David Eugene Johnston vs Michael W, Moore, etc.

NEXT CASE ON THE COURT'S DOCKET IS JOHNSTON VERSUS MOORE. THANK YOU, COUNSEL. MR. STRAND.

CHIEF JUSTICE. MAY IT PLEASE THE COURT. TODAY I AM HERE, REPRESENTING MR. JOHNSTON, AND I GUESS I WILL SIMPLY OUTLINE THE ISSUE. I THINK HOW THIS COURT NEEDS TO ADDRESS IT. FIRST, WHAT HAPPENED IN THIS CASE --

THIS, REALLY, IS A HIGHLY UNUSUAL PROCEEDING, IS IT NOT? COULD YOU ADDRESS TAKE ASPECT OF IT. THAT IS OF THE ENTITLEMENT TO HAVE A, REALLY, WHAT IS A SUCCESSIVE HABEAS, UNDER CIRCUMSTANCES LIKE THIS. I AM JUST ASKING IF YOU WOULD ADDRESS THAT IN THE COURTS OF OUTLINING WHAT IS IT FOR.

YES, I WILL DO THAT, YOUR HONOR. I THINK THAT THIS IS A SUCCESSIVE HABEAS, AND I THINK THIS COURT HAS THE JURISDICTION TO HEAR SUCCESSIVE HABEAS, IN ORDER TO AVOID MANIFEST INJUSTICE. THIS COURT FOUND OUT, IN OWENS. ALSO I WOULD TO REOPEN THIS CASE, CONSIDER IT IN THE PAST, THE STATE MADE A MOTION TO REOPEN THE CASE, TO RECONSIDER. CONSIDERED ON THE MERITS, THE COURT DID THAT, WE CAN REOPEN A CASE TO AVOID MANIFEST INJUSTICE, AND WHAT WOULD BE THE MANIFEST INJUSTICE IS THAT MR. JOHNSTON WOULD BE EXECUTED, WITHOUT HAVING THE OPPORTUNITY TO HAVE A CIRCUIT COURT JUDGE UTILIZE THE CORRECT LAW, ACCORDING TO STRICT LAND AND HIS PROGENY, AND THIS COURT'S PRECEDENT, IN DETERMINING WHETHER OR NOT THIS IS A PENALTY PHASE CLAIM, AND WHETHER OR NOT THIS COURT DEFERRED TO THE CIRCUIT COURT'S JUDGMENT, DEFERRED TO HIS, EXCUSE ME, HIS ANALYSIS OF THE LAW, AND WHAT LAW HE USED, AND DIDN'T QUESTION WHETHER OR NOT THE LAW THAT HE USED WAS CORRECT. AND THAT THAT TAKES US INTO STEPHENS V STATE.

WHAT DO YOU VIEW STEVENS AS? A REFINEMENT OF EXISTING LAW OR NEW LAW?

I SAID SAY THAT STEVENS IS NEW LAW, AND YOU HAVE TO CONSIDER STEVENS, ALONG WITH WILLIAMS V TAYLOR, WHICH CAME DOWN FROM THE UNITED STATES SUPREME COURT. THE ONLY CASE WHERE THE UNITED STATES SUPREME COURT HAS FOUND INEFFECTIVE ASSISTANCE OF COUNSEL, AND IF YOU LOOK AT THE FACTS OF THIS CASE, AND YOU LOOK AT THE FACTS OF WILLIAMS, MR. JOHNSON HAS A BETTER CASE THAN MR. WILLIAMS HAD, AND IN FACT IT WAS BASICALLY THE SAME ERROR WAS COMMITTED BY THE VIRGINIA SUPREME COURT THAT WAS COMMITTED BY THIS COURT, IN REVIEWING THE TRIAL COURT'S ORDER DENYING 3.850 RELIEF. THAT IS WHY WE ARE HERE, AND THE OTHER QUESTION IS WHERE ELSE COULD WE GO? WE CAN'T GO BACK TO THE CIRCUIT COURT AND ASK THE TRIAL COURT JUDGE. I HAVE TRIED TO DO THIS. THEY WON'T GO FOR IT. TELL THEM WOULD YOU RULE THAT THE FLORIDA SUPREME COURT'S REVIEW WAS INCORRECT? THEY WON'T DO THAT. SO THIS IS THE ONLY PLACE THAT WE CAN GO TO GET THI DONE. NOW, IF THIS COURT DOES NOT REVIEW THIS CASE, AND MR. JOHNSTON, HIS RIGHT TO LIVE WILL DISAPPEAR. THAT CLEARLY HAS TO BE MANIFEST INJUSTICE. NOW, FOR YOU TO LOOK AT THE CASE, WE HAVE TO DETERMINE WHETHER OR NOT THERE WAS AN ERROR HERE, YOU HAVE TO LOOK TO THE ORDER OF THE CIRCUIT COURT JUDGE. NOW, IN YOUR CASES, IN YOUR OPINIONS, YOU HAVE BEEN VERY CONSISTENT IN SAYING THAT A CIRCUIT COURT JUDGE HAS THE RIGHT TO DETERMINE THE FACTS, AND YOU ARE GOING TO DEFER TO THE CIRCUIT COURT JUDGE'S DETERMINATION OF FACTS. IT IS THE RIGHT THING TO DO. HE IS THERE. YOU ARE NOT. BUT UNDER STRICT LAND, THE QUESTIONS OF WHETHER OR NOT PERFORMANCE WAS

REASONABLE AND WHETHER OR NOT PREJUDICE ENSUED, ARE MIXED QUESTIONS OF FACT AND LAW, AND AS IN STEPHENS -- STEVENS AND ALL OF THE FEDERAL COURT, IN WILLIAMS AND IN ANOTHER CASE VERY SIMILAR TO THIS, THAT JUST CAME DOWN IN MISSISSIPPI ON THE FIFTH CIRCUIT, THAT THIS COURT HAS TO CONSIDER THOSE DE NOVO.

WAS THERE AN EVIDENCIARY HEARING?

YES, JUDGE. THERE WAS AN EVIDENTIARY HEARING. I CAN TELL YOU WHAT HAPPENED VERY QUICKLY.

