Jeffrey G. Hutchinson v. State of Florida

SC08-99

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE

FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> WE HAVE OUR LAST CASE ON THE

CALENDAR FOR TODAY, HUTCHINSON

VERSUS STATE.

THE PARTIES READY?

>> YES, YOUR HONOR.

MAY IT PLEASE THE COURT.

CLYDE TAYLOR ALONG WITH VIA

HARRISON ON BEHALF OF THE

APPELLANT IN THIS CASE, JEFFREY

HUTCHINSON.

WE'RE HERE ON THREE ISSUES AS A

RESULT A DENIAL BY THE TRIAL

COURT A 3851 MOTION.

THIS ISSUES INVOLVE A CLAIM

THAT TRIAL COUNSEL WAS INEFFECTIVE

FOR FAILING AND OVERLOOKING

COMPLETELY SIX POTENTIAL

WITNESSES WHO WOULD HAVE

TESTIFIED AT TRIAL THAT THE

VOICE OF THE DEFENDANT

ALLEGEDLY ON A 911 CALL WAS NOT
HIS.
>> LET ME ASK YOU THIS.
ON THIS 911 TAPE, IS THE SAME
VOICE, THE VOICE THAT IS ON THE
ENTIRE TAPE?
IS THERE A QUESTION ABOUT THAT?
>> THE WAY THE RECORD COMES
OUT, IT WOULD, IT APPEARS THAT
THE TWO STATE PERCENT WHO
INVESTIGATED AND THE TWO,
QUOTE, FRIENDS OF BOTH THE
DEFENDANT AND THE DECEASED
SAID, AS TO THE TAPE, IT WAS
THE VOICE OF THE DEFENDANT.
I DON'T RECALL SPECIFICALLY A
PARTICULAR SENTENCE OR NOT
SENTENCE.
WHAT --
>> WHAT WE'RE TALKING ABOUT IS
THE WHOLE TAPE.
>> THE WHOLE TAPE --
>> SUPPOSEDLY MR.^HUTCHINSON'S
VOICE?
>> CORRECT.
THE CRITICAL SENTENCE TO THE
EFFECT, I SHOT MY FAMILY.
>>, WOULD YOU HELP ME

UNDERSTAND WHAT AND FULLY
EXPLAIN FOR US, WHY GIVE THE
FACTS WITH REGARD TO THE FATHER
AND THE FATHER SAYING I BELIEVE
IT WAS THE FATHER, HIS VOICE
GETS HIGH WHEN HE IS AND YES,
WHO IS MAY BE OR CONCERNS WITH
REGARD TO THE VALIDITY OF
PUTTING THOSE PEOPLE ON THE
STAND AS OPPOSED, ALONG WITH
WHAT THE WORDS WERE IN THE TAPE
AS OPPOSED TO IT TAKE A
DIFFERENT APPROACH, WHY WOULD
THAT NOT BE AT LEAST A
REASONABLE STRATEGY AS I GUESS
WHAT OUR STANDARD IS?
>> WELL, ACCORDING TO TRIAL
COUNSEL THERE WAS, A QUOTE,
OVERWHELMING EVIDENCE AGAINST
HIS CLIENT AND HE REALIZED
THAT.
HE ADMITS THAT THE TAPE WAS A
CRITICAL PIECE OF EVIDENCE.
THE POSITION THAT THE DEFENSE
TAKES, AND WE TOOK BEFORE JUDGE
BAER RON WAS, IF YOU ARE FACED
WITH OVERWHELMING EVIDENCE,
THIS COURT FOUND IN ITS OPINION
IN JULY OF '04, WHEN FINDING

THAT THE TRIAL JUDGE HAD MADE
AN ERROR ALLOWING AN EXCITED
UTTERANCE TO COME IN WHICH
SHOULD NOT HAVE COME IN AND
THAT HAIR ERROR AS HARMLESS.
IN THE FACE QUOTE IN FACE OF
OVERWHELMING EVIDENCE INCLUDING
THE 911 CALL.
OUR POSITION WAS THEN AND IT IS
NOW, IF YOU'RE A TRIAL LAWYER,
PRESUMABLY EXPERIENCED AND
YOU'RE FACING AN UPHILL BATTLE
IN A DEATH CASE, WITHOUT JUST,
FLAT CONCEDING, WELL, WE DID
IT, SO PUT TO DEATH, YOU NEED
TO ATTACK ANY WEAK POINT IN THE
STATE'S CASE.
AND THE WEAKEST POINT BASED
UPON COMPETING WITNESSES
ADMITTEDLY FRIENDS AND FAMILY,
BUT NO DIFFERENT THAN
POTENTIALLY BIASED WITNESSES
FROM THE STATE.
>> I UNDERSTAND.
THAT IS THE REASON, WHEN YOU
HAVE SUCH A TERRIBLE CASE
FACING YOU, THAT YOU DO, TO
PROPERLY DEFEND SOMEONE, YOU

REALLY DO HAVE TO ATTACK, NO MATTER AT ALL COSTS, THE WEAKEST OF, WEAKEST LINK, BASICALLY WHAT YOU'RE SAYING?

>> I WOULDN'T SAY AT ALL COSTS BUT, THAT SUGGESTS --

>> YOU'RE ESSENTIALLY SAYING --

>> SOMETHING UNTOWARD.

I'M SUGGEST WHEN JUDGE BARRON MADE A FINDING A FINDING HE HAS PROBLEM ACCEPTING TESTIMONY OF SIX WITNESSES BECAUSE THEY WERE FRIENDS OR FAMILY OF THE DEFENDANT, THE JUDGE HAD NO PROBLEM ACCEPTING AS CREDIBLE THE TESTIMONY OF THE ADAMS WHO WERE FRIENDS FOR A MUCH SHORTER PERIOD OF TIME OF BOTH THE DEFENDANT AND THE DECEASED.

>> THAT IS DIFFERENT ISSUE.

>> AND TWO OFFICERS.

>> I'M REALLY GOING TO STRATEGIC DECISION.

>> THE POINT IS, IF YOU TAKE A LOOK AT THE ENTIRE RECORD, AND WHERE THIS BECOMES IMPORTANT, THE OPENING STATEMENT OF COUNSEL WAS ABOUT 22 LINES, ONE PAGE.

EVIDENCE WAS MISHANDLED.

THE STATE'S CASE WILL PROVE OUR

CASE.

AND, THAT WAS IT.

THERE WAS NO THEORY OF THE

DEFENSE SET FORTH.

THE 911 CALL WAS, AND IS, A

CRITICAL PIECE OF EVIDENCE.

YOU'RE LOOKING AT A 12-PERSON

JURY.

YOU NEED AT LEAST ONE OR TWO,

OR THREE JURORS TO BUY INTO

YOUR ARGUMENT.

>> LET ME ASK YOU THIS

QUESTION.

IN TERMS OF THE, THIS WAS,

THERE WAS AN EVIDENTIARY

HEARING IN THIS CASE.

>> YES, MA'AM.

>> AND, MR.^PETERSON TESTIFIED

THAT HE HAD PLAYED THE 911 TAPE

IN HIS OFFICE IN THE PRESENCE

OF DEFENDANT, THE FRIEND.

HE SAID AND THEY ALL SAID THAT

IT WAS, THE DEFENDANT'S VOICE.

AND, SO, I GUESS, THAT, THE

ISSUE, IT IS NOT REALLY THE

CREDIBILITY OF ADAMS AND

HUTCHINSON AND THE PARENTS,

BUT, THAT AT THE TIME, THAT THE

DEFENSE LAWYER WAS MAKING A

DECISION, AND IT ALL FITS IN, I

MEAN IN TERMS OF, YOU KNOW,

WHERE, HOW HE LEFT THE HOUSE

AND WHERE HE IS IN THE BAR, I

DON'T KNOW HOW YOU, THE JUDGE

FINDING THAT IT WAS BOTH

PETERSON'S TESTIMONY IS

CREDIBLE, I'M NOT SURE WHAT

STANDARD YOU'RE ASKING US TO

APPLY THAT WOULD, WOULD CAUSE

US TO DISPUTE THE JUDGE'S

FINDINGS OF CREDIBILITY, OR,

FIND UNDER THE CIRCUMSTANCES OF

THIS CASE THAT, THAT THEIR

DECISION NOT REASONABLE.

BECAUSE HE ALSO SAID, COBB SAID

THE IF YOU CHALLENGE THE

IDENTITY VOICE ON THE TAPE, THE

JURY WOULD HAVE CONCLUDED IT

WAS HIS VOICE AND JURY WOULD

NOT HAVE BELIEVED ANYTHING ELSE

HE SAID.

YOU SAY, I CAN SEE YOU'RE,

THAT IS --

>> NO.

>> BUT, THAT'S WHAT WE'VE GOT

IN THIS RECORD.

SO WE HAVE AN EVIDENTIARY

HEARING.

