>> ORDER IN THE COURT.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
THE ADMIRAL CHIEF JUSTICE
CHARLES CANADY PRESIDING.
>> GOOD MORNING AND WELCOME TO
THIS SESSION OF THE FLORIDA
SUPREME COURT.
AT TODAY'S DOCKET WE HAVE ONE
CASE, THE CASE OF STEIGER VERSUS
THE STATE.
COUNSEL FOR THE PETITIONER IS
NOW RECOGNIZED.
>> THANK YOU.
GOOD MORNING.
MAY IT PLEASE THE COURT.
MY NAME IS JARED BROWN AND A
REPRESENTATIVE SENT THE
PETITIONER HENRY STEIGER.
THE JURY CONVICTED MR. STEIGER
OF SECOND DEGREE MURDER OF
CASSANDRA ROBERTSON AFTER HIS
TRIAL LAWYER, PAUL HAMLIN,
ALLOWED THE PROSECUTION TO ADMIT
NUMEROUS IMPROPER COLLATERAL
CRIME REFERENCES, INCLUDING
BEING ON PROBATION, HAD BEEN
CHARGED IN A FEDERAL CASE AS
WELL AS AN ATTORNEY CLIENT
PRIVILEGE STATEMENT TANTAMOUNT
TO A CONFESSION WITH HIS
ATTORNEY, ERICA REED, AS WELL AS
A LENGTHY STATEMENT GIVEN TO THE
POLICE WHICH WAS INTRODUCED
THROUGH A WITNESS THAT COULD NOT
PROPERLY AUTHENTICATE STATEMENT.
FURTHERMORE, MR. HAMLIN ALSO,
WHEN FACED WITH AN OPPORTUNITY
TO PROPERLY OBJECT AND PRESERVE
THE ERRONEOUS ADMISSION OF THE
COLLATERAL CRIME EVIDENCE, NOT
ONLY FAILED TO DO SO ON NUMEROUS
OCCASIONS.
HAD A CONVERSATION WITH HIS
COMMENT ON THE RECORD, TALK HIM
OUT OF ASKING FOR A CURATIVE
INSTRUCTION AND FULLY SORTED THE
ABILITY TO PRESERVE THE ERROR
FOR FURTHER APPELLATE REVIEW.
IT IS PAR FOR THE COURSE THE WAY
HE CONDUCTED HIMSELF DURING THE
REPRESENTATION AS A TRIAL OF 24
WITNESSES, I'M SORRY, OF 24

WITNESSES EIGHT WERE NOT ASKED A SINGLE QUESTION ON CROSS-EXAMINATION AND ONE OF THEM WAS THE LEAD DETECTIVE AND EIGHT WERE ASKED LESS THAN ONE TRANSCRIPT FOR A PAGE AND SIX, TWO'S TRANSCRIPT PAGES OR LESS AND ONLY TWO OF 24 HAD EVEN TWO OR MORE PAGES OF TRIAL CROSS-EXAMINATION SPIRIT COUNSEL, THE SOUNDS A GREAT OPENING FOR AN ARGUMENT ON COLLATERAL ATTACK.
CAN YOU FOCUS ON 924-0513 AND TELL US HOW WE SHOULD BE LISTENING TO THIS NOW AS OPPOSED TO THEN?
>> SURE, WHAT IS VERY INTERESTING IS THAT THE OPINION JEFFERSON IN 2000 SPECIFICALLY ADDRESSES 924.051 OF SECTION THREE AND IN DOING SO RECOGNIZED THAT THAT STATUTE IS DANGEROUSLY CLOSE INFRINGING UPON CONSTITUTIONALLY MANDATED APPELLATE JURISDICTION AND WHEN EVALUATING THAT STATUTE BECAUSE OBVIOUSLY, THERE IS AN INTEREST IN NOT FINDING STATUTES ON CONSTITUTIONAL THIS COURT READ THAT PARTICULAR SUBSECTION TO ONLY MEAN THE CONTEMPORARY OBJECTION ALL RULE AND WHY THAT IS INTERESTING IS THAT BECAUSE AT THE ON SENT 1980 OF THE INTRODUCTION OF THE DIRECT APPEAL 3850 AND EVEN SUBSEQUENT UP TILL 1996 WHEN THAT STATUTE WAS INTRODUCED THE CONTEMPORARY OBJECTION HAD ALREADY BEEN IN PLACE AND IT IN NO WAY AFFECTED BLOCK VERSUS RAIN RIGHT AND IN NO WAY AFFECTED A WHEN THE STATE, WARD KNOWS THESE STATE AND THESE OPINIONS THAT PREDATE THE CRIMINAL APPEAL REFORM ACT OF 1996.
SO, IF THIS ONE PARTICULAR SUBSECTION THAT THE ATTORNEY GENERAL'S OFFICE HEAVILY RELIES ON IS THE SAME, PRIOR TO 96, BECAUSE IT WAS A CONTEMPORARY OBJECTIONABLE THEREFORE THE LAW DID NOT CHANGE AFTER 1996

THEREFORE, THAT STATUTE DOES NOT
IN ANY WAY AFFECT WHAT TOOK
PLACE AFTER IT WAS ASKED.
SO, IN THIS CASE WHEN YOU LOOK
AT THE OPINIONS THAT WERE ISSUED
BY THIS COURT THERE IS A REASON
THAT THEY DON'T GO INTO DETAIL
IN THIS COURT WISELY RECOGNIZED
THAT AS OF 2000 AFTER STATE TO
BE JEFFERSON IT ALREADY
ADDRESSED THE ISSUE.
IT'S A VERY THAT AT THE DISTRICT
COURT LEVEL THERE IS A
SIGNIFICANT RELIANCE UPON THE
STATUTE HOWEVER, AT THE SUPREME
COURT LEVEL OR AT THIS COURTS
LEVEL THERE ISN'T A HEAVY
ALLIANCE EVEN AFTER 1996 ON THE
FLORIDA 924.051 SUBSECTION
THREE.
ON TOP OF THAT THE DISTRICT
COURT, ON TOP OF USING THE
STANDARD OF, LET'S SAY IN 560,
SOUTHERN SECOND 207 OF THE
FLORIDA SUPREME COURT CASE FROM
1990 WHICH AGAIN, PREDATES A CAR
ACT.
>> MR. BROWN COULD BE LOOK AT
THE LANGUAGE OF THE STATUTE
TOGETHER?
>> SURE.
>> IT SAYS AN APPEAL MAY NOT BE
TAKEN FROM A JUDGMENT OR ORDER
OF THE TRIAL COURT UNLESS A
PREJUDICIAL ARROW IS ALLEGED IN
THE PROPERLY PRESERVED OR IF NOT
PRESERVED, PROPERLY PRESERVED
WOULD CONSTITUTE FUNDAMENTAL
ERROR.
IT GOES ON TO SAY A JUDGMENT OR
SENTENCE MAY BE REVERSED ON
APPEAL ONLY WHEN APPELLATE COURT
DETERMINES AFTER REVIEW OF THE
COMPLETE RECORD THAT PREJUDICIAL
ARROW OCCURRED AND WAS PROPERLY
PRESERVED IN THE TRIAL COURT OR
IF NOT PROPERLY PRESERVED WOULD
CONSTITUTE FUNDAMENTAL ERROR.
CORRECT?
>> YES, SIR.
>> AND THAT STATUTE HAS NOT BEEN
DECLARED A CONSTITUTIONAL
CORRECT?
>> THAT IS CORRECT, SIR.

