Robert B. Waterhouse v. State of Florida

THE NEXT CASE ON THE COURT'SCAL ENTODAY CAR -- ON THE COURT'S CALENDAR, JUSTICE QUINCE IS RECUSED. MR. HOBSON.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JOSEPH HOBSON. I AM ASSISTANT COLLATERAL CAPITAL REGIONAL COUNSEL, AT THE MIDDLE DISTRICT IN TAMPA, FLORIDA. I AM HONORED TO APPEAR BEFORE THIS COURT, TODAY, ON BEHALF OF ROBERT BRIAN WATERHOUSE. MR. WATERHOUSE FILED A MOTION, IN PINELLAS COUNTY CIRCUIT COURT, SEEKING RELIEF FROM A JUDGMENT AND SENTENCE OF DEATH IN 1990. THE TRIAL COURT SUMMARILY DENIED THIS MOTION, AND THE APPEAL AT BAR, TODAY, ENSUES. THIS COURT, IN THE PAST, HAS EXPRESSED A STRONG PREFERENCE FOR THE CONDUCTING OF EVIDENTIARY HEARINGS IN ALL CAPITAL CASES. I WOULD LIKE TO DISCUSS A FEW ISSUES IN THIS BRIEF THAT PRESENT A STRIKING RATIONALE FOR SUCH A NOTION. BEFORE GETTING INTO THE ISSUES, I WOULD LIKE TO SPEAK ABOUT, I WOULD LIKE TO NOTE THE PATTON DECISION, THE 28th OF LAST MONTH, THAT HOLDS A DEFENDANT, IN A POSTCONVICTION CASE, IS ENTITLED TO AN EVIDENCIARY HEARING, UNLESS, FROM THE RECORD, FILES OR MOTION, IT IS CLEARLY REFUTED THAT THE PRISONER IS ENTITLED IN THEIR RELIEF, OR IF THE CLAIM OR MOTION FAILED TO SUFFICIENTLY ALLEGE WHAT IS RECOGNIZED TO BE A VALID CLAIM.

THIS IS A RATHER UNUSUAL RECORD WE HAVE, IN THIS CASE, IS IT NOT?

I WOULD AGREE WITH THAT, YOUR HONOR. THE FIRST CLAIM I WOULD LIKE TO DISCUSS IS THAT MR. WATERHOUSE HIS TRIAL ATTORNEY, WAS INEFFECTIVE, IN FAILING TO PRESENT WHAT WAS A WEALTH OF MITIGATION EVIDENCE ON HIS BEHALF.

HOW MANY TRIAL ATTORNEYS DID -- YOU KNOW, WERE INVOLVED IN THIS? HAVE YOU COUNTED HOW MANY ATTORNEYS?

I THINK I CAN GUESSTIMATE FOR THE COURT, YOUR HONOR. IT WAS ABOUT FOUR. THERE WAS A PUBLIC DEFENDER AND TWO OTHER AND THEN THE FINAL ATTORNEY.

WELL, NAME THE LAWYER IN QUESTION.

THAT WOULD BE MR. HOFFMAN, YOUR HONOR.

SO WE ARE TALKING ABOUT MR. HOFFMAN'S CONDUCT.

SPECIFICALLY SUBMITTING THE OMISSIONS BY MR. HOFFMAN, IN FAILING TO PRESENT TO THE COURT A WEALTH OF MITIGATION, ON BEHALF OF HIS CLIENT.

DIDN'T THE -- DOESN'T THE RECORD OF APPEAL, AND I GUESS JUSTICE ANSTEAD SAID IT WAS UNUSUAL, BECAUSE IT ACTUALLY HAS THIS DEFENDANT TELLING MR. HOFFMAN THAT HE DOES NOT WANT ANY OF THE MITIGATION PUT ON?

WELL, YOUR HONOR, THAT IS A POINT THAT I WOULD RESPECTFULLY SUBMIT TO THE CONTRARY. THE RECORD, AND I WOULD DIRECT THE COURT'S ATTENTION TO FOUR PORTIONS OF THE RECORD. RECORD 188 TO 202, WHICH IS A RATHER CONTENTIOUS MOTION TO WITHDRAW. 738 TO 741, WHICH IS A COLLOQUY BETWEEN THE TRIAL COURT, MR. HOFFMAN AND MR. WATERHOUSE.

