Harry Franklin Phillips v. State of Florida

THE FINAL CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS PHILLIPS V STATE. MR. HENNIS.

THANK YOU, CHIEF JUSTICE WELLS AND MEMBERS OF THE COURT. I AM WILLIAM HENNIS FROM CCRC SOUTH. I AM HERE ON BEHALF OF HARRY PHILLIPS TODAY. JUST BRIEFLY, I WANTED TO SAY I WILL TRY AND COVER THREE AREAS. ONE WOULD BE THE SUMMARY DENIAL ORDER, AND WHY WE BELIEVE THAT WHAT WE PLED WAS SUFFICIENT TO GET AN EVIDENTIARY HEARING, ESPECIALLY AS TO THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, HAVING TO DO WITH THE MENTAL HEALTH EXPERTS. SECONDLY, THE IMPACT OF MENTAL RETARDATION NOW BEING SUPER MITIGATION IN FLORIDA, AFTER THE PASSAGE OF THE 2001 ACT BY THE LEGISLATURE AND THE GOVERNOR SIGNING THE STATUTE THAT MAKES SENTENCING OF MENTALLY RETARDED PEOPLE TO DEATH NO LONGER LEGAL IN FLORIDA, AFTER, IF THEY WERE SENTENCED AFTER JUNE 2001. AND THIRD, JUST GENERALLY, THE CONTEXT OF THE PLEADING FOR EVERYTHING THAT WAS PLED. AS TO THE INEFFECTIVE ASSISTANCE OF COUNSEL, OF COURSE THAT IS A MIXED QUESTION OF FACT AND LAW.

LET ME ASK YOU ONE QUESTION BEFORE YOU GET STARTED.

YES, MA'AM.

DO YOU ALLEGE, IN YOUR 3.850, THAT YOU HAVE EXPERTS, NOW, WHO WILL DEFINITIVELY SAY THAT MR. PHILLIPS IS MENTALLY RETARDED?

CERTAINLY. OUR CONTENTION AND THE QUOTES THAT WE INCLUDED IN OUR 3.850 FROM THE BRIEF, ARE THAT, NUMBER ONE, MR. PHILLIPS IS MENTALLY RETARDED. THAT HE RETAINED A MENTAL RETARDATION EXPERT WHO WILL COME IN AND TESTIFY TO THAT ON HEARING. HE HAS ALSO RETAINED A NEUROLOGIST WHO WILL COME IN AND TESTIFY DEFINITIVELY THAT HE DOES HAVE BRAIN DAMAGE, AND THAT WILL REPUT THE -- REBUT THE STATE'S PSYCHOLOGIST, WHO TESTIFIED AT THE 1994 RESENTENCING. YES, MA'AM.

AND YOU INDICATED THAT THE TRIAL JUDGE, WAS THERE A HUFF HEARING?

YES, MA'AM. AT THE HUFF HEARING, WE WENT INTO, I THINK, EX-PRESSITY -- EXPLICIT DETAIL WHICH I THINK IS QUOTED IN THE BRIEF, AND WE MENTIONED SUMMARY DENIAL, WHICH WE STRESSED, AGAIN, EXACTLY THOSE FACTS.

WHICH CLAIM IS YOUR RETARDATION CLAIM INCLUDED WITHIN, PLEASE.

IT WOULD BE THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE AND THE AKE CLAIM. IT IS TWO CLAIMS TOGETHER. IT IS -- I WOULD TRY TO GIVE YOU THE CITE, BUT I DON'T HAVE IT RIGHT HERE IN FRONT OF ME. IT IS BASICALLY A FAILURE TO INVESTIGATE, FAILURE OF DUE DILIGENCE, AND FAILURE TO OBTAIN AND PROPERLY USE MENTAL HEALTH EXPERTS CLAIM. I GUESS IT GOES DOWN TO WHAT TRIAL COUNSEL OR RESENTENCING TRIAL COUNSEL DID, WAS IT REASONABLE? WAS THERE A STRATEGIC REASON FOR WHAT HE DID? AND YOU REALLY NEED TO UNDERSTAND WHAT HE DID, IN THE CONTEXT OF THIS COURT'S DECISION IN 1992, THAT SENT MR. PHILLIPS'S CASE BACK FOR RESENTENCING. IN YOUR OPINION IN THAT CASE, YOU POINT OUT THAT THE TWO EXPERTS WHO TESTIFIED AT THE EVIDENTIARY HEARING IN 1998 -- 1988, OR MR. PHILLIPS, THAT IS DR. CARBONDALE, A PSYCHOLOGIST, AND DR. TUMER, A PSYCHOLOGIST, WERE

