NEXT CASE IS WILLIAM THOMPSON -VS- THE STATE OF FLORIDA. MS. DONOHO, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS MELISSA MINSK DOANE-HOE, AND I REPRESENT THE APPELLANT IN THE CASE, WILLIAM THOMPSON. IF I MAY REQUEST FIVE MINUTES FOR REBUTTAL, PLEASE. I AM HERE BEFORE THIS COURT FOR SUMMARY DENIAL OF THIS COURT'S RULE 3.850 MOTION. I AM SPECIFICALLY BEFORE THIS COURT, REQUESTING A REMAND ON THE EVIDENTIARY HEARING ON THE ISSUES PRESENTED IN THE MOTION AND SPECIFICALLY THE FILING THREE ISSUES I WOULD LIKE TO RAISE BEFORE THIS COURT. THE FIRST IS THE DENIAL OF MR. THOMPSON'S RIGHTS, WHEN HE WAS DENIED ACCESS TO PUBLIC RECORDS. THE SECOND IS THE REPEAT VIOLATION OF THE HITCHCOCK ERROR BY BARBARA SAVAGE, WHO WAS AN EYEWITNESS'S PRIOR TESTIMONY BEING READ INTO THE RECORD, AND FINALLY, COUNSEL'S INEFFECTIVENESS FOR FAILING TO OBJECT TO NUMEROUS ERRORS, SPECIFICSLY STATE MISCONDUCT. FIRST, MR. THOMPSON'S DENIAL TO PUBLIC RECORDS IN THIS CASE DEMANDS RENOUNCEMENT BY THIS TRIAL COURT FOR AN EVIDENTIARY HEARING, AND THE REASON IT COMES TO THAT IS BECAUSE MR. THOMPSON FILED HIS -- THIS CASE COMES FROM A RESENTENCING FROM WHICH THIS APPEAL FILE WAS HELD IN 1989. FOLLOWING THIS COURT'S REVERSAL OF HIS 1978 DEATH SENTENCE PURSUANT TO HITCHCOCK. IN 1993, HIS CORRECT APPEAL WAS FINAL, AND ON NOVEMBER 8 OF 1993, IT WAS DENIED. IN MAY OF 1995, MR. THOMPSON FILED HIS FIRST RULE 3.850 MOTION ON HIS RESENTENCING. IN THAT MOTION, HE RAISED THE ISSUE OF HIS DENIAL OF HIS ACCESS TO PUBLIC RECORDS. HE HAD MADE A PUBLIC RECORDS DEMAND 119, PREVIOUS TO HIS FILING OF HIS MAY 23 MOTION, AND THOSE DEMANDS WERE NOT COMPLETELY COMPLIED WITH.

NOW, AT THAT TIME OF THAT MOTION, RULE 3.852 HAD NOT BEEN ADOPTED. CORRECT?

THAT'S CORRECT, YOUR HONOR.

SO AS TO PURSUING PUBLIC RECORDS WITH ANY OTHER AGENCY, THAT HAD TO BE DONE BY INDEPENDENT ACTION.

THAT'S CORRECT.

THAT WAS NOT DONE IN THIS CASE.

WELL, AT THAT TIME, WHAT WAS DONE WAS FILING THE 3.850, WITH A CLAIM IN THE MOTION, WHICH BRINGS IT BEFORE THE COURT. IT IS THE TIME THE COURT'S DETERMINATION TO HAVE A HEARING AND TO HOLD A HEARING AND ASSIST COUNSEL IN GETTING RECORDS. WHAT HAPPENED WAS YOU KNOW, IN A SITUATION LIKE THIS, HOW LONG IS COUNSEL TO WAIT FOR PUBLIC RECORDS TO COME, SO IF THEY HAD REQUESTED 119 REQUESTS, LET'S SAY, A MONTH, I THINK, IN THIS CASE ABOUT A MONTH PRIOR TO FILING THE MAY 23 MOTION, WHAT WAS PROPER? IS IT 60 DAYS, 90 DAYS? SO IN OTHER WORDS, NOTHING WAS EVER BROUGHT BEFORE THE COURT. NO HEARING WAS HELD. THE JUDGE NEVER HELD A HEARING.

DID YOU ALL --

YOU HAD TO BE UNDER 119 AT THAT POINT, RIGHT?

AT THAT POINT THE RECORDS PRODUCTION HAD TO BE PURSUANT TO THE STATUTE. 119. AND IF IT WASN'T COMPLIED WITH UNDER 119, THEN AN ACTION, A CIVIL ACTION HAD TO BE FILED IN THE

CIRCUIT, WHERE THE AGENCY WAS, UNDER THIS CASE LAW OF THIS COURT.

THAT IS WHAT WAS HAPPENING, AFTER A PROCESS OF BEING DENIED ACCESS IN THE FIRST PLACE, AND THAT IS WHAT I AM SAYING TO THE COURT. IT WAS RAISED. RAISED AGAIN SIX MONTHS LATER IN ANOTHER 3.850, AMENDED 3.850, AND IT IS, ALSO, THE STATE'S BURDEN TO COMPLY TO THOSE REQUESTS, AND THERE WAS NEVER FULL COMPLIANCE TO THOSE REQUESTS.

DO WE HAVE ANYTHING IN THE RECORD THAT INDICATES -- WOULD INDICATE TO THE TRIAL COURT OR TO THIS COURT WHAT RECORDS THAT YOU GOT NO RECORDS. YOU GOT SOME RECORDS. WHICH RECORDS YOU WERE STILL SEEKING. THIS IS A PERSON WHO WAS CONVICTED IN 1976. HE HAS PLED GUILTY ON, I GUESS, TWO SEPARATE OCCASIONS, SO WE ARE, REALLY, TALKING ABOUT THE PENALTY-PHASE ISSUES RATHER THAN THE GUILT-PHASE ISSUES HERE. WHAT RECORDS DIDN'T YOU GET?

THAT IS A FAIR QUESTION. SPECIFICALLY THE RECORDS THAT WE DIDN'T GET-GO TOWARDS FINDING OUT INFORMATION ABOUT THE CODEFENDANT IN THIS CASE.

EXCUSE ME. I WAS JUST WONDERING, DID YOU SPECIFY THAT TO THE TRIAL JUDGE?

YOUR HONOR, IT WAS SPECIFIED SPECIFICALLY IN THE 3.850 MOTION. IT IS DELINEATED IN THERE WHAT RECORDS WEREN'T RECEIVED, AND WHAT RECORDS WERE STILL WANTING TO UNCOVER. AND SPECIFICALLY, GOING TO THE MITIGATION, REGARDING THE CODEFENDANTS, OUR ACCESS TO PUBLIC RECORDS REGARDING THE CODEFENDANT, WHICH WOULD GO SPECIFICALLY TO ISSUES IN MITIGATION.

AND THOSE WERE RECORDS THAT YOU REQUESTED FROM THE TWO AGENCIES, THEN YOU FIRST FILED IT, THAT WERE CAPABLE OF GIVING YOU THOSE RECORDS. THAT IS THE STATE ATTORNEYS OFFICE AND THE METRO-DADE LAW ENFORCEMENT AGENCY?

THERE ARE ACTUALLY OTHER AGENCY FROM WHICH WE REQUESTED RECORDS REGARDING THE CODEFENDANT, WHICH WE NEVER RECEIVED. AN AGAIN, MAYBE WE ARE TALKING ABOUT PROCEDURAL HURDLES, BUT AT THE TIME YOU HAD TO PURSUE THOSE THREW TLU CHAPTER 11 19, DID -- THROUGH CHAPTER 11 19, DID YOU NOT? -- THROUGH CHAPTER 119, DID YOU NOT?

