRRHOSIS OF THE LIVE. HE HAS GOT A HOME SITUATION -- OF THE LIVER , AND HE HAS GOT A HOME SITUATION , AND WHAT YOU HAVE IS FR ANKLY A VERY BR UTAL CR IM E , AND NOTHING BY WAY OF EXPLANATION TO THE JURY ABOUT WHY THIS 19-YEAR-OLD, QUOTE , ALL-AMERICAN KID , WENT INTO THIS PAWNSHOP IN THE MIDDLE OF THE DAY , A BUSINESS DAY, AND K I LLED THIS OWNER , THIS PAW NSHOP O WNER IN THIS FASHION. THERE IS NO EXPL ANATION FOR THAT THAT WAS PROVIDED. AND SO IT IS THE DEFENSE CONTENTION IN THIS COLLATERAL PROCEEDING , THAT DR . SILVER COULD HAVE TESTIFIED TO HIS YOUTH , HIS IMMATURITY IN HIS YOUTH , THE FACT THAT HE WAS A MO DEL PRISONER AND HAD A POTENTIAL TO BE, AND THIS IS REALLY THE CRITI CAL PART , NOT ONLY WAS HE WELL-BEHAVED IN THE JAIL AWAITING TRIAL BUT SIGNIFICANTLY THE JURY SHOULD HAVE HEARD THE FACT THAT DR . SILVER BELIEVES H E HAD A HIGH POTENTIAL TO BEHAVE HIMSELF WELL AS A PRI SONER , I F GIVEN A LIFE SENTENCE.

CHIEF JUSTICE: IF YOUWANT TO SAVE THE REST OF YOUR TIME FOR REBUTTAL.

YES, MA'AM. THANK YOU VERY MUCH.

GOOD MORNING. S COTT BR OWNE FOR THE STATEOF FLORIDA. YOUR HONO RS , THE APPELLANT IS AR GUING TO THIS COURT THAT IT SHOULD , ON ITS OWN , EXPAND CUYLER , WIGGINS AND SULLIVAN, AND ESSENTIALLY CREATE CASE LAW ON THE ISSUE OF CONFLICT. THE APPE LLANT

STATES IF I HEAR HER ARGUMENT CORRECTLY , THAT YOU SHOULD JUST PRESUME PREJUDICE, IF THE DEFENDANT POINTS TO A SPECULATIVE OR HYPOTHETICAL CONFLICT O F INTEREST. HOWEVER , THE PRECEDENT FROM THIS COURT AND THE SUPREME COURT IN CUYLER V SU LLIVAN AND MICKENS V T AYLOR NATION VERY CL EAR THAT YOU DO NOT FIND AN ACTUAL CONFLICT OF INTEREST UNLESS THE DEFENDANT CAN POINT TO SPECIFIC INSTANCES IN THE RECORD .

JUSTICE: WHAT DO YOU NEED TO SHOW AN ACTUAL CONFLICT OF INTERE ST? IN THIS INSTANCE WE HAVE AN ATTORNEY REPRESENTING A G UY CHARGED WITH MU RDER, AND HE HAD IN THE PAST , REPRESENTED A POLICE OF FICER W H O IS GOING TO GET ON THE STANDAND OFFER EVI DENCE AGAINST HIS CLIENT , SO WHAT ADDITIONAL DO YOU NEED TO HAVE AN ACTUAL CONFLICT OF INTEREST?

WELL, YOUR HONOR , THIS COURT AND THE SUPR EME COURT HAS DEFINED AN ACTUAL CONFLICT AS ONE THAT ADVERSELY AFFECT ED COUNSEL'S REPRESENTATION. IN OTHER WORD S, YOU HAVE TO POINT TO THE RE CORD AND SHOW THAT THE DEFENSE ATTORNEY MADE A CH OICE BETWEEN DISCREDITING ONE CLIENT WITH INFORMATION AT THE EXPENSEOF THE DEFENDANT .