NOT REBUTTED BY THE STATE'S EXPERT IN 1988, FINDING MR. PHILLIPS COMPETENT, AND DR. CARBONDALE AND DR. TUMER FOUND MR. PHILLIPS COMPETENT, BUT DIDN'T TESTIFY AT ALL ABOUT THE AGGRAVATION. IN 1992, IT WAS SAID THERE WAS UNREBUTTED STRONG MITIGATION PRESENTED, AND SO IT HAS TO GO BACK. NOW, WHAT HAPPENED WHEN THIS CASE BENT WENDT BACK, WAS -- THIS CASE WENT BACK, WAS THAT THE COUNSEL WHO DID THE RESENTENCING NEVER TALKED TO ANOTHER EXPERT, OTHER THAN DR. CARBONDALE AND DR. TIMER, WHO THE -- AND DR. TUMER, AFTER THE 1988 HEARING. IN 1987, DR. CARBONDALE SPENT 5 AND-A-HALF HOURS WITH HIM AND TESTIFIED. SHE NEVER TESTIFIED BUT WAS READ INTO THE RECORD BECAUSE OF A SERIES OF PROBLEMS THAT WERE IN THE BRIEF. MY CLIENT WENT BACK AND SPOKE FOR ONE HOUR IN 1994. HE, ALSO, DID NO ADDITIONAL TESTING. ONE THING THAT THE STATE CLAIMS IN THEIR BRIEF SYSTEM THAT DR. CARBONDALE DID PSYCHOLOGICAL TESTING THAT DR. TUMER HAD SUGGESTED, BUT THAT JUST DIDN'T HAPPEN, BECAUSE MY CLIENT WAS SEEN IN NOVEMBER 1987 AND DR. TUMER SAW HIM IN 1988. OBVIOUSLY SINCE SHE NEVER SAW HIM AGAIN, SHE COULDN'T HAVE DONE ANY PSYCH LOLINGCAL -- PSYCHOLOGICAL TESTING ON HIM.

DID DR. CARBONDALE OR DR. TUMER SUGGEST THAT ADDITIONAL PSYCHOLOGICAL TESTING BE DONE?

YES, IN FACT DR. TUMER, IN 1984, SAID ON THE WITNESS -- SAID N 1994, SAID ON THE WITNESS STAND, THAT HE BELIEVED FURTHER IF NEUROLOGICAL -- THAT HE BELIEVED FURTHER NEUROLOGICAL TESTING SHOULD BE DONE. HE SAID A NEUROLOGIST SHOULD BE ABLE TO DETERMINE THAT, DOING NEUROLOGICAL TESTING, AND OF COURSE THAT IS THE RELIEF WE WANTED IN POSTCONVICTION. THE DOCTOR DID NOT TESTIFY ABOUT THE STATE'S POSITION THAT MY CLIENT, REGARDLESS OF WHAT HIS MENTAL STATUS WAS, HAD STREET SMARTS, SO THAT EVEN IF HE DID HAVE A LOW IQ OR PERHAPS EVEN IF HE IS MENTALLY RETARDED, STREET SMARTS TRUMPED MENTAL RETDATION. WELL, WE KNOW, CERTAY FOR PEOPLE NOW WHO ARE SENTENCED AFTER JUNE 2001, IT DOESN'T MATTER HOW MUCH STREET SMARTS YOU HAVE, IF YOU ARE MENTALLY RETARDED AND YOU CAN PROVE IT IN COURT, YOU ARE NOT GOING TO BE SENTENCED TO DEATH IN FLORIDA. NOW, THE TESTIMONY OF DR. TUMER AND THE 1988 TESTIMONY THAT WAS READ INTO THE RECORD IN 1994, BY DR. CARBONDALE, CONTRADICTED EACH OTHER. DR. CARBONDALE CAME UP TO THE POINT OF SAYING THAT MY CLIENT WAS MENTALLY RETARDED, DID SAY THAT IN A SENSE, AND DR. TUMER DEFINITIVELY SAID HE WASN'T, SO COUNSEL PUT ON CONTRADICTORY TESTIMONY THAT, I THINK, REALLY HURT THE CREDIBILITY OF BOTH WITNESSES.