THAT WOULD BECOME A FACTOR IN IT, BUT HOW LONG DO YOU GO BEFORE YOU GO INTO SEPARATE COURTS UNDER 119. IT WAS, AT THAT TIME, THE LAST RESORT WAS TO GO TO INDIVIDUAL CIVIL COURTS TO REQUEST RECORDS. AT THAT TIME, YOUR HONOR, WE BELIEVE THAT MR. THOMPSON WAS DOING EVERYTHING IN HIS POWER TO GET RECORDS. SIX MONTHS LATER, AN AMENDED MOTION WAS FILED, ON NOVEMBER 8, AND ONE MONTH LATER, ON DECEMBER 12, 1995, THE JUDGE AT THAT TIME DENIED THE MOTION. ON OTHER GROUNDS. AFTER THAT, IT WENT UP ON APPEAL, AND IN APRIL OF 1996, THE STATE ASKED FOR RELINQUISHMENT BACK TO THE TRIAL COURT, FOR A HUFF HEARING. THIS COURT RELINQUISHED IT ON AUGUST 19 OF 1996, AND ON OCTOBER 17 OF 1996, A HEARING WAS HELD IN THE TRIAL COURT. AT THAT TIME THE TRIAL JUDGE DIDN'T KNOW WHAT WAS GOING ON. SHE HADN'T READ THE MOTIONS, AND SHE ASKED FOR EVERYBODY TO COME BACK ON OCTOBER 31, AND THEN ON OCTOBER 31, SHE RULED THAT EITHER MR. THOMPSON WAIVED HIS RIGHTS TO PUBLIC RECORDS OR HE RECEIVED PUBLIC RECORDS. SO ALL THE WAY ALONG THE WAY, MR. THOMPSON WOULD LIKE TO STATE TO THIS COURT THAT HE -- WITHIN THE POWER THAT WE HAVE, THEN, PURSUED PUBLIC RECORDS. I THINK THAT THIS CASE IS VERY MUCH ON POINT WITH VENTURA, WHERE THIS COURT STATED THAT ITS DUAL RESPONSIBILITY, RESPONSIBILITY FOR THE STATE TO PRODUCE THE RECORDS AND RESPONSIBILITY FOR COUNSEL TO CONTINUE TO REQUEST THE RECORDS, AND IF THIS COURT REVIEWS THE RECORD, YOU WILL SEE THAT, AT EVERY HEARING, COUNSEL FOR MR. THOMPSON REQUESTED A HEARING ON PUBLIC RECORDS. THE NEXT ISSUE THAT I WOULD LIKE TO RAISE WITH THIS COURT IS THE ISSUE REGARDING BARBARA SAVAGE'S TESTIMONY BEING READ INTO THE RECORD DURING THE 1989 RESENTENCING. BARBARA SAVAGE WAS EYEWITNESS TO THE

CRIME AND TESTIFIED AGAINST MR. THOMPSON IN 1978. THEREAFTER, THIS COURT REVERSED MR. THOMPSON'S SENTENCE, BASED ON HITCHCOCK ERROR. IN 1989, THE RESENTENCING COURT FOUND MS. SAVAGE TO BE UNAVAILABLE AND ALLOWED HER TESTIMONY TO BE READ INTO THE RECORD. HER DIRECT, AT THE TIME, WAS ABOUT 100 PAGES LONG, AND THE CROSS-EXAMINATION WAS FIVE PAGES LONG. MR. THOMPSON'S 1978 TRIAL COUNSEL WAS SPECIFICALLY DENIED THE RIGHT TO QUESTION MS. SAVAGE REGARDING MITIGATING FACTORS. COUNSEL ATTEMPTED TO ASK MS. SAVAGE ABOUT DRUG AND ALCOHOL USE AND WAS REPEATEDLY MET WITH OBJECTIONS FROM THE STATE, WHICH WERE, THEN, SUSTAINED BY THE JUDGE.

THIS IS BACK TO THE PRIOR PROCEEDING.

RIGHT. BECAUSE WHAT HAPPENED WAS THE COURT FOUND HER UNAVAILABLE AND THEN ALLOWED THE STATE TO REREAD -- TO READ IN HER TESTIMONY FROM THE 1978 SENTENCING. FINDING HER UNAVAILABLE.

WHAT IS THIS -- WHICH NUMBER ISSUE? YOU HAVE MANY ISSUES ON BOTH 3.850 AND UPON THE HABEAS. CAN YOU TELL ME WHICH ISSUE YOU ARE NOW SPECIFICALLY TALKING ABOUT?

CLAIM NUMBER SEVEN. ISSUE NUMBER SEVEN.

AN INEFFECTIVENESS OF APPELLATE COUNSEL OR TRIAL COUNSEL? ANOTHER ISSUE FROM THE DIRECT APPEAL, YOUR HONOR, OR?

ISH SEVEN ON DIRECT APPEAL. -- ISSUE SEVEN ON DIRECT APPEAL, I MEAN ON THE DIRECT APPEAL FROM YOUR 3.850. ALL RIGHT. WHY DON'T YOU -- I DON'T WANT --

I AM SORRY, YOUR HONOR.

IT IS MULTIPLE -- THERE ARE MULTIPLE ISSUES RAISED ON THIS APPEAL, AND I REALIZE YOU HAVE AN OBLIGATION TO DO THAT FOR YOUR CLIENT, BUT WHEN YOU RAISE SO MANY DIFFERENT ISSUES, IT BECOMES VERY HARD TO SEPARATE THE WHEAT FROM THE CHAFF, SO TO SPEAK. YOU ARE SAYING THERE SHOULD HAVE BEEN AN EVIDENTIARY HEARING ON THIS ISSUE?

YES, YOUR HONOR, I AM ASKING FOR AEVED YEAR HEARING.

-- AN EVIDENTIARY HEARING.

ON WHAT? HOW COULD COUNSEL HAVE NOT QUESTIONED QUESTIONED BARBARA SAVAGE, WHEN HER TESTIMONY IS BEING READ?

THAT IS THE ISSUE YOUR, IS WHETHER, A, SHE REALLY WASN'T AVAILABLE, WHICH WE CONTEND --

WAS THAT ISSUE RAISED ON DIRECT APPEAL?

IT WAS RAISED, ON DIRECT APPEAL, IN A WAY, I THINK, DIFFERENTLY FROM THIS, AND I WILL EXPLAIN WHY I SAY THAT. I SAY THAT, BECAUSE IT WAS RAISED ON DIRECT APPEAL IN A WAY WHICH COUNSEL WAS TALKING ABOUT THE ABILITY TO CONFRONT A WITNESS AND CROSS-EXAMINE.

COME BACK. YOU HAVE TO PUT THIS IN A PACKAGE, AND, I GUESS, WE ARE TRYING TO GET TO THAT. WHETHER THIS IS AN ISSUE, IN YOUR APPEAL FROM THE 3.850 OR THE ISSUE THAT YOU ARE RAISING BY HABEAS NOW, AS FAR AS THIS PARTICULAR ISSUE, WHICH IS IT?

I WOULD SAY BOTH.

AND HOW IS IT AN ISSUE IN YOUR APPEAL FROM THE 3.850? IN OTHER WORDS WHAT CLAIM DID YOU MAKE IN YOUR POST-CONVICTION MOTION THAT THIS ISSUE ARISES OUT OF?

TO UNDERSTAND, YOU DON'T WANT ME TO TELL YOU THE SPECIFIC CLAIM HEADING OR JUST -- I AM SORRY.

DO WHAT -- YOU HAVE TO HAVE AWAY TO APPROPRIATELY GET THIS ISSUE TO THIS COURT.

CORRECT.

WHICH WAY IS IT? WHAT ALLEGATIONS, IN YOUR HABEAS PETITION, GETS IT BEFORE US, AND WHICH ISSUE THAT YOU HAVE RAISED IN THE DENIAL OF POST-CONVICTION RELIEF, GETS IT BEFORE US?

