MAY IT PLEASE THE COURT. MY NAME IS RACHEL FUGATE OF HOLLAND AND NIGHT, AND WE REPRESENT THE APPELLANT MARC JAMES ASAY. WE ARE HERE TO FILE A DENIAL OF THE LOWER COURT MOTION. THE LOWER COURT SUMMARILY DENIED MOST OF MR. ASAY'S CLAIMS. HOWEVER THE COURT DID CONDUCT AN EVIDENTIARY HEARING ON MR. ASAY'S DEFENSE CLAIMS. THERE ARE THREE ISSUES THAT I WOULD LIKE TO DISCUSS HERE TODAY. FIRST WHETHER MR. ASAY WAS DENIED REPRESENTATION DURING HIS PENALTY PHASE, WHEN COUNSEL FAILED TO UNCOVER EVIDENCE OF BRUTAL CHILDHOOD ABUSE. SECOND, WHETHER THE TRIAL JUDGE'S STATEMENTS EXHIBIT THAT HE WOULD SENTENCE MR. ASAY TO DEATH CONSTITUTE A JUDICIAL BIAS AND THIRD, WHETHER THE LOWER COURT SHOULD HAVE CONSIDERED EVIDENCE THAT THE STATE PRESENTED FALSE TESTIMONY OF A JAIL HOUSE CONFESSION AND HELPED THE INFORMANT FABRICATE THAT TESTIMONY.

ON THE THIRD CLAIM, IN ITS TWO VERSIONS IN WHICH IT WAS PLED IN THE ORIGINAL 3.850 AND THE AMENDED, AND THE FIRST ONE WAS ONLY A SKETCHY REFERENCE, AND THE SECOND THERE WAS A REFERENCE TO JILLIO AND BRADY.

YES, YOUR HONOR.

I TAKE IT THAT THERE HAS NEVER BEEN ASSERTED THAT THIS TESTIMONY, WHICH OTHERWISE COULD HAVE BEEN REFERRED TO AS RECANTED TESTIMONY, WAS NEWLY-DISCOVERED EVIDENCE.

NO. THE INITIAL 3.850 MOTION WAS FILED SEVEN MONTHS EARLY. THE COURT, THEN, GRANTED COLLATERAL COUNSEL LEAVE TO AMEND THAT MOTION. THE COURT NEVER ENTERTAINED ANY IDEA THAT THIS CLAIM WAS PROCEDURALLY BARRED, AND IN FACT, WHEN THE INITIAL 3.850 MOTION WAS FILED, COLLATERAL COUNSEL DID NOT HAVE THE STATE ATTORNEY FILES OR THE SHERIFF'S FILES IN THIS CASE, AND THE EXPRESS BRADY AND GIGGLIO CLAIM WAS SUBSEQUENTLY PLED, WHEN THE COURT ORDERED COLLATERAL COUNSTOLL AMEND THE INITIAL MOTION.

MY QUESTION IS IT HAS NEVER BEEN PLED AS A NEWLY-DISCOVERED EVIDENCE.

NO, YOUR HONOR, IT HAS NOT. MR. ASAY WAS DENIED EFFECTIVE REPRESENTATION AT HIS PENALTY PHASE. THE ONLY THING MR. ASAY'S PENALTY PHASE JURY KNEW ABOUT HIM WAS THAT HE HAD VOLUNTARILY CONSUMED ALCOHOL ON THE NIGHT IN QUESTION AND THAT HIS MOTHER THOUGHT HE WAS A GOOD AND HELPFUL BOY. THE JURY DID NOT KNOW THAT MR. ASAY WAS TORTURED EVERY DAY OF HIS LIFE. HIS STEPFATHER, HAIR, WOULD BRUTALLY BEAT HIM WITH A BELT, A TWO BY FOUR, OR WHATEVER HE COULD GET HIS HANDS ON.

HOW WOULD YOU CHARACTERIZE THE INFORMATION THAT WAS PROVIDED TO DR. VALLEY, ABOUT HIS BACKGROUND? WAS THAT TOTALLY INSUFFICIENT? DID THAT NOT GIVE A HINT? WOULD YOU SHARE A LITTLE BIT ABOUT THAT WITH US, HOW YOU VIEW THAT?

IN THERE VALET'S NOTES, HE INDICATED THAT-KNOW DR. VALET'S KNOWS, HE INDICATED THAT HE KNEW THAT MR. ASAY WAS ABUSED IN PRISON. CERTAINLY THIS DOES REFLECT ON THE CONDUCT OF MR. ASAY AND CERTAINLY WOULD HAVE PUT TRIAL COUNSEL ON NOTICE THAT THERE WAS A WEALTH OF MITIGATION EVIDENCE AVAILABLE. THE JURY DID NOT KNOW THAT MR. ASAY'S STEPFATHER, HARRY, PLACED A PADLOCK ON THE REFRIGERATOR AND WOULD COUNT THE PIECES OF BRED EVERY NIGHT, IF THE CHILDREN TOOK ONE PIECE OF BREAD WITHOUT PERMISSION, THEY WERE BEATEN. WHEN MARC WAS YOUNG AND HAD PROBLEMS

CONTROLLING HIS BOWELS, HARRY WOULD RUB HIS FACE IN HIS SOILED PANTS, FLUSH HIS HEAD DOWN THE TOILET AND THEN INFLICT A SEVERE BEATING. MARC ASAY'S MOTHER WAS NO BETTER. SHE, TOO, BRUTALLY ABUSED THE CHILDREN. HOWEVER, FOR THE FIRST MONTHS OF MARC ASAY'S LIFE, SHE REFUSED TO HOLD HIM OR CARE FOR HIM. WHEN MARC ASAY WAS 11 YEARS OLD, HE WAS PROSTITUTED TO OLDER MEN, SO THAT HE COULD GIVE HIS MOTHER THE MONEY. THE REASON THE JURY DID NOT KNOW THE WHO ARES ON THAT CONSTITUTED MARC ASAY'S LIFE, WAS BECAUSE, AT THE TIME OF MR. ASAY'S PENALTY PHASE, ALL TRIAL COUNSEL KNEW ABOUT HIS CHILDHOOD WAS, QUOTE, THAT HAD HAD NOT BEEN A GREAT ONE. IF TRIAL COUNSEL HAD DONE A COMPETENT INVESTIGATION IN THIS CASE, HE WOULD HAVE REVEALED A LITANY OF NONSTATUTORY MITIGATING CIRCUMSTANCES, SUCH AS PHYSICAL ABUSE, EMOTIONAL ABUSE, SEXUAL ABUSE, HUNGER, AND DEPRIVATION, GROWING UP IN AN IMPOVERISHED ENVIRONMENT AND AN EXTENSIVE HISTORY OF ALCOHOL, SUBSTANCE AND INHALANT ABUSE.

WHAT RESPONSIBILITY DOES THE DEFENDANT, HIMSELF, WHO, IN THIS CASE, IS A -- ALLEGED NOT TO BE MENTALLY INCOMPETENT OR INFORM, PLAY IN GIVE -- OR INFIRM, PLAY IN GIVING INFORMATION TO PENALTY-PHASE COUNSEL. IN THIS CASE WE HAVE A SITUATION WHERE THE DEFENSE LAWYER HIRED AN INVESTIGATOR, SPOKE WITH THE MOTHER, SPOKE WITH MR. ASAY. IS IT YOUR CONTENTION THAT AN ADEQUATE INVESTIGATION REQUIRES THAT YOU GO BEYOND AND SEARCH OUT OTHER SIBLINGS IN ALL CASES? BECAUSE THIS IS A SITUATION WHERE THIS IS STILL ALL SELF-REPORTED, AS TO THAT THESE WERE INCIDENTS THAT OCCURRED DURING THE CHILDHOOD. THEY ARE NOT REVEALED IN ANY MEDICAL RECORDS OR PSYCHIATRIC RECORDS OR ANYTHING, IN SCHOOL RECORDS, ANYTHING LIKE THAT?

AT THE EVIDENTIARY HEARING, ALL OF THE SIBLINGS TESTIFIED ABOUT THESE HORRORS.

BUT THEY ARE NOT DOCUMENTED IN ANY RECORDS.