THESE ARE ALL ARGUMENTS THAT, FOR WHY YOU ARE SAYING THAT THERE SHOULD BE AN EVIDENTIARY HEARING, TO DETERMINE WHETHER THESE WERE STRATEGY DECISIONS, WHETHER, AND TO LOOK AT BOTH PRONGS, CORRECT?

THAT'S RIGHT.

BUT WHAT WAS, IN TERMS OF LOOKING AT THE TRIAL COURT'S REASONING FOR THE SUMMARY DENIAL GIVE US THE BEST REASON WHY THEY STILL HAVE TWO EXPERTS TO TALK ABOUT MENTAL, THESE BORDERLINE MENTAL RETARDATION, AS TO WHY THE PREJUDICE PRONG IS NOT CONCLUSIVELY REFUTED BY THE RECORD.

OKAY. WELL, I GUESS FIRST YOU SHOULD JUST LOOK BRIEFLY AT WHAT THE ORDER SAID. THE TRIAL COURT'S ORDER, AFTER THE '94 RESENTENCING, SAID THE COURT, ALSO, RECOGNIZES THAT THE DEFENDANT HAD A LOW IQ. HOWEVER, THE EVIDENCE, ALSO, SHOWS THAT HE IS STREET SMART, AND JUDGE FEHR ARE A'S -- AND JUDGE FERRAR'S SUMMARY DENIAL ORDER SAID THAT THE RECORD IS REPLETE THAT THE COURT DENIED THE DEFENDANT'S LOW IQ. OUR TESTIMONY IS THAT MENTAL RETARDATION IS RE THAN A LOW IQ AND THAT BRAIN DAMAGE WAS NOT TESTIFIED BEFORE THE 1994 HEARING. AND SO THAT NOW WHAT WE HAVE GOT IS NEWLY-DISCOVERED EVIDENCE. ONE OF THE THINGS THAT I FILED AS SUPPLEMENTAL AUTHORITY IS THE

TENNESSEE DECISION, VAN TRAN VERSUS STATE OF TENNESSEE, AND WHAT THE TENNESSEE SUPREME COURT BASICALLY FOUND WAS THAT THEIR MENTAL RETARDATION STATUTE APPLIED TO SOMEONE IN POSTCONVICTION, WHEN A NEW IQ TEST WAS DONE, WHICH LOWERED THE IQ SCORE, AND THEY SAID THAT HE HAD A CHANCE TO GET BACK IN COURT AND PROVE THAT HE WAS MENTALLY RETARDED, EVEN THOUGH THE TENNESSEE STATUTE EXPLICITLY WAS NOT RETROACTIVE, SO THIS IS A SIMILAR KIND OF SITUATION. THERE IS EVIDENCE THAT WE WERE PREPARED TO PRESENT AT THE EVIDENTIARY HEARING THAT OUR CLIENT WAS MENTALLY RETARDED, BASED ON NEW TESTING BY AN EXPERT, WHO WAS AN EXPERT IN MENTAL RETARDATION, WHO DID WHAT DR. CARBONDALE NEVER D.

AND WHAT WOULD THAT -- NEVER DID.

AND WHAT WOULD THAT TESTIMONY BE? WHAT WOULD HIS IQ BE, ACCORDING TO THIS NEW TEST SOMETHING.

THAT IS NOT IN THE RECORD, YOUR HONOR, SO I REALLY CAN'T GIVE YOU THAT INFORMATION. AS FAR AS THE --

YOU MEAN THAT IS NOT EXPLORED AT THE -- YOU DIDN'T GO INTO ANY DETAIL AT THE HUFF HEARING.

THE DETAIL THAT I WENT INTO DIDN'T INCLUDE THAT INFORMATION. THAT'S RIGHT. THERE WERE NO AFFIDAVITS OR REPORTS ATTACHED TO THE 3.850, BECAUSE THAT IS NOT REQUIRED UNDER GASKIN V STATE. WE MADE THE ALLEGATIONS THAT WE FELT LIKE WERE REQUIRED PIOUS BY THE 3.850 RULES.

THEY ARE NOT REQUIRED TO BE ATTACHED TO THE 3.850. DID YOU, IN FACT, OFFERED THAT AT THE -- OFFER THAT AT THE HEARING, IS REALLY WHAT THE QUESTION IS. DID YOU ATTEMPT TO SUPPLEMENT WHAT YOU HAD SAID AT THE, IN YOUR 3.850, AT THE HUFF HEARING?