WE HAVE EXAMINED, I THINK, PROBABLY, THE VERY CITATIONS THAT YOU ARE TALKING ABOUT. WHAT ARE YOU REFERRING TO, IN THOSE, THAT WOULD SUGGEST, TO THE CONTRARY, OF WHAT JUSTICE PARIENTE'S QUESTION, REALLY, TO YOU, IS, AND THAT IS THAT WE HAVE GOT A RECORD, HERE, WHERE THE INDIVIDUAL CLIENT SEEMS TO BE SAYING, ON THE RECORD, AND ANSWERING QUESTIONS OF THE TRIAL JUDGE POINT-BLANK, THAT, NO, I DON'T WANT MR. HOFFMAN, BUT I AM -- I WANT YOU TO HAVE THE OPPORTUNITY TO POINT OUT WHAT THE RECORD SHOWS IN YOUR VIEW, ABOUT THAT. WHAT PARTICULAR STATEMENTS, QUESTIONS, OR ANSWERS, ARE YOU RELYING ON TO DEMONSTRATE?

JUSTICE ANSTEAD, I WOULD RESPECTFULLY SUBMIT THAT MR. WATERHOUSE NEVER DOES ACTUALLY SAY, ON THE RECORD,. TO QUOTE MR. SHAKESPEARE, I THINK MR. HOFFMAN DOTH TOO MUCH. THE EXPRESSS OF MR. HOFFMAN, AT THE POINT IN THE TRIAL, BETWEEN HE AND THE TRIAL COURT, THAT HE DOES NOT WANT TO PRESENT MITIGATION.

THE TRIAL COURT AND MR. HOFFMAN FILED THE PROCEDURE THAT WE SET FORTH IN KUHNE, AND IF THE PROCEDURE WAS NOT ADEQUATE, THAT WAS THE ISSUE ON DIRECT APPEAL. AREN'T WE JUST RELITIGATING, IF WE WERE TO ALLOW THIS TO GO FORWARD, A -- WHETHER THE KUHNE PROCEDURE WAS ADEQUATE OR INADEQUATE?

I THINK NOT, YOUR HONOR. I THINK THE ISSUE, ON DIRECT APPEAL, WAS WHETHER MR. WATERHOUSE HAD MADE AN INTELLIGENT AND A KNOWING ELECTION OF SELF REPRESENTATION, AND ALSO AT ISSUE WAS WHETHER THE REQUIREMENTS OF FERRET A HAD BEEN MET.

NO. BECAUSE THE ISSUE OF KUN IS WHETHER, WHEN THE DEFENDANT WAIVES THE PRESENTATION OF MITIGATING EVIDENCE, WHAT THE TRIAL COURT AND WHAT THE -- WHAT THE DEFENSE ATTORNEY IS SUPPOSED TO DO. ISN'T THAT THE --

IT IS, YOUR HONOR, BUT I WOULD LIKE TO DIRECT THE COURT'S ATTENTION TO PAGE 899, OF THE RECORD, AND I WOULD LIKE TO QUOTE MR. WATERHOUSE. THIS IS WHEN THERE IS A DISCUSSION BETWEEN THE COURT AND MR. WATERHOUSE AND HIS ATTORNEY, AS TO WHAT HE WANTS TO DO, AND THE QUOTE IS, I QUOTE, I HAVE NOT HAD A CHANGE, I THINK IT IS MEANT TO SAY CHANCE, TO SIT DOWN WITH HIM AND EXPLAIN TO HIM THE THINGS THAT I WANT TO PUT FORTH IN MITIGATION AT THE CLOSING. HE HAS ONLY BEEN OVER THERE ONCE, AND ALL WE DISCUSSED, AND AT THAT POINT, THE TRIAL COURT HAS CUT HIM OFF.

THAT IS GOING TO CLOSING ARGUMENT. WASN'T THAT GOING TO CLOSING ARGUMENT?

I BELIEVE, YOUR HONOR, THAT THIS IS A DISCUSSION OF WHY MR. WATERHOUSE IS DISSATISFIED WITH HIS ATTORNEY. MUCH OF WHAT -- WHEN MR. WATERHOUSE IS QUESTIONED ABOUT DO YOU WANT TO PRESENT MITIGATION, HE, MORE OFTEN THAN NOT, CRITICIZES HIS ATTORNEY, AND ONE OF THE CRITICISMS HE HAS, WHICH IS CUTOFF BY THE TRIAL COURT, IS THAT HIS ATTORNEY HASN'T BEEN OUT TO SEE HIM. HE HASN'T HAD ADEQUATE TIME TO SPEAK WITH HIM.

DID HE REFUSE? IT SEEMS TO BE PRETTY CLEAR THAT THE DEFENDANT, HERE, REFUSED ANY TYPE OF EVALUATION OR TO PARTICIPATE IN ANY TYPE OF MENTAL HEALTH KINDS OF ISSUES. ARE WE MISTAKEN, IF WE SEE THAT IN THE TRANSCRIPT?

