John Erroll Ferguson vs State of Florida

THE COURT REGRETS HAVING EXTENDED THE RECESS FOR ADDITIONAL 15 MINUTES BUT HAD A MATTER THAT THE COURT NEEDED TO, BY NECESSITY, TAKE UP DURING THE RECESS, SO, NOW, WE ARE READY TO PROCEED WITH FERGUSON VERSUS STATE OF FLORIDA.

MAY IT PLEASE THE COURT. I AM KATHERINE BRADLEY FROM HOGAN AND HARTSON. WITH ME AT COUNSEL TABLE, TODAY, IS BARRETT PRETTYMAN. MR. FERGUSON IS AN INNATE ON -- IS AN INMATE ON FLORIDA'S DEATH ROW. SINCE 1965, HE WAS RENTERRED -- WAS RENDERED SCHIZOPHRENIC. WE COME HERE ON THE 3.850 PROCEEDINGS, ON THE GROUNDS THAT THIS COURT IS BOUND BY THIS COURT'S DECISION IN CARTER V STATE.

WOULD YOU TELL US WHERE THIS MATTER GENERALLY STANDS, PROCEDURALLY?

PROCEDURALLY, MR. FERGUSON BROUGHT A 3.850 PROCEEDING IN 1987, IN THE CIRCUIT COURT. AT THAT TIME, ON BEHALF OF MR. FERGUSON, WE MOVED TO STAY THOSE PROCEEDINGS, BECAUSE OF HIS INCOMPETENCE, ON THE GROUNDS THAT HE WAS TO BE COMPETENT IN POST CON VINKS. THE -- CONVICTION. THE COURT DENIED THAT MOTION FOR A STAY, AND THIS WE DEFINITELY BROUGHT A PROCEEDING IN THIS COURT ON THE BASIS OF CORBETT V STATE AND THAT WAS DENIED. MR. FERGUSON CURRENTLY HAS PENDING IN THE FEDERAL DISTRICT COURT IN FLORIDA, A FEDERAL HABEAS CORPUS PROCEEDING, WHICH HAS BEEN STAYED, PENDING THE RESOLUTION OF PROCEEDINGS BEFORE THIS COURT. WE ASKED TO REOPEN THE 3.850 PROCEEDINGS ON THE BASIS OF CARTER, BECAUSE WHAT THIS COURT HELD, IN CARTER IS THAT CAPITAL DEFENDANTS ARE TO BE COMPETENT TO PROCEED IN POSTCONVICTION PROCEEDINGS, WHEN THERE ARE FACTUAL ISSUES THAT REQUIRE THE ASSISTANCE OF THE DEFENDANT TO ASSIST COUNSEL, IN ORDER TO MAKE A FULL CASE IN POSTCONVICTION. BUT IN 1987, WE ASKED THE TRIAL COURT TO MAKE THIS SAME SORT OF DETERMINATION AND FOUND THAT HE WAS ENTITLED, AS A MATTER OF DUE PROCESS, TO HAVE A COMPETENCY PROCEEDING IN POSTCONVICTION. THE TRIAL COURT RELIED, DIRECTLY, ON JACKSON, AND SAID, NO, THERE IS NO SUCH RIGHT, BECAUSE --

DID THE TRIAL COURT ALLOW YOU TO PUT IN EVIDENCE OF COMPETENCY? IN OTHER WORDS WAS THERE A FACTUAL RECORD AT THAT TIME, DEVELOPED, AND IT WAS JUST THAT THE TRIAL COURT, BASED ON THE LAW AT THAT TIME, DID NOT CONSIDER IT, OR WHAT WAS THE STATUS BACK IN THAT, AT THAT HEARING?