NO, YOUR HONOR. IN FACT, THE COURT HAD REFUSED TO EVEN LET US DO SUPPLEMENTAL REQUESTS ON OUR PUBLIC RECORDS REQUESTS. THAT IS SORT OF OUTLINED IN THE PUBLIC RECORDS CLAIM IN THE CASE CASE. WE WEREN'T REALLY ALLOWED TO DEVELOP THIS CASE AT ALL, AT THE DISCOVERY LEVEL, AND SO YOU KNOW WE DIDN'TOLUTEER ANYTHING BEYOND WHAT IS QUOTED IN THE HUFF HEARING QUOTE THAT IS IN THE BRIEF. NOW, TO TRY TO GET BACK TO YOUR QUESTION, THOUGH, JUSTICE PARIENTE, ABOUT THE TRIAL COURT. NOW, THE TRIAL COURT HAD FOUND, IN 1988, CARBONDALE AND TUMER BOTH NOT TO BE CREDIBLE. THEN IT WAS YOUR DECISION IN '92 SAYING YOU HAVE GOT TO GO BACK, BECAUSE THEY HAD POWERFUL MITIGATION EVIDENCE, SO IN '94, TRIAL COUNSEL WAS IN THE POSITION WHERE HE KNEW, ALREADY, THAT THE SAME JUDGE WAS GOING TO BE HEARING DR. CARBONDALE AND DR. TUMER. HE PUT ON EXACTLY THE SAME EVIDENCE FROM CARBONDALE, AND TUMER DID NOTHING KNEW -- NEW, AND THEN HE -- DID NOTHING NEW, AND THEN HE ALSO KNEW THAT THE STATE WAS GOING TO TAKE THE TWO EXPERTS THAT THEY HAD AND HAVE THEM TESTIFY TO REBUT WHAT HAD BEEN PUT ON BEFORE, SO MY POSITION IS CERTAINLY COUNSEL HAD TO DO SOMETHING, BUT HE ESSENTIALLY DID NOTHING IN PREPARATION FOR THIS CASE. HE DID NO ADDITIONAL INVESTIGATION. HE SENT ONE EXPERT BACK IN FOR AN HOUR. THERE WAS NO ADDITIONAL TESTING DONE, AND WHAT HE SHOULD HAVE KNOWN, WHEN HE LOOKED AT THE PRIOR RECORD, WAS THAT WHAT WAS CRITICAL AND WHAT WAS RED MARKED ALL OVER THE CASE, WAS IS THIS CLIENT MENTALLY RETARDED AND IS TS CLIENT BRAIN DAMAD? AND IF HE DIDN'T PUT THAT ON, MY POSITION IS THAT WAS DEFICIENT PERFORMANCE, PRIMA FACIE. NOW, WHAT COULD DR. CARBONDALE HAVE DONE? WHAT COULD HAVE BEEN DONE TO RECOMMEND DITHIS PROBLEM? WELL, THERE COULD HAVE BEEN -- TO RECOMMEND DITHIS PROBLEM? -- TO RECOMMEND HE DITHIS PROBLEM? -- TOEMEDY THIS PROBLEM? WELL, THERE COULD HAVE BEEN TESTING DONE FOR MENTAL RETARDATION, AND THAT WOULD BE NOT THE BASE SCORES THAT THE DOC DOES

OR THE BASE TEST THAT DR. TUMER DID IN JANUARY 1988. THAT DOESN'T FIT THE CRITERIA UNDER FLORIDA LAW OR UNDER THE DSM, FOR MENTAL RETARDATION, SO YOU HAVE TO GET THE IQ SCORE. THEN SECOND, YOU WOULD HAVE TO DO ADAPT I HAVE FUNCTIONING TEST -- AN ADAPTIE FUNCTIONING TEST, LIKE THE VINELAND, AND THEN HAVE TO SHOW THAT THEDEFENDANT HAD THIS CONDITION BEFORE THE AGE OF 18, AND HAD YOU NOT DONE THAT, YOU CERTAINLY COULD NOT HAVE COME UP WITH MENTAL RETARDATION, WHICH IS WHAT IS REQUIRED.

WE ARE NOT GOING TO HOLD COUNSEL, IN 1994, DEFICIENT FOR NOT ANTICIPATING A STATUTE THAT DIDN'T GO INTO EFFECT UNTIL 2001.

BUT, YOUR HONOR, THE LAW REGARDING MENTAL RETARDATION WAS IN PLACE AT THAT TIME. FOR STATE SERVICES FOR RETARD RETARDATION WAS IN PLACE, AND HE DIDN'T MEET THAT DEFINITION.