BUT THEREFORE, AS FAR AS ANY OF THE FINDINGS OF THE TRIAL JUDGE, WHEN WE REVIEWED IT, HE WOULD HAVE GIVEN THE TRIAL JUDGE'S FINDINGS. I AM HAVING A HARD TME UNDERSTANDING A THAT WHAT WE ARE DOING HERE IS REARGUING A CASE THAT WAS DECIDED BY THIS COURT MANY YEARS AGO, AND STEVENS CLEARLY SHOWS THAT THIS WAS SIMPLY A CLARIFICATION THAT WE HAVE BEEN SAYING CERTAIN THINGS, ONE WAY OR ANOTHER, BUT WE HAVE, ALWAYS, BEEN REVIEWING, INDEPENDENTLY, THE FINDINGS OF THE TRIAL COURT, AND AS THE STATE POINTED OUT IN ARGUING THAT THAT IS WHAT THE LAW HAD ALREADY -- HAD ALWAYS BEEN.

JUDGE, THE REASON WE ARE HERE IS BECAUSE THE CIRCUIT COURT DID NOT USE THE CORRECT LAW IN APPLYING THE FACTS. DID NOT -- WHEN HE APPLIED THE FACTS TO THE LAW, HE USED THE INCORRECT LAW, AND THIS COURT DEFERRED TO HIS UTILIZATION OF PRINCIPLES WHICH WERE CONTRARY TO STRICKLAND, IN AFFIRMING HIS FINDING THAT NO RELIEF SHOULD HAVE COME DOWN. AND I THINK --

HOW DOES THAT SQUARE WITH FEDERAL CIRCUITS, THE LAST REVIEW OF THIS HAS BEEN IN A FEDERAL CIRCUIT OPINION, IN WHICH DID AN ANALYSIS, IF I AM READING IT CORRECTLY, IS NOT UNLIKE THE ANALYSIS THAT THIS COURT DID, WHEN IT WAS INITIALLY REVIEWING THE TRIAL COURT'S DECISION, AFTER THE EVIDENTIARY HEARING, AND SO HOW DID THAT DIFFER, IN ANY WAY, WITH WHAT YOU ARE SAYING IS THE CORRECT LAW?

JUDGE, I THINK THAT WHAT YOU CAN SEE, IF YOU ARE TALKING ABOUT THE ELEVENTH CIRCUIT COURT OF APPEALS DECISION, AFFIRMING THIS COURT'S FINDINGS, JUDGE, IF YOU LOOK, YOUR HONOR, IF YOU LOOK AT THAT, IT IS BASICALLY THE CIRCUIT COURT JUDGE, HE WROTE HIS ORDER. THIS COURT COPIED HIS ORDER, BASICALLY, INTO ONE PARAGRAPH IN THE OPINION.

THAT IS NOT --

AND THE ELEVENTH CIRCUIT --

THE ELEVENTH CIRCUIT OPINION HAS AN INDEPENDENT ANALYSIS, DOES IT NOT, AND THAT INDEPENDENT ANALYSIS LOOKS VERY MUCH LIKE THE ANALYSIS THAT THIS COURT DID, ORIGINALLY, IN REVIEWING THE COURT'S DECISION THAT THERE WAS NOT IN COMPETENCY OF COUNSEL.

JUDGE, YOUR HONOR, IT WOULD BE ON OUR POSITION THAT, IN FACT, WHAT THEY DID WAS THE SAME THING THAT THIS COURT DID, AND I THINK WHERE WE HAVE TO GET TO, IN ORDER --

YOU ARE SAYING THAT THE ELEVENTH CIRCUIT'S ANALYSIS WAS INCORRECT?

YES. THEY DIDN'T HAVE WILLIAMS V TAYLOR. THEY DIDN'T HAVE LOCKET V ANDERSON. THESE CASES, NOW, TALK ABOUT HOW TO ANALYZE THIS, IN ORDER TO FIGURE IT OUT, AND THE QUESTION, THE PROBLEM, HERE, IS, WITHIN THE CIRCUIT COURT'S DENIAL OF RELIEF, NOWHERE DOES HE ADDRESS THE MITIGATION THAT WAS ACTUALLY PRESENTED AT THE 3.850 HEARING. NOWHERE IN THAT, IN HIS ORDER, DOES HE ADDRESS THAT, IN CONJUNCTION WITH WHAT WAS

ACTUALLY PRESENTED.

IS THERE ARGUMENT HERE THAT THIS COURT GAVE DEFERENCE TO NOT JUST HISTORICAL FACTS BUT TO CONCLUSIONS OF LAW?

THAT'S CORRECT.

AND SO WHAT, SPECIFICALLY, ARE YOU SAYING THAT WE SHOULD NOT HAVE GIVEN DEFERENCE TO THAT WE DID?

WELL, I CAN TELL HUH THAT. THIS IS THE EASY PART. IF YOU LOOK AT PAGE 60 AND 34 OF THE RECORD, I THINK THAT THE JUDGE'S ORDER, YOU HAVE TO LOOK RIGHT AT THE ORDER, AND IT STARTS OUT, ON THE FIRST THING THAT HE SAYS IN HERE IS THAT TRIAL COUNSEL WERE NOT ASKED, AT THE EVIDENTIARY HEARING, WHY THEY DID NOT PRESENT THE LOUISIANA STATE HOSPITAL RECORDS IN THEIR POSSESSION, AND THEN HE MAKES A FINDING. HE SAYS, RIGHT HERE, THAT THERE IS NO EVIDENCE, WITHIN THE 3.850 TRANSCRIPT, THAT SAYS WHY THEY DIDN'T PRESENT THE RECORDS THAT ARE IN QUESTION IN THIS CASE. THEN HE GOES ON TO SAY "I FIND THAT THEIR DECISION WAS REASONABLE." AND THIS COURT SAYS THE SAME THING. THEY FIND THAT THE DECISION WAS REASONABLE. AFTER -- WITHIN THE ORDER, HE SAYS THAT THERE IS NO EVIDENCE. IN FACT, ON PAGE 100 OF THE TRANSCRIPT, LEAD COUNSEL TESTIFIED, WOULD IT BE FAIR STATEMENT TO SAY THAT YOU DID NOT INTRODUCE THE COURT RECORDS, BECAUSE MR. JOHNSTON, THE CLIENT, DIDN'T WANT YOU TO? THE QUESTION WAS YES. HE DIDN'T SAY YES. HE SAID MR. JOHNSTON DID NOT WANT ANY MENTAL HEALTH ISSUES PRESENTED IN THE COURT, AND HE WOULD NOT COOPERATE WITH THAT. THAT IS WHAT IS IN THE RECORD, NOT RIGHT HERE. THEN THE SECOND THING IS --

THERE WAS NO TESTIMONY ABOUT THE EXTENSIVE CRIMINAL RECORD THAT HE HAD AND COUNSEL COUNSEL'S CONCERN ABOUT THAT CRIMINAL RECORD? COUNSEL DIDN'T TESTIFY ABOUT THAT?