>> YES, MA'AM.

>> AND WE'VE GOT THE DEFENSE

LAWYERS ARE SAYING THINGS WHICH

TO ME SOUND REASONABLE ON THEIR

FACE.

AND, SO I DON'T KNOW HOW, BASED

ON OUR STANDARD OF REVIEW, WE

COULD REACH A DIFFERENT

CONCLUSION ON THIS ISSUE IN

THIS CASE?

>> TAKING IT IN A SLIGHTLY

BROADER PERSPECTIVE, WHEN YOU

ARE REFERRING TO MR.^COBB'S

STATEMENT.

HE INDICATES THAT THE JURY

WOULD NOT HAVE BOUGHT THIS

PARTICULAR ATTACK IF HE HAD

ATTACKED BY PUTTING ON THESE

OTHER WITNESSES AND HE DIDN'T

WANT TO INSULT THE JURY.

YET, IN CROSS-EXAMINATION THE

HEARING HE INDICATES THE REASON

HE WAIVED THE JURY IN THE

PENALTY PHASE WAS BECAUSE

EVERYBODY IN THAT COUNTY HATED

HIS CLIENT.

SO IT WOULD SEEM TO BE AN

INCONSISTENT POSITION.

ON THE ONE HAND, BASED UPON ONE

QUESTION, ON ONE AREA HE TAKES

A POSITION THAT IS A, AND ON

THE OTHER HE TAKES B.

WHAT WE WERE SAYING, I DON'T --

OUR POSITION WOULD BE THAT THE

TRIAL COURT, COULD NOT,

DETERMINE, THE IMPACT THOSE SIX

WITNESSES AS TO WHAT THEY WOULD

HAVE HAD ON A JURY, WHEN PLACED

AGAINST THE FOUR WITNESSES

STATE CALLED.

WHERE THAT SEGUES INTO THE

FOLLOW-UP TO THAT, OUR POSITION

IS, AND AGAIN, WE UNDERSTAND

WHAT JUDGE BARRON'S RULING WAS.

HE, TENDED TO FAVOR THE TWO

OFFICERS AND ADAMS AND

DISFAVORED THE FAMILY AND

FRIENDS.

THE LAWYER INDICATED THAT HE

WAS GOING TO ATTACK THE TAPE AS

TO AN EXPLANATION, I SHOT MY

FAMILY.

THERE IS SOME ARGUMENT THAT

MAYBE IT WAS BECAUSE PEOPLE

WERE AFTER HIM.

THAT THE FAMILY WAS KILLED.

PRETTY FAR AFIELD.

WHEREAS HAD THESE SIX WITNESSES

TESTIFIED, AND THAT JURY HAD

HEARD THEIR TESTIMONY THAT IT

WAS NOT HIS VOICE, EVEN SUB TO

VERY EFFECTIVE CROSBY BOBBY

ELMORE, WHO IS A VERY GOOD

LAWYER, THE ARGUMENT THEN WOULD

HAVE BEEN, WHY WOULD HE SAY IF

IT WAS HIS VOICE, I SHOT MY

FAMILY, WHEN IT WAS NOT HIS

FAMILY?

INTRUDERS --

>> MAYBE I'M HAVING TROUBLE

WITH.

>> OKAY.

>> IS IF THIS ISN'T, YOU'RE NOT

CONTESTING THIS TAPE RELATES TO

THE SHOOTING OF THE PEOPLE AT

THAT HOUSE?

>> NOT AT ALL.

>> ALL RIGHT.

SO, WHO ELSE'S, MAYBE, BECAUSE

WE HAVE TO HAVE UNDERMINED

CONFIDENCE.

WHOSE VOICE WOULD IT BE TO SAY

I SHOT MY FAMILY.

>> THE TWO INTRUDERS HE

CLAIMING BROUGHT IN AND HE GOT

IN A FIGHT WITH.

>> WERE THEY FAMILY?

>> KNOCKED HIM OUT.

BUT IF THEY WERE AFTER HIM

WHICH IS WHAT MR.^COBB WAS

SUGGESTING MIGHT HAVE BEEN THE

REASON FOR HIM UTTERING THOSE

STATEMENTS, HE COMES IN AND

THEY'RE IN THE MIDST OF

PERPETRATING THIS HEINOUS

CRIME.

THEY KNOCK HIM DOWN.

PUT THE PHONE IN HIS HAND.

THEY MAKE THAT PHONE CALL.

THEY WOULD ASSUME IT WOULD HIS

FAMILY HE WOULD BE THERE, WHEN

IT IS IN FACT NOT HIS FAMILY.

ONLY GUY THAT WOULD NOT KNOW, HIS

FAMILY WOULD KNOW IT IS NOT

HIM.

WHY WOULD I SAY I SHOT MY

GIRLFRIEND.

>> I SHOT MY FAMILY, HE LIVED

WITH HER CORRECT PRIOR TO THIS

INCIDENT, HE LIVED THERE.

THE CHILDREN WERE THERE.

I MEAN, A FAMILY, I MEAN A LOT

OF THINGS.

>> TRUE.

>> DOESN'T MEAN THIS IS MY WIFE

AND MY CHILDREN NECESSARILY.

>> BUT WHAT WE'RE SIMPLY SAYING

THIS LAWYER PRECLUDE ANY OF

THAT TYPE LINE OF ARGUEMENT OR

LOGIC OR ATTACK ON THE FOUR

WITNESSES.

IN EFFECT CONCEDED A CRITICAL

PIECE OF EVIDENCE AS RECOGNIZED

BY THIS COURT.

>> HOW CRITICAL REALLY IS THIS

PIECE OF EVIDENCE?

I MEAN, DON'T WE HAVE, IN THIS

CASE, THE SHOTGUN, I BELIEVE IT

WAS A SHOTGUN, WASN'T IT, THAT

KILLED THESE FOUR PEOPLE?

>> CORRECT.

>> WAS STILL FOUND KITCHEN.

IT WAS HIS GUN, CORRECT?

>> IT WAS ATTRIBUTED TO HIM.

>> WELL THE RECORD SAYS THIS

WAS HIS GUN AND HE HAD,

GUNPOWDER RESIDUE.

>> RESIDUE.

>> ON HIS HANDS.

>> THAT THE LAWYER TRIED TO SUGGEST MIGHT HAVE BEEN PUT THERE.

>> HE WAS THERE, AT THE PHONE, THE PHONE WAS STILL ON THE 911 OPEN TO THE 911 OPERATOR.

>> RIGHT BY HIS PERSON.

>> HE WAS VERY CLOSE TO THAT PHONE, WHEN THE POLICE GOT THERE.

>> YES.

>> HE ARGUES THAT THERE WAS A STRUGGLE, WITH THESE TWO ALLEGED INTRUDERS.
YET THERE WAS NO KIND OF BRUISING.
NO KIND OF ANYTHING THAT WAS FOUND ON HIM AND HE WAS EXAMINED AFTER THIS, AND, YOU KNOW, AND, THE STORY ABOUT THE INTRUDERS JUST DOESN'T SEEM TO BE SUPPORTED BY ANYTHING ELSE IN THE RECORD.
SO --

>> IT WOULD NOT BE --

>> DON'T WE HAVE ALL THAT EVIDENCE, EVEN OUTSIDE OF THIS 911 TAPE?

>> THE ARGUMENT AGAIN, SPEAKING

FROM THE PERSPECTIVE OF A TRIAL
LAWYER, WHEN YOU'RE LOOKING AT
THAT, THE WEDGE YOU'VE GOT TO
DRAW, DRIVE INTO THE CASE,
STARTS WITH THE 911 CALL.
AND IF THE 911 CALL CAN RAISE
SOME QUESTIONS, IT THEN RAISES
QUESTIONS AS TO HIS STATEMENT
OR THE STATEMENT ATTRIBUTED TO
HIM.
>> I'M STILL NOT SURE I
UNDERSTAND WHAT YOUR THEORY
WOULD HAVE BEEN.
ONE OF THE INTRUDERS TO SET UP
HUTCHINSON, CALL 911, AND SAID
I SHOT MY FAMILY?
>> THAT IS WHAT THE ARGUMENT,
THAT WAS THE ARGUMENT WOULD
FOLLOW IF THERE IN FACT TWO
INTRUDERS THAT WOULD BE WHY
THEY WOULD FRAME THE CALL.
IT WAS NOT HIS VOICE.
>> I MAY HAVE, WE ALL WEREN'T
BORN YESTERDAY.
THAT TO ME SOUNDS, AGAIN, MIGHT
HAVE BEEN SOMETHING THIS
DEFENSE LAWYER WOULD HAVE
CONSIDERED, AND HE MADE A

REASONABLE STRATEGIC DECISION,
THAT THE JURY WOULD LAUGH AT
THAT.
AND, BUT THAT'S ALL HE HAD, BUT
I CAN'T, I STILL AM NOT SURE I
UNDERSTAND HOW WE CAN
SUBSTITUTE OUR JUDGMENT, ON
THIS KIND OF ISSUE ON, WHAT'S
REASONABLE STRATEGY.
IF THE, IF THE DEFENSE LAWYER
HAD DONE NOTHING AND HADN'T
CHECKED OUT WHAT WAS ON THE 911
TAPE AND HADN'T TRIED TO VERIFY
IF IT WAS HIS VOICE OR NOT, YOU
MIGHT HAVE A DIFFERENT CASE, AS
FAR AS AT LEAST DEFICIENCY.
>> THE RECORD INDICATES THAT HE
IGNORED FAMILY AND WITNESSES
THAT HAD COME ALL THE WAY THERE
TO TESTIFY.
>> GOING TO JUSTICE QUINCE'S
QUESTION,
LET'S SAY THERE WAS NOT
CHALLENGING, OR GETTING VOICE
IDENTIFICATION EXPERT OR
SOMETHING WHICH YOU DON'T HAVE
A VOICE IDENTIFICATION EXPERT TO
SAY IT IS NOT HIM.
>> RIGHT.