>> AND YOU HAVE NOT MADE AN ARGUMENT ON APPEAL THAT IT IS UNCONSTITUTIONAL, CORRECT?
>> NO, SIR.
>> AND YOU AGREE THAT WE ARE REQUIRED TO FOLLOW THE LAW AND THEREFORE WE WOULD BE REQUIRED TO FOLLOW THIS STATUTE AS WITH OTHER APPELLATE COURTS IN CONDUCTING THEIR APPELLATE REVIEW, CORRECT?
>> I WOULD AGREE THAT THE COURT WAS FOLLOW THE LAW AS WELL AS PRESIDENT THAT IS IN PLACE AND THIS COURT IN 2000 STATE TO BE JEFFERSON THE CITATION IS 758 SOUTHERN SECOND 651 AND ONE BASEMAN INTERPRETING THE STATUTE DETERMINE THAT.
>> LOOKING BACK AT THE STATUTE YOU HAVE INDICATED THAT THESE ARE NOT PRESERVED ERRORS AND YOU DID NOT RAISE A CLAIM OF FUNDAMENTAL ERROR SO WHERE IS THE AUTHORITY TO CONSIDER YOUR CLAIM, IN EFFECTIVE ASSISTANCE OF COUNSEL ERRORS IN A DIRECT APPEAL FROM THE FINAL JUDGMENT, RATHER THAN POSTCONVICTION COLLATERAL ATTACK?
>> THERE ARE A NUMBER OF CASES THAT HAVE SUPPORTED THIS.
>> I'M ASKING ABOUT THE STATUTE AND APPLICATION OF THE STATUTE. THE STATUTE IS VERY PLAIN AND CLEAR.
DOES IT AUTHORIZE US TO CONSIDER AN APPELLATE COURT TO CONSIDER INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS THAT ARE NOT ARGUED AS FUNDAMENTAL ERROR?
>> IT DOES HAVE A MAN CONSIDERED IN LIGHT OF THE JEFFERSON OPINION.
>> SO YOU THINK THAT WE AMENDED THE STATUTE IN JEFFERSON?
WE DO NOT CLEAR IT UNCONSTITUTIONAL.
>> NO, THAT'S CORRECT.
THE COURT DID NOT DECLARE IT UNCONSTITUTIONAL IN JEFFERSON BUT THE COURT ANALYZED THE STATUTE, LOOKING TO THE LEDGE LATE OF INTENT OF THE PASSING OF

THE STATUTE AND THEN FACED —-
SAVE SAID SPECIFICALLY THAT THE
COURT IS READING THE STATUTE TO
JUST CODIFY THE CONTEMPORANEOUS
OBJECTION ROLL OUT OF FEARS THAT
THE STATUTE AS WRITTEN COULD
BECOME UNCONSTITUTIONAL.
>> OKAY.
>> AND ALSO —- I APOLOGIZE.
>> THAT'S IT.
>> WILL POINT OUT IN NUMEROUS
CASES AT THE SUPREME COURT LEVEL
HAVE ACKNOWLEDGED THE ARGUMENT
DOWN THE LINE UPON 9.041 MEANS
OF ADDRESSING IT IN JOHNSON BE
STATE TO 38 SOUTHERN THIRD 726,
2008 OPINION FROM THIS COURT,
THERE IS A REFERENCE TO A DIRECT
APPEAL INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM IN NO WAY RELIES
UPON A FUNDAMENTAL ERROR
ANALYSIS AND THAT CREATES
REFERENCES FLETCHER BE STATE 168
SOUTHERN THIRD 186 IN FLORIDA
2000 SUPREME OR FLORIDA SUPREME
COURT 2015 OPINION SO THERE IS A
BODY OF CASE LAW THAT POSTDATES
1996 AND POSTDATES THE JEFFERSON
OPINION WHICH ALLOWS FOR THIS
VEHICLE OF RAISING THE OPINION
WITHOUT RELYING UPON FUNDAMENTAL
ERROR AND I WILL POINT OUT THAT
NEITHER THE JOHNSON CASE NOR THE
FLETCHER CASE HAS ANY SORT OF
REFERENCE TO FUNDAMENTAL ERROR
WHEN DISCUSSING THE DIRECT
APPEAL APPLICATION OF A 3850.
I WILL ALSO POINT OUT THAT EVEN
THOUGH WE DID NOT RAISE AT THE
COURT ALWAYS HAS THE ABILITY TO
RESPOND TO ADDRESS ANY
FUNDAMENTAL ERROR SHOULD THE
COURT DEEM IT FIT AND WE HAVE
OPTED NOT TO ARGUE THAT
PARTICULAR ROUTE HOWEVER, IT IS
SOMETHING THAT SHOULD THE COURT
BELIEVED THAT TO BE THE
APPROPRIATE VEHICLE AND REMEDY
OF THE ARGUMENT ON THE
CIRCUMSTANCES WE ACKNOWLEDGE THE
COURTS ABILITY TO RAISE IT AND
RULE IN THAT FASHION SHOULD THAT
BE THE CASE.
>> APPLYING THE LEGAL STANDARD

WHICH PREDATES 1996 EVEN IN BLACK ROBE VERSUS WAINWRIGHT AND OWEN IN 1990 IT SEEMS CLEAR THAT THERE IS AN EFFECTIVE ASSISTANT APPARENT ON THE RECORD BECAUSE THE ADMISSION OF COLLATERAL CRIME EVIDENCE IS VERY PREJUDICIAL AND I THINK WHAT IS INTERESTING TO CONTRAST THE SITUATION IN WHICH A PREJUDICIAL ERROR IS OBJECTED TO THAT IT IS NORMALLY GOING TO RESULT IN A REVERSAL AT THE APPELLATE LEVEL. IN MATTHEW V. STATE SOUTHERN SECOND 600 AND DEFENDED THE ACCUSED OF MURDERING HIS WIFE HE IS ULTIMATELY CONVICTED AT TRIAL AND A POLICE REPORT OR I'M SORRY, PSYCHOLOGIST REPORT REFERENCES THAT HE WAS ON DOMESTIC VIOLENCE PROBATION AND THE SIMPLE SHORT REFERENCE TO HIM BEING ON PROBATION FOR DOMESTIC VIOLENCE WARRANTED A REVERSAL OF THIS INDIVIDUAL'S CONVICTION FOR MURDER AND EVEN IN THE SITUATION AND RODRIGUEZ V. STATE WHERE SOUTHERN SECOND 381 FLORIDA SECOND DISTRICT 2000 THERE IS A SITUATION WHERE DEFENDANT IS TESTIFYING AND WILL TESTIFY AND ADMITS TO BEING A FELON BUT THE PROSECUTOR OVERSTEPPED THEIR BOUNDS AND IMPROPERLY AND PEACHES BY ASKING THE DEFENDANT TO NAME THE SPECIFIC FELONIES AND THAT'S NOT ALLOWED BY LAW.
THE DEFENSE DOES NOT OBJECT AND THE DEFENDANT IS UNDER TRIAL FOR A FIREARM ADMITS THAT HE PREVIOUSLY COMMITTED A ROBBERY FIREARM AND THAT WAS FOUND TO BE AN ERROR MERITING REVERSAL EVEN THOUGH THERE WAS NO OBJECTION AND THERE IS NOT EVEN A REFERENCE TO THAT OPINION EITHER TO THERE BEING FUNDAMENTAL ERROR WHICH SEEMS TO BE IN LINE WITH THE LINE OF JURISPRUDENCE FROM THIS COURT WHICH DOES NOT REQUIRE FUNDAMENTAL ERROR TO JUSTIFY A REVERSAL AND THE REASON THAT THOSE ARE