JUSTICE LEWIS, AS THE COURT IS WELL AWARE, ORIGINALLY THIS CASE HAD BEEN REMANDED BY THIS COURT, SO THAT NONSTATUTORY MITIGATORS, IN HITCHCOCK VD OVER COULD BE CONSIDERED, AND THERE WAS PROFFERED TESTIMONY, IN THE INITIAL TRIAL, PARTICULARLY FROM DR. BERLIN, WHICH WAS VERY SIGNIFICANT MITIGATION, IN THE NATURE OF MR. WATERHOUSE IS SUFFERING FROM ALCOHOLISM, BOTH LONG-TERM AND CHRONIC, AND FROM AN IDIO SIN KRAT I CAN REACTION TO THE IN -- AN I.D. IOSY NCR ATIC TO THE AMOUNTS OF ALCOHOL. THERE WAS, ALSO, TESTIMONY AVAILABLE, IT WAS PROFFERED IN THE FIRST TIME --

THE FIRST TRIAL, BEHAVIOR AS A YOUNG BOY, OF MR. WATERHOUSE, OF HIS CHILDHOOD, WHICH WAS ONE OF SEVERE ABUSE, AND EVIDENCE OF MR. WATERHOUSE HAVING SUSTAINED A RATHER TRAUMATIC ASSAULT AT AGE SEVEN.

BUT ISN'T THE THRUST, AS I AM GOING THROUGH, LOOKING AT THIS TRANSCRIPT, IS THAT HE WANTS TO GO INTO LINGERING DOUBT KIND OF APPROACH, IN THE PENALTY PHASE AND, REALLY, DOESN'T WANT TO GET HIS FAMILY INVOLVED AND JUST DOESN'T WANT ANY PART OF THESE OTHER TYPES OF THINGS. WHY IS THAT NOT THE CASE?

IF I MAY, YOUR HONOR, THIS IS ONE OF THE REASONS WHY I FEEL THIS CASE IS VERY APPROPRIATE TO REMAND FOR AN EVIDENCIARY HEARING, SO THAT THE CRITICAL ISSUE HERE, AND THAT IS THE ATTORNEY-CLIENT DYNAMIC CAN BE EXAMINED, AND THIS COURT CAN HAVE A MORE THOROUGH RECORD ON WHICH TO AFFIRM.

COULD YOU RESTATE, FOR US, SORT OF YOUR POSITION, AS FAR AS WHAT THE RECORD DOES SHOW, IN TERMS OF WHETHER OR NOT HE WANTED HIS ATTORNEY TO GO FORWARD AND PUT ON MITIGATION, WHETHER HE WANTED TO ACCEPT MR. HOFFMAN AS HIS ATTORNEY, WHETHER HE WANTED TO REPRESENT HIMSELF? JUST GIVE US A THUMBNAIL SKETCH OF YOUR TAKE ON THIS, AND THEN, BASED ON THAT TAKE, WHERE THE ERROR WAS IN THE WAY THE TRIAL COURT TREATED THIS, AND WE ARE JUST GOING TO LISTEN TO YOUR TAKE ON IT. WHAT, IN YOUR VIEW, NOW, AFTER -- YOU ARE FAR MORE FAMILIAR WITH THIS THAN ANY OF US, WHAT IS YOUR TAKE ON WHAT WAS GOING ON, HERE, AND WHY WAS THIS WRONG?