THERE WAS AN EVIDENTIARY HEARING, OVER A PERIOD OF DAYS, NOT THE DAYS NOT CONSECUTIVE, AT WHICH TESTIMONY WAS INTRODUCED, CONCERNING MR. FERGUSON'S COMPETENCY, AND THE TRIAL COURT RULED THAT HE WAS COMPETENT, BASED ON THE TESTIMONY OF TWO PHYSICIANS, NEITHER OF WHOM HAD TREATED MR. FERGUSON, WHO DETERMINED THAT HE WAS, INDEED, HAD ALL OF THE SYMPTOMS OF SCHIZOPHRENIA BUT THAT HE WAS, IN FACT, WAS MALINGERING. EVERY OTHER PHYSICIAN TO TREAT HIM, BOTH THEN AND NOW, HAS CONCLUDED, IN FACT, HE IS A PARANOID SCHIZOPHRENIC, INCLUDING ONE OF THE PHYSICIANS, WHO TESTIFIED AT THE 1987 HEARING, THAT HE WAS MALINGERING.

WAS THAT JUST A BATTLE OF EXPERTS AT THAT POINT? THERE WERE EXPERTS ON THE OTHER SIDE, ALSO, AND I THINK YOUR PROBLEM IS THAT THE JUDGE, THEN, GAVE AN ALTERNATE RULING, AT THAT POINT.

THAT IS CORRECT.

CORRECT?

THAT IS CORRECT. BECAUSE, UNDER THE LAW OF THIS COURT AND THE LAW, GENERALLY, THERE IS NO COLLATERAL ESTOPPEL EFFECT THAT CAN BE AFFORDED TO THE COMPETENCY DETERMINATION BY JUDGE SNYDER, IN THE ORIGINAL POSTCONVICTION PROCEEDINGS, BECAUSE HE DID RECOGNIZE AND SPECIFICALLY STATED IN THE ALTERNATIVE, IN A LENGTHY DEBATE AND DISCUSSION, ABOUT JACKSON, THAT JACKSON PRECLUDED THE RIGHT TO COMPETENCY IN POSTCONVICTION, BECAUSE JACKSON HAD RECOGNIZED THAT THE CRIMINAL RULES OF PROCEDURE DO NOT APPLY TO THE CIVIL POSTCONVICTION PROCEEDING, AND JACKSON SPECIFICALLY FOUND THERE WAS NO DUE PROCESS RIGHT.

BUT THE FACT OF THE MATTER IS YOU DID GET THE BENEFIT OF IT, THOUGH, DID YOU NOT? THERE WAS A HEARING.

WE DID NOT GET THE BENEFIT OF CARTER, BECAUSE, SINCE THE JUDGE RULED IN THE ALTERNATIVE, AND SINCE HE BELIEVED, AS THE ONLY REASON -- THE ONLY THING HE COULD HAVE BELIEVED THE THAT POINT, WAS THAT JACKSON WAS THE LAW AND THAT JACKSON DID NOT ENTITLE MR. FERGUSON TO A COMPETENCY HEARING IN POSTCONVICTION. WE DON'T KNOW THAT THE COURT GAVE THE CONSIDERATION IT WOULD HAVE GIVEN TO THE EVIDENCE BEFORE IT, IF IT HAD KNOWN, AS IT WOULD HAVE, SUBSEQUENT TO CARTER, THAT, IN FACT, MR. FERGUSON WAS ENTITLED TO BE COMPETENT IN POSTCONVICTION. THAT IS WHY THE LAW OF COLLATERAL ESTOPPEL, CLEARLY, SAYS THAT, WHEN YOU HAVE ALTERNATIVE RULINGS, YOU CANNOT GIVE PREEXCLUSIVE EFFECT TO EITHER OF -- PRECLUSIVE EFFECT TO EITHER OF THOSE RULINGS, BECAUSE THE COURT WOULD NOT HAVE KNOWN --

EXCUSE ME. YOU WOULD NOT HAVE BEEN PRECLUDED, CONCERNING ANY EVIDENCE REFERRING TO MR. FERGUSON'S COMPETENCY AT THAT HEARING.

THAT'S RIGHT. THE JUNK DID TAKE EVIDENCE. THE ONLY REASON THERE IS NO PREEXCLUSIVE TO -- PRECLUSIVE TO THE HEARING IN 1987, BECAUSE WHEN THIS COURT MADE THE DENIAL OF 3.850, IT WAS RULED THAT JACKSON COULD NOT RULE ON THE LAW AND MR. FERGUSON WAS NOT COMPETENT TO PROCEED.