SIGNIFICANT IS BECAUSE ONE,
ABASING THE PREJUDICE AND WE
HAVE OBJECTION TO ONE SIMPLE
REFERENCE AND WE KNOW THERE IS A
REVERSAL.
EVEN HAVE A SITUATION THAT IS
EGREGIOUS THAT MERITS A REVERSAL
WHILE MR. STEIGER'S CASE, MR.
HAMLIN KNOWS WHAT IS COMING AND
THERE IS A RECORDING OF THE
STATEMENT THAT IS GIVEN TO THE
DEFENSE IN THIS RECORDING HAS
OBVIOUS THE PREJUDICIAL STATE
WINS BECAUSE MR. MYERS, THE
PROSECUTOR, ADMITS HE HAD TO
ADAPT A LOT OF THE INAPPROPRIATE
INFORMATION OUT HE DOES NOT DO
SO.
THERE IS ONE IN ERROR BY THE
PROSECUTION AND THIS IS A
DIFFERENT SITUATION IN THAT CASE
WHERE A DEFENSE ATTORNEY IS
INEFFECTIVE TO FIND THE 75TH
POTENTIAL EXCULPATORY WITNESS
BUT THIS IS ONE OF THOSE
SITUATIONS WHERE THE PROSECUTION
OVERSTEPPED ITS BOUNDS AND THEN
THE DEFENSE OVERSTEPPED ITS
BOUNDS AND BOTH DID SO NUMEROUS
OCCASIONS AND IT WASN'T
SPONTANEOUS AND IT WASN'T AN
ORGANIC MOMENT THAT OCCURRED IN
THE TRIAL BUT PLANNED IN A VIDEO
RECORDING AND WAS ON THE DRESS
REHEARSAL IN THE SAME AS A LIVE
SHOW.
EVERYONE KNEW IT WAS COMING.
>> COUNSELOR, AM I RIGHT MR.
STEIGER TESTIFIED AT TRIAL?
>> YES, SERPENT HE DID.
>> ISN'T IT WELL-SETTLED THAT
THE JURY WAS ENTITLED TO
DISBELIEVE, REJECT AND INDEED
BELIEVE THE OPPOSITE OF HIS
TESTIMONY?
IN OTHER WORDS DOESN'T THE FACT
THAT HE TESTIFIED AT TRIAL WEIGH
HEAVILY IN OUR CONSIDERATION OF
THE RECORD BEFORE US AND
WOULDN'T YOU AGREE THAT THIS
WOULD BE PERHAPS A BETTER CASE
FOR YOU IF HE HADN'T TESTIFIED
AT TRIAL?
>> I WOULD AGREE HIS TESTIMONY

IS CERTAINLY DAMAGING AND I CAN
IMAGINE IF I WERE COUNSELING HIM
I WOULD'VE DONE MY BEST TO
ADVISE THAT HE NOT TESTIFY
CERTAINLY HOWEVER, I THINK THERE
ARE A LOT OF THINGS THAT SHOW AN
OTHERWISE WEAK CASE BECAUSE
THERE IS NO ONE WHO SEES HIM DO
IT AND THERE IS A BODY THAT IS
ONLY FOUND WAY, WAY, WAIT MONTHS
LATER DOWN THE ROAD AND THE
DECOMPOSITION OF THE BODY
DOESN'T ALLOW FOR ANYONE TO COME
UP WITH THE MEANS OF DEATH.
THE MEDICAL EXAMINER TESTIFIES
THAT THERE IS NO BRUISING OR
INJURY OF ANY KIND THAT THEY CAN
FIND TO THE BODY BECAUSE THE
DECOMPOSITION IS SO BAD SO I
WOULD AGREE THAT WHAT HE SAID
AFTER THE FACT IS CLEARLY
TROUBLESOME BUT THAT SHOULDN'T,
IN ANY WAY, TO HAVE ITS
OBLIGATIONS TO DO WHAT IT IS
SUPPOSED TO DO PROPERLY.
MR. STEIGER WOULD TESTIFY IN A
FASHION THAT HE ULTIMATELY
TESTIFIED.
THERE IS STILL, THEY TRY TO
ARGUE AT ONE POINT THAT HIS
INITIAL STATE COULD'VE BEEN
AUTHENTICATED BY MR. STEIGER
SUBSEQUENT TESTIMONY WHEN THERE
IS NO REASON THAT THE
PROSECUTION COULD HAVE ADMITTED
THAT STATEMENT WHERE MR. STEIGER
CLEARLY IS DISHONEST WITH
RESPECT TO WHAT HAPPENS WITH
MS. ROBINSON AND THE STATEMENTS
HE GIVES ARE CLEARLY
CONTRADICTED BY THE POLICE
INVESTIGATION THAT UNFOLDS SO
IT'S VERY OBVIOUS PREJUDICE BY
ADMITTING A STATEMENT SEPARATE
FROM THE OTHER VIDEO RECORDING
WHERE ON NUMEROUS TIMES THEY
MENTIONED THAT MR. STEIGER SAID
I CAN TELL YOU THE SITUATION
WITH THE FEDS COULD POTENTIALLY
BE NEVER ENDING AND, BY THE WAY,
WAS VERY INTERESTING ABOUT THAT
IS THAT THIS IS NOT JUST A
SITUATION WHERE IT IS ONE TIME
OR TWO TIMES OR THREE TIMES OR

FOUR TIMES BUT IT IS FIVE.
IT COMES UP LIKE TEN PLUS TIMES
AND DOES NOT JUST HAPPEN IN A
ROW BUT THE INITIAL IMPROPER
STATEMENTS HAPPEN ON TRANSFER
PAGES 600 AND THEY END AT 602.
THEN THEY, MOMENTS LATER AGAIN
ON PAGE 611 AND THEN THEY COME
UP AGAIN ON PAGE 621 SO THERE IS
EVEN TIME AFTER THE FIRST SERIES
OF INAPPROPRIATE STATEMENTS FOR
WISTER HAMLIN TO COLLECT
HIMSELF, RECOGNIZE IT
INAPPROPRIATE THINGS WERE
INTRODUCED AND THEN OBJECT.
THE PROSECUTION ALSO HAD THE
TIME.
THE PROSECUTION ADMITS AFTER THE
FACT THAT THEY RISKED CERTAIN
STATEMENTS IN THIS RECORDING
THAT THEY SHOULD HAVE ATTEMPTED
TO REDACT GET THE JURY STILL
HEARD IT AND THEY ADMIT THAT
WHEN THEY WANTED TO GIVE THE
EVIDENCE OF THE JURY
DELIBERATION THEY WILL REDACT
THAT STUFF OUT SO THE JURY DOES
NOT HAVE THE FULL STATEMENT THAT
WAS JUST HEARD IN EVIDENCE.
HE ADMITS THAT HE IS ON
PROBATION AND THERE IS A
CONVERSATION WHERE THE LEAD
DETECTIVE SAYS THAT I APOLOGIZE,
THE SECOND DETECTIVE WHO WAS
WITH DETECTIVE ALVERSON,
DETECTIVE WILHITE SAYS HE TRIES
NOT TO DEAL WITH THE FEDS ON
ANYTHING AND LITERALLY SAYS
YEAH, THEY SCARE ME.
YOU EVEN HAVE THE POLICE
INVESTIGATING THIS INDIVIDUAL
FOR MURDER SAY THAT HE IS SCARY
OF THE PEOPLE WHO WERE
PREVIOUSLY INVESTIGATED MR.
STEIGER FOR AN OVERLY CRIME AND
THE REFERENCE BY DETECTIVE
ALVERSON THAT MR. STEIGER IS ON
PROBATION AND SAYS QUOTE, MAYBE
YOUR PROBATION OFFICER IS ONE TO
BLAME FOR NOT FOLLOWING UP SO
THE JURY DOESN'T —- I MEAN, THE
OBVIOUS LEAP MADE A JOKE AND WE
KNOW WE HAVE A FEDERAL CASE AND
WE KNOW HE IS ON PROBATION AND

