>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE, THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR.
GIVE ATTENTION, YOU SHALL BE HEARD.
GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT.
THE FIRST CASE ON THE DOCKET TODAY IS THE STATE OF FLORIDA V. POOLE.
>> GOOD MORNING.
I'M SCOTT BROWNE REPRESENTING THE STATE OF FLORIDA.
MAY IT PLEASE THE COURT, THE STATE APPEALS THE ORDER VACATING MR. POOLE'S DEATH SENTENCE BELOW ON THE BASIS OF HURST ERROR.
HOWEVER, MR. POOLE'S ENTERED THE PENALTY PHASE FOR HIS RESENTENCING ELIGIBLE UNDER FLORIDA AND UNITED STATES CONSTITUTIONAL LAW FOR A DEATH SENTENCE.
HE HAD PRIOR VIOLENT FELONY AND CONTEMPORANEOUS FELONY CONVICTIONS.
THIS COURT HAD PREVIOUSLY HELD FOR MORE THAN A DECADE THAT THESE CONVICTIONS TOOK THE CASE OUT OF THE PURVIEW OF RING AND APPRENDI.
HOWEVER, ON-- WHEN HURST V. FLORIDA WAS REMANDED BACK TO THIS COURT FOR A VERY LIMITED QUESTION, HARMLESS ERROR, THIS COURT EMPLOYED THAT DECISION TO IMPLEMENT ADDITIONAL REQUIREMENTS THAT WERE NOT REQUIRED, NOR EVEN SUGGESTED BY THE SUPREME COURT IN HURST V. FLORIDA.

IN FACT, THE RULING FROM THE SUPREME COURT WAS A VERY NARROW ONE.
THEY OVERRULED SPAZIANO TO THE EXTENT THAT THEY ALLOWED A JUDGE SITTING ALONE TO FIND AN AGGRAVATING CIRCUMSTANCE THAT RENDERED THE DEFENDANT ELIGIBLE--
>> DOESN'T THE FLORIDA CONSTITUTION PERMIT THIS COURT TO EXCEED IN AFFORDING CITIZENS' RIGHTS OF WHAT THE SUPREME COURT REQUIRES?
>> YOUR HONOR, THAT IS CORRECT. HOWEVER--
>> SO WHAT YOU'RE SAYING THEN IS WHEN YOU'RE SAYING THAT WE EXCEEDED THE MANDATE OF THE UNITED STATES SUPREME COURT, YOU'RE SAYING THAT WE DID THAT, YOU'RE NOT SAYING THAT WE COULD NOT DO THAT.
>> ACTUALLY, I AM IN PART BECAUSE WHEN YOU REFERENCED THE EIGHTH AMENDMENT TO JUSTIFY THAT DECISION, YOUR HONOR, THERE'S A CONFORMITY CLAUSE.
>> ARE YOU SAYING THAT WE VIOLATED THE CONFORMITY CLAUSE?
>> YES, YOUR HONOR.
BECAUSE, REMEMBER, HURST V. FLORIDA WAS A SIXTH AMENDMENT CASE.
NOW, WHEN IT WAS REMANDED BACK, YOU EMPLOYED THE SIXTH AMENDMENT, BUT YOU ALSO BROUGHT IN THE EIGHTH AMENDMENT WHICH PROVIDES FOR THE NARROWING FUNCTION.
NOW, WHEN YOU SAY IT'S A MATTER OF STATE LAW AND STATE CONSTITUTIONAL LAW, THIS COURT SHOULD BE ABLE TO CITE TO SOMETHING IN THE CONSTITUTION, OUR STATUTE OR CASE LAW TO SUPPORT THAT DECISION.
AND THAT'S THE PROBLEM.
WHEN YOU JUST SAY IT'S A MATTER OF STATE LAW, THERE'S NOTHING IN

THE STATE CONSTITUTION THAT SAYS
OUR RIGHT TO A JURY TRIAL
INCLUDES JURY SENTENCING.
THERE'S NOTHING IN OUR HISTORY
SURROUNDING JURY TRIALS, AND IN
PARTICULAR IN CAPITAL CASES.
REMEMBER PRE-1970 A DEATH
SENTENCE WAS AUTOMATIC UNLESS A
MAJORITY OF THE JURY RECOMMENDED
MERCY.
SO I DON'T KNOW WHERE THIS COURT
FOUND THAT MATTER OF STATE LAW,
BECAUSE IT DOESN'T APPEAR IN
EITHER OUR DECISIONAL LAW, THE
CONSTITUTION AND CERTAINLY NOT
THE FEDERAL CONSTITUTION.
NOW, IT'S TIME FOR THAT
PRECEDENT TO BE RECONSIDERED
BECAUSE, YOUR HONORS, THIS
COURT, THIS DECISION IN HURST V.
STATE IS ON AN ISLAND WITH
DELAWARE.
VIRTUALLY EVERY OTHER COURT,
INCLUDING FEDERAL COURTS OF
APPEALS, HAVE REJECTED THE
NOTION THAT BALANCING AND
WEIGHING ARE REQUIRED
ELIGIBILITY FINDINGS UNDER U.S.
CONSTITUTION.
SO THE STATE IS ASKING THIS
COURT TO RECOGNIZE THAT ERROR.
IT'S NOT SUPPORTED IN CASE LAW,
AND IT WOULD BE CONSISTENT WITH
THIS COURT'S PRIOR CASE LAW THAT
SAID RING AND APPRENDI IS
SATISFIED IF THERE'S A PRIOR
VIOLENT FELONY OR--
>> DO ANY OF THOSE OTHER STATES
THAT YOU'RE REFERENCING HAVE THE
STATUTORY SCHEME THAT WE HAVE
WHERE THE FINDINGS ON THE
AGGRAVATORS ARE NOT MADE DURING
THE ORIGINAL TRIAL, THEY'RE MADE
DURING THE PENALTY PHASE?
>> YES, YOUR HONOR.
IN FACT, MOST STATEMENTS ARE
SIMILAR TO WHAT FLORIDA EMPLOYS
BECAUSE, REMEMBER, THERE'S THAT
CAPITAL, THE FIRST-DEGREE MURDER
CONVICTION PLUS AT LEAST ONE.