JUSTICE: SO AREN'T YOU GOING TO THE PREJUDICE ANALYSIS THER E A LI TTLE TOOQUICKLY.THAT IS START WITH THE PROPOSITION THAT, HAY , THIS -- THAT, HEY, THIS POLICE DETECTIVE THAT I AM PUTTINGON THE STAND N O W AND THAT I S GOING TO OFFER CRIT ICAL EVIDENCE AGAINST MY PRESENT CLIENT, IS AL SO MY CLIENT. I REPRESENTED THIS FELLOW IN A VERY IMPORTANT LAWSUIT TO HIM WITH REFERENCE TO HIS LIVELIHOOD , AND I, ALSO , NOW , REPRESENTED HIM IN A N OBVIOUSLY VERY PERSONAL DIVORCE CASE. THIS IS MY CLIENT IS UP THERE NOW , TESTIFYING IN FRONT OF -- WHAT AM I GOING TO DO? A M I GOING TO HA MMER AWAY AT MY CLIENT HER E.

THE STAND -- MY CLIENT HERE ON THE STAND , AND ISN'T MY PRESENT CLIENT ENTITLED TO KNOW THAT NOT ONLY HAVE I REPRESENTED THE POLICE DETECTIVE IN THESE TWO VERY IMPORTANT MATT ERS IN THE DETECTIVE 'S LIFE IN THE RECENT PAST , BUT I AM ALSO CURRENTLY REPRESENTING THE DETECTIVE 'S SON IN AN ONGOING MAN NER , AND NOW THAT, SO DON'T WE START WITH THE APPEARANCE HERE , CLEARLY, OF CONFLICT. THAT IS THIS IS M Y CLIENT THAT IS ON THE STAND NOW THAT ORDINA RILY I WOULD BE TRYING TO HAMMER AWAY AT . SO ARE YOU SAYING THAT THERE IS NO APP ARENT CONFLICT ONTHE FACTS OF THIS CAS E?

YES, YOUR HONOR. HERE IS WHY.

JUSTICE: SO EXPLAIN THAT TO ME , BECAUSE IT LOOKS TO ME LIKE THE LAWYER THAT IS REPRESENTING THE CRIMINAL DEFENDANT IS THE LAWYER FOR THE POLICE DET ECTIVE AND THE POLICE DETE CTIVE'S SON. HELP ME OUT OF THAT.

YOUR HONOR , THERE IS NO EVIDENCE THAT , A T THE TIME OF MR . SLIN EY'S TRIAL THAT MR . SHIRLE Y WAS REPRESENTING CORPORAL SISK IN A NY MANN ER. IN FACT THE ONLY EVIDENCE YOU HAVE IS FIVE YE ARS PREVIOUSLY, HE REPRESENTED HIM IN AN UNRELATED C IVIL MATTER TO GET HIS J OB B ACK .

JUSTICE: HE WAS REPRESENTING HIS SON AT THE TIME OF THE TRIAL.

YOUR HONOR , THAT WAS NEVER ESTABLISHED BELOWBECAUSE THEY AND E NDED A DOCUMENT ALLEGE DLY A DI VORCE PROCEEDING WHICH, I THINK , , I BELIEVE WAS UNCONTESTED , AND I THINK IT PREDATED MR . SHIRLEY'S REPRESENTATION BY A NUMBER OF MONTHS, BUT IT WAS NEVER ESTABLISHED THAT THE SISK IN THE PLEADING WAS IN FACT THE DETECTIVE'S SON , , BECAUSE THERE WAS NO INQUIRY WHATSOEVER MADE BELOW , AND IN FACT THE ONLY TIME THEY REQUESTED JUDICIAL NOTICE OFTHAT DO CUMENT WAS D URING CLOSINGS ARGU MENT,

AND THERE WAS ABSOLUTELY NO R ULING FROM THE TRIAL COURT, SO I HAVE TO THINK YOU CAN SAY --

JUSTICE: DOES THE PU BLIC DEFENDER UNDER THESE CIRCUMSTANCES , IF THE PUBLIC DEFENDERS WAS REPRESENTING MR. SH RINE -- MR . SLINEY ANDHAD IN THE PAST REPRESENTED THE DETECTIVE, WOULD THE P UBLIC DEFENDER HAVE BEEN CONFLICTED OFF OF THAT CASE?