WE KNOW THAT THE LOCAL
LAW-ENFORCEMENT IS SCARED OF THE
FEDS AND THEN HE SAYS HOWEVER,
THEY ARE NOT IN THE BUSINESS OF
VIEWING ME IN THE BEST POSSIBLE
LIGHT AND THEY ARE A BUSINESS IS
TO VIEW ME IN THE WORST POSSIBLE
LIGHT AND THEN TO ASK ME TO
DEFEND MYSELF AND I HAVE BEEN
UNSUCCESSFUL IN THE PAST SO
THEN.
>> COUNSEL, COUNSEL.
YOU HAVE NOW MOVED INTO YOUR
REBUTTAL TIME AND YOU MAY
CONTINUE BUT YOU ARE CONSUMING
REBUTTAL TIME.
>> THANK YOU.
YOUR HONOR.
I APPRECIATE THAT.
FOR THE REASONS I BRIEFLY
MENTIONED 924 IN NO WAY AFFECTS
THE CURRENT STATUTE JEFFERSON
RENDERS IT IRRELEVANT TO THE
CIRCUMSTANCES AND I WOULD ASK
THAT THE REMAINDER OF MY TIME
WOULD TRANSFER TO REBUTTAL AND I
WILL RESERVE.
>> THANK YOU.
COUNSEL FOR THE STATE.
>> GOOD MORNING.
MAY IT PLEASE THE COURT MY NAME
IS DAREN SHIPPY AND I REPRESENT
THE STATE OF FLORIDA IN THIS
MATTER APPEARED WE HAVE FRAMED
THE CLAIM THAT I THINK THIS
COURT INCH INTERESTED IN IS
WHETHER GENERAL LAW THERE WAS AN
ACT IN FOUR STATUTE 924.051 AS
WELL AS THIS COURT'S HOLDING
FROM 1974 IN STATE VERSUS BARBER
PRECLUDE THE DEFENDANT.
IN THIS CASE INDIRECTLY
APPEALING WHAT THEY CLAIM ARE
TRIAL COUNCILS EFFECTIVENESS AND
THE QUESTION THAT ARISES FROM
THIS IS HOW DID WE GET HERE FROM
THERE?
THE REASON I ASK THAT QUESTION
IS IN LIGHT OF THIS COURT'S
DECISION FROM 1974 AND STATE
VERSUS BARBER FOLLOWED BY THE
ENACTMENT OF 924.051 IN 1996 WHY
ARE ANY CLAIMS OF INEFFECTIVE
ASSISTANCE BEING RAISED ON

DIRECT APPEAL AND I'M NOT GOING TO GO THROUGH INSIGHT ALL THE CASES THAT WE HAVE ALREADY CITED IN BRIEF BUT MULTIPLE CASES THROUGHOUT THIS STATE HAVE RECOGNIZED THE LIMITATIONS OF 924.051 AND WHAT THEY HAVE BEEN STUCK WITH IS THIS COURT'S DECISION STARTING IN 1980 IN FOSTER VERSUS STATE WHICH IS THE FIRST TIME THIS COURT EVER RECOGNIZED A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER DIRECT APPEAL AND BEFORE THAT IN STATE VERSUS BARBER RESPECTFULLY SUGGEST THIS COURT SAID RIGHT WENT IN ORDER TO HAVE AN APPEAL THERE NEEDS TO BE AN ADVERSE RULING BY THE TRIAL COURT AND BY DEFAULT IF YOU ARE RAISING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL YOU DO NOT HAVE AN ADVERSE RULING OF THE TRIAL COURT.
>> THERE HAVE BEEN CASES SUBSEQUENT TO THAT CASE THAT WENT THE OTHER DIRECTION ON THAT, RIGHT?
>> WELL, TWO CASES I HAVE THAT I CITED IN THE BRIEF FROM THIS COURT WOULD BE FOSTER VERSUS STATE AS WELL AS MONROE VERSUS STATE AND THERE HAS BEEN A LOT OF DISCUSSION BY THIS COURT BUT I DON'T RECALL THAT THIS COURT IS ACTUALLY FOUND INEFFECTIVE ASSISTANCE OF COUNSEL ON THE RECORD IN A DIRECT APPEAL OTHER THAN IN FOSTER AND IN MONROE. PLENTY OF CASES BROUGHT THE STATE OF FLORIDA HAVE HOSTED THOSE OPINIONS AND RUN WITH THEM AND IN MY OPINION IN VIOLATION OF NOT ONLY STATE VERSUS BARBER BUT AS WELL AS THE ENACTMENT OF 944.051 WHICH —-
>> WHAT IF THE COURT INSTEAD OF DOING IT BY A CASE LAW COULD THIS CASE HAVE A RULE THAT WOULD GOVERN, WE HAVE RULES THAT GOVERN APPEALS OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AND THAT IS IN OUR RULE OF APPELLATE

PROCEDURE AND HOW THOSE GET
FILED OR GOVERNED BY OUR RULES
OF CRIMINAL PROCEDURES SO, HOW
THOSE CLAIMS GET MADE AND HOW
THEY ARE DONE ON REVIEW ARE
THOSE ARE MATTER OF PROCEDURE OR
ARE THEY A MATTER OF SUBSTANCE
CONTROLLED BY THE LEGISLATOR?
>> I THINK IT'S SUBSTANCE
CONTROLLED BY THE LEGISLATOR AND
THAT STARTS WITH FLORIDA STATUTE
924.051 WITH IS THE BASIS FOR
THE MOTION FOR POSTCONVICTION
RELEASE THAT WE ALL RECOGNIZE IN
COLUMN 3850.
>> IT SEEMS TO ME THAT THE
LEGISLATOR HAS REQUIRED THERE TO
BE A HARMLESS ERROR STATUTE AND
THERE IS AN WE APPLY HARMLESS
ERROR BUT IS IT HOW APPEALS
INEFFECTIVE ASSISTANCE OF
COUNSEL AND HOW THEY ARE DONE,
WHEN THEY ARE DONE, WHAT THEY
LOOK LIKE AND ALL THAT CONTROL
AS A MATTER OF PROCEDURE BY THIS
COURT ACCORDING TO OUR RULES?
>> I STILL THINK WHETHER WHEN
THE CLAIM IS BROUGHT IS A
SUBSTANTIVE MATTER IN THE SAME
IS THE LEGISLATOR DETERMINES
WHEN A CIVIL ACTION HAS TO BE
BROUGHT BY OR ANYTHING OF THAT
NATURE AND I THINK IT IS A
SUBSTANTIVE MATTER CONCERNING
THE ABILITY AND THE RIGHT TO DO
SO AND PERHAPS —-
>> BUT COUNSEL LET ME ASK YOU
THIS, WHERE IN THE STATUTE AND
IF I UNDERSTAND WHAT THE JUSTICE
POLSTON IS ASKING HE'S NOT
ASKING ABOUT SOMETHING THAT IS
IN THE RULES NOW FOR HE IS
ASKING ABOUT SOMETHING THAT
COULD BE IN THE RULES AND I AM
TRYING TO UNDERSTAND WHAT YOU
THINK IN THE STATUTE AND IT MAY
BE THERE AND YOU MAY HAVE A GOOD
ANSWER BUT WHAT IN THE STATUTE
WOULD PRECLUDE US FROM HAVING A
RULE THAT ALLOWED BRINGING
CLAIMS OF INEFFECTIVE ASSISTANCE
OF COUNSEL THAT ARE APPARENT ON
THE FACE OF THE RECORD EARLIER
THAN THEY CAN BE BROUGHT UNDER

