

THE NEXT CASE ON THE COURT'S
CALENDAR IS NELSON VERSUS STATE.

>> I AM ALI SHAKOOR AND TODAY
I'M HERE TO DISCUSS ISSUES ONE
AND TWO IN OUR BRIEF WITHOUT
WAIVER OF THE OTHER ISSUES IN
OUR BRIEF AND IN THIS CASE AN
INCOMPETENT MAN WAS TRIED AND
CONVICT AND SENTENCED TO DEATH
AND IT IS CONTROLLED BY DUSKY
VERSUS UNITED STATES... AND THE
CASES CITED IN OUR BRIEF.

>> WHAT YOU TELL US WHAT
HAPPENS, PRETRIAL IN THE CASE,
[INAUDIBLE] THE BENEFIT OF THE
OPINION OF HIS EXPERIENCED
MENTAL HEALTH EXPERT, DR. HENRY
DE.

AND APPELLATE WAS CONFIDENT AND
THEN, THAT IT GOES ON, ABOUT
WHAT [INAUDIBLE] KNEW, WAS
THERE, EVEN THOUGH IT WASN'T A
TOUGH ORDERED COMPETENCE, DID...
DID THE DEFENSE ATTORNEY HAVE
MR. NELSON EVALUATED FOR
COMPETENCY.

>> COMPETENCY, NO, YOUR HONOR.

>> SO THAT STATEMENT THAT SAYS
THAT THE -- HE HAD THE OPINION
OF HIS EXPERT DEE, THE REPORT
DOESN'T KNOW THAT.

>> DR. DEE GAVE A REPORT AND HE
BELIEVED THE DEFENDANT WAS
MARGINALLY COMPETENT BUT DIDN'T
DO A FULL COMPETENCY EVALUATION

AND THE TRIAL ATTORNEY NEVER
REQUESTED A COMPETENCY
EVALUATION.

>> IS IT AT ALL SIGNIFICANT THAT
A COMPETENCY EVALUATION WAS DONE
WITH REGARD TO POSTCONVICTION
PROCEEDINGS AND WAS FOUND TO BE
COMPETENT AND AND I UNDERSTAND
COULD HAVE BEEN INCOMPETENT BACK
WHEN THE CASE WAS TRIED AND THAT
HE WAS FOUND TO BE COMPETENT.

>> I BELIEVE -- I DON'T BELIEVE
IT IS VERY HELPFUL AT ALL IN
THIS CASE, YOUR HONOR, BECAUSE,
REGARDING ISSUES 1 AND 2, WE ARE
DEALING WITH COMPETENCY AT THE
TIME OF TRIAL AND CASE LAW IS
CLEAR THAT YOU CAN'T...

>> BUT YOU HAVE TIME DEFICIENCY
IN WHAT THE TRIAL COUNSEL DID.

>> YES, YOUR HONOR.

>> AND IF THE TRIAL COUNSEL
LOOKING THE AT EVERYTHING, HE
HAS EXPERIENCED HAS AN EXPERT,
TALKED TO, YOU KNOW, HAS HIS
CLIENT AND SAYS, AS FAR I WAS
CONCERNED, HE WAS COMPETENT, I
DIDN'T SEE INDICATIONS HE WAS
INCOMPETENT, HOW DO YOU FIND THE
BEHAVIOR TO BE, AFTER THE JUDGE
FINDS IT IS SUFFICIENT, HOW DO
WE FIND IT NOT SUFFICIENT.

>> IN HILL VERSUS STATED, CITED
IN OUR BRIEF, IN HILL VERSUS
STATE THE TRIAL COURT DEPEND ON
THE JUDGMENT OF THE TRIAL

ATTORNEY, AS TO ISSUES OF
COMPETENCY AND DISREGARDING THE
OVERWHELMING ARGUMENTS OF
COMPETENCY AND IN THIS CASE WE
HAVE A SUICIDE ATTEMPT ON JUNE
1998.

AND IN THIS CASE WE HAVE
DR. ASHBY WHO DID THE
DETERMINATION OF WHETHER OR NOT
THE DEFENDANT HAD A FOUNDATION
TO GET A PSYCHOTROPIC MEDICATION
INSTRUCTION.

AND DR. ASHBY TESTIFIED THE
DEFENDANT WAS PSYCHOTIC AND THE
DOCTOR TESTIFIED THAT THE
DEFENDANT HAD IDIOSYNCRATIC
ASSOCIATIONS.

AND HE HAD -- HEARD VOICES.
HAD HALLUCINATIONS.

>> WHEN DID HE TESTIFY -- HE
TESTIFIED AT WHAT POINTED.

>> PRIOR TO TRIAL.

PRIOR TO THE JURY HEARING THE
ACTUAL TESTIMONY.

>> SO, IN THE DIRECT APPEAL THAT
WOULD HAVE BEEN SOMETHING... IN
OTHER WORDS, THIS ISSUE THE
TRIAL COURT SHOULD HAVE ORDERED
A COMPETENCY HEARING.

THAT -- WAS THAT RAISED ON
DIRECT APPEAL.

>> IT WAS NOT RAISED ON DIRECT
APPEAL.

>> THAT PART OF IT, IS -- IF IT
WAS APPARENT FROM THE RECORD,
THAT SHOULD HAVE BEEN RAISED,

AND... AS A DIRECT APPEAL.