>> HOW DOES THIS MEET THE
PREJUDICE PRONG OF STRICKLAND?
IN OTHER WORDS HOW DOES THIS
UNDERMINE OUR CONFIDENCE IN THE
OUTCOME OF THE GUILT PHASE THAT
THE MR.^HUTCHINSON WAS THE
PERPETRATOR OF THESE MURDERS?
>> YOU WOULD HAVE TO DETERMINE
WHETHER OR NOT THOSE SIX
WITNESSES, IN FACT, COULD HAVE
IMPACTED JURY INSOFAR, ISSUE
OF, ACRITICAL, WE CALL IT THE
CRITICAL PIECE OF EVIDENCE.
>> DID YOU HAVE, DID YOU
DEVELOP EVIDENCE THERE REALLY
WERE TWO INTRUDERS? THE CASE
THAT WAS ON, A CASE THAT THEY
ICED TO HAVE, THE FUGITIVE,
SORT OF SOUNDS LIKE --
>> NO.
>> NO WE LOOKED AT SECOND PIECE
OF EVIDENCE OR MASK OR STOCKING
WHICH IS OUR ISSUE IMNUMBER
TWO, THE INVESTIGATOR FOUND AND
TURNED OVER TO THE PETERSON
GROUP.
AFTER PETERSON WAS REMOVED FROM
THE CASE WENT AND APPROACHED

MR.^COBB WITH IT AND WAS IN
EFFECT TOLD, I DON'T NEED YOU.
I NOT GOING TO USE YOU AND NOTE
GOING TO DO ANYTHING WITH THAT.
>> WHAT WOULD HE HAVE DONE WITH
THAT?
>> POOL FILTER, WASN'T IT?
>> AGAIN IT TIES RIGHT BACK
INTO THIS INTRUDER ARGUMENT.
ALTHOUGH THE TESTIMONY OF THE
DEFENDANT HAS BEEN ON THE
INTRUSION, THAT THEY WERE
WEARING MASKS --
>> SPECIFICALLY THEY WERE
WEARING BLACK SKI MASKS.
WHAT WE HAVE HERE IS NEITHER
BLACK OR A SKI MASK?
>> NO.
DISCOLORED STOCKING THAT WOULD
COVER YOUR FACE.
>> HOW IS THAT IN ANY WAY
RELEVANT?
>> WE WERE ARGUING IT WOULD
HAVE BEEN RELRANT HAD WE GOT
INTO IT OR HAD THE LAWYER TRIED
SOMETHING.
OUR CONCERN THROUGHOUT THE
PROCEEDINGS, AND THIS GETS ME
TO NUMBER THREE WHICH WE WERE

SUMMARILY LITTLE DENIED
OPPORTUNITY TO EXPLORE DEALT
WITH THE ISSUE OF THE CONFLICT.
FACT DURING THE COURSE OF THE
REPRESENTATION OF
MR.^HUTCHINSON, WHO WAS
DIFFICULT CLIENT BY ALL
ACCOUNTS, THAT MR.^COBB HAD A
BAR COMPLAINT FILED AGAINST
HIM.
AND THAT BAR COMPLAINT RESULTED
AMONG OTHER THINGS IN THE CASE
BEING CONTINUED FOR A WHILE.
IN THE BAR COMPLAINT, ABOUT
WHICH WAS, MADE PART OF THE
RECORD, IN RESPONSE TO THE
CLAIMS OF THE APPELLANT IN THIS
CASE, MR.^COBB MADE A NUMBER OF
FAIRLY POINTED STATEMENTS
DIRECTED IN RESPONSE, INCLUDING
CALLING HIS CLIENT IN A LETTER
TO THE BAR A LIAR AND SUBORNER
OF PERJURY.
IRONICALLY COPIES, RECORD
DOESN'T SHOW COPIES OF THAT
RESPONSE AS REQUIRED BY THE BAR
WAS EVER SENT TO THE DEFENDANT,
APPELLANT.

SO BASICALLY YOU'VE GOT A
RATHER CONTENTIOUS PROCEEDING
BY THE BAR, WHEN MR.^COBB
INDICATES, AMONG OTHER THINGS
THAT HE IS DIFFICULT CLIENT.
ALWAYS BEING SENT DOWN RABBIT
TRAILS BY THE CLIENT AND HIS
CLIENT IS A LIAR.
THE BAR THEN, WOULD THEN,
WITHIN 60 OR 90 DAYS OF THE
ULTIMATE TRIAL DATE INDICATES
THE COMPLAINT IS BEING
DISMISSED.
MR.^COBB THEN INDICATES HE CAN
GO FORWARD WITH THE TRIAL AND
READY TO GO AS IF NOTHING
HAPPENED.
YOU THEN TAKE A LOOK AT
PERFORMANCE, AND WE HAD LISTED
AT ONE POINT IN TIME, A NUMBER
OF ISSUES THAT COULD HAVE OR
SHOULD HAVE BEEN DONE INCLUDING
THE 911 TAPE AND INCLUDING
EXPLORING MR.^FIELDS.
INCLUDING DEVELOPING SOME SORT
OF THEORY OF DEFENSE.
AND WHAT ELSE WAS DONE?
IN MR.^COBB'S POSITION AT
HEARING HE DIDN'T REMEMBER TO

MOST OF THOSE QUESTIONS.

>> THERE ARE SOME THINGS COULD HAVE BEEN DONE, WHY DO WE ONLY HAVE TWO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

ONE, THAT, IS THAT, THE VOICE TAPE, ONE ABOUT THE STOCKING?

I WOULD HAVE IMAGINED THAT, --

>> THOSE WERE ORIGINALLY INCORPORATED UNDER THE ISSUE OF THE CONFLICT THAT HE WAS LABORING UNDER THAT EFFECTED HIS ABILITY.

WE WEREN'T ABLE TO GET INTO THAT.

>> BUT SHOULDN'T THAT HAVE BEEN, IF YOU THINK THAT THERE WERE SO MANY THINGS THIS ATTORNEY DID WRONG, IN THIS CASE, WHY, SHOULDN'T THEY HAVE BEEN INDIVIDUAL, INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS?

>> A NUMBER OF THOSE NOT STANDING ALONE PROBABLY GIVEN RISE TO ANY KIND RELIEF.

IT WOULD BE COLLECTIVE ARGUMENT.

>> BUT STILL --

>> CAN'T ARGUE COLLECTIVE
UNLESS YOU CAN SHOW AT LEAST
UNDER OUR THEORY YOU CAN SHOW
SOME IMPEDIMENT TO THE EFFECT
TIFFNESS OF THE LAWYER BECAUSE
OF ANIMOUS HE CONTINUED TO HAVE
TOWARD THE CLIENT WHICH JUST
EFFECTED EVERYTHING.
HE HAD A SECOND CHAIR THAT WAS
NOT EXPERIENCED AT ALL.
HIS EX-WIFE.
HE HAD AN INVESTIGATOR THAT WAS
A PARALEGAL THAT HE FIRED FIVE
BEFORE THE TRIAL AND HE HAD A
SECRETARY.
THAT WAS THE DEFENSE TEAM.
THAT IS WHERE HE WAS GETTING A
LOT OF HIS IDEAS WHAT HE SHOULD
OR SHOULD NOT DO IN THIS CASE.
WE'RE SIMPLY SAYING WHEN YOU
IGNORE SIX WITNESSES THAT ARE
READY TO TESTIFY TO HELP YOU
OUT, THAT MAY LEAD OTHER
ISSUES, WHY NOT USE THEM?
WHY DIDN'T YOU USE THEM?
IS IT BECAUSE YOU HAD BASICALLY
GIVEN UP ON THE CLIENT AND THE
CASE?
BECAUSE OF THE BAR COMPLAINT.