SO I'M TALKING ALABAMA, OHIO, KANSAS, MISSOURI.
EVERY FEDERAL COURT OF APPEAL TO DETERMINE IT, INCLUDING THE 11TH CIRCUIT COURT OF APPEALS.
SO AGAIN, THAT RATIONALE IS MUCH MORE SOUND.
SO I THINK THE STATE HAS OFFERED UP SPECIAL JUSTIFICATION IN THIS CASE TO REVERSE THAT PORTION OF HURST V. STATE THAT MANDATED THE FINDINGS THAT ARE NOT REQUIRED BY EITHER THE STATE OR U.S. CONSTITUTIONS.
WITH REGARD TO THE ALLEGED McCOY-NIXON ERRORS IN THIS CASE, MR. POOLE'S VOICED NO OBJECTION AT THE TIME OF TRIAL TO MR. DEMICK, HIS EXPERIENCED TRIAL ATTORNEY'S INTENDED STRATEGY.
REMEMBER, MR. McCOY VOICED AN OBJECTION AT EVERY OPPORTUNITY.
IN FACT, HE SOUGHT TO DISCHARGE HIS ATTORNEY.
AND MR. McCOY'S RECORD ON DIRECT APPEAL SUPPORTED FINDING A STRUCTURAL ERROR.
SO THAT IS WHY THE SUPREME COURT SAID YOU DO NOT RESORT TO STRICKLAND.
IT IS A STRUCTURAL ERROR APPARENT FROM THE FACE OF THE RECORD.
HOWEVER, IN CONTRAST HERE AGAIN, THEY WERE SILENT--
>> WELL, YOU SAID HE WAS SILENT. DIDN'T COUNSEL SAY THAT HE HAD REPEATEDLY TOLD COUNSEL HE DID NOT WANT TO CONFESS OR TO ADMIT THAT HE HAD COMMITTED THE OFFENSES?
>> CORRECT, YOUR HONOR.
AND WHAT I MEANT IS SILENT ON THE RECORD.
SO MR. POOLE'S DIDN'T-- WHEN MR. DEMICK EXPLAINED, HEY, THERE'S OVERWHELMING EVIDENCE SUPPORTING YOUR CONVICTION HERE INCLUDING DNA THAT EXCLUDES

ANYONE ELSE-- I MEAN, HIS DNA
WAS IN THE 18-YEAR-OLD PREGNANT
VICTIM TO THE EXCLUSION OF
ANYONE ELSE ON THIS PLANET.
SO THERE IS THE ABSOLUTELY
OVERWHELMING EVIDENCE--
>> BUT IS IT YOUR POSITION THAT
McCOY IS DISTINGUISHABLE BASED
ON THAT?
BECAUSE THE ATTORNEY FOR POOLE
TESTIFIED THAT MR. POOLE'S WAS
ADAMANT THAT HE NOT CONCEDE
THOSE CHARGES, THE NON-HOMICIDE
CHARGES.
>> WELL, I THINK YOU HAVE TO
LOOK AT TACTICAL DECISIONS
RAISED.
AT THE POINT IN TIME WHEN
MR. DEMICK EXPLAINED BEFORE
GETTING UP IN CLOSING ARGUMENT,
HE TOOK MR. POOLE'S ASIDE AT
COUNSEL'S TABLE AND EXPLAINED TO
HIM, LOOK, THIS IS WHAT IS LEFT
TO ME.
THIS IS WHAT I'M GOING TO MAKE
THAT CONCESSION.
MR. POOLE'S DID NOT RESPOND--
>> WELL, BUT IN FAIRNESS IN THE
TESTIMONY FROM MR. DEMICK,
DIDN'T HE SAY THAT BASICALLY
HE'S GETTING READY TO STAND UP,
AND HE'S TELLING MR. POOLE'S
THIS, AND THERE WAS NO-- AS I
RECALL FROM MR. DEMICK'S
TESTIMONY, HE SAID THERE WAS
REALLY NO OPPORTUNITY FOR MR.
POOLE'S TO RESPOND OTHER THAN,
I GUESS, BY ACTING UP.
BECAUSE HE DIDN'T ASK HIM, HE
TOLD HIM I'M DOING THIS, AND
THEN HE STOOD UP AND DID IT.
>> WELL, HE EXPLAINED TO
MR. POOLE'S THAT THIS IS WHAT IS
LEFT TO US AT THIS TIME.
SO, YOUR HONOR, I APPRECIATE
THAT.
THIS ISN'T EXACTLY LIKE NIXON
BUT IT'S NOT LIKE McCOY
EITHER.
>> LET'S GO TO THE PRESERVATION

ISSUE--
>> YEAH.
>>-- IF WE COULD.
EXPLAIN WHY IT'S YOUR POSITION
THAT THIS WAS NOT PRESERVED.
>> THAT'S CORRECT.
>> IT WAS NOT PRESENTED
PROPERLY.
>> PROPERLY.
>> IN THE POST-CONVICTION COURT.
WOULD YOU EXPLAIN THAT?
>> YES, YOUR HONOR.
THE MOTION ITSELF REFERENCES TWO
CLAIMS UNDER STRICKLAND THAT THE
ATTORNEY'S COMMENTS VIOLATED
MR. POOLE'S RIGHT TO REMAIN
SILENT AND ALSO VIOLATED HIS
ATTORNEY/CLIENT PRIVILEGE.
IT DID NOT SAY IT VIOLATED HIS
AUTONOMY, IT DID NOT SAY THAT--
DID NOT ACTUALLY PRESENT A
McCOY ISSUE.
IT CONCEDED THAT NIXON AND
INEFFECTIVE ASSISTANCE OF
COUNSEL WAS THE APPROPRIATE
REVIEW.
SO I SUBMIT THAT YOU CAN'T WAIT
UNTIL CLOSING ARGUMENT TO--
AND, AGAIN, THERE WAS NO MOTION
TO AMEND AT THE TIME.
WERE WE AWARE THAT THIS WAS
GOING TO BE AN ISSUE, WHAT
COUNSEL'S ADVICE WAS?
CERTAINLY.
AND THERE IS A FACTUAL BASIS IN
THE RECORD.
BUT IT HAS TO BE PROPERLY
PRESENTED TO THE LOWER COURT IN
ORDER TO PRESERVE THE ISSUE.
BUT AGAIN, I THINK THE STARK
CONTRAST BETWEEN McCOY HERE
MANDATES DIFFERENT TREATMENT.
AGAIN, McCOY WAS A DIRECT
APPEAL CASE, AND THE SUPREME
COURT HAS SAID IN WEAVER V.
MASSACHUSETTS THAT YOU DON'T--
YOU AREN'T ENTITLED TO A
STRUCTURAL ERROR REVIEW IF YOU
WAIT UNTIL POST-CONVICTION TO
RAISE THAT CLAIM FOR THE FIRST