THE JUDGE MADE A RULING THAT MR. FERGUSON WAS COMPETENT AT THAT POINT, AND SAID, IN ANY EVENT, PURSUANT TO JACKSON, WORDS TO THAT EFFECT?

YES, YOUR HONOR, BUT HE WAS MORE EXTENSIVE. IT WAS NOT A THROW AWAY LINE. THERE WAS A SUBSTANTIVE DISCUSSION ABOUT JACKSON AND ABOUT WHAT JACKSON HAD RECOGNIZED AND HAD NOT RECOGNIZED, IN TERMS OF RIGHTS. HE SPECIFICALLY REJECTED, IN HIS PIN WON -- OPINION, MR. FERGUSON'S RIGHT THAT THERE IS A DUE -- POSITION THAT THERE IS A DUE PROCESS RIGHT IN POSTCONVICTION COMPETENCY HEARINGS. THIS COURT DID NOT ADDRESS THE COMPETENCY ISSUE AT ALL. ALL IT SAID WAS, AT THE END OF THE OPINION, AFTER ADDRESSING SOME OTHER ISSUES IN LENGTH, IS WE FOUND THAT IT IS WITHOUT MERIT THAT HE IS SBITHSED TO ANOTHER COMPETENCY -- IS ENTITLED TO ANOTHER COMPETENCY HEARING.

ARE YOU ASKING US, HERE, TODAY, FOR HIM TO HAVE ANOTHER COMPETENCY HEARING, OR BASED WHAT YOU HAVE ALREADY ADMITTED TO THE COURT, THE JUDGE'S DETERMINATION THAT HE WAS NOT COMPETENT, IS NOT IS UP ONORITY -- IS NOT SUPPORTED BY THE EVIDENCE?

CLOSER TO THE LATTER, YOUR HONOR, BUT WE WOULD ARGUE THAT THERE IS NO REASON TO GIVE ANY DEFERENCE WHATSOEVER TO THE JUDGE'S DECISION, SINCE IT IS NOT A QUESTION OF CLEAR ERROR. BECAUSE HE RULED IN THE ALTERNATIVE, IT IS AS IF HIS RULING IS NOT THERE. IT

CAN'T BE GIVEN ANY WEIGHT AT ALL, BUT WE DO BELIEVE, ON THE BASIS OF THE COURT IN 1987, THERE WAS EVIDENCE THERE, THE COURT COULD LOOK AT THE RECORD AND SUPPLEMENT IT WITH THE EVIDENCE THAT WE HAVE PRESENTED TO THE COURT ABOUT SCHIZOPHRENIA. IT IS NOT CONTESTED, AND IN OUR BRIEF, WE THINK THE ONLY CONCLUSION THAT COULD BE REACHED IS THAT MR. FERGUSON WAS INCOMPETENT THEN AND HE IS, STILL, IN COMPETENT TODAY.

HOW DO WE READ OUR OPINION, AFTER THE 1987 PROCEEDING? WE JUST DIDN'T ADDRESS THAT PARTICULAR ISSUE, SO, NOW, WE GET AN OPPORTUNITY TO DO SO?

THAT'S CORRECT, YOUR HONOR. I THINK THAT IS THE BEST WAY TO READ IT IS THAT THIS COURT RECOGNIZED THAT, BECAUSE JACKSON WAS THERE, AND WE HAD SPECIFICALLY REQUESTED THE COURT TO OVERRULE JACKSON, SO THAT ISSUE WAS DIRECTLY BEFORE THE COURT THAT, BASED ON JACKSON, MR. FERGUSON WAS NOT ENTITLED TO A COMPETENCY HEARING OR COMPETENCY PROCEEDING IN POSTCONVICTION AND THAT, THEREFORE, THE COURT DID NOT LOOK, AT ALL, AT THE ISSUE OF HIS COMPETENCY. WHILE THIS COURT'S STATEMENT IS WHAT CRYPTIC, BECAUSE THERE IS NO SPECIFIC REFERENCE TO JACKSON, IT IS, ALSO, CLEAR, THAT BECAUSE WE HAD SPECIFICALLY REQUESTED THAT JACKSON BE OVERRULED AND THE STATE HAD ARGUED IN FAVOR OF UP OLD WHOING JACKSON -- UPHOLDING JACKETS ONE, IF THIS COURT HAD INTENDED -- JACKSON, IF THIS COURT HAD INTENDED TO SAY SOMETHING MORE ABOUT MR. FERGUSON'S IN COMPETENCY, AS THE COURT WAS TRYING TO DO, YOU WOULD HAVE SAID SOMETHING TO THE EFFECT THAT JACKSON IS OVERRULED OR JACKSON IS NOT THE LAW.

