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02-1410 and 03-482

NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS PETERKA VERSUS STATE. ALL RIGHT. IF COUNSELLOR READY TO PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. LINDA McDERMOTT ON BEHALF OF DANIEL PETERKA. I WOULD LIKE TO START BY ARGUING ISSUE SIX IN THE INITIAL BRIEF, WHICH IS, REALLY, REQUESTS THAT THIS COURT WOULD REMAND MR. PETERKA'S CASE TO THE CIRCUIT COURT FOR FURTHER EVIDENTIARY DEVELOPMENT, AND THE NEED FOR FURTHER EVIDENTIARY DEVELOPMENT, I HAVE TRIED TO SET FORTH SOME OF THE FACTS IN THE INITIAL BRIEF, AND THEN AGAIN IN THE REPLY BRIEF, THAT I THINK REQUIRE, IN ORDER TO DO ANALYSIS OF MR. PETERKA'S CLAIMS, WOULD REQUIRE THIS COURT TO HAVE MORE FACTS, AND SPECIFICALLY IN THE LOWER COURT'S ORDER ON THE CLAIMS IN THE INITIAL BRIEF THAT I HAVE ATTEMPTED TO BRIEF, I THINK THAT THOSE CLAIMS DEMONSTRATE THAT THE ORDER WAS FLAWED, BECAUSE THE CIRCUIT COURT DIDN'T HAVE FACTS WHICH WERE READILY AVAILABLE TO POSTCONVICTION COUNSEL.

IS THIS BASICALLY YOUR CLAIM THAT, THE ORIGINAL POSTCONVICTION COUNSEL, REALLY, WAS INEFFECTIVE?

WELL, YOUR HONOR, I THINK THAT IS CERTAINLY PART OF IT, THAT POSTCONVICTION COUNSEL DIDN'T PRESENT AND PREPARE FOR THE HEARING. DIDN'T PROPERLY DEVELOP MR. PETERKA'S CLAIMS. ALSO I THINK THERE IS A SORT OF A DUE PROCESS ISSUE, IN THAT HE SHOULD HAVE BEEN ADEQUATELY REPRESENTED. HE SHOULD HAVE HAD THE OPPORTUNITY TO PRESENT INFORMATION THAT WOULD HAVE SUPPORTED HIS CLAIMS THAT WERE RAISED IN THE 3.850.

SO DID YOU, AT THE TIME THAT YOU MADE THE CLAIM TO THE TRIAL COURT, DID YOU POINT OUT SPECIFICALLY TO THE TRIAL COURT, WHAT ADDITIONAL INFORMATION ORIGINAL COUNSEL COULD HAVE PRESENTED IN SUPPORT OF THESE CLAIMS?

NO, YOUR HONOR. I CAME INTO THE CASE AFTER THE NOTICE OF APPEAL HAD BEEN FILED AND THE CASE WAS BEFORE THIS COURT.

SO WHAT ARE YOU POINTING OUT, THEN, TO US? ARE YOU POINTING OUT TO US WHAT COULD HAVE BEEN DEVELOPED THAT WAS NOT DEVELOPED?

YES, YOUR HONOR. I HAVE PRESENTED IN THE INITIAL BRIEF AND IN THE, AND I WILL CERTAINLY DISCUSS SOME OF THAT, IN THE INITIAL BRIEF AND IN THE REPLY, CERTAIN THINGS THAT I THINK SHOULD HAVE BEEN PRESENTED TO THE TRIAL COURT, IN ORDER TO PROPERLY ADJUDICATE MR. PETERKA'S 3.850 CLAIMS. I CAN GIVE A FEW EXAMPLES

BECAUSE YOU HAVE A LIMITED AMOUNT OF TIME, THIS COURT HAS NEVER RECOGNIZED A CLAIM OF INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL. THE UNPUBLISHED ORDERS THAT YOU REFERRED TO, WERE TWO CASES WHERE THERE WAS NO EVIDENTIARY HEARING, AND IT WAS REMANDED. THIS CASE, DO YOU KNOW OF ANY CASE OUT OF THIS COURT, WHERE THERE HAS BEEN AN EVIDENTIARY HEARING, WHERE THERE IS AT LEAST, THAT WE ARE, WITNESSES ARE PUT ON, WHERE YOU HAVE RECOGNIZED ANY KIND OF DUE PROCESS VIOLATION OR INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

WELL, THIS COURT HAS CERTAINLY RECOGNIZED THAT POSTCONVICTION DEFENDANTS ARE

ENTITLED TO COMPETENT , EFFECTIVE REPRESENTATION , THROUGHOUT THEIR 3.850 PROCEEDINGS, AND THIS COURT , IN PALP AND FOTOPOULOS , HAS RECOGNIZED THAT WHEN I T IS NOT PROPERLY DEVELOPED AND THIS COURT CAN'T REVIEW THE CLAIMS THAT HAVE BEEN PRESENTED , IT NEEDS TO HAVE A FULL DEVELOPMENT OF THOSE ISSUES.

ARE YOU , BECAUSE W E ARE GOING TO GET INTO DIDN'T THEY PRESENT THIS AND THAT , ARE YOU GOING TO ARGUE ANY OF OTHER OTHER ISSUES TODAY , ASSUMING WE REJECT ISSUE SIX AS TO ANYTHING , SEE , ARE YOU SORT OF, BY REALLY FOCUSING O N ISSUESIX , CONCEDED THAT THERE REALLY ISN'T ENOUGH IN THE OTHER ISSUES, TO WARRANT A REVERSAL?

I CERTAINLY THINK THAT THERE IS A ENOUGH , AND SPECIFICALLY AGAIN , INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE AND AT THE PENALTY PHASE, T O WARRANT REVERSAL OF MR . PETERKA'S CONVICTION AND SENTENCE . HOWEVER , I DON'T THINK HE HAS FULLY DEVELOPED THE PROCEEDING TO MAKE THOSE CLAIMS AND I AM NOT HERE TO ASK THE COURT TO MAKE A STATEMENT THAT THERE IS A CONSTITUTIONAL RIGHT TO MAY A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL. I AM ASKING THIS COURT TO RECOGNIZE THAT THE LOWER COURT SER FLAWED, AND IT IS FLAWED BECAUSE HE DID NOT RECEIVE THE INFORMATION THAT HE SHOULD HAVE RECEIVED, AND LET ME GIVE YOU A COUPLE OF EXAMPLE S , SO THAT THIS WOULD BE MORE UNDERSTAND ABLE IN WHAT WE ACTUALLY WANT T O DO. IN THE COURT 'S ORDER, MR . PETERKA , IN HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, DIDN'T PRESENT MILITARY EVIDENCE MYSTERY. THE COURT ORDER FOUND THAT MR . PETERKA WAS AT FAULT FOR NOT TELLING TRIAL COUNSEL ABOUT HIS MILITARY HISTORY. WELL , THERE IS EVIDENCE THAT IS NOT IN THE RECORD , SHOWING THAT MR . PETERKA , WHO WAS SEEN BY MENTAL HEALTH EXPERT IN FEBRUARY, THE FEBRUARY THAT HIS TRIAL BEGAN , AND THE MENTAL HEALTH EXPERT'S REPORT IS DATED A WEEK BEFORE THE TRIAL , AND I T SPECIFICALLY SAID THAT HE SPOKE TO BOTH MR . LOVE LESS AND MR . HARLEY, AND IN THAT WHOLE REPORT IS A SECTION ABOUT MR . PETERKA'S MILITARY HISTORY.