NO, YOUR HONOR. IN FACT RECENT --

JUSTICE: WHY NOT?

BECAUSE THE REPRESENTATION HAD CLEA RLY ENDED AT THE TIME OF MR . SLINEY 'S TRIAL. REMEMBER WE ARE NOT EVEN TALKING ABOUT A MATTER OF MONTHS HERE. THIS COURT'S PREC EDENT IN H UNTER AND B OUIE INVOLVED REPRESENTATION AFTER DEFENDANT AND THAT OFFICE,AND IN ONE OF THOSE CASESAND I BE LIEVE IT WAS BO UIE , WHERE THE PUBLIC DEFENDER, AND I HAVE NOT T UNED FO UND A C ASE WHERE -- I HAVE NOT F OUND A SINGLE CASE WHERE THE COURT OR THIS COURT HAS SAID IT IS A CONFLICT IN MICKENS V T AYLOR . IN FACT A SUCCESSIVE REPRESENTATION CASE LI KETHIS ONE CAN EVEN GIVE RISETO AN ACTUAL CONFLICT OF INTEREST. IN OTHER WORDS, I DON'T THINK IN THIS CASE YOU WOULD EVER HAVE THE BU RDEN TO PROVE PREJUDICE UNDER STRICKLAND.

JUSTICE: YOU ARE ARGUING A CTUAL CONFLICT WHICH YOUNEED TO DO , BUT CAN THE STATE AT LE AST CONCEDE THAT WHEN YOU HAVE PE OPLE GOINGOUT LOOKING FOR AN ATTORNEY TO REPRESENT THEIR SON IN THE MOST IMPO RTANT TRIALTHAT ANYBODY COULD BE REPRESENTING THEM IN, TO KNOW, TO NOT K NOW THAT THAT ATTORNEY I S , AS JUSTICE ANSTEAD JUST SAID , REPRESENTED A KEY DETECTIVE AND RECENT LY THE SON? I SN'T THAT AN IMPORTANT FACT THAT WE WANT TO ENCOURAGEATTORNEYS TO AT LEAST TELL THE PROS PECTIVE CLIENT YOU NEED TO KNOW ABOUT THIS. SO THE CLIENT CAN MAKE THEDECISION, BECAUSE AT LEASTIT THE IS A PER ACCEPTS OF CONFLICT - - A PERCEPTION OF CONFLICT.

YOUR HONOR , I DON'T KNOW THAT AT THE TIME MR . SHIRLEY ACCEPTED REPRESENTATION , I DON'T KNOW IF THAT SISK IN THE PLEA DING THAT WAS NEVER ACCEPTED INTO EVIDENCE BE Le AND NEVER ACC EPTED -- BELOWAND NEVER ACCEPTED THAT DIVORCE PRO CEEDING WHICH DIDN'T CONTAIN ANY MATERIAL INFORMATION, WOULD GIVE RISE TO A CONFLICT .

JUSTICE: NOT A , BASICALLY THE PUBLIC DEFENDER REPRESENTED THE DEFENDANT. PRESUMABLY THE PUBLIC PROVIDED WITH A LI ST OF WITNESSES. THIS WITNESS WOULD BE AN "A" L IST WITNESS ON THAT .

YES, , URN . -- YES, YOUR HONOR .

JUSTICE: AND WHEN HE SAW THIS WAS A SCHEDULE A WITNESS , HE COULD HAVE SAID YOU NEED TO KNOW ABOUT THE PRIOR RELATIONSHIP I HAVE HAD WITH THIS DETECTIVE AND HIS SON AND IS THAT OKAY.