WE NEVER GOT TO THAT ISSUE.
THE BAR COMPLAINT WAS NEVER
DEVELOPED THROUGH THE COURSE OF
THE HEARING AND WE SUGGEST IN
POINT THREE THAT WAS THE THIRD
ERROR, THAT THE JUDGE SHOULD
NOT HAVE SUMMARILY DENIED UNDER
EITHER STRICKLAND OR COOLER
STANDARD.
THAT WE SHOULD HAVE BEEN ABLE
TO EXPLORE IT TO DETERMINE
WHETHER OR NOT THESE ISSUES
THAT WERE FACING MR.^COBB
DURING THE TIME OF HIS
REPRESENTATION WOULD IN FACT
GIVE RISE TO QUESTIONING THE
OVERALL PROCEEDINGS AND
UNDERMINE THE CONFIDENCE OF THE
OUT COME, NOTWITHSTANDING THE
SIGNIFICANT EVIDENCE AGAINST
THIS DEFENDANT.
AND THERE WAS SIGNIFICANT
EVIDENCE, THERE IS NO QUESTION
ABOUT THAT.
AND DID.
>> YOU MAINTAIN ALL OF THESE
THINGS THAT YOU SAID, COUNSEL
SHOULD HAVE DONE BUT DID NOT

DO, OR NOT, WERE NOT

APPROPRIATE FOR INEFFECTIVE

ASSISTANCE OF COUNSEL?

>> STANDING ALONE?

I DON'T THINK SO.

I DON'T THINK SO.

THANK YOU.

>> GOOD MORNING, CHIEF JUSTICE

QUINCE.

MAY IT PLEASE THE COURT.

CHARMAINE MILLSAPS REPRESENTING

THE STATE.

GOING TO QUICKLY RUN THROUGH

THE SAME ISSUES.

FIRST OF ALL, I DID FILE A

NOTICE OF SUPPLEMENTAL

AUTHORITY ON THIS COURT'S

TOMKINS CASE REGARDING ACTUAL

INNOCENCE.

THIS COURT RECENTLY THAT YOU DO

NOT RECOGNIZE A FREESTANDING

CLAIM OF ACTUAL INNOCENCE.

SO, AND, THEY HAVE NO NEW

EVIDENCE HERE.

NOT A MATTER OF NOT GOOD, NEW

EVIDENCE.

THERE IS NO NEW EVIDENCE.

THEY ARE REALLY ATTACKING THIS

COURT'S PREVIOUS FINDINGS ON

THE DIRECT APPEAL.
AND THAT IMPROPER IN
POST-CONVICTION BASICALLY
BECOMES A, SEVERAL YEAR OUT OF
MOTION FOR REHEARING.
SO, WE DON'T BELIEVE THAT
ACTUAL INNOCENCE CLAIM IS EVEN
PROPERLY BEFORE THIS COURT.
ON THE ISSUE OF THE INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM
REGARDING THE 911 CALL, I'D
LIKE TO EXPLAIN THE COUNSEL
THAT HE HAD.
FIRST HE HAD A PUBLIC DEFEND
HAD WITHDREW DUE TO CONFLICT.
OBVIOUSLY SINCE THERE WAS NO
CODEFENDANT IN THIS CASE THE
CONFLICT WAS THE RELATIONSHIP.
AND THEN, TWO VERY EXPERIENCED
ATTORNEYS.
MR.^PETERSON, WHO TESTIFIED AT
THIS EVIDENTIARY HEARING.
>> WAS THIS THE 911 TAPE
INFORMATION DEVELOPED AS THESE
POTENTIAL WITNESSES DEVELOPED
DURING FIRST COUNSEL'S
REPRESENTATION?
>> SOME OF THE INFORMATION WAS

FROM MR.^PETERSON AND HE
TESTIFIED HE HAD PLAYED THE
TAPE FOR MR.^HUTCHINSON'S
PARENTS, AND FOR THE FRIENDS,
DEANNA AND CREIGHTON ADAMS.
HE PLAYED THAT TAPE FOR THEM.
TESTIFIED I PLAYED THE TAPE AT
MY OFFICE FOR THEM AND THE
MOTHER SAID, THAT THE PITCH
GOES UP BUT THAT'S WHAT HAPPENS
WHEN MR.^UP HUTCHINSON GETS
UPSET.
IN OTHER WORDS THE PARENTS AND
FRIENDS ALL AGREE THIS WAS
MR.^HUTCHINSON'S VOICE.
MR.^PETERSON TOLD MR.^COBB,
WHEN MR.^COBB, PETERSON AND,
CO-COUNSEL, HARRISON, WERE
REMOVED, NOT GETTING ALONG,
AGAIN, AND, THE, HUSBAND WIFE
TEAM OF MR.^AND MRS.^COBB CAME
IN, THAT BOTH MR.^PETERSON AND
MR.^COBB TESTIFIED, AND WERE
FOUND CREDIBLE THIS COURT,
THERE IS A FINDING OF
CREDIBILITY, BOTH AS TO
MR.^PETERSON'S TESTIMONY AND AS
TO MR.^COBB AND WHAT
MR.^PETERSON AND COBB BOTH SAID

WAS, WHETHER THE CASE GOT
TRANSFERRED, MR.^COBB CAME OVER
TO MY OFFICE AND WE SAT DOWN
AND WE TALKED ABOUT EVERYTHING.
AND, WHILE MR.^COBB COULDN'T
REMEMBER THIS, MR.^PETERSON DID
REMEMBER THAT HE TOLD HIM THAT
I PLAYED THE TAPE FOR THE
PARENTS AND FRIENDS AND, THAT
IS HUTCHINSON'S VOICE.
NOW, REMEMBER, WHAT YOU HAVE IS
REASONABLE INVESTIGATION.
WHEN YOU PLAY A TAPE, 911 TAPE,
FOR THE PARENTS, AND THE GOOD
FRIENDS, AND YOU'RE SITTING
AROUND, AND EVERYBODY TELLS
YOU, THAT IS YOUR CLIENT'S
VOICE, --
>> EVERYONE ISN'T TELLING YOU
IF YOU HAVE, WAS IT, TWO
BROTHERS AND A OFFICER, WHO
SAY
--
>> AT THE PENALTY PHASE.
THAT'S WHEN MR. COBB MET THEM.
IT WAS MR. PETERSON AND
MR. HARRIS THAT HAD GONE OUT TO
WASHINGTON AND DEVELOPED THE

MITIGATION CASE.

THEY WERE THE ONES, PRIOR

COUNSEL WAS THE ONES WHO HAD

DONE THE MITIGATION CASE.

THEY'D GOTTEN SCHOOL RECORDS,

TALKED TO THE FAMILY, THEY'D

FLOWN OUT TO SPOKANE,

WASHINGTON, AND DEER PARK,

WASHINGTON.

THEY WERE THE ONES WHO PUT

TOGETHER THE MITIGATION CASE AND

PACKED IT ON, SO TO SPEAK, TO

SUCCESSOR COUNSEL HERE,

MR. COBB.

BUT, NO, WE DON'T HAVE -- WHAT

WE HAVE IS AT THE EVIDENTIARY

HEARING THEY SAID THEY LISTENED

TO THIS TAPE AND MAY HAVE TOLD

PETERSON.

MR. PETERSON DID NOT REMEMBER

THAT.

HE DID NOT REMEMBER TAKING THE

911 TAPE OUT TO WASHINGTON.

QUITE FRANKLY, AFTER YOU'VE

TALKED TO HIS PARENTS AND PLAYED

IT FOR HIM, WHY WOULD YOU?

COUNSEL'S REQUIRED TO DO A

REASONABLE INVESTIGATION.

THERE'S NO WAY THAT'S NOT

REASONABLE.

THAT MEETS REASONABLE

INVESTIGATION.

WHAT'S MORE, WHAT ARE YOU REALLY

GOING TO DO WITH IT?

IT'S NOT HUTCHINSON'S VOICE.

WHAT ARE YOU GOING TO DO AT

TRIAL WITH THAT?

YOU'RE GOING TO HAVE TO DO SOME

SORT OF -- THE QUANTICO MEN IN

BLACK SKI MASKS PUT 911 AND PUT

THE PHONE NEAR MY -- 8 INCHES

FROM MY HAND.

THESE OFFICERS SHOW UP WITHIN

TEN MINUTES OF THIS 911 CALL

BEING MADE AT 8:41 P.M. ON THE

NIGHT OF THE MURDERS.

HUTCHINSON IS IN THE GARAGE, AND

THIS CORDLESS PHONE IS 8 INCHES

FROM HIS HAND.

>> WAS HE ON THE FLOOR?

>> YES, HE WAS CURLED UP.

YOUR HONOR, IT WASN'T THAT HE

WAS UNCONSCIOUS, HE WAS DRUNK,

AND THAT'S THE OTHER THING.