IS THAT NEWLY-DISCOVERED EVIDENCE?

I DON'T THINK IT IS NULL LIL DISCOVERED. IT WAS I DON'T THINK IT I S NEWLY-DISCOVERED. IT WAS IN THE RECORD AT TRIAL AND NOW WE HAVE EVIDENCE THAT MR. PETERKA DIDN'T PROVIDE IT.

IN THE RECORD , DON'T THEY RECALL IN THE RECORD WHERE YOU SEE THAT THEY WENT OVER HIS MILITARY RECORD?

THERE WAS N O TRIAL FILE IN THIS CASE, BECAUSE IT HAD APPARENTLY BEEN DESTROYED IN A FLOOD. WE NEVER RECEIVED THE FILE. WHAT THE PUBLIC DEFENDER SAID WAS WE ALWAYS DID THIS. WE ALWAYS HAD THIS SHEET, BUT WE DIDN'T HAVE THAT IN THIS CASE TO SEE

BUT AS FAR AS ALTERNATIVE GROUNDS TO AFFIRM THE TRIAL COURT, IF WE AGREE WITH YOU THAT IT WAS SOMETHING THAT THEY PROBABLY DID LOOK AT , WASN'T HE , WHAT WAS THE REASON THAT HE WAS DISCHARGED FROM THE MILITARY?

HE WAS HONORABLY DISCHARGED.

ISN'T THERE SOMETHING ABOUT HIS , EITHER ILLEGAL CONTACT, THIS ISN'T THE CASE , WAS THERE SOME ILLEGAL CONDUCT? SOME STRATEGY REASONS WHY, ORIGINAL TRIAL COUNSEL WOULDN'T HAVE PUT ON HIS MILITARY RECORD ?

LET ME CORRECT MYSELF. HE WAS GENERALLY DISCHARGED UNDER HONORABLE CONDITIONS , BECAUSE HE HAD BEEN CONVICTED OF A CRIME. WHILE HE WAS AWAY FROM THE MILITARY. NOW , MR. HARLEY, THE PENALTY CASE COUNSEL , SAID I WOULDN'T HAVE PUT THE TESTIMONY ON , BECAUSE I DIDN'T THINK THAT THAT WAS APPROPRIATE IN THIS TYPE OF COMMUNITY. MR.

HARLEY HAD BEEN TRYING FELONY CASES FOR LESS THAN ONE YEAR.

NOW WE ARE GOING TO THE MERITS OF THE MILITARY SERVICE , AND I AM NOT SURE , YOU ARE USING THAT AS AN EXAMPLE OF WHAT THE TRIAL COURT DIDN'T HAVE. I AM NOT S O SURE THAT IT MATTERS WHETHER , IT IS CLEAR THAT THEY KNEW ABOUT IT, SO HE OBVIOUSLY TOLD HIM ABOUT IT. NOW, IF THE JUDGE'S ORDER IS FLAWED BY SAYING THAT THEY DIDN'T TELL HIM ABOUT IT , WE CAN LOOK AT THE RECORD AND SEE THAT HE MUST HAVE , SO DO YOUHAVE ANY OTHER EXAMPLES OF WHAT

RIGHT, IF I COULD JUST FOLLOW-UP BRIEFLY ON. THAT MR . LOVE LESS, THE EXPERIENCEED TRIAL COUNSEL WHO SAID HE WAS AS EQUALLY RESPONSIBLE FOR PENALTY PHASE, SAID IF I HAD KNOWN ABOUT THE COMMEND ASIANS THAT MR . PETERKA HAD THE COMMENDATION THAT IS MR . PETERKA HAD RECEIVED , I WOULD HAVE PRESENTED THAT TESTIMONY , REGARDLESS OF THE FACT THAT HE WAS DISHONORABLY DISCHARGED IN NEBRASKA. THAT WAS HIS FIRST SHOWINGTHAT HE WAS AWARE IN THE CASE THAT MR . PETERKA HAD BEEN CONVICTED I N NEBRASKA OF TWO FELONY CONVICTIONS , AND HE FLED NEBRASKA , IN ORDER TO AVOID SERVING HIS TWO ONE-YEAR SENTENCES FOR THOSE CRIMES.

AS YOU STATED TODAY, POSTCONVICTION COUNSELDOCUMENTED SOME RECORDS THAT THE DEFENDANT HAD SPOKEN TO THEM ABOUT HIS MILITARY RECORD AND HE HAD THIS ABOUT A WEEK BEFORE THE HEARING , CORRECT?

THE TRIAL ATTORNEY HAD THE INFORMATION AT LEASE AT WEEK BEFORE THE EVIDENTIARYHEARING. THAT INFORMATION WAS NEVER PRESENTED T O THE EVIDENTIARY HEARING COURT.

AND COUNSEL , YOU HAVE AN INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL CLAIM. BUT WE HAVE EVIDENCE THAT HE PRESENTED THAT TO THE COURT , AND ISN'T THAT EFFECTIVE ASSISTANCE OF COUNSEL? AND ISN'T THAT WHAT WE RECOGNIZED?

HE IS ENTITLED TO EFFECTIVE REPRESENTATION. THIS COURT DOES NOT SAY THAT IT RISES TO A CONSTITUTIONAL LEVEL.

DIDN'T WE SAY IN AND AFTER LAMBRIX THAT, THERE IS NO INEFFECTIVE ASSISTANCE CLAIM OF POSTCONVICTION COUNSEL?

THAT IS NOT WHAT WE SAID IN PEADY VERSUS STATE , WHICH I THINK PEADY CAME AFTER LAMBERT AND SINGLETARY .

WE HAVE CONSISTENTLY SAID WE WILL NOT RECOGNIZE A CLAIM FOR INEFFECTIVE ASSISTANCE O F POSTCONVICTION COUNSEL . NOW , WE HAVE SAID THAT SEVERAL TIMES . AND WOULDN'T, I MEAN , WE WOULDHAVE TO RECEDE FROM THAT, IF WE ARE GOING TO DEAL WITH THIS ON THE BASIS OF AN INEFFECTIVE ASSISTANCE O F POSTCONVICTION COUNSEL .

I DON'T BELIEVE THAT THIS COURT HAS TO RECEDE FROM THEFACT THAT YOU WILL NOT RECOGNIZE A CONSTITUTIONAL CLAIM FOR INEFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL.I THINK THAT THIS IS PURELY CONSISTENT WITH WHAT THIS COURT HAS DONE, AND IN CASES LIKE HAPAND IN CASES LIKE IN CASES LIKE HAPP AND CASES LIKE FOTOPOULOS , WHEN THIS COURT COULD NOT CONDUCT A PROPER ANALYSIS , AND IN ORDER TO CONDUCT ASSISTANCE FAIRLY, YOU SENT THAT BACK TO DEVELOP T.

LET ME ASK AS I ASKED IN THE PRESEEDING CASE , WHY ISN'T THE CLAIM BASED UPON RING AND APPRENDI IN THE POSTCONVICTION 3.7851 MOTION , AS -3.851 MOTION , AS OPPOSED TO THE HABEAS?