THERE ARE SOME MENTAL HEALTH RECORDS OF OTTO ASAY, MARC'S BIOLOGICAL FATHER, STATING THAT WHEN MARC WAS IN THE HOUSEHOLD, THAT OTTO ASAY WAS SEVERELY PSYCH ON THE NICK BEATING HIS CHILDREN, SO THEY WERE IN THOSE RECORDS, BUT ESPECIALLY TRIAL COUNSEL SHOULD BE ON NOTICE THAT THERE IS THIS ABUSE, BECAUSE MR. ASAY DID CONVEY TO. HE SHOULD AT LEAST TALK TO A SINGLE OTHER SIBLING. THE ONLY PERSON THEY TALKED TO IN THIS CASE WAS MR. ASAY'S MOTHER, WHO WAS ONE OF THE PRIME ABUSERS?

IS IT DOCTOR VALLELA?

I AM NOT SURE HOW IT IS PRONOUNCED.

HE INDICATED, IN THE REPORTS, ALTHOUGH NOT THE EXTENT, ABOUT ABUSE. WHAT WAS THE PENALTY-PHASE COUNSEL'S TESTIMONY, AS TO WHAT HE DECIDED OR WHY HE DECIDED NOT TO PURSUE THAT ASPECT OF HIS CLIENT'S PAST?

HE HAD NO REASON FOR NOT PURSUING EVIDENCE OF MR. ASAY'S CHILDHOOD ABUSE. HE ADMITED THAT THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING AND ALLEGED IN MR. ASAY'S 3.850 MOTION, WAS RELEVANT TO THE PENALTY PHASE. HE HAD NO STRATEGIC DECISION FOR NOT FAILING TO PURSUE THIS TESTIMONY. HE TESTIFIED THAT HE BASICALLY JUST TURNED THIS CASE OVER TO HIS INVESTIGATOR AND COULDN'T EVEN REALLY REMEMBER WHAT INVESTIGATION WAS DONE.

SO DID HE TESTIFY AT THE EVIDENTIARY HEARING THAT, IF HE HAD HAD THIS INFORMATION, THAT HE WOULD HAVE PUT IT ON IN THE PENALTY PHASE, OR WAS THERE, ALSO, A QUESTION OF THE SECOND PRONG OF STRICKLAND, AS TO WHETHER THIS EVIDENCE HAD SORT OF A DOUBLE-EDGED SWORD, ESPECIALLY IN LIGHT OF ALL OF THE INCIDENTS IN PRISON THAT MIGHT HAVE BEEN VERY HARMFUL TO MR. ASAY'S CASE?

TRIAL COUNSEL DID TESTIFY THAT HE THOUGHT THE EVIDENCE WAS A DOUBLE-EDGED SWORD AND THAT HE WAS AFRAID IT WOULD OPEN DOORS, BUT THE KEY TO THIS DECISION IS, AT THE TIME OF MR. ASAY'S PENALTY PHASE, HE DID NOT KNOW THE INFORMATION EXISTED. HE HAD A DUTY TO INDEPENDENTLY INVESTIGATE AND EVALUATE THIS MITIGATION EVIDENCE. THERE CAN BE NO STRATEGIC DECISION ATTRIBUTED TO THIS FAILING, BECAUSE WHEN AN ATTORNEY FAILS TO INVESTIGATE, THEY CANNOT MAKE A REASONABLE DECISION BETWEEN HIS OR HER OPTIONS. THERE WAS NO STRATEGIC DECISION IN THIS CASE, BECAUSE THE DECISION, AT THE TIME OF MR. ASAY'S PENALTY PHASE, WAS SIMPLY NEVER MADE, AND WHILE TRIAL COUNSEL MAY HAVE BEEN AFRAID THAT IT WOULD HAVE OPENED DOORS, HIS DUTY, AT THE TIME OF MR. ASAY'S TRIAL, WAS TO GO THROUGH THOSE DOORS AND SEE WHAT WAS ON THE OTHER SIDE.

YOU ARE SAYING HE DIDN'T TESTIFY THAT HE QUESTIONED ASAY ABOUT THIS ISSUE? OR HE DIDN'T QUESTION ASAY'S MOTHER ABOUT THE ISSUE, OR HE DIDN'T DIRECT THE INVESTIGATOR TO LOOK INTO THIS ISSUE?

HE BASICALLY --

HELP ME WITH THAT, WITH REFERENCE TO WHAT THE LAWYER'S TESTIMONY WAS AT THE EVIDENTIARY HEARING.

TRIAL COUNSEL DID NOT REMEMBER EXACTLY WHO HAD TALKED TO OR WHAT THE PURPOSE OF IT WAS. HE TESTIFIED THAT HE BASICALLY JUST TURNED THIS CASE OVER TO HIS INVESTIGATOR. HE HAD NEVER TRIED A PENALTY PHASE AT THAT TIME, AND HE DIDN'T REMEMBER IF HIS INVESTIGATOR TALKED TO ANY OTHER WITNESS BESIDES MARC ASAY'S MOTHER, AND HE REALLY COULD NOT REMEMBER, AT THE TIME OF THE EVIDENTIARY HEARING.

WAS HIS ATTENTION CALLED TO THE STATEMENT, IN THE DOCTOR'S REPORT, ABOUT THE CHILDHOOD ABUSE?

WELL, WITH THE REPORT, HE TESTIFIED THAT HE ASSUMED THAT HE HAD HAD THE REPORT AT THE TIME OF TRIAL, BUT HE COULD NOT SPECIFICALLY REMEMBER IF HE HAD HAD IT. HE REVIEWED THE REPORT 15 MINUTES BEFORE TESTIFYING. HE, ALSO, CANNOT REMEMBER IF HE HAD HAD DR. VALELA'S NOTES, THAT WERE PROVIDED WITH THE REPORT, AND HE HAD TO, IN THIS CASE, HAVE RECEIVED THAT REPORT DIRECTLY FROM DR. VALLELA, BECAUSE THAT REPORT WAS NOT CONTAINED WITHIN THE FILES AT THAT TIME. IF TRIAL COUNSEL HAD EVEN CONTACTED DR. VALELA, WHICH HE TESTIFIED THAT HE DIDN'T EVEN CALL HIM, AND IF HE WOULD HAVE CONTACTED HIM, HE WOULD HAVE HAD EVIDENCE AND BE PUT ON NOTICE THAT THERE IS EVIDENCE OF CHILDHOOD ABUSE, AND HE SHOULD GOAT OUT AND TALK TO -- GO OUT AND TALK TO ONE OTHER SIBLING IN THIS CASE, AND IN FACT TINA LOGAN, MARC ASAY'S SISTER, TESTIFIED THAT SHE ATTEMPTED TO CONTACT HIM DURING THE TRIAL AND THAT HE WOULD NOT RETURN HER CALL.

MR. ASAY TESTIFIED, AND THE TRIAL JUDGE MADE A DECISION THAT, BASED UPON THE TESTIMONY, THAT WHAT MR. DAVID'S DECISION WAS, WAS A REASONABLE DECISION. IS THAT CORRECT?

THAT IS WHAT THE TRIAL COURT FOUND, BUT, AGAIN, THE TRIAL COURT OVERLOOKED THE FACT THAT, AT THE TIME OF TRIAL, THE DECISION WAS SIMPLY NOT MADE. THERE CAN BE NO STRATEGIC DECISION, BECAUSE MR. DAVID DID NOT KNOW ANY OF THIS INFORMATION EXISTED AT THE TIME OF THE TRIAL. HE NEVER MADE THIS DECISION WHEN IT WAS APPROPRIATE.

WOULD YOU AGREE THAT, FOR PURPOSES OF OUR REVIEW, THE TRIAL COURT'S DETERMINATION IS, AS TO THE TESTIMONY THAT WAS GIVEN BY MR. DAVID, HIM, WHETHER THERE WAS A REASONABLE BASIS, UNDER THE EVIDENCE, TO COME TO THE CONCLUSION OF WHETHER IT IS

COMPETENT AND SUBSTANTIAL EVIDENCE?