YES, THERE WAS A DEFENSE PUT

FORWARD HERE.

IT WAS AN ALTERNATIVE DEFENSE OF

NOT BEYOND A REASONABLE DOUBT,

BUT THE MAIN DEFENSE PUT FORWARD

HERE WAS INTOXICATION.

THEY CALLED FIVE WITNESSES AT

THE GUILT PHASE.

QUITE FRANKLY, COUNSEL'S DEFENSE

THAT WAS ACTUALLY PRESENTED WAS

MUCH BETTER THAN THIS ONE WOULD

HAVE BEEN.

FIVE WITNESSES, MOST OF WHICH

WERE THE STATE'S.

THESE WERE PEOPLE WHO TOOK THE

BLOOD TO PROVE THAT HUTCHINSON'S

BLOOD ALCOHOL CONTENT WAS

.21-.26.

WE DID RETROGRADE ANALYSIS, AND

IT'S DEFENSE COUNSEL THAT PUT ON

ALL THOSE WITNESSES, AND THOSE

WERE BY AND LARGE UNIMPEACHABLE

WITNESSES BECAUSE THEY WERE OUR

WITNESSES.

THEY WERE OUR PEOPLE.

>> HE SAID HOW MANY MINUTES

AFTER THEY FOUND HIM IN THE

GARAGE?

>> THE 911 CALL OCCURS AT 8:41

P.M.

WITHIN TEN MINUTES, THAT'S

BEFORE 8:51, THE POLICE -- THE

DEPUTIES ARRIVE.

HE'S CURLED UP IN THE GARAGE,

HE'S DRUNK.

I GET THAT FROM HIS OWN

STATEMENT ON THE 911 TAPE.

THAT WAS PLAYED FOR THE JURY.

AND THAT --

>> PART OF THE THING OF THE TAPE

AS I UNDERSTAND IT IS IT

ACTUALLY SHOWS A VERY DISTRESSED

PERSON THAT WAS --

>> USED IN MITIGATION.

>> -- "I CAN'T BELIEVE I DID

THIS."

>> WHICH WOULD ALSO TAKE AWAY IF

YOU DO THIS, THAT NEGATES USING

THE DISTRESS IN HIS VOICE ON THE

911 CALL AS MITIGATION.

>> AND THEN THE GUN POWDER

RESIDUE.

WHEN WAS THAT, WHEN WERE HIS

HANDS TESTED AND HE'S SHOWN TO

HAVE THE GUN POWDER RESIDUE?

10:20 THAT NIGHT, SO WHAT IS

THAT?

LESS THAN TWO HOURS?

>> AND WHERE WAS THE SHOTGUN?

IT WAS FOUND WHERE?

>> IT IS A 12-GAUGE PUMP
MOSSBERG, PUMP SHOTGUN PISTOL
GRIP FOUND ON THE KITCHEN
COUNTER.
WHAT'S MORE IS HIS THING ABOUT
THE TWO PEOPLE FROM QUANTICO
WITH THE BLACK SKI MASKS, HE
SAID THEY HAD A REMINGTON
SHOTGUN.
THAT'S NOT THE MURDER WEAPON,
OKAY?
THE MURDER WEAPON IS THAT
MOSSBERG.
WE COLLECT THE SHELLS, AND THERE
WAS JUST NO DISPUTE AT TRIAL
THAT THAT WAS HIS GUN AND THAT
GUN WAS THE MURDER WEAPON.
SO HIS TWO INTRUDER PEOPLE,
THEY'VE GOT THE WRONG WEAPON.
>> AND AS FAR AS THESE INTRUDER
PEOPLE, THERE ARE NO ADDITIONAL,
LIKE, FOOTPRINTS OR -- I MEAN,
THEY HAVEN'T DEVELOPED ANYTHING
TO SAY THAT OTHER THAN THIS -- I
GUESS YOU'LL DISCUSS IT, THE
STALKING, TO SHOW THAT THERE
WERE TWO OTHER PEOPLE THAT COULD
HAVE BEEN IN THE HOUSE.
I MEAN, THERE'S NOTHING

PHYSICALLY, PHYSICAL EVIDENCE

THAT POINTS TO THAT.

>> NO, AND THAT WASN'T -- HE

WASN'T GOING THERE.

HE WAS GOING FOR INTOXICATION,

SO, NO, THERE WAS NO EVIDENCE

DEVELOPED AT THE EVIDENTIARY

HEARING TO SUPPORT THE

TWO-INTRUDER THEORY, OKAY?

>> DO WE KNOW IF MR. HUTCHINSON

BROUGHT THIS SHOTGUN TO THE

HOUSE OR WHETHER THE SHOTGUN WAS

THERE?

BECAUSE IF I REMEMBER CORRECTLY

AT SOME POINT HE TOOK SOME OF

HIS CLOTHES AND GUNS OUT OF THE

HOUSE WHEN HE LEFT.

>> TO GO DOWN TO THE BAR.

>> [INAUDIBLE] OR DID HE BRING

IT BACK?

>> WELL, YOUR HONOR, I'M AFRAID

THAT IS WHAT HAPPENED.

HE TOOK SOME OF HIS CLOTHES.

WHEN HE GOT IN A FIGHT WITH

RENEE, HE TOOK HIS CLOTHES.

IT WAS LIKE HE WAS LEAVING,

MOVING OUT.

HE TOOK HIS CLOTHES AND HIS GUNS

AND WENT DOWN TO THE BAR.

NOW, IT SAYS "GUNS."

QUITE FRANKLY, YOUR HONOR, I

DON'T KNOW IF THIS MOSSBERG WAS

ONE OF THEM OR NOT.

>> DID THIS HAPPEN ON THE SAME

DAY HE MOVED OUT?

>> YES.

WHAT HAPPENED IS THEY GOT IN A

FIGHT THAT NIGHT, THEY GOT IN A

FIGHT THAT NIGHT AROUND 7:00,

AND WE KNOW THAT FROM THE PHONE

CALL.

RENEE CALLS A GIRLFRIEND SAYING

THAT SHE -- WHICH WAS ONE OF THE

BIG ISSUES IN THE DIRECT

APPEAL -- SAYING THEY HAD JUST

GOTTEN IN A FIGHT.

THAT'S AROUND 7, 7:30.

OKAY?

SO WHAT HAPPENS IS HE'S BEEN

DRINKING EXTENSIVELY.

THERE WERE PHOTOGRAPHS OF

ICEHOUSE BEER JUST, YOU KNOW,

BOTTLE AFTER BOTTLE OF IT.

SO HE HAS BEEN DRINKING.

THEY GET IN A FIGHT.

AROUND 7 RENEE, THE MOTHER OF

THESE CHILDREN, CALLS HER

GIRLFRIEND AND SAYS, WE GOT IN A FIGHT, AND HE HAS THROWN ALL HIS CLOTHES AND HIS GUNS -- A LOT OF HIS CLOTHES, INTO THE CAR AND GOES DOWN TO THE BAR AND HAS ANOTHER DRINK.

THE BARTENDER TESTIFIES HE SHOWS UP ABOUT 8:00.

ALL RIGHT?

THEN HE COMES BACK AND KILLS A 4-YEAR-OLD, A 7-YEAR-OLD, AND A 9-YEAR-OLD AND THEIR MOTHER WITH THIS MOSSBERG PUMP-GAUGE SHOTGUN, PISTOL GRIP PUMP-GAUGE SHOTGUN.

SO, YES, IT DOES HAPPEN THE SAME NIGHT.

THIS IS A CONTINUOUS SERIES OF EVENTS WHICH IS WHAT COUNSEL WAS TRYING TO USE.

THAT'S WHAT HE WAS GOING FOR.

HE WAS GOING FOR AN INTOXICATION/SORT OF SECOND DEGREE.

OF COURSE, THE PROBLEM WITH THAT IS IT DOESN'T EXPLAIN THE CHILDREN.

ALL RIGHT.

BUT, NOW, ALSO WHAT OPPOSING
COUNSEL HERE IS SUGGESTING IS
THAT WHEN THERE'S A CRITICAL
PIECE OF EVIDENCE, DEFENSE
COUNSEL HAVE TO DO SOMETHING TO
ATTACK IT.
WELL, SOMETIMES OUR CRITICAL
EVIDENCE IS SIMPLY
UNIMPEACHABLE, AND THERE'S
NOTHING COUNSEL CAN DO ABOUT IT.
YOU KNOW, THE SIXTH AMENDMENT
DOES NOT REQUIRE A MIRACLE
WORKER.
YOU'RE NOT GOING TO BE ABLE TO
CHANGE THIS VOICE, YOU'RE NOT
GOING TO BE ABLE TO CHANGE THE
STATEMENT ON THE TAPE, "I JUST
SHOT MY FAMILY."
SO I THINK COUNSEL DID A BETTER
JOB THAN THIS DEFENSE, AND I
DON'T THINK YOU CAN DO BOTH.
I KNOW THEORETICALLY YOU'RE
ALLOWED TO PRESENT INCONSISTENT
THEORIES TO JURIES, BUT JURIES
DON'T LIKE IT.
YOU CAN'T SAY IT WASN'T ME, IT
WAS TWO GUYS FROM QUANTICO, BUT
IF IT WAS ME, I WAS DRUNK.
THAT'S NOT GOING TO WORK.