MY TAKE, YOUR HONOR, IS THAT BOTH THE TRIAL COURT AND THE TRIAL ATTORNEY GREW EXASPERATED AND FRUSTRATED WITH MR. WATERHOUSE, TO THE DETRIMENT OF HIS RIGHTS. I REFER THE COURT TO PAGE 738, TO 741, NOW, THIS IS THE POINT OF THE COLLOQUY, WHERE, AGAIN, THE TRIAL ATTORNEY IS UP, PUTTING ON THE RECORD, VERY EXCESSIVELY, I THINK, THE FACT THAT HE DOESN'T WANT TO PRESENT MITIGATION. ALL HE WANTS TO DO IS RELATE ISSUES OF DOUBT. I WANT TO PRESENT MITIGATION. HE IS NOT LETTING ME. HIS TRIAL ATTORNEY TURNS TO HIM AND SAYS IS THAT WHAT YOU WANT? LET ME JUST READ TO THE COURT, THIS IS THE COURT ADDRESSING MR. WATERHOUSE. HE REFERS TO THE PREVIOUS OPINION, IN WHICH THE COURT VACATED THE DEATH PENALTY. HE SAYS, THERE I DID NOT ALLOW EVIDENCE OF ALCOHOL INTOX INDICATION -- INTOXICATION, DID NOT ALLOW MR. WATTER HOUSE'S ABUSE AS A CHILD, AND THE COURT TURNED TO THE DEFENDANT AND SAID DO YOU WANT THESE THINGS PRESENTED AT TRIAL? THE DEFENDANT SAID IT DOESN'T MATTER. THE COURT SAID TO ME, I TAKE IT THAT YOU HAVE PREPARED TO DO SO AND ARE PREPARED TO DO SO AND MR. WATERHOUSE DOES NOT WISH TO DO SO. AM I CORRECT? THE COURT PARDON? MR. WATERHOUSE. YES. FROM THAT POINT, YOUR HONOR, THE COURT IN FIERCE THAT HE DOESN'T WANT TO INFER MITIGATION. THE COURT ALLOWS HIM TO, BASICALLY, TAKE WHAT I WOULD CALL A PURE HOBSON'S CHOICE OF, IN HIS STATE, TO REPRESENT HIMSELF IN CLOSING. I WOULD LIKE TO TALK ABOUT HIS CLOSING ARGUMENT, BECAUSE ALL HE SAYS, IN THE CLOSING ARGUMENT, AT PAGE 808, IS, AND I QUOTE MR. WATERHOUSE HAS HIS OWN ATTORNEY. QUOTE, THE FIRST THING I WOULD LIKE TO SAY IS THAT I AM NOT HERE TO BEG YOU FOR MY LIFE, SO HOPELY TO -- HOPEFULLY TO ENLIGHTEN YOU. MR. WATERHOUSE COULD PRESENT A HALF DOZEN FACTORS OF MITIGATION, BUT I WON'T LET HIM DO SO, BECAUSE I DON'T THINK HE SHOULD BE UP HERE, BEGGING YOU. I WANT TO SPARE THE TRAUMA TO MY FAMILY. I WANT TO BE CANDID TO THE COURT. THIS IS NOT, SEEMINGLY, THE WORST THING GOING INTENSE AGAINST, IT BUT THE PROBLEM IS YOU HAVE CONTRADICTIONS ON THE RECORD. HE SAYS THIS, IN HIS MENTAL STATE, AND YET --

BUT WHAT ARE YOU CLAIMING SHOULD HAVE HAPPENED? IN OTHER WORDS WHAT SHOULD THE TRIAL COURT OR THE LAWYER HAVE DONE THAT THEY DIDN'T DO, AND --

WELL, WHAT IS, ALSO, INTERESTING ABOUT THIS CASE, IS THAT THE TRIAL COURT, THE TRIAL ATTORNEY DID MAKE CLOSING ARGUMENT AT THE SENTENCING HEARING, SO I WOULD SUBMIT

TO THE COURT --

YOU MEAN TO THE TRIAL JUDGE.

TO THE TRIAL JUDGE. AND AT THAT, HE COULD HAVE SUBMITTED A WRITTEN SUBMISSION OF THE MITIGATION EVIDENCE. HE COULD HAVE, PERHAPS, IF A BETTER ATTORNEY-CLIENT RELATIONSHIP HAD BEEN EXISTENT, AND MR. WATERHOUSE HAD BEEN MORE APPRISED, HE COULD HAVE, PERHAPS, PREVAILED UPON HIM TO PRESENT WHAT WAS AWFULLY IMPORTANT AND SIGNIFICANT MITIGATION, BUT AND SENT AN EVIDENTIARY HEARING, WE DON'T KNOW, AND THERE IS NOT ENOUGH ON THIS RECORD TO AFFIRM.

CAN I GO BACK TO SOMETHING ABOUT -- BECAUSE I WAS ASKING YOU ABOUT KUHNE, AND I SEE, IN LOOKING AT THAT OPINION, THAT THAT CASE IS NOT MENTIONED IN THE MAJORITY OPINION, AND THAT REQUIRES THAT, WHEN A DEFENDANT DOES NOT -- REFUSES TO PUT ON MITIGATING EVIDENCE, THERE IS A SPECIFIC PROCEDURE TO FOLLOW. WAS THAT ISSUE RAISED ON DIRECT APPEAL, THAT IS THAT THERE WAS -- BECAUSE THERE WAS FERRETTA ISSUES RAISED, THAT WAS WHETHER HE WAS ASKING TO REPRESENT HIMSELF OR NOT, AND THIS COURT SAID, NO, HE WAS BEING REPRESENTED BY AN ATTORNEY, SO THERE WAS NO -- THAT IS WHAT HE WANTED TO HAVE DONE. WAS THERE AN ISSUE RAISED, AS TO WHETHER THIS WAS NOT THE PROPER KUHNE PROCEDURE?