WHAT MY CONTENTION WAS HIS THAT IT WAS A REVIOLATION OF THE HITCHCOCK ERROR ORIGINALLY, WHICH THIS COURT REVERSED ON, WHICH WAS NEVER RAISED BY TRIAL COUNSEL, SO IT IS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

SO YOU ARE BRINGING IT UP AS PART OF THE DENIAL OF AN EVIDENTIARY HEARING ON YOUR CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AT THE PENALTY PHASE?

CORRECT.

AND WHAT ARE YOU SAYING TRIAL COUNSEL, OR WHAT HAVE YOU ALLEGED IN ORDER TO DETERMINE WHETHER YOU ARE ENTITLED TO AN EVIDENTIARY HEARING ON THAT ISSUE? WHAT HAVE YOU ALLEGED THAT TRIAL COUNSEL -- WHAT WAS THE MISTAKE OF TRIAL COUNSEL THAT YOU ARE FOCUSING ON, WITH REFERENCE TO THIS ISSUE?

IT WAS NEVER COUCHED IN A TERM THAT I HAVE RAISED, THAT WE HAVE RAISED IN THE MOTION, REGARDING A REVIOLATION OF HITCHCOCK. IT WAS ALWAYS OBJECTED TO IN THE FORM OF THE RIGHT NOT TO HAVE CONFRONTED HER, THE RIGHT TO CROSS-EXAMINE NATION. -- CROSS-EXAMINATION.

SO YOU ARE CLAIMING THAT COUNSEL WAS INEFFECTIVE IN NOT SAYING TO THE COURT, IN NOT ALLOWING FURTHER CROSS-EXAMINATION, TO BRING OUT MITIGATION, WAS A VIOLATION OF HITCHCOCK.

ABSOLUTELY.

BUT IF THE WITNESS WAS TRULY UNAVAILABLE, NOW WOULD ANY TRIAL COUNSEL HAVE BEEN ABLE TO CROSS-EXAMINE THE WITNESS WHOSE TESTIMONY HAS ALREADY BEEN GIVEN? IN OTHER WORDS YOU ARE SAYING SHE SHOULD HAVE BEEN ABLE TO -- YOU SHOULD HAVE BEEN ABLE TO ASK ADDITIONAL QUESTIONS TO BARBARA SAVAGE, BUT SHE WASN'T AVAILABLE, SO HOW WOULD A COMPETENT TRIAL COUNSEL HAVE HANDLED THAT, AND HOW COULD IT HAVE BEEN DEALT WITH DIFFERENTLY AT THE TRIAL?

WELL, CERTAINLY IT COULD HAVE BEEN ARGUED TO BE NOT READ, BECAUSE IT VIOLATED HITCHCOCK AGAIN, AND THEREFORE --

DID SHE HAVE EVIDENCE -- WAS SHE, ALSO, TESTIFYING -- SHE WAS ONLY TESTIFYING ON A PENALTY-PHASE ISSUE?

AT THE TIME THAT HER TESTIMONY WAS ONLY FOR A PENALTY-PHASE HEARING, YES, BECAUSE, YES, MR. THOMPSON HAD PLEADED GUILTY TWICE, FOR THE GUILT PHASE.

BECAUSE SHE ONLY TESTIFIED AS TO AGGRAVATING CIRCUMSTANCES, IN THE ORIGINAL TIME. THERE WAS NO OPPORTUNITY TO CROSS-EXAMINE ABOUT MITIGATING. THE TRIAL COURT SHOULDN'T HAVE ALLOWED HER TESTIMONY AT ALL.

NOT ONLY WAS SHE DENIED IT, SPEFS SPECIFICALLY DENIED WHEN THE TRIAL COURT ANSWERED QUESTIONS REGARDING MITIGATION. HE WAS SHUT DOWN COMPLETELY.

THAT WAS THE WAY IT WAS. THAT WASN'T ANYONE'S ERROR AT THAT TIME.

THAT IS THE WAY IT WAS. THAT IS WHY THIS ERROR ON HITCHCOCK. THIS IS VERY IMPORTANT, BECAUSE THE VOTE ON THIS CASE WAS 7-5, SO THIS, AND IT IS IMPORTANT FOR MANY REASONS, BECAUSE MS. SAVAGE HAS INFORMATION REGARDING THE INTOXICATION AT THE TIME OF THE CRIME. THERE WERE NUMEROUS PSYCHOLOGISTS AND PSYCHIATRISTS WHO TESTIFIED IN THIS CASE. THEY ALL TALKED ABOUT INTOXICATION AT THE TIME. THE JUDGE, ON THREE -- THE JUDGE, IN HIS ORDER, DAVE NO CREDIBILITY TO THOSE WITNESSES FOR WHATEVER REASON, BUT THE STATE EFFECTIVELY CROSS-EXAMINED THOSE WITNESSES ON THEIR TESTIMONY REGARDING THE INTOXICATION OF MR. THOMPSON AT THE TIME, BECAUSE IT WAS HIS OWN SELF REPORTING.

I AM HAVING DIFFICULTY WITH WHETHER YOU ARE TALKING ABOUT COUNSEL'S INADEQUACY AT THE TIME OF THE ORIGINAL CROSS-EXAMINATION OR COUNSEL'S INADEQUACY, NOW, WHEN THE TESTIMONY WAS REREAD AT THE SUBSEQUENT, RECENT --

I THINK I AM -- WHAT I AM TALKING ABOUT IS THE IMPORTANCE OF WHY MS. SAVAGE HAD TO BE THERE.

BUT WHOSE -- IN OTHER WORDS WE HAVE GOT ONE COUNSEL THAT WAS THERE WHEN SHE WAS ACTUALLY QUESTIONED BY THE STATE, AND THAT THERE WERE, YOU SAY, FIVE PAGES OF CROSS-EXAMINATION. WE HAVE GOT A DIFFERENT LAWYER, DO WE NOT?

CORRECT. CORRECT.

-- AT THE SUBSEQUENT PENALTY PHASE, WHEN THE TRANSCRIPT OF THAT CAME IN. WHICH COUNSEL IS IT THAT YOU ARE CLAIMING WAS INADEQUATE?

WELL, I AM BEFORE THE COURT CLAIMING THAT THE SECOND COUNSEL, 1989.

THE COUNSEL THAT WAS READ.

HOW, IF SHE WASN'T AVAILABLE, THEN HOW COULD COUNSEL HAVE GOTTEN THIS MITIGATION BEFORE THE JURY, THAT YOU ARE TALKING ABOUT?

WELL, I WOULD LIKE TO TALK ABOUT THE FACT OF HER UNAVAILABILITY IN THAT REGARD AND OUR CLAIM IN OUR 3.850, IS THAT SHE WAS UNAVAILABLE, BASED ON STATE MISCONDUCT. WE RECEIVED DOCUMENTS FROM THE STATE SHOWING THAT --

WELL, WELL, SEE, NOW I AM HAVING DIFFICULTY, IN TERMS OF YOU GOING TO ANOTHER ISSUE, APPARENTLY. IS THAT RIGHT?

WELL, YOU ARE ASKING --

I WANT TO STOP AT THIS ISSUE, IN TERMS OF THE ADEQUACY OF COUNSEL, THE COMPETENCY OF COUNSEL AT THE TIME THIS WAS BEING OFFERED INTO EVIDENCE AT THE RETRIAL, YOU KNOW, OF THE SECOND PENALTY HEARING.