>> YOU KNOW, SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND I ARGUE SUBSTANTIVE ERROR OR -- SHOULD REPHRASE, FUNDAMENTAL ERROR COULD BE RAISED AT ANY TIME, HOWEVER, IN SINGLETARY VERSUS JAMES, WE DEALT WITH THE ISSUE OF DIRECT APPEAL, OR THE ISSUE OF INCOMPETENCY AND WHETHER OR NOT THE TRIAL COURT SHOULD HAVE DONE A COMPETENCY EVALUATION AND SHOULD HAVE BEEN RAISED ON DIRECT APPEAL AND SINGLETARY VERSUS AGREED WITH YOU AND SAID IT SHOULD HAVE BEEN RAISE ON DIRECT APPEAL AND IT WASN'T AND STILL FOUND ERROR ON ISSUE 2, SUBSTANTIVE DUE PROCESS VIOLATIONS BECAUSE AN INCOMPETENT MAN NONETHELESS, TAKEN TO TRIAL... CONVICTED. BESIDES DR. ASHBY'S TESTIMONY REGARDING HALLUCINATIONS AND HEARING VOICES, BEING ON PSYCHOTROPIC AND ANTI-PSYCHOTIC MEDICATION WE HAVE THE TESTIMONY AFTER THE EVIDENTIARY HEARING OF JULIA WILLIAMSON, THE TRIAL ATTORNEY, AND SHE WAS CO-COUNSEL AND SHE WAS PRIMARILY IN CHARGE OF GUILT PHASE, JULIE WILLIAMSON TESTIFIED THAT SHE GOT MOST OF HER MATERIALS FROM THE POLICE REPORT.

SHE SAID THAT THE DEFENDANT,

MR. MICAH NELSON WAS NO HELP IN HIS OWN DEFENSE WHICH IS CONTRARY TO A DETERMINATION OF COMPETENCE, AND, THE COURT IS AWARE TO DETERMINE SOMEBODY COMPETENT THE DEFENDANT HAS TO HAVE A RATIONAL ABILITY TO CONFER WITH HIS OWN ATTORNEY, AND HAS TO HAVE A RATIONAL AND FACTUAL UNDERSTANDING OF THE CHANNELS AGAINST HIM, AND HAS TO BE ABLE TO... APPROPRIATE COURTROOM BEHAVIOR AND ACCORDING TO CO-COUNSEL WHO DEALT WITH MR. NELSON INTIMATELY, MR. NELSON DID NOT HAVE THAT. THIS CASE -- AND I MENTIONED HILL VERSUS STATE, AND I KNOW THAT THE STATE IS GOING TO MENTION... AND THEY MENTION IN THEIR ANSWER BRIEF, THE TRIAL COUNSEL MENTIONED TROGOTO MENTIONED AT THE HEARING THAT HE HAD LOTS OF CONVERSATIONS WITH MR. NELSON AND FELT THAT THAT HE WAS COMPETENT.

>> WHERE DID THE DEFENSE COUNSEL GET THE NOTION THAT -- I THOUGHT ONE OF THESE EXPERTS HAD SAID TO THE ATTORNEY THAT HE WAS AT LEAST marginally competent to proceed.

SO, WHO SAID THAT.

>> DR. DEE.

>> AT WHAT POINT IN THESE PROCEEDINGS.

>> DR. DEE DECLARED HIM
MARGINALLY COMPETENT EARLY IN
THE PROCEEDING.

>> EARLY IN THE PROCEEDING
BEFORE THE SUICIDE ATTEMPT.

>> AFTER THE SUICIDE ATTEMPT,
THAT HAPPENED AT THE ON THE SAME
EVENING AS THE DOCTOR'S FIRST
VISITED WITH THE CLIENT.

AFTER THAT SUICIDE ATTEMPT,
AFTER THE DOCTOR'S INITIAL
EVALUATION, DR. DEE DEAD THE
DEFENDANT IS MARGINALLY
COMPETENT AND RECOMMENDED THE
OTHER EXPERTS GET INVOLVED, AND
DR. DEE RECOMMENDED THE
DEFENDANT GET SENT TO THE STATE
HOSPITAL.

ON MARCH 11, 1999.

SUBSTITUTE TRIAL COUNSEL TOLD
THE TRIAL COURT THAT COMPETENCY
IS AN ISSUE, AND WE'RE GOING TO
REQUEST MORE TIME TO LOOK INTO
THE MATTERS OF COMPETENCY.

THE TRIAL COURT SAID OKAY.

TRIAL COUNSEL NEVER FOLLOWED UP
ON THAT.

>> OKAY.

I WANT TO MAKE SURE THAT THERE
IS... YOU ARE RAISING BOTH AN
INEFFECTIVE ASSISTANCE CLAIM.

>> YES.

>>... [INAUDIBLE] LOOK AT THE
PERFORMANCE AND WE HAVE TO LOOK
AT PRESENTLY DIS, CORRECT.

>> RIGHT.

>> AND -- PREJUDICE, CORRECT.

>> RIGHT.

>> AND A SUBSTANTIVE DUE PROCESS CLAIM.

>> YES.

>> AND IN THAT CLAIM WE HAVE TO FIND THAT HE IN FACT WAS INCOMPETENT DURING THE TRIAL.

>> ABSOLUTELY.

>> AND AN INCOMPETENT MAN WAS TRIED.

>> YES.

>> AND THEN ON THE STRICKLAND CLAIM WE HAVE TO FIND THAT EVEN THOUGH TRIAL COUNSEL AND THE JUDGE FOUND ALL OF THESE FACTS, WITH THE -- RIGHTED IN FRONT OF THEM AND MADE DETERMINATIONS, THAT HE WAS COMPETENT AND ANNOUNCED THAT THROUGH THE TRIAL COURT, THAT HE WAS COMPETENT TO PROCEED, EXPERIENCED DEFENSE COUNSEL THAT WAS SUFFICIENT AND EVEN -- SHOULD HAVE ASKED FOR A COMPETENCY EVALUATION, YOU STILL HAVE TO FIND PREJUDICE.

