

>> NEXT CASE BEFORE THE COURT IS
ALTERSBERGER VERSUS STATE.

>> I THINK EVERYBODY'S SETTLED
DOWN.

YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT, GOOD
MORNING.

MY NAME IS JULIE MORLEY AND I AM
HERE REPRESENTING [INAUDIBLE].

THIS CASE COMES BEFORE THE COURT
AFTER AN EVIDENTIARY HEARING
HELD.

THIS MORNING I'D LIKE TO FOCUS
ON ARGUMENT ONE IN OUR BRIEF,
WHICH WAS CLAIM ONE.

ARGUMENT ONE ESSENTIALLY ASSERTS
THAT BETWEEN THE TIME

MR. ALTERSBERGER ENTERED HIS
PLEA AND GUILTY AND THE TIME HE
WAS SENTENCED TO DEATH

[INAUDIBLE] BY FAILING TO INFORM
HIM OF THE STANDARD [INAUDIBLE].

[AUDIO DIFFICULTIES]

>> IN THIS CASE MR. ALTERSBERGER
PLED ON FEBRUARY 13 AND WAS
SENTENCED ON JUNE 15.

>> WASN'T THIS ISSUE PRIMARILY
DECIDED ON A FACTUAL BASIS?

>> EXCUSE ME, YOUR HONOR?

>> WASN'T THIS ISSUE DECIDED
PRIMARILY ON A FACTUAL BASIS?

>> ON DIRECT --

>> THAT -- NO.

THAT THE JUDGE BELOW ACCEPTED
THE STATEMENTS OF COUNSEL AS TO
WHAT THEY HAD TOLD THIS
DEFENDANT AND THERE WAS A
CREDIBILITY ISSUE AND THE TRIAL
JUDGE RULED THAT THE DEFENDANT
WAS ADVISED.

>> THE TRIAL COURT RULED THAT
THEY FOUND BOTH TRIAL ATTORNEYS
CREDIBLE, THEIR TESTIMONY.

>> RIGHT.

>> AND TRIAL COUNSEL'S TESTIMONY
AT THE HEARING WAS THAT THEY AT
NO TIME EVER ADVISED
MR. ALTERSBERGER OF THE
DIFFERENCE IN THE LEGAL
STANDARD.

>> I THOUGHT THAT THE TESTIMONY WAS IS THAT THEY ADVISED HIM OF GUILTY PLEAS AND WHAT THEY MEANT AND THOSE KINDS OF THINGS, MAYBE DIDN'T GO INTO PRECISE RULE NUMBERS.

BUT I THOUGHT THAT THERE WAS EVIDENCE THAT THEY DID TALK WITH THIS DEFENDANT ABOUT THAT SUBJECT MATTER.

>> ABOUT GUILTY PLEAS OR --

>> GUILTY PLEAS, WITHDRAWING GUILTY PLEAS.

>> THERE'S TWO TRIAL COUNSEL IN THIS CASE AND THEIR TESTIMONY IS SOMEWHAT CONFLICTING.

ATTORNEY GOINS STATED THREE TIMES THAT SHE AT NO POINT EVER DISCUSSED THE LEGAL DIFFERENCES

--

>> AND WHAT WAS HER ROLE?

>> SHE WAS LEAD COUNSEL OF THE CASE.

>> ALL RIGHT.

>> ATTORNEY MILLS SAID THAT HE THINKS HE COVERED IT IN A MORE ON GENERAL FASHION, BUT DIDN'T GO OVER RULE NUMBERS OR CASE LAW.

>> RIGHT.

>> BOTH ATTORNEYS KNEW MR. ALTERSBERGER' SINCERITY IN WANTING TO WITHDRAW HIS PLEA BECAUSE THEY WERE CONDUCTING RESEARCH ABOUT MOVING TO WITHDRAW HIS PLEA PRIOR TO THE ACTUAL SENTENCE.

THE RESEARCH ATTORNEY GOINS PRESENTED TO MR. ALTERSBERGER ALL REFERENCES STATUTES AND CASE LAW ABOUT MOVING TO WITHDRAW THE PLEAS AFTER SENTENCE.

IT'S KILGORE V. STATE.

SHE CITES 3.170 SUB L.

HER CONCERN WAS ABOUT PRESERVING HIS RIGHT TO APPEAL.

SHE STATED THAT SHE NEVER ACTUALLY DISCUSSED THE DIFFERENCE BETWEEN MANIFEST INJUSTICE VERSUS --

>> I'M CONFUSED ABOUT SOMETHING.
AND YOU ADMIT THAT WE ADDRESSED
VOLUNTARINESS OF THE PLEA ON
DIRECT APPEAL.

>> YES.

