GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE COURT CALENDAR IS DAVID COOK VERSUS THE STATE OF FLORIDA. MS. DAY, YOU MAY PROCEED.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM RACHEL DAY FROM CAPITAL COLLATERAL REGIONAL COUNSEL SOUTH IN FT. LAUDERDALE, AND I AM HERE ON BEHALF OF APPELLANT DAVID COOK, WHO APPEALS THE SUMMARY DENIAL OF HIS RULE 3.850 MOTION. THIS IS A CAPITAL CASE. MR. COOK WAS TRIED, CONVICTED, AND SENTENCED TO DEATH IN MIAMI, IN 1985.

WOULD YOU SPEAK UP JUST A LITTLE BIT.

I AM SORRY, YOUR HONOR.

I DON'T KNOW WHETHER PULLING THE MIKE FORWARD WOULD HELP OR NOT.

IS THAT BETTER?

THANK YOU.

OKAY. HE WAS TRIED, SENTENCED TO DEATH IN MIAMI IN 1985. ON DIRECT APPEAL, THIS COURT ELIMINATED TWO OF 9 THE AGGRAVATING CIRCSTANDS THAT THE TRIAL COURT HAD FOUND AND SENT IT BACK TO THE JUDGE FOR RESENTENCING. THE JUDGE, AGAIN, SENTENCED MR. COOK TO DEATH AND THIS COURT AFFIRMED, AT WHICH POINT MR. COOK FILED A 3.850 MOTION. THE COURT SUMMARILY DENIED THE RULE 3.850 MOTION, AND WE CLAIM IS ERRONEOUS, BECAUSE MR. COOK CLAIMS, IN HIS 3.850 MOTION, NUMEROUS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, INCLUDING THAT HE FAILED TO ADEQUATELY INVESTIGATE MR. COOK'S CASE. WHAT IS SURPRISING IS THAT THE RECORD --

WHAT IS MY PROBLEM WITH THIS CASE IS THIS CASE LOOKS TO ME LIKE IT IS JUST A PERFECT EXAMPLE OF WHAT IS GOING ON IN THE TRIAL COURTS, WITH THE FACT THAT THESE THINGS DRAG OUT FOR 16 YEARS. I MEAN HERE WE SHOW UP, IN 1996, AND ARE CLAIMING THAT THIS THING SHOULDN'T GO FORWARD, BECAUSE WE HADN'T GOT A RECORD THAT WE REQUESTED IN 1992! NOW, WHAT WAS GOING ON? I KNOW YOU WEREN'T THERE, FROM '92 TO '96, BUT YOU WERE THERE IN 1996. RIGHT?

I APPEARED IN THE ONE HEARING THAT HAPPENED IN THIS CASE, IN 1996. THE RECORD OF THE 3.850 PROCEEDINGS IS NOT QUITE CLEAR AS TO WHAT HAPPENED, BUT I DO KNOW, YOUR HONOR, THAT, AFTER THE RESENTENCING OF MR. COOK, TO DEATH, WAS AFFIRMED BY THIS COURT, MR. COOK DID FILE HIS RULE 3.850 MOTION, AND THIS WAS A TIME WHEN HE HAD TWO YEARS FROM THE DATE OF THE CONVICTION BECAME FINAL TO DO. THAT HE FILED A MOTION SOME NINE MONTHS BEFORE THAT TWO-YEAR ANNIVERSARY AND THEN SUPPLEMENTED IT, WITH ADDITIONAL CLAIMS, ON THE TWO-YEAR ANNIVERSARY.

AFTER YOU WENT TO THIS HEARING IN 1996, AND SAID I DON'T HAVE THIS RECORD OR THESE RECORDS THAT WE REQUESTED IN 1992, DID YOUR OFFICE DO ANYTHING ELSE TO TRY TO GET THAT RECORD?

WE ARE TALKING ABOUT THE PUBLIC RECORDS, YOUR HONOR.

RIGHT.

WHAT HAPPENED WAS WE HAD FILED A 3.850, WHICH HAD STATED THAT THERE WERE PUBLIC RECORDS ISSUES OUTSTANDING. THE SUPPLEMENT, AGAIN, REFERRED TO THE PUBLIC RECORDS ISSUES, IN 1993, AND REQUESTED A HEARING ON THE PUBLIC RECORDS ISSUES. AT THAT POINT, THE STATE, THEN, FILED A MOTION TO REQUEST THAT THE CASE BE TRANSFERRED FROM THE JUDGE WHO WAS APPARENTLY ASSIGNED TO IT, AT THAT POINT IN MIAMI, TO THE ORIGINAL TRIAL JUDGE, JUDGE CONNIE, AND THEN, AT THAT POINT, I AM NOT SURE WHAT HAPPENED BETWEEN 1993 AND 1996. IT WAS EVENTUALLY TRANSFERRED TO JUDGE CARNEY, BUT IT APPEARS TO BE LOST IN THE DADE COUNTY SYSTEM BETWEEN 1993 AND 1996.

WHAT ABOUT THIS HEARING THAT TOOK PLACE, WHEN HE RULED ON THE MOTION IN 1997?

MR. COOK FILED A MOTION FOR REHEARING AND PRESERVED HIS ISSUES THERE IN.

WAS THERE ANY ADDITIONAL EFFORT MADE TO GO GET PUBLIC RECORDS? ANOTHER PUBLIC RECORDS, ATTEMPTS CONTINUE, BUT WE HAD FILED, WE HAD PUT THE COURSE ON NOTICE THAT WE WANTED TO LITIGATE T THE COURT DENIED IT. HE DENIED IT IN HIS WRITTEN MOTION. WE FILED A MOTION FOR REHEARING. THAT WAS ALL WE COULD DO AT THIS POINT, WITHIN THE COURT SYSTEM, YOUR HONOR.

AM I CORRECT THE MOTION FOR REHEARING WAS UNDER ADVISEMENT FOR ABOUT A YEAR?

I AM NOT SURE EXACTLY HOW LONG, BUT FOR SOME TIME THE TRIAL COURT DID NOT RULE ON IT. YOU ARE CORRECT, YOUR HONOR. AS I MENTIONED, THE CASE WAS SUMMARILY DENIED, EVEN THOUGH MR. COOK PLED NUMEROUS ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF HIS TRIAL COUNSEL, AND I THINK THE RECORD REFLECTS THIS, PARTICULARLY IN THE PENALTY PHASE OF MR. COOK APARTMENTS TRIAL, WHERE IT IS GRAPHICALLY CLEAR THAT TRIAL COUNSEL DID NOT AGAIN TO INVESTIGATE MR. COOK'S MENTAL HEALTH CONDITION, UNTIL THE VERY DAY THAT THE PENALTY PHASE WAS DUE TO BEGIN. THE TRIAL TOOK PLACE ON WEDNESDAY, THURSDAY AND FRIDAY, THE 6, 7 AND 8 OF AUGUST, 1995. THE PENALTY PHASE WAS SET TO BEGIN ON MONDAY, THE 12th. ON MONDAY, THE 12th, TRIAL COURT APPEARED AT COURT AND ONLY THEN REQUESTED MENTAL HEALTH ASSISTANCE, TO SEE WHETHER OR NOT DAVID COOK COULD PRODUCE ANY MENTAL HEALTH INVESTIGATION. HE HADN'T ORDERED IT AT -- REQUESTED IT OVER THE WEEKEND OR DURING THE TRIAL.

DID YOU APPEAR AT THE HEARING TO EXPLAIN TO THE JUDGE WHY AN EVIDENTIARY HEARING WAS NECESSARY? WERE YOU NOT FAMILIAR ENOUGH WITH THE FILE, AT THAT TIME, TO MAKE THOSE ARGUMENTS?

AT THAT POINT I WAS NOT FAMILIAR AT ALL. WATCHED WAS THE CCR HAD -- WHAT HAPPENED WAS THE CCR HAD, JUST LAST MONTH, OPENED THE MIAMI OFFICE. I WAS WORKING ON THE JON MILLS CASE AND AT THAT POINT WAS OPENING UP THE OTHER CCR OFFICE IN TAMP.