TIME.
SO THE PROPER STANDARD HERE IS
INEFFECTIVE ASSISTANCE OF
COUNSEL.
AND NIXON GOVERNS.
AND ALSO THERE ARE OTHER--
>> WHAT ABOUT THIS WAIVER?
AT ANY TIME-- LET'S GO BACK TO
THE DIRECT APPEAL.
AT ANY TIME-- IS THIS ON?
THERE YOU GO.
AT ANY TIME DID THE COURT, I
MEAN, SOME OF US HERE HAVE BEEN
TRIAL COURT JUDGES AND HAVE
DEALT WITH DEATH CASES, HAVE
DEALT WITH THESE SITUATIONS
WHERE A DEFENDANT IS CHOOSING
NOT TO TESTIFY OR TESTIFY OR
WHETHER A DEFENSE IS GOING TO BE
PRESENTED.
AND IF TRIAL COURT WOULD TAKE
THE TIME TO ASK, YOU KNOW,
EXCUSE THE JURY AND,
MR. DEFENDANT, YOUR LAWYER
CLAIMS THAT HE'S ABOUT TO
CONFESS TO THE JURY THAT YOU DID
THIS, YOU DID THAT AND YOU DID
THIS.
YOU'RE IN AGREEMENT WITH THAT
STRATEGY.
SOME JUDGES WOULD DO THAT.
AND YOUR POSITION HERE IS, WELL,
THE DEFENDANT NEVER RAISED IT
DOWN BELOW.
WELL, WHEN WOULD HE HAVE HAD
THAT OPPORTUNITY IF HE WAS NOT
ASKED TO DO SO?
>> YOUR HONOR, MR. POOLE'S WAS
AN ACTIVE PARTICIPANT.
HE WAS POLITE, RESPECTFUL, AND
HE HAD MULTIPLE CONVERSATIONS
WITH HIS ATTORNEY.
IF HE HAD IRRECONCILABLE
DIFFERENCES WITH HIM, JUST LIKE
THE DEFENDANT DID IN McCOY--
>> BUT WHEN WOULD HE HAVE DONE
THAT IN PARTICULAR IN THIS CASE?
BECAUSE THE DEFENSE COUNSEL
TESTIFIED THAT, IN ESSENCE, HE
TOLD MR. POOLE'S THAT HE WAS

ABOUT TO CONCEDE THIS WHEN HE
WAS ABOUT TO STAND UP TO DO
CLOSING. WHAT WAS MR. POOLE'S
GOING TO DO,
START FLAYING AND SAYING NO IN
FRONT OF THE JURY?
>> NO.
>> I MEAN, HE'S NOT GOING TO ASK
THE TRIAL COURT JUDGE FOR A
SIDEBAR.
>> YOUR HONOR, HE COULD HAVE
SAID NO TO MR. DEMICK.
HE DIDN'T.
HE WAS UNRESPONSIVE JUST LIKE
NIXON.
>> BUT HE DID SAY NO TO DEFENSE
COUNSEL.
HE WAS ADAMANT THAT THAT WAS NOT
A STRATEGY THAT HE AGREED WITH.
THE ISSUE IS THAT THE TRIAL
COURT WAS UNAWARE THAT MR.
POOLE'S DID NOT AGREE WITH THE
STRATEGY OF TRIAL COUNSEL TO
CONCEDE THE NON-HOMICIDE
CHARGES.
>> MR. POOLE'S DID NOT BRING
THAT TO THE COURT'S ATTENTION.
AGAIN, I THINK WHY THE STATE
PRESENTED ALL OF THE COLLOQUY
BELOW IS BECAUSE THERE IS A
DIFFERENCE OF OPINION AS TO WHAT
MR. POOLE'S AND MR. DEMICK SAID.
YOU CAN SPECULATE THAT MR.
POOLE'S WAS NONRESPONSIVE AND HE
JUST HELD HIS EARLIER POSITION,
OR YOU CAN AGREE THAT MR.
POOLE'S HAVING SAT THROUGH
TRIAL, HEARING ALL THE DNA
EVIDENCE INCLUDING PASSING
STOLEN PROPERTY WITH HIS
BLOOD ON IT--
>> OKAY.
I'M SORRY TO INTERRUPT YOU,
BECAUSE I THINK WE UNDERSTAND
YOUR VIEWS ON TRYING TO
DISTINGUISH NIXON AND McCOY.
SO IF WE COULD MOVE, THOUGH, TO
THE ISSUE OF WHETHER WE SHOULD
BE VIEWING THIS THROUGH THE
STRICKLAND LENS OR WHETHER WE

SHOULD BE VIEWING IT THROUGH
SOME OTHER LENS.
AND SPECIFICALLY WITH THE ISSUE
OF WHETHER THERE'S A NEED TO
SHOW PREJUDICE AT THIS POINT.
>> WELL, ABSOLUTELY NOT, YOUR
HONOR.
THE QUESTION OF PREJUDICE-- AND
THAT'S WHY THE DEFENDANT IS SO
INSISTENT THAT WE VIEW THIS AS
STRUCTURAL ERROR, BECAUSE YOU
DIDN'T HEAR ONE ARGUMENT ABOUT
AN ALTERNATE DEFENSE.
AT LEAST IN McCOY, HE HAD AN
ALIBI.
MR. POOLE'S OFFERED NOTHING
EITHER AT TRIAL OR IN
POST-CONVICTION TO CHALLENGE ANY
OF THE COMPELLING EVIDENCE
AGAINST HIM.
SO WHEN HE ARGUES THAT ANOTHER
COURSE SHOULD HAVE BEEN TAKEN,
WHAT WAS IT?
NOTHING.
NOTHING IN HIS BRIEF, NOTHING
HAS BEEN ARGUED.
SO IF IT IS VIEWED UNDER
STRICKLAND, AS IS APPROPRIATE IN
THIS CASE--
>> SO WHAT DO YOU MAKE-- CAN
YOU HELP US UNDERSTAND THOUGH
THE PART OF McCOY WHERE THE
COURT SAYS THAT BECAUSE THE
COMPETENCE OF COUNSEL IGNORING
THE ISSUE IN A SITUATION LIKE
THIS, THAT WE SHOULDN'T BE
LOOKING AT IT THROUGH A
STRICKLAND LENS?
I UNDERSTAND THAT WAS ON DIRECT
APPEAL, BUT IS THAT THE REASON
WHY YOU'RE SAYING--
>> YES, YOUR HONOR.
AND I THINK THERE ARE UNIQUE
FACTS.
AND, AGAIN, I THINK McCOY'S
GOING TO BE LIMITED TO THE VERY
EXTREME FACTS IN THAT CASE WHERE
THE CONFLICT IS APPARENT FROM A
DIRECT APPEAL RECORD THAT BOTH
COUNSEL AND THE DEFENDANT SOUGHT