>> AND THE DEFENDANT ACTUALLY
MADE A STATEMENT IN COURT ABOUT
WANTING TO ACCEPT
RESPONSIBILITY, RIGHT?
THERE WAS AN AFFIRMATIVE
STATEMENT.
THE JUDGE FOUND ON THAT GIVEN
THE TOTALITY OF THE
CIRCUMSTANCES, THAT THERE WASN'T
A REASONABLE PROBABILITY THAT
THE DEFENDANT WOULD HAVE
INSISTED ON WITHDRAWING HIS
PLEA.

SO WHAT I'M TRYING TO UNDERSTAND
IS AT WHAT POINT -- NORMALLY AS
PART OF WHETHER HE'S GOING TO
PLEAD GUILTY.

IT'S NOT, WELL, IF YOU PLEAD
GUILTY, AFTER -- I'M JUST TRYING
TO UNDERSTAND WHERE THIS
ADDITIONAL FACT OF WHAT A --
YOU'RE SAYING A LAWYER IS
SUPPOSED TO TELL HIS CLIENT, IF
THE CLIENT MAKES A KNOWING AND
VOLUNTARY WAIVER OF HIS RIGHT TO
TRIAL BY JURY, ARE YOU SAYING
IT'S PART OF TO SAY, WELL, YOU
KNOW, THOUGH, YOU CAN -- YOU'VE
GOT TO -- BUT YOU CAN WITHDRAW
IT QUICKLY?

I MEAN, I DON'T SEE WHERE THAT
COMES IN, SO HELP ME ON THAT.

>> NO, YOUR HONOR.

THIS IS WHAT MAKES THIS CASE
UNIQUE.

THE VOLUNTARINESS WAS ADDRESSED
ON DIRECT APPEAL AND THAT
ADDRESSED THE FACTS AND
CIRCUMSTANCES SURROUNDING WHAT
WAS GOING ON WHEN HE ENTERED THE
PLEA AS OF MARCH 13.

OUR CASE IS FOCUSING ON THAT
TIME FRAME.

AND TRIAL COUNSEL HAD STATED
DURING THE EVIDENTIARY HEARING

THAT AT EVERY MEETING THAT THEY MET WITH MR. ALTERSBERGER BETWEEN PLEA AND SENTENCING, HE BROUGHT UP CONCERN OF THE PLEA, THAT HE WAS UNSURE THAT HE WANTED TO GO FORWARD WITH THE PLEA.

AND THEY BOTH STATE, BOTH TRIAL COUNSEL STATED THAT THERE IS NO DOUBT THAT PRIOR TO JUNE 15 HE HAD TOLD THEM HE WANTED TO WITHDRAW HIS PLEA.

SO WE'RE ARGUING UNDER THE SPECIFIC FACTS OF THIS CASE, THEY WERE REQUIRED TO EXPLAIN TO HIM THE LEGAL DIFFERENCES BECAUSE THEY KNEW THAT HE WANTED TO MAKE THIS MOTION AND THEY WERE DISCOURAGING FROM DOING IT UNTIL AFTER SENTENCING.

AND THAT'S SUPPORTED BY THE FACTS AND TESTIMONY AT THE TRIAL.

TRIAL COUNSEL SAID THAT, THAT EVERY MEETING HE WAS WAVERING, HE WAS UNSURE OF HIS DECISION. THEY BELIEVED --

>> AFTER HE HAD ALREADY PLED GUILTY.

>> YES, YOUR HONOR.

THERE WAS A THREE-MONTH PERIOD WHERE THE PENALTY PHASE HAPPENED, JURY RECOMMENDATION AND SENTENCING.

THEY BELIEVED THE SINCERITY OF HIS ASSERTION THAT HE WANTED TO WITHDRAW HIS PLEA.

>> TELL ME THE TIME AGAIN?

>> IT WAS MARCH 13, WAS THE PLEA DATE.

JUNE 15 WAS SENTENCING.

>> AND SO HE IS SAYING THAT BETWEEN MARCH AND JUNE HE REPEATEDLY SAID HE WANTED TO WITHDRAW HIS PLEA.

>> HE -- HE -- THIS TESTIMONY IS SOMEWHAT CONFLICTING.

MR. ALTERSBERGER SAID ALMOST IMMEDIATELY AFTER ENTERING THE PLEA, HE HAD ASKED TRIAL COUNSEL

THAT HE WANTED TO TAKE IT BACK.
TRIAL COUNSEL DOESN'T RECALL
THAT CONVERSATION, BUT THEY DO
TESTIFY THAT AT EVERY CONFERENCE
THEY HAD WITH HIM THROUGHOUT
THOSE THREE MONTHS, HIS PLEA WAS
OF ISSUE AND THAT HE WAS
CONSTANTLY WAVERING AND
CONCERNING ABOUT WHETHER
PLEADING WAS IN HIS BEST
INTEREST.

>> BUT I GUESS THE QUESTION IS,
SO -- IS THAT IT WAS IN HIS BEST
-- IT WAS IN HIS BEST INTEREST.
WHAT WAS THE POSSIBILITY THAT HE
WASN'T GOING TO BE FOUND GUILTY
OF MURDERING THE LAW ENFORCEMENT
OFFICER?