THIS IS A REHEARING THAT HAD BEEN SET FROM THE SUMMER UNTIL NOVEMBER.

THAT'S CORRECT, YOUR HONOR.

WHAT WAS SUPPOSED TO BE HEARD AT THIS HEARING?

WELL, MY UNDERSTANDING, AT THE TIME THAT I WENT TO THE HEARING, WAS THAT IT WAS GOING TO BE A STATUS CONFERENCE, TO DEAL WITH THE NUMEROUS OUTSTANDING PUBLIC RECORDS MATTERS. MR. COOK HAD FILED A MOTION TO COMPEL, WHICH HAD NOT BEEN HEARD. HE FILED THE MOTION TO COMPEL, AND A HEARING BEEN SET. THE ASSUMPTION WAS THAT THAT WOULD HAVE TO BE DEALT WITH, BEFORE THE CASE --

WHAT DID THE NOTICE OF HEARING ACTUALLY SAY?

IT SAID THERE IS GOING TO BE A HEARING ON THE RULE 3.850 MOTION, WHICH CAN MEAN MANY THINGS FORMS IT -- MANY THINGS. IT CAN MEAN MANY KINDS OF HEARINGS AT THIS POINT.

CAN YOU UNDERSTAND THE JUDGE'S FRUSTRATION, HE HAD WHAT WAS SUPPOSED TO BE A HUFF HEARING AND WITHOUT KNOWING THE ASSIGNED COUNSEL WAS NOT THERE EXPLAINING A MOTION FOR CONTINUANCE AND SAY WHAT IS GOING ON. YOU JUST SHOW UP AT THE HEARING AND SAY I DON'T KNOW ANYTHING ABOUT THIS FILE.

I AM SURE THE JUDGE WAS FRUSTRATED. HOWEVER I WAS NOT PREPARED FOR A HUFF HEARING, AND EVEN HAD IT BEEN PROPERLY NOTICED AS A HUFF HEARING, WHICH MR. COOK CONTENDS IT WAS NOT, THERE WERE ISSUES THAT SHOULD HAVE BEEN RESOLVED. EVEN IF MR. COOK THOUGHT HE WAS GOING TO HAVE A HUFF HEARING, IT HAD BEEN FILED FROM THE 3.850 AND THE SUPPLEMENT 3.850 AND THE MOTION TO COMPEL AND RULE 3.852, THAT WORK HAD BEEN DONE TO RESOLVE THE PUBLIC RECORDS ISSUES, BEFORE WE COULD MOVE ON.

DIDN'T YOU FILE A MOTION OR DIDN'T YOUR OFFICE FILE A MOTION TO HAVE YOUR DEFENDANT TRANSPORTED TO THIS NOVEMBER 22 HEAR SOMETHING.

A MOTION WAS SO FILED, INDEED.

IN RESPONSE TO THAT MOTION, THE STATE, THEN, FILED A -- SOME KIND OF ANSWER, WHICH INDICATED THAT MR. COOK DIDN'T NEED TO COME TO THIS HEARING, BECAUSE THIS WAS A HUFF HEARING. DIDN'T THAT PUT YOUR OFFICE ON NOTICE THAT THAT WAS WHAT THIS HEARING WAS ALL ABOUT?

RESPECTFULLY, YOUR HONOR, THE TIMING OF THE STATE'S RESPONSE WAS ON, I BELIEVE, NOVEMBER 20, WHICH WAS TWO DAYS BEFORE THE ACTUAL HEARING WAS RESCHEDULED. I DON'T THINK THAT CONSTITUTES PROPER NOTICE. I, MYSELF, WAS CERTAINLY NOT AVAILABLE, CERTAINLY NOT AWARE OF IT, AND THE COUNSEL OF RECORD AT THE TIME WAS NOT AWARE OF IT, EITHER, AT THAT POINT.

I GUESS WE ARE ALL A LITTLE FRUSTRATED HERE, BECAUSE THIS MOTION WAS FILED IN '93, I BELIEVE, AND THEN WE GET TO '96, AND WE DON'T HAVE ANY KIND OF MOTION FOR CONTINUANCE, AND THEN YOU JUST COME TO THE HEARING AND START, ALTHOUGH YOU HAD FILED A MOTION TO COMPEL THE PRODUCTION OF PUBLIC DOCUMENTS, I DON'T BELIEVE THAT THAT WAS EVER SET, OR WAS IT EVER SET FOR A HEARING?

I DON'T BELIEVE THAT WAS EVER SET FOR HEARING. MY IMPRESSION AND THAT OF THE COUNSEL OF RECORD WAS THAT WAS NOT THE FIRST THING THAT NEEDED TO BE DEALT WITH, AND I ATTEMPTED TO BRING THIS TO THE COURT'S ATTENTION AT THE HEARING, THAT WE NEEDED TO DEAL WITH THE MOTION TO COMPEL BEFORE WE COULD CONTINUE.

WERE YOU PREPARED, AT THAT TIME, TO DISCUSS EXACTLY WHAT HAD AND HAD NOT BEEN PROVIDED, IN THE WAY OF PUBLIC RECORDS? I DO REMEMBER THAT YOU SAID THAT YOU WERE NOT FAMILIAR WITH THE 3.850 MOTION.

RIGHT.

WERE YOU FAMILIAR ENOUGH WITH THE REQUEST FOR PUBLIC RECORDS AND WHAT HAD AND HAD NOT BEEN PRODUCED, TO MAKE A SUFFICIENT ARGUMENT TO THE COURT?

I WAS FAMILIAR ENOUGH TO KNOW THAT EVIDENTIARY DEVELOPMENT WAS NAEZ AREA -- WAS NECESSARY, WITH REGARD TO THE AGENCIES THAT WE HAD NAMED IN THE MOTION TO COMPEL.

YES, YOUR HONOR. HOWEVER, THAT WAS NOT POSSIBLE TO BE DONE AT THE STATUS CONFERENCE, SIMPLY BECAUSE OBVIOUSLY NOT ALL OF THE AGENCIES HAD BEEN NOTICED AT THAT POINT. MY UNDERSTANDING WAS IN THE WAY THAT EVERY OTHER CASE THAT I AM FAMILIAR WITH HAD OPERATED AT THAT POINT, WAS THAT THE FIRST THING THAT TENDS TO HAPPEN, IN TERMS OF HEARINGS, IS THAT A STATUS CONFERENCE HAPPENS AND THEN A PUBLIC RECORDS HEARING IS SET, WHERE THE AGENCIES CAN COME AND FILE OBJECTIONS OR PUT THEIR RECORDS CUSTODIANS ON OR WHATEVER. WE WERE NOT -- WE WERE PREPARED TO GO FORWARD WITH THAT.

DO WE HAVE, NOW, IN THIS RECORD, SPECIFICALLY WHAT PUBLIC RECORDS YOU ARE CLAIMING THAT YOU DON'T HAVE? THAT ARE NECESSARY, IN ORDER TO GO FORWARD WITH THIS POST POST-CONVICTION PROCEEDING?