THE CURRENT POSTCONVICTION
PROCESS?
THAT MAY BE ONE OF THE LEDGES
THINK THAT THE LATER SITTER
FOCUS ON IS THAT AND AGAIN I'M
NOT SAYING THAT THIS AFFECTS THE
OUTCOME IN THIS CASE BUT THEY
HAVE EXPRESSED THE GENERAL
INTENT TO ASSURE THAT ALL CLAIMS
OF ERROR ARE RAISED AND RESOLVE
OF THE FIRST OPPORTUNITY AND TO
THE EXTENT THAT WE WANTED TO
HAVE A RULE THAT WOULD ALLOW
THIS KIND OF CLAIM TO BE BROUGHT
EARLIER AND I MEAN BEFORE A
CONVICTION AND JUDGMENT AND
SENTENCE OUR FINAL THAT WHAT IN
THE STATUTE WOULD PRECLUDE THAT?
>> THE STATUTE ITSELF.
IT SET FORTH IN 924.051 AND
JUSTICE LAWSON ALREADY DID IT OR
READ IT WHERE IT SAYS AN APPEAL
MADE NOT BE TAKEN FROM THE
JUDGMENT ORDER OF A TRIAL COURT
UNLESS A PREJUDICIAL ERROR IS
ALLEGED AND IT'S PROPERLY —-
>> I DON'T THANK YOU UNDERSTAND
MY QUESTION.
I DON'T KNOW JUSTICE POLSTON
EXPLAINED IT AND I HAVE EXCITED
AND I'M AT A LOSS AS TO HOW I
COULD EXPLAIN IT BETTER SO I
WILL JUST GIVE UP.
>> COUNSEL, I THINK THE ISSUE
FOR YOU IS I THINK WHAT THEY ARE
TALKING ABOUT WOULD NOT EVEN BE
AN APPEAL BUT A NEW CLAIM,
RIGHT?
>> IN THE FIRST SENSE IT WOULD
BE JUST A CLAIM OF INEFFECTIVE
ASSISTANCE AND WOULD GO THROUGH
THE PROCESS EXCEPT IN EARLIER
PHASE THAT IS PERMITTED NOW.
>> AND SO, PART OF THE ISSUE AND
YOU RAISE THIS IN YOUR BRIEF,
COUNSEL, YOU KNOW, THE NATURE
OF THOSE CLAIMS USUALLY REQUIRES
HEARINGS AND NORMALLY YOU WANT
THE LAWYER TO SORT OF HAVE THE
OPPORTUNITY TO EXPLAIN WHAT THEY
WERE THINKING AND SO YOU MAY BE
ABLE TO CONCEDE THOSE OUTLIER
CASES WHERE THE COURT WOULD SAY
THAT THERE WASN'T ANY NEED FOR

THAT BUT IT WOULD BE A VERY
UNUSUAL WAY TO HANDLE
INEFFECTIVE ASSISTANCE CLAIMS TO
LET SOMEONE JUST RAISE THEM IN A
SORT OF OR I GUESS AS SOME SORT
OF PARALLEL TO AN APPEAL TYPE
PROCEEDING.
>> I'VE GOT FOUR THINGS TO SAY
AND I HOPE THIS MIGHT GET MORE
TO YOUR QUESTION, JUSTICE
KENNEDY AND COURIEL.
NUMBER ONE, THE BASIS FOR
APPELLATE REVIEW IS AN ADVERSE
RULING BY THE TRIAL COURTS.
YOU DO NOT HAVE THAT WHEN YOU
ALLOW CLAIMS TO BE RAISED AS
CURRENTLY RAISED ON DIRECT
APPEAL.
YOU DON'T HAVE THAT.
AND IT DOES NOT EXIST.
NUMBER TWO, AND THIS IS EQUALLY
IMPORTANT, THIS COURT HAS
ANNOUNCED THAT THE STANDARD OF
REVIEW FOR A CLAIM OF
INEFFECTIVE ASSISTANCE OF
COUNSEL IS A MIXED STANDARD OF
REVIEW.
THAT MEANS THAT BUILT INTO THAT
STANDARD IS YOU HAVE A TRIAL
COURT FACTUAL FINDING THAT
ELIMINATES THINGS AND AS LONG AS
THERE IS A SUBSTANTIAL COMPETENT
EVIDENCE UPON WHICH THAT TRIAL
COURT HAS MADE THOSE FACTUAL
FINDINGS YOU ARE BOUND BY THOSE
AND YOU DO NOT HAVE ANY FACTUAL
FINDINGS THE WAY YOU ARE
ALLOWING THESE CASES DO NOT BE
CONDUCTED WHICH IS SOMEONE IS
MAKING A CLAIM BECAUSE SOMEONE
DID NOT RAISE AN OBJECTION.
NUMBER THREE, THERE IS NO
OPPORTUNITY FOR THE STATE OR THE
TRIAL COUNSEL THAT AT THIS POINT
WHEN THAT CLAIM IS RAISED THEY
BECOME EQUAL PARTIES TO THE
DEFENDANT TO CHALLENGE THAT
CLAIM WITH EVIDENCE, NOT WITH
ARGUMENTS BUT WITH EVIDENCE.
WHAT WAS GOING THROUGH THE
ATTORNEY'S MIND, WHAT WAS THE
THOUGHT PROCESS, WAS THERE ANY
DISCUSSION IN ADVANCE AND ALL OF
THOSE THINGS AND FOURTH THERE IS

A DIFFERENT STANDARD OF REVIEW
AND SO IT'S A LESSER STANDARD OF
REVIEW TO RAISE A CLAIM AS
INEFFECTIVE ASSISTANCE COMPARED
TO FUNDAMENTAL ERROR AND IF IT
WASN'T AND EVERY OBJECTION WE
COULD SIMPLY OVERLOOK IT AND SAY
HE DID NOT OBJECT SO LET'S JUST
RAISE THIS INEFFECTIVE
ASSISTANCE AND DISREGARD WHAT
THE LEGISLATOR SAID AND
DISREGARD WITH THIS COURT HAS
SAID AND UNPRESERVED CLAIMS ARE
MEANT TO BE BROUGHT BY
FUNDAMENTAL ERROR ARGUMENTS, NOT
BY INEFFECTIVE ASSISTANCE BY
COUNSEL.
>> WHETHER SOMETHING IS
PRESERVED OR NOT IS NOT A MATTER
OF PROCEDURE OR SUBSTANCE WHO
GETS TO DECIDE THAT?
>> WHETHER IT IS PRESERVED OR
NOT?
>> YES.
>> THE APPELLATE COURT WOULD
MAKE A DECISION UNLESS THERE IS
A STIPULATION BETWEEN THE
PARTIES INVOLVING PERHAPS THE
COURT DOWN BELOW.
>> IS THAT A PROCEDURAL MATTER
OR SUBSTANCE, WHO GETS TO DECIDE
THAT?
THE COURT OR THE LEGISLATOR.
>> THE COURT WOULD BRING WHETHER
IT'S PRESERVED AND THE
LEGISLATOR HAS GIVEN YOU THE
PARAMETERS ON WHICH YOU ARE TO
CONSIDER APPEALS AND ARE THEY
PRESERVED OR FUNDAMENTAL ERROR?
THAT IS WHAT YOUR STARTING POINT
IS, NOT INEFFECTIVE ASSISTANCE
OF COUNSEL RAISED ON DIRECT
APPEALS.
THEY HAVE TOLD YOU THAT THIS IS
ONE OF THE APPEAL MAY BE RAISED,
NUMBER ONE IS THE CLAIM
PRESERVED AND IF IT IS NOT, DOES
IT CONSTITUTE FUNDAMENTAL ERROR.
>> IT SEEMS TO ME, COUNSEL, THAT
THE INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM THAT WE ARE
TALKING ABOUT HERE REALLY IS NOT
SOMETHING THAT THE MATTER OF
DIRECT APPEAL IS REALLY, SO IT