I CAN TELL YOU MYSELF THAT I HAVE PRESENTED IT BOTH WAYS. IT REALLY DEPENDED TO ME , ON WHETHER THE CASE WAS AT THE TIME, WITH THE CASE THAT WAS NEXT IN LINE. IF IT WAS BEFORE THIS COURT , I RAISED I T AS A HABEAS ISSUE , AND I KNOW THIS COURT HAS SORT OF NARROWED WHAT HABEAS MEANS, BUT MY UNDERSTANDING IS THAT , IF THERE IS SOMETHING UNCONSTITUTIONALLY HOLDING THEDEFENDANT OR THE SENTENCE IS UNCONSTITUTIONAL, THAT ISN'TAPPROPRIATE , AS LONG AS IT DOESN'T INVOLVE A FACTUAL ISSUE, WOULD BE APPROPRIATE FOR A HABEAS. I CERTAINLY HAVE NO PROBLEM

WE, ALSO, SAID IN ATWATER MOST RECENTLY , THAT MATTERS WHICH ARE APPROPRIATELY IN A POSTCONVICTION MOTION , ARE NOT TO BE IN A HABEAS. DO YOU RECALL SEEING THAT?

YES, YOUR HONOR. I MEAN , I HAVE NO PROBLEM FILING THAT A S 3.850. I THINK IT HAS BEEN DONE BOTH WAYS.

I JUST WANT TO GO BACK. I AM SYMPATHETIC TO A SITUATION THAT, IF THIS COURT SEES WHAT GENUINELY LOOKS LIKE A MISCARRIAGE OF JUSTICE THAT YOU HAVE GOT A POSTCONVICTION COUNSEL WHO WAS IN THE PROCESS OF SOMETHING HAPPENING , AND YOU, THERE IS , YOU SEE EVIDENTIARY HEARING AND NOTHING I S PUT INTO EVIDENCE , AND YOU KNOW , YOU ARE TALKING ABOUT THERE IS NOT EVEN MINIMAL REPRESENTATION THAT THE COURT MAY, ON OCCASION , HAVE TO REACH OUT. I A M JUST, THIS IS WHERE I AM GOING.I AM SEEING YOU ARE NOWPICKING OUT THE MILITARY , YOU KNOW, WELL, HE SHOULD HAVE PUT THAT IN , AND IF THAT HAD HAPPENED, THE JUDGE WOULD HAVE SAID THIS, AND I STILL GO BACK TO, IF YOU HAVE OTHER EXAMPLES OTHER THAN THE MILITARY , BECAUSE TO ME THAT WOULD HAVE BEEN EXAMPLE AFTER TWO-EDGED SWORD AND PROBABLY THERE IS NO BRIDGE DIS.

OKAY.

SO WE CAN TAKE INTO ACCOUNTTHAT , OKAY , LET'S ASSUME THAT TRIAL COUNSEL KNEW ABOUT IT. THEN WHAT WOULD WE HAVE THOUGHT , AND THAT IS A ALTERNATIVE BASIS T O AFFIRM IT , SO IF YOU HAVE GOT SOME OTHERREALLY, IS THAT YOUR MOST COMPELLING DEFICIT , IF YOU STILL WANT TO PURSUE THAT OR IF YOU WANT TO TALK ABOUT OTHER

I DO WANT TO PURSUE IT A LITTLE BIT FURTHER, BECAUSE ITHINK IF YOU LOOK AT THIS CASE AS A HOLE IN AND WHAT HAPPENED IN THE EVIDENTIARY HEARING , AND I PUT IN MY CLAIM THAT WHAT WAS DONE IN FOTOPOULOS AND HAPP , WHICH THIS COURT HAS PROPERLY POINTED IT OUT, SAYING THESE ARE ALL OF THE THINGSS THAT COULD HAVE BEEN DONE AND SHOULD HAVE BEEN DONE BY POSTCONVICTION COUNSEL . THIS WAS ESSENTIAL. WHEN IT WAS FILED IN THE 3.850 , THERE WERE NO FACTS IN THAT AND THEY SAID IT IS AN INCOMPLETE MOTION. THE NEXT ATTORNEY ON THE CASE TOOK THAT MOTION AND WENT TO AN EVIDENTIARY HEARING ON IT , WITHOUT DEVELOPING ANY OF THE FACTS THAT ARE THERE AND MORE EGREGIOUS LY LET ME MENTION THE ESCAPE ISSUE. AT THE EVIDENTIARY HEARING , POSTCONVICTION COUNSEL PUT ON A WITNESS TO SAY THAT THE JAIL RECORDS HAD BEEN DESTROYED. THERE WAS THIS WHOLE ISSUE ABOUT SKIPPER EVIDENCE ANDWHETHER OR NOT MR . PETERKA HAD BEEN A MODEL INMATE , WHICH TRIAL COUNSEL IS HE IF I WOULD TRIAL COUNSEL SAID IF I WOULD HAVE HAD IT, I WOULD HAVE PUT IT ON. IN POSTCONVICTION TRIAL COUNSEL'S BOX , THERE WERE FOUR COPIES OF MR . PETERKA 'S JAIL RECORDS THAT HE HAD RECEIVED BEFORE THE JAIL HAD DESTROYEDTHEM. THERE WAS AN ORIGINAL AND FOUR COPIES. THERE WERE TEN OR TWELVE BOXNESS THIS CASE , AND HE DIDN'T LOOK AT THE RECORDS THAT HE HAD TO FIGURE OUT THAT I CAN PRESENT THIS I N EVIDENTIARY HEARING IN COURT TO SUPPORT THE TESTIMONY. INSTEAD , MR . PETERKA WAS FOUND INCREDIBLE, AND LIEUTENANT ATKINS , WHO WAS CALLED TO TESTIFY, SAID , LOOK , I HAVE A VAGUE RECOLLECTION OF HIM. I CAN'T TELL YOU FOR SURE WHAT HIS BEHAVIOR WAS LIKE PRETRIAL. I CAN'T TELL YOU ABOUT THIS ESCAPE THAT HE IS SAYING HAPPENED THAT HE COULD HAVE PARTICIPATED IN AND DIDN'T, AND YET THAT FILE

WHAT WOULD THOSE RECORDS ACTUALLY SHOW ABOUT THIS ESCAPE , BECAUSE WE DO HAVE A DEFENDANT WHO IN FACT , WAS FOUND GUILTY IN ANOTHER STATE AFTER COUPLE OF FELONIES , AND THEN FLED THE JURISDICTION AND CAME TO FLORIDA , AND ISN'T THAT CORRECT?

THAT'S CORRECT.

SO WHAT DO YOU MAINTAIN THESE RECORDS WOULD SHOW ABOUT HIS ACTUAL FAILURE TO PARTICIPATE IN THIS JAIL ESCAPE?

WELL , THOSE RECORDS WOULD HAVE , THEY DIDN'T SPECIFICALLY SAY ANYTHING ABOUT THE ESCAPE, BUT THEY DID TALK ABOUT HIM BEING A MODEL INMATE, HIM GETTING ALONG WELL WITH THE OFFICERS. THERE IS A WHOLE, IT IS A WHOLE FILE ABOUT BASICALLY SAYING THAT BEING A MODEL PRISONER.

