Charles W. Finney v. State of Florida

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS FIN VERSUS STATE. -- IS FINNEY VERSUS STATE. JUSTICE QUINCE IS RECUSED ON THIS CASE.

> MAY IT PLEASE THE COURT. MY NAME IS RICHARD KILEY, EMPLOYED BY CCRC MIDDLE, AND I AM REPRESENTING CHARLES FINNEY IN THIS ACTION TODAY. I WOULD RELY ON THE BRITON ARGUMENTS IN THE DEFENDANT'S PETITION FOR HABEAS CORPUS AND I WOULD ARGUE ISSUES FIVE AND SIX IN APPELLANT'S CORRECTED BRIEF, ISSUE FIVE BEING THAT THE TRIAL COURT ERRED IN SUMMARILY DENYING WITHOUT HEARING, THE CLAIM THAT APPELLANT'S TRIAL ATTORNEY FAILED TO PRESENT MITIGATION WITNESSES IN THE PENALTY PHASE OF THE TRIAL. AND THUS DEPRIVED APPELLANT OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OTE CONSTTUTIN. ISSUE SIX IS INTERTWINED WITH ISSUE FIVE, IN THAT TRIAL COUNSEL DID NOT PROVIDE DR. GAMAS SH., THE -- GAMASH, THE PSYCHIATRIC EXPERT, WITH INFORMATION TO DO A PROPER ANDIZATION. TAMMY GALLIMORE, A FELONY NAMED JOE WILLIAMS, AN EMPLOYER AND FRIEND OF MR. FINNEY AND DR. GAM ASH -- GAMASH, THOSE THREE WITNESSES WERE ALL LOCAL, AND THUS THE JURY HAD NO IDEA OF MR. FINNEY'S CHILDHOOD, ANY CIRCUMSTANCES THAT DID OR MAY HAVE OCCURRED IN MR. FINNEY'S CHILDHOOD. THE 3.850 EMOTIONAL EVENINGS THAT THERE WERE -- THE 3.850 EMOTIONAL -- THE 3.850 MOTION ALLEGES THAT THERE WERE A NUMBER OF WITNESSES WHO COULD HAVE PROVIDED TESTIMONY IN MR. FINNEY FINNEY'S CASE. FOR EXAMPLE THE SISTER KATHERINE RICHARDSON COULD HAVE TESTIFIED THAT MR. FINNEY SUFFERED A CHILDHOOD FALL WHICH RESULTED IN A FIVE-INCH SCAR ON HIS HEAD, WHICH WAS APPARENT TO ANYBODY THAT SAW HIM. HE ALSO SUFFERED FROM ANEMIA AND WAS PRONE TO FAINTING SPELLS, WHICH WHICH WOULD HAVE GIVEN DR. GAMASH SOME INDICATION THAT HE SHOULD HAVE LOOKED FOR SOME KIND OF ORGANIC BRAIN DAMAGE.

WHERE DO WE LOOK FOR THAT IN THE RECORD? HOW IS THAT PRESENTED HERE? IN OTHER WORDS WHAT YOU ARE SAYING THAT THEY COULD HAVE TESTIFIED TO. HOW WAS THAT TOLD TO THE TRIAL COURT JUDGE?

IN THE TRIAL COURT JUDGE?

IN OTHER WORDS DID YOU ALLEGE THOSE SPECIFIC THINGS THAT YOU HAVE JUST REPEATED TO US? DID YOU ATTACH AFFIDAVITS OF --

SUBSEQUENT POSTCONVICTION COUNSEL ALLEGED THIS IN HIS CORRECTED BRIEF. HIS CORRECTED APPELLANT BRIEF.

SO THAT HAS ONLY BEEN ALLEGED IN THE APPELLATE BRIEF. IS THAT CORRECT?

THE SPECIFICS HAVE BEEN ALLEGED IN THE APPELLATE BRIEFS. THE WITNESSES, THEMSELVES, HAD BEEN ALLEGED IN THE ORIGINAL 3.850 MOTION. FURTHERMORE, IN THE ORIGINAL 3.850 MOTION, COUNSEL, PRIMARY COUNSEL FOR THIS CASE, MR. JACK CROOKS, DID ALLEGE THAT SCHOOL RECORDS AND MILITARY RECORDS SHOULD HAVE BEEN PROVIDED TO DR. GAMASH.

BUT WAS THERE AN ARTICULATION OF WHAT THOSE RECORDS WOULD HAVE SHOWN, OR WHAT THESE WITNESSES WOULD HAVE SAID?

ONLY IN THE CORRECTED APPELLANT BRIEF.

SO THAT WASN'T BEFORE THE TRIAL COURT JUDGE.

THE SPECIFIC ISSUES AS TO WHAT THESE PEOPLE WOULD HAVE TESTIFIED TO, WERE NOT. HOW FAR, YOUR HONOR, UNDER -- HOWEVER, YOUR HONOR, UNDER GAS KIN, THERE WAS NO REQUIREMENT THAT --

HERE IS MY POINT, IS THAT ANYBODY THAT HAS GONE TO SCHOOL PRESUMABLY HAS SCHOOL RECORDS, FOR INSTANCE.

YES, SIR.

AND IF YOU ARE CLAIMING THAT SOMEBODY SHOULD HAVE PRESENTED SCHOOL RECORDS, PRESUMABLY YOU WOULD BE CLAIMING THAT, BECAUSE THE SCHOOL RECORDS SHOW SOMETHING FAVORABLE TO THE DEFENDANT, IN TERMS OF MITIGATION. THAT IS THAT THEY, AS OPPOSED TO NOT KNOWING WHAT THOSE SCHOOL RECORDS WOULD SHOW, SO MY POINT IS HERE, A SIMPLE ALLEGATION THAT SCHOOL RECORDS SHOULD HAVE BEEN PRESENTED, IT SEEMS TO ME, REALLY TELLS THE TRIAL COURT NOT VERY MUCH, AS OPPOSED TO SAYING THE SCHOOL RECORDS SHOULD HAVE BEEN PRESENTED, BECAUSE THEY DEMONSTRATE A DETAILED HISTORY OF WHATEVER YOU ARE CLAIMING AS MITIGATION, SO I AM ASKING YOU HERE WHETHER, IN THE MOTION, WAS IT ALLEGED, WHAT THESE SCHOOL RECORDS WOULD SHOW? OR WAS IT JUST ALLEGED THAT SCHOOL RECORDS SHOULD HAVE BEEN PRESENTED?

IT WASAL AEGED -- IT WAS ALLEGED IN THE MOTION THAT MILITARY AND SCHOOL RECORDS WOULD HAVE GIVEN RISE TO MITIGATING CIRCUMSTANCES, STATUTORY MITIGATING CIRCUMSTANCES IN MR. FINNEY'S CASE, NOT WITH SPECIFICITY. THE SPECIFICITY WAS ALLEGED IN APPELLANT'S CORRECTED BRIEF.

THE TRIAL COURT DENIED THOSE CLAIMS, WITHOUT AN EVIDENCIARY HEARING. IS THAT CORRECT?