POSSIBLY , YOUR HONOR. BUT IN THIS SITUATION LE T' S LOOK AT WHAT CORPORAL SISK ACTUALLY TESTIFIED TO. HE WAS ONLY CALLED IN ON REBUTTAL. HE WASN'T THE LEAD DETECTIVE.HIS TESTIM ONY IN THE EN TIRE CASE-IN-CHIEF WAS TWO PA GES AND THE DEFENSE COUNSEL CROSS-EXAMINED HIM O N YOU WEREN'T WITH HIM THE WHOLE T IME. YOU WE REN'T EVEN THERE WHEN THE TA PED STATEMENT WAS TAKEN, SO AT BEST YOU HAVE GOT CORPORAL SISK AS A CUMULATIVE WITNESS TO THELEAD DETECTIVE , SO I THINK I F AN ATTORNEY IS L O OKING AT IT , AND I DON'T KNOW IF YOU REALIZE THAT DETECTIVE SISK WAS GOING TO BE HIM. WE HAVE IN THE REC ORD HERE THAT IT IS COMPLETELY ABSENT OF QUESTIONS OF MR. SHIRLEYON WHAT HE K N EW , WHAT THE CONFLICT WAS , AND , A GAIN , POSSIBLY YOU COULD S SAY MAYBE HE SHOULD HAVE, WHEN HE REALIZED IT , MENTIONED IT,BUT WE DON'T EVEN KNOW

THAT SISK WAS HIS SON. I DON'T KNOW THAT. I AM NOT --

JUSTICE: WE ASSUME THAT IT WAS .

EVEN IF YOU ASSUME THAT IT WAS .

JUSTICE: THAT IT WAS HIS SON. DIDN'T DETECTIVE SISK TESTIFY CONCERNING THE VOLUNTARINESS OF THE DEFENDANT'S STAT EMENT , AND WHAT DID THAT IMPORTANT EVIDENCE IN THIS CASE , IN ORDER TO GET THIS FIRST-DEGREE MURDER CONVICTION?

WELL , I THINK IT WASIMPORTANT , BUT IT MUST BE REMEMBERED THAT DETECTIVE SISK WAS NOT THE LEAD DETECTIVE.HE DI DN'T EVEN --

JUSTICE: BUT HE ST ILL OFFERED IMPORTANT EVIDENCE IN THIS CASE.

OKAY. WELL , PERHAPS, YOUR HONOR , BUT I SAY PERHAPS. LET'S TAKE HIS TESTIMONY OUTOF THE RECO RD. WE DON'T NEED IT. EVERYTHING THAT HE TESTIFIED TO WAS TESTIFIED TO BY DETECTIVE . BUT AGAIN LET'S ASSUME THATTHERE WAS A CONFLICT AND SOME QUESTION , SOME AREA OF INQUIRY THAT WAS NOT MADE OF CORPORAL SISK. DO WE HAVE A SINGLE QUESTION THAT SHOULD HAVE BEEN AS KED OF DETECTIVE SISK THAT WASNOT?NO. THIS COURT --

JUSTICE: THE POINT IS WE DON'T KNOW. THAT THIS COURT --

JUSTICE: WHAT IS THE CASE THAT ARTICULA TES THAT PROPOSITION IN YOUR VIEW THE B EST? THAT IS THAT SAY S ALL RIGHT, YOU KNOW , YOU HAVE SHOWN THAT THERE WAS A CONFLICT, BUT NOW YOU HAVE GOT TO SHOW PREJUDICE.YOU HAVE GOT TO SHOW THAT THE CONFLICT AFFECTED COUNSEL'S PERFORMANCE. WHAT IS OUR CASE THAT ARTICULATES THAT?