BUT HE HAD TWO EXPERTS THAT TESTIFIED TO MENTAL RETARDATION.

DR. TUMER, WHO FOUND THAT HE WAS NOT, AND DR. CARBONDALE WHO, FOUND THAT HER IQ SCORE, BASED ON THE TESTING, WAS POSSIBLY BASED ON AN IQ LEVEL BASED ON HER TESTING. SHE TESTIFIED THAT THERE WAS A FIVE-POINT RANGE, SUCH THAT HIS SCORE COULD BE 70. NOW, SHE, ALSO, TESTIFIED THAT HE WASN'T ANTISOCIAL. SHE KNEW ABOUT THE PRISON BETA SCORES. SHE SAID HE WAS FUNCTIONING AT THE LEVEL OF MENTALLY-RETARDED PEOPLE. THAT IS THE RECORD AT 9194. AND THEN SHE SAID THAT IT IS POSSIBLE THAT HIS IQ COULD BE AS LOW AS 68. MILDLY RETARDED. DR. TUMER CONTRADICTED HER AND SAID HE IS NOT RETARDED AT RECORD 629. NOW, I MENTIONED THE SUPER MITIGATION ISSUE, AND THIS HAS TO DO WITH THE POSSIBLE RETRO ACTIVITY OF THE 2001 STATUTE, AND I JUST ASK YOU TO LOOK AT THE ANALYSIS IN VAN TRAN, SOCIAL CONSENSUS REFLECTED BY THE 2001 STATUTE IN FLORIDA. GROSSLY DISPROPORTIONATE PUNISHMENT AND WHETHER OR NOT THERE IS A LEGITIMATE GENELOGCAL OBJECTIVE TO EXECUTING PEOPLE SENTENCED PRIOR TO 2001 WHO ARE MENTALLY RETARDED.

BUT IF, IF THE RESENTENCING OR SENTENCES, AFTER 2001, THE RESENTENCING HASN'T BEEN DECIDED THE QUESTION THAT THE JURY MAKES IT IS NOT JUST A QUESTION OF SAYING THEY ARE MENTALLY RETARDED AND THEY GET RELIEF, SO HOW WOULD YOU PROPOSE, IN CASES THAT ARE ALREADY FINAL, THAT THE NEW STATUTE WOULD APPLY? WOULD THERE HAVE TO BE A WHOLE NEW SENTENCING PROCEDURE BEFORE -- A WHOLE NEW SENTENCING PROCEEDING BEFORE A JURY?

I GUESS ONE POSSIBILITY WOULD BE TO HAVE NEW TESTING BE NEWLY-DISCOVERED EVIDENCE AND GO BACK IN, UNDER 3.850, AS YOU WOULD DO IF YOU HAD DNA NEWLY-DISCOVERED EVIDENCE.

BUT YOU HAVEN'T MADE THAT CLAIM IN THIS CASE, HAVE YOU?

NO. NO. WHAT I THINK IN THIS CASE WHAT IS NECESSARY IS EXACTLY WHAT COMMITTEE ASKED FOR IN THE 3.850 WHICH WAS TO GO BACK, PROVE THIS UP IN AN EVIDENTIARY HEARING, WHERE WE CALL OUR EXPERTS IN, AND PUT OUR CARDS ON THE TABLE, AND HAVE A DECISION MADE. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL.

CHANGE YOU -- THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. THE CLAIM BELOW, WHICH WAS CLAIMS FOUR, FIVE AND SIX, AND THE RULE THREE MOTION, AND ISSUE ONE AS RAISED IN APPEAL, IS THAT COUNSEL WAS INEFFECTIVE FOR FAILING