>> DOES THE STATE EVER -- I
MEAN, I GUESS FROM THE BEGINNING
THEY WEREN'T CONCERNED IT WAS
ANYONE'S VOICE BUT HIM -- WHAT
DO THEY CALL THEM, VOICE
IDENTIFICATION EXPERT OR NOTHING
LIKE THAT WAS DONE?
>> NO, WE GOT THE FRIENDS, AND
WE THOUGHT THAT WAS MORE THAN
GOOD ENOUGH.
WE GOT THE FRIENDS --
>> FRIENDS THAT SAID IT WAS
HIS --
>> RIGHT, AND THEY WERE FRIENDS
OF BOTH, AND THEY DIDN'T THINK
AT FIRST HUTCHINSON HAD DONE
THAT, SO TO US THAT WAS GOOD
ENOUGH, THAT WAS GOOD ENOUGH
EVIDENCE.
OKAY.
I THINK YOU ALL UNDERSTAND THE
STATE'S POSITION REGARDING THE
NYLON STOCKING FOUND NEAR THE
POOL.
I WOULD LIKE TO TALK ABOUT --
>> LET ME JUST ASK A
CLARIFICATION.
WAS IT A, WAS IT SOMETHING TO DO

WITH THE POOL, A POOL STOCKING?

OR WAS IT A NYLON LIKE A LADIES'

STOCKING?

>> IT'S A LADIES' STOCKING USED

AS A POOL FILTER.

I GATHER IT'S A CHEAP WAY TO GET

A POOL FILTER.

>> LEARN SOMETHING EVERY DAY.

[LAUGHTER]

>> WAS IT TAN?

>> IT WAS TAN, BUT IT WASN'T

PANTY HOSE.

THEY LITERALLY BOUGHT THEM, I

GATHER THAT'S A GOOD, CHEAP

SUBSTITUTE.

SO THAT'S WHAT THE TESTIMONY

WAS, SAID IT WAS USED AS A POOL

FILTER, BUT IT WAS A STOCKING.

IT WAS A LADIES' STOCKING.

>> HAD NO HOLES IN IT THAT --

>> NO HOLES IN IT, NO.

NO.

AND IT WAS FOUND NEAR THE POOL

MUDDY.

WHEN THE INVESTIGATOR FOUND IT,

THERE'D BEEN A DELAY IN TIME.

>> WAS IT PANTY HOSE?

>> IT SOUNDS LIKE ONE.

THEY SAID IT WASN'T PANTY HOSE,

IT WAS ONE.

>> A STOCKING.

>> A STOCKING.

A ONE STOCKING.

>> NOT SOMETHING THAT SOMEBODY

WOULD WEAR OVER THEIR HEAD.

>> NO.

>> I MEAN, I SHOULDN'T SAY THAT,

MAYBE THEY WOULD.

[LAUGHTER]

OKAY.

>> BUT REMEMBER THE STORY WAS

BLACK SKI MASKS.

YES, THIS IS THE WRONG MATERIAL,

THE WRONG CONFIGURATION --

>> AND THERE WAS ACTUALLY AN

INNOCENT EXPLANATION FOR IT

BEING THERE.

>> YES, YES.

AND IN THAT INNOCENT EXPLANATION

COUNSEL FOUND OUT ABOUT THROUGH

THE DEPOSITION OF DNA.

>> SO HE DIDN'T IGNORE IT, HE

DIDN'T IGNORE THE EVIDENCE --

>> NO, IT WAS IN THE DEFINITION

THAT IT WAS USED AS A POOL

FILTER.

AND HE READ THAT, HE TESTIFIED

THAT HE READ THE DEPOSITIONS OF
THE ONES -- OH, HE WAS -- ALSO
HE WAS AT THE DEPOSITION OF THE
STATE, TOOK THE DEPOSITION OF --
I JUST SAID THE PARENTS.
AND THEY COULD NOT SAY IT WASN'T
THEIR SON IN THE DEPOSITIONS
EITHER.
>> NOW WE'RE GOING BACK TO THE
VOICE.
>> YES.
I JUST WANTED TO MAKE SURE THAT
THERE WAS NOT ONLY THIS PLAYING
OF THE TAPE BY PRIOR COUNSEL.
TRIAL COUNSEL HIMSELF WAS
PRESENT FOR THE DEPOSITIONS OF
THE PARENTS.
THE STATE WANTED TO NAIL DOWN
THE PARENTS AS WELL.
SO, AND THEY COULDN'T DENY THAT
EITHER.
SO, OKAY.
BUT GOING BACK TO THE CONFLICT
OF INTEREST ISSUE, OKAY, THEY
RAISED A CUYLER V. SULLIVAN
CLAIM BASICALLY ON TWO THINGS,
THAT THIS LAWYER DISLIKED THE
CLIENT, DISLIKING OF THE CLIENT,
AND ON THE FACT THAT HUTCHINSON

HAD FILED A BAR COMPLAINT.

NOW, NEITHER ONE OF THOSE ARE

CAPABLE OF SULLIVAN WHERE YOU

DISPENSE WITH THE PREJUDICE

PROBLEM.

NEITHER ONE OF THOSE ARE WHAT

SULLIVAN IS ABOUT.

THE SIXTH AMENDMENT RIGHT TO

COUNSEL GIVES YOU A RIGHT TO A

LAWYER.

NOT TO A BOSOM BUDDY, NOT TO A

NEW BEST FRIEND.

YOU DO NOT HAVE TO LIKE YOUR

CLIENT.

THAT'S JUST NOT PART OF THE

ANALYSIS.

THAT DOESN'T EVEN MEET

STRICKLAND, MUCH LESS CUYLER.

>> BUT I GUESS THE DEFENSE

ARGUMENT HERE IS THAT BECAUSE

THE BAR COMPLAINT WAS FILED AND

COUNSEL HAD TO DEAL WITH ALL

THAT, THAT THE DISLIKE ESCALATED

INTO SOMETHING MORE THAN A

NORMAL, YOU KNOW, MAYBE A NORMAL

DISLIKE FOR A CLIENT, AND THAT

BECAUSE OF THAT HE DID NOT DO

CERTAIN THINGS.

AND SO WHY ISN'T THAT A KIND OF
ALLEGATION THAT WE MIGHT NEED TO
HAVE SOME EVIDENCE DEVELOPED ON?
>> BECAUSE YOU HAVE TO LOOK AT
THE WHAT HE DIDN'T DO, AND
THAT'S ANALYZED UNDER
STRICKLAND.
YOU DO NOT SAY, OH, HE DIDN'T
LIKE HIM, SO WE'RE GOING TO DO
SULLIVAN, AND WE'RE GOING TO
IGNORE INDIVIDUAL LIKE CLAIMS.
TELL ME WHAT HE DIDN'T DO, AND
WE'LL DO A STRICKLAND ANALYSIS
ON THE UNDERLYING CLAIM.
SAME WITH THE BAR COMPLAINT.
DON'T TELL ME HE JUST FILED A
BAR COMPLAINT, TELL ME WHAT'S
INSIDE THE BAR COMPLAINT.
>> BECAUSE YOU'RE SAYING -- I
JUST WANT TO, BECAUSE I KNOW
WE'VE HAD CASES ON THIS.
IF AN ACTUAL CONFLICT OF
INTEREST EXISTED IN THE TRIAL, I
MEAN, WHILE IT WAS STILL ON IN
THE TRIAL COURT OR ON APPEAL,
YOU DON'T HAVE TO MEET A
STRICKLAND TEST, YOU HAVE TO
SHOW THERE'S AN ACTUAL CONFLICT.
BUT WHEN IT GETS TO

POSTCONVICTION AND WE LOOK BACK
AT OUR CASES, ARE YOU SAYING THE
FACT THERE MIGHT HAVE BEEN AN
ACTUAL CONFLICT OF INTEREST IS
NO DIFFERENT THAN JUST IT MIGHT
BE AN EXPLANATION FOR A
STRICKLAND CLAIM, BUT IT HAS NO
VIABILITY ON ITS OWN?
OUR CASE --
>> THE UNITED STATES SUPREME
COURT IN MAKING TAYLOR ADMITTED
THEIR CUYLER V. SULLIVAN
JURISPRUDENCE.
CONFLICT OF INTEREST MEANS ONE
THING AND ONE THING ONLY.
ONE LAWYER REPRESENTS TWO
CLIENTS.
THEY HAVE LIMITED SULLIVAN FOR
YOU.
YOU DON'T HAVE TO PROVE ANY
PREJUDICE TO MULTIPLE
REPRESENTATION.
THAT'S IT, THAT'S ALL WE DO --
>> IN POSTCONVICTION.
IN POSTCONVICTION.
>> ANYWHERE -- NO, ON DIRECT
APPEAL AS WELL.
SULLIVAN APPLIES TO ONE

SITUATION ONLY, SAID THE UNITED

STATES SUPREME COURT.