IS NOT AN EXCEPTION TO THE STATUTE BUT MAY BE AN EXCEPTION TO OUR RULES ABOUT HOW WE DEAL WITH POSTCONVICTION CLAIMS AND THE COURT APPARENTLY MAY HAVE ATTEMPTED BY CASE LAW TO CARVE OUT AN EXCEPTION TO WHAT HAS TO BE DONE ACCORDING TO POSTCONVICTION RULES OF WHAT MUST BE FILED AND UP ON APPEAL AND WHAT IS YOUR REACTION TO THAT?
>> I DO THINK FOSTER CARVED OUT AN EXCEPTION AND I DO THINK WAS WRONG IN DOING SO BUT I THINK IN THE JUSTICES DISSENT CITING BARBER EXPLAINED TO HIS COLLEAGUES WHY IT WAS NOT RIGHT BECAUSE THERE WAS NO RULING FROM THE TRIAL COURT THAT YOU ARE LOOKING AT SIMPLY LOOKING AT A BIG BROAD RECORD WITH NO OTHER INFORMATION AND GOT NO FACTUAL FIND BY TRIAL COURT OR ANYTHING, SPECIFICALLY THAT SHOULD'VE BEEN CONDUCTED AND 3850 PROCEEDING SO JUSTICE ATKINS HAD A UNIFORM DECISION IN THE CASE AND HE REFLECTED OR RECOGNIZED STATE VERSUS BARBER CONTROLLED FOSTER. IS THAT RESPONSIVE, SIR?
OKAY.
WE TALKED ABOUT BARBER AND TALKED ABOUT THE ENACTMENT OF FLORIDA STATUTE 934-POINT 051 WHICH SETS OUT THE PROCEDURES AND LET ME SIMPLY RESPOND TO WHAT COUNSEL HAS MENTIONED IN THE FLORIDA STATE VERSUS JEFFERSON, YOU WILL FIND IN STATE VERSUS JEFFERSON BECAUSE THE DEFENSE OR ANY OF THE STATE CITED IT IN ITS BRIEF IN DISCUSSING 924.051 IN ORDER TO CONSTITUTE REVERSIBLE ERROR THE ERROR MUST BE NUMBER ONE PRESERVED FOR REVIEW OR AMOUNT FUNDAMENTAL ERROR SO LET ME ANY SUGGESTION THAT THERE WAS SOME OTHER HOLDING IS SIMPLY NOT ACCURATE WITH WHAT THIS COURT HELD IN STATE VERSUS JEFFERSON. THIS COURT HAS ALSO NOTED ALL THE WAY BACK IN 1983 CITED IT IN

THE OPINION THAT WILLIAMS VERSUS STATE RECOGNIZED THAT THE STATE FOR THE TRIAL COUNSEL WAS GIVEN THE OPPORTUNITY TO REFUTE ALLEGATIONS IN THE TRIAL COURT SHOULD RESOLVE ISSUES OF FACT IN THIS COURT OR ANY OTHER APPELLATE COURT IN THE STATE IS NOT SET UP TO RESOLVE ISSUES OF FACT IN THIS CASE IS A GREAT EXAMPLE OF THAT.
CONTRARY TO WHAT RESIDENT COUNCIL SAYS THERE IS A LOT OF THINGS BASED ON MY PERSONAL EXPERIENCE AND HAVING TRIED CASES I HAVE GOT AN IDEA ABOUT WHAT MADE PROBABLY HAPPENED ON BELOW THE COUNCILS ARE CLAIMING ABOUT SOME SORT OF HARMFUL ERROR WHICH IS NOT TRUE.
SO YOU GOT STATUTORY BASIS FOR FOLLOWING WHAT THIS COURT DID BACK IN THE STATE VERSUS BARBER WHICH IS UNIQUE TO HAVE AN ADVERSE TRIAL COURT RULING TO APPEAL.
UNLESS YOU WILL CRAFT SOME ADDITIONAL RULE YOU WOULD HAVE TO MAKE A DECISION OR MAYBE LITIGATION LATER ON OTHER WHETHER THE RULE IS CONSISTENT WITH 924.051 AND THAT IS THE STATE'S POSITION AND THE BASES AND THE ONLY BASIS FOR THE DEFENDANT IN THAT CASE TO CHALLENGE A RULING AND THAT IS IT.
THERE IS NO LIMITATION ON THE DEFENDANT BY HAVING TO FOLLOW THE PROCEDURE THAT IS CONTEMPLATED BY 924.051 AND ADDED TO THAT NINE TO 4.66 IS THE POSTCONVICTION STATUTE.
THERE IS NO HARM TO THE DEFENDANT.
IF THERE WAS NO FORM OF RELIEF WHATSOEVER, NO ABILITY TO RAISE THE CLAIM AND PERHAPS THERE IS SOMETHING TO LISTEN TO BUT THERE IS A PROCEDURE SENT OUT AND THIS COURT RECOGNIZED THAT LONG AGO THAT PROCEDURE EXISTED BACK IN 1974 AND SOMEHOW OR THE OTHER THE COURT GOT OFF TRACK AND WHAT

I'M ASKING THE COURT IS —-
>> COUNSEL, IF I UNDERSTAND WHAT YOU ARE SAYING, YOU JUST THINK THIS CATEGORY OF INEFFECTIVE ASSISTANCE THAT IS CLEAR ON THE FACE OF THE RECORD IS A BOGUS CATEGORY.
YOU DON'T THINK THERE IS ANY SUCH THING?
>> I BELIEVE THAT THERE —- FIRST OF ALL, IF I WAS THE ATTORNEY AND RECORD A.
>> IT IS NOT A TRICK QUESTION.
>> I AGREE.
I AGREE WITH YOU THAT THERE IS NO INEFFECTIVE ASSISTANCE OF COUNSEL ON THE RECORD.
>> I'M JUST ASKING IF THAT WAS YOUR POSITION AND I JUST WANT TO MAKE SURE THAT WAS YOUR POSITION.
I'M NOT SAYING OR ASSERTING THAT AS A POSITION OF MY OWN.
>> I AGREE WITH THAT.
I AGREE WITH THAT AND IN THIS CASE IF WE GET INTO A DEBATE ABOUT WHAT THE LAWYER DID OR DID NOT DO THEN YOU'VE PLAYED INTO MY HANDS THAT WE NEED A HEARING TO DEAL WITH THAT.
>> I WAS NOT EVEN ASKING ABOUT THIS CASE.
I WAS ASKING ABOUT JUST IN GENERAL YOU WOULD TAKE THE POSITION IN THE STATE WOULD TAKE THE POSITION THAT THERE CAN NEVER BE ANY SUCH THING AS INEFFECTIVE ASSISTANCE OF COUNSEL THAT IS APPARENT ON THE FACE OF THE RECORD?
>> BASED UPON THE WAY WE DEFINE IT, YES.
I AGREE WITH THAT BECAUSE YES, I COULD EXTEND IT FURTHER BUT I WILL AGREE WITH YOU TO THAT EXTENT IF THAT WILL ANSWER YOUR QUESTION BECAUSE THERE IS MORE INVOLVED THAN JUST READING THE RECORD THERE SIMPLY SOMETHING MORE INVOLVED THAN READING THE RECORD.
WITH THE STATE IS SUGGESTING THAT ALL OF THIS LEADS TO AN LET ME GET BACK TO SOMETHING ELSE