TO INVESTIGATE AND PRESENT EVIDENCE THAT THE DEFENDANT WAS MENTALLY RETARDED AND HAD BRAIN DAMAGE, BUT COUNSEL DID PRESENT THE EVIDENCE AND THAT IS WHY THE TRIAL COURT SUMMARILY DENIED THIS CLAIM. COUNSEL PRESENTED DR. CARBONEL, WHO TESTIFIED HE DID AN IQ TEST. IT IS A 75. IT IS A PLUS OR FINE MAYAN US FIVE RANGE. SHE TRIED HER -- IT IS A PLUS OR MINUS, AND SHE DID HER BEST, BUT A FIVE RANGE IS NOT LESS THAN 70. THAT IS STILL NOT LESS THAN 70, WHICH IS THE NUMBER ONE CRITERIA ON THE STATUTE, AND FOR MENTAL RETARDATION IS AN IQ LESS THAN 70. HE DOESN'T HAVE ONE. THEY INVESTIGATED IT. THEY TRIED TO PRESENT IT. THEY PRESENTED EVIDENCE ABOUT HIS ALLEGED PROBLEMS AND ADAPTIVE FUNCTIONING. HEINVIGATED. THERE WAS NOTHING MORE TO BE DONE. SAYING, WELL, WE SHOULD HAVE NEW IQ TEST SCORES DONE, LET'S KEEP IN MIND YOU HAVE TO HAVE THESE PROBLEMS STARTING BEFORE 18. THE FACT THAT YOU HAVE A HISTORY OF IQ SCORES ABOVE 70 IS GOING TO KIND OF NEGATE THE FACT THAT YOU SUDDENLY HAD THIS BEFORE AGE 18.

BUT AS FAR AS WHETHER THIS SHOULD BE TESTED IN AN EVIDENTIARY HEARING, WHEN YOU HAVE GOT A GAP AS LARGE AS THIS ONE IS, BETWEEN WHEN THE TESTIMONY IS GIVEN INITIALLY, AND A RESENTENCING, YOU KNOW, IN ORDER TO GIVE CREDIBILITY TO THE EXAMINATION, SHOULDN'T AT LEAST AN EVIDENTIARY HEARING EXPLORE WHETHER IT IS REASONABLE TRIAL STRATEGY NOT TO HAVE THAT CLIENT REEVALUATED, MAKE ATTEMPTS TO HAVE THE TWO EXPERTS LIE? THOSE ISSUES THAT YOU MAY BE RIGHT THAT IT IS GOING TO LOOK LIKE, NO, THERE IS REALLY NO DIFFERENCE IN THE QUALITY OR QUANTITY, AND THAT HIS DECISIONS WERE REASONABLE, BUT I GUESS HOW DO WE DETERMINE THAT, IN A SUMMARY PROCEEDING?

WELL, WHEN YOUR CLAIM IS FAILING TO INVESTIGATE AND PRESENT, AND YOU INVESTIGATE IT AND PRESENT IT, IT IS CONCLUSIVELY REFUTED BY THE RECORD.

YOU ARE SAYING THIS WASN'T REALLY MENTAL RETARDATION, THAT THEY HAVE A REASONABLY COMPETENT ATTORNEY, WOULD HAVE DONE, I GUESS, DIFFERENT TYPES OF IQ TESTING, AND WHATEVER WAS DONE, REALLY, WASN'T THE TYPE OF IQ TESTING THAT WOULD REVEAL MENTAL RETARDATION. SO I MEAN, THAT IS THE ARGUMENT.

THE WASAR, WHICH IS DIRECTLY LISTED, THE STANDARDIZED TEST SUCH AS, IT SAYS, SUCH AS THE WASE. AND HE WAS GIVEN A WASE THAT WAS LESS THAN 75. THAT IS NOT FAILING. COUNSEL IS NOT FAILING FOR NOT SHOPPING FOR EXPERT AFFECTION PERTH AFFECTION PERTH AND COMING BACK AND SAYING, NO, HE DOESN'T REALLY QUALIFY.

WHAT ABOUT THE BRAIN DAMAGE AND THE DOCTOR AT THE 1994 PROCEEDING, TESTIFYING AS TO THE ACTUAL TESTING THAT IS NECESSARY TO ESTABLISH BRAIN DAMAGE?

DR. CARBONEL DID DO NEUROPSYCHOLOGICAL TESTING, AND SHE TESTIFIED -- TESTIFIED THAT SHE BELIEVED HE WAS POSSIBLY BRAIN DAMAGED AND THE EXPERTS SAID HE WAS POSSIBLY BRAIN DAMAGED. THE JUDGE SAID THAT HE DIDN'T FIND THAT WAS POSSIBLE.

DID HE FIND --

HE FOUND LOW IQ AND THE POSSIBILITIES THAT HE FOUND.

WHAT ABOUT EVIDENCE?