TO END THEIR RELATIONSHIP.
>> BUT LET'S ASSUME THAT WE DISAGREE WITH YOU.
OBVIOUSLY, I'M NOT SPEAKING FOR ANYONE, INCLUDING MYSELF.
LET'S ASSUME THAT WE AREN'T PERSUADED BY THE ARGUMENT THAT THE CLIENT DIDN'T GO ALONG WITH THIS, THAT WE DON'T ACCEPT THE DISTINGUISHING ISSUE.
CAN YOU JUST, PLEASE, ADDRESS THE McCOY AND PREJUDICE POINT? WHAT WE SHOULD BE LOOKING--
>> I DID.
I THINK WHEN YOU RAISE AN ISSUE ON POST-CONVICTION BECAUSE OF THE FINALITY INTEREST-- AND, AGAIN, I'M RELYING ON WEAVER VS. MASSACHUSETTS WHICH I SUBMIT IS DIRECTLY ON POINT.
IF YOU RAISE THAT CLAIM AS A MATTER OF INEFFECTIVE ASSISTANCE THOUGH IF YOU HAD RAISED IT AT THE TIME OF TRIAL IT MAY HAVE BEEN A STRUCTURAL ERROR, WE STILL NEED YOU TO SHOW DEFICIENT PERFORMANCE AND PREJUDICE.
AND, AGAIN, I THINK THERE ARE OTHER SIGNIFICANT DIFFERENCES HERE.
REMEMBER, WHAT TRIAL COUNSEL DID IN THIS CASE IS HE DIDN'T CONCEDE THE MURDER AND ATTEMPTED MURDER.
HE HAD A THEORY, MAYBE NOT A COMPELLING ONE, THAT THEY WERE SEPARATED IN TIME.
SO UNLIKE McCOY, HE DIDN'T PLEAD HIS CLIENT GUILTY AT THE TIME OF TRIAL.
SO IF WE'RE EXPANDING McCOY TO COVER ROUTINE TACTICAL DECISIONS ON LESSER OFFENSES DURING TRIAL, I WOULD SAY THAT THE SUPREME COURT PERHAPS HAS OPENED A CAN OF WORMS.
BUT I SUGGEST TO YOU THAT THE MORE NARROW RULING, THAT IT IS A RARE CASE THAT CAN BE RAISED ON DIRECT APPEAL THAT SHOWS A

CONFLICT, AN ACTIVE CONFLICT
BETWEEN COUNSEL AND HIS DEFENSE
LAWYER, AND THAT IS WHEN McCOY
WILL CONTROL.
AND AGAIN, I SEE THAT I HAVE,
I'M RUNNING--
>> YOU HAVE USED ALL YOUR TIME
PLUS A LITTLE BIT.
>> THANK YOU.
>> I'LL GIVE YOU TWO MINUTES FOR
REBUTTAL.
>> THANK YOU, YOUR HONOR.
>> MAY IT PLEASE THE COURT,
JULIUS CHEN ON BEHALF OF
APPELLEE, CROSS-APPELLANT, MARK
ANTHONY POOLE.
I RESERVE FIVE MINUTES FOR
REBUTTAL.
IF I COULD JUST MAKE TWO POINTS,
I WOULD POINT THE COURT TO THE
RECORD AT ROA-1548 WHERE
MR. DEMICK TESTIFIES VERY
CLEARLY, "AT ANY TIME DID
MR. POOLE'S ABANDON HIS
OBJECTION TO YOU CONCEDING GUILT
TO THE NON-HOMICIDE OFFENSES?"
"NOT THAT I RECALL."
THAT MEANS THAT HE UNDERSTOOD
THAT MR. POOLE'S, IN THE
EXCHANGE IN WHICH HE TOLD MR.
POOLE'S-- NOT DISCUSSED THE
ISSUE WITH HIM, HE TOLD MR.
POOLE'S THAT HE WAS GOING
TO CONCEDE GUILT.
AND SPLIT SECONDS LATER WALKED
UP TO THE PODIUM TO CONCEDE
GUILT, THAT HE DID NOT EVEN
UNDERSTAND MR. POOLE'S TO HAVE
ABANDONED HIS LONGSTANDING
OBJECTION THAT HE HAD RAISED AT
LEAST A HALF A DOZEN TIMES
INCLUDING DURING THE COURSE OF
TRIAL.
AND AS A LEGAL MATTER, I WOULD
JUST POINT TO NIXON.
NIXON REFERS TO A SITUATION IN
WHICH YOU HAVE CONSULTATION AND
THEN SILENCE OR ACQUIESCENCE IN
THE FACE OF THAT CONSULTATION.
AND WHAT THE SUPREME COURT IN

FLORES ORTEGAS SAYS THAT IS A
TERM OF ART.
WHAT IT MEANS IS TO ADVISE A
CLIENT AND CRITICALLY HEAR TO
DISCOVER THE DEFENDANT'S WISHES.
THAT WAS NOT DONE HERE.
AND SO WE THINK THAT THE RECORD
CAN REALLY ONLY BE DONE OR READ
IN ONE WAY TO SAY THAT THERE WAS
AN INTRANSIGENT OBJECTION HERE.
AND THAT FITS WITHIN McCOY.
>> WHAT WAS THE FIRST POINT AT
WHICH MR. POOLE'S RAISED AND
MADE THE ARGUMENT, RAISED THE
ISSUE, MADE THE ARGUMENT THAT
THIS WAS A STRUCTURAL ERROR
BECAUSE IT WAS HIS
DECISION AND NOT COUNSEL'S
DECISION TO MAKE?
>> WELL, YOUR HONOR, HE HAD
ALWAYS PUT IN HIS CLAIM THAT THE
CONCESSION OF GUILT WAS A
VIOLATION OF THE SIXTH
AMENDMENT.
IT WAS NOT FRAMED IN TERMS OF
THE STRUCTURAL ERROR IN McCOY
AT THE POINT IN HIS MOTION.
AND WHAT I WOULD POINT OUT IS
THAT HE REFERENCED NIXON.
THERE'S NO DISPUTE ABOUT THAT.
AND I THINK WHAT I HEARD COUNSEL
SAY EARLIER WAS THAT EVERYBODY
WAS ON THE SAME PAGE.
I THINK IT WAS A NIXON-TYPE
CLAIM AT THAT POINT.
BUT I DON'T THINK THAT SHOULD BE
A BAR--
>> I MEAN, OTHER THAN THE-- IN
THE MOTION, OTHER THAN THIS
REFERENCE AT THE END TO NIXON
WHICH SEEMS ALMOST LIKE A NON
SEQUITUR, I MEAN-- WELL, I
GUESS THAT'S THE POINT.
[LAUGHTER]
IT SEEMS LIKE A NON SEQUITUR.
THERE'S NOTHING BEFORE THAT THAT
LEADS YOU TO THINK THAT THE TYPE
OF ERROR THAT IS BEING TALKED
ABOUT IS THE NIXON-McCOY
ERROR, IS THERE?