A A MODEL PRISONER, AND IN TERMS OF THE ESCAPE, THERE ARE UP IN ARTICLES THAT WE HAVE FOUND , THAT SHOW THAT THERE WERE TWO INDIVIDUALS WHO ESCAPED. WE INTERVIEWED THOSE INDIVIDUALS. THEY SAID MR. PETERKA COULD HAVE ESCAPED. HE HAD CIVILIAN CLOTHES IN HIS CELL. THEY URGED HIM TO COME WITH THEM , AND THEY URGED HIM TO COME WITH THEM AND HE SAID NO. I AM NOT GOING TO GO ON THE RUN. I AM GOING TO FACE MY RESPONSIBILITIES, AND HE ESSENTIALLY HAD BEEN REHABILITATED IN THE TEN MONTHS THAT HE HAD BEEN SITTING IN JAIL, FROM WHEN HE HAD FLED NEBRASKA AND HE WAS FACING THE TWO-YEAR CHARGES. I SEE MY TIME HAS RUN, AND I WOULD LIKE TO RESERVE THE FROZE REBUTTAL.

CHIEF JUSTICE: GOOD MORNING.

GOOD TO RESERVE THE REST FOR REBUTTAL .

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING, MR . CHIEF JUSTICE. MY NAME IS CHARMAINE MILLSAPS REPRESENTING THE STATE THERE. IS NO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM , AND MORE IMPORTANT IS ALL OF THIS WAS PRESENTED AT THE EVIDENTIARY HEARING . COUNSEL PRESENTED THE MILITARY COMMENDATION THAT IS HE SAID TRIAL COUNSEL DID NOT. WE LITIGATED THE MILITARY HISTORY OF THIS DEFENDANT AT THE EVIDENCE HEARING. THE COMMENDATION EVIDENTIARY HEARING. THE COMMENDATION WAS FROM A MEMBER OF THE MINNESOTA NATIONAL GUARD, AND COMMENDATIONS WERE INTRODUCED AS EXHIBITS.

WHAT DID TRIAL COUNSEL TESTIFY THAT HE DIDN'T INTRODUCE THAT AT THE ORIGINAL TRIAL ?

SO NOW WE ARE MOVING TO A TRUE TRIAL, INEFFECTIVE OF TRIAL COUNSEL, WHICH HAS BEEN RECOGNIZED. OKAY. OKAY. THERE WERE TWO TRIAL COUNSEL. MR . HARLEY WAS IN CHARGE OF PERSONALITY. WHAT HAPPENED IS THE PD'S HAVE A CENTRAL FILE, AND THAT CENTRAL FILE WAS DESTROYED BY A FLOOD, SO THEY COULD NOT SPECIFICALLY REMEMBER WHAT THEY DID AND DID NOT HAVE, BUT THEY DO HAVE A STANDARD FORM , AND THE TRIAL COURT DID NOT REJECT THIS . BASED SOLELY ON HE DIDN'T THINK THAT THE DEFENDANT HAD TOLD HIM. THAT IS NOT HOW THE ORDER READS.

IS THERE A STANDARD FORM ABOUT MITIGATION?

THERE WAS A STANDARD FORM ABOUT MITIGATION THAT THE PD'S OFFICE USES. NOW , THE ENTIRE FILE INCLUDING THAT FORM , WAS DESTROYED IN THIS FLOOD WAS DESTROYED IN THIS FLOOD, BUT WHAT THE TRIAL COURT SAID ABOUT THIS , IS HE SAID IF THEY DIDN'T KNOW ABOUT IT , IT IS BECAUSE PETERKA DIDN'T FILL OUT THE FORM, BUT THAT IS NOT WHY HE

REJECTED THIS. HE REJECTED THIS AS A TACTICAL DECISION, AND WHAT MR. HARLEY, PENALTY PHASE COUNSEL TESTIFIED REGARDING THE MILITARY HISTORY, WAS THIS. THIS TRIAL WAS AROUND EGGLAND AIR FORCE BASE THIS. IS A VERY MILITARY AREA. LOTS OF PEOPLE ON THIS JURY ARE GOING TO HAVE MILITARY EXPERIENCE. AND HE SAID THESE JURIES CONSIDERED THE WORST THING YOU CAN DO IS TO DISGRACE THE MILITARY, AND WHAT HAPPENED HERE WAS PETERKA COMMITTED THESE CRIMES WHILE HE WAS IN THE, HE COMMITTED THE CRIMES IN NEBRASKA WHILE HE WAS IN THE MINNESOTA NATIONAL GUARD, AND THE LAST THING COUNSEL, AND THIS WAS COUNSEL'S TESTIMONY, I DID NOT WANT TO CONNECT THOSE TWO. I DID NOT WANT THE JURY KNOWING THAT HE HAD COMMITTED THESE CRIMES WHILE HE WAS IN THE THAT THE GUARD. SO WHAT HE DID WAS THE GIRLFRIEND, ONE OF THE GIRLFRIENDS WHO TESTIFIED AT PENALTY, HE MENTIONED THAT HE WAS IN THE NATIONAL GUARD, SO HE JUST LEFT IT THERE. HE DID NOT WANT THE PROSECUTOR SAYING "AND THE REASON YOU WERE DISCHARGED NOT HONORABLY BUT GENERAL DISCHARGE, IS BECAUSE THIS WAS AN ADMINISTRATIVE DISCHARGE." BECAUSE HE WAS GOING, BECAUSE OF THESE CONVICTIONS. HE DID NOT WANT TO TOUCH THAT, AND THAT IS THE TRIAL COURT'S REASONING THAT THIS WAS A REASONABLE TACTICAL DECISION, FROM A TRIAL LAWYER, FAMILIAR WITH THE JURIES IN THIS AREA. THERE WERE TWO COUNSEL HERE. MR. LOVELESS, THE PD WHO HANDLES MOST - - NOW, THEY HANDLED EVERYTHING TOGETHER. THEY DIDN'T REALLY SPLIT IT UP IN PREPARATION BUT THEY DID SPLIT IT UP IN PRACTICE. MR. LOVELESS HANDLED GUILT AND MR. HARLEY HANDLED PENALTY. NOW, MR. LOVELESS IS A VERY EXPERIENCED PD, SIX PRIOR CAPITAL CASES. MR. HARLEY WAS HELPING HIM AS SECOND CHAIR, BUT HE WAS AN EXPERIENCED, NOT CAPITAL BUT AN EXPERIENCED PD WHO WAS HANDLING THAT, AND THAT WAS

WAS THERE TESTIMONY THAT THEY HAD A STANDARD OPERATING PROCEDURE, AS FAR AS INVESTIGATING MITIGATION AND WHAT AREAS THEY WOULD INVESTIGATE, MENTAL HEALTH?

ABSOLUTELY, AND THEY

FLUSH THAT OUT FOR US.

THEY TALKED ABOUT AND NOT ONLY DID THEY TESTIFY AS TO THAT, BUT ALSO THE PD'S INVESTIGATOR MR. GRAHAM, TESTIFIED AS WELL, AND HE TESTIFIED TO THE STEPS HE TOOK. THEY WERE INVESTIGATING THIS, MONTHS BEFORE. THIS PENALTY, THEY WERE INVESTIGATING

TELL US WHAT THEY DID, THOUGH, FLESH IT OUT, AS FAR AS WHAT THE EVIDENTIARY HEARING, WHAT THE TESTIMONY WAS, AS FAR AS THE INVESTIGATION AND THEN THE DECISION AS TO THE MITIGATION CASE TO PUT ON, AND THEN WHAT WAS PUT ON.