NO. THERE WAS TESTIMONY ABOUT ASPECTS OF THAT LOUISIANA STATE HOSPITAL RECORD, WHICH WERE NEGATIVE.

THERE WAS NO TESTIMONY BY COUNSEL ABOUT THAT?

NO. THERE WAS.

YOU DIDN'T -- I DIDN'T HEAR THAT, WHEN YOU JUST DESCRIBED WHAT THE ANSWER TO THAT WAS.

RIGHT. I -- WELL, NO ONE ASKED THEM IS THAT WHY YOU DECIDED NOT TO TURN -- NOT TO GET -- TO LET THE JURY HAVE IT? NO ONE ASKED HIM THAT. THEY DIDN'T TESTIFY. THERE WAS QUESTIONS AND ANSWERS. WELL, ISN'T THIS STUFF NEGATIVE THAT IS IN HERE? YES. IT IS NEGATIVE. IS IT SOMETHING THAT YOU WOULD NOT WANT THE JURY TO HAVE? YES, IT IS. NO ONE EVER SAID IS THAT THE REASON THAT YOU DIDN'T TURN IT OVER TO THE JURY? THEY DIDN'T SAY. THAT THEY SAID THERE WAS NEGATIVE THINGS IN IT. BUT THE SECOND, I THINK, THE NEXT ERROR THAT THE TRIAL COURT JUDGE MADE, IS WE HAVE GOT FOUR SETS OF RECORDS HERE, AND I FILED A SUPPLEMENT, APPENDIX, TO MAKE IT EASY FOR YOU, AND AT THE TRIAL, THEY HAD THE LOUISIANA STATE HOSPITAL RECORDS, WHERE MR. JOHNSTON WAS DIAGNOSED WITH SCHIZOPHRENIA MORE THAN 20 TIMES BY DIFFERENT DOCTORS. THAT IS WHAT THEY HAD AT TRIAL. IT IS THE FIRST THREE. THESE ARE THE RECORDS THEY DIDN'T HAVE AT TRIAL. THERE IS NO WAY THEY COULD HAVE MADE AN INFORMED DECISION NOT TO PRESENT THESE RECORDS, IF THEY DIDN'T HAVE THEM. THE FIRST SET OF RECORDS ARE RECORDS THAT ARE FROM THE NORTHEAST SPECIAL EDUCATION CENTER, WHERE, IN HIS FIRST YEAR OF SCHOOL, AGE 7, I DON'T KNOW WHY HE STARTED AT SEVEN, THREE MONTHS LATER THEY PUT HIM IN SPECIAL

EDUCATION. AT AGE 12, THEY EVALUATED HIM. FOUND THAT HE HAD AN IQ OF 58 AND PUT HIM IN SPECIAL EDUCATION CLASSES, AND THEN THEY DID FURTHER EVALUATION AND DETERMINED, BETWEEN THE AGES OF SEVEN AND TWELVE, THAT MR. JOHNSTON HAD BRAIN DAMAGE, AND IT WAS REDUCING HIS ABILITY AND INTELLECT. THEN AT TWELVE, THEY DID ANOTHER TEST AND DETERMINED HE WAS RETARDED AT 65, AND THEY PLACED HIM IN THE LEASTVILLE SCHOOL FOR THE MENTALLY RETARDED, A RESIDENTIAL SCHOOL FOR MENTALLY RETARDED IN LOUISIANA FOR TWO YEARS. WITHIN THOSE RECORDS, WHICH WOULD BE ONE AND TWO, THE LEASEVILLE SCHOOL FOR THE MENTALLY RETARDED AND THE NORTHEAST SPECIAL EDUCATION CENTER, THERE IS NOTHING NEGATIVE. IN FACT, THERE ARE NUMEROUS, INDEPENDENT COUNSELORS AND SO FORTH, DOCUMENTED HORRIBLE ABUSE OF THIS YOUNG MAN AT HOME. COUNSEL COULD NOT HAVE MADE A STRICT DECISION. HE DIDN'T HAVE --

LET ME ASK YOU SOMETHING A LITTLE MORE BASIC. DO YOU AGREE THAT, IF STEVENS IS JUST A REFINEMENT OR A CLARIFICATION OF EXISTING LAW, THAT IT WILL NOT BE APPLIED RETROACTIVELY IN ANY EVENT?

I WOULD HAVE TO SAY THAT YOU HAVE TO CONSIDER STEVENS, ALONG WITH WILLIAMS V TAYLOR.

DO YOU AGREE WITH THAT PROPOSITION?

NO. I DON'T AGREE WITH THAT PROPOSITION.

YOU DON'T?

NO. I WOULD HAVE TO SAY --

A CASE THAT DEFINES EXISTING LAW OR CLARIFIES IT HAS TO BE APPLIED RETROACTIVE RETROACTIVELY? IS THAT YOUR UNDERSTANDING?

NO. IT DOES NOT. IS MY UNDERSTANDING. BUT I COULD BE WRONG.

GETTING BACK TO WHAT JUSTICE QUINCE ASKED YOU, WHICH IS YOU SAID THAT THIS COURT MADE ERRORS IN ITS PRIOR DECISION, AND YOU ARE SAYING THE ERRORS ARE BASED ON OUR ACCEPTING THE JUDGE'S CONCLUSIONS OF LAW, BUT THE EXAMPLE THAT YOU GAVE, WHICH WAS THAT THE REASON THE TRIAL COURT FOUND THAT THE RECORDS WERE NOT INTRODUCED WAS, BASICALLY, A STRATEGIC OR -- WAS BECAUSE OF A LACK OF COOPERATION, BUT YOU ARE SAYING THAT THAT FINDING WAS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. WELL, THAT HAS, ALWAYS, BEEN THE TEST FOR WHETHER WE ACCEPT OR REJECT IT, SO WHAT YOU ARE NOW SAYING IS THAT THIS COURT MADE A WRONG DECISION, AND WE SHOULD CORRECT IT, BUT, I MEAN, WHAT WOULD SEPARATE THIS FROM ALL OF THE OTHER HUNDREDS OF OPINIONS THAT WE HAVE NEVER REVISITED, IN A SITUATION WHERE THERE HAS BEEN A DETERMINATION THAT THE TRIAL COURT'S ORDER WAS EITHER CORRECT OR INCORRECT. WHERE WOULD WE STOP AND START WITH THAT?