THAT IS CORRECT, YOUR HONOR, AND WE ARE CONTENDING, PURSUANT TO GASTIN, THAT THERE WAS NO REQUIREMENT UNDER RULE 3.850, THAT THE MOVANT MUST NAME THE NAMES AND IDENTITIES OF THE WITNESSES, IN ADDITION TO THE, THEIR TESTIMONY. HOWEVER, IN THE CASE OF BAR, FINNEY DID PROVIDE THE -- IN THE CASE OF BARR, FINNEY DID PROVIDE THE NAMES OF THE WILTNESSES THAT WOULD TESTIFY AND -- THE NAMES OF THE WITNESSES THAT WOULD TESTIFY AND HAD AND COULD PROVIDE SCHOOL RECORDS THAT DID CONTAIN INFORMATION AS TO WHAT WOULD HAVE BEEN FOUND, HAD DR. GAMASH DISCOVERED WHAT HAPPENED IN HIS PAST. FOR EXAMPLE, MR. FINNEY SUFFERED FROM HEROINE ADDICTION AND --

DO WE KNOW -- FROM SUFFERED FROM HEROIN ADDICTION AND FROM --

DO WE KNOW THAT FIRSTHAND?

WE DO NOT KNOW THAT FIRSTHAND YOUR HONOR.

WE CAN'T PUT ALLEGATIONS THAT WEREN'T BEFORE THE TRIAL COURT JUDGE, IN ORDER TO MAKE THAT DECISION. IT IS SORT OF LIKE, THEN, HAVING THE ISSUE DECIDED ON ONE BASIS AT THE TRIAL COURT LEVEL BUT, THEN, SAYING, NOW, HERE IS SOME OTHER STUFF THAT WE HAVE FOUND, AND WE WANT YOU TO KNOW, AND SO IT WOULD NOT BE PROPER, WOULD IT FOR THIS COURT TO CONSIDER THE SPECIFICS OF THINGS THAT WERE NOT DISCLOSED TO THE TRIAL COURT JUDGE.

WELL, YOUR HONOR, THE COURT, IN PEDAND FOTOPOULOS -- IN PEED AND FOTOPOULOS, TOOK

ISSUE IN WHAT TOOK PLACE IN POO D. AND FOTOPOULOS, WITH -- IN PEED AND IN FOTOPOULOS, WITH RESPECT TO TRIAL COURT COUNSEL. WITH RESPECT TO THAT ISSUE, I AM PERMITTED TO ARGUE ANY MATTERS BRIEFED BEFORE THE COURT. ANY MATTERS IN THE PELL ANT BRIEF -- IN THE APPELLATE BRIEF AND IN THE ANSWER AND IN THE REPLY BRIEF, ITSELF.

BUT YOU WOULD AGREE THAT THERE IS SUBSTANTIAL INFORMATION IN THE TRIAL COURT BRIEF THAT WAS NOT SUPPLIED TO THE TRIAL COURT JUDGE?

YES, I DO.

AT THE HUFF HEARING, WHEN ASKED ABOUT THE WITNESSES, THE COUNSEL FOR MR. FINNEY SAID THAT THIS WOULD BE LARGELY CUMULATIVE INFORMATION, DIDN'T HE?

NEW YORK CITY YOUR HONOR. HE SAID THIS MAY BE CUMULATIVE.

WHAT WAS THE TRIAL JUDGE TOLD ABOUT WHAT THESE WITNESSES MIGHT TESTIFY?

TAT THEY MAY BE CUMULATIVE.

WAS HE TOLD ANYTHING ABOUT THEIR SUBSTANCE OF WHAT THEY WOULD SAY?

NO, YOUR HONOR, AND THAT GAVE RISE TO MR. FINNEY'S -- WELL, NOVEMBER 12 OF 1999, MR. FINNEY HAD FILED A PRO SE MOTION FOR A REQUEST FOR A NELSON HEARING, SAYING THAT HIS 3.850 WAS INSUFFICIENTLY PLED. IT WAS A BOILER MOTION, AND THAT WAS SMMARILY DISMISSED WITHOUT A HEARING, BY THE TRIAL COURT. THAT IS BASICALLY WHAT HAPPENED. NOW, BECAUSE MR. CROOKS INDICATED THAT THESE WITNESSES MIGHT BE CUMULATIVE, THERE IS NO INDCATIN THAT THEY WOULD HAVE BEEN CUMULATIVE, AND FOR A SUBSEQUNT -- AND FURTHER, A SUBEQUENT INVESTIGATION BY MY OFFICE HAS REVEALED THAT THEY WOULD NOT HAVE BEEN CUMULATIVE. THE ARGUMENT OR, RATHER, THE PRENTATION OF MITIGATION, CONSISTED OF, BASICALLY, THAT MR. FINNEY'S LOCAL ATIOS, HE WAS A GOOD FATHER TO HIS DAUGHTER. AVENUES GOOD EMPLOYEE. THAT DIDN'T TOUCH ON ANY OF HIS EARLIER LIFE, AND THEY KNEW HE WAS FROM GEORGIA. I WOULD SUBMIT THAT THE COURT'S RECENT DECISION IN RAGSDALE HELD THAT HIS ATTORNEY HAD A STRICT DUTY TO CONDUCT A REASONABLE INVESTIGATION OF A DEFENDANT'S BACKGROUND FOR POSSIBLE MITIGATING EVIDENCE. NOW, MR. FINNEY HAD LISTED A GEORGIA ADDRESS ON THE PAWN TICKET THAT HE USED TO PAWN THE VICTIM'S VCR, HOURS AFTER HER DEATH. THEY KNEW HE WAS FROM GEORGIA. ALL THESE WITNESSS, THESE CHILDHOOD WITNESSES WERE FROM GEORGIA. YET --

AND THE MENTAL HEALTH EXPERT TESTIFIED SIMPLIVE BASED ON SELF-REPORTING?

ALMOST ENTIRELY ON SELF-REPORTING. THE MENTAL HEALTH EXPERT, QUITE FRANKLY, TESTIFIED N HE RECORD THAT HE IS USED TO CRIMINAL DEFENDANTS TRYING TO PUT THEMSELVES IN A FAVORABLE LIGHT. SO MR. FINNEY DID PAINT A LESS THAN ACCURATE PICTURE OF HIS CHILDHOOD. AND I THINK, DUE TO DR. GAMASH'S LACK OF KNOWLEDGE AND LACK OF BACKGROUND INFORMATION, HE WAS UNABLE TO TEST FOR BRAIN DAMAGE, FOR INSTANCE. DR. GAMASH HAD NO IDEA THAT MR. FINNEY HAD SUFFERED A HEAD INJURY. HAD NO IDEA THAT MR. FINNEY WAS ADDICTED TO HEROIN AND HASHISH WHILE IN THE UNITED STATES MILL AREA AND ENTERED TREATMENT FOR. THAT DR. -- FOR THAT. DR. GAMASH HAD NO IDEA THAT MR. FINNEY SUFFERED FAINTING SPELLS AT SCHOOL AND RECEIVED NO TREATMENT FOR THAT. HE BASICALLY HAD NO INFORMATION. SO BASICALLY DR. GAMASH TESTIFIED TO WHAT OCCURRED WITH MR. FINNEY'S LIFE WHILE MR. FINNEY WAS IN TAMPA, A RELATIVELY SHORT PERIOD OF TIME. IN FACT, A LOT OF DR. GAMASH'S TESTIMONY DIDN'T CONCERN MR. FINNEY AT ALL. IT CONCERNED THE EFFECT THAT A DEAT SENTENCE WOULD HAVE ON MR. FINNEY'S DAUGHTER, WHO HE MET OUTSIDE THE COURTROOM BRIEFLY. AND, OF COURSE, HE TESTIFIED THAT MR. FINNEY WOULD BE A VERY SUPPORTIVE FATHER, IF HE WERE GIVEN LIFE IMPRISONMENT AND

