Olen Clay Gorby v. State of Florida

MR. CHIEF JUSTICE: WELCOME TO THE FLORIDA SUPREME COURT. WE ARE VERY PLEASED TO HAVE, THIS MORNING, THE ACADEMY AND PRESIDENT INGRAM, AND ALL OF YOU, AND WE ARE PLEASED THAT YOU HAVE JOINED US IN YOUR INTEREST, IN THE WORK OF THIS COURT AND THE JUDICIAL GRAMPBLING OF OUR GOVERNMENT. THE FIRST CASE WE HAVE -- AND THE JUDICIAL BEVERAGE OF OUR GOVERNMENT. THE FIRST CASE THAT WE HAVE ON OUR ORAL ARGUMENT CALENDAR THIS MORNING IS GORBI VERSUS STATE OF FLORIDA. MR. MARI.

. --. MR. MARIO.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS SCOTT MARIO. WITH ME IS OLEN GRANT. WELL ARE HERE TO REPRESENT OLEN GORBY ON POSTCONVICTION-RELIEF. WHEN THE JURY WAS ADDRESSED, THE TRIAL COUNSEL REFERRED TO ORGANIC BRAIN DAMAGE, AND HE TOLD THE JURY, I HESITATE TO TALK ABOUT THAT, BECAUSE I DON'T KNOW WHAT VALUE IT HAS, AND THAT STATEMENT, I BELIEVE, IS EMBLEMATIC OF EVERYTHING THAT IS WRONG WITH THIS CASE.

CAN WE GO BACK. I AM HAVING SOME DIFFICULTY IN PUTTING THIS ALL TOGETHER, FROM THE PERSPECTIVE THAT IT IS CLEAR THAT DR. GOFF WAS PRESENTED, DURING THE GUILT PHASE. I AM HAVING SOME DIFFICULTY AS TO WHY HE WAS USED THEIR, BECAUSE THERE WAS NO COMPETENCY ISSUE, AND WHAT KIND OF DEFENSE WOULD BE USED, BUT IT DOES SEEM -- IT DOES NOT SEEM TO BE AN ADEQUATE ANSWER, IN THE TRANSCRIPT OR IN THE PLEADINGS OR IN THE ARGUMENTS, AS TO WHY IT WAS DONE THAT WAY, BUT, THEN, CLEARLY, THAT WAS A STRATEGIC DECISION, SO THOSE ARE THE ASPECTS THAT ARE OF CONCERN, BECAUSE THAT IS THE UNDER CURRENT, WITH ALL OF THESE -- IT IS CLEAR THAT THE INFORMATION DID COME TO THE ATTENTION OF THE JURY, BUT IT IS NOT CLEAR AS TO WHY IT WAS DONE IN THAT FASHION.

OKAY. I THINK I CAN ASSIST THE COURT. ACTUALLY OUR POSITION IS THAT DR. GOFF, BEING PRESENTED AS A GUILT-PHASE WITNESS, IS IS A EXAMPLE OF THE TYPE OF INEFFECTIVE ASSISTANCE IN THIS CASE, BECAUSE THERE WAS, AS YOU KNOW, NO ONE STANDING TO THE DEFENSE IN THIS CASE, AND SO HIS TESTIMONY ESSENTIALLY WENT -- THERE WAS NO SANITY DEFENSE IN THIS CASE, AND SO HIS TESTIMONY, ESSENTIALLY, WENT AS TO THE TACITNESS OF THE STATE. AS TO THE PROCEDURE, ITSELF, DR. GOFF TESTIFIED AS TO HIS POSITION, WHICH WOULD HAVE BEEN MORE APPROPRIATE IN THE GUILT OR PENALTY PHASE.

HE HAD SOME HESITANCY, BECAUSE THE EXPRESS DEFENSE OF MR. GORBY WAS I DIDN'T DO IT. I WASN'T THERE, SO THEREFORE DR. GOFF SEEMED TO BE SAYING I CANNOT EXPRESS AN OPINION ABOUT HIS MENTAL STATE AT THE TIME, BECAUSE HE WASN'T EVEN THERE.

IT IS A BIT UNCLEAR. I THINK WHAT DR. GOFF EXPLAINED, AT POSTCONVICTION, IS THAT, BECAUSE MR. GORBY DENIED BEING PRESENT -- HE DIDN'T DENY I BEING PRESENT AT THE VICTIM'S HOUSE, BUT HE DENIED ACTUALLY KILLING THE VICTIM, SO IN ESSENCE, WHAT WE HAVE, THOUGH, IS DR. GOFF CAN LOOK AT THE CHRONIC CONDITIONS, WHICH AFTER CONFLICTED -- WHICH AFFLICTED MR. GORBY, A CHRONIC CONDITION OF ORGANIC BRAIN DAMAGE OF LONG TIME ALCOHOL ABUSE WHICH EXACERBATED THAT BRAIN DAMAGE AND OTHER MENTAL DEFICIENCIES, AND HIS OPINION WAS THAT, BECAUSE THESE CONDITIONS ARE CHRONIC, AND ANOTHER DOCTOR'S POSITION WAS THEY FOLLOWED HIM 24 HOURS A DAY, SEVEN DAYS AWAY WEEK, IF YOU ISOLATE ANY ONE SEGMENT OF MR. GORBY'S BEHAVIOR, THOSE CONDITIONS

WOULD APPLY AND HE WOULD MEET BOTH THE CRITERIA FOR STATUTORY MENTAL MITIGATORS PERTAINING TO MENTAL HEALTH, THAT HE WAS NOT NECESSARY THAT HE HAVE DIRECT INFORMATION AS TO MR. GORBY'S MENTAL STATE AT THE INSTANT OF THE OFFENSE.

WE ARE TALKING ABOUT SOME VERY FACT-SPECIFIC ISSUES, NOW, AND CAN YOU SORT OF BRING US BACK TO THE ISSUES THAT YOU ARE RAISING ON APPEAL. THE COURT GRANTED AN EVIDENTIARY YEAR HEARING, WITH -- AN EVIDENTIARY HEARING, WITH RESPECT TO COUNSEL AT THE PENALTY PHASE, THAT CORRECT?

YES, YOUR HONOR.

I ASSUME THAT IS WHY YOU ARE HERE.

YES.

ONCE THE EVIDENCE HAS BEEN GRANTED, ALL OF THE REFERENCES ARE, ALL, TAKEN TO SUPPORT THE TRIAL COURT'S RESOLUTION OF THIS ISSUE, SO YOU NEED TO, I THINK, DRAW US A SHARP, CLEAR FOCUS, HERE, OF WHERE YOU THINK THE TRIAL COURT WENT WRONG AND WHY ITS RULINGS ARE NOT SUPPORTED BY THE EVIDENCE. WOULD YOU? ZOO CERTAINLY. CERTAINLY, YOUR HONOR, AND THAT IS WHAT I WAS GETTING INTO. I THINK THE MOST IMPORTANT ISSUE, IF I SAY NOTHING ELSE HERE, TODAY, THAT IS MEMORABLE, IS THIS, TRIAL COUNSEL DID NOT ASK EITHER ONE OF THE DEFENSE EXPERTS TO EVALUATE MR. GORBY FOR MITIGATION. BOTH OF THOSE EXPERTS WOULD HAVE TESTIFIED THAT BOTH OF THE STATUTORY MENTAL HEALTH MITIGATORS APPLIED IN MR. GORBY'S CASE, HAD THEY EVER BEEN ASKED. THAT WAS WHAT WAS ESTABLISHED AT POSTCONVICTION, AND MOREOVER, THE STATE'S OWN EXPERTS, THE COMPETENCY EXPERTS, DR. ANNIS AND DR. McCLERIN, WHO BOTH TESTIFIED AT POSTCONVICTION, DID NOT DISPUTE THAT THE MEANT -- THAT THE MENTAL HEALTH MITIGATORS, BOTH, APPLIED, SO WE HAVE THAT THEY WERE NEVER APPLIED. THEY WERE SIMPLY NEVER ASKED TO EVALUATE MR. GORBY FOR THAT POSITION.