YOUR HONOR, PARTICULARLY THE SUPPLEMENT TO THE 3.850 MAKES MENTION OF THE FACT THAT THERE IS NO CERTIFICATION. A GREAT NUMBER OF RECORDS WERE SUPPLIED THROUGH THE STATE ATTORNEY'S OFFICE IN DADE COUNTY, INCLUDING THE POLICE RECORDS, THE JAIL RECORDS, THE STATE ATTORNEY FILES, THEMSELVES. THE SUPPLEMENT MAKES MENTION OF THE FACT THAT THEY WERE SUPPLIED IN ONE BOX. THE CUSTODIAN OF RECORDS, WHO WAS SUPPOSEDLY ABLE TO CERTIFY THAT SUCH RECORDS WERE COMPLETE AND THE WHOLE FILE WAS NOT EVEN ABLE TO SAY WHICH RECORDS HAD COME FROM WHICH AGENCY. A HEARING WAS NECESSARY, IN ORDER TO SOLVE THAT CONFUSION. IN ADDITION, I BELIEVE THE MOTION FOR REHEARING MADE NOTE OF THE FACT THAT CERTAIN RECORDS, I BELIEVE, FROM THE DEPARTMENT OF CORRECTIONS, HAD NOT BEEN SUPPLIED, AND, ALSO, I FORGET WHICH MOTION, BUT, AGAIN, ONE OF THE PLEADINGS HAD MADE MENTION OF THE FACT THAT, ALTHOUGH RECORDS HAD BEEN REQUESTED FROM THE STATE ATTORNEYS OFFICE ON TWO CODEFENDANTS, THOSE FILES HAD NOT BEEN SUPPLIED.

WHAT I AM REACHING FOR, MS. DAY, IS THAT, IF IT SHOULD BE THE DECISION OF THIS COURT THAT YOU SHOULD GET PUBLIC RECORDS, WHAT I WANT TO KNOW IS DO -- IS THERE SOMETHING IN THIS RECORD THAT WE CAN SAY THESE ARE THE SPECIFIC PUBLIC RECORDS THAT ARE NECESSARY TO BE PRODUCED, WITHIN A SPECIFIC PERIOD OF TIME, SO THAT YOU CAN GO FORWARD WITH THIS MATTER WITHIN A SPECIFIC PERIOD OF TIME? IS THAT CLARIFIED IN THIS RECORD?

I THINK IT IS CLEAR THAT WE NEED TO HAVE A HEARING THAT WOULD ASCERTAIN THAT, FIRST OF ALL, WOULD PROVIDE US WITH THE FILES THAT WE KNOW WE DON'T HAVE. FOR EXAMPLE A CODEFENDANT STATE ATTORNEY FILES. THAT IS VERY CLEAR. I THINK, ALSO, IT IS NECESSARY FOR US TO RESOLVE WHICH AGENCY SUPPLIED WHICH RECORDS, THROUGH THE STATE ATTORNEYS OFFICE. SO THAT WE CAN HAVE SOME KIND OF CERTIFICATION THAT WE HAVE THE COMPLETE FILES.

A PROCEDURE SHORT OF HAVING THE JUDGE DO THIS, FOR YOU TO SIT DOWN WITH THE ATTORNEY GENERALS OFFICE AND GET THIS ASSORTED OUT? I DON'T KNOW. IT SEEMS AS IF YOU TAKE THE CIVIL CONTEXT, THAT IS SITUATIONS WHERE THERE IS DISCOVERY ISSUES ALL OF THE TIME AND THE COURTS ENCOURAGE THE PARTIES TO GET TOGETHER TO TRY TO RESOLVE IT. HAS THAT BEEN TRIED?

YOUR HONOR, WE TRIED, WITH THE STATE ATTORNEYS OFFICE, AND WE HADN'T SUCCEEDED TO OUR SATISFACTION. THAT IS WHY WE BROUGHT IT TO THIS COURT, AND I REMIND THE COURT THAT, AT THE TIME, BEFORE RULE 3.850 CAME INTO EXISTENCE, UNDER THE WALTON CASE PUBLIC RECORDS WERE RECOGNIZABLE IN RULE 3.850 PLEADINGS.

ASIDE FROM THE PUBLIC RECORDS ISSUE, YOU MENTIONED THE PENALTY PHASE, INEFFECTIVE ASSISTANCE ISSUES.

INDEED, YOUR HONOR.

DO THE PUBLIC RECORDS REQUESTS RELATE TO THAT, OR DO YOU HAVE YOUR OWN -- WOULD YOU BE ABLE, IF AN EVIDENTIARY HEARING WAS SET IN 60 DAYS, TO GO FORWARD WITH YOUR INEFFECTIVE ASSISTANCE OF PENALTY PHASE?

YES, BUT, YOUR HONOR, I BELIEVE THAT WE WOULD BE ABLE TO GO FORWARD WITH OUR INEFFECTIVE ASSISTANCE AT PENALTY PHASE. I BELIEVE THAT IS FULLY PLED AT THIS POINT, YOUR HONOR. MR. COOK HAS ALLEGED NUMEROUS INSTANCES OF INEFFECTIVE ASSISTANCE OF COUNSEL, BASED ON COUNSEL'S FAILURE TO INVESTIGATE, AS DEMONSTRATED BY THE FACT THAT HE DIDN'T APPOINT A MENTAL HEALTH EXPERT UNTIL THE DAY THE PENALTY PHASE WAS EXPECTED TO START. THE MENTAL HEALTH EXPERT DIDN'T HAVE TIME TO DO A FULL EVALUATION OR SDRNT TIME TO DO A NEUROPSYCHOLOGICAL TESTING. SHE DIDN'T HAVE TIME TO REVIEW ANY BACKGROUND MATERIALS, EVEN IF TRIAL COUNSEL HAD INVESTIGATED PROPERLY. MR. COOK'S SCHOOL RECORDS, HIS MEDAL RECORDS AND TALKED TO FAMILY MEMBERS AND FRIENDS WHO WOULD HAVE BEEN AVAILABLE, HAD HE SOUGHT TO INVESTIGATE, SOME MONTHS OR WEEKS BEFORE, RATHER THAN AT THE VERY I LAST MINUTE, AFTER THE -- AT THE VERY LAST MINUTE, AFTER THE GUILT PHASE. CERTAINLY MR. COOK IS READY TO GO FORWARD WITH A PENALTY PHASE, INEFFECTIVE ASSISTANCE OF COUNSEL EVIDENTIARY HEARING. YOUR HONOR, I SEE MY YELLOW LIGHT IS ON. MAY I RESERVE THE REMAINING TIME FOR REBUTTAL?

YOU MAY.

THANK YOU, YOUR HONOR.

COUNSEL.

MAY IT PLEASE THE COURT. FARIBA KOMEILY, ASSISTANT ATTORNEY GENERAL, ON BEHALF OF THE STATE.

I WOULD LIKE TO GET SOME TIME FRAMES, FROM THE STATE'S POINT OF VIEW HERE. THE RULE 3.850 WAS SUPPLEMENTED LAST ON OCTOBER 6, 1993.

YES, MA'AM.

AND THE JUDGE, THERE IS NO ORDER DOING ANYTHING ON THIS CASE UNTIL MARCH 7, 1996. WHAT HAPPENED IN THAT THREE-YEAR PERIOD OF TIME?

THE ONLY THING THE RECORD REFLECTS IS THAT THE CASE WAS TRANSFERRED FROM TWO JUDGES, FROM ONE JUDGE TO ANOTHER AND THEN TO THE ORIGINAL TRIAL JUDGE. ON MARCH 6, 1996, THE ORIGINAL TRIAL JUDGE ENTERED AN ORDER, ASKING THE STATE FOR A RESPONSE TO THE RULE 3, WITHIN 60 DAYS.

SO THE STATE DID NOTHING TO MOVE THIS CASE ALONG FOR THAT THREE-YEAR PERIOD.

NOT SPECIFICALLY, IN TERMS OF ASKING FOR A HEARING, YOUR HONOR.

IS THAT THE ATTORNEY GENERAL'S HANDLING IT OR IS IT THE STATE ATTORNEYS?

IN 1995, OCTOBER, I BELIEVE, THAT THE RULES WENT INTO EFFECT WITH THE ATTORNEY GENERALS OFFICE BECOMING COCOUNSEL.

SO BASICALLY FOR A TWO-YEAR PERIOD OF TIME, THE STATE ATTORNEYS OFFICE DID --

YOUR HONOR --

-- NOTHING.