WELL, I THINK IT -- I THINK WHAT THE COURT IS GOING TO HAVE TO DO IS TO HAVE TO LOOK TO THE ORDER AND DETERMINE WHETHER OR NOT THE COURT DEFERRED TO THE LAW AND WAS USED BY THE JUDGE, AND IF THE JUDGE WAS USING THE WRONG LAW, THAT WAS WRONG.

BUT JUSTICE QUINCE ASKED YOU WHERE WAS THE WRONG LAW? YOU GAVE AN EXAMPLE OF SOMETHING WHICH WERE FACTS THAT THE JUDGE FOUND THAT YOU SAID WEREN'T SUPPORTED BY THE EVIDENCE. THAT IS NOT -- YOU ARE SAYING YOU DISAGREE THAT THERE WAS COMPETENT, SUBSTANTIAL EVIDENCE, AND YOU ARE DISAGREEING THAT THE COURT COULD HAVE EVER FOUND THAT THERE WAS COMPETENT SUBSTANTIAL EVIDENCE.

WELL, THERE IS ADDITIONAL ERROR. I THINK THE MAIN ERROR THAT THE JUDGE FOUND THAT HE MADE WAS FINDING THAT MITIGATING CIRCUMSTANCES WERE ACTUALLY AGGRAVATING CIRCUMSTANCES. AND IN HIS -- HE SAYS THIS HE SAYS THAT IT IS REASONABLE FOR THE ATTORNEYS NOT TO HAVE PRESENTED THE RECORDS FROM THE LOUISIANA STATE HOSPITAL, IS BECAUSE OF THE DEROGATORY ASPECTS OF THOSE RECORDS. OKAY. DEROGATORY ASPECTS OF THE RECORDS. THE RECORDS ARE REPLETE, WHICH HAS A NEGATIVE CONNOTATION, ARE REPLETE WITH REFERENCES TO DEFENDANT'S ARREST CONVICTION, THOSE ARE NEGATIVE, HIS SUICIDAL TENDENCY, RECOGNIZED MITIGATION IN FLRIDA, HOMICIDAL AND ABNORMAL TENDENCIES. HOMICIDAL. THESE ARE THINGS HAT CAME OUT IN STATE HOSPITAL THAT SAID WE NEED TO KEEP HIM, BECAUSE HE IS DANGEROUS, BECAUSE OF SCHIZOPHRENIA. ABNORMAL TENDENCIES, BECAUSE HE IS GAY. I DON'T THINK THAT IS SOMETHING THAT COULD BE CONSIDERED AGGRAVATION BY A JURY IN FLORIDA. HIS COMBATIVE, THREATENING AND ANTISOCIAL ACTS. IN FACT, THERE ARE NOTHING IN THE TERMS OF ANTISOCIAL ACTS, THAT IS WHAT THE JUDGE BELOW SAID, HIS DRUG AND ALCOHOL ABUSE. THAT IS RECOGNIZED MITIGATION. HIS FUTURE DANGEROUSNESS. THE JURY IS PRESUMED TO FOLLOW THE INSTRUCTIONS. THEY ARE NOT TO CONSIDER FUTURE DANGEROUSNESS. HE SAYS THAT IS PROOF.

BUT ARE YOU SAYING THAT THE TRIAL COURT GOT IT WRONG ABOUT THAT?

NO. HE CONSIDERS ALL OF THIS, DIAGNOSIS OF SCHIZOPHRENIA, ORGANIC BRAIN DAMAGE, TO BE NEGATIVE THINGS, AND THEN HE GOES ON TO SAY --

ARE YOU TELLING ME THAT TRIAL COUNSEL DON'T, ALL THE TIME, LOOK AT RECORDS THAT MIGHT SHOW ONE THING, WHICH IS -- WE HAD THIS IN A CASE RECENTLY, WHERE THE ISSUE WAS SOMEBODY HAD ABUSED A CHILD AND THEN KILLED A CHILD, AND WHETHER THEY SHOULD HAVE INTRODUCED EVIDENCE TOO WHAT THEIR PSYCHOLOGICAL STATE WAS. LAWYERS SAY, ALL THE TIME, THAT THERE IS A TWO-EDGED SWORD. YOU SHOW ALL OF THE PROBLEMS WITH THE PERSON, AND THE JURY REACTS IN A WHOLE DIFFERENT WAY, SO THAT, TO ME, IS ALL THE JUDGE IS SAYING, IN THIS PART OF THE ORDER.

WELL, I THINK THAT, IF YOU KEEP GOING DOWN, HE SAYS THE NEGATIVE ASPECTS OF THE HOSPITAL RECORDS WOULD EXPLAIN WHY THE DEFENDANT WAS CAPABLE OF COMMITTING A HEINOUS CRIME, AND THAT IS WHAT MITIGATION DOES. AND THEN HE GOES ON TO SAY --

YOU ARE IN YOUR --.

HE WOULD TEND TO SHOW THAT HE WAS IN CAPABLE OF REHABILITATION AND MIGHT KILL AGAIN.

COUNSEL, YOU ARE IN YOUR REBUTTAL.

RIGHT. I UNDERSTAND THAT. THAT IS THE FINAL THING I NEED TO SAY, HERE, IS THAT THE JUDGE BASED HIS DECISION ON HE WAS LOOKING AT, SAYING THE JURY WOULD NOT FOLLOW THE INSTRUCTIONS AND CONSIDER ONLY THE AGGRAVATION. HE WOULD -- THAT THE JURY WOULD CONSIDER FUTURE DANGEROUSNESS AND DECIDE TO SENTENCE THE GUY TO DEATH, BUT THEY CAN'T DO. THAT WE HAVE TO PRESUME THAT THE JURY IS FOLLOWING THEIR INSTRUCTIONS, AND FINALLY, THE LAST PART OF THIS IS THE SECOND SET OF RECORDS. HE WAS FOUND, THERE WAS AN AGGRAVATOR FOUND OF -- THAT PRIOR CRIME OF VIOLENCE, THREATENING A LAW ENFORCEMENT OFFICER. THEY DIDN'T DO ANY INVESTIGATION. IF THEY WOULD HAVE GOT THE RECORDS, THEY WOULD HAVE FOUND OUT THAT THIS AGGRAVATOR THAT WAS ARGUED BY THE PROSECUTOR, THREE DAYS AFTER HE COMMITTED THE OFFENSE, HE WAS FOUND INCOMPETENT BY THE KANSAS STATE HOSPITAL AND HE DIDN'T HAVE TO GO TO TRIAL. THEY MEDICATED HIM FOR A COUPLE OFMENTS MONTHS AND THEN HE WENT AND PLED GUILTY. THEY DIDN'T EVEN HAVE THIS, SO THEY COULD HAVE ATTACKED THE AGGRAVATION WITH IT. NO ONE ANALYZED THE MITIGATION. NOTHING WAS ANALYZED IN HERE. SO THIS COURT DEFERS TO HIS BELIEF THAT