IT IS A MIXED CONCLUSION OF LAW, AS A MATTER OF FACT, AND THEREFORE DOES NOT RECEIVE THE DE NOVO REVIEW. THIS IS NOT A CONTROVERSIAL FINDING BY A LOWER COURT. THIS IS THE FINDING OF WHETHER IT WAS REASONABLE. THE DECISION WAS MADE. TRIAL COURT DID NOT KNOW IT PIECE KPISTED, SO THE TRIAL COUNSEL COULD NOT REASONABLY MAKE THE DECISION WHETHER IT WOULD OPEN MORE DOORS OR DO MORE HARM THAN GOOD.

WHAT WAS WITH REFERENCE TO THE CLAIM OF TRIAL COUNSEL'S MISCONDUCT?

THE TRIAL COURT VIRTUALLY IGNORED THE FACT THAT, AT THE TIME OF THE PENALTY PHASE, MR. DAVID DID NOT KNOW THE INFORMATION EXISTED. THEY JUST RELIED ON THE FACT THAT, YEARS LATER, WHEN PRESENTED WITH THIS INFORMATION, MR. DAVID CAME IN AND TESTIFIED I MIGHT NOT HAVE PRESENTED THAT. THAT IS WHAT THE COURT RELIED ON. IF MR. DAVID HAD INVESTIGATED AND HAD UNCOVERED THIS INFORMATION, HE MAY NOT HAVE ACTUALLY BEEN OBLIGATED TO PRESENT, IF, AFTER HE EVALUATED THE INFORMATION, CONCLUDED THAT IT WOULD DO MORE HARM THAN GOOD.

ISN'T THAT, THEN, SO LET'S ASSUME THAT WE LOOK AT IT, AND WE REALIZE, MY GOODNESS, OF COURSE HE SHOULD HAVE INVESTIGATED THIS, AND NO REASONABLE, MINIMALLY REASONABLY COMPETENT LAWYER WOULD NOT HAVE PURSUED THIS AND TALKED TO SIBLINGS, THEN WE STILL HAVE TO ADDRESS, THOUGH, THE SECOND PRONG OF STRICKLAND, WHICH IS DID IT UNDERMINE THE RELIABILITY OF THE PENALTY PHASE, AND COULD YOU JUST BRIEFLY ADDRESS THAT? I KNOW YOU HAVE TWO OTHER POINTS, AND I AM ESPECIALLY INTERESTED IN YOU TALKING ABOUT THE GROSS TESTIMONY ISSUE.

VERY QUICKLY, THE ONLY THING THE JURY KNEW ABOUT HIM WAS THAT HIS MOTHER THOUGHT HE WAS A GOOD BOY AND THAT HE HAD VOLUNTARILY CONSUMED ALCOHOL ON THE NIGHT IN QUESTION. WITH THAT LIMITED AMOUNT OF TESTIMONY, THE JURY RETURNED A 9 TO 3 DEATH RECOMMENDATION ON BOTH COUNTS. AT THE EVIDENTIARY HEARING, COLLATERAL COUNSEL PRESENTED EXTENSIVE EVIDENCE OF BRUTAL ABUSE. THE TRIAL COUNSEL ESTABLISHED THAT MR. ASAY WAS TORTURED FROM THE TIME HE ENTERED THIS WORLD UP UNTIL THE TIME THAT HE COMMITTED THIS CRIME. IT WOULD NOT HAVE BEEN IGNORED BY THE JURY. THE JURY HAD VERY LITTLE INFORMATION IN FRONT OF IT, WHEN THEY SENTENCED MR. ASAY TO DEATH, AND ALL THEY NEEDED AT THAT TIME WERE THREE ADDITIONAL JURORS.

WE HAVE VERY LITTLE TIME. WOULD YOU TURN TO THOSE OTHER ISSUES.

YES, YOUR HONOR. JUDGE HADDOCK SHOULD NOT HAVE BEEN PRESIDING OVER MR. ASAY'S CASE. JUDGE HADDOCK WAS, IN FACT, BIASED AGAINST MR. ASAY IN THE TRIAL AND POST-CONVICTION PROCEEDINGS.

YOU HAVE TO ESTABLISH BIAS, BECAUSE NO MOTION FOR RECUSAL WAS TIMELY FILED.

WE FILED A MOTION FOR RECUSAL, WHICH JUDGE HADDOCK CLAIMED WAS INSUFFICIENT. RECENTLY THIS COURT STATED THAT, BECAUSE THE JUDGE RULED ON THE MERITS AND REFUSED AND HELD IT UNTIMELY, THAT BECAUSE OF THAT, ANY OBJECTION WAS HELD UNTIMELY MOVED, SO JUDGE HADDOCK HELD ON THE MERITS OF THE CASE, ON THE MOTION TO RECUSE. IT WAS UNTIMELY AND THEREFORE IT WAS MOOT. THE MOTION TO RECUSE WAS LEGALLY STATED. JUDGE HADDOCK STATED, DURING JURY SELECTION, AFTER A PROSPECTIVE JUROR STATED THAT NOTHING COULD MITIGATE PREMEDITATED MURDER, JUDGE HADDOCK STATED THAT WHAT I THINK WE OUGHT TO DO IS LET HIM OFF THE JURY BUT PUT HIM ON THE SUPREME COURT. JUDGE HADDOCK LATER REITERATED HIS BIAS, WHEN HE STATED THAT THE FIRST DISTRICT COURT OF APPEALS WOULD NOT HEAR AN APPEAL ON THIS CASE, IF THERE IS A CONVICTION OF FIRST-DEGREE MURDER. THAT STATEMENT WAS MADE BEFORE THE STATE RESTED ITS CASE AND

BEFORE TRIAL COUNSEL HAD THE ABILITY TO PRESENT ANY CIRCUMSTANCES THAT MIGHT MITIGATE AGAINST A DEATH SENTENCE, AND MR. ASAY'S FEAR THAT HE WOULD NOT RECEIVE A FULL AND FAIR HEARING WAS TRUE, WHEN THE COURT REFUSED TO CONSIDER EVIDENCE THAT THE STATE EXTORTED TESTIMONY FROM THOMAS GROSS OF AN ALLEGED JAIL HOUSE CONFESSION BY MR. ASAY AND THAT THE STATE ATTORNEY HELPED HIM FABRICATE THIS TESTIMONY AND WOULD COACH THE TESTIMONY TO MAKE IT MORE DAMAGING AND INFLAMMATORY, EVEN THOUGH HE KNEW THE TESTIMONY WAS FALSE.

YOU ARE INTO YOUR REBUTTAL TIME. YOU CAN USE IT AS YOU DESIRE.

THANK YOU, YOUR HONOR. I WILL RESERVE THE RIGHT.

MAY IT PLEASE THE COURT. RICH ADD MARTELL ON BEHALF OF THE -- RICHARD MARTELL, ON BEHALF THE STATE OF FLORIDA. I WANT TO ADDRESS THE TIMELINESS ISSUE. IN 3.850, WHICH IS ALLEGED IN 1983, THERE IS NOTHING THAT BRADY SUGGESTS, NOWHERE, SO IT IS NOT IT STARTS WITH A SEED AND THE SEED GETS BIGGER. IT STARTS WITH AN ABS, AND ALL WE GET IS A FRAGMENT AREA SENTENCE, WHICH IS ADD TO A CLAIM, WHICH MAKES IT LOOK LIKE AN ADDED CLAIM AND NOT STATE SUPPRESSION OF EVIDENCE.

IS THE NOVEMBER OF '93 AMENDED MOTION, IT WAS THE ONE THAT THE JUDGE GRANTED LEAVE FOR THEM TO AMEND TO FILE?

HE GRANTED LEAVE, BASED ON THE PUBLIC RECORDS. IT HAS NEVER BEEN STATED THAT THE GROSS CLAIM --

YOU DIDN'T AT THAT POINT SAY, WELL, THIS PART IS UNTIMELY. WHAT YOU ARE SAYING IS IT WAS SO INSUFFICIENTLY PLED THAT JUST BY ADDING A SENTENCE, IT DIDN'T EVEN PUT THE STATE ON NOTICE.