WOULD MAINTAIN A CLOSE RELATIONSHIP WITH HIS DAUGHTER, BUT HIS MAIN TESTIMONY CONCERNED THE FACT THAT HIS DAUGHTER LOVED MR. FINNEY AND HIS DAUGHTER WOULD BE GRATEFUL, WOULD BE GREATLY AFFECTED BY HIS SENTENCE OF DEATH IMPOSEED ON MR. FINNEY. IN OTHER WORDS, JUDGE, PURSUANT TO TORRES ABUDELLA, COLLAERAL COUNSEL HAS PRESENTED OR COULD HAVE PRESENTED AT THE 3850 HEARING, A GREAT WEALTH OF MITIGATION THAT TRIAL COUNSEL SHOULD HAVE PRESENTED, IF THEY AVE DONE A REASONABLE BACKGROUND CHECK -- IF THEY HAD DONE A REASONABLE BACKGROUND CHECK, BY CHECKING ONE STATE NORTH OF THIS STATE. THESE PEOPLE WERE ALL AVAILABLE TO TESTIFY. THE SCHOOL RECORDS, THE MILITARY RECORDS WERE ALL AVAILABLE. WE FOUNDTHEM. WE REVIEWED THEM.

YOUR VIEW IS THAT THE ORIGINAL CCR COUNSEL WAS,REALLY NOT COMPETENT, AND THAT, BECAUSE OF THAT, WE HAVE AN OBLIGATION TO HAVE AT LEAST AT EVIDENTIARY HEARING. IS THAT, I MEAN, IT SOUNDS TO ME IN ANSWER TO JUSTICE ANSTEAD'S QUESTION, IS THAT YOU ARE CONCEDING THAT THIS WAS NOT BE BEFORE THE TRIAL JUDGE -- THAT THIS WAS NOT BEFORE THE TRIAL JUDGE, AND SO I AM STILL TRYING TO MAKE SURE, ON WHAT BASIS DO WE HAVE, THEN, TO REVERSE THE TRIAL JUDGE?

WELL, FIRST OF ALL, YOUR HONOR, WE WOULD CONTEND THAT, IN THE ORIGINAL BRIEF, WE HAVE SATISFIED THE CRITERIA IN GAS KIN, AND-KNOW GASKIN, AND WE HAVE -- IN GASKIN, AND WE HAVE SATISFIED EVERYTHING UNDER THE RULE 3.850. WE HAVE SATISFIED THAT THERE WERE NO AFFIDAVITS. COUNSEL MAKES MENTION IN HER BRIEF AS TO, HAD AFFIDAVITS BEEN FILED, THERE WAS NO INDICATION OF CHANGE. THERE WAS NO QUESTION THAT THAT WOULD HAVE ALLEGED TO HAVE BEEN DONE. WE ALSOAL EVENING THAT SCHOOL AND -- WE ALSO ALLEGE THAT SCHOOL AND MILITARY RECORDS SHOULD HAVE BEEN PROVIDED TO DR. GAMASH, BUT GOING BACK TO THE QUESTION OF POSTCONVICTION COUNSEL, WE ARE CONTENDING THAT, ON NOVEMBER 12, 1999, MR. FINNEY HAD A RIGHT TO BE HEARD ON HIS NELSON CLAIM. HE HAD FILED A PRO SENESS ONE MOTION WITH THE TRIAL COURT -- A PRO SE NELSON MOTION WITH THE TRIAL COURT, AND THAT WAS NEVER ADDRESSED. MR. FINNEY WAS DISSATISFIED WITH THE BRIEF AND CONTENDED THAT THE BRIEF WAS A BOILERPLATE MOTION AND BARE MINIMUM NUMBER, A BARE 38 PAGE INS THE 3.850 -- A BARE 38 PAGES IN THE 3.850 MOTION WAS SUBMITTED TO THE COURT. THAT WAS OUR CONTENTION IN THE MATTER AND, HOWEVER, OUR CONTENTION IS THAT MR. FINNEY HAD A RIGHT TO BE HEARD ON THAT MATTER AND HE WAS NOT GIVEN THAT RIGHT.

IS THAT BASED ON PAREN 12, WHERE IT SAYS THE COURT HAS THE ASSIGNMENT TO MODIFY COUNSEL TO ENSURE THAT THE DEFENDANT IS RECEIVING QUALITY REPRESENTATION. IS THAT SOMETHING THAT YOUR CONTENTION --

YES.

-- THAT THAT REQUIRES THAT, IF IT IS BROUGHT TO A JUDGE'S ATTENTION DURING THE COURSE OF REPRESENTATION THAT, THEY HAVE FURTHER OBLIGATION TO INQUIRE?

WE ARE CONTENDING THAT THE TRIAL COURT DID HAVE AN OBLIGATION TO MAKE SURE MR. FINNEY WAS GETTING ADEQUATE POSTCONVICTION REPRESENTATION. AND HE NEVER ADDRESSED THOSE CLAIMS. YOUR HONOR, FURTHERMORE, IN REGARDS TO THE FAILURE OF TRIAL COUNSEL, THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN PROVIDING SUFFICIENT BACKGROUND INFORMATION FOR MR. FINNEY, WE WOULD CITE CERESE, KATHERINE RICHARDSON, BILLY STUBS, JAM WESLEY, LYNN WESLEY COULD HAVE ALL PROVIDED INFORMATION THAT MR. FINNEY HAD SUFFERED SOME BRAIN DAMAGE. MR. FINNEY WAS SHOT IN THE STOMACH AT ONE POINT IN TIME. HE, ALSO, WAS SUFFERING FROM FAINTING SPELLS ON A REGULAR BASIS AND SUFFERED A SERIOUS HEAD INJURY. MILITARY RECORDS WOULD HAVE REVEALED THAT HE WAS SERIOUSLY IMPAIRED BY A HEROIN ADDICTION AND ADDICTION TO HASHISH. ALL OF THESE THINGS, ALL OF THESE THINGS COULD HAVE AIDED DR. GAMAVH IN HIS EVALUATION OF MR. FINNEY. SINCE HE WAS NOT AWARE OF THE POSSIBLE BRAIN DAMAGE, HE

DIDN'T GIVE ANY TESTS FOR POSSIBLE BRAIN DAMAGE. HE GAVE AN MMPI AND TEST WHICH I HAVE NEVER HEARD OF, TO DETERMINE WHETHER OR NOT THE DEFENDANT WAS A PSYCHOPATH, AND COMPLETELY IGNORED THE BRAIN INJURY ISSUE, BECAUSE HE DIDN'T KNOW. HE DIDN'T KNOW TO LOOK. I AM NOT SUGGESTING THIS IS A 8 CLAIM. I AM SUGGESTING THAT THIS IS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, IN THAT TRIAL COUNSEL SHOULD HAVE PROVIDED SOME INFORMATION, SOME GUIDANCE, AS TO MR. FINNEY'S EARLY LIFE. AND THEY SHOULD HAVE CALLED WITNESSES, MITIGATION WITNESSES, TO GIVE THE JURY A PICTURE OF THIS MAN'S CHILDHOOD. THEY DID NOT. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL TIME.

YES, SIR. THANK YOU, SIR. MR. CHIEF JUSTICE

THANK YOU.