>> ACCORDING TO SINGLETON... PREJUDICIAL.

>> IF THAT IS FIND AND YOU HAVE TO FIND HE WAS INCOMPETENT TO PROCEED.

>> RIGHT.

AND UNDER TATE, THE PROCEDURAL DUE PROCESS ANALYSIS THE BURDEN IS ON THE STATE TO DETERMINE THE DEFENDANT IS COMPETENT AND ONCE

WE RAISE THAT ISSUE UNDER
PROCEDURAL DUE PROCESS THE
BURDEN ON THE STATE TO PROVE OUR
CLIENT IS COSTUME TENT AND WE
ASSERT THERE IS OVERWHELMING
EVIDENCE OUR CLIENTS WAS
INCOMPETENT UNDER PROCEDURAL DUE
PROCESS.

>> WHAT OTHER THAN THE FACT THAT
HE ATTEMPTED SUICIDE ARE YOU
HANGING THAT -- YOUR HAT ON, TO
SAY THAT THERE IS NO DOUBT ABOUT
IT BUT, THAT THE MAN WAS
INCOMPETENT.

>> IS THE SUICIDE ATTEMPT IN ADD
OF ITSELF IS NOT ENOUGH,
STRAIGHT OUT OF DROPE AND BEYOND
THAT WE HAVE A MAN DIAGNOSED
SCHIZOAFFECTIVE DISORDER AND THE
TRIAL ATTORNEY KNEW THIS AND HAD
THE BENEFIT OF TALKING TO THE
DOCTOR BEFORE DR. ASHBY TOOK THE
STAND.

>> YOU HEAR AND THAT IS
SOMETHING BETWEEN SCHIZOPHRENIA
AND --

>> DEPRESSION.

>> DEPRESSION.

>> WHAT DOES THAT REALLY TELL
YOU ABOUT THE DEFENDANT.

>> SCHIZOAFFECTIVE DISORDER, AS
FAR AS THE SYMPTOMS IN DUE
HEARING VOICES OR OTHER AUDITORY
HALLUCINATIONS AND IDIOSYNCRATIC
ASSOCIATION WHICH MEANS THE
DEFENDANT WILL SAY THINGS THAT

MAKES SENSE TO HIM AND MAY NOT TO A LAYPERSON.

>> AND DID SOMEONE TESTIFY THAT HE WAS DOING THAT.

>> DR. ASHBY, ABSOLUTELY.

>> AT WHAT POINT?

>> DURING HIS DURING HIS EXAMINATION HE WAS DOING THIS?

>> DR. ASHBY TESTIFIED IN THE PRETRIAL TOURING OF THE HEARING OF VOICES AND AND THE ANTIPSYCHOTIC -- AND THE HEARING OF VOICES EVEN ON THE ANTIPSYCHOTIC MEDICATION AND THE ID SO CONTRACT HALLUCINATIONS AND THE ANTIPSYCHOTIC DRUGS, THAT IS ENOUGH FOR ANY REASONABLE ATTORNEY TO SAY, HOLD THE PHONE, MY CLIENT MAY BE INCOMPETENT AND IS HEARING VOICES AND -- INCOMPETENT AND HE'S ON ANTI-PSYCHOTIC DRUGS AND NOT TO MENTION, DR. DEE SAYS MR. NELSON NEEDS TO BE TREATED IN THE STATE HOP AND ANY REASONABLE ATTORNEY WOULD HEAR THE WORD "STATE HOSPITAL" AT THE TRIAL LEVEL AND UNDERSTAND THERE MAY BE AN ISSUE OF COMPETENCY HERE.

>> AND NOW YOU GO -- YOU KNOW, I'M HAVING TROUBLE WITH AND I WANTED TO BE SURE WE HAVE -- BEFORE A ASK ABOUT THE SEPARATE CLAIMS, ONE IS WHETHER THE DEFENDANT WAS -- DEFENSE

ATTORNEY WAS DEFICIENT ON NOT ASKING FOR THE COMPETENCY HEARING AND THERE WAS AN EVIDENTIARY HEARING BEFORE THE TRIAL JUDGE, POSTCONVICTION.

>> RIGHT.

>> WHAT DID THE TRIAL COURT FIND BASED ON HEARING FROM THE DEFENSE ATTORNEY AND HEARING EVERYTHING THAT YOU ARE TELLING US, WHAT IS THE -- DID THE TRIAL COURT FIND.

>> THE TRIAL COURT DETERMINED IN THE FACTUAL FINDING, PAGE 55 OF HIS ORDER, THAT THERE IS INSUFFICIENT EVIDENCE TO SUPPORT ANY NOTION THAT OUR CLIENT WAS INCOMPETENT AND HE DETERMINED THAT BASED ON MR. TROGOLO'S TESTIMONY IN REGARDS TO HOW HE INTERACTED WITH THE CLIENT. BUT, BEGAN, THAT IS CONTRARY TO HILL VERSUS STATE, WHERE YOU CANNOT RELY STRICTLY ON THE ASSERTIONS OF A TRIAL ATTORNEY, WHEN THERE IS EVIDENCE THAT -- TO THE CONTRARY THAT THE CLIENT IS ACTUALLY COMPLETELY INCOMPETENT.

THE TRIAL COURT --

>> DID HE ACTUALLY FIND THE -- THE JUDGE FINDS BASED ON EVERYTHING, THAT THE -- AS YOU SAY, AND IT IS DISCUSSED ON PAGE... IS IT 56 OF THE TRIAL COURT'S ORDER, THAT ON THE...