>> YOUR HONOR, I WOULD POINT TO TWO THINGS IN THE MOTION.
IT REFERENCES, OF COURSE, THE VIOLATION OF THE ATTORNEY/CLIENT PRIVILEGE.
BUT WHAT IT SAYS IS IT'S NOT JUST THAT VIOLATION.
THE VIOLATION PROTECTS OTHER SIXTH AMENDMENT RIGHTS INCLUDING RIGHTS TO LEGAL REPRESENTATION, AND IT PROTECTS THE ADVERSARIAL NATURE OF THE PROCEEDING WHICH WAS LOST HERE.
AND THEN IT CITES NIXON.
BUT WHAT I THINK IS MORE TELLING IS THAT WHEN THE STATE RESPONDS-- AND THIS IS AT ROA-529 TO 531-- IT FULLY UNDERSTANDS THE NATURE OF THE CLAIM.
IT SAYS THAT EVEN WITHOUT THE CONSENT OF THE DEFENDANT, AND IT CITES AUTHORITY FOR THIS POINT, THAT THE CONCESSION OF FACILITY CAN BE MADE.
EVEN WITHOUT THE CONSENT.
AND WHEN YOU GET TO THE HEARING, YOU HAVE 70 SOME ODD PAGES DEVOTED TO THE SUBJECT OF WHETHER OR NOT POOLE REJECTED WHAT THE PROSECUTOR CALLED A LINE BY LINE EXPLICATION OF NIXON TO DETERMINE WHETHER OR NOT IT IS DISTINGUISHABLE AND WHETHER OR NOT IT PROVIDED DEMICK THE AUTHORITY TO CONCEDE GUILT.
AND THEN YOU GET TO THE CLOSING ARGUMENT WHERE THE STATE MAKES THE EXACT SAME ARGUMENT ALL THE WAY THROUGH.
IT SAYS AT 1652 THE-- AND I THINK THIS IS A CRITICAL LINE-- THAT POOLE DID NOT AGREE WITH COUNSEL'S STRATEGY DOES NOT MATTER.
SO AT ALL STAGES, THE STATE WAS FULLY APPRISED OF WHAT THE NATURE OF THE CLAIM WAS.
AND TO GET BACK TO THE NIXON

POINT VERSUS CITATION TO THE McCOY, I THINK IT'S NOTABLE HERE AND INSTRUCTIVE THAT EVEN IN McCOY ITSELF WHEN IT WAS IN THE LOUISIANA SUPREME COURT, IT WAS ARGUED AS A NIXON CLAIM. AND IT'S NOT SURPRISING THAT EVERYBODY WOULD CITE IT THAT WAY.
NIXON IS THE RELEVANT AUTHORITY AT THAT POINT.
PEOPLE DON'T KNOW WHAT TO DO IF IT IS DISTINGUISHABLE BECAUSE THERE IS AN INTRANSIGENT AND EXPRESS OBJECTION.
BUT ONCE -- I MEAN, THAT'S ESSENTIALLY WHAT THIS ENTIRE PROCEEDING WAS ABOUT, TO DETERMINE WHETHER OR NOT NIXON WAS DISTINGUISHABLE.
AND IT WASN'T UNTIL, OF COURSE, THE U.S. SUPREME COURT SAID, NO, WE'RE THINKING ABOUT THIS ALL WRONG, EVEN IN THAT PARTICULAR CASE, IN McCOY'S CASE--
>> I MEAN, I'M JUST HAVING A HARD TIME, IF YOU COULD POINT ME TO WHERE IN THE MOTION YOU MAKE THE EXPRESS ARGUMENT THAT THIS IS DISTINGUISHABLE FROM NIXON, AND THAT'S THE BASIS FOR YOUR CLAIM.
>> WELL, YOUR HONOR, WE DON'T MAKE THAT EXACT ARGUMENT.
WHAT WE DO CLEARLY DO IS WE PUT INTO ISSUE THE CLAIM THAT THE CONCESSION OF GUILT IS A VIOLATION OF THE SIXTH AMENDMENT.
AND IT CITES NIXON.
AND, AGAIN, I WOULD JUST POINT TO THE STATE'S RESPONSE HERE.
THERE IS NO CONFUSION AT ALL.
AND THIS RECORD, TO BE CLEAR, IS TAILOR MADE FOR McCOY IN THE END.
I DON'T THINK IT WOULD SERVE THE PURPOSES OF WAIVER IN ANY WAY, SHAPE OR FORM TO SAY THAT THIS CLAIM IS WAIVED.

THE STATE MADE EVERY ARGUMENT
THAT IT WANTS TO MAKE, IT IS
CONTINUING TO MAKE THE SAME
ARGUMENTS HERE, AND THE COURT
WAS FAIRLY APPRISED AT ROA-1732.
IT MAKES A RULING.
IT SAYS THAT NIXON GAVE DEMICK,
QUOTE, THE AUTHORITY TO CONCEDE
GUILT.
AND SO THIS WAS PRESENTED TO THE
COURT, IT WAS RULED UPON, AND I
THINK IT WOULD BE EXTREME
FORMALISM TO SAY AT THIS POINT
THAT THE STATE CAN SAY, YOU
KNOW, WE MADE ALL OF THESE
ARGUMENTS ABOUT NIXON, WE THINK
THAT THE OBJECTION JUST DOESN'T
MATTER, IT HAS NOTHING TO DO
WITH THE AUTHORITY TO CONCEDE
GUILT.
THERE ARE REFERENCES THROUGHOUT
THE RECORD, THROUGHOUT THE
HEARING, THROUGHOUT ALL OF THE
ARGUMENTS TO CONCEDE GUILT.
AND THAT ISSUE WAS ACTUALLY
DECIDED, SO THERE'S NO
IMPEDIMENT TO THIS COURT'S
REVIEW.
THERE'S A FULL RECORD OF WHICH
IT CAN ADJUDICATE THE ISSUE, AND
WE THINK THAT IT'S FULLY
PRESERVED UNDER STATE LAW.
ON THE STRUCTURAL ERROR POINT, I
WOULD JUST MAKE--
>> CAN YOU MAYBE DISTINGUISH,
ARE YOU FAMILIAR WITH DEPELVINE
V. STATE WHERE WE SAID AN ISSUE
WAS RAISED FOR THE FIRST TIME IN
CLOSING ARGUMENT IN THAT CASE,
THAT THE COURT PROPERLY
SUMMARILY DENIED IT AS
INSUFFICIENTLY PLED.
I MEAN, HOW IS IN ANY DIFFERENT?
BECAUSE THE FIRST TIME, AS I
UNDERSTAND IT, THIS ARGUMENT WAS
MADE WAS AFTER THE HEARING IN
THE CLOSING STATEMENTS THAT WERE
FILED.
>> WELL, YOUR HONOR, AGAIN, IT'S
OUR POSITION THAT THE STATE