ONE LAWYER, TWO CLIENTS.

IF YOU -- ACTUALLY, IN CUYLER V.

SULLIVAN THERE WERE TWO LAWYERS

AND THREE CLIENTS, BUT YOU HAVE

TO HAVE ONE LAWYER REPRESENTING

MULTIPLE CLIENTS.

THERE MUST BE MULTIPLE

REPRESENTATION.

EVERY OTHER THING WE DO

STRICKLAND ON.

EVERY OTHER CLAIM WE DO

STRICKLAND ON.

IT DOESN'T APPLY -- SULLIVAN IS

A DIRECT APPEAL ISSUE IF YOU

KNOW ABOUT IT.

NOW, THEORETICALLY THE

CONFLICT -- I DON'T KNOW HOW

YOU'RE NOT GOING TO KNOW WHO'S

REPRESENTING YOU, BUT YOU MIGHT

NOT KNOW WHATEVER THE CONFLICT

IS.

FOR INSTANCE, IN MICKENS V.

TAYLOR ITSELF, THE LAWYER WAS

REPRESENTING A CLIENT, AND HE

HAD REPRESENTED THE VICTIM IN

THE PAST, AND THE CLIENT DIDN'T

KNOW THAT.

SO IF YOU HAD THAT KIND OF
SITUATION, OKAY, WHERE YOU DID
HAVE SOME SORT OF MULTIPLE
REPRESENTATION CLAIM AND YOU
ONLY FOUND OUT ABOUT IT
POSTCONVICTION, THEN YOU COULD
DO A SULLIVAN CLAIM
POSTCONVICTION.
OKAY?
BUT IF YOU KNOW ABOUT IT, NO,
YOU MUST DO IT ON DIRECT APPEAL.
HE KNEW HE FILED A BAR
COMPLAINT.
IF YOU'RE GOING TO LOOK AT THIS,
THIS IS NOT SULLIVAN.
WE THINK YOU HAVE TO DO
STRICKLAND ON IT.
BUT IF YOU'RE GOING TO LOOK AT A
BAR COMPLAINT AS A CONFLICT OF
INTEREST WHICH THE UNITED STATES
SUPREME COURT SAYS IN MICKENS V.
TAYLOR RELYING ON THEIR NIXON
CASE NOT TO DO, BUT IF YOU'RE
GOING TO DO THAT, HE KNEW THAT.
HE NEEDED TO RAISE THAT ON
DIRECT APPEAL.
HE NEEDED TO RAISE THE FACT THAT
HE HAD FILED A BAR COMPLAINT

IF HE WANTS TO DO IT AS A

SULLIVAN CLAIM.

NOW, THE REASON I DIDN'T MAKE

THE SULLIVAN ADD PROCEDURALLY

BARRED IS BECAUSE I DON'T THINK

IT IS A SULLIVAN.

THIS IS STRICKLAND.

>> I'M THINKING ABOUT HOW DID

YOU PROCEDURALLY DO THAT,

BECAUSE WOULD THERE EVEN BE A

DEVELOPED RECORD SO THAT YOU

COULD RAISE SUCH A CLAIM ON

DIRECT APPEAL IF THERE'S A BAR

COMPLAINT AND THAT ATTORNEY

CONTINUES TO REPRESENT YOU?

WHAT DO YOU HAVE IN THE RECORD

THAT YOU COULD RAISE ON DIRECT

APPEAL?

>> WELL, EXACTLY WHAT YOU DO IN

ALL THE OTHER SULLIVAN CASES,

YOU BRING IT TO THE TRIAL

JUDGE'S ATTENTION.

YOU'RE SUPPOSED TO TELL TRIAL

JUDGES ABOUT THE -- IF YOU KNOW

ABOUT THE CONFLICT, YOU'RE

SUPPOSED TO TELL THE TRIAL

JUDGE.

YOU SHOULD HAVE FILED A SULLIVAN

MOTION SAYING THERE WAS CONFLICT

OF INTEREST.

I FILED A BAR COMPLAINT, HERE IT

IS.

YOU DEVELOP IT IN THE TRIAL

COURT.

NOW, IF YOU TRULY CAN'T FIND OUT

ABOUT THE CONFLICT UNTIL LATER,

THEN YOU COULD DO THAT

POSTCONVICTION.

YOUR HONOR, THE UNITED STATES

SUPREME COURT WHEN IT DOES ITS

CONFLICT OF INTEREST CASES A LOT

OF TIMES IT IS BROUGHT TO THE

TRIAL COURT'S ATTENTION.

HALF THE SULLIVAN CONFLICT OF

CASES THEY WERE BROUGHT TO THE

TRIAL COURT'S ATTENTION.

HE SHOULD HAVE BROUGHT THAT TO

THE TRIAL COURT'S ATTENTION.

HE COULD HAVE PUT THE BAR

COMPLAINT IN THE, IN THE, IN THE

RECORD.

HE COULD HAVE SAID, I WANTED

ANOTHER LAWYER BECAUSE, YOU

KNOW, OF THE BAR COMPLAINT.

NOW, THAT'S OUR OTHER PROBLEM

WITH THIS.

THINK OF THIS AS A MATTER OF

POLICY.

IF YOU REALLY HOLD THAT THE MERE

FILING OF A BAR COMPLAINT GIVES

RISE TO A SULLIVAN CONFLICT OF

INTEREST, EVERY DEFENDANT CAN DO

NOTHING BUT FILE --

>> WELL, WE'VE ACTUALLY SAID TO

THE CONTRARY.

JUST LISTEN.

THE FILING OF A BAR COMPLAINT

DOES NOT GIVE RISE IN ITSELF TO

A CONFLICT OF INTEREST.

HAVEN'T WE HELD THAT?

>> IN CONNOR YOU CAME PRETTY

CLOSE, BUT THEN YOU ALSO

PROCEEDED TO ANALYZE IT AS A

SULLIVAN ISSUE.

SO, NO, WE THINK YOU NEED TO

MAKE THIS CLEAR, AND I CITED A

CASE FROM A DCA WHERE THE DCA'S

REVERSING CRIMINAL CONVICTIONS

BECAUSE THIS COURT HAS NOT

EXPLICITLY ADOPTED MICKENS V.

TAYLOR, AND THE STATE URGES YOU

TO DO SO FOR EXACTLY THAT

REASON.

AND ALSO AS A MATTER OF PUBLIC

POLICY.

YOU DO NOT WANT TO PUT --

>> I THOUGHT HUTCHINSON CONCEDED
THE FILING OF A GRIEVANCE DOES
NOT IN ITSELF PROVIDE A BASIS
CITING HUGGINS FROM THIS COURT.
DOES HUGGINS NOT STAND FOR THIS
PROPOSITION?
>> YES, AND YOU'VE SAID THAT --
WELL, AND THIS COURT --
>> I'M ASKING YOU ABOUT HUGGINS.
>> WELL, BUT --
>> IN OTHER WORDS, I'M NOT SURE
WHAT WE WERE TALKING ABOUT.
HE IS NOT --
>> [INAUDIBLE] NOT CLEAR, AND
COURTS, DCAs ARE REVERSING
CRIMINAL CONVICTIONS BECAUSE --
AND EXPLICITLY SAYING DO YOU OR
DO YOU NOT FOLLOW MICKENS V.
TAYLOR?
I DON'T KNOW HOW TO MAKE IT ANY
MORE CLEAR THAN THAT.
WHAT I RELIED ON OUT OF THE
FIFTH DCA HAS REVERSED A
CONVICTION LITERALLY ASKING WE
DON'T KNOW WHETHER THE FLORIDA
SUPREME COURT FOLLOWS MICKENS V.
TAYLOR OR NOT.
SO I THINK YOU NEED TO MAKE IT

CLEARER.

DCA JUDGES ARE NOT UNDERSTANDING

THAT.

THIS COURT NEEDS TO EXPLICITLY

ADOPT MICKENS.

NO, YOU HAVE NEVER DONE THAT,

AND THE STATE URGES YOU TO DO

SO.

>> THANK YOU VERY MUCH.

WITH THAT, YOU HAVE EXCEEDED

YOUR TIME.

>> THANK YOU.