DID DR. GOFF TESTIFY AS TO THE MENTAL HEALTH IN THE PENALTY PHASE, AND IF HE DID, HOW DID HE USE IT?

I DON'T THINK IT IS FAIR TO CHARACTERIZE IT, YOUR HONOR, AND THAT IS BECAUSE OF THE LANGUAGE I QUOTED FROM THE PENALTY-PHASE SUMMATION, WHERE HE TELLS THE JURY THAT DR. GOFF TESTIFIED THAT MR. GORBY HAS BRAIN DAMAGE, BUT I DON'T KNOW WHAT VALUE THAT HAS. THAT IS WHAT HE TOLD THE JURY. HE SAID YOU CAN FIND THAT IS MITIGATION, BUT I DON'T KNOW WHAT VALUE THAT HAS.

AND WHAT ACTUAL MITIGATORS DID HE ARGUE, AT -- DID HE ARGUE THE MENTAL MITIGATORS TO THE COURT, TO THE JURY?

THE JURY WAS INSTRUCTED THAT THEY COULD FIND BOTH STATUTORY MENTAL HEALTH MITIGATORS. I WOULDN'T SAY THAT HE, EXACTLY, ARGUED THEM. WHAT HE DID IS HE SAYS ONE MITIGATING FACTOR YOU MAY FIND IS EXTREME EMOTIONAL MENTAL DISTURBANCE, AND THE OTHER IS THAT MR. GORBY'S ABILITY TO CONFORM TO THE STANDARDS OF THE LAW, WHICH THEY COMPARED, I PRESENT TO YOU IS CONCLUSORY INFORMATION. HE DID NOT ATTEMPT TO ADVANCE, DURING THE GUILT PHASE WITH DR. GOF AND WITH A GOULET WITNESSES, THAT THE MENTAL HEALTH MITIGATORS EVER APPLIED. NEVER, ON THE WITNESS STAND, DID HE EVER OFFER THE OPINION, BEFORE THE JURY, NOW THAT, THE GENERAL MENTAL HEALTH MITIGATORS DID APPLY.

AGAIN, THIS GOES BACK TO DR. GOFF, THAT HE COULD NOT EXPRESS THAT VIEW TO THE JURY BECAUSE OF THE DEFENSE POSITION?

NO, YOUR HONOR, IN POSTCONVICTION, DR. GOFF DID TESTIFY THAT HE DID BELIEVE THAT BOTH MENTAL HEALTH MITIGATORS --

AT THE TIME OF THE TRIAL, THOUGH, WAS IT NOT THE VIEW OF DR. GOFF THAT HE COULD PRESENT THOSE OPINIONS AT THAT TIME?

NO. HE WASN'T ASKED AT THE TIME OF THE TRIAL. I THINK WHAT YOUR HONOR HAS IN MIND IS, DURING THE EXAMINATION OF DR. GOFF BY THE STATE ATTORNEY, HE SAID THAT HE COULDN'T OFFER AN OPINION AS TO MR. GORBY'S MENTAL STATE AT THE TIME, BECAUSE MR. GORBY DENIED HAVING COMMITTED THE OFFENSE, AND BASED ON WHAT CAME OUT AT POSTCONVICTION, AT THE EVIDENTIARY HEARING, IT APPEARS THAT DR. GOFF HAD A QUALITATIVELY DIFFERENT UNDERSTANDING OF WHAT WAS REQUIRED FOR A FINGED OF INSANITY VERSUS WHAT WAS REQUIRED FOR THE FINDING OF THE STATUTORY MENTAL MITIGATORS. BECAUSE THE LEGAL DEFINITION FOR INSANITY HAS TO DO WITH THE McNAUGHTON RULE, THAT HE EITHER DID NOT KNOW THE QUALITY AND NATURE OF HIS ACTIONS OR DID NOT DISTINGUISH RIGHT FROM WRONG. DR. GOFF WAS ABLE TO TESTIFY THAT BOTH OF THE MENTAL HEALTH MITIGATORS APPLIED, BASED ON THE CHRONIC NATURE OF MR. GORBY'S --

DR. GOFF TESTIFIED AT THE EVIDENTIARY HEARING, CORRECT?

THAT'S CORRECT.

WOULD YOU GIVE US A THUMBNAIL SKETCH OF WHAT HIS TESTIMONY WAS, AS FAR AS WHAT HIS STRATEGY WAS, FOR THE PENALTY PHASE OF THIS TRIAL.

IN ESSENCE AND UNFORTUNATELY MANY OF THESE QUESTIONS WERE SIMPLY NOT ASKED, BUT HE BELIEVED THAT DR. GOFF HAD GIVEN HIM AS MUCH INFORMATION AS HE COULD GIVE HIM. THAT WAS HIS UNDERSTANDING. NOW, HE HAD NEVER ASKED DR. GOF IF HE COULD, DR. GOFF OR DR. WARNER, FOR THAT MATTER, IF THEY COULD ESTABLISH THE MENTAL HEALTH MITIGATING FACTORS, SO THAT GOING INTO THE PENALTY PHASE, TRIAL COUNSEL DID NOT, IN FACT, KNOW WHAT THEY WOULD SAY. HE JUST ASSUMED.

BUT HE HAD -- DR. GOFF HAD, ALREADY, TESTIFIED, HAD HE NOT, SO HE KNEW WHAT DR. GOFF WOULD SAY, BECAUSE DR. GOFF HAD ALREADY SAID WHAT HE WOULD SAY. DIDN'T DEFENSE COUNSEL TESTIFY, IN ESSENCE, THAT HIS DECISION WAS, SINCE HE HAD HAD DR. GOFF TESTIFY AT THE GUILT PHASE, AND AT LEAST IN HIS VIEW, HE HAD SAID EVERYTHING THAT HE WOULD HAVE ASKED HIM AT A PENALTY PHASE, THAT HE SIMPLY RELIED ON THAT, THEN, AT THE PENALTY PHASE?

HE, REALLY, DID NOT RELY ON HIM AT THE PENALTY PHASE. WHAT HAPPENED --

HE DIDN'T RELY? I AM NOT SURE I UNDERSTAND.

LET ME BE CLEAR. DR. GOFF'S GUILT-PHASE TESTIMONY WAS ESSENTIALLY LIMITED TO THE QUESTION OF WHETHER OR NOT MR. GORBY SUFFERED FROM BRAIN DAMAGE, WHICH HE DID, AND HE, FURTHER, OFFERED THE OPINION THAT HE HAD SEVERE ALCOHOL ABUSE, WITH A HISTORY OF BLACKOUTS, AND HOW THAT MAY HAVE INTERACTED WITH THE BRAIN DAMAGE. HE DID NOT RELATE THAT TO ANY OF THE MENTAL HEALTH MITIGATING FACTORS.

I AM NOT -- OKAY. I AM NOT, REALLY, ASKING TO EVALUATE THAT, SO MUCH AS I AM ASKING WHAT THE TESTIMONY OF THE DEFENSE LAWYER WAS, AS TO WHAT -- THAT HIS STRATEGY WAS FOR THE PENALTY PHASE. I MEAN, HE WAS ASKED ABOUT THAT, WAS HE NOT?

IN OTHER WORDS WHAT DID HE DO AND WHAT WAS HIS GAMEPLAN, INSOFAR AS PRESENTING A DEFENSE AT THE PENALTY PHASE, FOR THIS DEFENDANT?