THAT WOULD HAVE BEEN, EVIDENCE, AN ISSUE FOR DIRECT APPEAL, TO SAY THAT THE COURT FAILED TO FIND THE UNREBUTTED ISSUE THAT HE WAS BRAIN DAMAGED, AND THAT HASN'T BEEN RAISED HERE EITHER IN THE HABEAS OR IN THE RULE 3, THAT COUNSEL WAS INEFFECTIVE OR ON DIRECT APPEAL, BUT THE EVIDENCE WAS PRESENTED. AND COUNSEL DOESN'T HAVE TO CONTINUALLY SHOP AROUND. IF HE GOES TO THE EXPERTS AND ASKED THEIR OPINION AND THEY COME BACK AND SAY NO, HE DOESN'T HAVE TO SHOP AROUND AND SHOP AROUND UNTIL HE GETS AN EXPERT WHO WILL AGREE WITH HIM. THERE IS NO CLAIM HERE THAT THE EXPERTS DIDN'T

HAVE ANYTHING. IT IS JUST WE HAVE NEW EXPERTS, AND THAT WAS THE ENTIRETY OF THE HUFF HEARING PRESENTATION IS WE HAVE NEW EXPERTS. WHO WERE WILLING TO SAY WHAT THE OLD EXPERTS WEREN'T. GIVE US AN EVIDENTIARY HEARING. AND THAT IS NOT SUFFICIENT. WHERE THE EVIDENCE IS PRESENTED.

WAS THERE ANY ATTEMPT TO PROFFER ANYTHING TO THE TRIAL JUDGE, TO DEMONSTRATETHIS OR WAS DEFENSE COUNSEL EVEN GIVEN THAT KIND OF OPPORTUNITY?

HE HAD THE OPPORTUNITY TO PRESENT ARGUMENT AT THAT HUFF HEARING, AND ALL HE SAID WAS, YOUR HONOR, I HAVE A NEW EXPERT WHO IS GOING TO SAY HE IS BRAIN DAMAGED, AND THAT HE IS MENTALLY RETARDED. GIVE ME AN EVIDENTIARY HEARING. HE CERTAINLY HAD THE OPPORTUNITY TO SUGGEST ANYTHING HE WANTED ABOUT WHAT THEY HAVE GOT. IF THE COURT HAS NO FURTHER QUESTIONS, THE STATE WOULD RESPECTFULLY REQUEST YOU AFFIRM.

JUST BRIEFLY, I THINK THIS IS AN ISSUE OF FUNDAMENTAL FAIRNESS. THE STATE ARGUES THAT WE BEAR THE BURDEN OF SHOWING MENTAL RETARDATION, IN THEIR BRIEF AND, ALSO, IN THEIR RESPONSE TO OUR PETITION FOR HABEAS CORPUS, AND THAT IS EXACTLY WHAT WE HAVE BEEN LOOKING FOR, SINCE WE FILED THE 3.850. HE HAD 21 DAYS, SINCE I WAS APPOINTED TO THIS CASE, TO FILE A 3.850, AND IN OUR PUBLIC RECORDS CLAIM, THAT IS OUTLINED HOW THAT CAME ABOUT THAT MR. PHILLIPS SHOULD BE HELD ACCOUNTABLE FOR THE PROBLEMS OF BUREAUCRACY THAT ARE OUTLINED IN THAT CLAIM, BUT I THINK THAT MR. PHILLIPS DOES DESERVE FOR US TO PROVE UP HIS MENTAL RETARDATION. THE STATE ARGUES THAT THREE OF THE FOUR EXPERTS AT THE RESENTENCING STATED THAT THE DEFENDANT WASN'T RETARDED, AND THEY IGNORE THAT THERE WAS ONLY ONE QUALIFYING IQ TEST THAT WAS EVER GIVEN TO MR. PHILLIPS, AND THAT WAS IN 1987, THAT THE FIVE POINT ERROR MARGIN WHICH I OUTLINED IN MY BRIEF EXPLICITLY, PER DSM AND PER STATE LAW, OUR CURRENT STATE LAW, WOULD PUT MR. PHILLIPS IN THE 70 IQ RANGE, AND THAT CLEARLY WHAT DR. CARBON HE WILL TESTIFIED TO -- CARBONEL TESTIFIED TO, AND IF HE HAD THAT CHANCE TO PROVE THAT UP WITH A TEST, IT WOULD ADMITTED. THE TEST THAT WAS ADMITTED IN 88 WASTHLAST -- IN 1988 WAS THE LAST QUALIFYING TEST AND THE ONLY QUALIFYING TEST IN THE RECORD, AND DR. VINELAND DIDN'T DO A VERY EX -- AND THE VINELAND A VERY EXPLICIT TEST, AS I TESTIFIED TO IN MY BRIEF, WASN'T DONE. I THINK THE GAP BETWEEN THE EVIDENTIARY HEARING AND COUNSEL'S RESENTENCING IS VERY IMPORTANT, AND WHAT I HAVE LAID OUT IN THE BRIEF POINTS OUT HOW HE DID ESSENTIALLY NOTHING, AND THE STANDARD HAS TO BE HIGHER THAN THAT, FOR REASONABLE PERFORMANCE BY TRIAL COUNSEL. YOU CAN'T JUST RELY ON THE FACT THAT THE SUPREME COURT SENT THE CASE BACK TO DETERMINE WHAT YOUR PATH IS GOING TO BE IN THE CASE. HE ACTUALLY DID NOTHING WITH HIS EXPERTS. PRIOR IQ SCORES BETWEEN 73 AND 83, ALL THOSE OTHER SCORES ARE BETA SCORES, WHICH, I THINK, IF YOU WILL READ MY BRIEF, AND IF YOU WILL LOOK AT VAN TRAN, AND LOOK AT THE LITERATURE, YOU WILL FIND THAT THOSE ARE NOT SCORES THAT HAVE ANY MEANING WHATSOEVER IN THE CONTEXT OF DETERMINING MENTAL RETARDATION. THEY ARE SCREENING SCORES.