LET ME COME BACK TO YOUR MAIN THOUGHT HERE. TELL US WHAT CLAIM YOU ARE MAKING, NOW, THAT YOU WOULD BE ENTITLED TO, UNDER CARTER, THAT THE TRIAL COURT DID NOT AFFORD YOU, IN THE EARLIER EVIDENTIARY HEARING. IN OTHER WORDS, ARE YOU MAKING SOME CLAIM THAT I AM, NOW, ENTITLED TO SOMETHING UNDER CARTER, A DIFFERENT STANDARD FOR COMPETENCY, PERHAPS, OR WHATEVER, THAT THE TRIAL COURT DID NOT ALLOW ME, BACK WHEN THE TRIAL COURT HAD THE EVIDENTIARY HEARING, IN 1987, AND MADE A DETERMINATION AS TO COMPETENCY, ARE YOU MAKING SOME CLAIM THAT THERE IS SOMETHING ELSE THAT YOU ARE ENTITLED TO, UNDER CARTER, THAT YOU DIDN'T GET, BACK WHEN THE TRIAL COURT HAD THE EVIDENTIARY HEARING? SETTING ASIDE YOUR ARGUMENT ABOUT THAT IT SHOULDN'T HAVE ANY PREEXCLUSIVE EFFECT, BUT ARE YOU MAKING SOME CLAIM?

WE ARE -- OUR CLAIM IS THAT THERE HAS NOT BEEN A VALID COMPETENCY DETERMINATION, UNDER CARTER.

I DON'T THINK YOU UNDERSTOOD MY QUESTION. DO YOU UNDERSTAND, MY QUESTION IS, ARE YOU CLAIMING THAT, IN THE CONDUCT OF THE EVIDENTIARY HEARING, THAT WENT ON IN 1987, IF I UNDERSTAND IT CORRECTLY, BOTH SIDES PUT ON EVIDENCE OF COMPETENCY, AND THEN ARGUED THE LAW OF COMPETENCY TO THE TRIAL COURT JUDGE AT THAT TIME. IS THAT CORRECT?

THAT'S CORRECT.

ALL RIGHT. ARE YOU CLAIMING, NOW, THAT, UNDER CARTER, THERE IS SOMETHING THAT ADDITIONAL THAT YOU ARE ENTITLED TO, THAT YOU DIDN'T GET, BACK WHEN YOU HAD THIS HEARING IN 1987?

IT IS UNCLEAR WHAT STANDARD THE TRIAL COURT APPLIED, SINCE THE TRIAL COURT DIDN'T THINK THAT THERE WAS ANY RIGHT TO COMPETENCY AT ALL, AT THAT STAGE.

ALL RIGHT. SO IS THAT -- ARE YOU CLAIMING THAT THE TRIAL COURT, THEN, APPLIED THE WRONG STANDARD OF COMPETENCY IN THE 1987 HEARING?

YES. BECAUSE THE TRIAL COURT DIDN'T BELIEVE THERE WAS A RIGHT TO COMPETENCY AT ALL, AND WE DON'T KNOW WHAT STANDARD THEY APPLIED.

LET'S SUPPOSE THAT RERE-- THAT WE REJECT YOUR ARGUMENT, IN TERMS THAT THE TRIAL COURT DIDN'T MAKE A PROPER DETERMINATION OF COMPETENCY. WHAT ARE YOU LEFT WITH, IF WE WERE TO COME TO THAT CONCLUSION?

IF -- THERE WAS A FULL HEARING. THERE WAS EVIDENCE THAT WAS ADMITTED. BASED ON WHAT WE KNOW NOW --

DID YOU SAY IF THERE WAS?