WELL, HE BELIEVED THAT THE JURY HAD NOT ACCEPTED THE MENTAL HEALTH TESTIMONY OF DR. GOFF, BECAUSE THEY HAD CONVICTED IS MR. GORBY, APPARENTLY, AND SO HE DIDN'T SEE IT AS BEING PARTICULARLY USEFUL AT THAT POINT, AND THAT IS WHY I THINK HE SORT OF REFERRED TO IT IN THIS VAGUE, OFFHAND FASHION, AND HAS STRATEGY, IF HE IS SAID TO HAVE ONE, IS TO PRESENT LAY WITNESSES AS A PLEA FOR MERCY. HE CALLED MR. GORBY'S MOTHER AND HIS TWO SISTERS, ABOUT THE FACT THAT THE FAMILY LOVED MR. GORBY, AND THAT IS WHAT WAS PRESENTED AT THE PENALTY PHASE, NOT ANY MENTAL HEALTH MITIGATION.

DECHARACTERIZE IT THAT WAY? AS A PLEA FOR PERCENT SPY?

HE CHARACTERIZED IT AS HUMANIZING MR. GORBY, I THINK IT WAS, AT THE PENALTY PHASE HEARING.

WHERE DID HE GO WRONG AT THE EVIDENTIARY HEARING, ALTHOUGH WE HAVE A DUTY TO LOOK AT THE INEFFECTIVENESS QUESTION INDEPENDENTLY, WE MUST, ALSO, REFER TO THE TRIAL COURT'S FACTUAL FINDINGS, SO WHERE DID THE TRIAL COURT GO WRONG, IN HER FACTUAL FINDINGS, IN DENYING THE LEAVE, AND IT LOOKS LIKE MOST OF IT IS IN PARAGRAPH TEN OF THE ORDER, WHERE THAT IS -- THIS ISSUE IS REFERRED TO. CORRECT?

WELL, ACTUALLY, I WOULD JUST NOTE THAT, IN PARAGRAPH TEN, SAY THAT PARAGRAPH NINE IS WHERE THE COURT ADD -- IS WHERE HE ADDRESSES THE PENALTY PHASE, BUT THE COURT, ESSENTIALLY, FINDS, IN PARAGRAPH TEN, THAT THERE WOULD BE NO PREJUDICE, BECAUSE THE OUTCOME WOULD BE THE SAME. THE FINDINGS WOULD BE THE SAME, HAD HE PRESENTED DR. GOFF IN THE PENALTY PHASE. AND THAT IS SIMPLY NOT TRUE, BECAUSE DR. GOFF WOULD HAVE ESTABLISHED, AND DR. WARNER WOULD HAVE ESTABLISHED THAT BOTH OF THE STATUTORY MENTAL HEALTH MITIGATING FACTORS APPLIED, AND THIS WOULD HAVE BEEN UNREBUTTED TESTIMONY, BECAUSE THE STATE'S EXPERT WOULD NOT HAVE CONTRADICTED IT. SO, FIRST OF ALL, THAT, I THINK, IS INCORRECT. THERE IS, ALSO, SOME PROBLEMS WITH THE COURT'S --

IS THAT ENOUGH FOR ESTABLISHING PREJUDICE? IN OTHER WORDS LET'S ASSUME THAT WE COULD READ THIS TO SAY THAT WOULD HAVE SHOWN STATUTORY MITIGATORS. IN LIGHT OF THE CIRCUMSTANCES OF THIS CRIME AND THE AGGRAVATORS, ISN'T IT, REALLY, THE TEST WOULD HAVE BEEN BUT FOR THIS LIFE SENTENCE IMPOSED. IT IS NOT JUST A MENTAL MITIGATOR FOUND.

FIRST OF ALL, WE HAVE TO REMEMBER THIS THE JURY RECOMMENDATION WAS 9-TO-3. THREE JURORS WOULD HAVE VOTED FOR LIFE AND HAD A PREDISPOSITION FOR LIFE. IF THE TESTIMONY WOULD HAVE BEEN PRESENTED, CONCERNING THE STATUTORY MITIGATORS, THERE WAS, ALSO, AN ARRAY OF NONSTATUTORY THAT WAS NEVER PRESENTED IN THIS CASE, AND I THINK A CUMULATIVE ANALYSIS, UNDER KYLE AND UNDER GUMBY, WOULD HAVE ESTABLISHED IT.

YOU ARE TALKING ABOUT -- THIS IS NOT A CASE WHERE WE SEE NO MITIGATION WAS PRESENTED. THIS DEFENSE LAWYER WENT TO WEST VIRGINIA. HE INTERVIEWED PEOPLE. HE PUT DIFFERENT WITNESSES ON. HE TESTIFIED THAT THE FATHER WAS UNCOOPERATIVE, SO WHEN WE GET INTO THAT, AS TO LET'S LOOK AT WHAT WAS PRESENTED AT THE EVIDENTIARY HEARING VERSUS WHAT WAS PRESENTED AT TRIAL, AREN'T WE JUST, REALLY, AT THIS POINT, THEN, SECOND-GUESSING WHAT TRIAL COUNSEL DID?

NO. I THINK IT IS IMPORTANT TO ANALYZE, TO CRITICALLY ANALYZE EACH THING THAT TRIAL COUNSEL DID, AND, WELL, AT FIRST GLANCE, IT APPEARS THAT HE DID A COMPETENT JOB. IF YOU LOOK MORE CLOSELY, YOU FIND THE UNDERLYING REALITY IS QUITE DIFFERENT A EXAMPLE OF THAT WHICH YOU JUST MENTIONED, YOUR HONOR, HIS TRAVELING ON TO WEST VIRGINIA TO INTERVIEW THE FAMILY MEMBERS, WELL, HE, FIRST OF ALL, DELAYED, UNTIL TWO WEEKS BEFORE THE TRIAL, BEFORE HE DID THIS, EVEN THOUGH FOR MONTHS HE HAD KNOWN THAT HIS INVESTIGATOR WOULD NOT BE ABLE TO DO ANY INVESTIGATION, BECAUSE SHE HAD NO TIME, SO

TWO WEEKS BEFORE THE TRIAL, HE GOES TO WEST VIRGINIA, AND HIS INTERVIEW WAS VERY SUPERFICIAL. HE GATHERED ALL OF THE FAMILY MEMBERS TOGETHER IN ONE ROOM AND ASKED A FEW PER FUNKTORY QUESTIONS AND THEN -- PERFUNCTORY QUESTIONS AND THEN HE FLEW BACK HOME, AND HE NEVER PRESENTED THAT TO HIS MENTAL HEALTH EXPERTS. THEY NEVER KNEW THAT HE WAS GIVEN ALCOHOL WHEN HE WAS 11 YEARS OLD AND THEY NEVER KNEW THAT MRS. GORBY, HIS MOTHER, HAD SEXUAL INTERCOURSE IN DIFFERENT POSITIONS WHILE THE CHILDREN WERE IN THE BED SLEEPING.

ISN'T IT TRUE THAT HE DIDN'T WANT TO PRESENT THE TESTIMONY DURING THE GUILT PHASE? HE FELT IT WOULD AFFECT THE HARM'S EVENT. DR. WARNER DIDN'T TESTIFY. HE WANTED SOMEONE ELSE. HE WANTED DR. GOFF.

THAT IS ACTUALLY IF DISPUTE, BECAUSE DR. GOFF'S MEMORY IS DIFFERENT ON THAT POINT, YOUR HONOR.

THE TRIAL COURT COULD HAVE ACCEPTED IT, THOUGH, COULD IT NOT, GOING THE OTHER WAY?

I DON'T THINK YOU SEE IN THE LOWER COURT'S ORDER THAT HE DOES NOT MAKE ANY FINDING AS TO THAT ISSUE, AND IN ANY CASE, BECAUSE THIS IS AN INEFFECTIVE ASSISTANCE CLAIM, BEFORE THIS COURT IS DE NOVO REVIEW AND THERE IS NO FACTUAL FINDINGS BY THE TRIAL COURT.

I THINK WE DO HAVE TO DEFER TO THE FACTUAL FINDINGS, CORRECT? I THINK, MAYBE THAT STRICKLAND SAYS, ON THE ISSUE OF THE INEFFECTIVENESS, THEN, WE DO HAVE TO HAVE A DE NOVO REVIEW.