YOUR HONOR, YOU ARE REFERRING TO THE BRIEF SUBMITTED ON BEHALF OF THE CCRC?

NO. IN THE DIRECT APPEAL OF THE CASE.

I CANNOT ANSWER THAT QUESTION, YOUR HONOR. I DO NOT KNOW.

THAT WOULD BE -- THAT IS WHY I AM CONCERNED THAT WE ARE RELITIGATING WHAT SHOULD HAVE BEEN RAISED ON DIRECT APPEAL, THAT THERE WAS NOT PROPER COMPLIANCE WITH KUHNE, BECAUSE WHAT KUHNE SAYS IS THAT THE DEFENDANT HAS GOT TO CONFIRM, ON THE RECORD, THAT HE WISHES TO WAIVE PRESENTATION OF PENALTY-PHASE EVIDENCE, AND YOU ARE SAYING, FROM THE COLLOQUY, THAT THAT WASN'T A PROPER PROCEDURE, THAN IS A DIRECT APPEAL ISSUE, IT WOULD STRIKE ME.

WELL, WE WOULD SUBMIT, AND THE INEFFECTIVENESS OF THE TRIAL COUNSEL TO HAVE ALLOWED IT, AND I AM FAMILIAR WITH THE LANGUAGE OF TEFTELLER AND THAT KIND OF GRAY AREA HAD, THAT IT WAS STILL A VALID CLAIM, INEFFECTIVE ASSISTANCE OF COUNSEL. MAY I JUST SAY ONE POINT, AND THEN I WILL DEFER TO MY WORTHY COLLEAGUE. THE PROBLEM IN THIS CASE IS THAT YOU HAVE A JUDGMENT AND SENTENCE OF DEATH IMPOSEED ON A CASE WHERE THERE IS NO HEED TO THE MENTAL PROBLEMS THAT THE DEFENDANT, THE APPELLANT HAS, AND YET WE ARE RELYING ON THE SAME JUDGMENT OF THAT APPELLANT TO UPHOLD THAT SENTENCE. THANK YOU.

MS. SABELLA.

MAY IT PLEASE THE COURT. CANDACE SABELLA FOR THE STATE OF FLORIDA. WHAT WE DO KNOW, AFTER 20 YEARS, IS THAT MR. WATERHOUSE HAS LITIGATED EVERY SINGLE ISSUE THAT HE HAS RAISED HERE, THAT THE FACTS SUPPORTING ALL THESE ISSUES HAVE BEEN CONSIDERED BY THIS COURT AND REJECTED. THERE WAS ABSOLUTELY NOTHING NEW PRESENTED IN THE 3.850, AND THERE WAS NO REASON FOR THE TRIAL COURT TO HOLD AN EVIDENTIARY HEARING.

MAY I GO BACK, THEN, TO, WAS THE ISSUE OF WHETHER THERE WAS PROPER COMPLIANCE WITH THE PROCEDURES SET FORTH IN KUHNEV STATE -- IN KUHNE V STATE, WAS THAT ADDRESSED IN THE DIRECT APPEAL?

IT WAS NOT ADDRESSED IN THE COURT'S OPINION, AND I WOULD HAVE TO ASSUME THAT THE DEFENDANT RAISED IT.

IS THAT WHAT WE HAVE HERE? NO MITIGATION WAS PUT ON. AM I CORRECT?

NO MITIGATION WAS PUT ON. ABSOLUTELY.

SO WE HAVE SET FORTH A VERY SPECIFIC PROCEDURE TO ENSURE THAT, WHEN THIS MOST DRASTIC OF SITUATIONS OCCUR, WHICH IS THAT A DEFENDANT WAIVES THE PRESENTATION OF MITIGATION OF EVIDENCE, THAT THERE IS A VERY SPECIFIC PROCEDURE TO GO THROUGH. NOW, WE JUST DON'T KNOW, THEN, RIGHT NOW, IN THIS RECORD, WHY THAT WAS NEVER ADDRESSED OR WHETHER IT WAS RAISE ODD DIRECT APPEAL, BECAUSE, IF THIS DOESN'T COMPLY WITH KUNNE, THEN WE HAVE GOT A PROBLEM, DON'T WE?

NO, YOUR HONOR. AS JUSTICE ANSTEAD NOTED, THIS IS A VERY UNIQUE CASE. WE HAVE A NUMBER OF INCIDENTS, WHEN THEY GO THROUGH WITH MR. WATERHOUSE WHAT HE WANTS TO DO, WHAT THE PROBLEM IS WITH HIS LAWYERS. HIS COUNSEL NOTED HE WENT THROUGH FOUR LAWYERS. WHAT HAPPENED PRIOR TO THAT IS, AFTER THE ORIGINAL DIRECT APPEAL, WE HAD A 3.8.