BY THE TIME THAT WE WERE ON NOTE ACE THAT IT INVOLVED THOMAS GROSS, WHICH WAS TWO AND-A-HALF YEARS LATER, ON THE FIRST DAY OF THE EVIDENTIARY HEARING, WE ASSERTED THAT IT WAS TIME BARRED.

ISN'T THE FACT THAT THE ACTUAL RECORD TESTIMONY OF MR. GROSS, RECORD 744-59, ENOUGH NOTICE AS TO THAT THEY WERE TALKING ABOUT MR. GROSS?

WELL, THOSE RECORD CITES ARE THERE. I CAN SEE THAT. IT IS A 100-PAGE-PLUS MOTION. THERE IS A CLAIM WHICH IS TITLED BRADY AND JOVELL, WHICH HAS NOTHING IN IT. I DON'T THINK HAVING A CLAIM STATING THAT THE PROSECUTOR'S COMMENTS RELEGATEED MR. ASAY'S DEATH SENTENCE FUNDAMENTALLY UNFAIR, AS TO THE DEATH SENTENCE, I WILL GET BACK TO THAT. FIRST, TURNING TO THE INEFFECTIVENESS OF COUNSEL IN THE PENALTY PHASE. COUNSEL HAS PRESENTED YOU WITH SOME MATTERS THAT WERE NOT PRESENTED AT THE EVIDENTIARY HEARING AND WERE OF NOTE. MR. ASAY AND HIS MOTHER WERE EXTREMELY UNCOOPERATIVE. HE DID NOT SIMPLY FLING THE FILE AT THE INVESTIGATOR AND SAY GO FIND SOMETHING. MR. ASAY AND HIS MOTHER DID NOT HELP THEM. THERE IS TESTIMONY THAT THE INVESTIGATOR CALLED MR. ASAY'S MOTHER, IN ORDER TO OBTAIN BACKGROUND INFORMATION, AND SHE PRETENDED TO BE HIS AUNT, AND SHE AND MR. ASAY LAUGHED ABOUT THAT, BECAUSE THEY THOUGHT IT WAS REALLY SMART TO TRY TO FOOL THE DEFENSE INVESTIGATOR. THIS THIS WAS NOT AARON EWAN A CIRCUMSTANCE IN WHICH THE COUNSEL ABANDONED HIS CLIENT. HE TRIED TO GET INFORMATION FROM THIS CLIENT. HIS CLIENT GAVE HIM ABSOLUTELY NO HINT THAT THIS EVIDENCE EXISTED OR ENCOURAGED HIM TO PURSUE IT. NOW, AS FAR AS WHAT DR. VALLELA KNEW --

DID THAT EVIDENCE COME IN THROUGH THE TESTIMONY OF THE INVESTIGATOR OR HOW DID THAT COME IN?

THERE MR. DAVID'S INVESTIGATOR. MR. DAVID DID NOT TESTIFY FOR EITHER SIDE.

SO THROUGH THE LAWYER'S TESTIMONY?

CORRECT. AND DID THE LAWYER REPORT THAT THE INVESTIGATOR REPORTED BACK TO HIM?

CORRECT. ALL RIGHT. DR. VALELA'S NOTES INDICATE THAT MR. ASAY TOLD HIM THAT HE HAD BEEN PHYSICALLY ABUSED, BRUTALLY BEATEN, AND HIS HIS OLDER BROTHER JOSEPH, WHO, INCIDENTALLY IS ONE OF THE CHARACTERESS AT THIS EVIDENTIARY HEARING, COMMITTED SEXUAL ASSAULT. THAT PROVES THAT MR. ASAY COULD HAVE, ALSO, TOLD ANYONE ELSE ABOUT THAT, BUT IT ALSO PROVES THAT DOCTOR VALLELA, THAT IS GOING TO BE MY PRONUNCIATION, DID NOT INDUCE A FAVORABLE MEDICAL REPORT. TO BACKTRACK JUST A MINUTE. MR. DAVID WAS NOT THE FIRST ATTORNEY IN THIS CASE. THERE WAS A MAN NAMED BEZELL, WHO WAS THE ONE THAT MR. ASAY HAD ORIGINALLY RETAINED, AND ONE OF THE THINGS THAT HE HAD ACCESS TO IN THE INVESTIGATION REPORT WERE THE NOTES THAT MR. BEZELL HAD WHEN HE TALKED TO FAMILY MEMBERS, AND WHEN HE TALKED TO ASAY'S MOTHER, SHE TOLD HIM THAT MR. ASAY HAD AN EXPLOSIVE PERSONALITY PROBLEM HARKS THAT HE HAD HAD EXTENSIVE PROBLEMS IN SCHOOL AND THAT HE HAD HAD EXTENSIVE PROBLEMS IN PRISON, AND DAVID TESTIFIES AT THE HEARING, AND IT IS UNCONTRADICTED THAT HE HAD ACCESS TO THAT INFORMATION. THAT IS NOT MAKING AM NOT LIKELY THAT HE WOULD REFUSE TO REVIEW ADDITIONAL INFORMATION IF HE COULD GET IT.

YOU SAY THAT HE HAD ACCESS TO SCHOOL RECORDS AND PRISON RECORDS OR WHATEVER, OR HE HAD ACCESS TO THE NOTES OF THE PREVIOUS ATTORNEY?

HE HAD ACCESS TO THE NOTES OF THE PREVIOUS ATTORNEY, ALTHOUGH IN THIS HEARING WE DO HAVE THE SCHOOL RECORDS OR AT LEAST SOME OF THEM, AND WE DO HAVE THE PRISON RECORDS, AND THEY BEAR THAT OUT SUBSTANTIALLY. HE HAD 16 DISCIPLINARY REPORTS.

DID THE ATTORNEY GET THE SCHOOL RECORDS AND THE PRISON RECORDS? IN OTHER WORDS WAS THE ATTORNEY DAVID FAMILIAR WITH THOSE RECORDS? IN HIS EARLIER INVESTIGATION.

I DON'T THINK HE HAD THE SCHOOL RECORDS. I AM NOT 100% SURE ABOUT THE PRISON RECORDS, BUT HE HAD DISCUSSED, WITH ASAY, HIS INCARCERATION, AND ASAY HAD, ALSO, DISCUSSED WITH VALLELA WHAT HAD GONE ON IN PRISON.

DID THE LAWYER GIVE HIM MORE A MORE EXPLICIT EXPLAIN -- DID THE LAWYER GIVE A MORE EXPLICIT EXPLANATION AS TO SAYING WHY HE DID NOT EXPLORE ANY FURTHER THE BACKGROUND OF CHILD ABUSE OR THE PRISON CONDITIONS? IN OTHER WORDS WHEN HE TESTIFIED HERE, YOUR OPPONENT SAYS THAT HE, IN ESSENCE, SAID, EITHER, I DON'T REMEMBER OR, KNOW, ALL I DID WAS WHAT SHOWS UP ON THE RECORD. DID HE TESTIFY MORE EXPLICITLY IN HIS OWN DEFENSE, THAT HE DID DO MORE?

HE DIDN'T REMEMBER A LOT OF THINGS, AND THAT WAS PARTLY BECAUSE THE EVIDENTIARY HEARING DIDN'T HAPPEN UNTIL TWO AND-A-HALF YEARS AFTER THE MOTION WAS FILED, AND HE HAD NOT HAD ACCESS TO HIS FILES DURING THAT PERIOD OF TIME, BUT I THINK THE BOTTOM LINE TO, THIS AND I AM GOING TO PUT A LOT OF EMPHASIS ON SOMETHING THAT COUNSEL JUST SAID, BECAUSE SHE JUST SAID THAT, IF COUNSEL, THAT IT WOULD BE PERMISSIBLE FOR DAVID TO HAVE SAID, AFTER HE HAS REVIEWED THIS STUFF, THAT ONCE HE HAS SEEN IT, HE WOULDN'T HAVE PURSUED IT. WELL, IF SHE AGREES WITH THAT, THEN SHE HAS LOST THE FIRST PRONG OF STRICKLAND, NOT JUST SECOND PRONG OF STRICKLAND BUT THE FIRST PRONG OF STRICKLAND. STRICKLAND SAYS WE ARE NOT THERE TO GRADE COUNSEL'S PERFORMANCE. WE ARE THE ON-WE ARE NOT THERE TO SAY WHETHER COUNSEL SHOULD OR SHOULDN'T HAVE DONE THIS BUT IN FINDING WHETHER OR NOT EVERY REASONABLE COUNSEL WOULD HAVE FAILED TO DO THIS, AND

UNLESS SHE CAN DEMONSTRATE THAT EVERY COUNSEL WOULD HAVE FAILED TO DO THIS, SHE IS PUTTING --

AREN'T THERE CASES THAT SAY THAT THE LAWYER RESPECT, FIRST OF ALL, HAS A FUNDAMENTAL OBLIGATION TO INVESTIGATE. YOU HAVE GOT TO KNOW WHAT IS OUT THERE, BEFORE YOU CAN MAKE ANY STRATEGIC DECISIONS ABOUT WHAT TO DO, SO WHAT DOES THE RECORD TELL US ABOUT THIS ISSUE OF INVESTIGATING OR NOT INVESTIGATING?