WHAT ABOUT THE ISSUE ABOUT THE BRAIN DAMAGE AND WHETHER THE JURY DID HEAR, IN THE 1994 RESENTENCING, ABOUT BRAIN DAMAGE FROM DR. CARBONEL.

WHAT THEY SAID WAS THEY DID A SCREENING TEST THAT MIGHT BE WITH REGARD TO COGNITIVE OR A SCREENING TEST, BUT SINCE THEY DIDN'T DO NEUROLOGICAL TESTING OR AN EXAMINATION BY A DOCTOR, THEY COULDN'T MAKE A DIAGNOSIS OF BRAIN DAMAGE. IN FACT IT IS A QUESTION AT THAT TIME IN THE STATE OF FLORIDA WHETHER AN ATTORNEY COULD MAKE A DIAGNOSIS, UNDER THE CASE LAW.

IS THERE REFERENCE TO, WHATEVER THE SENTENCING MEMORANDUM WAS IN THE 1994 HEARING, THAT BRAIN DAMAGE WAS FOUND? BECAUSE THAT STATUTORY MITIGATOR WASN'T FOUND.

NO, JUDGE, AND HOSTLY FROM HERECRD, I HONESTLY DID NOT REMEER. JUST FINALLY IOULD POINT OUT TH PENURY IS CITD IN OUR 3.-- THAT P THAT PENURY IS -- THAT PENRY IS CITED IN OUR 3.850, RECORD 64 EVER OUR 3.850, ON PAGE 36 OF THE 3.850, DATED 12-2-99, SAYING THAT, WHILE SOME MENTAL HEALTH EVIDENCE WAS PRESENTED, IT WAS PRESENTED SUPERFICIAL. IT WAS PIECEMEAL AND SUPERFICIAL AND THAT A COMPLETE, ACCURATE AND VALID INFORMATION WAS WITHHELD FROM THE JURY, AND THAT THIS DEPTION VIOLATED MR. PHILLIPS' CONSTITUTIONAL RIGHTS, AND WE ARE TALKING THERE PRECISELY ABOUT THE EVIDENCE OF MENTAL RETARDATION AND EVIDENCE OF BRAIN DAMAGE. HAT IS CLEAR, IF YOU LOOK AT THAT CITE IN THE CONTEXT AFTER COUPLE OF PARAGRAPHS BEFORE. AS FAR AS SHOPPING AROUND IS CONCERNED, IT IS NOT SHOPPING AROUND FOR EXPERTS, WHEN YOU HAVE A SITUATION WHERE YOU HAVE HAD EXPERTS THAT HAVE BEEN FOUND BY TRIAL COURTS, TWICE IN A ROW, NOT TO BE CREDIBLE, AND YOU GO OUT AND FIND SOMEONE WHO CAN DO AN INDEPENDENT EVALUATION. ONE OF THE PROBLEMS IN THIS CASE THAT IS, ALSO, MENTIONED, IS THAT ALL OF THESE PEOPLE -- MR. CHIEF JUSTICE

YOU ARE OUT OF TIME.

-- WERE RETAINED FOR COMPETENCY PURPOSES. MR. CHIEF JUSTICE

THANK YOU, COUNSEL, NO YOUR ASSISTANCE. THE COURT WILL BE IN RECESS.