, A FULL-BLOWN EVIDENTIARY HEARING, WHERE PRIOR COUNSEL PRESENTED ALL THIS EVIDENCE THAT THEY CLAIM SHOULD HAVE BEEN PRESENTED IN MITIGATION AND WAS NOT. HE GOT A RESENTENCING, BASED ON THIS CLAIM THAT HE ALL THIS EVIDENCE. MR. WATERHOUSE CLEARLY KNEW WHAT MITIGATING EVIDENCE COULD HAVE BEEN PRESENTED AND THAT IT SHOULD HAVE BEEN PRESENTED, BUT HE CHOSE, AND IT IS CLEARLY ON THE RECORD HERE, THAT HE CHOSE NOT TO PRESENT THAT.

DO YOU THINK THAT ONE OF THE THINGS WE HAVE TO DO IS LOOK AT THE WHOLE CONTEXT OF THIS CASE, THAT THIS IS A DEFENDANT THAT YOU ARE SAYING HAS BEEN PLAYING GAMES WITH THIS PROCESS, BECAUSE, ON ONE HAND, HE GETS A REVERSAL TO PUT ON MITIGATION THAT HE KNOWS EXISTS, AND THEN, IN THE NEXT TRIAL, HE, THEN, NOW, SAYS THAT HE DOESN'T WANT THIS MITIGATION.

AND HE IS VERY EFFECTIVE -- AND HE HAS VERY EFFECTIVELY BEING PLAYING GAMES WITH THE SYSTEM. ABSOLUTELY. HE KNEW WHAT THERE WAS TO BE PRESENTED. HE KNEW WHAT HE COULD NOT PRESENT, AND THERE FOR HE INSISTED ON PRESENTING EVIDENCE OF LINGERING DOUBT, WHICH HE KNEW HE COULD NOT PRESENT.

SO IN ORDER TO MAKE THIS DETERMINATION, THOUGH, WE CAN'T JUST GO BACK TO COLLOQUY IN THIS CASE. WE HAVE GOT TO ACTUALLY GO AND LOOK AT THE WHOLE, THE PRIOR, THE FACT THAT THERE WAS A REVERSAL, FOR HIM TO BE ABLE TO PUT ON MITIGATING EVIDENCE.

FIRST OF ALL, I THINK YOU HAVE TO LOOK BACK TO YOUR RESENTENCING OPINION. AS YOU NOTED, IF THERE WAS SOME FAILURE TO COMPLY WITH KUHNE, THAT IS SOMETHING THAT SHOULD HAVE BEEN RAISED THEN.

WAIT A MINUTE. LET ME GET THIS IN CONTEXT. ISN'T THIS A 1990 SENTENCING?

THIS IS A 1990 SENTENCING. ABSOLUTELY. YES.

KUNHNE CAME OUT IN 1993?

I CAN'T TELL YOU. I HAVE IT CITED IN MY BRIEF.

WAS THERE ANY -- I THOUGHT --

IT IS 1993, YOUR HONOR. AGAIN, THIS IS NOT AN ISSUE THAT --

HOW DO WE KNOW -- DO WE KNOW THAT THAT IS NOT RETROACTIVE?

YES, YOU HAVE.

SO WHY ARE WE, REAL, GOING AT IT? -- WHY ARE WE, REALLY, GOING AT IT? I AM TRYING TO UNDERSTAND WHETHER --

IT MIGHT BE MY FAULT. I THOUGHT THAT ONE OF THE ISSUES WAS WHETHER THIS GENTLEMAN, THE DEFENDANT, WAIVED MITIGATION, AND WE ARE IN A SITUATION WHERE WE DECIDED KUHNE SO WE COULD AVOID HAVING TO HAVE EVIDENTIARY HEARINGS ON THE ISSUE, BUT IN LIGHT OF THERE NOT BEING KUHNE, THEN MAYBE WE DO NEED AN EVIDENCE YAERING HEARING ON THE ISSUE.

WE DON'T NEED AN EVIDENTIARY HEARING ON THIS ISSUE, BECAUSE IT HAS BEEN DECIDED. KUHNE WAS NOT BROUGHT FORTH BY COUNSEL. IT WAS SIMPLY STATED THAT KUHNE IS SOMETHING THAT IS WAIVED, IN DETERMINING TO HIS LAWYER. THIS COURT FOUND, IN THE RESENTENCING OPINION THAT, HE HAD WAIVED THE PRESENTENCING MITIGATION. IT IS NOT SOMETHING THAT WE HAVE TO GO BACK. IT IS CLEARLY ON THE RECORD. THAT IS WHY WE HAVE SUMMARY DENIAL, THAN IS WHY SUMMARY DENIAL IS APPROPRIATE.