I THINK MY ANSWER TO THAT WOULD BE THE SAME, THAT, AS I ANSWERED TO JUSTICE PARIENTE,

IS THAT HE FAILED TO RAISE THE ISSUE AS I HAVE RAISED IT, AND THAT HE DIDN'T OBJECT AS IT BEING A HITCHCOCK ERROR, AND THEREFORE IT SHOULDN'T HAVE BEEN READ INTO THE RECORD.

SO ARE YOU TELLING US THAT, AT THE ORIGINAL TRIAL OR PENALTY PHASE, WHERE MS. SAVAGE TESTIFIED, SHE WAS ASKED SOME QUESTIONS ABOUT INTOXICATION AND DRUG USE AND THEY CUT HER OFF?

YES, MA'AM, THEY DID.

AND SO NOW YOUR ARGUMENT IS THAT, BECAUSE SHE COULD NOT TESTIFY TO THIS NONSTATUTORY MITIGATING, THAT THE COUNSEL AT THE SECOND PENALTY PHASE SHOULD HAVE OBJECTED TO THE, HER TESTIMONY, UNDER THOSE GROUNDS, AND THEREFORE WOULD NOT -- THAT TESTIMONY WOULD NOT HAVE BEEN READ INTO THE RECORD. IS THAT WHAT YOU ARE SAY SOMETHING.

CORRECT.

LET ME ASK YOU ONE FURTHER QUESTION. WAS THERE ANY TESTIMONY, AT THE PENALTY PHASE, CONCERNING DRUG AND ALCOHOL USE?

AT THIS 1989 OR CURRENT ONE?

THE PENALTY PHASE THAT WE ARE CONCERNED ABOUT.

THE THERE WAS TESTIMONY REGARDING THAT FROM THE EXPERT PSYCHOLOGISTS AND PSYCHIATRIST, AND THEY WERE EFFECTIVELY CROSS-EXAMINATION -- CROSS-EXAMINED, EXCUSE ME, BY THE STATE, SAYING THAT ALL OF THEIR TESTIMONY THAT THEY WERE GIVING WAS SELF REPORTED BY MR. SO MUCH -- BY MR. THOMPSON.

AND AT YOUR 3.850 HEARING, DID YOU PROFESSOR WHAT MS. SAVAGE WOULD HAVE SAID? A LOT OF THE ARGUMENT --

A LOT OF THE ARGUMENT AT THE HUFF HEARING ON THIS CASE SURROUNDED THE RECORDS CLAIMS, THE FIRST CLAIM THAT I WAS DISCUSSING WITH THIS COURT, BUT IT IS IN THE 3.850 MOTION, AND IT IS, I CAN CITE TO THE PAGE AND THE RECORD, IF YOUR HONOR WOULD LIKE.

A PROFESSOR OF WHAT SHE WOULD HAVE SAID.

IT IS A SHORT ONE, BECAUSE ALL WE KNOW IS WE HAVE INDICATION THAT SHE KNEW ABOUT THE INTENTION INDICATION, AND BEER AND -- OF THE INTOXICATION AND BEER AND USING PILLS, BUT SHE WAS CUTOFF FROM THAT, SO WE CAN PROFFER AS MUCH AS WE KNOW, WITHOUT HAVING HAD A FULL -- HAVING HAD FULL TESTIMONY FROM HER. BUT SHE WAS THERE, AND SHE WAS THERE DURING THE WHOLE TIME, AND SHE WAS THERE WHEN THEY WERE ALL -- WHEN THEY WERE USING ALCOHOL AND DRUGS.

I KNOW YOU HAVE USED UP A LOT OF YOUR REBUTTAL. IF YOU WISH TO SAVE SOME, YOU MAY. IF YOU WISH TO PROCEED.

YEAH. I WOULD LIKE TO SAVE SOME TIME FOR REBUTTAL. THANK YOU.

THANK YOU. MS. KOMELLY.

MAY IT PLEASE THE COURT. FARIBA KOMELLY, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. ON THE PUBLIC RECORDS ISSUE, IT IS THE STATE'S POSITION THAT THE TRIAL JUDGE WAS ABSOLUTELY CORRECT IN FINDING THAT THE STATE HAD COMPLIED WITH ITS PUBLIC

RECORDS OBLIGATIONS, TO THE EXTENT THAT IT WAS NECESSARY.

HOW DO WE KNOW -- ON THIS RECORD, SPECIFICALLY AS TO RECORDS ON THE CODEFENDANT, WHICH IS, AT LEAST NOW, A FOCUS OF THE FIRST ISSUE, THAT -- ARE YOU SAYING THAT THE STATE DID PROVIDE THE REQUESTED RECORDS ON THE CODEFENDANT?

YES, MA'AM. THE SECOND SUPPLEMENTAL TRANSCRIPTS, DATED OCTOBER 31, AND, ALSO, THE STATE'S PRELIMINARY RESPONSE. THE STATE ATTORNEY'S POSITION WAS, LOOK, WE ARE UNDER HOFFMAN AND JACKSON. WE HAVE AN OBLIGATION TO TURN OVER THE STATE ATTORNEY'S RECORDS AND THOSE OF THE POLICE AGENCIES CONNECTED WITH US. IN THOSE TERMS, HERE IT IS. WE HAVE PROVIDED 32, 8, 9 PAMINGS OF COPIES. HERE IS THE BILL AND HERE IS THE LETTER FROM THE INVESTIGATOR. THEY PICKED UP THE COPIES. EVERYTHING WE DO HAVE, WITH RESPECT TO THE RESENTENCING, WE HAVE BEGIN TO THEM. NOW, THE ONLY EXEMPTION THAT WE TOOK IS CHAPTER 119 CLEARLY PROVIDES IT DOES NOT APPLY TO ANY RECORDS PRIOR TO 1979, I.E. THE 1976 GUILTY PLEA, WHICH WAS NOT AT ISSUE IN THESE PROCEEDINGS. EVERYTHING WE HAVE, WE HAVE GIVEN IT TO THEM. THE STATE'S SECOND POSITION WAS HERE IS A SECOND LETTER HANDED TO DEFENSE COUNSEL, AGAIN, AT THE OCTOBER 31 HEARING, SAYING METRO DADE POLICE AGENCY, WHICH WAS THE INVESTIGATING POLICE AGENCY, HAS, ALSO, PROVIDED ITS RECORD.

AS TO THE CODEFENDANT AS WELL.