WELL, BUT, THE WAY I READ STRICKLAND AND THE WAY THE 11 CIRCUIT PRECEDENCE RECITED IN OUR BRIEF READING, IS THE FIRST PRONG, SO FRANKLY I AM NOT ALL THAT INTERESTED IN WHAT MR. DAVID DID OR DIDN'T DO OR COULD OR COULD NOT DECIDE.

DOESN'T CASE LAW SAY THAT FUND A.M. LAW SAYS THAT COUNSEL HAS AN OBLIGATION TO INVESTIGATE?

I AM -- A FUNDAMENTAL LAW SAYS THAT COUNSEL HAS AN OBLIGATION TO INVESTIGATE?

UNLESS YOU CROSS THIS THRESHOLD, YOU DON'T GET ANYWHERE ELSE.

LET'S DEAL WITH THE ISSUE OF INVESTIGATION FIRST. WHAT DOES CASE LAW TELLS US ABOUT WHETHER OR NOT THERE IS A OBLIGATION, ON THE PART OF COUNSEL, IN PREPARING FOR A PENALTY PHASE IN A DEATH CASE, HAS AN OBLIGATION TO INVESTIGATE?

HE DID AND HE MET THAT OBLIGATION HERE.

IF CASE LAW TELLS US THAT THERE IS AN OBLIGATION, AND IN THIS CASE YOU ARE TELLING US THAT THE RECORD SUPPORTS THAT HE DID FULFILL THAT OBLIGATION.

STRICKLAND TELLS US THAT HIS COUNSEL'S DUTIES ARE IMPACTED ABOUT WHAT HIS CLIENT DID OR DIDN'T TELL HIM. IN THIS CASE CLIENT DIDN'T TELL HIM ANYTHING WHICH WOULD HAVE LED TO INFORMATION. HE HAD AN INVESTIGATOR. HE SENT THE INVESTIGATOR TO TALK TO THE FAMILY. HE HAD THE NOTES OF THE PREDECESSOR COUNSEL. NONE OF THIS STUFF LED IT TO HIM. HE PERFORMED A REASONABLE INVESTIGATION, UNDER THE CIRCUMSTANCES. REASONABLE COUNSEL, BEING CHARGED WITH WHAT HE IS HAVING DONE, WOULD NOT HAVE ADMITTED THIS EVIDENCE. THERE IS NO SHOWING THAT IT WOULD HAVE BEEN CONSTITUTIONALLY REQUIRED TO DO THAT. THIS IS A PARTICULARLY HEINOUS DOUBLE RACIST HOMICIDE. NOW, MR. ASAY PROBABLY HAD A REALLY CRAPPY GROWING UP. I CAN'T DISPUTE THAT, BECAUSE, YOU KNOW, WHAT HAPPENS, WE DON'T HAVE ANY STATE WITNESS WHO WAS PRESENT IN THIS HOUSEHOLD WHO CAN SAY WHETHER OR NOT THE STEPFATHER DID THAT OR THIS PERSON DID THAT, BUT THAT DOESN'T MITIGATE THESE CRIMES. HE IS OUT --

WOULDN'T THERE BE SOMETHING LIKE AT LEAST AT RULE OF THUMB THAT THE WORSE THE CRIME, AND CERTAINLY AS YOU POINTED OUT THIS IS ONE OF THE WORST OF CIRCUMSTANCES, TALKING ABOUT TWO DEATHS, HERE, ARE WE NOT, IN THE EGREGIOUS CIRCUMSTANCES.

CORRECT.

BUT WOULDN'T THERE BE A RULE OF THUMB, IF THERE IS GOING TO BE A RULE OF THUMB, THAT THE WORSE OFFENSE, THE GREATER THE OBLIGATION TO INVESTIGATE AND LOOK FOR POTENTIAL MITIGATION? WOULD THAT MAKE SENSE?

I AM NOT SURE WHAT THE OBLIGATION OF --

IF I UNDERSTOOD YOUR POSITION THERE, YOU ARE NOT SUGGESTING THAT, BECAUSE THIS IS ONE OF THE WORST, THAT THERE FOR THAT DIMINISHED THE LAWYER'S OBLIGATION TO

INVESTIGATOR ARE YOU?

NO, SIR, I AM NOT. WHAT I WAS GOING TO SAY IS THAT THE ELEVENTH CIRCUIT HAS HELD, WHEN CONSTRUING FLORIDA DEATH CASES, THAT THERE ARE SOME CRIMES CRIMES WHICH, BY THEIR NATURE, SIMPLY CAN'T BE MITIGATED.

IS THAT WHAT YOU ARE SAYING? IN OTHER WORDS THAT THIS CRIME OR THESE CRIMES -- THERE WAS TWO OF THEM -- WERE SO BAD THAT, IN ESSENCE, THE LAWYER SHOULD THROW UP HIS HANDS AND SAY THESE ARE SO BAD THAT I SHOULD NOT DO ANY INVESTIGATION? BECAUSE THERE IS NOTHING THAT I COULD DISCOVER, NO MATTER HOW BAD THE CHILDHOOD OR WHATEVER CIRCUMSTANCES WERE. I WOULD NEVER BE ABLE TO CONVINCE A REASONABLE JURY TO MITIGATE THESE TWO EGREGIOUS CRIMES?