FIRST DISCUSSION IN CLAIM ONE,
THAT HE DID NOT FIND BASED ON
THE LEAD DEFENSE ATTORNEY DID
NOT FIND BASED ON THE EXTENSIVE
EXPERIENCE THAT IT WAS NECESSARY
TO FILE A MOTION FOR COMPETENCY
DETERMINATION, AND, DIDN'T THE
JUDGE FIND AND TESTIFY THAT
MR. NELSON WAS ABLE TO
COMMUNICATE WITH THE DEFENSE
TEAM, AND THAT HE UNDERSTOOD THE
PROCEEDINGS AND THE ROLES OF THE
PLAYERS AND DR. DEE'S MENTAL
EXPERT ADVICE THAT HE WAS
MARGINALLY COMPETENT TO PROCEED
AND THE FACT THAT HE HAD ONCE
TRIED TO COMMIT SUICIDE AND WAS
ON PSYCHOTROPIC MEDICATION DOES
NOT MEAN HE WAS INCOMPETENT OR
THE COURT WAS REQUIRED TO ORDER
A COMPETENCY EVALUATION AND THE
EVIDENCE SUPPORTS THE CONCLUSION
THE DEFENDANT WAS COMPETENT AND
THAT IS THE JUDGE'S FINDING,
SPECIFICALLY, AS TO THE
SUBSTANTIVE DUE PROCESS CLAIM.

>> RIGHT.

>> CORRECT.

>> WHICH I BELIEVE, USE THAT ON
PAGE 56 --

>> AND WHAT IS THAT... SO THAT
IS NOW GOING TO, THAT HE IS NOT
ONLY FINDING HE WASN'T DEFICIENT
BUT AS TO PREJUDICE --

>> RIGHT.

>> IF THERE IS NOT -- IF WE LOOK

THE AT ALL OF THE EVIDENCE, AND THE JUDGE HAS... SUPPORT THE FACTUAL FINDINGS BY COMPETENT SUBSTANTIAL EVIDENCE, WHERE IS THE PREJUDICE THEN, IF HE SAYS HE WASN'T -- MAYBE, IT WOULD HAVE BEEN NICE.

>> RIGHT.

>> AND MAYBE JUST ANOTHER TRIAL JUDGE WOULD HAVE SAID, I AM GOING TO ORDER A COMPETENCY EVALUATION.

>> WELL --

>> BUT IN THE END THE PREJUDICE HAS TO BE AN INCOMPETENT DEFENDANT WAS TRIED AND WAS NOT ABLE TO ASSIST IN HIS OWN DEFENSE, THAT WOULD BE THE PREJUDICE.

>> YES, YOUR HONOR, THE TRIAL COURT WAS WRONG AND HAD A MISAPPREHENSION OF FACT, BECAUSE, THE RULING OF CONTRARY TO CASE LAW, AS I DISCUSSED, THERE IS HALLUCINATIONS IN THE CASE AND ERRATIC BEHAVIOR AND A SUICIDE ATTEMPT, AND, IN TATE VERSUS ROBINSON WHEN THE U.S. SUPREME COURT REVERSED, THERE'S A HEAD INJURY AND THERE WAS SUBSEQUENT ERRATIC BEHAVIOR AND HEARING VOICES AND HALLUCINATIONS AND THAT IS SIMILAR TO MR. NELSON. AND, IN DROPE THERE IS SUICIDE ATTEMPT AND STRANGE BEHAVIOR AND

ATTEMPT TO KILL THE WIFE AND
MR. NELSON TRIED TO KILL HIMSELF
BY SLICING THE THROAT AND THE
UNITED STATES SUPREME COURT SAID
THAT THE JUDGE SHOULD ORDER A
COMPETENCY DETERMINATION AND WE
HAVE A PROCEDURAL BAR ISSUE IN
THE CASE BUT IT TAKES US BACK TO
THE TRIAL ATTORNEY, WHO WAS
DEFICIENT, BECAUSE --
ATTORNEY, WHO WAS DEFICIENT
BECAUSE DESPITE THE OVERWHELMING
EVIDENCE, OF IN COMPETENCY THE
TRIAL ATTORNEY INSISTED ON HIM
GOING TO TRIAL AND BECOME
CONVICTED AND THE TRIAL ATTORNEY
STATED ON THE RECORD THROUGH
SUBSTITUTE TRIAL COUNSEL THAT
THERE IS AN ISSUE OF COMPETENCY
AND ONE OF OUR EXPERTS, I.E.
DR. DE.
SAID OR CLIENT IS ORIGINALLY
COMPETENT AND WE NEED ANOTHER
EXPERT TO LOOK INTO THIS AND
THEY NEVER FOLLOWED UP ON THAT
AND THAT IS DEFICIENT
PERFORMANCE AND ONCE THEY HEAR
THE WORD STATE HOSPITAL AND THE
DOCTOR TESTIFIED HE THINKS THE
STATE HOSPITAL IS INVOLVED, SO
THAT IT IS -- THERE ARE MORE
EXPERTS AND A CLINICAL SETTING,
THINGS LIKE THAT THE TRIAL
ATTORNEY NEVER FOLLOWED UP ON
THAT AND NEVER GOT OTHER EXPERTS
INVOLVED, AND THIS IS A PERFECT

OPPORTUNITY TO LOOK AT ALL OF THE OVERWHELMING EVIDENCE OF INCOMPETENCY AND SAY TO BE SAFE I WILL ASK THIS TRIAL JUDGE FOR A COMPETENCY PANEL.

>> DOES THE RECORD AFFIRMATIVELY SHOW THAT THEY DID NOT DO IT, OR IS THERE JUST AN ABSENCE OF EVIDENCE AS TO WHAT HAPPENED.