WHATEVER RECORDS WE HAVE. THEY REQUESTED SOMETHING. WE GAVE IT TO THEM. IT IS WHATEVER THAT WE HAVE. WE GAVE IT TO THEM. NOW, THE STATE'S POSITION WAS YOU, ALSO, HAVE A MULTITUDE OF OTHER AGENCIES LISTED IN BOTH THE FIRST MOTION TO VACATE, IN MAY OF '95 AND THE AMENDED MOTION TO VACATE, IN NOVEMBER OF '95. NOVEMBER OF '95. IF THE COURT WOULD TAKE A LOOK AT THE INITIAL MOTION FOR POST CONVICTION RELIEF IN THERE, THERE IS A SPECIFIC NOTATION BY THE DEFENDANT, HIMSELF, SAY SAYING WE KNOW THAT WE HAVE REQUESTED THESE RECORDS, AND IF THESE AGENCIES DO NOT TURNOVER THESE RECORDS, THEN WE HAVE TO FILE CIVIL SUITS, PURSUANT TO 119. THEY SAY THAT IN THE INITIAL ONE. YET IN SUCH THING WAS EVER DONE. THEN THEY -- THEN THEY FILED THE AMENDED MOTION. NOW, BOTH IN THE INITIAL MOTION AND AMENDED MOTION, THERE IS NOT ONE WORD ABOUT SEEKING THE COURT'S ASSISTANCE IN GETTING THESE RECORDS FROM OTHER AGENCIES. I WOULD NOTE, I AM SORRY I FORGOT, THAT THE INITIAL RECORDS REQUEST TO THE STATE ATTORNEY'S OFFICE AND THE METRO DADE, HAD BEEN DONE IN APRIL OF 19958. THE STATE HAD PROVIDED ITS COPIES, PHYSICALLY PICKED UP BY CCR IN MAY OF '95, WITHIN 30 DAYS. IT WAS TIMELY DONE. NOW, WITH RESPECT TO THOSE OTHER AGENCIES, IF THE MOTION IS CLEAR, AND IT IS ONE OF THE ONLY ONES I HAVE EVER SEEN, THERE IS NO REQUEST FOR A PUBLIC RECORDS HEARING. NONE WHATSOEVER. THERE IS NOT ONE WORD ABOUT SEEKING RECOURSE, ASSISTANCE IN DOING ANYTHING ABOUT THE OTHER AGENCIES. IN FACT THEY ARE ACKNOWLEDGING, UNDER 119 WE HAVE TO PROCEED UNDER CIVIL. NOW, WHAT HAPPENED IS THE MOTION GETS SUMMARILY DENIED IN DECEMBER OF '95. AND I REQUESTED A RELINQUISHMENT, BECAUSE THERE WAS NO HUFF HEARING. THIS COURT RELINQUISHED IN AUGUST OF 1995 -- 96. I AM SORRY. IN AUGUST OF 1996, AT WHICH POINT IN TIME, VENTURA VERSUS STATE HAD COME OUT. IT CAME OUT APRIL 26 OF 1996. AT THAT POINT IN TIME, THE OPINION IS VERY CLEAR THAT YOU SHOULD FILE A MOTION TO COMPEL AT THE EARLIEST OPPORTUNITY. AT THE SAME TIME THIS COURT PROPOSED RULE 3.852, AND IT WAS NOT EFFECTIVE. IT DID NOT BECOME EFFECTIVE UNTIL OCTOBER 31 OF THAT YEAR, BUT IT SPECIFICALLY, UNDER PROVISIONS F-2 AND G-3, PROVIDES WITHIN 30 DAYS, YOU HAVE TO FILE A MOTION TO COMPEL. OTHERWISE YOU, QUOTE, WAIVE THE MATTER. NOW, WHAT HAPPENED IN THIS CASE IS WE HAD A HEARING ON OCTOBER 17, AS COUNSEL POINTED OUT. HOWEVER, ON THE OCTOBER 17, THIS RECORD IS VERY, VERY CLEAR THAT DEFENSE COUNSEL RECOGNIZED THEY HAVE AN OBLIGATION TO DO A MOTION TO COMPEL. AND THIS IS AT THE SUPPLEMENTAL TRANSCRIPTS, PAGE 870, COUNSEL SPECIFICALLY SAID "I WOULD LIKE TO PURSUE CHAPTER 119 OF THE PUBLIC RECORDS. WE WOULD LIKE TIME TO FILE A MOTION TO COMPEL." THE JUDGE SAYS I

AM HAVING ANOTHER HEARING ON OCTOBER 31. I WILL HEAR ALL THE MOTIONS. ON OCTOBER 31, WE, THEN, COME BACK AND COUNSEL, AGAIN, ACKNOWLEDGES, AND I QUOTE, THIS IS FROM THE SECOND SUPPLEMENTAL TRANSCRIPTS IN THE RECORD ON APPEAL, OCTOBER 31 HEARING, AT PAGE 4. WHAT NORMALLY HAPPENS IN THESE TYPES OF PROCEEDINGS IS THAT WE DEAL WITH THE PUBLIC RECORDS ISSUES INITIALLY. SHE GOES ON TO SAY "IT USUALLY CONSISTS OF CHAPTER 119 HEARINGS, AFTER A MOTION TO COMPEL HAS BEEN FILED, SO MY SUGGESTION WOULD BE WE PROVIDE A LISTING TO THE COURT OF THE OUTSTANDING CHAPTER 119 ISSUES, SO IT IS A MATTER OF CONCERN." COUNSEL GOES ON TO SAY, IN THE TRANSCRIPT, THAT SOME OF THE OUTSIDE AGENCIES HE LISTED IN THE ORIGINAL MOTION AND OUR AMENDED MOTION IN 1995, THEY HAVE SINCE COMPLIED, SO WE HAVE A DIFFERENT LISTING. MY POINT IS AT NONE OF THESE HEARINGS IS THERE ANY MOTION TO COMPEL TO TELL US, OKAY, FINE, WHAT NEW AGENCIES HAVE NOT COMPLIED? OR COME IN AND SEEK A HEARING AND GIVE US NOTICE WHO IT IS THAT YOU WANT TO HAVE A HEARING WITH, TO FIND OUT WHAT RECORDS HAVE NOT BEEN PRODUCED.

AT THOSE SUBSEQUENT HEARINGS, WAS THERE EVER ANY CONTINUED ALLEGATION ON, THE PART OF CCR, THAT, AS TO THE PRODUCTION FROM STATE ATTORNEYS OFFICE AND METRO DADE POLICE, THAT THAT STILL WAS INCOMPLETE? IN OTHER WORDS WAS --

NO. NO. THIS IS --

ONLY AS TO THE OTHER --

THE HEARING IS AFTER THE -- CERTAINLY IT IS OCTOBER 31 OF 1996. IT IS AFTER THE INITIAL AND AMENDED MOTIONS, SAYING NONCOMPLIANCE. THERE IS NO DISPUTE WITH THE STATE HAS COMPLIED.

THERE IS NO ASSERTION AS TO YOUR AGENCY.

AS TO THE STATE ATTORNEYS AND THE POLICE DEPARTMENTS, AND THE STATE'S POSITION IS, LOOK, WE HAVE GIVEN YOU EVERYTHING THAT WE HAD TO DO, UNDER HOFFMAN AND JACKSON. WE ARE SUPPOSED TO PROVIDE OUR OWN RECORDS AND THOSE OF THE POLICE AGENCIES. THAT WE HAVE DONE. FOR THE REST OF THOSE AGENCIES, YOU NEED TO GO UNDER PUBLIC RECORDS. OR, SINCE WE ARE NOW AFTER THE RELINQUISHMENT PERIOD, THE STATE'S POSITION WAS, OKAY, FINE. FILE YOUR MOTION TO COMPEL, YET WE HAVE TWO HEARINGS, DEFINITIVE ACKNOWLEDGMENTS BY THE DEFENDANT, ON THE RECORD, THAT A MOTION TO COMPEL NEEDS TO BE FILED, BECAUSE THEY ARE ADMITTING THE STATUS HAS CHANGED, YET THE NOTICE OF APPEAL IN THIS CASE IS FILED MARCH 25 OF 1997, AND THERE IS ABSOLUTELY NO MOTION TO COMPEL. AND THE STATE'S POSITION IS I AM SORRY, BUT 3.852 BECAME EFFECTIVE. THERE ARE TWO PROVISIONS, F-2 AND G-3, THAT SAY YOU HAVE TO FILE YOUR MOTION TO COMPEL. OTHERWISE YOU HAVE WAIVED IT.

WHAT WAS YOUR POSITION AT THE OCTOBER 31 HEARING, AS TO THE OTHER AGENCIES?

AS TO THE OTHER AGENCIES, THAT IT HAS BEEN WAIVED, PURSUE THEM. YOU HAVEN'T PURSUED THEM. WE FILED A PRELIMINARY RESPONSE. IT WASN'T ONLY AT THE OCTOBER 31. AFTER THE RELINQUISHMENT, THE STATE ATTORNEYS OFFICE FILED A PRELIMINARY RESPONSE SAYING, LOOK, WE HAVE PRODUCED THE RECORDS, UNDER LOPEZ V SINGLETARY. IF YOU HAVE AN OBJECTION TO THE RECORDS, TAKE IT UP WITH THE TRIAL COURT JUDGE, PURSUE IT. OTHERWISE IT IS WAIVED.