RIGHT. THAT IS WHAT I WAS SPEAKING OF, YOUR HONOR.

BUT THE HISTORICAL FACT, WE, STILL, DEFER TO THE TRIAL COURT.

BUT MY POINT WAS THAT THE LOWER COURT DID NOT MAKE A FACTUAL FINDING ON THAT POINT. I SEE I AM INTO MY REBUTTAL TIME, BUT I DO WANT TO ADDRESS ONE ISSUE VERY QUICKLY, DISTINCT FROM THIS ONE, AND THAT IS THE ISSUE OF THE GENERAL JURY QUALIFICATION PROCEDURE IN BAY COUNTY. THIS WAS RAISED AT CLAIM ONE AND, ALSO, IN THE INITIAL BRIEF, AT ARGUMENT 4-A, I BELIEVE.

WAS IT OBJECTED TO AT TRIAL?

NO, IT WAS NOT, YOUR HONOR, AND THAT IS WHY IT HAS BEEN RAISED AS INEFFECTIVE ASSISTANCE, ALTHOUGH PARENTHETICALLY, I WOULD NOTE THAT THERE IS NO LOCAL RULE, IN THE 14th CIRCUIT, WHICH WOULD GIVE NOTICE TO PARTIES THAT THIS PROCEDURE WAS ACTUALLY TAKING PLACE.

THERE IS NO -- YOU SUMMARIZE THAT IT TAKES PLACE, BECAUSE THAT WAS TRADITION. YOU DON'T KNOW THAT IT ACTUALLY TOOK PLACE, IN THIS PARTICULAR CASE.

WELL, WE HAVE COLLATERAL INFORMATION INDICATING THAT IT, DID AND THE MOST RECENT CASE ON POINT, WHICH WAS BEFORE THIS COURT, ACTUALLY, WAS A CASE WHERE THE STATE ATTORNEY ADMITTED IT WAS STILL TAKING PLACE, AND THE PRACTICE HAD GONE ON FOR VERY LONG.

HOW DO YOU SEE THE PRACTICE AS BEING HARMFUL TO YOUR CLIENT?

BECAUSE, YOUR HONOR, IN CONTRAST TO EVERY OTHER CASE WHICH HAS ADDRESSED THIS ISSUE, IN THIS PARTICULAR CASE, DEFENSE COUNSEL WAS NOT PRESENT. MR. GORBY WAS NOT

PRESENT DURING THE PROCEEDING. THERE WAS NO COURT REPORTER, NO RECORD. MOST SIGNIFICANTLY, THE STATE ATTORNEY WAS PRESENT, AND ALLOWED TO PARTICIPATE, AND ALLOWED TO ADVISE THE COURT AS TO WHICH VENIRE TO OBTO AND WHICH NOT TO OBJECT TO, BECAUSE -- TO OBJECT TO AND WHICH NOT TO OBJECT TO, AND THE LOWER COURT RULED THAT THIS PROCEDURE, AS PLED IN THE 3.850 AND HAS BEEN PROCEDURALLY BARRED, THERE IS NO HEARING ON THIS CLAIM. WE DON'T KNOW WHAT HAPPENED UNTIL WE CAN CROSS-EXAMINATION THE CHIEF JUDGE AND THE OTHER JUDGES IN THE CIRCUIT, TO ASCERTAIN ANY PREJUDICE O.

DO YOU HAVE FACTS SUPPORTING THAT, OR IS THAT SPECULATION, AS TO WHAT THE STATE ATTORNEY'S ROLE WAS, IN ADVISING THE JUDGE?

YES. I BELIEVE THAT, WHAT WOULD HAPPEN, IS THAT ON MONDAY MORNINGS, IN THE -- IN BAY COUNTY, ALL OF THE VENIRE PEOPLE WERE BROUGHT INTO ONE ROOM, AND SOME WOULD PROFESSOR VARIOUS HARP EXCUSE TO BE REMOVED -- HARDSHIP EXCUSES TO BE REMOVED FROM THE JURY POOL. FOR EXAMPLE THEY HAD TO BE AT THEIR JOB OR THEY HAD A CHILD AT HOME THAT WAS SICK, AND IT WAS UP TO THE STATE ATTORNEY TO OBJECT OR NOT TO OBJECT TO THE RELEASE OF THESE VENIRE PEOPLE, AND THIS WAS DONE WITHOUT PRESENCE OF DEFENSE COUNSEL.

IF THE STATE ATTORNEY OBJECTED, THIS PERSON WOULD BE SENT HOME AT THAT POINT?

THE JUDGE COULD, THEN, AGREE TO EXCUSE THE VEMI -- VENIRE PERSON.

WOULD HE DO THAT, AT THE BEHEST OF THE STATE ATTORNEY, OR THAT IS WHAT I AM TRYING TO GET AT?

YES. I BELIEVE THAT WE HAVE INFORMATION WHICH SHOWS THIS IS THE PRACTICE WHICH IS LONG STANDING IN BAY COUNTY, THAT THIS HAPPENS EVERY MONDAY.

IF THE STATE ATTORNEY SUGGESTED IT, THEN THIS POTENTIAL JUROR WOULD BE DISMISSED. THAT IS WHAT YOU ARE TELLING ME. THAT IS WHAT YOU ARE REPRESENTING.

YES, YOUR HONOR.

BUT NOT THE ACTUAL PEOPLE WHO COME IN FOR THIS PARTICULAR CASE. THIS IS THE ENTIRE POOL OF PEOPLE WHO HAVE BEEN CALLED TO JURY SERVICE. IS THAT BECAUSE ARE TALKING ABOUT?

RIGHT. SOME OF WHICH WOULD GO TO MR. GORBY'S CASE AND SOME OF WHICH WOULD BE DISPATCHED TO OTHER COURTROOMS FOR OTHER TRIALS. I THINK THIS IS AN OUTRAGEOUS PRACTICE AND SHOULD BE ENJOINED AND WE SHOULD REMAND FOR A HEARING ON THIS ISSUE, SO WE KNOW EXACTLY WHAT HAPPENED. THERE IS NO TRANSCRIPT. WE DON'T KNOW WHAT HAPPENED. THE RECORDS HAVE BEEN DESTROYED. THE RULES REGARDING THE POOLS DENY US TO ASK WHAT HAPPENED. AND FOR THIS COURT TO ACCEPT THE FACTUAL ALLEGATION IN HIS A 3.850 AS TRUE, WHEN THERE IS NO HEARING REMAND --

HAS THIS PRACTICE BEEN DISCONTINUED NOW?

NO. AS I UNDERSTAND, YOUR HONOR, IT CONTINUES TO THE PRESENT DAY, AND THE ONLY DIFFERENCE IN THIS CASE AND BAITS, IN WHICH MR. BAITS WAS NOT GIVEN RELIEF, WAS THAT MR. IN BATES'S CASE, THERE WAS AN EVIDENTIARY HEARING AND HIS ATTORNEY WAS, IN FACT, PRESENT AND COULD OBJECT TO OR NOT OBJECT TO THE STATE ATTORNEY'S DECISIONS.

THIS IS LIMITED TO, THAT YOU ARE TALKING ABOUT, IS RECUSAL FROM JURY DUTY?

HARDSHIP RECUSALS, YOUR HONOR.

HOW WAS IT DONE IN MOST OTHER COUNTIES?