GOOD MORNING, YOUR HONORS. CAROL DITTMAR FROM THE ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE OF FLORIDA, THE APPELLEE. MAY IT PLEASE THE COURT.

MS. DITTMAR, WOULD YOU AGREE WITH THIS PROPOSITION, THAT IN EVALUATING A 3.850 INEFFECTIVE INEFFECTIVENESS CLAIM, THAT, UNLESS THE RECORD AND MOTIONS CONCLUSIVELY SHOW THAT THE DEFENDANT IS NOT ENTITLED TO AN EVIDENCIARY HEARING, THEN IS HE ENTITLED TO AN EVIDENTIARY HEARING? WOULD YOU AGREE WITH THAT PROPOSITION?

I AGREE THAT IS TRUE, IF YOU HAVE A FACIALLY-SUFFICIENT MOTION. IF YOU HAVE A MOTION WHICH MEETS THE REQUIREMENT OF THE RULE, INCLUDING THE ALLEGATIONS OF SPECIFIC FACTS TO PROVE THE CLAIM. I BELIEVE THAT THE DEFENDANT HAS A BURDEN IN A POSTCONVICTION MOTION, TO ESTABLISH THAT THEY ARE ENTITLED TO AN EVIDENTIARY HEARING, AND I THINK THAT IS CONSISTENT WITH WHAT THIS COURT HAS SAID. IN FACT, THE --

WELL, THE RULE READS IF THE MOTION FILED AND RECORDS IN THE CASE CONCLUSIVELY SHOW THAT THE MOVANT IS ENTITLED TO NO RELIEF, THE MOTION SHALL BE DENIED WITHOUT A HEARING, THEN FLIP-FLOP THAT COIN. IT WOULD SEEM TO MEAN THAT HE WOULD BE ENTITLED TO IT. IN FACT, CASE LAW SPEAKS TO IT.

BUT YOU HAVE TO HAVE A SUFFICIENT MOTION BEFORE THE COURT. I THINK IT STARTS WITH THESE ARE THE REQUIREMENTS OF THE MOTION. PART OF WHAT IS REQUIRED IS THE ALLEGATION OF SPECIFIC FACTS. THIS COURT, IN THE LaCROIX CASE, WHICH IS QUOTED IN THE TRIAL JUDGE'S ORDER BELOW, DENYING THIS POSTCONVICTION MOTION, SAID THE DEFENDANT MUST ALLEGE SPECIFIC FACTS THAT, WHEN CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES ARE NOT CONCLUSIVELY REBUTTED ON THE RECORD, AND DEMONSTRATE DEFICIENCY ON THE PART OF COUNSEL, WHICH IS DETRIMENTAL TO THE DEFENDANT. THEY MUST ALLEGE BOTH DEFICIENCY AND PREJUDICE IN THEIR SPECIFIC FACTS. IF THEY DON'T HAVE ANY FACTS THERE, IS NO WAY THE RECORD CAN REBUT FACTS THAT HAVE NOT BEEN PLED.

WOULD IT BE SUFFICIENT FOR THE MOTION, TO SAY THAT THERE WAS SUBSTANTIAL MITIGATING EVIDENCE RELATIVE TO THE EARLY LIFE OF THE DEFENDANT, THAT WAS NEVER PUT IN EVIDENCE? WOULD A MOTION --

WITHOUT IDENTIFYING WHAT THAT SPECIFIC MITIGATION EVIDENCE IS, I DON'T SEE HOW THAT CAN BE SUFFICIENT, WHEN YOU HAVE A CASE WHERE THE TRIAL JUDGE, IN SENTENCING, HAS FOUND AND WEIGHED, IN NONSTATUTORY MITIGATING FACTOR, THAT THERE WAS A DEPRIVED CHILDHOOD, SO IF YOU HAVE EVIDENCE GOING TO THAT TYPE OF MITIGATION, WHICH WAS PRESENTED TO THE JURY AND WAS CONSIDERED AND FOUND BY THE TRIAL JUDGE, AND THEN YOU COME BACK IN THE POSTCONVICTION MOTION AND SAY, WELL, THE JUDGE NEEDED TO CONSIDER EVIDENCE ABOUT CHILDHOOD, BUT YOU DON'T OFFER ANY EVIDENCE ABOVE WHAT

WE KNOW WAS PRESENTED AND CONSIDERED, THAT IS NOT A SUFFICIENT MOTION TO GET AN EVIDENTIARY HEARING. THE, IN THIS CASE, THE MENTAL HEALTH EXPERT, DR. GAMASH, TESTIFIED EXTENSIVELY ABOUT MR. FINNEY'S CHILDHOOD AND BACKGROUND. IN FACT, MOST OF HIS TESTIMONY IS DEVOTED TO DESCRIBING FINNEY'S BACKGROUND. HE, REALLY, DID NOT FIND ANYTHING SIGNIFICANT IN THE PSYCHOLOGICAL TEST THES THAT HE CONDUCTED. HE FOUND FINNEY TO BE OF AVERAGE INTELLIGENCE, TO HAVE NOT BEEN SUFFERING FROM ANY MENTAL ILLNESS, AND HE GOES THROUGH THAT BRIEFLY, AT THE END OF HIS TESTIMONY, BUT PRIMARILY HIS TESTIMONY IS ABOUT MR. FINNEY'S BACKGROUND. IT APPEARS, FROM READING HIS TESTIMONY, THAT HE HAS REVIEWED RECORDS, BECAUSE HE TALKS WITH SPECIFICITY, ABOUT THE GRADES. HE SAYS, YOU KNOW, HE KNEW THAT MR. FINNEY WAS BORN IN MACON, GEORGIA, AT OR NEAR THE POVERTY LEVEL. HIS MOTHER WAS A DIETITIAN. HIS FATHER WAS A CARPENTER. HIS FATHER WAS A VERY HEAVY DRINKER, WHO LEFT THE HOME WHEN FINNEY WAS ABOUT THREE YEARS OF AGE. FINNEY WAS THE THIRD OF THREE KIDS. THE MOTHER RELIED ON THE KIDS TO HELP AROUND THE HOUSE QUITE A BIT. HE WAS AN AVERAGE STUDENT, MAYBE BETTER IN SOME RESPECTS. DR. GAMASH SAYS HE RECALLS, AS IF HE HAS LOOKED AT THESE RECORDS WHEN HESS TESTIMONY, HE SAYS WHAT I RECALL IS HE MADE B'S AND C'S, NEVER A REAL DISCIPLINARY PROBLEM. HE ATTENDED ONE ELEMENTARY SCHOOL, BUT THEN WHEN HE WAS IN SECONDARY SCHOOL AND THEY WERE IN THAT AREA UNDERTAKING BUSING AND DESEGREGATION, HE WENT TO SEVERAL SECONDARY SCHOOLS. HE TALKS ABOUT HOW HE NEVER HAD ANY MAJOR FIGHTS OR DISCIPLINE THROUGHOUT HIS SCHOOL TIME THAT, HE HAD, GOT ALONG WELL WITH TEACHERS. HE HAD A FAIRLY LARGE NETWORK OF FRIENDS, GOT ALONG WELL WITH OTHER STUDENTS. HE ENLISTED IN THE ARMY SHORTLY AFTER GRADUATION. HE SERVED IN THE FIRST AIRBORNE RANGER DIVISION, SERVED TWO YEARS FROM 1972 TO 1974, RECEIVED A HONORABLE DISCHARGE, RETURNED TO MACON, USED HIS MILITARY BENEFITS TO GO TO VOCATIONAL SCHOOL, AND ON AND ON AND ON, SO HE IS VERY EXTENSIVE ABOUT THE INFORMATION HE PROVIDES TO THE JURY ABOUT MR. FINNEY'S BACKGROUND, AND NONE OF THE INFORMATION THAT HE PROVIDES HAS BEEN ATTACKED IN POSTCONVICTION AS BEING INACCURATE OR HIS, AS OMITTING ANY SIGNIFICANT INFORMATION. THERE IS NOTHING THAT CHANGES WHAT THE JURY ALREADY KNEW.