SO BY OCTOBER 31, 1996, EVEN IF A MOTION HAD BEEN FILED, IT WAS POSITION IT HAD BEEN WAIVED?

NONE HAD BEEN EVER FILED. NO. AT THAT POINT IN TIME, THE RULE HAD GONE INTO EFFECT, AND WE HAVE 30 DAYS. NOW, THIS COURT SUBSEQUENTLY TOLD 3.852, UNTIL NOVEMBER OF '96,

WITH FOUR DAYS RUNNING, THEY TOLD IT IN NOVEMBER OF '96 -- THEY TOLLED IT IN NOVEMBER OF '96, BUT THE TOLLING ENDED ON MARCH 31. AS I SAID BEFORE, THIS CASE WAS TILED ON MARCH 25 -- WAS FILED ON MARCH 25, 1997. THE TOLLING HAD LONG BEEN OVER. THERE WAS NO MOTION TO COMPEL FILED. AS I SAID IN THE TRIAL BRIEF, THAT, BECAUSE WE HAD A MOTION TO DISQUALIFY PENDING, WE COULDN'T FILE ANY PLEADINGS. THERE IS ABSOLUTELY NO AUTHORITY IN LAW FOR THAT. IN FACT THE DEFENDANT DID THE MOTION AFTER THE MOTION FOR DISQUALIFICATION WAS FILED. THERE WERE OTHER PLEADINGS. CLEARLY A MOTION TO COMPEL COULD HAVE BEEN FILED. THE STATE, WITH ALL DUE RESPECT, CANNOT FIGURE OUT, WHEN COUNSEL IS ON THE RECORD SAYING, LOOK, MY ALLEGATIONS FROM 1995 HAVE NOW CHANGED. THERE ARE ADDITIONAL AGENCIES, BUT I DON'T KNOW WHAT THOSE AGENCIES ARE. I CAN'T NOTICE THEM FOR HEARING.

IS THERE ANYTHING IN THE RECORD, EITHER IN WRITING. ORELON: ALLY IN A HEARING, WHERE COUNSEL FOR THE DEFENDANT DESIGNATES,, WELL, WE HAVE RECEIVED THIS BUT WE HAVEN'T RECEIVED THIS. JUDGE, WE WANT YOU TO HELP US GET THESE OTHER RECORDS?

AT THE HEARINGS, NO, SIR. AT THE HEARINGS, ALL THE ALLEGATIONS ARE OH, WELL, THEY HAVE CHANGED. I AM NOT GOING TO TELL BECAUSE THE CHANGE IS. IN THE ORIGINAL MAY 1995 HEARING, AND THE NOVEMBER 8, 1995, HEARING, THERE WERE ALLEGATIONS, NOT AS TO WHAT WE HAVE RECEIVED BUT AS TO WHAT WE HAVE NOT RECEIVED. BUT, THEN, YOU HAVE THE SUBSEQUENT HEARINGS, WHERE COUNSEL ARE SAYING WE NEED A MOTION TO COMPEL. THE STATUS HAS CHANGED, AND AFTER THE INITIAL DESIGNATION, AFTER WE CAME BACK FROM THE RELINQUISHMENT, ON THE RELINQUISHMENT, NO, SIR. ON THE HEARINGS OR IN WRITING, THERE IS NONE. WITH RESPECT TO THE SECOND ISSUE, THE HITCHCOCK CLAIM, AS I UNDERSTAND THE CLAIM, IT WAS RAISED IN TERMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, FOR HAVING FAILED TO RAISE A HITCHCOCK ISSUE AT THE 1989 RESENTENCING. ANY CLAIM AS TO THE CROSS-EXAMINATION, 1978, HAS BEEN WAIVED AT THIS POINT, BECAUSE WITH RESPECT TO THE GUILT PORTION AND THE INEFFECTIVE ASSISTANCE OF COUNSEL, AS TO THE GUILT PORTIONS, WE HAVE HAD TWO PRIOR POST-CONVICTION PROCEEDINGS IN THIS CASE, ONCE IN 1982 AND ONCE IN 1987, WHERE THOSE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL WERE RAISED. NOW, BARBARA SAVAGE TESTIFIED AS TO THE FACTS OF THIS CRIME. THE CLAIM, AS I UNDERSTAND IT, WAS RAISED THAT THERE SHOULD HAVE BEEN A HITCHCOCK OBJECTION AT THE 1985, BY THE DIFFERENT COUNSEL WHO WAS REPRESENTING THE DEFENDANT AT THE 1989 RESENTENCING, AND APPELLATE COUNSEL WAS, ALSO, INEFFECTIVE FOR HAVING RAISED, FAILED TO RAISE THE ISSUE ON APPEAL. THE STATE'S POSITION IN THE COURT BELOW WAS THAT, IN FACT, TRIAL RESENTENCING COUNSEL IN 1989 HAD RAISED THE HITCHCOCK OBJECTION AND THAT IS IN THE RECORD OF THE RESENTENCING PROCEEDINGS, PAGES 928-31, AND PAGE 943. IT IS CITED ON PAGE 55 OF THE STATE'S BRIEF. AS TO THE APPEAL, THE BRIEFS OF THE PARTIES, ON APPEAL, HAD BEEN PROVIDED TO THE POST-CONVICTION COURT BELOW, AND THOSE BRIEFS ARE A PART OF THIS RECORD, AS WELL. APPELLATE COUNSEL SPECIFICALLY PRESENTED ISSUE AND SPECIFICALLY CITED TO HITCHCOCK ON THIS, AND, AGAIN, I HAVE CITED THE PORTIONS OF THE BRIEF. IT IS ON MY -- PAGE 55 OF MY BRIEF. SO IT HAS BEEN RAISED. IT HAS BEEN RAISED. IT WAS REJECTED BY THIS COURT. YOU CAN'T HAVE INEFFECTIVE ASSISTANCE OF COUNSEL. THEY DID THEIR JOB. THEY MADE THE OBJECTION.

THEY MADE THE OBJECTION THAT BARBARA SAVAGE'S PRIOR TESTIMONY SHOULDN'T HAVE BEEN --

READ.

ROW ROW READMITTED IN THE SENTENCING, BECAUSE IT WOULD VIOLATE HITCHCOCK?

YES.

AND THAT WAS ALSO RAISEED?

IT WAS RAISED AT THE RESENTENCING. IT WAS RAISED ON DROCKT APPEAL OF THE RESENTENCING AND REJECTED BY THIS COURT. PORTIONS OF THE BRIEFS ACTUALLY CITING TO HITCHCOCK, I HAVE, IT IS SPCR 570 AND THEN 730-732. IT IS ALL CITED ON PAGE 55 OF MY BRIEF, BUT THE CLAIM, ASIDE FROM IT WAS RAISED, THERE FOR YOU CAN'T RELITIGATE IT UNDER ADVICE WAS INEFFECTIVE, IS ONE ARGUMENT. SECONDLY AND MORE IMPORTANT IS THIS IS NOT A CASE WHERE BARBARA SAVAGE'S TESTIMONY WENT AS TO THE FACTUAL CIRCUMSTANCES OF THE CRIME. WITH RESPECT TO THAT ON THIS RECORD, WE HAVE THE DEFENDANT'S OWN CONFESSION IMMEDIATELY AFTER THE CRIMES, ESTABLISHING THE FACTS OF THE CRIME. WE HAVE THE DEFENDANT'S SWORN TESTIMONY AT THE CODEFENDANT'S TRIAL, TWO YEARS LATER IN 1978, WHERE HE WENT INTO THE SAME FACTS AND TOOK FULL RESPONSIBILITY. THAT WAS ADMITTED AT THE RESENTENCING, IN ADDITION TO THE CONFESSION, AND AT THE RESENTENCING, WE, ALSO, HAD TESTIMONY FROM THE CODEFENDANT AT THE 1989 RESENTENCING. THE CODEFENDANT, ALSO, COME IN AND GAVE LIVE TESTIMONY, AS TO THE FACTUAL CIRCUMSTANCES OF THE CRIME. IT IS ALL CORROBORATED.