NO. I AM NOT SAYING THAT. I AM SAYING ANY COMPETENT ATTORNEY IN HIS POSITION FACES AN UPHILL BATTLE, AND THAT THEY HAVEN'T SHOWN, EITHER PRONG, THAT STRICKLAND HAS BEEN SATISFIED IN THIS CASE, GIVEN THE NATURE OF THE HOMICIDE. I AM SAYING THE FRUITFUL ARGUMENT HERE WOULD NOT HAVE BEEN CHILD ABUSE BUT ANY MENTAL DEFECT THAT COULD HAVE BEEN FOUND. HE PURSUED MENTAL LIT MYTHGATION AND GETS A DEVASTATING REPORT. HE DOESN'T FIND ANYTHING. NO PROBLEMS, NO BRAIN PROBLEMS, NO PSYCHOSIS, BUT FINDS HE IS MANIPULATIVE, DECEPTIVE AND LYING. SO, AGAIN, HE HIT A DEAD END. THE PEOPLE THEY PUT ON IN THE CHRAT RAM PROCEEDING WERE TOTE -- IN THE COLLATERAL PROCEEDING WERE TOTALLY UNPERSUASIVE. THIS DEATH SENTENCE REMAINS RELIABLE. THIS DEFENSE COUNSEL DID THE BEST WITH WHAT HE HAD AND IT WASN'T VERY MUCH, WHICH IS NOT HIS PROBLEM IN THIS CASE. IT IS THE NATURE OF HIS CLIENT'S ACTIONS, WHICH HAVE NEVER BEEN EXCUSED OR MITIGATED, DESPITE THE FACT THAT THEY HAD A HEARING BELOW ON THIS ISSUE. OKAY. AS TO THE OTHER TWO CLAIMS, THE RECUSAL, THE MATERS REMAIN TIME BARRED. I DON'T THINK QUINCE HOLDS THAT A JUDGE'S FAILURE TO EXPRESSLY CITE THAT IN HIS ORDER DENYING A MOTION FOR RECUSAL, BARS CONFIRM ANSWER ON THAT GROUND. SOMETHING RATHER CONFUSING ABOUT THIS CASE WAS WE HAVE TWO LEVELS OF RECUSAL, IN THE SENSE THAT WE HAVE A 3.850, WHICH SAYS I WAS DENIED A FAIR TRIAL BECAUSE THE STATEMENTS -- OF THE STATEMENTS THE JUDGE MADE DURING THE TRIAL. I WILL CALL THAT THE RETROACTIVE RECUSAL POINT. THEN WE HAVE ANOTHER CLAIM, IN THE 3.850, WHICH SAYS THAT THE JUDGE HADDOCK SHOULD RECUSE HIMSELF FROM THE POST-CONVICTION PROCEEDINGS, BECAUSE OF THE SAME STATEMENTS WHICH HE HAD MADE AT THE TIME OF TRIAL. IT IS OUR POSITION THAT, INCLUDING THAT CLAIM IN THE MOTION, WAS IMPROPER. OBVIOUSLY THESE MATTERS ARE BARRED. HOW CAN YOU REACH BACK TO 1988 STATEMENTS AS BASIS FOR RECUSAL IN A 1993 PROCEEDING? YOU CAN'T DO IT. THESE STATEMENTS, UNDER THIS COURT'S CASE LAW, THESE ARE INSUFFICIENT AND TIME BARRED. UNDER ARRIVER, ASTEIN HORST, STANO, AND ZIEGLER. AS TO THE GROSS CLAIM, THE JUDGE DID PROPERLY FIND THAT THAT MATTER WAS INSUFFICIENTLY PLED AS WELL AS PROCEDURALLY BARRED. THE STATE WAS NOT PROVIDED NOTICE THAT THERE WAS A VALID BRADY CLAIM, UNTIL THE MORNING OF THE EVIDENTIARY HEARING. AT THAT POINT IN TIME, DEFENSE COUNSEL ASSERTED COMPLETELY ERRONEOUSLY, THAT THE PROSECUTOR HAD TO BE DISQUALIFIED FROM THE ENTIRE PROCEEDING, WHEN, OF COURSE, THE PROSECUTOR IS A CRITICAL PLAYER IN ALL OF THIS.

LET ME ASK YOU A QUESTION.

COULD WE GO BACK TO --

SURE.

-- THE RECUSAL MOTION, AND IF I UNDERSTAND CORRECTLY, YOU JUST SAID THAT THERE IS NO WAY YOU CAN USE THE STATEMENTS MADE IN 1988 OR 1993 RECUSAL. IS THAT WHAT YOU SAID?

I SAMING THAT, IF YOU WANT TO ARGUE THAT HE CAN'T PRESIDE OVER THE PENDING

COLLATERAL PROCEEDING, YOU CAN'T BASE THAT ON 1988 STATEMENTS WHICH ARE NOT PART OF THE RECORD.

WHY AREN'T THOSEERLY KBRER -- WHY AREN'T THOSE EARLIER STATEMENTS INDICATIVE OF THE TRIAL JUDGE'S VIEW OF THIS CASE AND FIRST-DEGREE MURDER CASES, IN GENERAL, SUCH THAT, ONE MIGHT HAVE A REASONABLE BELIEF THAT, NO MATTER WHAT KIND OF EVIDENCE YOU PUT ON, AT A 3.850 HEARING, THAT THE JUDGE IS GOING TO BE PREDISPOSED TO DENY IT?

WELL, I GUESS I WILL AUGMENT MY ANSWER A LITTLE BIT. JUDGE HADDOCK HAD ALWAYS PRESIDED OVER THIS CASE. NOW, THE 3.850 IS FILED 18 MONTHS AFTER FINALITY OF THE CONVICTION AND SETS. THE MOTION TO RECUSE IS NOT FILED UNTIL 15 DAYS AFTER THE 3.850 HAS ALREADY BEEN ASSIGNED TO JUDGE HADDOCK, SO IT IS MY POSITION THAT THERE IS A NUMBER OF DIFFERENT TIME BARS, ONE OF THEM BEING IF, AS YOU SAY, THEY WISHED JUDGE HADDOCK NOT TO PRESIDE OVER THIS PROCEEDING, I STILL THINK THEY WAITED TOO LONG.

WHEN SHOULD THEY HAVE FILED IT?

THEY SHOULD HAVE FILED IT UPON APPOINTMENT IN THIS CASE.

EXCUSE ME?

UPON THEIR APPOINTMENT IN THIS CASE AS COLLATERAL COUNSEL.

AND AT THAT POINT, DID THEY KNOW THAT JUDGE HADDOCK WAS GOING TO BE PRESIDING OVER THE CASE?

WELL, I THINK IT HAS ALWAYS BEEN CLEAR THAT THIS COURT HAS THE PREFERENCE THAT THE SENTENCING JUDGE, IF AVAILABLE, WILL BE PRESIDING OVER THE CASE.

SO THEY WOULD KNOW THAT HE WOULD BE AVAILABLE?

WELL, THEY COULD DO A MOTION TO HAVE IT ASSIGNED TO ANOTHER JUDGE IN ADVANCE OF THIS, TO AVOID EXACTLY THIS SITUATION, AND IT IS IMPORTANT THAT THESE MATTERS ARE WITHIN THE TRIAL RECORD. THIS ISN'T SOMETHING WHICH ARISES THROUGH INVESTIGATION THAT THEY COULDN'T HAVE KNOWN ABOUT. THIS HAS ALWAYS BEEN IN THE APPELLATE RECORD. ONE READING OF THE APPELLATE RECORD GIVES YOU THIS BASIS, ASSUMING THAT YOU HAVE IT, AND I THINK THAT YOU CAN'T WAIT UNTIL YEARS HAVE PASSED WITHIN THE PROCESS, TO ASSERT IT FOR THE FIRST TIME.

DO YOU READ WILLOSEY AS SETTING UP THE TIME AS TEN DAYS AFTER THE DEFENDANT LEARNED THE ORIGINAL TRIAL JUDGE HAD BEEN APPOINTED TO PRESIDE OVER THE POST-CONVICTION PROCEEDINGS, OR IS THAT JUST DICT SNA..

-- DICTA?

WILLOSEY IS INDICATIVE OF THE TRIAL COURT, AND I THINK IF TRIAL COUNSEL IS OF KNOWLEDGE THAT THE ORIGINAL JUDGE IS STILL AVAILABLE, HE OR SHE WILL BE PROVIDING OVER OVER THE SENTENCING PROCEEDINGS AND AT SOME POINT IT SHOULD BE PROVIDED IN THE PROCEEDINGS. I DO NOT THINK THAT IT MEETS THE BAR WICK STANDARD. THE QUESTION ABOUT WHAT LAW APPLIES, WE HAVEN'T BEEN TOLD ABOUT THE CONTEXT OF THESE REMARKS. THE CONTEXT OF THAT REMARK COMES DURING A BENCH CONFERENCE ON AN ISSUE OF LAW, WHEN DEFENSE COUNSEL IS CITING FIRST DCA PRECEDENT AND THE JUDGE IS MORE OR LESS SAYING, BECAUSE THIS IS A CAPITAL PROSECUTION, FLORIDA SUPREME COURT GOVERNS THIS. THAT IS THE WAY I READ HIS REMARKS. OF COURSE TRIAL COUNSEL WAS THERE. HE DIDN'T TAKE OFFENSE AT EITHER ONE OF THESE REMARKS. I THINK THIS COURT CAN TAKE KNOWLEDGE OF

THE FACT THAT APPELLATE COUNSEL OFTEN RAISE ISSUES WHICH AREN'T PRESERVED. IN FACT THAT HAPPENED IN THIS APPEAL A NUMBER OF TIMES. TRIAL COUNSEL READ THIS RECORD AND FOUND NOTHING SEEMINGLY AWRY WITH THESE REMARKS. I DON'T THINK YOU HAVE CASES UNDONE BY THINGS WHICH STRIKE NO ONE AS OBJECTIONABLE UNTIL YOU HIT THE APPELLATE PROCESS. I THINK THAT WOULD BE A BAD RULE OF LAW AND WOULD NOT BE ONE WHICH WOULD LEAD TO IN JUST RESULTS WHEN THE TRUTH IS INVOLVED. THESE ARE LEGALLY INSUFFICIENT.