NO. THERE WAS. BASED ON WHAT WE KNOW, WHAT WE KNOW FROM THE HEARING, IN 1987, IS THAT JUDGE SNYDER RELIED ON TWO NONTREATING PHYSICIANS, BOTH OF WHOM SAID, MR. FERGUSON HAS EVERY SYMPTOM OF SCHIZOPHRENIA, BUT WE THINK IT IS BEING FAKED. WHAT WE KNOW, SINCE THEN, IS THAT MEDICAL SCIENCE TELLS US THAT SCHIZOPHRENIA HAS A SPECIFIC TIME OF ONSET IN ADULTS.

WHAT HAS HAPPENED SINCE THEN AND WHAT WE HAVE FOUND OUT, SINCE THEN, HOW DOES THAT FACTOR IN THE JUDGE MADE A DETERMINATION THAT, AT THE TIME HE MADE IT, ON THE SCIENCE, AS IT WAS AT THAT TIME AND THE EXPERTS THAT APPEARED BEFORE HIM, THE FACT THAT, NOW, SUBSEQUENT TO THAT, OTHER EXPERTS HAVE EXAMINED HIM, MAYBE THE SCIENCE HAS MOVED AHEAD. THAT WAS NOT BEFORE THE JUDGE AT THAT TIME.

THAT'S CORRECT.

DID HE MAKE A CORRECT CALL AT THAT POINT.

IT IS NOT AN ISSUE OF WHETHER HE MADE THE CORRECT DETERMINATION. IT IS WHETHER HIS DETERMINATION WAS ENTITLED TO ANY DEFERENCE AT ALL, GIVEN THE RIGHT OF ESTOPPEL, BUT THE FACT IS IT DOES MAKE A SDIF REIGNS WHAT EVIDENCE IS BEFORE THE COURT AND WHAT THE COURT DOES WITH THAT EVIDENCE. DNA IS A PRIME EXAMPLE.

AREN'T YOU TALKING ABOUT, NOW, THOUGH, IS I WANT ANOTHER COMPETENCY HEARING. THAT IS THAT I AM ENTITLED TO ANOTHER COMPETENCY HEARING, BECAUSE I HAVE NEW EVIDENCE, AND IS THAT WHAT YOUR CLAIM IS?

THE NEW EVIDENCE THAT WE HAVE IS NO DIFFERENCE FROM THE EVIDENCE BEFORE THE COURT THEN, IN TERMS OF THE FACT THAT MR. FERGUSON HAS BEEN INCOMPETENT SINCE AT LEAST 196 A. THE MEDICAL RECORDS BEFORE THE COURT THEN. THE MEDICAL RECORDS IN OUR PETITION TO OPEN THE MOTION FOR 3.850, A YEAR AGO, DEMONSTRATE THAT HE HAS HAD AN UNINTERRUPTED HISTORY OF MENTAL ILLNESS FOR THAT LONG.

YOU ARE NOW PROVIDING THAT THE JUDGE MADE AN INCORRECT DECISION. THERE IS COMPETENT EVIDENCE TO SUPPORT THE FACTS. ISN'T THAT WHAT YOU ARE CLAIMING?

THERE IS EVIDENCE TO SUPPORT THAT DETERMINATION.

WHY NOT? IF I UNDERSTAND IT, YOU CONCEDE THAT BOTH SIDES HAD EVIDENCE ON BOTH SIDES OF THIS ISSUE, AND THEREFORE, REALLY, IT WAS AN ISSUE THAT WAS UP FOR GRABS, THAT THE TRIAL COURT, ON THE BASIS OF THE EVIDENCE PRESENTED, COULD HAVE GONE EITHER WAY ON THIS COMPETENCY ISSUE. ISN'T THAT THE STATE OF THE EVIDENTIARY RECORD?