>> THE RECORD AFFIRMATIVELY SHOWS THERE WAS NEVER A REQUEST FOR A COMPETENCE PANEL.

>> I MEAN, A STATE -- I UNDERSTAND, BUT THAT DOESN'T SHOW THEY DIDN'T DO ANYTHING FURTHER.

I MY RECOLLECTION, FOR EXAMPLE, THEY COULD HAVE CONSULTED WITH SOMEONE AND TALKED FURTHER WITH DR. DEE AND TALKED FURTHER WITH DR. ASHBY I BELIEVE, AND COULD HAVE EXPLORED IT.

AND THEN DECIDED NO, WE DON'T WANT TO GO THROUGH WITH IT.

>> THE RECORD IS NOT SUPPORTING THAT.

THE --

>> THE RECORD DOES SUPPORT, THEY JUST STOPPED AND DIDN'T TALK TO ANYONE, AND JUST SAID, FORGET IT.

>> TALKED TO DR. DEE MORE AND STILL DETERMINED HE'S marginally COMPETENT AND HE STUCK WITH THAT AND THE JUDGE IN THE ORDER SAID, IN QUOTING DR. DEE'S EVIDENTIARY

HEARING TESTIMONY, ALSO USED THE WORD SOMEWHAT COMPETENT AND MARGINALLY AND SOMEWHAT COMPETENT AND ANY REASONABLE TRIAL ATTORNEY WOULD HEAR THOSE WORDS AND THINK THERE MIGHT BE AN ISSUE OF COMPETENCY HERE AND REGARDING DR. ASHBY, MR. TROGOLO TESTIFIED HE FIRST SPOKE TO DR. ASHBY RIGHT BEFORE HIS PRETRIAL TESTIMONY AND YOU WOULD THINK THERE IS A JAILHOUSE PSYCHIATRIST, SEEING YOUR CLIENT, WOULD YOU WANT TO TALK TO HIM AND GET HIS RECORDS AND INPUT AND ASK HIM FOR A DETERMINATION COMPETENCY AND TRIAL COUNSEL

YOU WOULD WANT TO TALK TO THAT PSYCHIATRIST.

TRIAL COUNSEL FAILED TO DO THAT, AS THEY WAITED UNTIL THE PRETRIAL HEARING BECAUSE ALL THEY HEARD ABOUT WAS THE ISSUE OF PSYCHOTROPIC MEDICATION. TRIAL COUNSEL WANTED TO PUT ON TESTIMONY FROM DR. ASHBY TO A DOWN A PSYCHOTROPIC INSTRUCTION FOUNDATION.

>> LET ME ASK ABOUT THE COMPETENCY DETERMINATION MADE AT THE FIRST CONVICTION PROCEEDING. DIDN'T TWO OF THE EXPERTS WHO EXAMINED THE DEFENDANT DETERMINED THAT HE WAS

LINGERING?

>> YES.

SEVEN YEARS LATER, THEY WERE
RETROACTIVE.

>> ITEM INTO A REBUTTAL.

I WILL COME BACK.

>> MAY IT PLEASE THE COURT?

ASSISTANT ATTORNEY GENERAL OF
THE STATE OF FLORIDA, I WOULD
LIKE TO BREAK DOWN THE FIRST TWO
CLAIMS.

CLAIM ONE HAS TWO QUESTIONS, THE
SECOND CLAIM -- IN CLAIM ONE,
RATING BOTH THE DUE PROCESS
COMPETENCY CLAIM AND ALSO IN
EFFECT, THE ASSISTANCE OF
COUNSEL CLAIM.

IT IS A MATTER OF WHAT IS ON A
DIRECT APPEAL, WHETHER THE TRIAL
COURT --

>> IS THE HABEAS CLAIM IN THIS
CASE?

>> HE CHALLENGES THE POST
CONVICTION COURT'S FINDING OF
COMPETENCY BUT DOES NOT RAISE
THAT AS A CLAIM IN HIS HABEAS.

WHAT WE HAVE ON THE RECORD OF
DIRECT APPEAL IS NUMEROUS
STATEMENTS THAT THE APPELLATE IS
CONFIDENT.

WE HAVE IT FROM TRIAL COUNSEL
THAT HE MAKES A NICE RECORD
ESPECIALLY WHEN THEY ARE
DISCUSSING THE PSYCHOTROPIC DRUG
JURY INSTRUCTION HE HAS FACED
NUMEROUS TIMES.

HE MAKES IT CLEAR I AM NOT
SEEKING A COMPETENCY
DETERMINATION.

>> IT IS SOMETHING THAT NOT
HAVING BEEN A DEFENSE LAWYER OR
UNDERSTAND, IT IS A HORRIBLE
CRIME, A SICK CRIME THAT
OCCURRED HERE, REALLY SICK.

THE ISSUE OF -- THEY LOOKED AT
THE MENTAL MITIGATION -- DID THE
DEFENSE LAWYER TESTIFIED HE HAD
A STRATEGIC REASON, I COULD HAVE
ASKED FOR THE COMPETENCY
EVALUATION BUT I WAS CONCERNED I
WOULD GET SOME OTHER THINGS THAT
MIGHT NOT BE HELPFUL TO ME?

>> I WOULD NOT TURN IT A
STRATEGIC REASON.

HE HAD A FACTUAL REASON, THE
EVIDENCE DID NOT SUPPORT IT.
HE TESTIFIED TO THE EFFECT HE
HAD NO PROBLEMS COMMUNICATING
WITH HIS CLIENT OVER TWO YEARS
REPRESENTING HIM.

HE HAD IS FORENSIC EXPERT DR.
DEE INVOLVED.

YOU ARE EITHER COMPETENT OR
INCOMPETENT.