OKAY. THEY TESTIFIED THAT IT WAS MONTHS BEFORE, WHEN THEY STARTED INVESTIGATING PENALTY, THEY USED THAT FORM, THE INVESTIGATOR, THE INVESTIGATOR WAS THE ONE WHO SEEMS TO HAVE BEEN, I GUESS, POINT MAN, WAS A WAY TO EXPLAIN IT ON INVESTIGATING. HE WAS THEIR INVESTIGATOR, WITH A LOT OF PRIOR EXPERIENCE, INVESTIGATING CAPITAL CASES.

AND DOES THE RECORD REFLECT HIS PRIOR MILITARY HISTORY? I THINK MR. GRAHAM IS A RETIRED AIR FORCE OFFICER. IS THAT IN THE RECORD? OR DO YOU KNOW?

I DON'T KNOW, YOUR HONOR. NOW, EVERYBODY TESTIFIED, ALMOST ALL OF THESE LAWYERS SEEM TO HAVE HAD A MILITARY BACKGROUND. THE JUDGE, HIMSELF, SAYS SOMETHING LIKE I AM AN OLD MILITARY FELLOW, MYSELF, WHEN THEY ARE TALKING ABOUT WHAT THE COMMENDATION MEANS. I THOUGHT IT WAS MR. LOVELESS. WHO ALSO HAD A MILITARY BACKGROUND.

TELL US WHAT THE RECORD REFLECTED.

YES. THE EVIDENTIARY HEARING RECORD SAYS SOMETHING ABOUT MR. LOVELESS MILL TAEFER

MILITARY BACKGROUND .

WAS THERE THE MENTAL HEALTH EVALUATION? WAS THERE THE QUESTIONING OF FAMILY MEMBERS? IN OTHER WORDS DID THEY DO ALL OF THE THINGS THAT, BY NOW , WE SEE AS STANDARD OPERATING PROCEDURE BY COUNSEL, WITH REFERENCE TO MITIGATION? WHAT DID THEY DO?

MAINLY THEY WERE FOCUSING, YES , ON FAMILY MITIGATION . THEY WERE GOING TO PRESENT HIM AS A GOOD GUY.

WAS THERE A MENTAL HEALTH INVESTIGATION?

EXPERT TESTIMONY PRESENTED? NO.

NOT TESTIMONY, BUT WAS THERE A MENTAL HEALTH EXPERT HIRED AND CONSULTED ?

YOUR HONOR , BECAUSE THAT WAS NOT ONE OF THEIR CLAIMS, I DON'T THINK THAT WAS FLESHED OUT EXACTLY , HOW FAR THEY WENT INTO MENTAL MITIGATION. THEY WERE PRESENTING HIM MORE , THIS WAS MORE A LAY , GOOD PERSON , THEY PRESENTED THE MOTHER, THE GIRLFRIEND, A FRIEND IN THE AREA.

LET ME ALSO

LET ME ASK YOU ABOUT THE GOOD BEHAVIOR ON THIS JAIL ISSUE , BECAUSE IT IS A LITTLE DIFFERENT, IN THAT THEY SAID THE COUNSEL SAID , THAT , TRIAL COUNSEL SAID , AT THE EVIDENTIARY HEARING , IS AWARE THAT GOOD JAIL CONDUCT WAS CONSIDERED MITIGATING EVIDENCE, AND THAT HE SAID LOVE LESS STATED HE WAS NOT AWARE OF THE ESCAPE AND WOULD HAVE PRESENTED PETERKA'S REFUSAL TO PARTICIPATE IN THE ESCAPE , IN THE SENTENCING MEMORANDUM , IF HE HAD BEEN AWARE OF IT. THAT IS WHAT HE TESTIFIED TO , AND THEN THE TRIAL COURT FOUND THAT THERE WAS , THE RECORDS HAD BEEN DESTROYED , AND COULDN'T SPECIFICALLY RECALL . NOW , IF MR . McDERMOTT IF MS. McDERMOTT REPRESENTS IN FACT, THAT TRIAL COUNSEL HAD AVAILABLE TO POSTCONVICTION COUNSEL , THE FULL JAIL RECORDS THAT WERE THERE , COULD YOU ADDRESS , I GUESS THE TWO-TIERED PART OF THIS. IN OTHER WORDS, LET'S JUST ASSUME THE JAIL RECORDS EXIST , AND COUNSEL SHOULD HAVE BEEN AWARE OF IT . COULD YOU ADDRESS WHETHER THAT WOULD, THEN , BE DEFICIENT PERFORMANCE NOT TO PUT IT ON , AND IF THERE IS PREJUDICE CREATED BY THAT, SO LET'S ASSUME THE WORST , YOU KNOW , LET'S ASSUME THAT POSTCONVICTION COUNSEL SHOULD HAVE SEEN THOSE JAIL RECORDS AND MADE THE COURT AWARE OF THEM.

OKAY. AT THE EVIDENTIARY HEARING , EXACTLY THE OPPOSITE. I MEAN , YOU ARE PUTTING ME IN A VERY AWKWARD POSITION , BECAUSE THE EVIDENTIARY HEARING SHOWS THAT THEY CALLED THE RECORDS CUSTODIAN OF THE JAIL, WHO SAID IT IS OUR STANDARD POLICY TO DESTROY THESE.

YOU DON'T KNOW FIRSTHAND, WHAT MS. McDER NOT IS REPRESENTING, THAT THEY - - MS. McDERMOTT IS REPRESENTING, A THAT THEY ARE ACTUALLY IN THE FILE.

I HAVE NO WAY OF KNOWING , FROM THE EVIDENTIARY RECORD. BUT I WOULD LIKE TO GET RIGHT TO THE POINT THAT PARTICIPATING IN AN ESCAPE , IS NOT MODEL INMATE EVIDENCE. THAT IS REFUSAL TO DO WRONG. THAT IS NOT WHAT MODEL INMATE EVIDENCE IS . INMATE EVIDENCE IS ACTIVELY GOOD. HE SAT IN MISS CELL AND JUST SAT THERE UNTIL IN THE MORNING.

DID THAT GO TO DEFICIENT PERFORMANCE ? IF IT IS NOT MITIGATION, THEN IT IS NOT DEFICIENT PERFORMANCE NOT TO PUT IT ON.

ABSOLUTELY. IT REALLY GOES INTO BOTH. I THINK IT FOLDS INTO BOTH . I DON'T THINK YOU CAN GET , HE DID NOT REPORT THAT HIS CELLMATES WERE ESCAPING.THAT WOULD BE MODEL INMATE EVIDENCE.

WEREN'T THERE A VARIETY OF INSTANCES IN O F INFERENCES , IF YOU ARE GOING TO EXPLORE THAT, A VARIETY OF INFERENCES THAT COULD BE DRAWN , AND WOULD BE AND ONE WOULD BE THAT IF A PERSON WHOSE LIFE IS ON THE LINE AND HAS AN OPPORTUNITY TO ESCAPE WHEN OTHERS ARE ESCAPING AND SAID, NO, SIR , I AM NOT . I AM GOING TO GO AND FACE THE MUSIC, THAT THAT WOULD BE COMMENDABLE CONDUCT , ESPECIALLY IF IT WAS MATCHED WITH OTHER CONSISTENT GOOD CONDUCT AT THE JAIL.

IF HE HAD TAKEN IT A STEP

SOME REASONABLE PEOPLE COULD TAKE I T

IF HE HAD TAKEN IT A STEP FURTHER.

WE DON'T KNOW HOW A JURY MIGHT EVALUATE THAT HOUR A TRIAL JUDGE MIGHT HE VEIL WAIT THAT.