ON THE THIRD POINT, WHICH WAS WHAT YOU TALKED ABOUT, WHAT IS IN THE FIRST TWO MOTIONS, WHAT IS THE ROLE OF THE HUFF HEARING, AS FAR AS PUTTING STATE AND THE JUDGE ON NOTICE THAT THE CLAIM SPECIFICALLY IS A BRADY, GILLIO CLAIM?

AT THE HUFF HEARING, COUNSEL STATED, IN LEGALLY CONCLUSIONRY LANGUAGE, THAT FALLS TESTIMONY HAD BEEN PUT ON. THE PROSECUTOR ASKED REPEATEDLY FOR SPECIFICS AND SAID WILL YOU FLESH OUT YOUR ALLEGATIONS SO WE KNOW BECAUSE ARE TALKING ABOUT. DEFENSE COUNSEL SAYS I DON'T HAVE TO TELL YOU ANYTHING. THERE IS NO DISCOVERY IN POST-CONVICTION. YOU ARE TRYING TO STEAL MY WORK PRODUCT. IF YOU WANT TO KNOW WHAT I AM TALKING ABOUT, FILE A PUBLIC RECORDS DEMAND ON MY OFFICE. NOT REALLY SOMETHING THAT YOU WOULD WANT TO ENCOURAGE, SO THE STATE WAS NOT RECALCITRANT HERE. THE STATE GAVE MR. ASAY A HEARING ON THE CLAIMS THAT WE THOUGHT HONESTLY FELT MERITED A HEARING. WE DIDN'T KNOW ENOUGH ABOUT THE ISSUE AND WE ASKED FOR MORE INFORMATION AND WEREN'T TOLD ANYTHING.

WHAT IF, IN NOT MENTIONING SPECIFICALLY WHO THIS PERSON WAS, IN I CAN SAYING THAT THEY PUT ON GROSS TESTIMONY AND IT WAS FALSE. IS THAT ENOUGH?

IF HAD HE -- IF THEY HAD USED GROSS'S NAME, WE WOULD HAVE HAD THE ABILITY --

THERE WEREN'T A LOT OF WITNESSES IN THIS CASE, TO THE EXACT PLACE WHERE GROSS TESTIFIED. IT DIDN'T MAKE IT ANY SECRET AS TO WHICH WITNESS THEY WERE TALKING ABOUT.

WELL, IN MY COURSE OF DOING LITIGATION, I MEAN, I HAVE FOUND A LOT OF -- YOU HAVE TO READ A LOT OF PLEADINGS, AND OFTENTIMES A NUMBER OF TIMES BEFORE YOU FULLY UNDERSTAND WHAT THE CLAIM IS. WE MAY HAVE BEEN SOMEWHAT DERELICT IN NOT GOING TO THESE PAGE CITATIONS, BUT I HAVE NEVER KNOWN THIS COURT TO SAY IF YOU WANT US TO TELL US WHAT THE FACTS ARE, WE WILL GIVE YOU THE REPORT AND YOU CAN SEE WHAT IS ON THERE.

ONE, WAS IT LEGALLY INSUFFICIENT OR, TWO, WAS IT LEGALLY INSUFFICIENT? WHICH WAS IT?

WE HAVE A CIRCUMSTANCE HERE THAT WE ARE TRYING TO RESOLVE THIS CASE IN THE COURSE OF ONE PROCEEDING, WHICH THIS COURT HAS ENCOURAGED US TO DO. DEFENSE COUNSEL IS BROUGHT DOWN. HE IS SITTING IN THE COURTROOM. IS HE SITTING ON THE STAND. THEY WON'T CALL HIM. THEY WON'T ACTUALLY EXAMINE HIM. NOW, THE WAY THIS COMES ABOUT IS DEFENSE COUNSEL READS FROM A DOCUMENT THAT HE PURPORTS TO BE A DOCUMENT FROM GROSS. WE SAY CAN WE SEE IT? HE SAYS NO. WE SAY CAN WE INTRODUCE IT? HE SAYS NO. BECAUSE THEY KNOW THAT, IF THE AFFIDAVIT IS PASSED TWO YEARS, WE ARE GOING TO ARGUE THAT THIS IS BARRED, SO WE HAVE A SITUATION WHERE WE HAVE AN AVAILABLE WITNESS THAT COULD HAVE GIVEN A GREAT RECORD NOT ONLY FOR HADDOCK BUT FOR YOU, AND THEY WON'T --

BUT THIS IS ESTABLISHED THAT SAYS AS LONG AS THE GUY IS HERE, WE ARE HERE ON THE EVIDENTIARY HEARING, LET'S PRESENT THE GROSS, GIGGLIO CLAIM AND SEE WHAT IT IS.

HE IS ARGUING TO GIVE A COUNTERPROFFER RESPONSE THAT ALL OF THIS IS NOT TRUE. HE IS ARGUING THAT THIS WHOLE CASE IS GOING TO BE UNDONE, IF THE PROSECUTOR ISN'T THROWN OUT. HE IS ARGUING THAT HE NEEDS A YEAR AND-A-HALF'S WORTH OF EVERY CASE THAT THAT

PROSECUTOR -- EVERY PUBLIC RECORD --

ISN'T THAT THROWN OUT THOUGH?

THEY ARE ALL BALLED UP AS TO WHETHER HE CAN RAISE A VALID CLAIM OF REVERSAL FOR THOMAS GROSS, AND I THINK THE MOST HE CAN GET FOR THOMAS GROSS IS THE OPPORTUNITY FOR A HEARING, AND WE THINK HE HAD THE OPPORTUNITY FOR A HEARING AND HE PUNTED ON IT, BUT IF YOU WANT TO POINT DIRECTLY ON THE MERITS, HE CAN'T. A COMINGNIZEABLE. OF RELIEF, WHETHER IT IS BRADY, GIGGLIO, WHATEVER. THE STATE OFFERED TWO BITS OF TESTIMONY. HE SAID THAT ASAY CONFESSED TO HIM, WHICH IS ICING ON THE CAKE, BECAUSE WE NEVER HAD DIRECT EYEWITNESS TESTIMONY AS TO BOTH MURDERS, AND HE SAID THAT ASAY HE RAISED HIS TATTOOS, WHICH HAS NEVER BEEN DISPUTED, AND THE INMATE WHO PUT THE RACIST TATTOOS ON MR. ASAY WAS CALLED. SO MR. GROSS COULD DROP FROM THE FACE OF THE EARTH, AND IT WOULD NOT REFLECT RELIABILITY OF THIS CASE. NOW, THEY HAVE BEEN ARGUING CONSIES TENTLY SINCE -- CONSISTENTLY SINCE THE APPEAL THAT THE STATE INTRODUCED RACE IN PROSECUTION. THAT IS SIMPLY NOT TRUE, BECAUSE TOTALLY INDEPENDENTLY OF MR. GROSS, MR. ASAY MADE CONTEMPORANEOUS STATEMENTS OF RACIAL HATRED AT THE TIME THAT HE MURDERED BOTH OF THESE PEOPLE, WITHIN 20 MINUTES OF EACH OTHER IN DOWNTOWN JACKSONVILLE. NOW, THEY RAISE CLAIMS THAT TRIAL COUNSEL WAS INEFFECTIVE --

THE RED LIGHT WAS ON. WOULD YOU BRING YOUR ARGUMENT TO A CLOSE.

I WILL SUM UP VERY, VERY QUICKLY. THEY ARGUED THAT HE DIDN'T CROSS-EXAMINE THOSE WITNESSES ENOUGH TO SHAKE THEM. THEY DIDN'T CALL THOSE WITNESSES. THEY CALLED THE BROTHER FOR PURPOSES OF MITIGATION AND NEVER QUESTIONED HIM ON THAT AND NEVER CALLED THE I WITNESS, SO THAT TESTIMONY REMAINS UNAFFECTED AND THE DENIAL OF RELIEF SHOULD BE AFFIRMED. THANK YOU.