DR. DEE EXAMINED THE APPELLATE
THE FIRST TIME HE HAD A SUICIDE
ATTEMPT.

>> WHAT WAS THE PURPOSE OF THE
PSYCHOTROPIC MEDICATION?

I THINK OF THAT IS BEING GIVEN
TO PEOPLE BECAUSE THEY HAVE SOME
KIND OF SERIOUS PROBLEM.

>> THE TESTIMONY WAS WHEN HE WAS ADMITTED, DR. ASHBY HAD HIS INITIAL EXAMINATION, NELSON RECORDED HE HAD -- PRESCRIBING THESE DRUGS, SOME OF THE EXPERT AT THE COMPETENCY HEARING TESTIFIED THESE PRISON PSYCHIATRISTS ARE MORE APT TO PRESCRIBE DRUGS TO CALM DOWN DEFENDANTS THAT ARE HAVING VARIOUS ISSUES.

THE PURPOSE OF IT AS IT RELATES TO OUR TRIAL WAS THE TRIAL ATTORNEY FOUND THESE DRUGS HELP HIS CLIENT, AND MADE SURE HE WAS COMPETENT WHEN HE WAS ON THESE DRUGS.

HIS TESTIMONY WAS HE WANTED THE JURY TO CREATE AN APPEAL ISSUE IF THE STATE OBJECTED TO IT.

THAT WAS HIS GOAL IN INTERJECTING THE PSYCHOTROPIC MEDICATION INTO THE PROCEEDINGS.

>> YOU SAY THE TRIAL ATTORNEY WANTED HIM TO CONTINUE ON THESE MEDICATIONS.

THE TRIAL ATTORNEY HAS SOME ISSUE OR SOME REASON TO BELIEVE HE IS OTHERWISE INCOMPETENT.

>> NOT EXACTLY.

HE SAYS VERY CLEARLY ON THE DIRECT APPEAL RECORD WHEN DISCUSSING THIS, MY CLIENT IS COMPETENT, I AM NOT MOVING FOR A COMPETENCY HEARING, I WANT THE JURY INSTRUCTION BUT AS LONG AS

HE STAYS ON THESE DRUGS AND DR. ASHBY'S TESTIMONY IS THIS WILL ASSIST HIM, HE HAD NO PROBLEMS COMMUNICATING WITH HIS CLIENT.

>> HOW SERIOUS WAS THE SUICIDE ATTEMPT?

FOR THE DRUGS PRESCRIBED AFTER THE SUICIDE ATTEMPT --

>> DRUGS WERE PRESCRIBED IMMEDIATELY UPON HIS ENTERING INTO THE JAIL WHICH WAS TWO YEARS BEFORE HIS TRIAL.

THE SUICIDE ATTEMPT CAME A YEAR AND A HALF BEFORE HIS TRIAL.

IT WAS A PLASTIC UTENSIL USED TO SLICE HIS NECK.

IT WAS CLOSED WITH A COUPLE STITCHES.

>> WAS THAT BROUGHT TO THE TRIAL COUNSEL'S ATTENTION?

>> I AM NOT SURE WHEN HE LEARNED ABOUT THAT.

IT DEFINITELY CAME IN AT THE PENALTY PHASE.

I DON'T KNOW IF HE WAS ALERTED BEFORE THEN.

>> WHO WAS NOT ALERTED?

>> THE TRIAL JUDGE.

I AM NOT SURE.

I LOOKED AND I COULDN'T FIND A DIRECT REFERENCE TO THE PENALTY PHASE.

IT CAME OUT IN DR. DEE'S PENALTY TESTIMONY.

>> THE SUICIDE ATTEMPT, THE ADVANTAGE TO PURSUE LITIGATION.

>> IT DID COME OUT IN DR. DEE'S TESTIMONY.

BUT HE TESTIFIED THE FIRST TIME HE HAD A SUICIDE ATTEMPT, A YEAR-AND-A-HALF GOES BY, HE SEES HIM EIGHT TIMES DURING THAT PERIOD AND IS REPORTING BACK TO TRIAL TELL ALL THESE TIMES HE IS MEETING WITH HIM AND SAYS I MET HIM ON THE EVE OF TRIAL AND IT WAS OUR BEST SESSION EVER. HE WAS VERY FORTHCOMING WITH INFORMATION, IT WAS HIS BEST SESSION THAT HE HAD.

>> THAT TESTIMONY CAME IN THE PENALTY PHASE OF THIS CASE OR IN THE EVIDENTIARY HEARING?

>> THE EVIDENTIARY HEARING THAT THEY TESTIFIED AT.

>> YOU WERE STARTING TO SAY THERE WERE TWO PARTS OF CLAIM ONE, PROCEDURAL DUE PROCESS WAS BARRED --

>> BASICALLY WHAT YOU HAVE TO LOOK AT, AND THE TRIAL JUDGE FOUND NO DEFICIENT PERFORMANCE, VERY EXPERIENCED ATTORNEY FOR 20 YEARS AT THE TIME OF THIS TRIAL, HE CONFERRED WITH HIS CLIENT, HIS CLIENT HAS GIVEN HIM AN IDENTICAL STATEMENT TO WHAT HE TOLD THE POLICE AS TO THE NATURE OF THE FACT OF THE CRIME AND NO PROBLEMS RELATING THE FACTS OF THE CASE TO TRIAL COUNSEL. TRIAL COUNSEL HAD NUMEROUS

DISCUSSIONS WITH HIM ABOUT ACTUAL LEGAL STRATEGY ON JURY INSTRUCTION AND SO FORTH AND HE AGREED.

ROBERT TRAGOTO'S OPINION WAS MY EXPERT TELLS ME HE IS COMPETENT, I HAVE NO REASON TO MOVE FOR A COMPETENCY HEARING.