WE ARE HERE ON A 1990 RESENTENCING.

YES, YOUR HONOR.

WHICH WAS AFFIRMED BY THIS COURT IN 1992. AND THEN THERE WAS, IN MY -- AM I CORRECT THAT THERE WAS AN AFFIRMANCE IN JANUARY OR A DENIAL OF THE 3.850, IN JANUARY OF 1998.

THAT'S CORRECT, YOUR HONOR.

NO EVIDENTIARY HEARING IN THE MEANTIME.

CORRECT.

OKAY.

THE 3.850 WAS FILED IN 1994. THERE WAS PUBLIC LITIGATION IN THE MEANTIME, AND THEN WE HAD THAT RULING, AND THEN THERE WAS A MOTION FOR REHEARING, AND HERE WE ARE. A LONG TIME LATER.

OKAY.

YEAH. AS FAR AS HIS CLAIM THAT COUNSEL SHOULD HAVE GOTTEN MENTAL HEALTH, AS YOU HAVE NOTED, HOFFMAN OBTAINED A MENTAL HEALTH EXPERT. WATERHOUSE REFUSED TO HAVE THAT MAN QUESTION HIM. HE DIDN'T WANT ANYTHING TO DO WITH IT. THE ONLY THING HE WANTED TO HAVE ANYTHING TO DO WITH IS TO PRESENT EVIDENCE OF LINGERING DOUBT, AND EVEN THAT, I SUBMIT, WAS JUST ANOTHER PART OF HIS ATTEMPT TO JUST MESS UP THE SYSTEM, BECAUSE THERE WERE CERTAIN WITNESSES THAT HE WANTED TO PROFFER QUESTIONS WITH, WITH REGARD TO LINGERING DOUBT, TO ASK THIS WITNESS, AND THE COURT ALLOWED HIM TO DO THAT. HAVING SAID THAT HE COULD, THEN, DO IT, HE WITHDREW THOSE QUESTIONS. WHAT WE KNOW FOR A FACT IS THAT MR. WATERHOUSE, IN HIS CLOSING ARGUMENTS, AS HE STATED, SAID I DID NOT WANT TO PUT ON ANYTHING IN MITIGATION. THE ONLY THING I WANT TO ARGUE TO YOU IS THAT I DID NOT COMMIT THIS CRIME.

WAS MR. WATERHOUSE REPRESENTING HIMSELF, DURING THE CLOSING ARGUMENT?

MR. WATERHOUSE, AND, AGAIN, IT IS A VERY UNIQUE SITUATION. HE WAS NOT REPRESENTING HIMSELF, ALTHOUGH THIS COURT, IN ITS RESENTENCING OPINION, SAID THAT, TO THE EXTENT THAT HE WAS, THAT THERE WAS A PROPER FERRETTA INQUIRY AND THAT HE COULD HAVE. I ASK THIS COURT TO AFFIRM THE DENITE -- THE DENIAL. THANK YOU.

I MENTIONED THE CLOSING STATEMENT OF MR. WATERHOUSE, BECAUSE IT -- WOULD ALMOST BE DISINGENIOUS OF ME NOT TO ACKNOWLEDGE IT. IT IS OUT THERE. BUT I REMIND THE COURT, BECAUSE I THINK IT BEARS EMPHASIS HERE, THAT A CASE WHERE THE ISSUE IS NO MITIGATION, IN THE FORM OF MENTAL HEALTH PROBLEMS SUFFERED BY THE DEFENDANT, AND YET WE ARE LOOKING AND, I THINK, ATTACHING FAR TOO MUCH IMPORTANCE TO STATEMENTS HE MADE IN HIS PRO SE COMMENTS. I DON'T THINK HE CAN REALLY CALL IT AS A CLOSING ARGUMENT.

NOW CAN WE GET AWAY FROM THE FACT THAT THIS IS A DEFENDANT THAT SECURED -- WE HAVE CASES WHERE DEFENDANTS SAY, YOU KNOW WHAT? I WANT TO DIE, AND YOU KNOW, THEY SAY -- THEY DISCHARGE THEIR COUNSEL AND THEY JUST SAY, LISTEN, IT THAT IS WHAT I WANT TO DO, AND THEN WE ARE LOOKING FOR WAYS TO MAKE SURE THE PROCESS IS RELIABLE. HERE IS A CASE WHERE THE DEFENDANT APPARENTLY, REALLY, IS NOT, SINCE YOU ARE REPRESENTING HIM ON HIS 3.850, BUT WE HAVE GOT A CASE WHERE IT WAS REVERSED FOR THE VERY REASON THAT THIS DEFENDANT ASKS THE COURT THAT HE WANTED TO BE ABLE TO PUT ON NONSTATUTORY MITIGATION. THEN IT COMES BACK TO THE NEXT TRIAL, AND INSTEAD OF PUTTING THAT ON, HE IS, NOW, SAYING I DON'T WANT TO PUT IT ON. AREN'T WE SUPPOSED TO -- IN THIS CASE, AREN'T WE SUPPOSED TO LOOK AT THE WHOLE CONTEXT OR THE HISTORY OF THIS CASE, TO SAY THIS IS ENOUGH YOU HAD YOUR CHANCE, AND YOU DIDN'T WANT IT, AND THAT IS THE END OF THIS STORY.