THE JURY SHOULD CONSIDER FUTURE DANGER. THAT IS ALL I HAVE. THANK YOU.

MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY, AND I, AGAIN, REPRESENT THE STATE ON THIS APPEAL. PERHAPS THE PLACE TO START IS FROM THE END OF MY OPPONENT'S ARGUMENT, WHICH APPEARS TO BE THAT THIS COURT SHOULD ESTABLISH A PER SE, BINDING, IRONCLAD RULE THAT ANYTHING THE DEFENDANT OR HIS ATTORNEYS HAVE IN THEIR POSSESSION, WITH RESPECT TO THE DEFENDANT'S CHARACTER, REGARDLESS OF WHETHER IT SHOWS THAT HE IS ACQUIRE BOY OR THAT HE -- A CHOIR BOY OR THAT HE IS A HATCHET MURDERER, MUST, BY LAW, BE PUT BEFORE THE JURY, BECAUSE THEY ARE GOING TO CONSIDER IT AS MITIGATION, AND THAT, LADIES AND GENTLEMN, IS ABSOLUTELY ABSURD. NO COURT TO EVER CONSIDER AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM HAS EVER SAID THAT THERE IS GOING TO AND CHECKLIST OF REQUIRED MITIGATION THAT COUNSEL MUST PUT IN. THAT IS BECAUSE WE ARE LAWYERS. WE ARE SUPPOSED TO DO SOME OF THAT LAWYER STUFF AND DECIDE WHAT WE WANT TO PUT BEFORE THE JURY, TO GET THE THEORY OF A CASE, AND IN THE CASE AFTER DEFENSE ATTORNEY, TRY TO SAVE THE DEFENDANT'S LIFE.

IS HE RIGHT, THOUGH, THAT THERE IS SOME MINIMUM STANDARD, IN TERMS OF INVESTIGATION, IN SDOFERING WHAT IS OUT THERE, BEFORE YOU CAN EXERCISE THAT LAWYERING DISCRETION TO DECIDE WHAT TO DO WITH THAT? THAT IS THAT, IF THERE IS SO MUCH OUT THERE, IN SOME CASES, THAT YOU DIDN'T EVEN BOTHER TO FIND, AND THEN YOU END UP WITH A CASE WHERE, AS I RECALL IN THIS CASE, THE TRIAL COURT FOUND NO MITIGATING CIRCUMSTANCES. IS THAT CORRECT?

I BELIEVE IT IS, YOUR HONOR. I DON'T RECALL DIRECTLY, TO BE HONEST WITH YOU.

BUT DO WE GO BACK, BEFORE WE GET TO THE LAWYER'S JUDGMENT, NOW, ABOUT STRATEGY OR WHATEVER, THAT THE LAWYER HAS THIS FUNDAMENTAL OBLIGATION TO FIND OUT WHAT IS OUT THERE, AND ESPECIALLY IN INSTANCES WHERE IT TURNS OUT THAT THERE WAS AN ENORMOUS AMOUNT OUT THERE, AS OPPOSED TO THE NO MITIGATION FOUND, I THINK, BY A TRIAL COURT JUDGE?

JUSTICE ANSTEAD, I THINK THE WAY TO ANSWER YOUR QUESTION IS THIS. ACTUALLY THERE IS TWO ANSWERS TO IT. FIRST OF ALL, THIS COURT HAS, ALREADY, SAID THAT COUNSEL'S PERFORMANCE WAS NOT DEFICIENT NOR WAS IT PREJUDICIAL, WITH RESPECT TO THE PENALTY PHASE. YOU ALL SAID THAT NINE YEARS AGO, BUT WHAT YOU ARE TALKING ABOUT IS WHY FROM IS A DEFICIENT PERFORM -- IS WHY THERE IS A DEFICIENT PERFORMANCE AND A PRONG AS TO WHY THAT DEFICIENT PERFORMANCE, IN THIS CASE, CAME OUT IN 1984, AND THAT IS BECAUSE, EVEN ASSUMING, FOR DISCUSSION, JUST FOR THE SAKE OF ARGUMENT, THAT YOU HAVE SOMETHING THAT THE LAWYER DIDN'T DISCOVERY. WHAT MR. JOHNSTON'S ARGUMENT ASKS YOU TO DO IS GUT THE PREJUDICE COMPONENT OF STRICKLAND, BECAUSE WHAT HE IS SAYING IS, VERY LITERALLY, AN ARGUMENT FOR A FINDING OF DEFICIENT PERFORMANCE AND JUMPING TO A FINDING OF INEFFECTIVE ASSISTANCE EVER COUNSEL, BECAUSE TRIAL COUNSEL DIDN'T FIND OR DIDN'T USE SOME SCRAP OF PAPER THAT HAS SOMETHING ON IT ABOUT THE DEFENDANT, AND IT DOESN'T MATTER --

IT SEEMS TO BE MORE THAN A SCRAP OF PAPER. IT SEEMS TO BE LESS THAN A CERT, FOR COUNSEL TO BRING TO US, TO BRING TO THE ATTENTION OF THE COURT, RECORDS FROM A CHILDHOOD, FROM INSTITUTIONALIZED CIRCUMSTANCES, AND TRYING TO BRING THAT TO A COURT'S ATTENTION. IT SEEMS TO ME THAT THE COURTS ARE SUPPOSED TO LOOK AT THESE TYPES OF THINGS, AND THAT DOESN'T FIT IN HERE? THE ARGUMENT SEEMS TO FLOW, WHETHER WE HAVE DECIDED IT OR NOT ON A PRIOR OCCASION, BUT IT SEEMS THAT THE ARGUMENT THAT HE IS PRESENTING THIS MORNING IS THAT YOU HAVE THE FIRST TWO EXHIBITS THAT HE IS

TALKING ABOUT, AND THOSE HAVE A GREAT DEAL TO DO WITH IT, WHAT AN INDIVIDUAL IS OR BECOMES, AND YOU ARE SAYING THAT THAT IS A SCRAP OF PAPER. I FIND IT HARD TO DEAL WITH IT IN THOSE TERMS, IF IT IS CORRECT THAT THAT IS WHAT THOSE RECORDS SHOW.