I THOUGHT THAT THE MILITARY RECORD SHOWS, IN FACT THAT, HE HAD A SUBSTANTIAL DRUG PROBLEM IN THE MILITARY.

WELL, THAT IS SOMETHING THAT HAS COME UP WITH THE APPEAL. THAT WAS NOT SOMETHING THAT WAS MENTIONED IN THE POSTCONVICTION MOTION. THAT IS SOMETHING, AND WHEN MR. KILEY STARTED OUT THIS MORNING, SAYING I AM GOING TO TALK ABOUT ISSUES FIVE AND SIX, IN FACT, ALL OF HIS REMARKS THIS MORNING WERE OUT OF ISSUE EIGHT, HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL BECAUSE THE ALLEGATIONS AND THE FACTS THAT HE WAS RECITING WERE NOT IN ISSUES FIVE AND SIX AND DID NOT RELATE, WERE NOT PRESENTED TO THE TRIAL COURT AS A BASIS FOR HAVING A HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL.

SO IF IT HAD BEENAL AEGED -- IF IT HAD BEEN ALLEGED IN THE ORIGINAL MOTION THAT THERE WERE MILITARY RECORDS THAT WERE NOT SUPPLIED OR OBTAINED THAT CONTAINED EVIDENCE AFTER DRUG PROBLEM, THAT, WOULD THAT ALLEGATION HAVE BEEN ENOUGH TO GET AN EVIDENTIARY HEARING?

WELL, CERTAINLY A DRUG PROBLEM IS SOMETHING THAT WHICH THERE WAS NOT TESTIMONY AT THE INITIAL PENALTY PHASE, AND, AGAIN, GOING BACK TO THE HUFF HEARING, THAT WAS NOT OFFERED. AS TO WHETHER OR NOT THAT WOULD HAVE SATISFIED THIS TRIAL JUDGE, I CAN'T REALLY SPECULATE ON THAT. I WOULD THINK THAT IT WOULD DEPEND ON THE INFORMATION YOU HAD ABOUT THE DRUG PROBLEM, HOW LONG THE PROBLEM EXISTED, HOW IT AFFECTED MR. FINNEY'S LIFE. I THINK SOME DRUG PROBLEMS CAN BE A LOT MORE SERIOUS THAN OTHERS F THIS WAS SOMETHING THAT HAPPENED WHEN -- THAN OTHERS. IF THIS WAS SOMETHING THAT

HAPPENED WHEN HE WAS BACK IN THE MILITARY, YEARS AND YEARS, 20 YEARS BEFORE THIS CRIME COMMITTED, THAT MAY NOT BE SOMETHING THAT IS CONSIDERED TO BE SIGNIFICANT ENOUGH TO CHANGE ANYTHING.

I GUESS, BECAUSE YOU ARE ARGUING THAT, AS PLED, THE MOTION WASN'T SUFFICIENT, AND HELP US, BECAUSE WE HAVE HAD, ON OTHER OCCASIONS, DURING THAT PERIOD OF TIME, WITH CERTAIN ATTORNEYS IN CCR, MIDDLE, THAT THE MOTIONS HAVE BEEN EITHER INADEQUATELY PLED, AND WE HAVE, ALTHOUGH WE HAVE NOT EVER RECOGNIZED AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WE HAVE MADE CERTAIN ACCOMMODATION ACCOMMODATIONS. WHY, JUST IN THE INTEREST OF FAIRNESS, AND ESPECIALLY WITH THIS LITIGANT HAVING BROUGHT THIS TO THE JUDGE'S ATTENTION PRO SE, THAT THERE WAS BOILERPLATE PLEADINGS, THAT SOME OF THEM DIDN'T ACTUALLY HAVE MR. FINNEY'S NAME ON THEM, WHY ISN'T IT MORE APPROPRIATE TO ALLOW THIS TO GO BACK FOR AN EVIDENTIARY HEARING, RATHER THAN RELY, BECAUSE OF THE FACTS IN THIS AMENDED BRIEF?

IT IS NOT FAIR, BECAUSE IT ENCOURAGES SANDBAGGING THE COURT. IT ENCOURAGES THEM NOT TO PUT FACTS IN THEIR POSTCONVICTION MOTION, IF THEY CAN GAIN A DELAY BY WAITING UNTIL POSTCONVICTION APPEAL AND COME BEFORE THIS COURT AND OFFER FACTS THAT THEY KNOW MAY BE SUFFICIENT TO GET A HEARING, THAT THEY DIDN'T PRESENT TO THE TRIAL JUDGE, WHY SHOULD THEY PUT THOSE IN THOSE INITIAL MOTION? IF THEY CAN GET AWAY WITH DOING IT LATER, WHY WOULD THEY EVER HAVE THE INCENTIVE TO DOING IT THE PROPER WAY, IF THIS COURT DOESN'T ENFORCE --

IN THIS CASE, AND I UNDERSTAND WHAT YOU ARE, ABOUT THERE MAY BE DELAY BEING AN ADVANTAGE TO A DEFENDANT, BUT IS THERE ANY INDICATION THAT THIS CAME ABOUT FOR ANY OTHER REASON THAN JUST A POOR, YOU KNOW, POOR LAWYERING AND POOR PLEAING, AS OPPOSED TO A -- POOR PLEADING, AS OPPOSED TO A PURE TACTICAL CIRCUMSTANCE?

I DON'T REALLY KNOW HOW TO ANSWER THAT IN THIS PARTICULAR CASE, OTHER THAN TO SAY THAT, UNLESS YOU GO THROUGH IN EVERY CASE, AND HAVE A SUBSEQUENT HEARING TO DETERMINE WHETHER OR NOT THE POSTCONVICTION HEARING WAS SUFFICIENT, YOU ARE ALWAYS GOING TO HAVE NEW ALLEGATIONS AND NEW CLAIMS THAT CAN COME UP, WHETHERYOU VE A HEARING BELOW OR NOT. THAT IS SOMETHING THAT CAN GO ON FOREVER.

HOW DO WE ENFORCE THE ITT OF THE LEGISLATURE, IN SECTION 27.711-12 THAT, THE COURT SHALL MONITOR THE PERFORMANCE OF ASSIGNED COUNSEL TO ENSURE THAT THE DEFENDANT IS GETTING QUALITY REPRESENTATION. LOOKING AT THIS INITIAL BRIEF, LOOKING AT THIS MOTION, THIS DOES NOT APPEAR, TO ME, TO BE QUALITY REPRESENTATION.