I BELIEVE IN MOST OTHER COUNTIES, EITHER DEFENSE COUNSEL WOULD BE PRESENT OR THERE WOULD AT LEAST BE A COURT REPORTER PRESENT, TO BE SURE THAT THERE WAS NO PREJUDICE TO THE DEFENDANT. IN A CASE CLOSELY ON POINT, WHICH IS MACKEY, WHICH WAS ADDRESSED IN THE DCA, IT ADD MIGHT NOT ISSUED THE STATE ATTORNEY -- ADMONISHED THE STATE ATTORNEY'S OFFICE TO DISCONTINUE IT, AND THAT WAS IN 1989, AND IN THAT CASE THE TRIAL JUDGE GRANTED A PRETRIAL HEARING, AT WHICH THE DEFENSE ATTORNEY COULD QUESTION THE STATE ATTORNEY, TO DETERMINE IF ANY PREJUDICE OCCURRED AND HE WAS, ALSO, OFFERED THE OPPORTUNITY TO QUESTION THE PROSPECTIVE JURORS, TO SEE IF THAT HAPPENED. THAT, ALSO, WAS NOT DONE IN THIS CASE.

YOUR TIME IS UP. MR. WHITE.

THANK YOU, YOUR HONOR. STEVE WHITE, ASSISTANCE ATTORNEY GENERAL, REPRESENTING THE APPELLEEANT RESPONDENT. THE STATE HAS A DIFFERENT PERSPECTIVE.

LET'S GET RIGHT TO THE ISSUE, MR. WHITE, OF THE ISSUE OF THE USE OF DR. GOFF AT THE GUILT PHASE INSTEAD OF THE PENALTY PHASE. NOW, I UNDERSTAND THAT, IN DR. GOFF'S TESTIMONY, HE TALKS ABOUT ALCOHOLISM AND THE BRAIN DAMAGE AND HOW THIS MADE HIM IMPULSIVE OR WORDS TO THAT EFFECT BUT WHY -- WAS THERE ANY STRATEGIC REASON THAT THE TRIAL ATTORNEY DID NOT DEVELOP THAT? IF HE WAS NOT GOING TO CALL DR. GOFF AT THE PENALTY PHASE, SHOULDN'T HE HAVE AT LEAST MADEA REALLY COGENT ARGUMENT ABOUT WHAT THAT TEST -- MADE A REALLY COGENT ARGUMENT ABOUT WHAT THAT MEANS IN THE PENALTY PHASE.

YES. MY RECOLLECTION DIFFERS FROM OPPOSING COUNSEL. MY RECOLLECTION OF THE DEFENSE COUNSEL. COMERICK? I AM NOT SURE HOW TO PRONOUNCE HIS NAME, BUT IN ANY EVENT, FROM POSTCONVICTION TESTIMONY, IT WAS INDICATED THAT HE WAS WORRIED, FROM THE GET-GO, ABOUT THE GUILT PHASE. HE WAS WORRIED, DUE TO THE VERY STRONG EVIDENCE THAT THE STATE HAD, IN TERMS OF THE KBLT GUILT PHASE, THAT HIS CLIENT -- FROM THE GUILT PHASE THAT, HIS CLIENT WAS GOING TO BE CONVICTED, AND SO HE WAS PREPARING, CONCURRENTLY, FOR BOTH THE GUILT PHASE AND THE PENALTY PHASE. HE KNEW HE WANTED TO LAY THE GROUNDWORK FOR THE PENALTY PHASE AS HE WAS PREPARING, ALSO, FOR THE GUILT PHASE, AND SO HE DID SPEND HOURS ON THE PHONE WITH MS. GARRISON, THE DEFENSE MOTHER. HE DID GO TO WEST VIRGINIA AND MEET WITH HER AND THE FAMILY. HE DID HIRE --

WAS THIS AT A TIME OTHER THAN, AS THE APPELLANT SAY --

PRETRIAL.

-- TWO WEEKS BEFORE THE ACTUAL HEARING.

I DON'T KNOW IF IT WAS TWO WEEKS, YOUR HONOR, BUT IT WAS ROUGHLY WITHIN A MONTH OF THE TRIAL, BUT, ALSO, DR. GOFF TALKED, AT LENGTH, WITH THE MOTHER, AND REVIEWED AN ENORMOUS VOLUME OF RECORDS THAT TRIAL COUNSEL HAD GATHERED. TRIAL COUNSEL LISTED ALL OF THE AGENCIES THAT HE HAD OBTAINED RECORDS, REGARDING THE DEFENDANT'S BACKGROUND, INCLUDING THE CLINIC, WHICH TREATED HIM AFTER A SERIOUS ACCIDENT WHEN HE WAS FOUR YEARS OLD.

EXPLAIN WHAT WAS THE REASON, IF THE DEFENSE ATTORNEY WAS ONLY CONCERNED ABOUT THE PENALTY PHASE, PUTTING DR. GOFF ON IN THE GUILT PHASE AND THEN NOT IN THE PENALTY FAIRTION ATTEMPTING TO ESTABLISH STATUTORY -- PHASE, ATTEMPTING TO ESTABLISH STATUTORY MENTAL MITIGATORS. IN OTHER WORDS IF HE KNOWS THIS GUY IS GOING TO BE

CONVICTED, I NEED TO DO WHATEVER I CAN TO SAVE HIM FROM THE DEATH PENALTY.

ALSO FROM THE GET-GO, YOUR HONOR, HE WAS KIND OF CAUGHT BETWEEN A ROCK AND A HARD PLACE. HIS CLIENT, CAPTAIN MacKEATHEN, WHO TESTIFIED AS TO WHAT THE DEFENDANT'S STORY WAS, AND APPARENTLY THE DEFENDANT ADHERED TO THAT STORY DURING THE TRIAL, IN TERMS WITH HIS CONFIDENCE WITH DEFENSE COUNSEL. HE SAID I WASN'T THERE, TO THE CAPTAIN MacKEATHEN. I WASN'T THERE. SO ON THE ONE HAND HE HAD A DEFENSE THAT HE NEEDED TO ADHERE TO, BECAUSE HIS CLIENT INSISTED THAT HE DIDN'T DO THE MURDER THAT, HE WASN'T THERE, AND ON THE OTHER HAND, HE IS TRYING, ALSO, PREPARE, ATTACK THE GUILT PHASE, FOR WHATEVER WAY HE CAN, INCLUDING TRYING TO POKE HOLES IN THE STATE CASE AND, ALSO, POKE HOLES IN TERMS OF THE INTENT AND PREMEDITATION, THROUGH DR. GOFF, BUT, ALSO, LAY THE GROUNDWORK FOR THE PENALTY PHASE, BUT HIS POSITION WAS THAT THE GROUNDWORK WAS LAID, YOUR HONOR, AND HE DID ARGUE, AND THE STATE DISAGREES WITH OPPOSING COUNSEL REGARDING DEFENSE COUNSEL'S PENALTY PHASE CLOSING ARGUMENT. HE DID ARGUE STRENUOUSLY THAT DR. GOFF DID PROVIDE THE BASIS FOR THE TWO STATUTORY MENTAL MITIGATORS.

I AM STILL NOT SURE -- GOING BACK TO JUSTICE QUINCE'S QUESTION, MAYBE THE UPSHOT, THEN WHY, THOUGH, WHY WOULDN'T YOU PUT ON DR. GOFF OR OTHER MENTAL HEALTH MITIGATION, IN THE PENALTY PHASE? IF HE WAS HE WAS LIMITED IN THE -- IF HE WAS LIMITED IN THE GUILT PHASE, BUT YET HE STILL PUT DR. GOFF ON, WHO TALKED ABOUT WHAT WOULD BE CONSISTENT WITH THE DEFENDANT BEING THERE BUT JUST NOT HAVING THE MENTAL CAPACITY, I GUESS, TO COMMIT PREMEDITATED MURDER.

OR THE INTENT TO COMMIT ONE OF THE UNDERLYING FELONIES FOR FELONY MURDER, RIGHT?

SO IT IS IN INCONSISTENT DEFENSE. -- IT IS INCONSISTENT DEFENSE. YOU ARE ADMITTING THAT THE DEFENDANT WAS THERE, IF YOU PUT DR. GOFF ON DURING THE GUILT PHASE. NORMALLY YOU WOULD THINK SOMEONE WOULD WAIT AND PUT IT ON THE PENALTY PHASE.