JUSTICE LEWIS, I WAS MAKING AN EXAMPLE. I WAS REFERRING TO THIS PARTICULAR CASE, BUT IN THIS PARTICULAR CASE, THE CIRCUIT COURT AND THIS COURT HAS, ALREADY, LOOKED AT THOSE RECORDS AND HAS, ALREADY, FOUND THAT COUNSEL'S PERFORMANCE IN DECIDING OR NOT USING THOSE RECORDS, BECAUSE OF THE DEROGATORY ASPECT OF THEM, WAS NONDEFICIENT PERFORMANCE NOR WAS IT PREJUDICIAL.

SO THAT I UNDERSTAND IT, WEREN'T THE RECORDS THAT ARE BEING REFERRED TO AND A PART OF THIS EXHIBIT, WERE THEY AVAILABLE? DID TRIAL COUNSEL HAVE THEM? I THOUGHT MY UNDERSTANDING, AFTER THE QUESTION, DID THIS -- I THOUGHT MY UNDERSTANDING, AND I AM ASKING THE QUESTION, DID THE TRIAL COUNSEL HAVE THESE RECORDS, WHEN HE MADE HIS DECISION AS TO WHAT TO PUT ON? CAN YOU JUST ANSWER THAT QUESTION? DID HE HAVE THE RECORDS?

WELL, I DON'T MEAN TO GIVE YOU A FLIPPANT ANSWER, JUSTICE PARIENTE, BUT THAT WAS AN ISSUE THAT WAS BEFORE THIS COURT. I DON'T KNOW.

BUT I AM ASKING --

I DON'T KNOW. I SIMPLY DON'T KNOW. I DON'T REMEMBER WHAT THE RECORD SAID. I DIDN'T COME UP HERE PREPARED TO ARGUE A 1990 APPEAL. I CAME UP HERE TO ARGUE A 2000 APPEAL THAT IS BASED UPON A FALSE LEGAL PREMISE THAT THIS COURT'S DECISION, IN STEVENS VERSUS STATE, SOMEHOW, MEANS THIS COURT WAS WRONG, WHEN IT I SHOULD ITS 199 -- WHEN IT ISSUED ITS 1991 OPINION IN THIS CASE. THAT IS WHAT WE ARE TRULY HERE ON. THE LAST HALF OF MR. JOHNSTON'S ARGUMENT WAS, TRULY, AN ARGUMENT THAT SHOULD HAVE BEEN MADE IN 1991 OR 1990, WHENEVER THIS CASE WAS PREVIOUSLY ARGUED TO THIS COURT. WHETHER OR NOT IT WAS MADE, I DON'T KNOW. I WASN'T PRACTICING IN FLORIDA THEN. I WASN'T EVEN WITH THE FLORIDA ATTORNEY GENERAL'S OFFICE, IN 1990, WHEN THIS CASE WAS ARGUED BEFORE, BUT THE FUNDAMENTAL PROBLEM WITH ALL OF THIS, WITH WHY WE ARE HERE, IS BECAUSE MR. JOHNSTON IS ARGUING THAT THIS COURT'S DECISION, IN STEVENS, AND I WOULD SUGGEST THAT STEVENS, REALLY, DIDN'T DO ANYTHING MORE THAN RESTATE WHAT THE LAW HAS, ALWAYS, BEEN, AND WE HAVE, ALWAYS, KNOWN WHAT IT WAS, IS SOMEHOW AFFECTED BY WILLIAMS VERSUS TAYLOR, AND YESTERDAY, IN ONE OF MY ARGUMENTS, WE HAD WILLIAMS VERSUS TAYLOR CAME UP, AGAIN, YESTERDAY, AND AS I SAID, YESTERDAY, WILLIAMS VERSUS TAYLOR DEALS WITH THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 AND ITS APPLICATION TO THE FEDERAL HABEAS CORPUS STATUTE AND THE STANDARD OF REVIEW TO BE EMPLOYED BY THE FEDERAL DISTRICT COURTS AND THE FEDERAL CIRCUIT COURTS. STEVENS AND WILLIAMS ARE APPLES AND ORANGES AND DON'T HAVE ANYTHING TO DO WITH EACH OTHER. WILLIAMS WAS AN EFFECTIVE -- WAS AN INEFFECTIVE ASSISTANCE OF COUNSEL CASE. SURE. A LOT OF THE CASES THAT COME OUT OF THE COURTS ARE INEFFECTIVE ASSISTANCE OF COUNSEL CASE. I HAVE CITED A FEW OF THEM IN MY BRIEF, TOO, BUT THE BOTTOM LINE TO ALL OF THIS IS THAT STEVENS DID NOT CREATE ANY BASIS, LEGALLY, FACTUALLY, EQUITYBLY, OR ANY OTHER WAY, FOR THIS COURT TO REOPEN A CASE IT DECIDED NINE YEARS AGO. THIS COURT HAS ALREADY SAID STEVENS DOESN'T DO THAT. THERE IS NO REASON FOR THIS COURT TO RECEDE FROM THAT, AND I AM, FRANKLY, GOING TO LEAVE A LOT OF TIME ON THE CLOCK, BECAUSE I REALLY DON'T KNOW WHAT -- THERE IS NOTHING ELSE TO SAY ABOUT THE CASE. THIS IS NOT A CASE THAT IS PROPER, PROPERLY BEFORE THIS COURT. IT HAS BEEN FULLY LITIGATED BEFORE. IT HAS GONE THROUGH THE FEDERAL DISTRICT COURT, THE FEDERAL CIRCUIT COURT. THE COURT OF APPEALS IN ATLANTA. AFFIRMED.