WELL, I THINK THAT IS WHY AN EVIDENTIARY HEARING IS WANT ARE WARRANTED IN THIS CASE, JUSTICE, BECAUSE, AGAIN, WE CAN'T ACCOUNT FOR WHAT HAPPENED, FROM THE FIRST PERIOD OF TIME, WHERE THEY APPARENTLY WANTED TO PRESENT THE PROFFERED TESTIMONY, TO THIS TIME, WHERE HE APPARENTLY DIDN'T, AND WE HAVE A RECORD THAT CONTAINS HIS ATTORNEY TRYING TO REPRESENT TO THE COURT HE WANTS TO WAIVE MITIGATION, HIM COMPLAINING ABOUT HIS ATTORNEY, AND NO EVIDENTIARY HEARING, WHERE TESTIMONY COULD BE TAKEN BY MR. HOFFMAN, PRESUMABLY, POSSIBLY, MR. WATERHOUSE, IN WHICH THIS ISSUE COULD BE FLUSHED OUT. WHAT WAS MR. WATERHOUSE'S UNDERGO OF MITIGATION? DOES MR. WATERHOUSE HAVE THE SAME UNDERSTANDING OF AND DEFINITION AS WE ALL, AS --

ARE YOU REPRESENTING THAT, IF THERE WAS A 3 -- IF THERE WAS AN EVIDENTIARY HEARING, YOUR CLIENT IS PREPARED TO TESTIFY AS TO WHAT THE CONDUCT, WHAT THE CONTACT WAS?

WELL, CERTAINLY, YOUR HONOR. THE COURT CAN APPRECIATE I WANT TO MAINTAIN AND PROTECT MY CONFIDENCE AS TO THE CLIENT, BUT I WILL MEN'S TO THE COURT THAT THIS MOTION WAS FILED IN 1997. THIS ALLEGATION WAS MADE, AND IT WAS ADOPTED BY MR. WATERHOUSE. IT WAS SIGNED AND VERIFIED BY HIM, SO I THINK, YES, IT IS IMPLICIT THAT WE ARE ASKING A REMAND, SO THAT THIS ISSUE CAN BE FLUSHED OUT. IF I CAN TALK BRIEFLY ABOUT THE PREJUDICE. I REFER THE COURT TO THE STATE'S CLOSING ARGUMENT, ON PAGE 799. THEY GO ON TO SAY THAT, JUST END OF IT. QUOTE, THERE WAS NO EVIDENCE AND CERTAINLY NO REASONABLE CONVINCING EVIDENCE TO JUSTIFY THIS MITIGATING CIRCUMSTANCE WHATSOEVER. ALSO THIS COURT, IN THE DIRECT APPEAL, DID DISCOUNT TWO OF THE SIX AGGRAVATORS, THIS WHICH WAS -- THAT THE CRIME WAS COMMITED TO AVOID ARREST, AND THAT WHICH THE CRIME WAS DONE IN HEIGHTENED PREMEDITATION. IT STRUCK THOSE TWO, BUT IT FOUND IT TO BE HARMLESS ERROR, BECAUSE THE FOUR REMAINING AGGRAVATORS WERE HELD TO BE VALID, AND THE ABSENCE OF MITIGATION. SO, AGAIN, I SUBMIT TO THE COURT THAT THE JUDGMENT AND SENTENCE OF DEATH HERE IMPOSED, WITH ABSOLUTELY NO EVIDENCE OF

THE VERY SIGNIFICANT AND WEIGHTY MITIGATION DOES COMPROMISE, WITHIN THE MEANING OF STRICKLAND, THE INTEGRITY OF THE JUDGMENT AND SENTENCING. IF THERE ARE NO OTHER QUESTIONS, I WILL --

THANK YOU, COUNSEL. APPRECIATE COUNSEL'S MEMBERSHIP IN THESE CASES THIS MORNING, AND THE COURT WILL BE IN RECESS. THE MARSHAL: PLEASE RISE.