I THINK YOU HAVE TO BE VERY CAREFUL WITH WHAT YOU ARE SAYING ABOUT QUALITY REPRESENTATION AND NOT HAVING QUALITY REPRESENTATION. IT MAY BE THAT AN ATTORNEY WHO IS NOT WILLING TO RISK HIS PROFESSIONAL REPUTATION BY PUTTING ALLEGATIONS THAT HE CANNOT ESTABLISH AND THAT HE HAS NO REASONABLE BASIS TO BELIEVE THAT HE CAN EVER DETERMINE, SOME ATTORNEYS MAY NOT WANT TO PUT THOSE ALLEGATION INS A MOTION. OTHER ATTORNEYS MAY FEEL LIKE THAT IS THEIR JOB AND THAT IS WHAT THEY ARE GOING TO DO, EVEN IF IT MEANS THEY ARE MISREPRESENTING FACTS TO THE COURT. YOU HAVE --

ARE YOU IN POSSESSION, DO YOU KNOW ANYTHING ABOUT THESE MILITARY RECORDS?

I DO NOT HAVE ANY MILITARY RECORDS. I DON'T KNOW ANYTHING ABOUT THE MILITARY RECORDS, OTHER THAN IT APPEARS, FROM READING DR. GAMASH'S TESTIMONY, THAT HE CERTAINLY WAS AWARE OF A LOT OF FACTS OF MR. FINNEY'S MILITARY SERVICE. AND I ASSUME THAT THE RECORDS ARE CONSISTENT WITH HIS TESTIMONY, BECAUSE I ASSUME, IF THERE WAS SOME INCONSISTENCY, THE DEFENSE WOULD LET US KNOW ABOUT THAT. THE, YOU KNOW, YOU MENTIONED THAT THIS WAS A CASE WHERE MR. FINNEY HAD FILED A PRO SE MOTION, ALLEGEING

THAT HE DID NOT BELIEE HIS POSTCONVICTION COUNSEL WAS DOING HIS JOB, AND YOU, ALSO, ASKED ME ABOUT THE STATUTE, WHICH I DEFINITELY WANT TO ADDRESS, BUT FIRST OF ALL, FOR MR. FINNEY'S POSTCONVICTION MOTION OR HIS PER SE MOTION, ASKING THAT JACK CROOKS BE DISMISSED AS HIS ATTORNEY, HIS DISSATISFACTION AT THAT POINT CENTERED ON THE FACT THIS WAS AT A TIME WHEN AN EVIDENTIARY HEARING HAD BEENRANTED ON A CLAIM OF DNA, AS BEING POSSIBLE NEWLY-DISCOVERED EVIDENCE. MR. FINNEY WAS CONCERNED THAT, IN SECURING THE NEW DNA TESTING, FROM THE CRIME SCENE EVIDENCE, THAT THEY WERE GOING TO USE EVIDENCE THEY HAD FROM FINNEY, PRIOR TO TRIAL. THE BLOOD DRAW THEY HAD TAKEN PRIOR TO TRIAL. MR. FINNEY WAS CONCERNED THAT THAT EVIDENCE MAY HAVE BEEN TAINTED, TAMPERED WITH IN SOME RESPECT. HE WANTED A NEW BLOOD DRAW TO BE USED IN COMPARING THE NEW DNA TESTING THAT WAS TO BE DONE. THAT WAS HIS MAIN GRIPE IN HIS PRO SE MOTION TO DISMISS COUNSEL. THAT WAS BEING ADDRESSED. IN FACT, COUNSEL WENT TO THE COURT AND SECURED AN ORDER TO GET A NEW BLOOD DRAW, AND SO AT THE TIME THAT IT WAS DISCUSSED, THE COURT WAS AWARE OF WHAT HIS DISSATIES FACKT FAX WAS, AND -- DISSATISFACTION WAS AND HE WAS AWARE THAT IT WAS BEING ADDRESSED BY THE CCR, AND SO THE JUDGE WAS AWARE OF ALL OF THOSE CIRCUMSTANCES, TO THE EXTENT THAT HE THREW SOME LANGUAGE IN THAT HE IS DISSATISFIED BECAUSE CCR MIDDLE, ACCORDING TO WHAT HE HAS HEARD, DID NOT HAVE A GOOD REPUTATION. THERE IS NOTHING THERE THAT WILL BE SUFFICIENT FOR THE COURT TO DO ANYTHING WITH, AND AS FAR AS THE STATUTE, I THINK THE STATUTE IS REALLY INTERESTING, BECAUSE I DON'T UNDERSTAND HOW IT CAN BE ENFORCED, WITHOUT HAVING THE TRIAL JUDGE INTERJECT THEMSELVES INTO THE CONFIDENTIAL RELATIONSHIP BETWEEN POSTCONVICTION COUNSEL AND THE POSTCONVICTION DEFENDANT, BECAUSE IF THE TRIAL JUDGE IS THINKING, GEE, THIS ISN'T THE WAY I WOULD REPRESENT THAT PERSON. WHAT IS HE SUPPOSED TO DO? I THINK WHAT HAPPENED IN THIS CASE IS THE TRIAL JUDGE FOLLOWED WHAT THIS COURT HAS SUGGESTED DOING, AFTER HAVING THE HUFF HEARING, HAVE REGULAR STATUS CONFERENCES, TO ENSURE THAT THE ATTORNEYS WERE PREPARING FOR THE EVIDENTIARY HEARING, WERE GETTING THE EVIDENCE THAT THEY NEEDED, WERE SECURING THE TESTING. THAT IS THE TYPE OF THING THE STATUTE IS TALKING B THE STATUTE IS SAYING, YOU KNOW, WE DON'T -- IS TALKING ABOUT. THE STATUTE IS SAYING WE DON'T WANT THESE CASES WHERE WE HAVE ALL SEEN THEM, WHERE THEY HAVE LANGUISHED IN THE TRIAL COURTS FOR TEN YEARS ON A POSTCONVICTION MOTION. I THINK THAT IS MORE WHAT THE STATUTE IS GOING ON, THE SITUATIONS -- THE STATUE IS GOING TO, THE SITUATIONS WHERE THEY AREN'T BEING REPRESENTED AT ALL, WHERE NOBODY IS IN THERE FIGHTING FOR THEM AND NOBODY IS SECURING THEIR INTERESTS IN A MOTION. THAT IS NOT WHAT HAPPENED IN THIS CASE. THE PARTIES HAD REGULAR COMMUNICATION TO CONSIDER WE KNOW WHERE WE ARE GOING, CONSIDERED ALL THE CLAIMS AND GRANTED THE EVIDENTIARY HEARING AND WORKING TOWARDS MAKING SURE EVERYONE HAD WHAT THEY NEEDED TO LITIGATE POSTCONVICTION HEARING, SO IT REALLY, I THINK THE STATUTE WAS COMPLIED WITH, BY HAVING THE STATUS CONFERECES AND KEEPING ON TRACK OF IT. I DON'T THINK YOU CAN HAVE A TRIAL JUDGE GET A POSTCONVICTION MOTION AND SAY, WELL, GEE, THIS DOESN'T MEET THE THICKNESS STANDARD. HE MUST NOT HAVE GOOD COUNSEL. THERE MUST BE A PROBLEM WITH THE QUALITY OF HIS REPRESENTATION. THERE ARE SOME ATTORNEYS WHO MIGHT PUT MORE ALLEGATIONS IN, WHETHER THEY HAVE REASONABLE BASIS FOR THOSE ALLEGATIONS OR NOT. THERE ARE OTHR ATTORNEYS WHO ARE GOING TO TRY AND, AS CASE LAW SUGGESTS, WINNOW OUT THOSE GOOD CLAIMS AND NOT PUT N THE CLAIMS THAT THEY DON'T THINK ARE HELPFUL. THE ATTORNEY WHO DRAFTED A LOT OF THE PLEADINGS IN THIS COURT, WHO NO LONGER REPRESENTS MR. FINNEY AND WHO IS SO CRITICAL OF JACK CROOKS, ALSO HAS MADE A LOT OF MISTAKES IN THE QUALITY OF HIS PLEADINGS BEFORE THIS COURT. HE HAS ARGUED HAT TRIAL COUNSEL DID NOT OBJECT TO THINGS THAT COUNSEL DID OBJECT TO THAT IS EASILY REFUTED BY THE RECORD. HE ARGUES, IN THE HABEAS PETITION, THAT THE TRIAL COURT NEVER RULED ON A MOTION FOR SEQUESTRATION, WHICH WAS, IN FACT, RULED ON AT THE TIME OF TRIAL. SO ARE YOU GOING TO GET SO BOGGED DOWN IN SAYING, WELL, GEE THIS PLEADING MISREPRESENTS THE RECORD AND IT IS INACCURATE, AND SO WE NEED TO TAKE THIS ATTORNEY OFF THE CASE, OR HOW ARE YOU GOING TO DEAL WITH IT, WHEN YOU HAVE CONCERNS IN YOUR OWN COURT ABOUT THE BRIEFS