-- FROM THE STATE ATTORNEYS POINT OF VIEW, YOU WENT TO TRIAL. THERE IS A VALID CONVICTION. IT COMES TO THIS COURT. THERE IS A DENIAL OF RELIEF. AS THE UNITED STATES SUPREME COURT COURT PUT IT, THE TRIAL IS THE MAIN HE HAVEETENT. THE CON -- THE MAIN EVENT. THE CONVICTION IS VALID. IT IS INCUMBENT UPON SOMEBODY'S MOVING IT ALONG. BUT IN THIS CASE --

YOU ARE SAYING, AFTER A CONVICTION IS FINAL, THAT THE POST-CONVICTION PROCEEDINGS ARE MOVED TIMELY ALONG?

YOUR HONOR, WE TRY. YOU SEE, IN 99.9% OF THE CASES, WE TRY, BUT AT THIS POINT THE APPELLANT IS COMING IN AND SAYING I FILED THE MOTION FOR POST-CONVICTION RELIEF AND I FILED THE MOTION TO COMPEL, AND I AM NOT EVEN GOING TO LIST, TO SCHEDULE IT FOR HEARING, TO ASK FOR A HEARING. IF ANYBODY WISHES TO HAVE IT HEARD THEN IT SHOULD BE STATE, BUT LET ME GO THROUGH THE PROCEDURES IN THIS CASE.

BUT ALL THIS TIME SOMEONE, THE STATE JUST DOES NOT ASSUME ANY RESPONSIBILITY IN THIS REGARD?

UNDER THE RULES, I BELIEVE, YOUR HONOR, UNDER THE NEW RULES, 3.852, WHICH WENT INTO EFFECT IN '96 AND THEN '98, UNDER THOSE RULES, THERE ARE PROCEDURES FOR SCHEDULING HEARINGS, AND IT IS USUALLY THE TRIAL COURT'S RESPONSIBILITY, BUT THERE HAS TO BE A COURT ORDER FOR THE STATE TO RESPOND, AND IN THIS CASE, IN MARCH OF 1996, THE JUDGE DID, AFTER HAVING -- AFTER THE CASE HAVING BEEN TRANSFERRED TO THE JUDGE, THE JUDGE DID ENTER AN ORDER, ASKING THE STATE TO RESPOND WITHIN 60 DAYS, AND WE DID. RIGHT AFTER THE TRIAL JUDGE'S ORDER, REQUIRING THE RESPONSE FROM THE STATE, THAT IS WHEN A MOTION TO COMPEL PUBLIC RECORDS WAS FILED BY THE DEFENDANT. AT THAT POINT IN TIME, THE STATE OF THE LAW WAS, IF YOU WANTED PUBLIC RECORDS FROM AGENCIES WITHIN DADE COUNTY, WHERE THE CONVICTION, WHERE THE PROSECUTING ATTORNEY WAS INVOLVED, THEN THE COURT HAD JURISDICTION, AND YOU HAD TO FILE THE MOTION TO COMPEL AS TO THOSE AGENCIES. WITH RESPECT TO AGENCIES, SUCH AS DOC OR AGENCIES OUT OF THE JURY DICTION OF THE COURT, THEN YOU HAD TO PURSUE HOFFMAN SUITS, CIVIL SUITS, AND THEN, IN '95, THERE WAS A PROCEDURE FOR TRANSFERRING THE LOVE MAN SUITS INSIDE THE RULE 3 PROCEEDINGS. IN THIS CASE, THERE WERE NO HOFFMAN SUITS, EVEN THOUGH HOFFMAN WAS IN EFFECT FROM '92 TO '95, THEY COULD HAVE FILED CIVIL SUITS THAT COULD HAVE BEEN TRANSFERRED, WITH RESPECT TO DOC, WITH RESPECT TO FDLE. NONE WERE FILED. THE MOTION TO COMPEL --

THE MOTION WAS FILED OCTOBER 1996. IT WAS 18 MONTHS BEFORE THE MOTION FOR REHEARING WAS DENIED, JULY 31, 1998.

YES, MA'AM.

IS THERE ANY EXPLANATION FOR A YEAR AND-A-HALF --

YES, MA'AM. IN THE RECORD THERE IS A LOSS OF DESIGNATED COUNSEL BY CCR.

THE JUDGE HAS IT UNDER ADVISEMENT. THERE WAS NO, NOTHING THAT COUNSEL --

THERE WAS A SPECIFIC LOSS OF COUNSEL FILED, RIGHT AFTER THE HEARING.

THE JUDGE HAS NO AUTHORITY TO ENTER AN ORDER DENYING A MOTION FOR REHEARING DURING THAT PERIOD OF TIME?

THE JUDGE APPARENTLY DID NOT DO SO, BUT BEAR IN MIND IT IS IN EXCESS OF 100 PAGE MOTION FOR REHEARING, IN SUPPLEMENT TO THE RULE 3.850, WHICH THE JUDGE HAD UNDER ADVISEMENT. BUT AFTER THEY FILED THE MOTION FOR REHEARING, THERE WAS LOSS OF DESIGNATED COUNSEL BY CCR.

WAS A NEW ATTORNEY APPOINTED OR WHAT HAPPENED?

THEREAFTER THEY FILED, MR. TODD SCHER FILED A NOTICE OF APPEAL AND THE JUDGE DENIED THE REHEARING, AND THEY FILED A NOTICE OF APPEARANCE.

FOUR YEARS COULD HAVE BEEN LOPPED OFF THE DELAY IN THIS CASE, IF THE JUDGE, IN THE TIME THAT MS. DAY APPEARED, SAID YOU HAVE GOT INEFFECTIVE ASSISTANCE OF COUNSEL AND PENALTY AT GUILT PHASE. THERE ARE CLEAR EVIDENTIARY ISSUES THAT HAVE TO BE RESOLVED, AND I AM GOING TO SET A PUBLIC RECORDS HEARING FOR 30 DAYS AND AN EVIDENTIARY HEARING FOR 90 DAYS AND FOUR YEARS WOULDN'T HAVE BEEN WASTED.

EXACTLY. LET ME EXPLAIN ABOUT THE MOTION TO COMPEL. THEY FILED THE MOTION TO COMPEL, WITH RESPECT TO DADE COUNTY AGENCIES, AND THIS IS ONE MONTH AFTER THE JUDGE SAYS STATE RESPOND AND GIVING THE STATE 60 DAYS. IN THE INTERIM, A MONTH BEFORE THE STATE FILES ITS RESPONSE, THEY FILED A MOTION TO COMPEL, WITH RESPECT TO THESE DADE COUNTY AGENCIES. THE STATE'S RESPONSE ADDRESSES BOTH THE PUBLIC RECORDS AND SUBSTANCE OF THE MOTION. WITH RESPECT TO THE PUBLIC RECORDS, THE STATE MAKES VERY CLEAR THAT, LOOK, BEFORE THE INITIAL MOTION FOR POST-CONVICTION RELIEF IN '93 WAS FILED, THEY ASKED US FOR PUBLIC RECORDS REQUESTS AND WE COMPLIED. NOT ONLY DID WE COMPLY, BUT IN THE SPIRIT OF COOPERATION THAT YOU WERE TALKING ABOUT EARLIER, WE GOT AHOLD OF ALL AGENCIES. WE ARE CLEARLY NOT TRYING TO DELAY. WE ARE TRYING TO HELP ALONG. WE GOT AHOLD OF ALL OF THESE OTHER AGENCIES THAT ARE WITHIN OUR JURISDICTION AND WHO WOULD BE COOPERATING WITH US, SUCH AS METRO DADE, SUCH AS THE JAIL, SUCH AS THE MEDICAL EXAMINER. WE GOT AHOLD OF ALL OF THOSE, REQUESTED THEIR RECORDS AND, HERE, COME AND PICK THEM UP FROM THE STATE ATTORNEYS OFFICE. THE STATE ATTORNEY FURTHER MADE THE REPRESENTATION THAT NOT ONLY DID HE RECEIVE THOSE RECORDS BUT HE TURNED THEM OVER TO THE DEFENDANT. THIS IS PART OF THE INITIAL FILING OF THE MOTION FOR POST-CONVICTION RELIEF. THOSE ASSERTIONS HAVE NEVER BEEN DISPUTED. IN FACT THE DEFENDANT'S OWN SUPPLEMENT REFLECTS THAT, YES, THE STATE ATTORNEY HAS TURNED OVER THESE RECORDS.