HE WAS WALKING A FINE LINE, ADMITTEDLY, BUT THE WAY HE COUCHED IT TO THE JURY WAS THE STATE HASN'T PROVED ITS CASE BEYOND A REASONABLE DOUBT. THE PROBLEMS WITH THIS, THEY DIDN'T DO THIS INVESTIGATION. THEY SHOULD HAVE. WEISCH IS NOT BELIEVABLE, ET CETERA, ET CETERA, POKING HOLES IN THE STATE'S CASE AND ADHERING TO THE DEFENDANT'S STATEMENT TO CAPTAIN MacKEATHEN ON THE ONE HAND. THEN THE DEFENSE COUNSEL ARGUED TO THE JURY, BUT IF YOU FIND THAT MY CLIENT WAS THERE, HE DID NOT HAVE THE MENTAL CAPACITY TO COMMIT THE CRIME. SO HE ARGUED,ALITYTIVELY TO THE JURY -- ALTERNATIVELY TO THE JURY, A TRIAL TACTIC THAT, PERHAPS, ALL DEFENSE LAWYERS WOULD NOT ADHERE TO BUT NEVERTHELESS NOT AN OUTRAGEOUS TACTIC, WHEN IT CAME DOWN TO THE PENALTY PHASE, DISAGREEING WITH COLLATERAL COUNSEL, HE DID ARGUE THAT DR. GOFF PROVIDED THE BASIS FOR THE TWO STATUTORY MITIGATORS, AND, IN FACT, IF WE LOOK AT DR. GOFF'S GUILT-PHASE TESTIMONY, HE EMPHASIZED THE ORGANIC PENALTY DISORDER THAT THE DEFENDANT HAD MAKES HIM SHORT-TEMPERED. I WOULD ARGUE THAT, IF ANYTHING, DR. GOFF'S GUILT-PHASE TESTIMONY IS STRONGER, FOR THE PURPOSES OF THE STATUTORY MENTAL MITIGATORS, THAN DR. CROWN'S POSTCONVICTION, WITH THE BENEFIT OF THE YEARS OF HINDSIGHT, THAT, IN FACT, DR. GOFF, AT THE GUILT PHASE, TESTIFIED THAT THIS IS CHARACTERISTIC, SHORT TEMPERED, DIFFICULTY TO MAINTAIN TEMPER AND DIFFICULTY TO STOP, ONCE HE STARTS SOMETHING, SO AFTER THE FIRST BLOW, HE WOULD HAVE DIFFICULTY STOPPING, WOULD BE THE INFERENCE FROM HIS TESTIMONY, DIFFICULTY SEEING THE CONSEQUENCES OF HIS ACTIONS REGARDING THE MENTAL MITIGATOR AND CAPACITY TO APPRECIATE CRIMINALITY. SO DR. GOFF'S GUILT-PHASE TESTIMONY, WHICH HE DID ARGUE DURING THE PENALTY PHASE, DID PROVIDE FOR THE STATUTORY MENTAL MITIGATORS, BUT IT WAS IN THE CONTEXT OF A PLEA OF MERCY. THIS WAS, BY WAY OF EMPHASIZING TO THE JURY THAT THE LAW EMPHASIZES LIFE, AND IF YOU HAVE ANY DOUBT AS TO WHETHER TO RECOMMEND LIFE OR DEATH, YOU SHOULD

RECOMMEND LIFE, BECAUSE WE HAVE, IN THIS PARTICULAR CASE, TYING IN DR. GOFF, TYING IN THE TWO STATUTORY MITIGATORS, AND IN THIS PARTICULAR CASE, WE HAVE TESTIMONY OF THESE TWO STATUTORY MITIGATORS, AND HE EXPLICITLY ARGUED TO THE JURY, AT THE PENALTY PHASE, THAT EVEN IF YOU REJECTED DR. GOFF'S TESTIMONY FOR PURPOSES OF THE MENTAL ELEMENTS OF THE CRIMES, YOU CAN, STILL, ACCEPT THAT TESTIMONY, IN TERMS OF PROVING THE MENTAL MITIGATE ON, BECAUSE WE DON'T HAVE TO PROVE MENTAL MITIGATORS, BEYOND A REASONABLE DOUBT. THE STATE HAD TO PROVE THE MENTAL ILL BEYOND A REASONABLE DOUBT. WE ONLY HAVE TO PROVE THE MENTAL MITIGATORS, TO A PREPONDERANCE OF THE EVIDENCE.

SO YOU ARE ARGUING THERE WASN'T, REALLY, EVEN A QUALITATIVE DIFFERENCE BETWEEN THE NATURE OF WHAT WAS PRESENTED IN THE EVIDENTIARY HEARING, AS FAR AS THE MENTAL MITIGATION, AND THE TESTIMONY OF DR. GOFF AT TRIAL, THAT THEY WERE QUALITATIVELY --

EXACTLY, YOUR HONOR, AND, IN FACT, ARMED WITH HINDSIGHT, DR. CROWN'S DIAGNOSIS WAS EXACTLY THE SAME AS DR. GOFF'S AT THE GUILT PHASE.

AND THAT IS ESSENTIALLY WHAT THE COURT FOUND, WAS THAT THERE WAS NO PREJUDICE FROM, EVEN IF IT WOULD HAVE BEEN BETTER TO PUT ON OTHER WITNESSES IN THE PENALTY PHASE, IT WAS NOT SUFFICIENT TO RISE TO THE PREJUDICE LEVEL OF STRICKLAND?

YES, YOUR HONOR, AND IN FACT, A REASONABLE RESPONSE TO THE STATE, AT THE PENALTY PHASE, IF DR. CROWN HAD TESTIFIED, FOR EXAMPLE, AT THE PENALTY PHASE, WOULD HAVE BEEN TO PUT DR. MacCLARIN ON TO TESTIFY, AS HE DID IN THE POSTCONVICTION HEARING, THAT, BECAUSE THE DEFENDANT DENIED BEING AT THE SCENE OF THE CRIME, WE ARE MISSING A KEY ELEMENT, IN TERMS OF DETERMINING THE STATUTORY MENTAL MITIGATORS AT THE CRIME SCENE SCENE. THAT IS WE DON'T KNOW -- AT THE CRIME SCENE. THAT IS WE DON'T KNOW WHAT HE FELT OR WHAT HE THOUGHT, BECAUSE HE SAID HE WASN'T THERE, AND THIS WOULD SUBSTANTIALLY WEAKEN ANY TESTIMONY REGARDING THE STATUTORY MENTAL MITIGATORS, SO THE STATE WOULD HAVE BEEN ENTITLED TO PRESENT DR. MacCLARIN AT THE PENALTY PHASE, IF, IN FACT, DR. CROWN HAD TESTIFIED AT THE PENALTY PHASE, SO DEFENSE COUNSEL USED A REASONABLE TACTIC. IT MAY NOT BE, IN HINDSIGHT, THE PERFECT TACTIC OR WE MAY QUESTION IT AS A MATTER OF HINDSIGHT, BUT IT WAS A REASONABLE TACTIC, THAT HE HAD DR. GOFF'S TESTIMONY. HE PUT IT IN CONTEXT OF A PLEA OF MERCY TO THE JURY AT THE PENALTY PHASE, AND THEN, ACTUALLY, AT THE SENTENCING PHASE, HE ARGUED TO THE JUDGE THERE WAS SOME RESIDUAL DOUBT AND DON'T EXECUTE MY CLIENT, BECAUSE IT MAY COME TO LIGHT LATER ON HE WAS POSSIBLY INNOCENT, BUT NEVERTHELESS THE TRIAL JUDGE HAD HEARD EVERYTHING, OF COURSE, THAT HAD TRANSPIRED BEFORE.

THAT IS NOT EVEN A PROPER ARGUMENT, IS IT?

WELL --

RESIDUAL DOUBT?