UNDERSTOOD ALL ALONG, EVEN
BEFORE THE CLOSING ARGUMENT--
>> IT'S NOT ABOUT WHAT THE STATE
UNDERSTOOD NECESSARILY, IT'S
WHAT YOU SAID IN THE PLEADINGS
AND--
>> WELL, YOUR HONOR, WE THINK
THAT FALLS INTO A CATEGORY OF
CASES INCLUDING THE DORBAL CASE
I THINK IS CITED IN THE
FOOTNOTES OF THE STATE'S BRIEF
IN WHICH A CLAIM COMES OUT OF
THE BLUE.
YOU CAN'T JUST GO TO A HEARING
AND SAY, OH, GUESS WHAT, I
ACTUALLY HAVE THIS OTHER CLAIM
OVER HERE.
WE CLEARLY HAVE A DISPUTE FROM
THE START.
EVERYBODY UNDERSTANDS, AGAIN,
THAT THERE IS A CHALLENGE TO
CONCESSION OF GUILT ON SIXTH
AMENDMENT GROUNDS.
NIXON IS THE CRITICAL PRECEDENT
THAT UNDERLIES THE PARTY'S
ARGUMENTS, AND THEY GO FORWARD
ON THAT BASIS.
SO TO SAY THAT THE STATE WAS--
>> I READ YOUR MOTION AS
ESSENTIALLY SAYING, YES, IT WAS
A STRATEGY DECISION UNDER NIXON,
BUT IT VIOLATED MY CLIENT'S
RIGHT TO REMAIN SILENT, IT
VIOLATED THESE OTHER RIGHTS.
I MEAN, THAT'S THE WAY IT SEEMED
TO BE FRAMED.
IT SEEMS TO EVEN CONCEDE THAT IT
WAS A STRATEGY CALL WHEN IT WAS
PLED AND AT THE HEARING.
>> WELL, YOUR HONOR, WHAT I
WOULD SAY AGAIN IS THAT INSTEAD
OF READING THIS ON A COLD RECORD
AND SAYING, WELL, WHAT DO WE
THINK THIS MOTION SAYS TO US,
LOOK AT WHAT THE STATE DID.
THE STATE HAD A FULL
UNDERSTANDING THE ENTIRE TIME.
AND TO BE CLEAR, IT OBJECTED
ESPECIALLY AT THE HEARING ON
EVERY OTHER QUESTION THAT WAS

RAISED FOR VARIOUS OTHER
REASONS, BUT IT NEVER AT ANY
POINT INCLUDING IN ITS WRITTEN
CLOSING ARGUMENT SAID, HEY,
THERE'S BEEN A SHIFT HERE IN THE
NATURE OF THIS CLAIM.
IT DIDN'T SAY THAT AT ALL.
IT DIDN'T SAY THIS IS FALLING
OUTSIDE THE SCOPE OF WHAT WAS
ARGUED IN THE MOTION.
IT WENT ALONG THE ENTIRE WAY
BECAUSE IN ITS VIEW THIS WAS ALL
OF THE PIECE.
THERE WAS, AGAIN, A CHALLENGE TO
THE CONCESSION OF GUILT, VERY
CLEAR, CITING NIXON AND THEN
ARGUMENT ABOUT WHETHER OR NOT
NIXON CONTROLS HERE AND PROVIDED
AUTHORITY.
>> ASSUMING THERE WAS
PRESERVATION AND ASSUMING THERE
WAS ERROR, DO YOU AGREE THAT WE
STILL NEED TO EVALUATE SOME FORM
OF PREJUDICE?
>> NO, YOUR HONOR.
>> THEN TELL ME HOW WEAVER DOES
NOT DIRECT EXACTLY THAT IN THE
INEFFECTIVE ASSISTANCE OF
COUNSEL CONTEXT WHERE THERE'S AN
ALLEGED STRUCTURAL ERROR AND
WEAVER'S STATEMENT ON HOW THE
BURDEN SHIFTS FROM A DIRECT
APPEAL CONTEXT WHICH McCOY WAS
TO A INEFFECTIVE OF ASSISTANCE
OF COUNSEL AND COLLATERAL
CONTEXT WHICH WE'RE IN HERE?
>> SURE, YOUR HONOR.
>> I KNOW THAT'S A LOT.
GO AHEAD.
>> YEAH.
SO I START WITH THE POINT THAT
WEAVER GRAPPLES WITH AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM.
WE DO NOT HAVE AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM HERE
IF YOU AGREE THAT THE McCOY
CLAIM WAS PRESERVED.
WHAT YOU HAVE IS AN AUTONOMY
RIGHT THAT, WHICH HAS A

VIOLATION THAT IS COMPLETE AT
THE MOMENT THAT MR. POOLE'S
AUTONOMY IS ACTUALLY OVERRUN.
AND SO THE REASON THAT'S
CRITICAL HERE IS THAT PREJUDICE
IS AN ELEMENT--
>> I'M LOOKING AT PAGE 15 OF THE
MOTION.
IT SAYS TRIAL COUNSEL WAS
INEFFECTIVE FOR STATING DURING
CLOSING ARGUMENTS THAT MR.
POOLE'S ACKNOWLEDGES HIS GUILT
FOR SEXUAL BATTERY, BURGLARY AND
ROBBERY, THUS DENYING HIS RIGHT
TO THE SIXTH-- FIFTH, SIXTH,
EIGHTH AND FOURTEENTH
AMENDMENTS.
>> THAT'S CORRECT, YOUR HONOR.
BUT I'M TAKING AS YOUR PREMISE
THAT WE HAVE PRESERVED A McCOY
CLAIM--
>> NO.
MY PREMISE IS THERE'S-- YOU
PRESERVE SOME FORM OF IT, BUT
IT'S STILL AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM.
>> NO, THAT'S NOT CORRECT, YOUR
HONOR, IN OUR VIEW.
WE BELIEVE AS IN McCOY THAT
THERE WAS A REFRAMING AND A
BETTER UNDERSTANDING NOW WITH
THE NATURE OF THIS CLAIM.
THIS CLAIM IS NOT AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM.
THAT'S WHAT McCOY HOLDS VERY
CLEARLY.
AND GIVEN THAT IT'S NOT, THEN
YOU DON'T HAVE TO GO THROUGH THE
PREJUDICE STEP, BECAUSE THE
PREJUDICE STEP IS ONLY RELEVANT
TO AN INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM.
>> SO I HAVE TO IGNORE EXACTLY
WHAT YOU SAID IN THE MOTION?
>> YOUR HONOR, EVEN McCOY,
AGAIN, WAS ARGUED AS AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM BELOW--
>> IT WAS DIRECT APPEAL THOUGH.
>> WELL, THAT DOESN'T MATTER FOR