IT IS THE STATE OF THE EVIDENTIARY RECORD IN 1987, BUT IT IS NOT THE STATE OF FACTS AND LAW, RELATING TO MR. FERGUSON. MR. FERGUSON HAS BEEN IN THE STATE'S CUSTODY THE

ENTIRE TIME. HE HAS BEEN PLACED IN CHATTAHOOCHEE MENTAL INSTITUTION, TWICE, AT THE BEHEST OF THE STATE, ONCE BECAUSE ONE OF THE VERY PHYSICIANS UPON WHOM JUDGE SNYDER RELIED, WHO HAD CLAIMED THAT MR. FERGUSON WAS MALINGERING, DECIDED TO TEST MISS MALINGERING THEORY BY TAKING MR. FERGUSON OFF HIS ANTI-PSYCHOTIC DRUGS, COLD TURKEY. THE RESULT WAS CATASTROPHIC.

DID THAT HAPPEN BEFORE '87?

IT HAPPENED BEFORE '87.

SO EVEN NOW WE ARE COMING BACK TO WHETHER OR NOT YOU ARE CLAIMING YOU ARE ENTITLED TO A NEW HEARING, BECAUSE YOU HAVE NEW EVIDENCE. IS THAT WHAT YOU ARE CLAIMING?

THAT WOULD BE ONE APPROPRIATE WAY TO ADDRESS MR. FERGUSON'S ISSUE.

I DON'T UNDERSTAND THAT TO BE WHAT YOU ARE CLAIMING THOUGH.

BUT WE BELIEVE IT ON THE RECORD FROM 19867, COUPLED WITH WHAT WE -- FROM 1987, COUPLED WITH WHAT WE KNOW ABOUT SCIENTIFIC EVIDENCE, NOT --

LET ME HAVE A CRACK AT THIS. WHAT I UNDERSTAND OCCURRED WAS THAT THE JUDGE DID HAVE THIS COMPETENCY PROCEEDING IN '87 AND THEN PROCEEDED TO THIS EVIDENTIARY HEARING, ON THE 3.7850. AND -- ON THE 3.850, AND THAT WAS APPEALED TO THIS COURT, AND IT WAS AFFIRMED. NOW, THAT WAS A FULL EVIDENTIARY HEARING. CORRECT?

THERE WERE ANITIONAL FAMILY -- ADDITIONAL FAMILY MEMBERS THAT WERE BROUGHT. CORRECT?

CORRECT. A NOW, YOU, AS I, ALSO, UNDERSTAND THE RECORD, YOU HAVEN'T POINTED TO ANY SPECIFIC FACT THAT IS PRESENTLY NEWLY-DISCOVERED, SINCE THAT HEARING, THAT WASN'T ABLE TO BE ESTABLISHED OR INTENDED, BY REASON OF INCOMPETENCE, HAVE YOU?

NO. YOUR HONOR, BECAUSE WE CAN'T. MR. FERGUSON HAS BEEN INCOMPETENT THE ENTIRE TIME. WE WERE NOT ABLE TO ENGAGE IN MEANINGFUL DISCUSSIONS WITH HIM THEN, TO GET THE KIND OF FACTS THAT WE NEEDED TO SUPPORT THE CLAIMS THAT ARE AT ISSUE IN THIS PROCEEDING, RELATING TO INEFFECTIVE ASSISTANCE IN HITCHCOCK AND THE ROEING COPS ISSUE. THOSE -- AND THE ROGUE COPS ISSUE. THOSE ARE ONLY THINGS THAT WE CAN KNOW WHEN WE WERE A MEANINGFUL CONVERSATION WITH OUR CLIENT. HE HAS NOT BEEN COMPETENT THE ENTIRE TIME. THE WHOLE POINT IS THAT WE NEED HIS HELP, TO BE ABLE TO DEVELOP THOSE CLAIMS.

WHAT DO YOU SEE AS OUR STANDARD OF REVIEW OF THAT COMPETENCY HEARING?

DE NOVO, BECAUSE UNDER THE DOCTRINE OF COLLATERAL ESTOPPEL, WHAT JUDGE SNYDER DID WAS ENTITLED TO NO DEFERENCE.