THAT IS WHAT THE TRIAL JUDGE FOUND.

THAT WAS SUPPORTED BY THE EVIDENCE IN THIS RECORD.

>> IF WE FIND THESE WERE ENOUGH INDICATIONS THAT REASONABLE TRIAL COUNSELS SHOULD HAVE ASKED FOR COMPETENCY EVALUATION, HOW DO WE EVALUATE PREJUDICE?

>> THE STATE CAN REBUT THAT.

THE COMPETENCY HEARING FROM POST CONVICTION PROCEEDINGS IN ADDITION TO WHAT IS IN THE RECORD, THE POST CONVICTION COMPETENCY HEARING CLEARLY SHOWS HE WAS MALINGERING AND THESE SELF REPORTED HALLUCINATIONS' CAME ABOUT BECAUSE HE HAD BEEN INCARCERATED AND CHARGED WITH FIRST-DEGREE MURDER.

DR. DOLENTE AND DR. SESTA RIGHT TO THE POST CONVICTION HEARING GAVE DETAILED TESTIMONY AS TO HOW UNLIKELY IT WOULD BE THAT HE WAS SUFFERING WITH THESE OTHER DOCTORS.

THEIR TESTIMONY WAS GIVEN, THE TRIAL JUDGE FOUND THEM TO BE THE

CREDIBLE EXPERT IN THE
COMPETENCY HEARING AND GAVE
THEIR OPINION AS OPPOSED TO DR.
DOLENTE WHO SAID HE WAS
INCOMPETENT.

THEY GAVE HIM FORCED QUESTIONS,
THAT ANYBODY EXHIBITING THIS
HOLLYWOOD TYPE OF MALINGERING HE
WAS DOING WOULD HAVE BEEN SO BAD
OFF IT WOULD HAVE BEEN EVIDENT
BEFORE HE GOT TO THIS STAGE IN
LIFE.

HE WOULD HAVE BEEN SERIOUSLY
HOSPITALIZED FOR HIS MENTAL
CONDITION IF HE WAS AS BAD AS HE
WAS GIVEN OFF TO BE.

>> THE CRIME THAT HE COMMITTED
IN THIS CASE, THE PRIOR CRIME
THAT DIDN'T COME IN TO EVIDENCE
IN THE PENALTY PHASE THAT WE NOW
KNOW ABOUT WHEN HE WAS 16, WHEN
HE VAGINALLY RAPED A
FIVE-YEAR-OLD, HE HAD BEEN AN
EARLY VICTIM OF INCEST, THAT
SHOWS SOMEBODY SIGNIFICANTLY ILL
BUT THE COMPETENCY QUESTION IS
DIFFERENT.

>> HE WAS FOUND TO BE A SEXUAL
DEVIANT WHEN HE WAS 16.
THAT IS ANOTHER CLAIM THEY DON'T
RAISE IN THE ORAL ARGUMENT.
THE COUNCIL WAS INEFFECTIVE FOR
NOT PRESENTING HIM.
NOT THAT HE RAPED A
FIVE-YEAR-OLD.
DR. KREMPER'S REPORT WAS CLEAN

THAT THERE WERE NO
HALLUCINATIONS, NO PSYCHOSIS,
NOTHING OF THAT SORT.

THE ONLY THING HE FOUND WAS
SEXUAL DEVIANCY.

>> THAT WAS WHEN HE WAS 16?
HOW OLD WAS HE AT THE TIME OF
THIS MURDER?

>> JUST SHY OF HIS TWENTY-SECOND
BIRTHDAY.

>> THE ISSUE OF THE COMPETENCY,
THE ALLEGED INCOMPETENCY WOULD
HAVE BEEN WHICH PERIOD OF TIME?

>> I BELIEVE THE CRIME WAS
NOVEMBER OF 1997, THE TRIAL WAS
1999, ALMOST EXACTLY A TWO YEAR
PERIOD BETWEEN THE MURDER AND
THE TRIAL.

DR. DEE SAW HIM --

>> I WANT TO MAKE SURE, A PERSON
CAN BE SEVERELY MENTALLY ILL BUT
COMPETENCY AS WE UNDERSTAND IT
IS THE ABILITY TO COMMUNICATE
AND HAVE A RATIONAL
UNDERSTANDING OF CHARGES.

>> ROBERT TRAGOTO TESTIFIED AT
LENGTH, MS. WILLIAMSON WHO CAME
INTO THE CASE LATER, SHE CAME IN
SIX MONTHS BEFORE THE TRIAL, SHE
DID NOT COMMUNICATE WITH HIM AS
WELL BUT ROBERT TRAGOTO HAD NO
PROBLEMS.

MS. WILLIAMSON ON
CROSS-EXAMINATION ADMITTED
NELSON HAD COMMUNICATED WITH
OTHER MEMBERS OF THE DEFENSE

TEAM ABOUT THE FACTUAL
PROCEEDINGS.

THE ONLY OTHER THING I WANT TO
POINT OUT IS CORRECT COUNCIL
THAT TESTIFIED ABOUT A
SUBSTITUTE ATTORNEY PUTTING ON
THE RECORD THERE WERE CONCERNS
ABOUT COMPETENCY.

THAT IS NOT AN ACCURATE
REPRESENTATION.

AN ATTORNEY WAS FILLING IN FOR
ROBERT TRAGOTO IN MARCH OF 1999.

THE TRIAL WAS IN NOVEMBER.
BASICALLY A STATUS HEARING.

THIS SUBSTITUTE ATTORNEY CAME IN
AND SAID WE HAD OUR CLIMATE SEEN
BY A EXPERT AND HE WAS
MARGINALLY COMPETENT.