EXCUSE ME A MOMENT. AS I UNDERSTAND IT, THE DEFENSE ATTORNEY, ALSO, WROTE A LETTER, ACKNOWLEDGING RECEIPT OF SOME OF THESE PUBLIC RECORDS THAT WE ARE TALKING ABOUT.

YES, MA'AM.

BUT IN THE LETTER, THE ATTORNEY, ALSO, SAYS, BUT I DID NOT RECEIVE CERTAIN OTHER THINGS. I BELIEVE IT WAS THINGS ABOUT THE CODEFENDANT. WHEN WAS THAT LETTER FILED, IN RELATIONSHIP FOR THE STATE'S ANSWER?

THIS IS ALL NOVEMBER OF '92, BUT THE LETTER CONTINUES, MA'AM. THE RECORD REFLECTS. THE RECORD CONTINUES. I WILL BE BACK. THANK YOU FOR YOUR COOPERATION. I WILL BE BACK TO PICK UP ON MY NEXT TRIP, AND I WILL LET YOU KNOW.

SO MY QUESTION IS, THEN, WAS THE STATE'S -- DID THE STATE'S RESPONSE, ALSO, DEAL WITH THOSE OTHER THINGS --

THEY SAID WE HAVE TURNED OVERALL OF OUR RECORDS, AND WE HAVE NOT TAKEN ANY EXEMPTIONS. NOW, WHEN WE GET TO THE HUFF HEARING, THAT IS ALL IN THE STATE'S RESPONSE,

AND THE STATE RESPONSE GOES TO EACH OF THE SUBSTANTIVE CLAIMS, SAYING GIVEN THE ALLEGATIONS HERE IN, AN EVIDENTIARY HEARING IS NOT REQUIRED, AND I WILL GET TO THAT, BUT THEN WE COME TO THE HUFF HEARING. FIRST STATE IS THE ONE, AGAIN, TALKING ABOUT THE MOVING OF THE CASE ALONG. WE ARE THE ONE WHO DID THE NOTICE OF HEARING. THERE IS STILL NO NOTICE OF HEARING BY THE DEFENDANT. THE STATE IS THE ONE WHO SCHEDULED THE HEARING. THE COUNSEL, BECAUSE THERE WAS ANOTHER TRIAL GOING ON, BUT THE NOTICE OF HEARING SPECIFICALLY SAID YOU ARE HERE BY SCHEDULED FOR A HEARING ON THE DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF. IT DOES NOT SAY A STATUS CONFERENCE. IT DOES NOT SAY A MOTION TO COMPEL. IT DOES NOT SAY ANYTHING ABOUT ANY PUBLIC RECORDS. AT THIS JUNCTURE, THE DEFENDANT FILES A MOTION TO TRANSPORT THE DEFENDANT, AND THE STATE FILES AN OBJECTION THERE TO. AND CERTIFICATE OF SERVICE ON THAT REFLECTS THAT IT WAS NOT MAILED OUT. IT WAS FURNISHED TO DEFENDANT'S LEAD COUNSEL ON NOVEMBER 19, THREE DAYS PRIOR TO THE HEARING SCHEDULED HERE. IN THAT NOTICE, THE STATE SPECIFICALLY SAYS THAT THE DEFENDANTS DEFENDANT'S PRESENCE IS NOT REQUIRED, AND I AM QUOTING FROM THE RECORD, AT PAGE 274, FROM THE STATE'S RESPONSE. THE STATE EXPRESSLY STATED THE SINGLE ISSUE TO BE RESOLVED IS WHETHER AN EVIDENTIARY HEARING IS NEEDED. IN A SIMILAR CASE OF HUFF VERSUS STATE, THE SUPREME COURT ESTABLISHED A SPECIAL RULE ONLY FOR DEATH PENALTY POST-CONVICTION CASES, WHICH ALLOWS COUNSEL TO APPEAR BEFORE THE COURT AND BE HEARD ON THE INITIAL RULE 3.850 MOTION. THE STATE THEN QUOTED FROM HUFF VERSUS STATE, WHERE THIS COURT STATED, AND THIS IS IN THE RESPONSE, AND IT IS FURNISHED TO DEFENDANT'S COUNSEL. IT SAYS THE HEARING BEFORE THE JUDGE IS FOR THE PURPOSE OF DETERMINING WHETHER AN EVIDENTIARY HEARING IS REQUIRED AND TO HEAR LEGAL ARGUNIT RELATING TO THE MOTION. IT IS CLEAR THAT THIS IS A HUFF HEARING. THERE IS NO MENTION OF A STATUS CONFERENCE. I DO REALIZE THAT, IN THE INITIAL BRIEF OF THE APPELLANT, THERE IS A QUOTE FROM THE TRIAL JUDGE'S ORDER, WHERE THE APPELLANT IS MISQUOTING THE RECORD, AND INSERTING THE WORD STATUS CONFERENCE IN THERE. THAT IS NOT WHAT THE RECORD REFLECTS. THE RECORD REFLECTS THAT THE JUDGE HELD, AT THE APPOINTED TIME, I EXPECTED ARGUMENT ON THE MERITS IN ACCORDANCE WITH HUFF AND YOU WERE NOT PREPARED. AT THE HUFF HEARING, THEN, WE HAVE SECOND CHAIR COUNSEL FOR THE DEFENDANT, APPEARING, AND RIGHT OFF THE BAT SAYING MY UNDERSTANDING IS THIS IS A STATUS CONFERENCE FOR YET ADDITIONAL PUBLIC RECORDS REQUESTS UNDER THE NEW RULE. I HAVEN'T EVEN READ THE MOTION. THE JUDGE DID GIVE AN OPPORTUNITY FOR COUNSEL TO ARGUE THE MERITS AND SAID THIS IS MY UNDERSTANDING OF WHY WE ARE HERE ON THE CASE IS TO HEAR THE MERITS OF WHY YOU MAY BE ENTITLED TO AN EVIDENTIARY HEARING, AND THERE IS NO RESPONSE. NOW, LET'S GET TO THE PUBLIC RECORDS AT THIS JUNCTURE. WHEN COUNSEL SAYS I WAS PREPARED TO ARGUE, THEY WERE NOT. AT THE SAME HEARING, THE STATE, AGAIN, MAKES THE REPRESENTATION THAT WE HAVE TURNED OVER EVERYTHING THAT WE HAVE. THERE ARE CERTAIN CLAIMED AGENCIES, SUCH AS DADE COUNTY CLERK AND THE JUVENILE CLERK. THESE ARE NOT AGENCIES UNDER THE PUBLIC RECORD ACT. WE HAVE NO CONTROL OVER THEM. AND THE CASE LAW HAS BEEN, IS, AND HOPEFULLY WILL BE. IT IS VERY SPECIFIC. THESE ARE NOT AGENCIES. YOU CAN GO DOWN TO THE CLERK'S OFFICE AND PULL ANY RECORD THAT YOU WANT. THAT IS WHY THEY DON'T HAVE TO TURN OVER ANYTHING. YOU HAVE THE RIGHT OF ACCESS AT ANY TIME, BUT WITH RESPECT TO OTHER AGENCIES, IN ACCORDANCE WITH ITS RESPONSE, THE STATE REPRESENTED WE HAVE TURNED OVER EVERYTHING. WE DIDN'T WITHHOLD ANYTHING, AND WE HAVE NOT TAKEN ANY EXEMPTIONS. THERE IS NO DISPUTE BY COUNSEL OF THAT REPRESENTATION. THERE IS NOTHING ABOUT OH, WELL, I HAVE AN ARGUMENT OTHERWISE, YOUR HONOR. LET ME ADD. THAT INSTEAD WHAT THE ARGUMENT WAS, BY DEFENSE COUNSEL AT THE HEARING, IS THAT THERE, QUOTE, MAY BE AGENCIES OUTSIDE OF DADE COUNTY'S JURISDICTION, WHICH, AT THIS JUNCTURE, PURSUANT TO THE NEW RULE 3.852, WE NEED TO DO AN AMENDMENTED MOTION TO COMPEL FOR, SO GIVE US AN OPPORTUNITY, UNTIL NOVEMBER 30 OF THIS YEAR, WHICH IS WHEN THE PROVISIONS OF THE THEN NEW RULE 3.852 WERE IN EFFECT. GIVE US AN OPPORTUNITY TO FILE THAT. SO IT IS NOT A MATTER OF BEING ABLE TO ARGUE, BEING PREPARED AND ARGUING IN FAVOR OF THE MOTION TO COMPEL THAT HAS ALREADY BEEN FILED. AT THAT POINT IN TIME, THAT HAS BEEN RESOLVED. IT