VERY MINOR AT MOST. I AM NOT, I PERSONALLY THINK IT ISN'T ANY, BUT THAT IS NOT COMPELING MITIGATION.

YOU ARE SAY ING THIS IS NOT PART OF WHAT OCCURRED AT THE EVIDENTIARY HEARING, RIGHT? I AM TRYING

YES. WE EXPLORED THE ESCAPE ER EVIDENCE. YES , WE DID EXPLORE THIS ISSUE .

BUT TELL ME, THE RECORDS FROM THE JAIL WERE NOT AVAILABLE.

NO.NO.

I AM TRYING TO STAY IN ONE BOX BEFORE GETTING INTO THE OTHER.

THE EVIDENTIARY HEARING TESTIMONY WAS THAT THE RECORDS WERE DESTROYED AS PART OF A STANDARD POLICY. LIEUTENANT ATKINS OF THE JAIL , THE SKIPPER EVIDENCE THAT THEY PRESENTED AT THE EVIDENTIARY HEARING , WAS LIEUTENANT ATKINS WHO WAS IN JAIL , WHO SUPERVISED PETERKA WHILE HE WAS IN JAIL AT THIS TIME , SAID HE WAS A BETTER THAN AVERAGE INMATE.

WHAT DID COUNSEL SAY, ON THIS , OR WAS HE QUESTIONED?

YES. HE WAS QUESTIONED ON THAT .

TELL US ABOUT THAT.

AND HE SAID HE, OKAY , FIRST OF ALL , HE SAID IN GENERAL, YES, THIS TYPE OF SKIPPER INMATE , MODEL INMATE , NOT NECESSARILY JUST ESCAPE , BUT ALSO THE TESTIMONY THAT WAS PRESENTED THAT HE WAS , B Y LIEUTENANT ATKINS, THAT HE WAS A BETTER THAN AVERAGE INMATE, MITIGATING EVIDENCE.HE WAS AWARE THAT IT IS MITIGATING. HE ROUTINELY INVESTIGATES IT , IS WHAT PD LOVE LESS TESTIFIED TO. I ROUTINE LY , I RARELY PRESENT IT, THOUGH , BECAUSE , HE SAID,I AM PARAPHRASING HERE , YOUR HONOR , BASICALLY HE SAID JURIES DON'T FIND COMPELLING EVIDENCE OF MITIGATION. THAT IS BASICALLY WHAT HE SAID. HE SAID I AM NOT SURE WHAT JURIES DO WITH THAT KIND OF INFORMATION.HE WAS VERY AMBIVALENT ABOUT PRESENTING SKIPPER EVIDENCE.

IN HIS PRACTICE .

WHY HE ALWAYS VEST DPATSIT.

THAT HE ORDINARILY WOULD NOT USE T.

HE ORDINARILY DOES NOT USE IT, BECAUSE HE DOES NOT , THE IMPLICATION OF WHAT HE WAS SAYING WAS THIS IS NOT COMPELLING EVIDENCE, AND HE IS TALKING ABOUT WHAT I WANT TO CALL TRUE SKIPPER EVIDENCE. HE DOESN'T THINK EVEN THAT I S COMPELLING. I THINK THE FAILURE TO ENGAGE IN AN ESCAPE , WHERE YOU ARE A CAPITAL DEFENDANT LIKELY TO BE CAUGHT AND CAUGHT AND CHARGED WITH ESCAPE , IS NOT ALL THAT COMPELLING HERE.

BUT YOU DO AGREE THAT HE TESTIFIED HE WASN'T AWARE OF THE ESCAPE AND WOULD HAVE PRESENTED IT OR TESTIFIED.

RIGHT. AND LET ME ALSO EXPLAIN WHEN THIS ESCAPE OCCURRED. THIS COULD NOT

YOU AGREE THAT HE SAID THAT , THAT HE , LOVELESS , SAID HE WAS NOT AWARE OF THE ESCAPE AND WOULD HAVE

NOBODY WAS AWARE OF THE ESCAPE, YOUR HONOR, NO ONE AT THE TRIAL WAS AWARE OF THE ESCAPE, AND HERE IS PARTIALLY WHY. AT THE TIME OF THE GUILT PHASE, THE ESCAPE HADN'T OCCURRED. THIS ESCAPE , ACCORDING TO MR . PETERKA , WHICH IS THE ONLY SOURCE FOR THE ESCAPE OCCURRING , OCCURRED IN BETWEEN THE GUILT AND PENALTY. IN BETWEEN PENALTY AND SENTENCING. THE PENALTY-PHASE JURY COULD NOT HAVE EVER HEARD THIS, BECAUSE IT HAD NOT OCCURRED. THE MOST HE COULD HAVE DONE I S PRESENTED HIS HE - - PRESENTED AS PART OF THE SPENCER EVIDENCE ON THE HEARING .

DID THE POINT THAT HE SAID HE HAD NOT DISCUSSED THIS ESCAPE BETWEEN THAT TIME , BEFORE THAT SPENCER HEARING?

YES. HE DID NOT TELL THEM ABOUT THIS SKAE. HIS EXPLANATION FOR NOT TELLING THEM IS THAT IT WAS SUCH BIG NEWS, THAT HE ASSUMED THEY WOULD FIND OUT. WELL, THAT IS NOT REASONABLE, YOUR HONOR. IT IS NOT REASONABLE TO ASSUME THAT YOUR LAWYERS ARE GOING TO FIND OUT ABOUT YOU SITTING IN A JAIL CELL. EVEN IF THE LAWYERS HAD READ THE NEWSPAPER ACCOUNTS , LET'S ASSUME FOR A MINUTE , I DON'T KNOW THAT THERE ANY UP IN AC OCCUPANTS. LET'S ASSUME FOR A MINUTE THAT THERE ARE. THEY ARE GOING TO REPORT THE ONES WHO DID ESCAPE NOT THE ONE WHO DIDN'T. THERE IS NO WAY FOR THESE LAWYERS TO KNOW ABOUT THIS ESCAPE , UNLESS MR . PETERKA TELLS THEM. HE ADMITTED , AT THE EVIDENTIARY HEARING, THAT HE DID NOT TELL THEM. IT IS NOT REASONABLE TO EXPECT , OH, AND WHAT'S MORE, BECAUSE OF THE EVIDENTIARY , THE MITIGATION FORM THAT WAS FILLED OUT MUCH EARLIER , IT IS REASONABLE THAT PETERKA SHOULD HAVE KNOWN THAT THIS WOULD BE THE KIND OF THING THAT HIS LAWYERS MIGHT BE INTERESTED IN. HE HAD AN OBLIGATION TO TELL THEM , AND HE DID NOT TELL THEM. AND EXPECTING THEM TO KNOW THROUGH THE LEGAL GRAPEVINE , THAT AN ESCAPE OCCURRED THAT YOU WEREN'T INVOLVED IN , REMEMBER HOW YOU MAKE REMEMBER HOW UNIQUE THIS INFORMATION IS TO MR . PETERKA IT IS NOT GOING TO GET INTO THE NEWSPAPER WHO DIDN'T ESCAPE. IT IS ONLY GOING TO GET INTO THE NEWSPAPER THOSE WHO DID ESCAPE. HE NEEDED TO DISCLOSE THIS AND HE DID NOT , AND THERE CANNOT BE DEFICIENT PERFORMANCE UNDER THESE FACTS. I WOULD ALSO LIKE TO ADDRESS THE RING CLAIM AND THE HABEAS. THESE CLAIMS SHOULD NOT BE BROUGHT AS PART OF A HABEAS. HABEAS IS FOR INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL. APPELLATE COUNSEL BEFORE RING , BY DEFINITION , CANNOT BE INEFFECTIVE FOR FAILING TO RAISE THIS. THERE WAS CONTROLLING PRECEDENT AGAINST IT. THESE CLAIMS SHOULD BE BROUGHT IN A 3.850 , I F , A , THEY SHOULD BE BROUGHT ON DIRECT APPEAL IF THEY ARE AT IF WE ARE AT TRIAL, IF THE TRIAL GOES ON.