I GUESS I THOUGHT THE CLAIM WAS, SOMEHOW, SOME TYPE OF INEFFECTIVENESS IN NOT MAKING SURE THE RESENTENCING JURY RECEIVED EVIDENCE MITIGATING EVIDENCE, OF DRUG AND ALCOHOL USE.

MY UNDERSTANDING HAD BEEN FROM THE BRIEFS IT IS, LIKE, OH, WELL, HER TESTIMONY WENT TO AGGRAVATING CIRCUMSTANCES, AND I WANTED TO CLARIFY THAT IT IS THE FACTUAL CIRCUMSTANCES OF CRIME AND SEPARATE AND APART FROM HER TESTIMONY, WE HAD THE CONFESSION. WE HAD THE DEFENDANT'S OWN TESTIMONY PREVIOUSLY.

I THOUGHT HE PLEADED GUILTY.

PLED GUILTY PLUS I AM SAYING THE PURE FACT YIL -- FACTUAL CIRCUMSTANCES THAT THE DEFENDANT TESTIFIED TO IS CORROBORATED BY HIS 1976 CONFESSION, HIS CODEFENDANT'S TESTIMONY AT THE CODEFENDANT'S TRIAL, AND THE CODEFENDANT'S LIVE TESTIMONY IN 1989. SO THAT IS BESIDES THE POINT. ON THE CROSS-EXAMINATION, WHERE COUNSEL WAS CUTOFF, THERE WAS, BY THE WAY, NO PROFFER OF WHAT SAVAGE WOULD TESTIFY TO, BECAUSE WE TESTIFIED THAT SHE WAS UNAVAILABLE. NO ONE COULD FIND HER. BUT THE MITIGATION DID COME IN. WHAT HAPPENED IN THIS CASE, AS I POINTED OUT BEFORE, IS THERE WERE PRIOR POST-CONVICTION PROCEEDINGS. IN 1987, WE HAD A SECOND MOTION FOR POST-CONVICTION RELIEF, AND DEFENDANT WAS REPRESENTED BY CCR MEMBERS. THE CCR MEMBERS, IN 1987, TWO YEARS PRIOR TO THE RESENTENCING IN THIS CASE, WENT OUT, FOUND SAVAGE, GOT A MITIGATION AFFIDAVIT FROM HER. THAT AFFIDAVIT, WITH RESPECT TO MITIGATION, THE TRIAL JUDGE ALLOWED THE DEFENDANT TO READ THAT AFFIDAVIT TO THE RESENTENCING JURY. THEY HAD IT BEFORE THEM. SEPARATE AND APART FROM WHAT MITIGATION, THE MITIGATION THAT WAS ACTUALLY READ TO THE RESENTENCING JURY IN 1989. SEPARATE AND APART FROM THAT, IN THESE POST-CONVICTION PROCEEDINGS, WE HAVE NO ADDITIONAL PROFFER, SO --

DID SHE TALK, IN THAT AFFIDAVIT, ABOUT INTOXICATION AND DRUG USE?

SHE TALKED ABOUT USE OF ALCOHOL, TO THE BEST OF MY RECOLLECTION, ABOUT BOTH OF THE CODEFENDANTS. IT WAS NOT AARON EW OF -- IT WAS NOT A ISSUE OF INTOXICATION.

BUT THAT CLEARLY DEMONSTRATES THAT THEY HAD AN OPPORTUNITY TO PRESENT HER EVIDENCE ABOUT INTOXICATION AND DRUGS.

THAT IS MY POINT. NOT ONLY WAS THERE AN OPPORTUNITY, THE RESENTENCING JUDGE ALLOWED THEM. WE HAVE TWO PORTIONS FROM SAVAGE. FIRST IS FROM HER 1978 TESTIMONY WITH REGARD TO THE FACTUAL CIRCUMSTANCES OF THE CASE, AND THEN THE RESENTENCING

JUDGE ALLOWED THE DEFENDANT TO PRESENT THE 1987 AFFIDAVIT, WITH RESPECT TO THE MITIGATION.

BUT WHATEVER DIDN'T COME IN ABOUT INTOXICATION AND DRUG USE IN THE CROSS-EXAMINATION --

CAME INTO THE AFFIDAVIT.

-- CAME IN THROUGH THE AFFIDAVIT. IS THAT CORRECT?

EXACTLY. CAME IN THROUGH THE AFFIDAVIT, AND SEPARATE AND ABOVE AND BEYOND WHATEVER IS CONTAINED IN THAT AFFIDAVIT, THERE ARE NO ALLEGATIONS IN THE POST-CONVICTION MOTION OR AT THE HUFF HEARING OR AT ANY OF THE OTHER HEARINGS, WHICH IS WHY THE STATE'S POSITION IS, LOOK, YOU RAISED HITCHCOCK AT TRIAL. YOU RAISED HITCHCOCK ON APPEAL OF THE RESENTENCING, AND THIS COURT REJECTED IT. WITH GOOD REASON. SO NOW YOU CAN'T TURN AROUND AND RELITIGATE IT IN TERMS OF OH, WELL, THEY DIDN'T RAISE IT IN PRECISELY THE TERMS THAT HE I AM RAISING IT NOW, BUT SEPARATE AND APART FROM THAT, IF YOU ARE GOING ON THE FACTUAL CIRCUMSTANCES OF HER TESTIMONY, I AM SORRY, BUT IT WAS CORROBORATED BY THE DEFENDANT, HIMSELF. CONFESSION. TESTIMONY, AND THE CODEFENDANT'S TESTIMONY. IF YOU ARE GOING AS TO THE MITIGATION ASPECT OF IT, THE AFFIDAVIT WAS READ TO THE JURY, AND NOTHING ABOVE AND BEYOND THAT HAS EVER BEEN PROVEERRED. -- PROFFERED. I BELIEVE I HAVE ADDRESSED EVERYTHING THAT WAS RAISED, UNLESS THE COURT HAS QUESTIONS ON OTHER ISSUES, PERHAPS, THAT HAVE BEEN RAISED IN THE BRIEF THAT I COULD ADDRESS, I WOULD REST ON MY BRIEF. AND RESPECTFULLY REQUEST THAT THIS COURT AFFIRM THE LOWER COURT'S DENIAL OF POST-CONVICTION RELIEF, AND THAT THIS COURT, ALSO, DENY HABEAS CORPUS RELIEF. THANK YOU.

THANK YOU. MISS DOANE-HOE.

THANK YOU, YOUR HONOR. MAY IT -- MISS DOMOHO.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I ASK TO LOOK AT THE AFFIDAVIT OF BARBARA SAVAGE, AND NOT ONE PLACE DOES SHE TALK ABOUT INTOXICATION. NOT ONE PLACE. IT IS DEVOID OF THAT. THIS AFFIDAVIT TALKS ONLY ABOUT THE INFLUENCE THAT THE CODEFENDANT HAD ON MR. THOMPSON.

WELL, IS THERE ANY SHOWING, THOUGH, THAT THE TRIAL COURT LIMITED HER AFFIDAVIT OR EVIDENCE ABOUT ALCOHOL AND DRUG USE?