I MEAN, IT'S NOT LIKE THIS IS A
CASE WHERE THERE IS
CIRCUMSTANTIAL EVIDENCE.
I MEAN, SO I'M TRYING TO
UNDERSTAND WHERE HIS IDEA, OH, I
REALLY SHOULDN'T HAVE PLED
GUILTY, AS THE -- THE STATE
NEVER TOOK THE DEATH PENALTY OFF
THE TABLE.

>> CORRECT.

>> SO WHERE WAS HIS ADVANTAGE IN
SAYING, WELL, I'M INSISTING ON
MY RIGHT TO TRIAL?

WHAT WAS THAT ABOUT?

>> OUR ARGUMENT IS THAT TRIAL
COUNSEL BELIEVED THIS WAS A
REASONABLE STRATEGY, TO ENTER
THE GUILTY PLEA.

BUT THE DECISION TO ENTER AND
WITHDRAW IS ENTIRELY THE
CLIENT'S.

>> THAT'S TRUE.

BUT THERE'S NO QUESTION THAT
BEFORE THE JUDGE IN MARCH HE
SAYS WHAT?

HE SAYS, I HAVE TO ACCEPT
RESPONSIBILITY.

>> RIGHT, WHICH WE AT THE
EVIDENTIARY HEARING LEARNED WAS
MOSTLY SCRIPTED LANGUAGE.

>> AFTER SOMEONE'S GOT THE DEATH
PENALTY, WHAT THEY ARE GOING TO

SAY ABOUT WHAT THEY WANTED TO DO
IS A LITTLE MORE ON
QUESTIONABLE.

>> CORRECT.

BUT THAT'S WHAT MAKES THIS CASE
UNIQUE, YOUR HONOR.

THIS ISN'T A BUYER'S REMORSE
SITUATION WHERE AFTER HE GETS --
YOU KNOW, MR. ALTERSBERGER
TRYING TO GET TWO BITES OF THE
APPLE HERE, HIM WAITING TO SEE
WHETHER HE WOULD GET LIFE BEFORE
MAKING THE MOTION.

HIS WISHES TO WITHDRAW WERE MADE
TO TRIAL COUNSEL PRIOR TO THE
MOTION -- I'M SORRY, PRIOR TO
SENTENCING, BECAUSE THEY
RESEARCHED THAT INFORMATION,
PROVIDED HIM WITH INFORMATION
ONLY ABOUT WITHDRAWING THE PLEA
AFTERWARDS.

AND THEN AT THE DAY OF
SENTENCING, WITHOUT ANY BREAK,
WITHOUT ANY WHISPERED
CONVERSATION OR RECESS, THEY
IMMEDIATELY WITHDRAW HIS PLEA
AFTER SENTENCING.

SO THEY KNEW THAT THIS WAS HIS
DESIRE, BUT IT WAS TRIAL COUNSEL
WHO WERE DISSUADING HIM FROM
ENTERING THE PLEA PRIOR BECAUSE
THEY DID NOT WANT TO NEGATE THE
RESPONSIBILITY MITIGATOR BEFORE
THE JUDGE.

THAT WAS THEIR STRATEGY.

THE REASONABLENESS OF THAT
STRATEGY, THEY BELIEVED IT WAS A
REASONABLE STRATEGY.

>> WELL, ARE YOU SUGGESTING IT'S
NOT?

ARE YOU SUGGESTING IT WAS NOT
REASONABLE STRATEGY?

>> I'M NOT GOING TO CONCEDE THAT
IT WAS A REASONABLE STRATEGY.

>> WELL, WOULD IT NOT HAVE
ESTABLISHED OTHER AGGRAVATORS
HAD THEY GONE INTO THE FACTS?
I MEAN, THIS IS NOT LIKE SOME
CIRCUMSTANTIAL CASE.

>> CORRECT.

>> SO IS THAT THE CASE, THAT ADDITIONAL AGGRAVATORS WOULD HAVE COME BEFORE THE JURY BASED UPON THE STATEMENTS OF THIS INDIVIDUAL JUST BEFORE THE SHOOTING?

>> I DON'T THINK THE STATE WAS SEEKING ANY OTHER AGGRAVATORS OTHER THAN THE TWO THAT WERE ESTABLISHED IN SENTENCING. SO I DON'T KNOW IF ADDITIONAL AGGRAVATORS WOULD HAVE BEEN FOUND.

>> WELL, THEN WHAT HE HAD SAID WITH REGARD TO -- ABOUT GETTING A LAW ENFORCEMENT OFFICER, DID THAT COME IN?

>> THAT CAME IN THROUGH HIS CODEFENDANT, YES.

>> AT WHAT POINT?

>> IN THE PENALTY PHASE?

WELL, THAT WOULD HAVE COME IN FOR THE GUILT PHASE.

>> CORRECT.

>> INITIALLY.

>> CORRECT.