THE NATURE OF THE CLAIM, I
THINK, WHETHER OR NOT IT'S
POST-CONVICTION REVIEW OR DIRECT
REVIEW--
>> EXCEPT THAT WEAVER SAYS
EXACTLY THAT.
>> YOUR HONOR--
>> DOES WEAVER SAY EXACTLY THAT?
THAT IT MATTERS?
>> YOUR HONOR, IT MATTERS
BECAUSE--
>> DOESN'T WEAVER SAY THAT?
>> YES.
>> OKAY.
>> IN THE PARTICULAR CONTEXT OF
THE STRUCTURAL ERROR THAT COULD
HAVE BEEN RAISED ON DIRECT
REVIEW--
>> WHICH IS WHAT EXACTLY WHAT
THIS IS.
>> NO, YOUR HONOR.
NO, YOUR HONOR.
IN THIS CASE WE COULD NOT HAVE
RAISED THIS CLAIM ON DIRECT
REVIEW.
THIS IS THE TYPE OF CLAIM THAT
GETS DEVELOPED IN A
POST-CONVICTION HEARING.
THIS HAPPENED IN NIXON V.
SINGLETARY--
>> EXCEPT THAT IT WAS RAISED ON
DIRECT APPEAL IN McCOY.
>> THAT'S TRUE, BECAUSE THERE
ARE SITUATIONS-- WE THINK THEY
WOULD BE RARE-- IN WHICH A
DEFENDANT WOULD SOMEHOW MAKE A
RECORD.
I DON'T THINK THAT'S A
REQUIREMENT HERE.
THERE'S NO DISPUTE FROM THE
STATE HERE AT LEAST, THIS IS AT
PAGES 30 AND 38, NOTE 11 THAT
MR. POOLE'S COULD NOT HAVE
RAISED THIS CLAIM ON
DIRECT REVIEW.
SO THERE'S NO END RUN.
THAT IS THE ANIMATING FEATURE OF
WEAVER IN THIS CASE.
WHAT WEAVER SAYS IS WE DON'T
WANT A DEFENDANT TO BE ABLE TO

ESCAPE RULES OF FORFEITURE AND A WAIVER OF A CLAIM.
AND SO THAT'S NOT WHAT IS HAPPENING HERE.
THIS WAS MR. POOLE'S FIRST OPPORTUNITY TO RAISE HIS CLAIM UNDER THE SIXTH AMENDMENT, AND HE DID IT IN A POST-CONVICTION PROCEEDING AS HE WAS SUPPOSED TO.
AGAIN, IN NIXON V. SINGLETARY, WHICH GAVE RISE TO THE NIXON CASE IN THE--
>> IT SEEMS LIKE YOUR ARGUMENT, I THOUGHT YOUR ARGUMENT WAS YOU'RE MAKING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BUT RATHER THAN GOING THROUGH STRICKLAND, IT'S FUNDAMENTAL ERROR BECAUSE IT'S STRUCTURAL. THAT'S NOT YOUR ARGUMENT?
>> THAT IS ONE OF OUR ARGUMENTS IN OUR BRIEF, BUT I THINK THE PRIMARY BARRIER TO APPLYING WEAVER HERE IS THAT IT SAYS YOU NEED TO HAVE A FORFEITED, ESSENTIALLY-- SORRY.
A FORFEITED STRUCTURAL ERROR THAT COULD HAVE BEEN RAISED ON DIRECT APPEAL.
THERE WAS THE PUBLIC TRIAL, RIGHT, THAT WAS NOT OBJECTED TO, FORFEITED ON THE DIRECT APPEAL.
AND THEN IT IS SHOE HORNED INTO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM LATER ON.
BECAUSE THAT'S THE ONLY WAY THAT YOU COULD CONTINUE TO PURSUE IT.
THAT'S NOT THE SITUATION HERE.
WE HAVEN'T TRIED TO SHOE HORN ANY CLAIM THAT WE COULD HAVE RAISED ON DIRECT REVIEW INTO AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HERE.
WE NOW KNOW THAT THE McCOY CLAIM IS A SIXTH AMENDMENT AUTONOMY VIOLATION.
IT HAS NOTHING TO DO WITH PREJUDICE AND, THUS, WE THINK THAT ONCE YOU ACCEPT THAT WE

HAVE BROUGHT A McCOY CLAIM,
THAT CLAIM NEEDS TO BE
ADJUDICATED IN THE SAME WAY THAT
IT WOULD BE NORMALLY.
IT IS NOT AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM IN
WHICH PREJUDICE IS AN ELEMENT OF
THAT CLAIM AND THE VIOLATION IS
NOT COMPLETE UNTIL THE PREJUDICE
IS SHOWN.
THE PREJUDICE HERE IS-- SORRY.
THE VIOLATION IS COMPLETE HERE
AT THE MOMENT THAT THE AUTONOMY
OF MR. POOLE'S IS DISREGARDED BY
HIS COUNSEL.
IF I COULD TURN VERY QUICKLY TO
HURST.
THE STATE HERE SAYS TODAY THAT
THERE'S REALLY NOTHING IN STATE
LAW.
AND JUST VERY QUICKLY IN MY LAST
30 SECONDS I POINT TO TWO
PASSAGES.
FIRST, IN THE U.S. SUPREME COURT
THERE IS A CITATION WHERE IT
SAYS THE FLORIDA SENTENCING
STATUTE DOES NOT MAKE A
DEFENDANT ELIGIBLE FOR DEATH
UNTIL FINDINGS BY THE COURT THAT
SUCH PERSON SHALL BE PUNISHED BY
DEATH.
AND THEN IT SAYS THE TRIAL COURT
ALONE MUST FIND THE FACTS.
AND THEN, B, THAT THERE ARE
INSUFFICIENT MITIGATING
CIRCUMSTANCES TO OUTWEIGH THE
AGGRAVATING CIRCUMSTANCES.
THAT, WE THINK, IS A CLEAR
CITATION TO STATE LAW THAT
PROVIDES THE ANALYSIS UNDER THE
SIXTH AMENDMENT HERE.
THAT IS ECHOED IN HURST OF 202
SOUTHERN THIRD.
>> YOU USED ALL YOUR TIME.
I'LL STILL GIVE YOU TWO MINUTES
ON YOUR CROSS-APPEAL REBUTTAL.
>> THANK YOU.
>> THANK YOU, YOUR HONOR.
THE STATE IS STANDING BY ITS
PRESERVATION ARGUMENT.

IT WAS ARGUED AS INEFFECTIVE
ASSISTANCE, IT WAS DECIDED BY
THE TRIAL COURT AS AN
INEFFECTIVE ASSISTANCE CLAIM.
SO THE FACT THAT WHAT THE STATE
MIGHT HAVE UNDERSTOOD ABOUT THE
CLAIM IS IRRELEVANT.
THE CLAIM WAS NOT PLED WITH
SPECIFICITY THAT 3851 REQUIRES.
ONE MORE POINT.
AT THIS POINT WHEN THE TACTICAL
DECISION WAS MADE, GO BACK AND
LOOK AT THAT TRANSCRIPT FROM THE
EVIDENTIARY HEARING.
MR. DEMICK SAID THIS IS WHAT IS
LEFT TO ME, THIS IS WHAT I NEED
TO DO.
MR. POOLE'S DIDN'T SAY NO, HE
DIDN'T OBJECT.
THE DEFENDANT IS ASKING THIS
COURT TO SPECULATE THAT HIS
SILENCE WAS A CONTINUATION OF
SOME VOCIFEROUS OBJECTION TO
COUNSEL'S STRATEGY LIKE McCOY.
YOU CAN'T MAKE THAT JUMP BASED
ON THIS RECORD.
SO PUTTING ASIDE THE MOMENT THE
DIFFERENT PROCEDURAL POSTURE OF
THESE TWO CASES, THE DEFENDANT
HAS TO HAVE THIS COURT SPECULATE
THAT SILENCE WAS CONTINUED
OBJECTION WHEREAS I THINK, AND
THE STATE SUBMITS, THAT THE MORE
LIKELY OR REASONABLE EXPLANATION
IS SILENCE WAS MR. POOLE'S
RECOGNITION OF THE OVERWHELMING
EVIDENCE PRESENTED BY THE STATE
AT TRIAL.
>> AGAIN, I'M JUST CAUGHT UP ON
THIS, WHEN WOULD HE HAVE HAD
THAT OPPORTUNITY?
IF DEFENSE COUNSEL-- LET'S SAY
HE DISCUSSES IT WITH HIM,
DEFENSE COUNSEL AND HIS CLIENT,
MR. POOLE'S, TALK ABOUT THAT AND
THEN HE, DEFENSE COUNSEL GETS UP
THERE AND STARTS TELLING THE
JURY MY CLIENT DID THIS, MY
CLIENT DID THAT, MY CLIENT DID
THIS.