THAT YOU ARE SEEING? AND THAT IS SOMETHING THAT I THINK IS NOT PRESENTED ON THE FACTS OF THIS CASE, BECAUSE YOU HAVE A SITUATION WHERE YOU HAVE VALID ALGATIONS. YOU HAVE ENOUGH FOR THIS COURT TO REVIEW WHAT THE TRIAL COURT DID BELOW, AND YOU HAVE THE RULES IN PLACE, SO WHAT WE ARE LEFT WITH IS COMING BACK TO YOUR QUESTION. WHAT DID THE TRIAL JUDGE DO HERE AND HOW CAN YOU -- DO HERE, AND HOW CAN YOU FAULT THE TRIAL JUDGE FOR DOING WHAT HE DID ON THIS RECORD, AND I THINK FINNEY GOT TO THIS COURT AND COULDN'T REALLY FAULT ANYTHING THE TRIAL JUDGE HAS DONE, SO HE IS TURNING AROUND AND FAULTING HIS OWN COUNSEL, AND AT SOME POINT THAT HS GOT TO STOP, BECAUSE IF IT DOESN'T STOP, IT WILL GO ON AND ON AND ON FOREVER, SO I THINK YOU HAVE TO LIMIT YOURSELVES TO THE MOTION THAT IS THEY FILE. CERTAINLY WE HAVE THE NEW RULE, SO HOPEFULLY THAT WILL BRING A LITTLE MORE CLARITY TO THIS WHOLE AREA OF THESE POSTCONVICTION PROCEEDINGS, BUT IN THE MEANTIME, YOU HAVE CASES LIKE THIS THAT WERE FILED UNDER THE OLD RULE, WHERE THERE IS NOT AN AUTOMATIC EVIDENTIARY HEARING AND EVEN THOUGH THE TRIAL JUDGE IN THIS CASE PROVIDED FOR AN EVIDENTIARY HEARING AND ATTEMPTED TO HAVE ONE, WHEN IT GOT TIME TO GO TO THE HEARING, MR. , AND I DON'T KNOW WHO WAS REPRESENTING FINNEY AT THAT TIME BUT CERTAINLY REPRESENTED TO THE COURT THAT THEY COULD NOT GO FORWARD ON THAT CLAIM.

I GUESS --

THE SUFFICIENCY OF THE MOTION WHICH WAS, WHAT DO YOU UNDERSTAND TO BE THE DEFINTIVE LAW, RELATIVE TO WHEN A MOTION IS SUFFICIENT? WHAT IS THERE TO BE INCLUDEDED IN THE MOTION, TO MAKE IT SUFFICIENT?

THE MOTION HAS TO INCLUDE SPECIFIC FACTS WHICH DEMONSTRATE A PRIMA FAIE CASE THAT THE CLAIM HS EEN MET. THE CLAIM CAN BEPROVEN, IF IT GOES TO AN EVIDENCIARY YEAR HEARING. THE PURPOSE OF HAVING A -- AN EVIDENTIARY HEARING. THE PURPOSE OF HAVING A MOTION IS TO TELL THE COURT OR SHOULD BE TO TELL THE COURT, IF YOU GIVE ME A HEARING, THESE ARE THE THINGS I CAN PROVE TO YOU THIS. IS WHY WE NEED TO HAVE A HEARING. THESE ARE THE FACTS IN DISPUTE THAT WE NEED TO LITIGATE.

WHAT CASE HAVE WE SAID THAT IN?

WELL, I THINK THE RULE, ITSELF, SPECIFICALLY SAYS ERE MUST BE SPECIFIC FACTS. THE LaCROIX KBROIN, WHICH I WAS JUST --THE LaCROIX OPINION, WHICH I WAS JUSTQUOTING FROM, SAYS THAT THERE MUST BE SPECIFIC FACTS, SPECIFIC FACTS THAT ARE NOT CONCLUSIVELY REBUTTED ON THE RECORD, AND, AGAIN, IF YOU ARE FOCUSING ON WHERE THE RECORD REBUTS, YOU HAVE TO HAVE THE FACTS FOR THE RECORD TO BE ABLE TO REBUT SOMETHING. IF YOU DON'T HAVE THE FACTS, YOU CAN'T REVIEW IT UNDER THAT.

BUT IT IS THE FACTS THAT ARE PLED ARE THAT THERE IS SIGNIFICANT MITIGATING EVIDENCE THAT TRIAL COUNSEL DID NOT PUT IN, AND THIS WAS NOT BROUGHT UP BY COUNSEL, AS ERROR, AS INSUFFICIENCY, RATHER, ON THE PART OF TRIAL COUNSEL. HOW MUCH MORE HAS TO BE PLED INTO THAT?

WELL, TO ME --

WHAT WOULD HAVE TO BE THE FILLER TO THAT?

IF YOU HAVE SAID THAT SUBSTANTIAL MITIGATION WAS NOT PRESENTED, YOU HAVEN'T TOLD THE COURT ANYTHING. THAT IS A CONCLUSORY STATEMENT. THAT IS A CONCLUSION. IT IS NOT A FACT F THERE IS SUBSTANTIAL MITIGATION, YOU SAY THERE WAS HORRIBLE CHILDHOOD ABUSE. YOU SAY THERE WAS SEVERE MENTAL ILLNESS. YOU HAVE TO IDENTIFY WHAT FACTS ARETHERE, WHAT MITIGATION IS THERE. YOU CAN'T JUST SAY SUBSTANTIAL MITIGATION EXISTS WHICH WAS NOT PRESENTED. GIVE ME A HEARING, AND THERE ARE A NUMBER OF CASES WHERE THIS COURT

HAS SID YOU CAN'T PLEAD A GENERAL CONCLUSORY STATEMENT AND EXPECT TO GET A HEARING.

WHAT DID THIS MOTION SAY HERE?

THIS MOTION SAID COUNSEL SHOULD HAVE CALLED, I BELIEVE IT WAS, FIVE WITNESSES, A COUPLE OF OTHER COWORKERS, AND THREE OR FOUR FAMILY COUSINS AND FAMILY MEMBES.