>> SO YOU DON'T THINK THAT'S A REASONABLE STRATEGY, FOR A LAWYER TO TRY TO KEEP THAT OUT FROM A JURY?

>> WE CAN ASSUME FOR THIS PROCEEDING IT WAS A REASONABLE STRATEGY, BUT THE TIME FRAME WE'RE FOCUSING ON IS NOT MARCH 13, BUT WHAT HAPPENED AFTERWARDS, AND THAT WE HAVE A CLIENT DIRECTLY INFORMING THEIR ATTORNEYS OF HIS DESIRES AND THEN NOT INFORMING HIM WHAT HAPPENS BETWEEN WITHDRAWING PLEAS PRIOR AND AFTER. AND THE STANDARD REALLY GETS MUCH, MUCH DIFFICULT AFTER SENTENCING, WHICH IS WHAT THE TRIAL JUDGE ACKNOWLEDGED, THAT HE HAD --

>> WELL, WHAT WOULD HAVE BEEN THE GOOD CAUSE -- LET'S JUST SAY HE HAD TRIED TO WITHDRAW HIS PLEA BEFORE JUNE.

THERE'S STILL A GOOD CAUSE -- I MEAN, IT'S EASIER.

>> CORRECT.

>> BUT IT'S NOT HOME FREE, YOU JUST SAY I WANT TO WITHDRAW IT.

>> CORRECT.

>> WHAT WOULD HAVE BEEN THE LIKELIHOOD?

DON'T WE HAVE TO LOOK AT THAT, AS TO WHETHER A JUDGE WOULD HAVE GRANTED A WITHDRAWAL OF THE PLEA?

WHAT WAS HIS REASON?

WHAT CHANGED BETWEEN MARCH AND WHEN HE SAID, YOU KNOW, I'M JUST WONDERING WHETHER THIS WAS THE BEST STRATEGY?

>> WELL, UNDER THE RULE, THE JUDGE -- SHALL ON GOOD CAUSE WITHDRAW THE PLEA --

>> WELL, WHAT WAS THE GOOD CAUSE?

>> TO THAT POINT, THE JUDGE NAMED ITS DISCRETION TO WITHDRAW THE PLEA FOR ANY REASON.

MAY IN ITS DISCRETION.

WE'RE ARGUING THAT IT'S DISCRETIONARY.

HE COULD HAVE JUST WITHDRAWN THE PLEA.

>> LET'S JUST SAY -- WHAT WAS HIS GOOD CAUSE REASON?

>> IT WAS VERY SIMILAR TO THE FACTS THAT WERE BROUGHT OUT DURING THE MOTION TO WITHDRAW PLEA HEARING CONDUCTED AFTER SENTENCE WAS IMPOSED IN THIS CASE.

SO IT IS GOING TO BE A SIMILAR FACTS AND CIRCUMSTANCES THAT GO -- BUT WE DON'T NEED TO LOOK AT WHETHER MR. ALTERSBERGER WOULD HAVE BEEN SUCCESSFUL AT TRIAL, BECAUSE THESE ARE VERY DIFFICULT FACTS FOR HIM.

BUT THERE WAS A TRIAL STRATEGY TO NEGATE THE PREMEDITATION ELEMENT, WHICH WAS SEEN IN THE PENALTY PHASE, AND MR. ALTERSBERGER, WHICH WAS

TESTIFIED BY TRIAL COUNSEL, THAT HE WAS ONBOARD FOR THIS TRIAL STRATEGY.

>> LET ME GO TO YOUR HURST CLAIM.

RING CLAIM WAS RAISED ON DIRECT APPEAL.

>> YES.

>> AND IT'S BEEN RAISED AGAIN. IT WAS A 9-3 JURY VERDICT.

>> YES.

>> DEFENDANT WAS ONLY 19. THE TWO AGGRAVATORS WERE CCP AND MURDER OF A LAW ENFORCEMENT OFFICER.

WHAT IS YOUR ARGUMENT?

FIRST WE'D HAVE TO DECIDE THAT HURST APPLIES RETROACTIVELY TO POST-RING CASES, 2002.

>> CORRECT.

>> AND WHAT'S YOUR ARGUMENT AS TO WHY HE WOULD GET RELIEF UNDER HURST?

>> YOUR HONOR, IN TERMS OF HURST, WE DIDN'T BRIEF THIS ISSUE BECAUSE THE COURT DIDN'T ASK US TO, BUT IT WAS RAISED ON DIRECT APPEAL.

>> SO YOU DIDN'T RAISE IT?

I THOUGHT -- YOU DID NOT RAISE IT BEFORE THIS COURT?

>> I DON'T BELIEVE SO.

I THINK THERE WAS AN EIGHTH AMENDMENT CHALLENGE IN OUR HABEAS PETITION.

HURST HAD NOT BEEN RULED UPON AT THE POINT THAT WE BRIEFED THIS CASE.