WAS RESOLVED IN THE STATE'S RESPONSE, AND IT WAS, AGAIN, RESOLVED AT THE HUFF HEARING. WE HAVE TURNED OVER EVERYTHING. THERE IS NOTHING ELSE. WHAT APPELLANT WAS ASKING FOR IS GIVE US ANOTHER OPPORTUNITY. NOW, THE ORDER, THE ORIGINAL ORDER THAT DENIED POST-CONVICTION RELIEF IS NOT FILED UNTIL DECEMBER 4. COUNSEL HAD ASKED FOR AN OPPORTUNITY TO FILE AN AMENDMENTED MOTION TO COMPEL BY NOVEMBER 30 AND THEY NEVER DID. I DO RECOGNIZE THAT THIS COURT TOLD THE -- TOLLED THE RULE UNTIL MARCH OF 1997, BUT THIS CASE, AS YOU POINTED OUT, THE MOTION FOR REHEARING WAS NOT DENIED UNTIL 1998. THERE HAS NEVER BEEN AN AMENDMENTED MOTION TO COMPEL, WITH RESPECT TO THESE OTHER AGENCIES THAT MAY HAVE NOT BEEN PROVIDING PUBLIC RECORDS. THERE HAS NEVER BEEN AN AMENDMENTED MOTION TO COMPEL, AND UNDER THE SAME RULE, RULE 3.852 IN EFFECT AT THE TIME, THE DEFENDANT IS ASKING GIVE ME AN OPPORTUNITY FOR AN AMENDMENTED MOTION TO COMPEL, TO GO UNDER THAT RULE, THAT VERY SAME RULE PROVIDES THAT, IF YOU DO NOT FILE THAT MOTION TO COMPEL, SPECIFICALLY A MOTION TO COMPEL, WITHIN 30 DAYS, YOU HAVE WEIGHED YOUR RIGHT. IN LIGHT OF THE FACT THAT THIS DEFENDANT, FROM 1992 TO 1996, AT THE TIME OF THE HUFF HEARING, HAD THE OPPORTUNITY TO FILE HOFFMAN SUITS FOR THOSE AGENCIES OUTSIDE OF DADE COUNTY, AND IN LIGHT OF THE FACT THAT, WITH RESPECT TO THE DADE COUNTY AGENCIES, THEMSELVES, THE RECORD IS VERY CLEAR WE TURNED OVER EVERYTHING. STATE, IN ACCORDANCE WITH ITS RESPONSE AND AT THE HUFF HEARING AND IN THESE PROCEEDINGS, MAINTAINS THEY HAVE WAIVED ANY RIGHT TO ADDITIONAL PUBLIC RECORDS.

WOULD YOU ADDRESS, FOR ME, THE STATUS OF THE LAW, IN REGARDS TO WHEN THE TRIAL JUDGE HAS TO FILE HIS WRITTEN ORDER ON SENTENCING. WHEN THE TRIAL JUDGE HAS TO FILE THE WRITTEN ORDER FOR SENTENCING. I BELIEVE THERE IS AN ALLEGATION, HERE, THAT IT HAD TO BE DONE WITHIN 30 DAYS, AND IT WAS NOT DONE UNTIL ABOUT 50 DAYS AFTER SENTENCING.

AT THE TIME OF THESE PROCEEDINGS, AND YOU ARE TALKING ABOUT THE 1990 RESENTENCING, THESE WOULD BE IN ACCORDANCE WITH THE SAME PROCEEDINGS THAT WERE GOING ON WITH -- IN STATE, DAVID VERSUS STATE, WHICH IS QUOTED IN THE BRIEF. THERE WAS NO REQUIREMENT OF CONTEMPORANEOUSNESS OR ANYTHING ELSE, WITH RESPECT TO THE RESENTENCING. WHAT HAPPENED IN THIS CASE IS THE CASE WENT UP ON DIRECT APPEAL. THIS COURT INVALIDATEED TWO OF THE AGGRAVATING FACTORS, AND THIS COURT SPECIFICALLY SAID WE CANNOT BE CERTAIN WHETHER, IN THE ABSENCE OF THESE TWO AGGRAVATING FACTORS, WHETHER THE TRIAL JUDGE WOULD HAVE IMPOSED A SENTENCE OF DEATH OR NOT. WE REMAND FOR RESENTENCING BY THE JUDGE, BUT NO NEW JURY IS TO BE EMPANELED. STATUS OF THE LAW, THEN, STATUS OF THE LAW, NOW, IS, AND THAT IS THE WORDING IN DAVIS VERSUS STATE, THERE IS NO REQUIREMENT THAT NEW EVIDENCE BE TAKEN. AT THE TIME THAT THESE PROCEEDINGS WERE GOING ON, UNDER REECE, UNDER KRUMP, UNDER DAVIS, THERE WAS NO ALLEGATION OF A HEARING. NOTHING AT ALL. IT JUST WOULD GO DOWN AND THE PREPARATION OF THE ANNOUNCEMENT OF A NEW SENTENCE. WHAT HAPPENED IN THIS CASE IS, AFTER REMAND, THE JUDGE ACTUALLY PROVIDED AN OPPORTUNITY FOR THE PARTIES TO PRESENT SENTENCING MEM AND A, AND THEN -- MEMORANDA AND THEN HELD A HEARING WHERE NOT ONLY WAS DEFENSE COUNSEL PRESENT BUT THE DEFENDANT, HIMSELF, WAS PRESENT, AND THE PARTIES, NO NEW EVIDENCE, NO NEW EVIDENCE WAS PRESENTED. THE JUDGE HEARD THE ARGUMENTS OF COUNSEL IN FRONT OF DEFENDANT. THE JUDGE DISCUSSED THESE, AND AT THE END OF THE HEARING ANNOUNCED THE SENTENCE WILL REMAIN THE SAME. IN ACCORDANCE WITH THIS COURT'S MANDATE THAT HAD SAID WE ARE NOT SURE WHETHER THE JUDGE WOULD HAVE REIMPOSED A SENTENCE. THEN THE JUDGE INDICATED CLEARLY, ON THE RECORD, THAT, AFTERWARDS, THAT HE DID NOT THINK A NEW SENTENCING, WRITTEN SENTENCING ORDER IS REQUIRED. WHY? BECAUSE NO NEW EVIDENCE HAD BEEN PRESENTED. THE FINDINGS ON THE AGGRAVATING FACTORS AND MITIGATING FACTORS HAD ALREADY BEEN MADE IN THE PRIOR SENTENCING ORDER. THEY HAD BEEN AFFIRMED. THE REMAINDER OF THE MITIGATION, AGGRAVATING FACTORS, THIS COURT HAD NOT FOUND ANY FAULT WITH, ON DIRECT APPEAL, AND WHAT HAPPENS IS, THEN, AFTER SOME ADDITIONAL RESEARCH, THE JUDGE FEELS THAT, PERHAPS, HE