JUST FROM A JUDICIAL POINT OF VIEW , FIRST OF ALL HABEAS IS NOT JUST INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.

APPELLATE COUNSEL CLAIMS.

APPELLATE. IT IS NOT JUST HABEAS IS USED FOR MANY DIFFERENT TYPES OF RELIEF. HABEAS , THE WRIT OF HABEAS CORPUS.

WELL , YES, I AM FAMILIAR WITH IT , BUT THIS COURT HAS LIMITED IT

ARE THERE ANY FACTUAL DISPUTES ON THE RING CLAIM?

ARE THERE NORMALLY? NO , THEY ARE NORMALLY A MATTER OF LAW.

SO WOULD YOU SUGGEST THAT A CASE LIKE THIS , THAT BECAUSE , NOW , YOU KNOW , 3.850 , 3.851 WOULD NEED TO BE BROUGHT WITHIN, IF IT IS A FUNDAMENTAL CHANGE OF THE LAW , WE FCK WE HAVE GOT EITHER A ONE OR WE HAVE GOT EITHER A ONE OR TWO-YEAR LIMIT ON THAT.

IF SUCCESSFUL .

NO. FROM THE TIME THAT RING WAS DECIDED. THERE IS A LIMITATION ON WHEN THOSE CAN BE BROUGHT.

YES , BUT I DON'T THINK THIS COURT SHOULD EVEN ENTERTAIN THEM AS SUCCESSIVE 3.850s , UNTIL THIS COURT DECIDES RING IS RETROACTIVE .

WE HAVE BEEN DECIDING , WE HAVE BEEN DISPOSING OF MANY CLAIMS OPPOSE THE CONVICTION. I GUESS MY QUESTION TO YOU IS , IS THE STATE TAKING A POSITION THAT A CASE LIKE THIS, WE SHOULD TRANSFER THE HABEAS CLAIM TO THE TRIAL COURTS, WHAT THE TRIAL COURTS LET THE TRIAL COURT DENY AND THEN COUP ON APPEAL SO WE CAN AFFIRM IT?

I WOULD SAY DO NOT FILE THEM UNTIL WE SAY RING IS SUCCESSIVE.

BUT IF WE HAVE BEEN ALLOWING AND CONSIDERING IT , FROM THE STATE'S POINT OF VIEW , DOES THAT , IS THAT WHAT THE STATE WOULD SUGGEST, THEN , THAT WE TRANSFER THESE TO THE TRIAL COURTS AND HAVE THE TRIAL COURT CONSIDER THEM, AND THEN HAVE THEM COME UP HERE ON APPEAL?

YES. I MEAN, VERSUS USING HABEAS TO DO IT , THAT WOULD BE PROFESSORABLE , BUT I WOULD NOT EVEN DO THAT IS, UNTIL YOU HOLD , I WOULD SAY , IF YOU ARE AT THIS STAGE WHERE YOU HAVE ALREADY FILED , NOT ONLY DIRECT APPEAL BUT POSTCONVICTION , IF YOU ARE BEYOND THAT , YOU SHOULD ONLY FILE A SUCCESSIVE 3.851 , WHEN WE HOLD RING IS RETROACTIVE , AND FROM THAT DAY FORWARD, LET THEM BRING THAT, AND UNTIL YOU HOLD RING AS RETROACTIVE , I WOULD NOT , THEY SHOULDN'T BE BRINGING THEM ANYWHERE.

YOU TAKE THAT POSITION BECAUSE THAT IS WHAT IS I N RULE 3.851?

YES , BECAUSE OF THE EXACT LANGUAGE OF THE RULE , AND YOUR HONOR, I AM NOT SURE I DID IT IN THIS PARTICULAR HABEAS , BUT IN MOST HABEAS ES I HAVE BEEN SAYING THAT THAT LANGUAGE ITSELF, IN THAT RULE , ENVISIONS THAT THIS COURT , AND THIS IS THE WAY THEY DO IT IN FEDERAL HABEAS , THAT THIS COURT HAS HELD THE CASE TO BE RETROACTIVE. OKAY. SO YOU , SO THE STATE'S POSITION IS I KNOW YOU HAVE BEEN LETTING THEM DO IT LOTS OF DIFFERENT WAYS , BUT WE SHOULD CLARIFY WHEN THEY CAN AND CANNOT , AND 3.8 SUCCESSIVE SHOULD NOT BE ALLOWED , UNTIL THIS COURT HOLDS A PARTICULAR CASE, NOT JUST RING, ANY

CASE , RETROACTIVE . THANK YOU. I ASK YOU TO AFFIRM THE JUDGMENT, THE TRIAL COURT'S DENIAL OF THE POSTCONVICTION MOTION FOLLOWING THE EVIDENTIARY HEARING. GOOD DAY.

CHIEF JUSTICE: FIVE MINUTES .

I WANT TO ADDRESS A COUPLE OF POINTS ABOUT THE , I GUESS INEFFECTIVE ASSISTANCE OF COUNSEL PENALTY PHASE CLAIM. THE STATE CLAIMED THAT IT WAS MR . PETERKA 'S OBLIGATION TO TELL HIS TRIAL COUNSEL WHAT WAS MITIGATING IN HIS JAIL RECORDS, IN HIS JAIL CONDUCT , AND I SAID ARGUE THAT THAT IS AND I WOULD ARGUE THAT THAT IS

YOU WOULD AGREE THAT THIS TOOK PLACE AFTER THE ACTUAL PENALTY PROCEEDING BEFORE THE JURY , AND BEFORE

SURE.

BUT BEFORE THE SPENCER HEARING.

ABSOLUTELY.

AND SO HOW WAS COUNSEL TO KNOW O F THIS?

IT WAS IN THE PAPER. PART OF THE PROBLEM IS IN THIS CASE

MR . PETERKA WAS DISCUSSEDIN THE PAPER?

NO , BUT THE ESCAPE WAS DISCUSSED IN THE PAPER. THAT THERE HAD BEEN THIS ESCAPE. ONE OF THE INMATES WAS ACTUALLY NOT ARRESTED AGAINFOR MONTHS, SO IT HAD BEEN IN THE PAPER. IT WAS IN THE PAPER AGAIN WHEN THAT INDIVIDUAL WAS ARRESTED . BUT

IS THERE EVIDENCE IN THE RECORD THAT COUNSEL HAD READ THE NEWSPAPER ARTICLE?

NO , BECAUSE IT WAS NEVER DEVELOPED AT THE EVIDENTIARY HEARING.THIS IS PART OF THE PROBLEM IN ARGUING THESE CLAIMS.

BUT THE FACT , THE RECORD DOESN'T SAY THAT COUNSEL READ THE NEWSPAPER ARTICLE .