DID IT SAY WHY?

NO. DID NOT SAY WHY. DID NOT SAY WHAT THESE WITNESSES WOULD HAVE SID. THERE WAS A CO-WORKER THAT TESTIFIED IN PENALTY PHASE EXTENSIVELY, A VERY GOOD FRIEND OF MR. FINNEY'S WHO HAD WORKED WITH HIM. THERE WAS HIS WIFE, HIS COMMON LAW WIFE HAD TESTIFIED. DOCTOR GAMASH NOT ONLY WENT INTO HIS BACROUND UT TALKE ABOUT HIS VERY STRONG WORK ETHIC. WHAT ANOTHER CO-WORKER FROM A DIFFERENT ESTABLISHMENT COULD HAVE ADDED HAS NOT BEEN FOUND. THE JUDGE FOUND THAT MR. FINNEY HAD A VERY STRONG WORK ETHIC AND SHE WEIGHED THAT IN MITIGATION. WHAT ELSE IS A CO-WORKER GOING TO SAY THAT HASN'T BEEN CONSIDERED? WELL, APPARENTLY NOTHING, BECAUSE THERE IS NOTHING OFFERED IN THE POSTCONVICTION MOTION THAT WILL SAY WHAT THESE WITNESSES COULD TALK ABOUT, AND THE SAME THING WITH THE FAMILY WITNESSES. THE, YOU KNOW, DR. GAMASH, ALSO, STATED THAT HE WOULD NOT RELY SOLELY ON FINNEY'S SELF-SERVING STATEMENTS. HE STATED THAT HE SPOKE WITH TAMMY AT LENGTH ABOUT THEIR RELATIONSHIP AND BACKGROUND AND USED HER STATEMENTS, ALSO, TO CORROBORATE, SO THERE IS, I THINK, VERY SUFFICIENT ON THIS RECORD, THAT THE TRIAL JUDGE IS DEALING WITH THESE ISSUES WAS SUFFICIENT AND WAS IN LINE WITH WHAT THIS COURT HAS SAID TO DO. I THINK THE JUDGE BELOW, IN DENYING THESE CLAIMS, DID THE ONLY THING THAT HE COULD DO WITH HIM. HE DID ATTEMPT TO HAVE A HEARING. HE WAS AWARE, OBVIOUSLY, THAT THIS COURT LIKES THE TRIAL JUDGE TO SAY HAVE EVIDENTIARY HEARINGS OPPOSE THE CONVICTION MOTIONS, AND I THINK HE WAS -- ON POSTCONVICTION MOTIONS, AND I THINK HE WAS GENEROUS, IN THAT HE GRANTED, AND WHEN PUSH CAME TO SHOVE, THEY WERE UNABLE TO PRESENT ANY EVIDENCE AT A HEARING. MR. CHIEF JUSTICE

YOUR TIME IS UP. THANK YOU VERY MUCH.

WOULD YOU RESPOND TO THE SUFFICIENCY OF YOUR MOTION. HOW BALD CAN THAT MOTION BE?

I WILL DO BETTER THAN THAT, JUDGE. ON PAGE 16 OF THE MOTION, SUBSECTION C, PARAGRAPH ONE, TRIAL COUNSEL DID NOT PROVIDE MR. FINNEY'S MENTAL HEALTH EXPERTS WITH BACKGROUND INFORMATION, ALTHOUGH AVAILABLE AT THE TIME INCLUDING SCHOOL RECORDS, WORK RECORDS, NEIGHBORS AND EMPLOYEES AND FRIENDS AND RELATIVES, FOR THEM TO MAKE A MEANINGFUL EVALUATION OF MR. FINNEY OR DEFENSE AT THE TIME OF THE ALLEGATION. THIS CONSTITUTES AN INEFFECTIVE ASSISTANCE AND GREATLY PREJUDICES MR. FINNEY DURING ALL PHASES OF HIS TRIAL. JUDGE, I WOULD STATE THAT THAT PROVIDES SUFFICIENCY OF THE MOTION OF THE 3.850. PAGE 19, SUBSECTION 6, DR. MICHAEL GAMASH, WHO EXAMINED MR. FINNEY PERFORMED AN EXAMINATION AND TALKED WITH HIS WIFE, TAMMY LIEN GALMORE AND HE PROVIDE AN EVALUATION. IT WAS IMPERATIVE OF AND INEFFECTIVE ASSISTANCE OF COUNSEL TO NOT PROVIDE FURTHER INFORMATION, INCLUDING TESTIMONY FROM HIS SISTER, TESTIMONY FROM HIS COUSINS, LYNN WESLEY, JIM WESLEY, NOR WERE THE WITNESSES CALLED FOR COUNSEL BEFORE OR AT THE TIME OF TRIAL. NOR WERE THE RECORDS OR DOCUMENTS COMPLETE. FURTHER REBUTTAL, MS. DITTMAR MAKES MENTION OF INFORMATION THAT WAS PROVIDEED TO DR. GAMASH BY MR. FINNEY WAS CONSISTENT WITH WHAT DR. GAMASH TESTIFIED TO AT TRIAL. THAT INFORMATION WAS PROVIDED SOLELY BY MR. FINNEY, AND MR. FINNEY PRESENTS HIMSELF AS A HONORABLY-DISCHARGED SOLDIER, WITH NO DISCIPLINARY PROBLEMS, EMPLOYED OR RATHER STATIONED WITH THE 101ST AIRBORNE

DIVISION. HE MAKES NO MENTION OF HIS DRUG TREATMENT PLANS. HIS DRUG TREATMENT PROGRAMS THAT HE WAS IN. HE MAKES NO MENTION OF THE DISCIPLINARY ACTIONS HE WAS INVOLVED IN. HE MAKES NO MENTION OF HIS FALLING DOWN AND HEAD INJURIES SUSTAINED WHILE IN THE SERVICE, IN ADDITION TO HIS CHILDHOOD INJURIES. HE MAKES NO MENTION OF THIS. THIS WAS ENTIRELY SELF-REPORTING SO, OF COURSE, IT IS, DR. GAMASH IS CONSISTENT WITH MR. FINNEY'S TESTIMONY. DR. GAMASH HAD NO OTHER INFORMATION TO BASE AN INCONSISTENCY ON. HE WASN'T PROVIDED WITH ANYTHING BUT WHAT MR. FINNEY TOLD HIM, AND DR. GAMASH, QUITE FRANKLY, STATED CRIMINAL DEFENDANTS PUT THEMSELVES IN THEIR BEST LIGHT. NOW, JUDGE, FURTHERMORE, I WOULD SUBMIT TO THE COURT THAT THIS IS NOT A CASE WHERE DELAY IS GOING TO BENEFIT MR. FINNEY. NOW, THOSE WITNESSES WERE AVAILABLE IN TIME FOR THE 3.850 HEARING, IF THERE WAS GRANTED ONE. I DON'T KNOW IF THEY ARE AVAILABLE NOW. THE MILITARY RECORDS ARE. DR. GAMASH IS. BUT THESE OTHER WITNESSES, NO GAIN OR BENEFIT TO MR. FINNEY COULD HAVE BEEN UTILIZED BY DELAYING THIS HEARING. THAT IS ALL I HAVE TO SHARE. MR. CHIEF JUSTICE

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE. THANK YOU, MR. KILEY. THIS COURT WILL BE IN RECESS.