I WOULD SAY H UNTER AND B OUIE AND EVEN SNELGROVE , RECENT CASES OUT OF THIS COURT.THE APP ELLANT IS ASK ING TO YOU SKIP AN ENTIRE ST EP. O NCE YOU HAVE A PO SSIBLE OR SPECULATIVE CONFLICT, THAT IS ALL WE NEED TO SHOW AND THEN YOU REVERSE THE CONVICTION. THIS COURT WOULD HAVE TO COME UP WITH ENTI RELY NEWCASE LAW , TO --

JUSTICE: THERE HAVEN'T BEEN ANY CASES THAT HAVE S AID WAIT A MINUTE. THIS CONFLICT, ALL BY ITSELF , BEING AN ACTUAL CONFLICT , IS ENOUGH IN AND OF ITSELF, TO PRESUME PREJUDICE . THERE HAVEN'T BEEN ANY CASES LIKE. THAT.

YOUR HONOR , THERE HAVE BEEN, PRIOR TO, IN THOSE CASES , SI MPLY , AND I N SNELGROVE , THOSE CASES WERE BASED ON THE PREVIOUS RULE AND ON THE PUBLIC DEFENDER ASSERTING A CONFLICT AND U NDER THE OLD RULE THE TRIAL COURT WANTS THE PD TO ASSERT A CONFLICT - -

JUSTICE: I AM NOT TALKING ABOUT THE PUBLIC DEFENDER. I AM TAL KING ABOUT CONFLICT LAW GENERALLY. THERE HAVEN'T BEEN A NY CASES THAT SAY WA IT A MINUTE. IF THERE IS REA LLY AN ACTUAL CONFLICT, THEN YOU DON'THAVE TO , THE DEFENDANT CARRIES NO BURDEN AFTER THAT , OTHER THAN TO SHOW THEACTUAL CONFLICT?

NO, YOUR HONOR, AND EVEN IN MULTIPLE REPRESENTATION,YOU HAVE TO SHOW AN ADVERSE EFFECT BEFORE YOU PRESUME PREJUDICE, SO YOU CAN'T SKIP THAT STEP EVER.THERE IS NO CASE LAW FOR IT AT ALL. IF I MAY ADDRESS THE PENALTYPHASE NOW, IN THIS CASE MR . COOPER REPRESENTED THE APPELLANT PRIOR TO TRIAL. HE HAD CONDUCTED MOST OF THE DEPOSITIONS.IT IS NOT TRUE THAT HE HAD VERY LITTLE TIME TO PREPAREFOR THE PENALTY PHASE. IN FACT HE DID QU ITE A GOOD BIT TO PREP ARE. HE HI RED NOT ONE , NOT TW O, BUT A TOTAL OF THREE ME NTAL HEALTH EXPERTS, THAT THEIR TESTIMONY WAS NOT FAVORABLE TO THIS DEFENDANT , IS NOT HIS FA ULT. REMEMBER, MR . SLINEY CLAIMED THE IN ITIAL EXPERT

THAT HE U SED STEROIDS AND HE AB USED ALCOHOL AND DR UGS. HE DIDN'T GIVE THE SAME STORY TO THE O THER TWO EXPERTS WHO WERE RETAINED. IN FACT TO THE CONTRARY, HE DENIED U SING STEROIDS. HE DE NIED USING STEROIDS TO MR. COOPER. HE DEBD THAT AL COHOL -- HE DENIED THAT ALCOHOL WAS -- IN FACT SLINEY ADMITTED DURING THE POSTCONVICTION THAT HE DIDN'T TELL DR . SILVER ABOUT HIS ALCOHOL USE. THIS IS A CASE WHERE THE CLIENT'S OWN COND UCT, HIS OWN STATEMENT LIMITED WHAT THE DEFENSE COUNSEL COULDPRESENT IN MITI GATION , AND AS CHIEF JUSTICE PARIENTE POINTED OUT, THE MENTAL HEALTH EXPERT'S TESTIMONY WAS DECIDEDLY UNFAVORABLE TO MR . SLINEY. IN FACT , HAD COUNSEL PRESENTED DR. SILVER , THENEGATIVE IN THAT REPORT FAR OUTWEIGHED ANY BENEFIT TO MR . SLINEY.