WE UNDERSTAND THAT THIS CASE HAS HAD MUCH LITIGATION, BUT WHAT IS YOUR RESPONSE TO

THE APPELLANT'S ARGUMENT THAT THE TRIAL JUDGE, IN HIS ORDER DENYING 3.850 RESLEEVE AND FINDING THAT COUNS-- RELIEF AND FINDING THAT COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE, DISCUSSES A LOT OF WHAT WAS IN THESE RECORDS THAT WERE NOT PRESENTED TO THE TRIAL JURY, AND SORT OF MAKES A DETERMINATION THAT ALL OF THIS WOULD HAVE PLAYED NEGATIVELY, IN A TRIAL JURY'S MIND? HOW CAN THE TRIAL JUDGE MAKE SUCH A DETERMINATION?

WELL, ASSUMING, AND I AM ASSUMING, SOMEHOW, THAT WE ARE GETTING PAST ALL OF THE PROCEDURAL IMPEDIMENTS TO THS.

WE ARE HERE, AND WE WOULD LIKE TO GET TO --

THE TRIAL COURT HAD THE EVIDENTIARY HEARING. THEY HAD TRIAL COUNSEL ON THE WITNESS STAND. TRIAL COUNSEL, AS I RECALL, WAS QUESTIONED, WITH RESPECT TO THESE RECORDS. THE RECORDS CONTAIN INFORMATION THAT IS NOT FAVORABLE TO THE DEFENDANT, AND WHILE IT HAS BEEN COUCHED IN TERMS OF NONSTATUTORY AGGRAVATION, I DON'T KNOW --

BUT ISN'T THAT PRETTY MUCH TRUE OF ALL OF ANY OF THESE RECORDS THAT WE SEE? WHEN WE SEE RECORDS FROM HOSPITALS AND DOCTORS' VISITS AND ALL THESE THINGS, I MEAN, WE NORTH EXPECTING THIS TO BE -- WE ARE NOT EXPECTING THIS TO BE INFORMATION ABOUT A CHOIR BOY, AND YET THESE KINDS OF RECORDS ARE ROUTINELY OFFERED TO THE JUDGE AND THE JURY, TO DEMONSTRATE THE DEFENDANT'S CHARACTER, WHICH MIGHT BE OF A MITIGATING NATURE. HOW DOES A TRIAL JUDGE MAKE A DETERMINATION THAT THAT -- THAT THIS JURY WOULD NOT HAVE CONSIDERED THESE RECORDS MITIGATING?

THE TRIAL COURT IS IN THE POSITION -- IS IN THE POSITION, AS IS THIS COURT, TO REVIEW, TO LOOK AT THE DOCUMENTS, AND DECIDE WHETHER A REASONABLE LAWYER COULD HAVE DECIDED NOT TO PUT THOSE RECORDS BEFORE THE JURY. THAT IS WHAT LAWYERS DO!

YOU JUST SAID YOU DON'T KNOW THAT THIS LAWYER -- YOU DON'T KNOW THE RECORD, WHETHER THE LAWYER HAS THE RECORD OR NOT, AND OUR CASE LAW DOES SAY THAT, IF A LAWYER DID NOT HAVE THE RECORDS, THEY CAN'T EXERCISE REASONABLE TRIAL STRATEGY, IN NOT USING RECORDS THEY DIDN'T HAVE.

THEN, IF THAT IS THE CASE, AND I AM NOT CONCEDE AGO THAT IT IS, THEN THAT IS WHY YOU HAVE THE SECOND PRONG OF STRICKLAND, WHICH IS PREJUDICE, AND HE CAN'T OVERCOME PREJUDICE. UNDER THE WORST CASE SCENE AIR YO FOR THE -- SCENARIO FOR THE STATE, THESE RECORDS ARE ENTIRELY DAMAGING RECORDS, AND THERE IS NO REASON TO CONCLUDE THAT A REASONABLE LAWYER COULD DECIDE NOT TO PUT THOSE RECORDS BEFORE THE JURY. I DON'T KNOW THAT ONE WOULD WANT TO PUT, BEFORE THE JURY, IN A CASE INVOLVING THE MURDER OF A 84-YEAR-OLD WOMAN, INFORMATION THAT MR. JOHNSTON IS HOMICIDAL, AND THAT HE IS COMBATIVE, THREATENING, ANTISOCIAL, POTENTIALLY. A HISTORY OF PRIOR DRUG AND ALCOHOL ABUSE, AND THAT HE IS DANGEROUS, IN THE OPINION OF MENTAL HEALTH STATE EXPERTS. WHETHER OR NOT YOU GET INTO THAT THAT IS STATUTORY AGGRAVATION OR WHATEVER YOU WANT TO CALL IT, THE BOTTOM LINE IS IT SOUNDS LIKE A FAIRLY RAPID WAY TO KILL YOUR CLIENT, WHEN YOU ARE TRYING TO GET A JURY TO RECOMMEND A SENTENCE LESS THAN DEATH, TO TELL THEM THAT HE IS HOMICIDAL AND GO THROUGH ALL THIS LITANY OF WHO ARE IBLINGS ABOUT HIM. -- OF HORRIBLES ABOUT HIM.

WAS THIS LITANY OF HORRIBLES CONTAINED IN HIS RECORDS OF INSTITUTION AS A YOUNG CHILD AND THE BRAIN DAMAGE. IS THAT YOUR UNDERSTANDING?

THAT IS MY UNDERSTANDING, JUSTICE WELLS. AND WHILE ONE COULD SAY THAT, OKAY, FINE, MAYBE YOU COULD MAKE AN ARGUMENT TO A JURY, THAT THIS GUY, YOU KNOW, JUST CAN'T CONTROL HIMSELF. HE IS REALLY MEAN. HE IS, REALLY, JUST A BAD GUY, AND HE IS GOING TO