BUT WE WOULD JUST BE ARGUING THE SAME ARGUMENTS THAT THIS COURT HAS HEARD THE LAST TWO MONTHS ABOUT RETROACTIVITY, THAT HURST SHOULD BE RETROACTIVE UNDER WITT AND MR. ALTERSBERGER SHOULD BE GETTING THE BENEFIT OF THAT. I'LL BE RESERVING THE REST OF MY TIME FOR REBUTTAL.

THANK YOU.

>> MAY IT PLEASE THE COURT, GOOD MORNING.

I'M SUZANNE BECHARD OF BEHALF OF THE STATE OF FLORIDA THIS MORNING.

I WOULD LIKE TO ADDRESS THE ISSUE THAT MISS MORLEY RAISED AS FAR AS THE FIRST ISSUE ON THE POSTCONVICTION CLAIM.

IN THIS CASE THERE WAS AN EVIDENTIARY HEARING HELD. MISS GOINS TESTIFIED AS FAR AS EXPLAINING THE DIFFERENCES BETWEEN THESE TWO RULES. SHE SAID SHE DIDN'T RECALL EXPLAINING THE SUBTLETIES OF THEM TO HIM, AND SHE SPECIFICALLY SAID -- AND I USE THE WORD "SUBTLETIES" BECAUSE IT WOULD HAVE BEEN THE SAME UNDERLYING FACTUAL SITUATION. MR. MILLS TESTIFIED THAT HE PROBABLY DISCUSSED IN A GENERAL WAY THE DIFFERENCES BETWEEN THE TWO RULES.

AND THE COURT FOUND THAT EVEN THOUGH MR. MILLS SAID, WELL, HE PROBABLY DISCUSSED IN GENERAL THE DIFFERENCES, THE COURT FOUND THAT HIS ATTORNEYS TOLD HIM THAT WITHDRAWING THE PLEA WAS NOT IN HIS BEST INTEREST, THAT THIS WOULD NEGATE THE HOPE OF HAVING THIS TAKING RESPONSIBILITY MITIGATOR, THIS POTENTIAL MITIGATOR, WHICH THEY FELT WAS VERY, VERY STRONG IN THIS CASE. AND THE COURT FOUND THAT THEIR BEHAVIOR HERE DID NOT FALL BELOW THE REASONABLE STANDARD OF EFFECTIVENESS.

SO THERE WAS NO INEFFECTIVENESS HERE.

AND TOUCHING ON THE PREJUDICE ANALYSIS HERE, UNDER HILL, HE WOULD HAVE TO ESTABLISH THAT THERE'S A REASONABLE PROBABILITY THAT HE WOULD HAVE WITHDRAWN HIS PLEA AND WOULD HAVE INSISTED ON GOING TO TRIAL.

AND WHEN YOU LOOK AT THE FACTS OF THIS CASE, YOU HAD A

SITUATION WHERE THE STATE WAS NOT TAKING THE DEATH PENALTY OFF THE TABLE UNDER ANY CIRCUMSTANCES.

SO IT WAS GOING TO BE EITHER DEATH OR LIFE IMPRISONMENT. PART OF THE AGREEMENT WITH THE STATE, THOUGH, INVOLVED TAKING OUT CERTAIN VERY, VERY DAMAGING EVIDENCE.

THAT EVIDENCE INVOLVED MR. ALTERSBERGER' STATEMENTS AT A PARTY THE SAME EVENING THAT HE MURDERED SERGEANT SOTTILE, HE WENT TO A PARTY AND HE MADE COMMENTS IN FRONT OF ABOUT 20 WITNESSES THAT WERE INCULPATORY.

>> BUT, YOU KNOW, I UNDERSTAND WHAT THE FACTS OF THE CASE ARE, BUT THE STANDARD IS REALLY WHETHER OR NOT HE WOULD HAVE WITHDRAWN THE PLEA, RIGHT?

>> RIGHT.

>> AND SO HOW SOON AFTER HE ENTERED THE PLEA DID HE BEGIN TO TELL HIS ATTORNEYS, I DON'T THINK WE'VE DONE THE RIGHT THING.

I WANT TO WITHDRAW THIS PLEA.

>> WELL, THE ATTORNEYS TESTIFIED THAT HE WAS CONFLICTED AND THAT HE REALIZED THAT HE REALLY DIDN'T HAVE ANY GOOD CHOICES. AND THEY BELIEVED THAT THEIR JOB WAS TO ENCOURAGE HIM TO GO FORWARD WITH THIS BECAUSE IT WAS HIS BEST SHOT AT GETTING A LIFE SENTENCE.

AND THAT'S WHAT THEY WERE FIGHTING FOR FOR HIM.

>> AND SO DID HE AT ANY POINT BETWEEN THE TIME HE ENTERED THE PLEA AND THE TIME THAT SENTENCING TOOK PLACE AFFIRMATIVELY TELL HIS ATTORNEYS I WANT TO WITHDRAW THIS PLEA?