CH IEF JUSTICE: WHAT DID MR. COOPER SAY AS TO WHY H E DIDN'T PUT ON DR . SILVER?

SAID ON CE HE GOT THE REP ORT, IT WAS N E GATIVE .

CHIEF JUSTICE: ONE OF THESE STRATEGIC - -

YOUR HONOR , IT WOULD HAVE DESTROYED , HE WAS ABLE TO PORTRAY MR . SLINEY AS A GOOD, ALL-AMERICAN K ID WHEN HE WASN'T. HE WAS REAL LY A PSYCHOPATH . HE WAS A WHEELER DE ALER, ACON MAN WITHOUT ANY REMORSEWHATSOEVER.

CHIEF JUSTICE: DID THE -- THE JURY VOTE ON THIS CASE?

7 -5 , YOUR HONOR , AND AGAIN THAT IS DUE TO COUNSEL'S ABIL ITY T O LIMIT THE NEGATIVE INFORMATION ABOUT MR . SLINEY AND WHAT MR . SLINEY INDICATES SHOULD HAVE BEEN PRES ENTED THROUGH DR . SILVER WAS ALREADY PRESENTED THROUGH LAY WITNESSES THAT HE WAS IN FACT YOUNG AND HE ARGUED THAT TO THE JURY , BUTMORE IMPORTANTLY HE PRESENT A DD PRISON GUARD THAT SAID SLINEY WAS A MOD WILL PRISONER, SO WITHOUT -- A M ODEL PRIS ONER, SO WITHOUT GETTING DR. SILVER ON , HE GOT TO THE FACT THAT HE PROBABLY WOULD HAVE AD HERED TO THE FACTS OF PRISON WITHOUT PRESENTING THE RENEGE -- THE NEGA TIVE INFORMATION THAT COULD INTREEN PRESENTED.

CHIEF JUSTICE: REBUTTAL.

V ERY BRIEFLY. ASKING THIS COURT TO CR EATE NEW LAW . -- I AM NOT ASKING THIS COURT TO CREATE NEW LAW. I AM ASKING IT TO CLARIFY THE LAW, PARTICULARLY MICKENS V TAYLOR AND CU YLER V SULLIVAN AND THAT WHOLE LINE OF CASES.

JUSTICE: CAN YOU ADDRESSTHAT THERE WAS NOTHING IN THE RECORD OTHER THAN THE N AME OF SISK IN THE PLEADING THAT WAS ATTACHED TO THE MOTION THAT WOULD IDENTIFY THAT PERSON AS THE DETECTIVE'S SON ?

THERE WAS NO ARG UMENT BY THE STATE. THERE WAS VERY LITTLE OBJECTION.THERE WAS NOTHING A T THE EVIDENTIARY HE ARING ON THIS I SSUE , WHERE THEY WERE OBJECTING TO THE DOCUMENTSOR THE TAKING OF JUDICIAL NOTICE .

JUSTICE: I AM NOT TALKING ABOUT OBJECTIONS.I AM TALKING ABOUT YOUR BURDEN OF PROOF TO SHOW THAT THIS SISK WAS DETECTIVE SISK'S SON. WAS THERE STIPULATION PRESENTED TO THAT EFFECT? WAS THERE EV IDENCE PRESENTTO DO THAT EF FECT?

NO , THERE WAS NOT.

JUSTICE: IN FACT ALLTHERE WAS WAS A DOCUMENT ATTACHED TO THE MOTION.

THERE WAS A DOCUMENT AND OUR REPRESENTATION TO THECOURT AS AN OFFICER OF THECOURT THAT THIS WAS THE SONAND THIS WAS K EVIN SHIRLEY REPRESENTING THE SON IN

THIS ACTION.