BUT THE JUDGE DID, SPECIFICALLY, MAKE A FINDING THAT THE DEFENDANT DOES NOT SUFFER FROM A MAJOR MENTAL ILLNESS, AND THAT HE HAS THE PRESENT ABILITY TO UNDERSTAND THE PROCEEDINGS AND TO ASSIST COUNSEL, IF HE SO CHOOSES. THEY, THEN, THE COURT MADE A FINDING AS TO WHAT WAS THE MORE CREDIBLE EVIDENCE. HOW CAN THIS COURT, DE NOVO, READ A COLD RECORD AND DECIDE WHICH OF THE EXPERTS TO BELIEVE OR NOT BELIEVE, AND WHAT YOU ARE SAYING IS WHAT WE SHOULD BE DOING WHEN WE LOOK AT THAT, IS, ALSO, UNDERSTAND THAT SOMETIME AFTER THIS HEARING, THAT ONE OF THE EXPERTS COULD HAVE BEEN DISCREDITED, BECAUSE YOUR CLIENT, ACTUALLY, WAS TAKEN OFF MEDICATION AND WAS IN CHATTAHOOCHEE. I THINK THAT IS -- I DON'T KNOW HOW REALISTICALLY WE COULD EVER DO

THAT.

WELL, YOUR HONOR, WE SUBMIT THAT IT IS AN EASY CASE HERE. THE STATE HAS NOT, EVER, ARGUED THAT MR. FERGUSON IS COMPETENT NOW. IT HAS PLACED HIM IN CHATTAHOOCHEE TWICE. THE PHYSICIAN WHO TOOK HIM OFF THE DRUGS AND SAW WHAT HAPPENED WHEN HE WENT COLD TURKEY, WAS A STATE PHYSICIAN. THE STATE HASN'T EVEN SAID, IN ANY MEANINGFUL --

AREN'T YOU ASKING US TO DISREGARD DR. HABER AND DR. MILLER'S OPINIONS IN BECAUSE THEY ARE THE ONES THAT SAID THAT HE WAS -- THAT HE WAS MALINGERING AND THAT HE WAS COMPETENT TO PROCEED.

YES. BECAUSE EVERYTHING IN THE RECORD SHOWS THAT HE IS INCOMPETENT, AND THE STATE HAS NOT CONTESTED THAT IN ANY MEANINGFUL WAY. THE STATE HAS NOT SAID THAT HE WAS COMPETENT, BACK IN 1987. WHAT IT HAS BASICALLY SAID IS DOES IT, REALLY, MATTER WHETHER HE WAS OR NOT, BECAUSE HE GOT THIS HEARING. WE SUBMIT THAT HE DID NOT GET THE HEARING TO WHICH HE IS ENTITLE, BECAUSE THE COURT DID NOT KNOW THAT IT HAD TO APPLY THE LAW OF CARTER.

YOU ARE IN YOUR REFWULTHS.

THANK YOU -- IN YOUR REBUTTAL TIME.

THANK YOU. I WILL SAVE THE REST OF MAY TIME.

MAY IT PLEASE THE COURT. MY NAME IS BARBARA YATES, THE ATTORNEY GENERAL'S OFFICE ON BEHALF OF THE STATE OF FLORIDA. I, TOO, WONDER WHAT THEY ARE ASKING FOR, AS THE SECOND BITE OF THE APPLE. EVERYTHING IN THE JUDGE'S 1988, 1989 ORDER, AFTER THE '88 COMPETENCY HEARING, SHOWS THAT HE USED THE PROPER STANDARD. HE CITES, ON THE SIXTH PAGE OF IT, HE USED THE DUSKY VERSUS UNITED STATES STANDARD, IN GAUGING COMPETENCY.

WHAT ABOUT THE ARGUMENT THAT THE DOCTORS WHO, BASICALLY, SAYS THAT HE MAY HAVE SHALL MENTAL ILLNESS, BUT -- HAVE SOME MENTAL ILLNESS, BUT HE IS, REALLY, MALINGERING, WHEN IT COMES TO NOT BEING ABLE TO ASSIST HIS ATTORNEYS, HAD HIM COMMITTED TO CHATTAHOOCHEE AND THERE IS SOME OTHER EVIDENCE THAT WOULD, NOW, DISCREDIT THEIR -- ISN'T COMPETENCY SORT OF AN ONGOING QUESTION HERE, AND WHY SHOULDN'T WE HAVE A COMPLETE EVIDENTIARY HEARING, WHERE THE JUDGE KNOWS WHAT STANDARD HE OR SHE IS TO APPLY AND GO FROM THERE?