>> THE ANSWER TO THAT IS NO. THEY TESTIFIED THAT THAT DID NOT HAPPEN AND THE TRIAL COURT FOUND THAT THEIR TESTIMONY IN THAT

REGARD WAS CREDIBLE, THAT HE NEVER -- THAT THEY WOULD HAVE FILED A MOTION TO WITHDRAW PLEA PRIOR TO SENTENCING IF HE HAD DIRECTED THEM TO DO SO.

>> I THINK WHAT SHE'S ARGUING, THOUGH, IS THAT ONCE HE STARTED SHOWING THAT HE WAS CONFLICTED ABOUT IT, COUNSEL HAD AN OBLIGATION TO EXPLAIN TO HIM THAT, YOU KNOW, IT'S GOING TO GET HARDER TO WITHDRAW THIS PLEA ONCE YOU'RE SENTENCED.

SO IF YOU'RE THINKING ABOUT DOING THAT, THE TIME TO DO THAT IS NOW.

I THINK THAT'S PRETTY MUCH WHAT THE GIST OF HER ARGUMENT IS.

>> I UNDERSTAND THE GIST OF HER ARGUMENT, BUT WE NEED TO LOOK AT THIS IN THE GRAND SCHEME OF THE WHOLE THING.

AND WHAT COUNSEL WAS TRYING TO DO IS SAY, LOOK, YOU'VE GOT YOUR VERY, VERY BEST SHOT AT A LIFE SENTENCE IF WE GO FORWARD WITH THIS NOW AND GO THROUGH THE PENALTY PHASE WITHOUT ALL THIS REALLY DAMNING EVIDENCE.

AND, YOU KNOW, WE FEEL LIKE YOU'VE GOT THE BEST SHOT POSSIBLE OF GETTING A LIFE SENTENCE.

THEY DIDN'T BELIEVE THAT HE HAD ANY SHOT AT GETTING AN ACQUITTAL OR EVEN A REDUCED -- YOU KNOW, A LESSER INCLUDED OFFENSE WITH ALL THE EVIDENCE THAT THE STATE HAD. BUT WITHOUT THAT REALLY BAD EVIDENCE THAT WAS MORE OR LESS ON NEGOTIATED OUT FOR THE PENALTY PHASE --

>> COULD YOU TALK A LITTLE BIT MORE ABOUT THAT EVIDENCE? BECAUSE IT WASN'T JUST INCULPATORY EVIDENCE.

>> RIGHT.

>> IT DEFINITELY WAS BAD. BUT IT WENT BEYOND THAT. COULD YOU EXPLAIN THAT?

>> IT WENT BEYOND THAT.
NOW, THERE WAS A HEARING HELD
ABOUT IT, AND THE COURT LIMITED
OUT CERTAIN OPINION TYPE
EXPRESSIONS THAT THE WITNESSES
COULD HAVE SAID.
FOR EXAMPLE, HE SAID THIS AND HE
WAS LOOKING PROUD THAT HE DID IT
OR LOOKING THUGGISH.
BUT WHAT HE DID WAS AND WHAT
THEY COULD TESTIFY TO WAS THAT
AFTER HE SHOT SERGEANT SOTTILE,
HE ACTED OUT THE VICTIM'S LAST
PAINFUL MOMENTS FOR THESE
WITNESSES.
AND THAT WAS GOING TO COME IN.
>> HE WAS MOCKING HIM.
>> HE WAS -- EVIDENTLY, YES, HE
WAS MOCKING AND DERIDING THE
SUFFERING OF HIS VICTIM, YES.
THAT WOULD HAVE COME IN.
AND THAT WOULD HAVE BEEN JUST
EXTREMELY, EXTREMELY DAMAGING
FOR THIS CLIENT.
AND YOU LOOK AT THESE TRIAL
ATTORNEYS, WHO HAVE A VAST
NUMBER OF YEARS OF EXPERIENCE.
I DON'T REMEMBER HOW LONG MR.
MILLS HAD BEEN PRACTICING, BUT
MISS GOINS HAS BEEN DOING DEATH
PENALTY CASES FOR NEARLY 30
YEARS.
SHE HAS HAD GREAT SUCCESS,
ACCORDING TO THE TRIAL COURT'S
FINDINGS, IN SAVING HER CLIENTS'
LIVES UNDER -- YOU KNOW, WHEN
SHE TAKES THESE THINGS, THESE
CASES.
SOMETHING LIKE 12 LIFE SENTENCES
AND FOUR DEATH SENTENCES.
SO YOU HAVE THE CREAM OF THE
CROP HERE.
THESE ATTORNEYS KNOW WHAT
THEY'RE DOING.
THEY KNOW WHAT'S GOING TO HAPPEN
IF HE GOES FORWARD AND EITHER
WITHDRAWS THIS PLEA OR DOESN'T
PLEAD AT ALL.
AND THEY BELIEVED THAT THEIR JOB
AS EFFECTIVE COUNSEL WAS TO, YOU

KNOW, ENCOURAGE HIM TO PLEAD,
EMPHASIZE THAT, LOOK,
WITHDRAWING YOUR PLEA MEANS THAT
YOU LOSE THIS BENEFIT HERE AND
WE'RE NOT GOING TO BE ABLE TO
ARGUE THAT YOU TOOK
RESPONSIBILITY, EITHER, IF YOU
WITHDRAW THE PLEA.