THANK YOU.

TRIAL COUNSEL WAS DEFICIENT IN THIS CASE. HE WAS ON NOTICE OF THE ABUSE. MARK ASAY MOTHER'S WAS THE ABUSER, AND MARK ASAY WAS THE ABUSED.

YOU WOULD AGREE THAT THE ELEVENTH CIRCUIT, IN BOTH SIMS AND -- VERSUS SINGLETARY, WHICH CAME OUT IN '98, AND MORE RECENTLY IN GLOCK VERSUS MOORE, HAS STATED THAT THE LACK OF COOPERATION BY THE DEFENDANT WAS A KEY FACTOR IN EVALUATING THE REASONABLENESS OF COUNSEL.

YES, YOUR HONOR. TRIAL COUNSEL ADMITTED THAT, TOWARDS LATER IN THE PROCEEDINGS, THAT MARC ASAY DID BECOME MORE COOPERATIVE AND SO DID THE MOTHER, AND HE, IN FACT, DID PUT THE MOTHER ON THE STAND TO TESTIFY AT THE PENALTY PHASE PROCEEDINGS. HE WAS ON NOTICE OF THIS ABUSE. HE KNEW THERE WAS A POSSIBILITY THAT MARC ASAY WAS ABUSED. IF HE HAD TALKED TO ONE SIBLING, HE WOULD HAVE KNOWN THE WHO ARES ON -- THE HORRORS THAT WERE EVENTUALLY ESTABLISHED AT THE EVIDENTIARY HEARING. HE WAS ALSO ON NOTICE OF EXTENSIVE INHALANT ABUSE. DOCTOR VALELA ATTRIBUTED NO SIGNIFICANT ABUSE. HE SHOULD HAVE BEEN ON NOTICE OF THE INHALANT ABUSE, OF MARC ASAY'S HISTORY. AT THE EVIDENTIARY HEARING HE PRESENTED TESTIMONY OF TWO MENTAL HEALTH EXPERTS WHO HAD THIS CRITICAL INFORMATION. THEY HAD THE TESTIMONY OF MR. ASAY'S SIBLINGS AND THE DOCUMENTATION OF INHALANT ABUSE AND THEY ESTABLISHED STATUTORY MITIGATING CIRCUMSTANCES AND NONSTATUTORY MITIGATING CIRCUMSTANCES. TRIAL COUNSEL WAS ON NOTICE OF THIS WILL ABUSE AND THE INHALANT ABUSE, AND HE SHOULD HAVE INVESTIGATED IT AND UNCOVERED IT.

I AM CONCERNED ABOUT, ON THE THIRD POINT, THAT THERE WASN'T -- THERE SEEMS TO BE A LOT OF GAME PLAYING THAT WAS GOING ON, ESPECIALLY AT THE HUFF HEARING, AND YOU HAVE

GOT A 100-PAGE MOTION. YOU HAVE GOT THIS CLAIM. YOU HAVE GOT A LINE BURIED THERE. IF THIS IS A SUBSTANTIAL CLAIM THAT HAS A VERY BROAD IMPLICATIONS THAT A-ON-THAT THE STATE INDUCED FALSE TEST -- IMPLICATIONS THAT THE STATE INDUCED FALSE TESTIMONY THROUGH THE ASSISTANT STATE ATTORNEY, WHAT WAS GOING ON AT THE HUFF HEARING TO NOT BE SPECIFIC ABOUT IT, AND WHY NOT PUT MR. GROSS ON, SO WE CAN GET TO SEE WHETHER THIS WAS A CONVICTION THAT SHOULD BE OVERTURNED FOR SOMETHING AS CRITICAL AS THIS, ONE WAY OR ANOTHER? YOU KNOW, WE HAVE BEEN VERY LIBERAL AS FAR AS WHAT WE SAY THE PLEADING RIRMS REQUIREMENTS ARE, BECAUSE -- THE PLEADING REQUIREMENTS ARE, BECAUSE A LOT OF TIME YOU DON'T HAVE THE INFORMATION, BUT IN THIS CASE YOU HAD THE INFORMATION. WHAT IT GOING ON? AND I REALIZE THAT YOU WEREN'T THE COUNSEL AT THE TIME, BUT IT DOES DISTURB ME THAT THAT TYPE OF POSTURING WAS GOING ON.

AT THE HUFF HEARING COLLATERAL COUNSEL DID STATE THAT THE MOTION CONTAINED ALLEGATION THAT THE STATE PRESENTED ONE WITNESS WHOSE ONLY PURPOSE WAS TO PORTRAY MR. ASAY AS A RACIST, AND WHOSE TESTIMONY THE STATE KNEW TO BE WHOLLY FALSE, MISLEADING, AND IN EXCHANGE FOR UNDISCLOSED BENEFIT. THE STATE'S RESPONSE TO THIS WAS, WELL, THERE IS NOT MUCH TO THAT. THEY SHOULD AT LEAST HAVE TO NAME THE WITNESS. THE COURT HAD PREVIOUSLY RULED, WHEN THE COURT, WHEN THE STATE ASKED COLLATERAL COUNSEL TO FLESH OUT THEIR PLEADINGS, THAT THERE IS GREAT LEEWAY IN THE PLEADING REQUIREMENT, AND THAT THE STATE WAS NOT UNDULY BURDENED BY THE WAY IN WHICH MR. ASAY HAD FILED HIS CLAIMS, AND IN FACT THE TRIAL COURT NEVER FOUND THE CLAIM TO BE INCORRECTLY PLED. HE FOUND IT TO BE BARRED BECAUSE IT WAS ON DIRECT APPEAL. HOWEVER THE ISSUE OF THOMAS GROSS GIVING FALSE TESTIMONY, WITH THE KNOWLEDGE OF THE STATE ATTORNEY, WAS NEVER RAISED ON DIRECT APPEAL AND WAS NOT PROCEDURALLY --

AFTER THE HUFF HEARING, CLAIM 11 WAS DISPOSED OF, AS IT SHOULD HAVE BEEN ON DIRECT APPEAL, INDICATING THAT THE TRIAL JUDGE WAS STILL CONFUSED ABOUT WHAT THE NATURE OF CLAIM WAS.

AT THAT TIME TAKE HE SHOULDN'T HAVE BEEN BECAUSE TRIAL COUNSEL SIGNIFICANTLY POINTED OUT THAT THERE WAS AN ALONGATION IN THAT CLAIM -- AN ALLEGATION IN THAT CLAIM THAT THE STATE PRESENTED FALSE TESTIMONY. HE WAS ON NOTICE THAT THERE WAS MORE TO THAT CLAIM THAN JUST WHAT WAS DISMISSED ON DIRECT APPEAL, BUT HE STILL RULED THAT THE ISSUE WAS PROCEDURALLY BARRED. IT SHOULD NOT HAVE BEEN PROCEDURALLY BARRED AND HE ALLOWED THAT TESTIMONY.

BEFORE YOU SIT DOWN, DID MR. ASAY'S HAVE AN OPPORTUNITY TO PRESENT GROSS'S TESTIMONY LIVE AND DECIDE NOT TO DO IT?

THOMAS GROSS WAS AT THE EVIDENTIARY HEARING. WHEN THE TRIAL COURT DENIED THE CLAIM, COLLATERAL COUNSEL STATED THAT HE STILL FELT HE WAS ABLE TO PRESENT A PROFFER IN THIS ANY WAY IN WHICH HE CHOSE. THE COURT AGREED AND SAID, YES, YOU CAN PRESENT A PROFFER IN ANY WAY IN WHICH YOU CHOOSE, SO THE TRIAL COURT DECIDED NOT TO HAVE THOMAS GROSS TESTIFY BUT TO PUT INTO THE RECORD WHAT HE WOULD HAVE TESTIFIED TO. IT IS A LENGTHY PROFFER, 6 OR 7 PAGES LONG, AND THE COURT STATED THAT IT DID NOT UNDERSTAND THE GIST OF WHAT THOMAS GROSS WOULD HAVE TESTIFIED TO.

THANK YOU.