THAT MAY BE ANALOGOUS SITUATION.
WHEN SOMEONE IS ARRESTED, TAKEN INTO CUSTODY, THERE IS A TYPICAL PROBABLE CAUSE AFFIDAVIT PLACED IN THE COURT FILE AND THE TRIAL JUDGE FOR THE FIRST APPEARANCE JUDGE WILL LOOK AT THAT AND MAKE A DECISION WHETHER THERE IS PROBABLE CAUSE FOR ARREST AND IF WE DID NOT NEED TO HAVE A TRIAL IN THE CASE AND IF ANYBODY ELSE WAS SIMPLY LOOKING AT THE PROBABLE CAUSE AFFIDAVIT WE COULD LOOK AT THAT AND SAY BASED UPON WHAT IS WRITTEN IN THIS PROBABLE CAUSE AFFIDAVIT HE IS GUILTY SO WHY DO WE NEED A TRIAL?
WE NEED A TRIAL BECAUSE SOMETIMES WHAT YOU SEE DOESN'T TELL THE ENTIRE STORY AND WE GIVE YOU THAT OPPORTUNITY.
>> WE ALSO NEED A TRIAL BECAUSE THE SIXTH AMENDMENT SAYS SO.
>> I DON'T DISAGREE WITH THAT BUT THE ANALOGY IS WE ARE READING A PIECE OF PAPER WHICH IS YOUR READING A RECORD AND YOU DON'T HAVE ALL THE INFORMATION BECAUSE YOU DON'T HAVE ANY INPUT FROM THE TRIAL COUNSEL AND YOU DON'T HAVE ANY ARGUMENT FROM THE STATE BASED UPON EVIDENCE SO THE PROBABLE CAUSE OR EXCUSE ME.
>> MR. SHIPPY, ONE THING I FIND INTRIGUING BECAUSE I READ ONCE A CASE IN TEXAS WERE APPARENTLY THE LAWYER REPRESENTING A DEATH PENALTY HAD A CASE AND SHOWED UP AT A MUCH INTOXICATED EVERY DAY FOR COURT AND DID NOTHING, NOTHING PRETTY MUCH YOUR ARGUMENT THE OPENING STATEMENT WAS IN HER PRINCIPAL AND SO ON AND ON AND THE SITUATION LIKE THAT WHERE IS BEFORE US ON DIRECT APPEAL AND THE RECORD SHOWED THAT THE DEFENSE COUNSEL DID NOTHING AND JUST SAT THERE PRETTY MUCH THE ENTIRE TIME AND ABSOLUTELY NOTHING AND THAT MAY BE AN EXTREME EXAMPLE BUT IN A SITUATION LIKE THAT WHY DO WE NEED A HEARING?

>> WELL, I GUESS.
>> WHAT WOULD COME OUT OF THE HEARING THAT HE ASKED ONE LITTLE WRONG QUESTION SOMEPLACE SO WHY WOULD WE NEED A HEARING?
>> IF YOUR QUESTION IS RELATED TO WHETHER A DEFENSE ATTORNEY ASKED QUESTIONS OF EVERY WITNESS I WILL TELL YOU FLAT OUT, NO. ACTUALLY RESPOND TO OPPOSING COUNSEL.
>> BUT HE DID NOTHING AND SAT THERE THE WHOLE TRIAL IN THE OPENING STATEMENT AND NO CROSS-EXAMINATION, NOTHING. JUST SAT THERE.
>> WELL,.
>> WHY DO WE NEED A HEARING?
>> YOU ARE PURSUING THERE WAS A BASIS TO OBJECT AND THE BASIS TO OBJECT WOULD'VE BEEN PREJUDICIAL ERROR AND IN YOUR ANALYSIS OR YOUR SCENARIO SO I MEAN I THINK THERE IS MORE INFORMATION THAT WE NEED TO HAVE BEFORE WE CAN ANSWER THAT QUESTION AND IF WE ASSUME THAT HE WAS DRUNK OR WHATEVER I WOULD BE A LITTLE BIT HARD PRESSED TO KNOW WHY A TRIAL JUDGE WOULD NOT HAVE RECOGNIZED THAT AND DEALT WITH IT WHICH IS HAPPENED IN THE PAST BUT THE IDEA THAT YOU HAVE TO OBJECT DOES NOT EXIST.
THE COMPLAINT OF OPPOSING COUNSEL THAT ONLY ONE QUESTION WAS ASKED OF THE LEAD INVESTIGATOR REFLECTS IGNORANCE OF HOW TRIALS ARE CONDUCTED WHICH IS —-
>> COUNSEL, I'M SORRY TO INTERRUPT BUT I THINK THESE QUESTIONS HAVE GUIDED YOU OFF TRACK.
>> OKAY.
>> IF WE ARE TALKING ABOUT AN APPEAL THERE ARE TWO PATHS TO PRESERVE YOUR FUNDAMENTAL ERROR SO IN THIS AND APPEAL SO PART OF THE ANSWER THAT JUSTICE LABARGA GOT MIGHT BE THAT THERE WAS FUNDAMENTAL ERROR IN A CASE LIKE THAT AND NOW THEY'VE ALSO ASKED YOU QUESTIONS ABOUT SORT OF

JERRY RINGING SORT OF AFTER THE
FACT BRAND-NEW POSTCONVICTION
INEFFECTIVE OF ASSISTANCE OF
COUNSEL CLAIMS IS BROUGHT FOR
THE FIRST TIME IN AN APPELLATE
PROCEEDING AND IF THE COURT
WANTED TO CONSIDER DOING THE
ROLE LIKE THAT THAT WOULD BE OUR
PROBLEM AND WHO KNOWS WHETHER
THAT COULD EVER POSSIBLY BE A
WISE THING TO DO BUT THIS CASE
IS NOT THAT CASE AND THIS IS AN
APPEAL AND YOUR OPPONENT ON THE
OTHER SIDE IS OBVIOUSLY DOING A
GREAT JOB WITH THE RECORD THAT
THEY HAVE AND THEY HAVE NOT
BROUGHT A POSTCONVICTION CLAIM
AND THEY HAVE BROUGHT AN APPEAL
AND YOU HAVE TWO BOXES AND THOSE
OF THE BOXES I THANK YOU NEED TO
SORT OF FOCUS ON AND HOPEFULLY
WE DID THAT BY ARGUING THAT THE
STATUTE THAT APPLIES TO THIS
APPEAL IS 924.051 IN THE STATUTE
THEM APPLY TO A CLAIM OF
INEFFECTIVE ASSISTANCE OF
COUNSEL WHICH WE HAVE
POSTCONVICTION CLAIM IS 924.066
AND THE RELATIVE RULES THAT GO
WITH THOSE SO YOU'VE GOT DIRECT
APPEAL RULES THAT REFLECTED IN
THE FOUR REELS OF SOLID
APPELLATE PROCEDURE AND RULES
THAT APPLY POSTCONVICTION WHICH
IS 3.850 IN THE DEATH PENALTY
3.851.
I CAN MAKE IT SIMPLE AS THAT.
IT LOOKS LIKE JUST ABOUT OUT OF
TIME SO WHAT THE STATE IS ASKING
THIS COURT TO DO IS TO RECOGNIZE
THAT COUNSEL IN THIS INSTANCE
DID NOT RAISE ANY CLAIMS OF
FUNDAMENTAL ERROR AND BASED UPON
THE COURT'S DECISION FROM LONG
AGO AS WELL AS 924.051 THE
APPEAL SHOULD BE REJECTED AND
RECEIVED FROM FOSTER AND MUNROE
OR FOSTER GIVES PROBLEM BECAUSE
THERE WAS AN ACTUAL CONFLICT OF
INTEREST SITUATION LIMITED TO
THAT FAX AND ANNOUNCE RULE THAT
FROM HERE FORTH DIRECT APPEALS
OF INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIMS WILL NOT BE