SO THAT'S WHAT THEY BELIEVED WAS
GOING TO BE THE VERY BEST SHOT
FOR HIM.

AND THE OTHER THING THAT I WANT
TO TOUCH ON HERE AS FAR AS THE
PREJUDICE STANDARD GOES IS HE'S
GOT TO SHOW THAT HE WAS
PREJUDICED, NOT JUST THAT IT'S A
MORE LENIENT RULE, A MORE
LENIENT STANDARD PRIOR TO PLEA.
THE STANDARD PRIOR TO PLEA IS
EITHER THE COURT IN ITS
DISCRETION MAY OR ON GOOD CAUSE
SHALL ALLOW THE DEFENDANT TO
WITHDRAW.

AND, AGAIN, WE GET BACK TO THIS
UNDERLYING REASON.

HE CANNOT ESTABLISH THAT THE
COURT WOULD HAVE IN ITS
DISCRETION PERMITTED HIM TO
PLEAD.

AND AS FAR AS GOOD CAUSE, THE
CASES HAVE HELD GOOD CAUSE IN
THIS CONTEXT WOULD BE, FOR
EXAMPLE, AN INVOLUNTARY PLEA.
AND THE ISSUE OF THE
VOLUNTARINESS OF THIS PLEA WAS
TALKED ABOUT MANY TIMES.

>> I KNOW.

BUT THERE IS A VERY SIGNIFICANT
STANDARD BETWEEN SOMEBODY WHO
WITHDRAWS THEIR PLEA, YOU KNOW,
AFTER SENTENCING.

I MEAN, IF A JUDGE -- IF ON DAY
ONE THE DEFENDANT SAYS, I WANT
TO PLEAD AND FOUR DAYS LATER,
WITH NOTHING ELSE CHANGING,
SAYS, LISTEN, I SAID IT, BUT
I'VE THOUGHT IT AND I REALLY,
REALLY WANT TO GO TO TRIAL.
YOU KNOW ON, WHAT'S THE
DISCRETIONARY REASON FOR DENYING

THAT?

>> WELL, I MEAN, --

>> I MEAN, IN OTHER WORDS,
THERE'S BEEN NO CHANGE IN
RELIANCE --

>> BUT WE'RE IN POSTCONVICTION
HERE.

>> I UNDERSTAND THAT, BUT I'M
JUST SAYING AS A GENERAL RULE,
WE LOOKED TO CASES WHEN I WAS ON
THE APPELLATE COURT.

THAT'S A HUGE DIFFERENCE.

YOU ALMOST NEVER CAN WITHDRAW A
PLEA AFTER TRIAL -- I MEAN AFTER
SENTENCING WHERE TIME HAS GONE
ON WHERE BEFORE -- AGAIN, YOU'RE
LOOKING TO SEE WHAT AM I GOING
TO GET, RIGHT?

>> RIGHT.

AND THE AFTER SENTENCING IS
MANIFEST INJUSTICE.

THAT AGAIN WOULD GO BACK TO THE
VOLUNTARY NATURE OF THE PLEA.

AND THERE'S NO INDICATION HERE
-- IN FACT, IT'S BEEN RULED UPON
A COUPLE OF DIFFERENT TIMES,
THAT THE PLEA WAS IN FACT
VOLUNTARY.

AND, YES, THE STANDARD IS
DIFFERENT.

BUT HERE AGAIN, HE WOULD HAVE TO
ESTABLISH THAT COUNSEL WAS
INEFFECTIVE, WHEN WE HAVE
COUNSEL WHO ARE SIMPLY TRYING TO
SAVE THIS GUY'S LIFE BY KEEPING
OUT HORRIBLE, HORRIBLE EVIDENCE
IN THE PENALTY PHASE.

SO IT'S THE STATE'S POSITION
THAT HE HAS SHOWN NEITHER
STRICKLAND PRONG HERE, AND THE
STATE WOULD ASK THAT THE COURT
AFFIRM THE RULING BELOW.

THANK YOU.

>> THERE IS NO DOUBT THAT THE
FACTS OF THIS CASE WERE
TERRIBLE.