>> VERY BRIEFLY, IN CONJUNCTION

WITH THIS CONFLICT OF INTEREST

ISSUE WHETHER IT'S UNDER

SULLIVAN OR STRICKLAND, THE

ARGUMENT THAT WE ADVANCED OR

TRIED TO ADVANCE AT THE TRIAL

COURT AND WERE SUMMARILY CUT OFF

SO THERE IS NO RECORD -- YOUR

HONOR, YOU HAD MENTIONED THAT

EARLIER -- WAS, IN FACT, AT SOME

POINT IN TIME, SIGNIFICANT POINT

IN TIME, DURING PROCESS OF THE

REPRESENTATION OF THE DEFENDANT

ON TRIAL FOR HIS LIFE THE LAWYER

WAS, IN FACT, REPRESENTING

ANOTHER INTEREST.

HE WAS REPRESENTING HIMSELF.

HE DIDN'T HAVE SOME OTHER LAWYER
REPRESENTING HIM BEFORE THE
FLORIDA BAR, HE WAS REPRESENTING
HIMSELF.
SO HE WAS ADVOCATING CERTAIN
ISSUES AS TO HIS BENEFIT TO TRY
TO RESOLVE THAT BAR COMPLAINT,
AND AT THE SAME -- NOT COPYING
HIS CLIENT WITH THAT.
AND AT THE SAME TIME LATER
SAYING, OH, BUT EVERYTHING'S
FINE NOW BECAUSE THE BAR
COMPLAINT HAS BEEN SUSPENDED.
>> LET ME ASK YOU, DO YOU NOT
CONCEDE STANDING ALONE THE
FILING OF A BAR COMPLAINT DOES
NOT GIVE RISE --
>> ABSOLUTELY.
THAT'S NOT WHAT WE'RE ARGUING.
WE'RE SAYING THERE SHOULD HAVE
BEEN -- WE RAISED IT IN THE
3851, THE COURT SHOULD HAVE
ALLOWED US TO SHOW THERE WAS AN
ACTUAL CONFLICT THAT CONTINUED
ON, AND AS A RESULT A NUMBER OF
OTHER ISSUES WERE NOT DONE BY
THIS LAWYER.
>> DID THE TRIAL LAWYER TRY TO

WITHDRAW FROM REPRESENTATION
AFTER THE FILING OF THE BAR
COMPLAINT?
SO THERE'S NOTHING IN THE RECORD
FOR THE DIRECT APPEAL THAT WOULD
HAVE GIVEN A LAWYER A BASIS FOR
KNOWING THAT THERE WAS A
POSSIBLE --
>> SOME OTHER LAWYER FOR THE
APPELLANT ARE WE TALKING ABOUT?
>> YES, SOMEONE --
>> NOT THAT I COULD FIND, AND IF
THE CLIENT HIMSELF WAS NOT
GETTING COPIED, WHICH IT SEEMS
THE RECORD REFLECTS, WITH THE
RESPONSES BY HIS LAWYER TO THE
BAR COMPLAINT, HE'S A LIAR, HE'S
SUPPORTING PERJURY.
HE NEVER GETS THAT, AND HE
FINALLY GETS THE LETTER FROM THE
BAR SAYING WE'VE LOOKED AT IT,
THIS IS NOT AN ISSUE THE BAR
WOULD HANDLE, WE'RE TAKING NO
ACTION.
WITHIN A YEAR, THE FILE WILL BE
PURGED.
I'M NOT SURE WHERE THE DEFENDANT
HIMSELF IN CUSTODY WOULD KNOW
THAT HE COULD GO TO THE COURT

AND FILE SOME OTHER OBJECTION.

SO OUR POSITION IS WHETHER OR

NOT WE CLARIFY MICKENS, AND

MICKENS DOES NOT SEEM TO SAY

THAT THERE CANNOT BE SITUATIONS

WHERE A LAWYER HIMSELF IF HE'S

UNDER INVESTIGATION, FOR

EXAMPLE, FOR A CRIMINAL CONDUCT

IN RELATIONSHIP TO

REPRESENTATION OF A DEFENDANT IS

NOT, IN FACT, REPRESENTING TWO

INTERESTS, TWO COMPETING

INTERESTS.

HIS POTENTIAL WELFARE, HIS

LICENSE TO PRACTICE LAW, HIS

LICENSE TO REMAIN IN GOOD

STANDING, AS OPPOSED TO HIS

CLIENT WHO'S FACING A MOST

SEVERE SANCTION IN A CASE.

SO WHAT WE WOULD HOPE TO BE ABLE

TO DO AND WE THINK THE TRIAL

COURT ERRED IS NOT ALLOWING US

TO FULLY DEVELOP THE RECORD AS

TO, OKAY, WHAT ABOUT THIS

LETTER?

WHAT ABOUT THIS?

WHY --

>> ASSUMING YOU FIND THAT HE

WROTE THOSE LETTERS, STILL IN
POSTCONVICTION, IT WOULDN'T BE A
PER SE REVERSAL.
YOU WOULD STILL HAVE TO SHOW IT
ADVERSELY AFFECTED HIS
PERFORMANCE AT TRIAL.
>> CORRECT.
AND THEN WE WOULD HAVE GONE
INTO, OKAY, WHY DID YOU FIRE
YOUR PARALEGAL FIVE DAYS BEFORE
YOUR TRIAL?
WHY DID YOU NOT DO A --
>> [INAUDIBLE] YOU'VE GOT TO
SHOW THAT THERE'S SOME PREJUDICE
TO THE --
>> BY OMISSION.
PREJUDICE BY OMISSION --
>> THAT AFFECTED THE RESULT.
>> CORRECT.
>> IN THE TRIAL, RIGHT?
>> YES, SIR.
>> WHERE IS IT?
>> WE DIDN'T -- WE NEVER GOT
TO -- WE HAD IT ALL UNDER THE
UMBRELLA OF THAT PARTICULAR
ISSUE, THE CONFLICT WITH THE
LAWYER, AND THE JUDGE SAID I'M
NOT GOING TO HEAR IT.
PUT YOUR DOCUMENTS IN, AND

THAT'S THE END OF IT.

I MEAN, WE WERE SUMMARILY CUT

OFF.

RIGHTLY OR WRONGLY, THAT ENDED

IT.

>> EVEN IN THIS COURT IT SEEMS

TO ME THAT YOU HAVE NOT REALLY

COME UP, TOLD US ANY VIABLE

ISSUES THAT THE ATTORNEY REALLY,

I MEAN, THAT HE DID SOMETHING

WRONG AT TRIAL.

WHAT YOU'VE ACTUALLY SAID IS,

YOU KNOW, HE FIRED HIS

PARALEGAL.

WHAT DIFFERENCE DOES THAT MAKE?

>> RIGHT.

>> IT WAS FIVE DAYS BEFORE

TRIAL.

I MEAN, HIS WIFE, THESE OTHER

ALLEGATIONS THAT YOU MAKE, I

MEAN, YOU DON'T REALLY POINT TO

ANYTHING THAT WENT ON AT THE

TRIAL THAT SHOULDN'T HAVE

HAPPENED OR SHOULD HAVE HAPPENED

THAT DEMONSTRATES THAT BECAUSE

THIS MAN HAD A PROBLEM HE DID

NOT ADEQUATELY REPRESENT THIS

DEFENDANT.

>> I THOUGHT YOU CLAIMED THAT HE DID NOT LOOK INTO THE 911 CALL.

>> I'M SORRY?

>> THAT HE DID NOT FOLLOW YOUR STRATEGY FOR THE 911 CALL BECAUSE OF THE BAR COMPLAINT.

>> WELL, ULTIMATELY THAT WOULD BE -- HAD WE DEVELOPED THAT HEARING, THAT WOULD HAVE BEEN TIED BACK IN, THERE'S NO QUESTION ABOUT THAT.
THE SAME THING WITH NOT WANTING TO USE DARYL FIELDS, THE INVESTIGATOR, WHO INDICATED THAT HE HAD, IN FACT, FOUND EVIDENCE OF AN ATTEMPT TO BREAK IN THE FRONT DOOR, THE DAMAGE TO THE FRONT DOOR AND THE POOL DOOR AS OPPOSED TO THE GARAGE WHERE THE DEFENDANT WAS FOUND WHO HAD A KEY TO THE RESIDENCE.
SO THE OTHER ASPECT OF THE FIELDS INVESTIGATION WITH THE STOCKING MASK WAS APPARENTLY DAMAGE THAT HAD SUBSEQUENTLY BEEN REPAIRED TO BOTH THE FRONT AND BACK DOOR OF THE RESIDENCE WITH WHO KNOWS WHAT EVIDENCE THAT WOULD HAVE BEEN FOUND.

THANK YOU.

>> THANK YOU VERY MUCH,

MR. TAYLOR, MS. MILLSAPS.

THE COURT WILL NOW BE IN RECESS

UNTIL TOMORROW MORNING.

>> PLEASE RISE.

>> SUPREME COURT IS NOW

ADJOURNED.