DO THESE KIND OF THINGS, SO JUST LOCK HIM UP BUT DON'T KILL HIM. IF COUNSEL MADE THAT ARGUMENT, WE WILL BE UP HERE, HEARING HOW INEFFECTIVE TRIAL COUNSEL WAS FOR TELLING THE JURY HOW DANGEROUS THIS DEFENDANT IS, HOW EVIL HE IS, AND HOW LIKELY HE IS TO PROBABLY KILL SOMEBODY ELSE. AND THAT IS WHERE WE HAVE TO ALLOW THE TRIAL LAWYER TO MAKE A DECISION, AND EVALUATE THAT DECISION BY THE PROPER STANDARD, WHICH IS, IF A REASONABLE LAWYER COULD HAVE CONCLUDED NOT TO PUT THIS EVIDENCE BEFORE THE JURY, THAT IS A MATTER OF TRIAL STRATEGY, AND THE COURTS OF THIS STATE AND THE FEDERAL COURTS THAT HEAR THESE CASES, AND WE ALL DEAL WITH THIS EVERYDAY, WE DON'T SECOND-GUESS IT. YOU HAVE GOT TO BE ABLE TO DO SOME OF THAT LAWYER STUFF. YOU HAVE GOT TO BE ABLE TO MAKE THOSE DECISIONS. OTHERWISE THE DEFENDANT DOESN'T NEED A LAWYER AT THE PENALTY PHASE. YOU PUT IN EVERYTHING YOU HAVE GOT ABOUT TM ABOUT HIM AND LET THE JURY DECIDE WHAT THEY ARE GOING TO DO, AND THAT IS NOT WHAT THE SYSTEM IS ALL ABOUT. LAWYERS HAVE, ALWAYS, BEEN EXPECTED TO EVALUATE THE CHEMISTRY OF THE COURTROOM, I BELIEVE IN THE WORDS OF THE ELEVENTH CIRCUIT COURT OF APPEALS, AND MAKE A TACTICAL AND STRATEGIC DECISION ABOUT WHAT TO DO AND WHAT IS THE BEST WAY TO WIN THIS CASE, AND SOMETIMES IT APPEARS ON GUT INSTINCT AND INTATION, AND THIS -- AND INTUITION, AND YOU CAN'T CHANGE THAT. LET THE TRIAL BE UP TO TRIAL COURT LAWYERS. IN THIS CASE, THIS IS AN ATTEMPT TO APPEAL A 3.850 THAT WAS DECIDED BY THIS COURT IN 1981. THERE IS NO BASIS, EITHER FACT OR FICTION SHUN, TO REOPEN THIS CASE. I WILL ASK THE COURT TO DENY THE HABEAS. THERE BEING NO FURTHER QUESTIONS, THANK YOU.

JUST BRIEFLY, ANSWER THE QUESTION KNOW THE RECORD FINDS, AT ONE, TWO, THREE OF THE APPENDIX, THE LAWYERS DIDN'T HAVE THEM AT TRIAL.

IS IT TRUE THAT MOST OF THE RECORDS, THIS STUFF ABOUT FUTURE DANGEROUSNESS AND OTHER ASPECTS, IS THAT WHAT IS PREDOMINANTLY IN HIS RECORDS?

NO. NO. NO. THEY ARE SAYING HE IS SCHIZOPHRENIC, AND IF HE IS NOT ON HIS MEDICATION, HE IS DANGEROUS, AND HE IS A DANGER TO SOCIETY, IF HE IS NOT MEDICATED.

THE JUDGE KNEW -- IN HIS SENTENCING ORDER, IT SAYS THAT HE HAS BEEN EARLIER DIAGNOSED AS SCHIZOPHRENIC. SO WASN'T THAT ALREADY BEFORE THE JURY?

NO. IT WAS NOT. THE RECORDS WERE NOT PRESENTED TO THE JURY.

HOW DID THE JUDGE FIND THAT THERE WAS EVIDENCE THE DEFENDANT SUFFERED FROM A MENTAL DISORDER AND THAT HE HAS BEEN DIAGNOSED AS SCHIZOPHRENIC, THAT HE HAS BEEN COMMITTED TO MENTAL INSTITUTIONS ON A GREAT NUMBER OF OCCASIONS. THAT IS IN THE SENTENCING ORDER.

THAT WAS DURING THE CROSS-EXAMINATION OF THE STATE'S EXPERT. BACKGROUND MATERIAL THAT HE HAD REVIEWED.

DID HE HAVE THE RECORDS?

NO. HE DIDN'T HAVE THEM, AT THE TIME OF THE EVALUATION. IT WAS A 45-MINUTE CONFERENCE, CONFERENCE,ET VALUATION. THE -- CONFERENCE, THE EVALUATION. THE ONLY THING I CAN SAY IS IT IS SIMPLE. THIS COURT CAN DEFER TOHE TRIAL COURT JUDGE'S DETERMINATION AS TO WHETHER IT WAS REASONABLE. THE TRIAL COURT DID NOT LOOK AT ANY OF THESE RECORDS. THIS COURT DID NOT TAKE A LOOK AT THESE RECORDS AND SEE THAT THERE IS NOTHING THERE, AND DID NOT LOOK AT THEM AND DETERMINE, YES, THE TRIAL COURT, WAS IT CORRECT?

WERE THOSE RECORDS PRESENTED AT THE 3.850?

YES, THEY WERE PRESENTED.

SO HOW CAN YOU ASSUME THAT THE COURT DID NOT LOOK AT THE RECORDS?

BECAUSE THE WAY THE TRIAL COURT'S ORDER IS HE, HE TREATS THE RECORDS AS IF THE REASON THAT THEY WEREN'T PRESENTED WAS THAT -- BECAUSE THE ATTORNEYS MADE A STRATEGIC DECISION NOT TO PRESENT THEM, BUT THEY DIDN'T HAVE THEM. STRICKLAND SAYS THAT IT HAS TO BE AN INFORMED DECISION.

BUT THEY DID HAVE THE LOUISIANA PRISON RECORDS.

JUST STATE HOSPITAL RECORDS. THEY DIDN'T HAVE THE RECORDS FROM THE SCHOOL FOR THE MENTALLY RETARDED, AND THEY DIDN'T HAVE THE RECORDS WHERE HE WAS FOUND INCOMPETENT, THREE DAYS AFTER THE OFFENSE, WHICH WAS USED FOR HIS PRIOR VIOLENT AGGRAVATING CIRCUMSTANCES. NOW, THE COURT, WHEN YOU LOOK AT THE COURT, IN YOUR OPINION, YOU CAN SEE, YOU DON'T DISCUSS ANY OF THIS. YOU HAVE THE OBLIGATION TO DO A DE NOVO REVIEW. IF YOU LOOK AT IT, IF YOU LOOK AT THESE THINGS, YOU WILL SEE THAT IT WASN'T REASONABLE, AND UNDER OWENS AND PRESTON, YOU CAN EITHER SEND IT BACK TO THE COURT TO ANALYZE IT EXPRESSLY, OR YOU CAN GRANT RELIEF OR MANIFEST IT TO OCCUR.

THANK, MR. STRAND. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.