SHOULD FILE SOMETHING IN WRITING, AND DEFENSE COUNSEL IS NOTICED, AND DEFENSE COUNSEL IS EXPRESSLY ASKED DO I NEED THE DEFENDANT TO BE HERE? WHAT I AM DOING IS MERELY -- THE DEFENSE COUNSEL SAYS, NO, YOUR HONOR, DEFENDANT'S PRESENCE IS NOT REQUIRED, BECAUSE WHAT YOU ARE DOING IS MERELY DOING THE MINISTERIAL ACT OF REDUCING THE ROLE PRONOUNCEMENT TO -- INTO WRITING. NOW, AT THE TIME THE ONLY THING, THE ONLY CASE IN EXISTENCE, AS TO CONTEMPORANEOUSNESS OF WRITTEN ORDERS WITH THE ORAL PRONOUNCEMENT WAS GROSSMAN VERSUS STATE, WHICH WAS AN INITIAL SENTENCING. THIS COURT, IN A SUBSEQUENT CASE, HERNANDEZ VERSUS STATE, EXPLAINED THAT THE CONTEMPORANEOUS REQUIREMENT WAS TO PREVENT AN INITIAL HASTY DECISION AS TO THE IMPOSITION OF THE DEATH SENTENCE. IT NEVER HAD BEEN APPLICABLE TO RESENTENCINGS, SUCH AS THIS ONE, WHERE YOU ARE GOING BACK WITHOUT NEW EVIDENCE BEING TAKEN. IT NEVER HAS BEEN APPLIED SINCE THEN. AND THE STATE WOULD NOTE THAT THE REASONING, IN GROSSMAN, WAS BASED ON LEGISLATIVE INTENT OF PREVENTING HASTY IMPOSITIONS OF SENTENCES OF DEATH INITIALLY, AND THE LEGISLATURE CHANGED THAT PROVISION. IT PROVIDED THAT THE CONTEMPORANEOUS REQUIREMENT IS NOT REQUIRED, BUT AT THE TIME OF THESE RESENTSINGS AND SINCE -- RESENTENCINGS AND SINCE THEN, AND NO CASE BEFORE AND NO CASE SINCE HAS THE CONTEMPORANEOUSNESS REQUIREMENT OF GROSSMAN, WHICH HAS SINCE, THEN, BEEN OVERRULED, IT HAS NEVER BEEN APPLIED TO A RESENTENCING. IT HAS, THE CASE THAT WAS REVERSED WAS HERNANDEZ, WHICH WAS AT LEAST THREE AND-A-HALF YEARS AFTER THE RESENTENCING IN THIS CASE, AND AS I POINTED OUT, AND I CAN NOT EMPHASIZE ENOUGH, IS AN INITIAL RESENTENCING.

WOULD YOU SPEAK TO YOUR OPPONENT'S ARGUMENT --

INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE. THERE ARE TWO COMPONENTS. ONE MENTAL HEALTH MITIGATION WAS NOT PRESENTED AND FAMILY BACKGROUND MITIGATION WAS NOT PRESENTED. THIS IS A CASE THAT THERE WAS AN INTERIM, THE TRIAL COUNSEL DOES ASK FOR APPOINTMENT OF MENTAL HEALTH EXPERTS. HE GETS TWO OF THEM, ONE PSYCHIATRIST, DR. NEALEY, ONE PSYCHOLOGIST, DR. HABER, AND OF THE TWO, BOTH REPORTS INDICATE NO MAJOR MENTAL ILLNESS ATTACHED TO THE PSI, WHICH WENT BEFORE THE TRIAL JUDGE BEFORE THE INITIAL SENTENCE, BUT BE THAT AS IT MAY, DR. HABER WAS A MORE FAVORABLE OF THE TWO AND DEFENSE COUNSEL PRESENTED TESTIMONY FROM DR. HABER. NOW, THERE IS A CLAIM OF LACK OF INVESTIGATION, WITH RESPECT TO VOLUNTARY DRUG AND ALCOHOL ABUSE AND FAMILY BACKGROUND, BUT IN THIS CASE, THE RECORD REFLECTS DR. HABER NOT ONLY EXAMINED THE DEFENDANT PRIOR TO TESTIFYING, BUT SHE, ALSO, WAS PRESENT IN THE COURTROOM, LISTENING TO THE TESTIMONY OF THE BACKGROUND WITNESSES. NOW, WHO WERE THESE BACKGROUND WITNESSES? THE WITNESS OF THE DEFENDANT'S PARENTS HAVE BEEN DECEASED AT THE TIME. THE DEFENSE COUNSEL THERE FOR PRESENTED TESTIMONY FROM THE TIME OF THE DEFENDANT'S VERY EARLY CHILDHOOD THROUGH THE MOMENT THAT THESE CRIMES WERE COMMITTED. THIS TESTIMONY CAME FROM THE DEFENDANT'S BROTHER, THE DEFENDANT'S SISTER, THE DEFENDANT'S BROTHER-IN-LAW, TWO NEIGHBORS WHO HAD GROWN UP, WHO WERE CLOSE FRIENDS OF THE DEFENDANT'S MOTHER, AND THE DEFENDANT HAD GROWN UP AROUND THEM. THEY HAD DAILY CONTACT WITH THE DEFENDANT. THE DEFENDANT'S EMPLOYER, THE DEFENDANT'S FRIEND, AND A COUPLE OF OTHER PEOPLE WHO KNEW HIM FROM VARIOUS CONTACTS. NOW, IN THIS CASE, THIS SITUATION IS SUCH THAT THE DEFENDANT WAS CLAIMING, AND HE HAD TOLD DR. HABER AND HE, IN FACT, TESTIFIED AT THE PENALTY PHASE THAT, LOOK, I HAD A DRUG AND ALCOHOL PROBLEM, BUT I HID THIS FROM EVERYONE, AND WHEN I SAY EVERYONE, THIS IS THE DEFENDANT'S OWN -- THIS IS WHAT HE TOLD, QUOTE, TO DR. HABER, ON THE RECORD. THE DEFENDANT, HIMSELF, WHEN HE TESTIFIED, HE VERIFIED IT. HE SAID, YES, I DID HAVE THIS PROBLEM BUT I HID IT FROM MY FAMILY, FROM MY FRIENDS AND FROM MY RELATIONS. THE FAMILY MEMBERS, IN TURN, THE FRIENDS AND THE EMPLOYER AND EVERYONE ELSE WHO GOT UP ON THE STAND TESTIFIED HE IS A TEE TOTALER. WE HAVE NEVER SEE SEEN HIM ABUSE ANY DRUGS OR ALCOHOL. DECEMBER FIGHT -- DESPITE THAT, DR. HABER RELIED ON THE DEFENDANT'S OWN STATEMENT AND TESTIFIED THAT THE DRUGS AND ALCOHOL

AT THE TIME OF THE CRIME HAD IMPAIRED HIS OWN JUDGMENT, BUT PLEASE BEAR IN MIND IT IS VERY CLEAR ON THIS RECORD THERE WAS TESTIMONY FROM TWO CODEFENDANTS WHO WERE AT THE SCENE OF THE CRIME WITH THE DEFENDANT, FOR A PERIOD OF AT LEAST TWO HOURS, AND TESTIFIED HE WAS NOT DRUNK. THERE WAS NO DRUG PROBLEM. THE DEFENDANT GAVE A VERY, VERY DETAILED CONFESSION OF THE CRIME, WHERE NOT ONLY DOES HE GIVE THE DETAILS, CONTRARY TO A DRUG AND ALCOHOL PROBLEM, BUT HE DOES NOT --

YOU MUST BRING YOUR ARGUMENT TO A CLOSE.