THIS AFTERWARD EIGHT WAS PREPARED IN 1987 -- THIS AFTERWARD EIGHT WAS -- THIS AFFIDAVIT WAS PREPARED IN 1987 FOR A WARRANT AT THE TIME, AND COUNSEL WHO PREPARED THIS AT THE TIME, I AM SURE, WAS ACTING ON A BELIEF OF PRESENTING EVIDENCE THAT WOULD BE PRESENTABLE FOR A WARRANT LITIGATION AT THE TIME. THIS WASN'T MADE IN PURSUIT OF FINDING EVERYTHING OUT FOR ANOTHER RESENTENCING.

WHAT DOES THE RECORD TELL US, KNOW, ABOUT THE UNAVAILABILITY OF SAVAGE -- TELL US, THOUGH, ABOUT THE UNAVAILABILITY OF SAVAGE, EITHER THROUGH HER AFFIDAVIT OR AT THE TESTIMONY AT THE SECOND SENTENCING TO GIVE EVIDENCE ABOUT ALCOHOL AND DRUG USE?

THE -- WHAT IS INTERESTING ABOUT THIS AFFIDAVIT -- LET ME ANSWER YOUR QUESTION, YOUR HONOR. THE STATE CAME FORWARD AND PUT ON AN INVESTIGATOR THAT SAID WE CAN'T FIND HER. WE WENT OUT. WE SPOKE TO HER A WHILE AGO. WE WE TOLD HER TO CALL US. WE CAN'T FIND HER. WE SENT SOMEBODY OUT IN GEORGIA TO FIND HER. WE CAN'T FIND HER. THE DEFENSE ATTORNEY PUT ON EVIDENCE, THROUGH THEIR OWN INVESTIGATE OR, THAT THEY HAD INFORMATION ABOUT WHERE SHE MIGHT BE BUT HAD ALWAYS ACTED UNDER THE BELIEF THAT -

-

THEY WHO?

THAT THE DEFENSE HAD AN INVESTIGATOR, HAD INFORMATION ABOUT WHERE SHE MIGHT BE. THEY HAD CONTACT WITH HER MOTHER. THEY FOUND OUT THAT HER CHILDREN WERE IN PUBLIC SCHOOL IN GEORGIA. NONE OF THIS INFORMATION WAS FOUND OUT ABOUT THE STATE ATTORNEY'S OFFICE. THEY WALTZED IN ON VERY MINIMAL INFORMATION.

SO THE DEFENSE HAD ALL OF THIS INFORMATION. WHY DIDN'T THE DEFENSE ATTEMPT TO --

THEY DID, YOUR HONOR. THEY REQUESTED FUNDS FOR INVESTIGATION, AND THEY REQUESTED TIME, AND THEY WERE DENIED BOTH.

BUT AREN'T YOU SAYING THAT THE DEFENSE KNEW WHERE SHE WAS? IS THAT WHAT YOU JUST SAID?

THEY HAD INFORMATION THAT COULD LOCATE HER, BUT THEY NEVER ACTUALLY FOUND HER. THEY NEVER -- THEY FOUND THE MOTHER, AND THEY FOUND OUT -- IT IS UNAVAILABLE TO THE DEFENSE TO GET SCHOOL RECORDS. THE STATE CAN GET SCHOOL RECORDS AND FIND OUT WHERE PARENTS ARE, BUT DEFENSE CAN'T GET SCHOOL RECORDS AND FIND OUT WHERE PARENTS ARE. AND THE DEFENSE WAS DOING -- HAD THEIR INVESTIGATOR, WAS ACTUALLY DOING SOMETHING FOR THEM FOR A FAVOR, AS HE IS DRIVING THROUGH GEORGIA. SO THE DEFENSE HAD INFORMATION THAT SHE COULD BE LOCATED, THAT THE STATE NEVER TAPPED INTO, AND THEN THE JUDGE DENIED COUNSEL ACCESS TO GO GET HER, THROUGH FUNDS AND THROUGH TIME.

IS THE OPPONENT CORRECT THAT THERE ARE OBJECTIONS ABOUT HITCHCOCK ON THE RECORD AND, ALSO, THAT IT WAS RAISED AS AN ISSUE?

I DISAGREE. YES. THE CASE IS CITED. HOWEVER, IT IS CITED IN THE CONTEXT OF THE RIGHT TO CONFRONTATION AND THE RIGHT TO CROSS-EXAMINATION, AND THIS COURT'S OPINION STATES THAT. THIS COURT'S OPINION ONLY ADDRESSES THE RIGHT TO CONFRONTATION, THE RIGHT TO CROSS-EXAMINE. IT DOESN'T --

THAT IS THE ONLY CONTEXT IN BOTH THE OBJECTION ON THE RECORD AND IN THE ISSUE RAISED ON --

THAT IS MY -- THAT IS HOW I READ THE RECORD. YES, YOUR HONOR. I READ IT AS SORT OF THROWING IN HITCHCOCK. WHAT HE IS SAYING IS WE SHOULD HAVE A RIGHT TO CROSS. WE SHOULD HAVE A RIGHT TO CONFRONT, BECAUSE HITCHCOCK SAYS WE ARE ALLOWED TO, NEVER SAYING THAT THIS IS A REVIOLATION OF IT AND THIS EVIDENCE SHOULDN'T BE PRESENTED, AND ESPECIALLY WHEN WE HAVE INFORMATION THAT WE KNOW WE CAN GET THIS WITNESS, AND THE STATE HASN'T DONE EVERYTHING THEY COULD TO GET THE WITNESS.

JUSTTIS SHAW HAS -- JUSTICE SHAW HAS A QUESTION.

LET ME ASK YOU THIS. IF THE STATE DOES NOT HAVE THE ADDRESS AFTER WITNESS, BUT AS YOU SUGGEST, THEY CAN DO THING THAT IS THE AVERAGE CITIZEN CANNOT DO AND SUBPOENA RECORDS AND SO FORTH. WHAT -- IS THAT A OBLIGATION ON THE STATE TO DO THAT? HOW FAR DOES THE STATE HAVE TO GO IN THAT VEIN OR CAN THEY SIMPLY ANSWER WE DON'T KNOW? WE DON'T HAVE THE ADDRESS OF THAT WITNESS? HAVEN'T THEY FULFILLED THE OBLIGATION AT THAT POINT, IF THAT IS A TRUE STATEMENT?

MY CONTENTION IS, NO, THEY HAVEN'T. IF THEY HAVEN'T DONE DUE DILIGENCE TO FIND THIS

PERSON THROUGH TLIR SOURCES AND JUST DONE A FEW THINGS AND THROWN UP THEIR HANDS AND SAID WE CAN'T FIND HER, THEN I SUBMIT TO THIS COURT THAT THAT IS NOT ENOUGH.

DIDN'T THIS COURT ADDRESS THAT PARTICULAR ISSUE IN THE LAST OPINION, AND DIDN'T THEY SAY THAT THE STATE HAD, IN FACT, ISSUED A WITNESS SUBPOENAED AND HAD COMPLIED WITH CHAPTER 942? -- CHAPTER 9.42?

WHAT WE HAVE SENTENCE FOUND OUT, THROUGH PUBLIC RECORDS, IS THERE A IS A POSSIBILITY THAT THE STATE WAS CAUSING MS. SAVAGE OF NOT WANTING HER TO APPEAR, THROUGH TACTICS OF BEING AFRAID, THREATENING HER WITH POLICE ACTION AND SUCH.

IF SHE DIDN'T COME, NOT IF SHE DID COME.

CORRECT, BUT I THINK THERE IS DEFINITELY A STATE ACTION THERE TO BE PURD USED IN AN EVIDENTIARY -- PURSUED IN AN EVIDENTIARY HEARING AS TO WHY SHE DID NOT RESPOND AND SHOW UP.

THANK YOU. WE APPRECIATE YOUR ASSISTANCE.