BUT THE DECISION TO ENTER A PLEA
OR TO GO TO TRIAL IS ENTIRELY
MR. ALTERSBERGER' DECISION AND
IT'S ONE OF THE GREATEST RIGHTS

AFFORDED TO A DEFENDANT IN THE
CRIMINAL JUSTICE SYSTEM.
IT IS TRUE THAT TRIAL COUNSEL
TESTIFIED THAT HE DID NOT INSIST
ON FILING A MOTION TO WITHDRAW
THE PLEA PRIOR.
AND IF HE HAD, THEY WOULD HAVE
MADE THAT MOTION.
BUT OUR ARGUMENT IS WITHOUT THE
PROPER LEGAL KNOWLEDGE, HE
WOULDN'T BE MAKING AN INFORMED
DECISION AS TO WHEN TO MAKE THAT

--

>> DON'T YOU ALSO HAVE TO
ESTABLISH THAT THERE WAS A
REASONABLE PROBABILITY THAT THE
JUDGE WOULD HAVE ACCEPTED THE
MOTION TO WITHDRAW THE PLEA?

>> YES.
YOUR HONOR --

>> ISN'T THAT SPECULATIVE --
THAT'S THE OTHER PROBLEM.
ISN'T IT SPECULATIVE ON YOUR
PART?

HOW DO YOU ESTABLISH THAT?

>> WELL, GOOD CAUSE CAN BE A
WHOLE SLEW OF THINGS UNDER THE
LAW.

>> YOU WERE SAYING, WELL, IT
COULD BE -- HE COULD HAVE DONE
IT FOR ANY REASON.

>> CORRECT.

>> THAT'S JUST SPECULATION.
SO I THINK I ASKED YOU THIS,
BUT, AGAIN, WHAT WOULD BE THE
GOOD CAUSE THAT THE JUDGE WOULD
HAVE CONSIDERED?

>> THE FACTORS THAT WERE
CONSIDERED AT THE MOTION TO
WITHDRAW THE PLEA HEARING
REGARDING THE VOLUNTARINESS
COULD BE CONSIDERED FOR THE GOOD
CAUSE ARGUMENT, AS WELL AS NOT
BEING GIVEN APPROPRIATE LEGAL
ADVICE.

I THINK THERE WAS A CASE LISTED
IN OUR MOTION, IF I COULD FIND
IT, NICOLE V. STATE, WHICH IS
GOOD CAUSE CAN BE ERROR BY
COUNSEL IN ADVISING THE

DEFENDANT.

SO DURING THAT TIME --

>> WELL, WHAT DID THE COUNSEL NOT DO IN ADVISING HIM TO ENTER THE PLEA?

>> WELL, I WOULD BE GOING BACK TO NOT ADVISING HIM OF THE PROPER LEGAL STANDARD.

>> NO.

NOT THAT PART.

WE'RE AT THE BEGINNING OF IT, WHEN HE'S -- WHAT WAS -- WHAT DID THEY NOT TELL HIM ABOUT ENTERING THE PLEA THAT WOULD HAVE BEEN MISADVICE OF COUNSEL?

>> I THINK I MISSPOKE THERE, YOUR HONOR.

THE FACTS THAT WERE PREVIOUSLY BROUGHT AT THE PRIOR EVIDENTIARY HEARING, AS WELL AS THE FACTS

--

>> WHICH WAS?

>> THAT HE WAS PRESSURED INTO ENTERING HIS PLEA.

IT WAS PROBABLY ABOUT A TEN-DAY TIME PERIOD.

>> PRESSURED BY COUNSEL?

>> COUNSEL.

>> TELLING HIM THAT YOU HAVE NO REALLY GOOD OPTIONS HERE AND SO

--

>> CORRECT.

>> -- A PLEA WOULD BE IN YOUR BEST INTEREST?

THAT'S THE PRESSURE?

>> HE HAD EMOTIONALLY CHARGED MEETINGS WHERE THEY BROUGHT HIS MOTHER IN.

THEY ENLISTED DR. KROP TO HELP PERSUADE HIM INTO THIS PLEA. THERE WERE MANY FACTORS BROUGHT OUT AT THIS HEARING, THAT THE JUDGE COULD HAVE CONSIDERED ALL OF THAT UNDER THE MORE LIBERAL STANDARD.

THE LAW PREFERS A TRIAL ON THE MERITS AND GIVES A DEFENDANT OPPORTUNITY TO REFLECT ON HIS PRIOR PLEA AND WHETHER IT WAS THE BEST DECISION.

THIS IS A UNIQUE CASE BECAUSE
THE CASES THAT WE HAD CITED WERE
ALL NONCAPITAL CASES.

SO IT'S A SITUATION WHERE
SOMEONE PLEADS AND IS SENTENCED
SHORTLY THEREAFTER.

HERE WE HAVE A LONGER TIME FRAME
AND THERE'S A PENALTY PHASE IN
BETWEEN.

IF THERE'S NO OTHER QUESTIONS,
I'D JUST ASK THIS COURT TO
REVERSE THE LOWER COURT'S RULING
AND GRANT MR. ALTERSBERGER A NEW
TRIAL.

>> THANK YOU FOR YOUR ARGUMENTS.
COURT'S IN RECESS FOR TEN
MINUTES.

>> ALL RISE.