RECOGNIZED IN THE STATE OF
FLORIDA.
THANK YOU FOR YOUR TIME.
>> THANK YOU, COUNSEL.
WE WILL HEAR REBUTTAL ARGUMENT.
>> THANK YOU.
I THINK THE INTERESTING THING
THAT WAS SAID BY THE ATTORNEY
GENERAL WITH RESPECT TO WHETHER
THIS IS A PROCEDURAL SUBSTANCE
ISSUE AND ITS —- THE COURT CAN
DECIDE THIS ISSUE WHETHER IT IS
PRESERVED OR NOT.
>> WELL ACTUALLY COUNSEL, HE DID
NOT TALK ABOUT THIS BUT THIS IS
REGULATING THE SUBSTANTIVE RIGHT
TO APPEAL AND THERE IS A
STATUTORY DEFINITION OF WHAT
PRESERVATION IS AND WHAT THE
LEGISLATOR HAS SAYS IN ORDER TO
APPEAL YOU HAVE TO HAVE DONE
ACTS WHICH IS EITHER FUNDAMENTAL
ERROR WHAT THEY DEFINED AS
PRESERVATION AND SO I THINK IT
IS NOT OBVIOUS WHETHER REALLY
THAT WE CAN JUST PUT THAT IN A
PROCEDURAL BOX.
I MEAN, YOU KNOW, ONE MAY BE
COULD ARGUE THAT THE DEFINITION
IS SOMEHOW IN CONFLICT WITH THIS
CONSTITUTIONAL RIGHT TO APPEAL
BUT THE LEGISLATOR OBVIOUSLY HAS
TREATED THIS WITH THE
SUBSTANTIVE ISSUE IN TERMS OF
THE GATEWAY TO THE APPEAL
ITSELF.
>> I WOULD AGREE AND THAT IS WHY
THE JEFFERSON OPINION IS
IMPORTANT.
IT DISCUSSES HOW THE STATUTE
TOUCHED UPON THE CONSTITUTIONAL
CONFERENCE IN JURISDICTION AND
THAT IS WHERE, IN FACT ARTICLE
FIVE, SECTION B MANDATES THE
RIGHT FOR THE APPEAL AND THAT IS
WHAT ENDS UP BECOMING THE
HALLMARK OF THE DISCUSSION IN
THE JEFFERSON WHETHER LEGISLATOR
IS ENCROACHING UPON WHAT IT CAN
DO CONSTITUTIONAL.
I ALSO WANT TO POINT OUT ALONG
THOSE LINES THAT THE COURT HAS
INHERENT POWERS, IT HAS WILL TO
ACT AND THAT IS JUSTICE LABARGA

GOT MENTIONED THERE ARE
SITUATIONS AND GRANTED IT WAS AN
EXTREME HYPOTHETICAL WHERE THERE
COULD BE SOMEBODY SO OBVIOUSLY
INEFFECTIVE THAT IT IS A MATTER
OF POLICY OF WHAT —-
>> BUT HOW YOU RESPOND TO
JUSTICE THE CLEAR VACATION ON
THAT?
THAT WOULD BE FUNDAMENTAL ERROR.
>> I AGREE THAT IT IS CERTAINLY
COMPLICATED AND CERTAINLY
CONVOLUTED AND THERE IS REASON
THAT WE ARE HERE RIGHT NOW
DISCUSSING THIS BECAUSE IT'S
VERY ESTEEM AND TOUGH TO GET
THROUGH BUT I THINK THE ULTIMATE
ISSUE HAS TO BE THAT THE WAY
THIS PARTICULAR STATUTE HAS BEEN
INTERPRETED IT MAY SEEMINGLY SAY
ONE THING HOWEVER, WHEN THE
COURT DID A DEEP DIVE ON THE
LEGISLATIVE INTENT AND WE LOOKED
INTO WHAT THE STATUTE MEANS WITH
RESPECT TO AN APPEAL THAT
OBVIOUSLY PRESERVATION FOR THE
SAKE OF THIS IS DIFFERENT THAN
WHAT OTHERWISE WOULD BE
PRESERVATION FOR THE SAKE OF A
STANDARD APPEAL BECAUSE AS THE
COURT WERE CHIEF JUSTICE CANADY
MENTIONED DISCUSSING AN ISSUE AT
THE FIRST OPPORTUNITY THAT YOU
COULD WELL FOREIGN INEFFECTIVE
ASSISTANCE OF COUNSEL THIS IS
THE FIRST OPPORTUNITY THAT YOU
CAN RAISE AN ADDRESS AND ISSUE
BECAUSE IT DOESN'T MAKE SENSE TO
EXPECT AN ATTORNEY WHO IS NOT
OBSERVING THE FACT THAT A
PREJUDICIAL ERROR JUST HAPPENED
WOULD THEN ALSO REALIZE HEY, LET
ME OBJECT TO ME NOT DOING WHAT
I'M SUPPOSED TO DO IN THE FIRST
PLACE AND THIS IS IN EFFECT A
FIRST OPPORTUNITY WHICH IS AS
THE JUSTICE DISCUSSED IT'S A
SEPARATE VERTICAL THAT THESE
CLAIMS FALL INTO WERE STANDARD
APPELLATE PRACTICE DOESN'T
COMPLETELY GOVERN THEM AND
BECAUSE THE CURRENT STATE OF THE
LAW AS IS ALLOWS.
>> COUNSEL, YOU'VE USED YOUR

TIME AND IF YOU WOULD SUM UP IN
ABOUT 30 SECONDS.
>> THANK YOU, SIR.
THE CURRENT STATE OF THE LAW
ALLOWS THROUGH A DIRECT APPEAL,
MR. SAWYER, TO ADDRESS THE
INEFFECTIVENESS ON THE FACE OF
THE RECORD IN A FASHION WHICH
SHE HAS RAISED IT WE WOULD ASK
THAT THE COURT TO KEEP THE RULE
IN PLACE THAT ALLOWS THIS,
RECOGNIZE THAT IT IS SEPARATE
FROM THE WAY IN OTHERWISE
TECHNICAL PRESERVE CLAIM WOULD
BE RAISED IF OBJECTED TO AT THE
LOWEST LEVEL AND REMANDED TO THE
TRIAL COURT FOR A NEW TRIAL
BECAUSE ON ITS FACE MR. STEIGER
HAS MET THE LEGAL BURDEN FOR
REVERSAL.
THANK YOU.
>> THANK YOU, COUNSEL, WE
THINK BOTH OF YOU FOR YOUR
ARGUMENTS IN THIS CASE TODAY.
THAT IS THE ONLY CASE ON OUR
DOCKET.
SO, THIS PROCEEDING IS OVER.