NO , BECAUSE AT THE EVIDENTIARY HEARING, THE NEWSPAPER ARTICLE WAS NEVER PRESENTED.

SO WOULD HE HAVE AN OBLIGATION, AS PART OF PERFORMANCE , EFFECTIVE PERFORMANCE OF COUNSEL'S DUTIES, A DUTY TO DAILY READ THE NEWSPAPER, TO MAKE SURE THAT THERE ARE ARTICLES THAT NOT MENTION THEIR CLIENT BUTMAY HAVE SOME RELEVANCE TO THEIR CLIENT?

I DON'T THINK THAT IS THE OBLIGATION. I THINK THE OBLIGATION IS GO TO YOUR CLIENT BEFORE THE SPENCER HEARING AND SAY THIS IS ALL MITIGATING STUFF. WE TALKED ABOUT MITIGATION . DO YOU KNOW ANYTHING ELSE THAT I CAN PRESENT TO THE COSENTENCE OR OR TO THE JUDGE THAT WOULD BE THE COSENTENCER OR TO THE JUDGETHAT WOULD BE PART OF THE MITIGATION. IT WAS TRIAL COUNSEL AFS'S DUTY TO UNKEFER COUNSEL'SDUTY TO UNCOVER MITIGATION. THE FAMILY WAS ASKED TO PREPARE A PHOTO ALBUM , TO GIVE THAT TO TRIAL COUNSEL. THEY WEREN'T EVEN ASKED TO COME TO THE PENALTY PHASE. MR. PETERKA 'S PARENTS TRAVELED TO FLORIDA BECAUSE THEY WANTED TO SUPPORT THEIR SON , AND WHEN THEY ARRIVED HERE AND I T LOOKED LIKE IT WAS GOING TO A PENALTY PHASE, THEN TRIAL COUNSEL SAID WE WILL GET YOU REIMBURSED FOR YOUR TRAVEL , BECAUSE WE WANT TO USE YOU AS WITNESSES , BUT THEY FRONTEDTHE MONEY. NOTHING WAS EVER ARRANGED FOR THEM TO COME. THERE WAS NEVER A MITIGATION INTERVIEW WITH THE PARENTS AND LIKewise WITH ANY OF THE FAMILY, WITH ANY OF MR . PETERKA 'S FRIENDS , WITH ANY OF HIS MILITARY

COLLEAGUES , INMATES IN THE JAIL , THE RECORDS WERE NOT DISCOVERED, ANDING IT IT IS TRIAL COUNSEL'S DUTY TO DO THAT. IN THIS CASE THE JURY HEARD A STORY OF A YOUNG MAN WHO FLED BECAUSE HE DIDN'T WANT TO SERVE TWO ONE-YEAR CONSECUTIVE SENTENCES. WHAT BETTER MITIGATION WOULD THERE B E THAT BE TO SHOW THEJURY THAT THIS IS A MAN WHO THRIVES INSTRUCTURED SETTINGS LIKE THE MILITARY, LIKE PRISON,BECAUSE THAT IS WHAT HE NEEDS. HE NEEDS THAT STRUCTURE , AND HE BECOMES , HE GETS COMMEND ASIANS. HE IS A LEADER FORM HE COMMEND ASIANS. IS HE A LEADER. HE HELPS THOSE AROUND HIM. WHAT BETTER MITIGATION IN THIS CASE COULD HAVE HELPED HIM THAN THAT MITIGATION?

HE COULDN'T HAVE THRIVED IN THE MILITARY , SINCE HE GOT A GENERAL DISCHARGE BECAUSE OF THE CRIMES HE COMMITTED IN NEBRASKA. I MEAN , IT SEEMS TO ME IT IS A TWO-EDGED SWORD, THIS WHOLE BUSINESS ABOUT THE MILITARY AND BEING ABLE T O , THEN , BRING OUT THE FACT THAT HE WASN'T HONORABLY DISCHARGED. HE DIDN'T THRIVE IN THE MILITARY.

BUT THE JURY KNEW THAT HE HAD BEEN DISCHARGED FROM THE MILITARY. THERE WAS NO DOUBLE-EDGED SWORD TO THIS. THE JURY WAS AWARE THAT HE HAD BEEN CONVICTED OF CRIMES IN NEBRASKA, THAT H E HAD BEEN IN THE MILITARY.THE TIMING OF THE TWO, THERE WAS NO OTHER INFERENCE TO THEM THAT THAT WAS WHY HE HAD BEEN DISCHARGED FROM THE JURY , SO TO PRESENT HIS MILITARY HISTORY AND THE FACT THAT HE HAD COMMITTED TO DO EIGHTYEARS , WHEN HE WENT ON LEAVEAND HE HAS AN ALCOHOL PROBLEM, THIS WAS NOT PRESENTED AT THE EVIDENTIARY HEARING, BECAUSE POSTCONVICTION COUNSEL FAIL TO DO ANYTHING ON THIS, THEN IN THE MILITARY REPORT IT TALKS ABOUT HOW MR. PETERKA HAD AN ALCOHOL PROBLEM, WHEN HE DRANKHE WAS IMPULSIVE AND DID THINGTHAT IS LED TO BAD JUDGMENT , AND THAT WAS EXACTLY THE CIRCUMSTANCES UNDER WHICH HE HAD BEEN CONVICTED I N NEBRASKA .

AT THE TRIAL IN THIS CASE , THE TRIAL COURT FOUND FIVE CASES , CORRECT?

CORRECT.

SO GETTING TO THE PRONG IN THIS CLAIM, HOW IS COUNSEL'S EFFORTS UNDERMINED BY FAILURE TO PRESENT THIS SMALL A AGGRAVATING CIRCUMSTANCES ?

LET ME GET TO THIS. ONE AGGRAVATOR WAS STRUCK AND TWO WERE FOUND TO BE DOUBLE. THAT WAS AN ERROR THAT THIS COURT HAD FOUND. SO THAT WOULD LEAVE THEM TWO VALID AGGRAVATORS . THE STATE IN THEIR BRIEF THERE WERE FIVE VALID AGGRAVATORS . ALSO I N TRIAL THIS COURT FOUNDERROR IN THE FACT THAT THE JUVENILE RECORD WAS REVEALED TO THE JURY AND I T SHOULD NOT HAVE BEEN, WHEN THE MOTHER TESTIFIED, SO THERE HAS BEEN ERROR ALREADY FOUND IN THE PENALTY PHASE.

WAS CCP UPHELD?

YES, YOUR HONOR, IT WAS. YES.

AND THAT IS ONE OF THE AGGRAVATORS WE SAY , ALONG WITH HAC , ONE OF THE MOST WEIGHTY .

EGREGIOUS.

YES. I SEE MY TIME HAS EXPIRED . I WOULD ASK THIS COURT TO REMAND ON THE NARROW ISSUES O F INEFFECTIVE NESS SO WE CAN FULLY DEVELOP THE CLAIMS AND YOUR HONOR CAN PROPERLY ANALYZE MR. PETERKA 'S 3.850.

CHIEF JUSTICE: THANK YOU BOTH. THE COURT IS GOING TO TAKE ITS REGULAR 15-MINUTE

MORNING RECESS AT THIS TIME, BEFORE WE HEAR THE NEXT CASE ON THE DOCKET. WE WILL STAND IN REDECEMBER FOR 15 MINUTES.

MARSHAL: IN REDECEMBER FOR 15 MINUTES.

MARSHAL: PLEASE RISE.