UNLESS THE JUDGE AT THAT POINT
IN TIME INTERRUPTS THE ARGUMENT,
EXCUSES THE JURY AND SAYS, WAIT
A MINUTE, HE'S CONFESSING THAT
YOU-- HE'S TELLING THE JURY
THAT YOU COMMITTED ALL THESE
CRIMES.
DID YOU TWO HAVE THAT
CONVERSATION.
UNLESS THAT OCCURRED, WHEN WOULD
MR. POOLE'S HAVE HAD THE
OPPORTUNITY DURING THE COURSE OF
THE TRIAL TO GET UP AND SAY, NO,
I DON'T WANT HIM DOING THIS?
>> I THINK MR. DEMICK IN THE--
MAY I JUST ANSWER THE QUESTION,
YOUR HONOR?
I'M SORRY.
MR. DEMICK ANSWERED THAT BELOW.
HE SAID MR. POOLE'S DIDN'T
OBJECT, JUMP UP AND DOWN
AND SAY NO.
AND THEN HE WENT AND GAVE HIS
ARGUMENT.
SO I THINK ON THESE FACTS IT IS
EASILY DISTINGUISHABLE FROM
McCOY, IT'S MUCH MORE LIKE
NIXON.
THE STATE ASKS THAT YOU REVERSE
THE LOWER COURT ORDER GRANTING A
NEW PENALTY PHASE BUT OTHERWISE
AFFIRM.
THANK YOU.
>> MAY IT PLEASE THE COURT, I
WOULD JUST MAKE ONE QUICK POINT
ON THE PRESERVATION ISSUE.
WHAT THE STATE IS ESSENTIALLY
ASKING IS FOR MR. POOLE'S TO
HAVE HAD THE FORESIGHT THAT
McCOY WAS GOING TO CHANGE THE
WAY THAT WE THINK ABOUT THESE
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIMS, SHIFTING IT
FROM A NIXON FRAMEWORK
TO A SIXTH AMENDMENT
AUTONOMY FRAMEWORK ALTOGETHER.
I DON'T THINK HE SHOULD HAVE
BEEN EXPECTED TO KNOW THAT GOING
INTO HIS MOTION OR ANYTIME
DURING THE PROCEEDING THAT HE

NEEDED TO REFRAME.
AND, AGAIN, THIS IS A TAILOR MADE RECORD FOR A McCOY CLAIM.
THERE IS NOTHING IN THIS RECORD-- IF YOU HAD GONE BACK TO THE START, I THINK, AND SAID, OKAY, WE HAVE McCOY NOW HOW WOULD WE MAKE A RECORD, YOU WOULD HAVE PRECISELY THE SAME EVIDENTIARY HEARING, YOU HAVE PRECISELY THE SAME ARGUMENTS ON BEHALF OF THE STATE.
AND THE ONLY THING THAT WOULD BE DIFFERENT, IN OUR VIEW, IS THAT McCOY WOULD HAVE COMPELLED THE TRIAL COURT HERE TO REVERSE ON ALL COUNTS.
>> WELL, YOU COULD HAVE AT LEAST MADE THE FACTUAL.
I MEAN, IT'S-- THE INITIAL MOTION WAS ARGUING ABOUT NOT EVEN SO MUCH THE CONCESSION AS THE WORDING, YOU KNOW, THE DIFFERENCE BETWEEN SAYING I ACKNOWLEDGE THAT I DID THESE ACTS VERSUS I ACKNOWLEDGE THAT, YOU KNOW, SUCH AND SUCH HAS BEEN PROVEN AS A MATTER OF LAW.
SO, I MEAN, PART OF IT MAYBE WOULD HAVE INVOLVED McCOY GIVING YOU THE LEGAL TOOLS TO BE ABLE TO ARTICULATE THE CLAIM, BUT THERE'S NOT EVEN A SENSE FACTUALLY IN THE MOTION THAT YOUR CLIENT WAS CLAIMING THAT, HEY, I OBJECTED TO THIS APPROACH, AND COUNSEL WENT AHEAD AND DID IT ANYWAY.
>> WELL, YOUR HONOR, I AGREE THAT THE MOTION IS NOT A MODEL OF CLARITY, BUT WHAT I WILL SAY--
>> IT ACTUALLY IS REALLY CLEAR.
I MEAN, THAT'S THE PROBLEM.
IF YOU CONTRAST THE INITIAL MOTION WITH THE CLOSING ARGUMENT, IT'S A STARK DIFFERENCE.
I MEAN, THE CLOSING ARGUMENT PRESENTS IT AS, IN FACT, TWO

SEPARATE ARGUMENTS EITHER OF
WHICH WOULD ALLOW YOU TO
PREVAIL.
IT'S PRETTY CLEAR IF YOU PUT
THEM SIDE BY SIDE THAT IN THE
FIRST ONE YOU'RE ONLY MAKING THE
ONE ARGUMENT ABOUT THE WAY THAT
IT WAS PHRASED.
>> WELL, YOUR HONOR, JUST VERY
QUICKLY, I WOULD AGAIN POINT TO
WHAT THE STATE DID HERE.
THERE WAS NO OBJECTION FROM THEM
SAYING THAT THIS CLAIM HAS
SHIFTED IN ANY WAY, SHAPE OR
FORM.
AND, AGAIN, IT WOULD BE EXTREME
FORMALISM TO SAY A FULLY
LITIGATED ISSUE WITH THE STATE
MAKING ALL THE ARGUMENTS IT
WANTED TO MAKE AND THE TRIAL
COURT RULING TO SAY THIS WAS NOT
TIMELY RAISED AND THAT THE COURT
WAS NOT FAIRLY APPRISED IN THIS
SITUATION.
THANK YOU.
>> THANK YOU.