HE IS RECOMMENDING A SECOND
EXPERT.

IT IS FETAL ALCOHOL SYSTEM, THAT
IS WHAT ROBERT TRAGOTO TESTIFIED
TO, THEY WERE PURSUING THE FETAL
ALCOHOL DEFENSE.

IT IS NOT THE WE HAVE CONCERNS
ABOUT HIS COMPETENCY, DR. DEE
HAS FOUND HIM COMPETENT AND
WE'RE PURSUING OTHER EXPERTS.

OTHER QUESTIONS?

THE STATE WILL ASK THE COURT
AFFIRMED A LOWER-COURT ORDER.

>> TO PICK UP WHERE COUNCIL LEFT
OFF, OUR CLIENT, EXPERTS SAID
OUR CLIENT IS MARGINALLY
COMPETENT, WE TEND TO GET A
SECOND EXPERT TO FOLLOW UP ON

THAT.

ROBERT TRAGOTO INTENDS TO FOLLOW UP ON THAT.

THAT RECORD SPEAKS TO ITSELF.

ROBERT TRAGOTO NEVER FOLLOWED UP ON ANY ISSUES OF COMPETENCY.

THERE WAS DISCUSSION ABOUT THE 2006 HEARING WHERE DR. DOLENTE AND DR. SESTA DETERMINE OUR CLIENT WAS MALINGERING.

YOU CAN'T --

>> THERE HAS TO BE EVIDENCE THAT IF THE COMPETENCY EVALUATION HAS BEEN DONE HE WOULD BE FOUND INCOMPETENT OR WAS INCOMPETENT BETWEEN 1997, AND 1999.

EVEN IF WE DON'T FOR SOME REASON REJECT THE TRIAL COURT'S FINDINGS, IF THERE WAS NO DEFICIENCY, I DON'T SEE HOW WE WOULD SAY THAT THE RECORD IS THAT THERE WAS NO COMPETENCE OR SUBSTANTIAL EVIDENCE -- THAT WE WOULD HAVE TO SAY WE DISAGREE WITH THAT, EVERYTHING YOU TOLD US, HE WAS INCOMPETENT TO PROCEED DURING THAT TWO YEAR PERIOD OF TIME.

>> DR. MAHER SAID THAT IT IS NOT THAT THE SYMPTOMS OR BEHAVIORS ARE EXHIBITED OVER THESE YEARS --

>> I AM AT A LOSS FOR THAT BECAUSE THE TRIAL JUDGE IN THE SENTENCING ORDER, CORRECT ME IF I AM WRONG, IS SUGGESTING OR

SAYING THERE IS NO INDICATION IN ANY OF THE SCHOOL RECORDS OF MENTAL HEALTH PROBLEMS.

PRIOR TO SEEING DR. DEE, THERE IS NO HISTORY OF MENTAL ILLNESS.

IS THAT JUST PULL OFF THE LAW?

>> HE TOUCHED ON HIS REPORT BASICALLY OF MENTAL HEALTH ISSUES WITH LOW IQ.

HE WAS NOT DIAGNOSED SPECIFICALLY BUT THE REPORT WAS INTERPRETED WITH A HISTORY OF MENTAL HEALTH ISSUES OF MENTAL ILLNESS BUT I DON'T WANT THE COURT TO BE DISTRACTED BY THIS 2006 HEARING, AND ACT LIKE THAT HAS ANY WEIGHT ON WHAT HAPPENED.

>> WE HAVE TO FIND AS A MATTER OF LAW, WE HAVE TO REJECT THE TRIAL COURT'S FINDINGS, THAT HE WAS INCOMPETENT.

LOOKING AT WHAT HAPPENED BEFORE AND AFTER, TRYING TO SEARCH AND SAY DOES IT LOOK LIKE HE MUST HAVE BEEN INCOMPETENT?

OF COURSE YOU CAN LOOK AT IT, YOU WOULD HAVE BEEN ARGUING IF HE WAS NOT FOUND INCOMPETENT THAT IT WAS RELEVANT.

>> I USE THE WORD DISTRACTION BECAUSE SEVEN YEARS LATER WHAT YOU HAVE BEFORE A TRIAL AND WHAT CASE LAW SUPPORTS, THAT YOU LOOK AT FACTS, SPECIFIC ISSUES PRIOR TO TRIAL.

SIMILAR TO THOSE CASES WE HAVE

THE HALLUCINATIONS, WE HAVE THE
SUICIDE ATTEMPT, WE HAVE THE
ERRATIC BEHAVIOR.

WE FOCUS ON WHAT HAPPENED PRIOR
TO TRIAL.

WHAT DID THE JUDGE KNOW?

THAT IS CLEAR AT THIS POINT.

AN INCOMPETENT MAN WAS TRIED,
CONVICTED AND SENTENCED TO
DEATH.

BASED ON PRE-TRIAL FACTUAL
ISSUES THAT HAPPENED IN OTHER
CASES.

THE UNITED STATES SUPREME COURT,
THIS VERY COURT HAS STATED THAT
WITH ISSUES AND SYMPTOMS LIKE
THIS, COMPETENCY ISSUES ARE
RAISED AND NEED TO BE LOOKED
INTO.

AN INCOMPETENT MAN WAS TRIED AND
CONVICTED, SENTENCED TO DEATH.

THAT IS NOT WHAT WE DO IN THIS
COUNTRY, THAT IS NOT WHAT WE DO
IN THIS STATE.

I ASK FOR RELIEF.

>> THANK YOU FOR YOUR ARGUMENT.

THE COURT WILL TAKE ITS MORNING
RECESS OF TEN MINUTES.

>> PLEASE RISE.