WELL, IT NOT LEGALLY RECOGNIZED AS SUCH, YOUR HONOR, BUT BASICALLY IT WAS A PLEA OF MERCY, AGAIN, IN ESSENCE OF THE. -- IN ESSENCE. IT WAS A COROLLARY TO HIS ARGUMENT TO THE JURY. THE LAW FAVORS LIFE. HE WAS PROVIDING ANOTHER REASON TO THE TRIAL COURT TO FAVOR LIFE IN THIS PARTICULAR INSTANCE, BUT IN TERMS OF THE MENTAL HEALTH EVALUATION THAT THE STATE, AS IT ARGUED IN ITS BRIEF, BUT, ALSO, EMPHASIZE THE FACTS OF THE MURDER AND THE AGGRAVATORS IN THIS CASE, AS TO WHETHER ANY ADDITIONAL MENTAL HEALTH TESTIMONY WOULD HAVE MADE A DIFFERENCE. WHETHER THEY HAVE MET THE STRICKLAND BURDEN OF PREJUDICE. AND GIVEN THIS OVERWHELMING EVIDENCE, THE NOTE ON THE DOOR, SHOWING HIS STATE OF MIND, AT THE TIME OF THE CRIME, IN HIS HANDWRITING, WROTE, BACK ON TUESDAY, THIS WAS A SUNDAY WHEN THE MURDER OCCURRED, HE HAD THE

PRESENCE OF MIND, THE FORE THOUGHT TO TRY TO DELAY PEOPLE DISCOVERING THE MURDER FOR A COUPLE MORE DAYS, WHILE HE COULD GET AWAY AND GET AWAY WITH THE VICTIM'S CREDIT CARDS, WHICH HE SEOUL, AND THE -- STOLE, AND THE VICTIM'S CAR, WHICH HE STOLE, TO FACILITATE HIS GET AWAY TO TEXAS. THERE IS A TRAIL OF CREDIT CARD TICKETS THAT LEAD FROM PANAMA CITY TO TEXAS, WITH THE DEFENDANT MAKING THE CHARGES ALONG THE WAY. THE BRUTAL NATURE OF THE KILLING, ITSELF, WHICH IS ELABORATED IN THIS COURT'S DIRECT APPEAL OPINION. BASICALLY THE FACTS OF THE MURDER, ITSELF, ARE JUST OVERWHELMING, IN TERMS OF MAKING ANY PSYCHOLOGIST, ADDITIONAL PSYCHOLOGIST TESTIMONY, FAILING TO MEET THE STICK PLAEGED DISTEST. SO -- STRICKLAND PREJUDICE TEST, SO FACING THIS EVIDENCE AT THE TIME OF TRIAL, HE WAS HOPING THAT HE COULD CONVINCE THE JURY THAT THE STATE HAD NOT PROVED ITS CASE BEYOND A REASONABLE DOUBT, BUT HE WAS, ALSO, LAYING THE GROUNDWORK FOR THE PENALTY PHASE, AND IN FACT A BIG DIFFERENCE HERE, I THINK, PERHAPS THIS IS WHAT WE ARE QUARRELING OVER, THAT ON COLLATERAL -- AT THE COLLATERAL PHASE OF THE CASE, THAT THE DEFENDANT IS ARGUING THAT, WELL, THE DEFENSE COUNSEL SHOULD HAVE GOTTEN AN EXPERT TO MOUTH THE WORDS OF THE STATUTE. INSTEAD DEFENSE COUNSEL USED THE DIAGNOSIS, IN THE GUILT PHASE, AND THE DEFENSE COUNSEL ARGUED THE WORDS OF THE STATUTE. WHICH IS NOT AN UNREASONABLE TACTIC, NOT A TACTIC THAT MEETS THE STANDARD OF STRICKLAND. BUT THE DIAGNOSIS, THERE IS NO CONTEST THAT THIS PHASE, EVEN ARMED WITH HINDSIGHT OF TEN YEARS, THE DIAGNOSIS IS THE SAME, NOW, AS WHEN DR. GOFF TESTIFIED AT THE GUILT PHASE, ORGANIC PENALTY DISORDER, WHICH CAUSES SHORT SHORT-TEMPEREDNESS AND IMPULSIVITY, ET CETERA, ET CETERA, ALL OF WHICH HE TESTIFIED AT THE GUILT PHASE AND WHICH DEFENSE COUNSEL DID ARGUE, AT THE PENALTY PHASE TO THE JURY, AS ESTABLISHING THE TWO STATUTORY MITIGATORS, SO THE STATE WOULD ARGUE THAT THEY HAVE NOT MET THE STRICKLAND BURDEN, AS TO THE MENTAL MITIGATORS. THE DEFENSE COUNSEL DID CONDUCT A REASONABLE INVESTIGATION, SPENT HOURS INTERVIEWING THE MOTHER, GOING TO WEST VIRGINIA, ET CETERA, ET CETERA, AND DR. GOFF, AS WELL, TESTIFYING AS TO THE EXTENSIVE PREPARATION THAT HE DID, IN PREPARING HIS DIAGNOSIS AT THE GUILT PHASE, NOT JUST AT THE POSTCONVICTION PHASE.

WOULD YOU TOUCH UPON THE CHALLENGE, HERE, WITH REGARD TO THE BAY COUNTY PROCEDURES AND AS IS CHARACTERIZED WITH THE STATE ATTORNEY, SITTING AT THE RIGHT HAND OF THE JUDGE AND INFLUENCING THE JURORS, WHO ACTUALLY WALK INTO THE COURTROOM, AND I GUESS THE INFERENCE BEING THAT ALL NONCAUCASIANS ARE EXCLUDED OR THERE IS SOME INFERENCE OR SUGGESTION TO THAT?

YOUR HONOR, THE STATE'S CONTENTION, BEYOND INFERENCE, SPECULATION, IMPROPER SPECULATION TO GROUND A REVERSAL ON. THERE IS ABSOLUTELY NO RECORD SUPPORT THAT, IN THIS CASE, ANY OF THIS HAPPENED. THERE ARE JUST INFERENCES BUILT UPON INFERENCES BUILT UPON INFERENCES, APPARENTLY TIED TO SOME OTHER CASES. I DON'T KNOW HOW MANY CASES ARE TRIED IN BAY COUNTY, BUT THEY HAVE TO BE IN THE HUNDREDS PER YEAR, AND THEY HAVE PRODUCED SOME INDICATION THAT, AND IN A FEW OF THE CASES, THAT THERE IS A PROCEDURE THAT THEY CAN TEST THAT IS UNLAWFUL O.

YOU ARE SAYING WE SHOULD HAVE A HEARING, SO WE CAN PUT ALL OF THESE THINGS ON. WHAT IS THE STATE'S RESPONSE TO THAT?

YOUR HONOR, THEY, FIRST, HAVE TO ESTABLISH A PRIMA FACIE CASE, AND ON THE FACE OF THEIR PLEAD PLEADING, SOMETHING WAS WRONG IN -- OF THEIR PLEADING, SOMETHING WAS WRONG IN THIS CASE.

WHAT IS MISSING?

THERE IS NO EVIDENCE, IN THIS CASE, THAT ANYTHING WAS WRONG.

HE DIDN'T GET A CHANCE TO PUT ON HIS EVIDENCE. WHAT IS THE PRIMA FACIE EVIDENCE MISSING, TO GET A HEARING ON? WHAT IS MISSING? BECAUSE HE DIDN'T HAVE A TRANSCRIPT, YOU WOULD HAVE TO PLEAD I HAVE A TRANSCRIPT. THIS IS WHAT HAPPENED, THERE AND FOR I GET A HEARING, AND IF I DON'T -- WHAT IS MISSING, IS WHAT I AM TRYING TO FIGURE OUT.