JUSTICE: SHIRLEY WAS ACTUALLY HIRED BY, WHO WAS IT, SLINEY 'S FA THER? SO THAT IS WHER E THE INITIAL CONVERSATION ABOUT REPRESENTATION OF THE SON CAME ABOUT. WAS BET WEEN THE FATHER AND SHIRLEY. CORRECT ?

NO. IT WAS THE , SHIRLEY'S REPRESENTATION OF SISK AND SISK'S SON CAME ABOUT AS HAPPENSTANCE --

JUSTICE: I AM TALKING ABOUT SHIRLEY 'S REPRESENTATION OF SLINEY .

YES. SLINEY 'S FATHER APPROACHEDHIM.

JUSTICE: AND AT THIS EVIDENTIARY HEARING , THE F ATHER WAS NOT CALLED TO TESTIFY ABOUT --

THE FATHER WAS DECEASED AT THE TI ME.

JUSTICE: RIGHT AND THERE WAS NO EVIDENCE IN THERECORD ABOUT WHAT HAPPENED AT THE TIME THAT SHIRLEY WAS FIRST HIRED.

UNFORTUNATELY THE FATHER HAD ALL OF THE CONVERSATIONS WITH MR . SHIRLEY , DID ALL OF THE BUSINESS WITH MR . SHIRLEY ABOUT HIS SON'S REPRESENTATION, AND UNFORTUNATELY HE DIED BEFORE THE EVID ENTIARY HEARIN G.

JUSTICE: SO AS FAR AS WE KNOW, THEY COULD HAVE DISCUSSED IT .

THEY COULD HAVE. WE DON'T KNOW.

CHIEF JUSTICE: DID HE PUT MR. SHIRLEY ON?

I AM SO RRY ? C HIEF DID YOU PU T MR. SHIRLEY ON THE STAND?

NO, MA'AM. HE WAS COOPERATIVE BUT NOT INTERESTED I N HELPING THE DEFENSE PROVE THAT HE WAS THE GUY.

CHIEF JUSTICE: BUT YOU COU LD HAVE PUT HIM ON TO ESTABLISH THE CONFLICT.

WELL , H E ADMITTED THAT THE FIRST EVIDENTIARY HEARING THAT HE REPRESENTED DETECTIVE SISK. THAT WAS ESTABLISHED. ABOUT THE SON . PERHAPS WE SHOULD HAVE PUTHIM ON AGAIN TO ESTABLISH THE SON --

JUSTICE: H O W DID THE COURT TREAT THE RECORDS THAT YOU INTRODUCED , A S FAR AS WHETHER THEY WERE SUFFICIENT PROOF OF REPRESENTATION OFTHE SON?

IT REACHED THE MERITS OF THE ISSUE. WE CAN ONLY ASSUME AL THOUGH THERE WAS NO SUCH RU LING , THAT IT TO OK THE PAPERWORK UNDER CONSIDERATION, THEDOCUMENTS FILE D AND CONSIDERED THE CASE ON THE MERITS. AND IN S EVEN SECON DS --

CHIEF JUSTICE: ACTUALLY YOU ARE OUT OF YOUR TIM E, BUT IF YOU WANT TO GIVE SEVEN SECONDS.

I JUST WANT TO EMPHASIZE THAT UNDER SKIPPER AND VUYEAU, THE FACT THAT THEREIS A PROPORTION SLIT ON PROPORTIONAL ITY AND THE JURY VOTE AND THE FACT THAT THEDEFENDANT COULD HAVE AN EXPERT CO ME IN AND SAY HE WOULD HAVE BEEN WELL-BEHAVED AS A MODEL PRISONER , CRITICAL TO THE CASE AND COUNSEL WAS INEF FECTIVE.

CHIEF JUSTICE: THA NK YOU VERY MU CH. THE COURT WILL TAKE THE M ATTER UNDER ADVISEMENT AND WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RI SE.