MAY I HAVE 30 SECONDS, YOUR HONOR? THE DEFENDANT'S CONFESSION DOES NOT MENTION ANY OF THAT, EITHER, AND THE DEFENDANT ADDITIONALLY CONFESSES TO YET A THIRD PERSON AND DOES NOT BRING THIS UP. NOW, WHERE YOU HAVE A SITUATION WHERE DEFENSE COUNSEL IS FACED WITH THE FACT THAT SOMEBODY IS SAYING I HAVE A PROBLEM BUT NOBODY ELSE CAN CORROBORATE IT, I ACTIVELY HID IT FROM SOMEONE, YOU CANNOT COME BACK AND SAY HE IS DEFICIENT FOR FAILING TO INVESTIGATE. WHAT WAS HE SUPPOSED TO INVESTIGATE? THE CASE LAW IN THIS AREA, I HAVE RELIED ON CORRELL, IS VERY CLEAR, AND QUOTED FROM STRICKLAND V WASHINGTON. THE INFORMATION THAT YOU ARE PROCEEDING ON IS DEPENDENT ON WHAT YOU RECEIVE FROM THE DEFENDANT. WHEN THE DEFENDANT SAYS I HAVE ACTIVELY HIDDEN IT, THEN YOU CAN'T PROCEED ANY FURTHER.

THANK YOU VERY MUCH.

THANK YOU.

REBUTTAL?

YES, YOUR HONOR. I WOULD LIKE TO ADDRESS THE LAST POINT THAT COUNSEL FOR THE STATE RAISED. THIS CASE IS DISTINGUISHABLE FROM THE CORRELL CASE, IN WHICH THERE WAS ALMOST ACTIVE COLLUSION BETWEEN THE DEFENDANT AND HIS FAMILY MEMBERS TO COVER UP PHYSICAL AND SEXUAL ABUSE. IN THIS CASE THE DEFENDANT MAY WELL HAVE HIDDEN HIS ALCOHOL AND DRUG PROBLEMS FROM HIS MEAD FAMILY. THAT IS VERY COMMON, I WOULD SUBMIT. HOWEVER, IT WAS -- COUNSEL WAS ON NOTICE, AT LEAST BEFORE THE TRIAL BEGAN, THAT MR. COOK HAD AN ALCOHOL PROBLEM. HE HAD MENTIONED, IN THE MOTION TO SUPPRESS, THAT HE HAD DRUNK HALF OF A FIFTH OF A BOTTLE OF GIN, THE NIGHT BEFORE HE WAS TAKEN TO BE QUESTIONED. ALCOHOL WAS CERTAINLY A POINT AT THAT TIME, IF COUNSEL HAD NEVER BEEN AWARE OF IT BEFORE. IF COUNSEL HAD BEEN AWARE AT THAT POINT, HE COULD HAVE INVESTIGATED MR. COOK'S SCHOOL RECORDS. NOW, MR. COOK HAS CLAIMED, IN HIS 3.850, THAT HE HAD BEEN SUSPENDED FROM ONE HIGH SCHOOL FOR POSSESSION OF MARIJUANA, AND HE HAD ULTIMATELY BEEN TRANSFERRED FROM THAT SCHOOL TO ANOTHER FACILITY, BECAUSE HE WAS IN POSSESSION OF DRUGS ON THE SCHOOL PRELZ. THOSE RECORDS WERE EASILY AND READILY AVAILABLE. MR. COOK'S TRIAL COUNSEL COULD HAVE TALKED TO TEACHERS. HE COULD HAVE TALKED TO DRUG BUDDIES. HE COULD HAVE TALKED TO ANY ONE OF A NUMBER OF PEOPLE OUTSIDE THE IMMEDIATE FAMILY. FURTHERMORE THE PEOPLE WHO WERE PUT ON AT THE PENALTY PHASE, SUCH AS IT WAS, THERE WERE ONLY TWO SIBLINGS AND ONE BROTHER-IN-LAW. MR. COOK IS ONE OF TEN SIBLINGS. COUNSEL DID NOT SPEAK TO THE OTHER EIGHT. HE DIDN'T SPEAK TO ANY OF MR. COOK'S FRIENDS, WHO KNEW HIM FROM THE DAYS HE LIVED IN NEW JERSEY, BEFORE HE EVER MOVED TO FLORIDA. IF COUNSEL HAD INVESTIGATED MORE FULLY MR. COOK'S EARLY BACKGROUND, HE WOULD HAVE UNCOVERED EVIDENCE OF PHYSIQUE A.M. ABUSE -- OF PHYSICAL ABUSE, OF POSITIVE ENEARTH, OF -- OF POVERTY, OF MALNUTRITION.

WE CAN'T TELL, FROM THIS RECORD, WHETHER COUNSEL WAS REASONABLE OR NOT, AT THE EVIDENTIARY HEARING.

IT WAS SO SUPERFICIAL AS TO BE ACTIVELY MISLEADING. THERE WAS EVIDENCE OF PHYSICAL ABUSE. THERE WAS EVIDENCE OF POVERTY, OF DEPRIVATION, OF CHILDHOOD TRAUMA, OF MR.

COOK'S LEARNING DISORDER, NONE OF WHICH CAME INTO THE PENALTY PHASE IN ANYTHING LIKE THE DEPARTMENT OF OR THE LEVEL THAT IT SHOULD HAVE DONE. THIS WAS A 8-TO-4 JURY RECOMMENDATION. ONLY TWO MORE JURORS NEEDED TO VOTE FOR LIFE, IN ORDER FOR MR. COOK TO HAVE GOTTEN A LIFE SENTENCE, SO THE PREJUDICE IS CLEAR. FURTHERMORE THIS COURT, IN AFFIRMANCE OF MR. COOK'S DEATH PENALTY, NOTED SPECIFICALLY THAT THE MITIGATION THAT HAD BEEN PRESENTED WAS MINIMAL. THIS -- IT CANNOT BE HARMLESS. AS TO THE PUBLIC RECORDS, YOUR HONOR, I WOULD NOTE, AS FAR AS THE SO-CALLED HOFFMAN SUITS WERE CONCERNED, MR. COOK WAS NOT ABLE, AFTER THE COURT DENIED HIS RULE 3.850 MOTION, TO AMEND HIS MOTION TO COMPEL. THE PROVISION THAT THE STATE WAS TALKING ABOUT RELATES TO PENDING 13 50s. THIS COURT ORALLY DENIED MR. COOK'S 3.850 MOTION ON THE HEARING NOVEMBER 22. FOUR DAYS LATER, RULE 3.852 WAS TOLD. THE WRITTEN ORDER CAME OUT ON DECEMBER 4, AND A RULE 3.850 WAS STILL TOLLED UNTIL MARCH. HE FILED A MOTION FOR REHEARING. HE PRESERVED HIS OUT-OF-DATE COUNTY CLAIMS, THROUGH THE MOTION FOR REHEARING. AS TO THE MOTION TO COMPEL, REGARDING THE DADE AGENCIES, NOTHING WAS RESOLVED BY THE STATE'S ASSERTION THAT IT SUPPLIED ALL THE RECORDS. IT MAY HAVE SUPPLIED ALL THE RECORDS, BUT IT WAS NOT CLEAR THAT THEY WERE ACCURATE, THEY WERE IN ANY KIND OF ORDER. IT WAS NOT CLEAR WHO -- WHICH AGENCY HAD SUPPLIED WHICH RECORD. THAT NEEDED TO BE RESOLVED. MR. COOK'S COUNSEL IS UNDER A DUTY TO INVESTIGATE EVERY SINGLE PUBLIC RECORD THAT COULD AFFECT HIS CASE, AND IN THIS CASE, THERE WERE TWO CODEFENDANTS TESTIFYING AGAINST HIM, FILES RELATING TO THE CODEFENDANTS ARE EXTREMELY RELEVANT. IN SHORT, YOUR HONOR, I WOULD ASK THAT THIS COURT GRANT RELIEF TO MR. COOK, TO REMAND THE CASE BACK TO THE CIRCUIT COURT, FOR FURTHER PUBLIC RECORDS PROCEEDINGS AND THEN TO ALLOW MR. COOK A CHANCE TO AMEND AND FOR AN EVIDENTIARY HEARING. THANK YOU VERY MUCH.

THANK YOU, COUNSEL.