THEY HAVEN'T ALLEGED ANY FACT IN THIS CASE THAT THIS HAPPENED. THEY HAVE ALLEGED FACTS IN OTHER CASES, WHERE THIS MAY HAVE HAPPENED. BUT IN THIS CASE, IT IS JUST SPECULATIVE THAT THIS PARTICULAR THING HAPPENED. PLUS IT IS EXTREMELY SPECULATIVE THAT THERE WAS ANY PREJUDICE TO THE DEFENSE IN THIS CASE AT ALL. THAT THERE WAS A PROSECUTOR THERE IN THIS CASE. NO ALLEGATION IN THIS CASE, BASED UPON ANY FACT, WHATSOEVER, IN THIS CASE THAT, THAT HAPPENED AND, OF COURSE, AS HAS ALREADY BEEN NOTED, THERE WAS NO OBJECTION BELOW.

THE STATE DOESN'T CHALLENGE THE FACT THAT THE PROCEDURE EXISTED IN BAY COUNTY THAT, THE STATE ATTORNEY GOT TOGETHER WITH THE JUDGE AND IN QUALIFYING THIS PRAN HE WILL OF JURORS THAT WOULD POTENTIALLY -- THIS PANEL OF JURORS THAT WOULD POTENTIALLY SERVE, AND THAT HE HAD INPUT INTO WHETHER CERTAIN JURORS, POTENTIAL JURORS, WOULD NOT SERVE. THAT IS NOT CHALLENGED, IS IT?

WELL, YOUR HONOR, WITH ALL DEFERENCE TO THE COURT, IT DOESN'T SEEM TO BE THE STATE'S BURDEN, IN THE 3.850, TO TRY TO REBUT SHEER SPECULATION. THE STATE IS NOT CONCEDING THAT POINT, JUST TO MAKE SURE THAT IS CLEAR. THE STATE IS NOT CONCEDING THAT THERE WAS ANY IMPROPER PROCEDURE AT ALL.

IS IT NOT THE PROCEDURE, IN BAY COUNTY, FOR THIS TO HAPPEN?

YOUR HONOR, PERSONALLY I DON'T KNOW. THE BURDEN, THEN, AGAIN, IS TO PLEAD IT WITH SUFFICIENT SPECIFICITY.

SO WE WILL ACCEPT IT IS TRUE. IF THE STATE IS NOT CHALLENGING IT, WE CAN ACCEPT THAT IT IS TRUE.

WE CAN ACCEPT THAT IT IS TRUE THAT, IN SOME OTHER CASES, APPARENTLY THEY HAVE FOUND INSTANCES WHERE THIS MAY HAVE OCCURRED, BUT NOT IN THIS CASE.

AS A FORMER PROSECUTOR --

YES, YOUR HONOR.

-- THERE WERE CERTAIN CATEGORIES OF PEOPLE THAT I THOUGHT WERE MORE FAVORABLE TO THE STATE, AND THERE WERE CERTAIN CATEGORIES THAT WERE MORE FAVORABLE TO THE DEFENSE. AND AS A LAWYER, YOU CAN UNDERSTAND THIS. YOU DIVIDE THEM, LET'S SAY, COUNT ANSWER -- ACCOUNT ANSWER, TEACHERS -- SCC OUNTANTS, TEACHERS, THERE IS A TYPE THAT, DO YOU DENY THINKING THAT THIS IS A PERSON I WANT ON MY JURY, AND WHAT THE DEFENSE IS SAYING THAT IF THEY CAN REMOVE CERTAIN CATEGORIES FROM POTENTIAL JURORS, THEY HAVE A FOOT UP, AND THE STATE HAS NO SAY SO IN THAT. THAT IS THE -- SAY-SO IN THAT. THAT IS THE DEFENSE ARGUMENT, AND ISN'T THERE SOMETHING UNFAIR ABOUT THAT?

YOUR HONOR, IF, IN FACT THAT, HAPPENED IN THIS CASE, YES, YOUR HONOR.

WHAT DID HE ALLEGE IN THIS CASE? THAT YOU -- AND WHAT WOULD HE HAVE TO ALLEGE? I THOUGHT HE ALLEGED THAT IT WAS A PRACTICE IN BAY COUNTY, TO DO THIS.

BUT HE DIDN'T POINT TO ANYTHING, AT ALL, IN THIS CASE --

BUT WHAT WOULD EVIDENCE TO --

SOMETHING TO INDICATE THAT IT HAPPENED IN THIS CASE, THAT THERE WAS AN IMPROPER INFLUENCE BY THE PROSECUTOR.

BUT IF HE ALLEGED THAT IT WAS A PRACTICE --

IN SOME OTHER CASES, A HANDFUL OF OTHER CASES, OUT OF HUNDREDS, IF NOT THOUSANDS.

HE DID NOT ALLEGE, WITH SPECIFICITY, THAT THERE WAS A PRACTICE, AN ONGOING PRACTICE IN BAY COUNTY TO DO THIS?

HE TRIED TO INFER, FROM THE FEW CASES THAT HE FOUND, THAT THERE WAS AN ONGOING PRACTICE. BUT, AGAIN, THE STATE CONTENDS THAT IS JUST ABSOLUTE SHEER, RAW, BEAR SPECULATION.

SINCE THIS IS AN INEFFECTIVE --

YES, YOUR HONOR. I WAS GOING TO MOVE TO THAT.

SINCE THIS IS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THE JUDGE FOUND THAT PROCEDURALLY BARRED BECAUSE IT WASN'T BROUGHT, BUT ONE OF THE THINGS, AND WE SOMETIMES GET INTO, THIS THE ISSUE ON PROCEDURALLY-BARRED CLAIMS ARE THAT SOMETIMES THEY CAN PROPERLY BE BROUGHT AS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, IF THE FAILURE TO OBJECT IS THE TYPE OF FUNCTIONING THAT WOULD BE --

RIGHT.

-- BELOW THE MINIMUM ACCEPTED STANDARDS. IT WOULD SEEM TO ME THAT, I GUESS, ANOTHER WAY TO APPROACH THIS IS THAT, IF THIS IS SOMETHING THAT IS A LONG STANDING PRACTICE IN BAY COUNTY, IN HUNDREDS AND HUNDREDS AND HUNDREDS OF TRIALS, AND TO COUNSEL, IS THERE ANYTHING THAT WE CAN SHOW THAT SHOWS THAT THIS IS NOT, REALLY, SOMETHING THAT COUNSEL WOULD BE INEFFECTIVE, FOR FAILING TO RAISE IT, BECAUSE IT HAS BEEN DONE FOR THIS LONG? AND THAT MAY BE ANOTHER APPROACH. I DON'T KNOW IF THAT IS THE RIGHT APPROACH OR NOT APPROACH.

IN FACT I WAS GOING TO MAKE THAT POINT, IN RESPONSE TO JUSTICE HARDING'S QUESTION, AS WELL, THAT THAT IS WHY WE ARE HERE. THE QUESTION IS WHETHER COUNSEL WAS ROBEABLE -- WAS REASONABLE IN NOT OBJECTING, IF YOU TAKE THE CLAIM AT FACE VALUE. COUNSEL, WHO WAS AN EXTREMELY EXPERIENCED TRIAL LAWYER IN BAY COUNTY, WHETHER HE SHOULD HAVE OBJECTED TO A PROCEDURE THAT HE DIDN'T SEE, ON ITS FACE, AS ANYTHING WRONG. HE DIDN'T EVEN USE ALL OF HIS PRESENTORIES, YOUR HONOR. ON THAT CLAIM ALONE, WE CAN DO ARGUE EW THAT THE CLAIM WOULD HAVE PROCEDURALLY BARRED, THAT THERE HAS BEEN NO SHOWING OF PREJUDICE AND HE DIDN'T USE ALL OF HIS FROMENT OTHERS. HE DIDN'T FIND ANYBODY OBJECTIONABLE ON THE JURY, IN TERMS OF STACKING THE DECK AGAINST HIM WITH PEOPLE WHO ARE SUPPOSEDLY STATE-ORIENTED?

COUNSEL, YOU HAVE USED THEIR TIME. THANK YOU, COUNSEL. EVERYONE HAS USED THEIR TIME.