THE JUNK KNEW THE STANDARD HE HAD TO APPLY -- THE JUDGE KNEW THE STANDARD HE HAD TO APPLY IN 1988, AFTER THE EVIDENTIARY HEARING. THERE IS NO NEED FOR A COMPETENCY HEARING AT THIS POINT. BUT THEY NEGLECT TO SAY IS THAT THERE IS STILL COMPETENCY EXECUTED, IF AND WHEN A WARRANT IS SIGNED ON MR. FERGUSON, THIS WILL PROBABLY BE BROUGHT UP. IT DOESN'T MATTER IF HE WAS COMPETENT NOW. HE WAS FOUND COMPETENT AT THE TIME HE RAISED THESE CLAIMS. HE WAS FOUND COMPETENT TO ASSIST HIS COLLATERAL ATTORNEYS IN DEVELOPING THE CLAIMS FOR THE 3.850. IN FACT --

BUT I THINK THEIR ARGUMENT, HERE, IS THAT WE CANNOT HAVE CONFIDENCE IN WHAT HAPPENED, IN THE 3.850, BECAUSE HE WAS NOT COMPETENT TO HELP HIS ATTORNEYS DEVELOP THOSE CLAIMS THAT WERE FACTUAL ISSUES.

THAT HAS ALWAYS BEEN THEIR CLAIM, AND THE TRIAL COURT, AFTER HEARING, I BELIEVE IT WAS, SIX EXPERTS AND FIVE LAY WITNESSES, IN THE COURT'S DISCRETION I DIRECT YOUR ATTENTION TO CASTRO V STATE, 744 SO.2D 989, WHERE YOU CITE FROM HUNTER V STATE, WHERE IT SAYS IT IS THE DUSKEY-V-STATE STANDARD, AND THE RESPONSIBILITY OF DECISION AND EVEN

WHEN THE EXPERT'S REPORTS CONFLICT, IT IS THE FUNCTION OF THE TRIAL COURT TO RESOLVE FACTUAL CONFLICTS. THE TRIAL COURT MUST CONSIDER ALL ELEMENTS -- ALL EVIDENCE RELATIVE TO COMPETENCE, AND ITS DECISION WILL STAND, ABSENT A SHOWING OF ABUSE OF DISCRETION. THAT IS EXACTLY THE STANDARD THAT THE TRIAL COURT EMPLOYED IN THIS CASE. ON DIRECT APPEAL, AFTER THE COMPETENCY HEARING, ANOTHER JUDGE, JUDGE FULLER, WHO WAS ACTUALLY THE ORIGINAL TRIAL JUDGE ON THIS, INHERITED THE CASE. HE ALLOWED FERGUSON TO AMEND HIS 3.850. THEY RAISED AN ADDITIONAL SEVEN OR EIGHT CLAIMS. THERE WAS AN EVIDENTIARY HEARING ON THAT. THEY ARE CLAIMING WE HAVE TO HAVE IN COMPETENT, BECAUSE HE COULDN'T TELL US THINGS. WHEN YOU LOOK AT THAT, IT IS REFUTED BY THE RECORD. THEY ARE SAYING ONLY FERGUSON CAN TELL US WHAT HAPPENED WITH THESE COPS WHO WERE, LATER, AFTER THIS PROSECUTED ON FEDERAL DRUG CHARGES. OH, EVEN THOUGH HIS FAMILY TESTIFIED THAT HE WAS NOT ABUSED, WE CAN'T HEAR FROM FERGUSON, AND HE MIGHT HAVE BEEN ABUSED. THIS IS TOTAL SPECULATION. THERE IS ABSOLUTELY NOTHING TO IT. IN THE BRIEFS ON DIRECT APPEAL, FERING YOU SOB'S BRIEF -- FERGUSON'S BRIEF CONTAINS 29 PAGES ABOUT THIS ISSUE. THE STATE'S BRIEF HAS 27 PAGES. ON DIRECT APPEAL, AT THE VERY END OF THE OPINION, THIS IS IN 593 SO.2D, THE NEXT TO THE LAST PARAGRAPH, FERGUSON, ALSO, RAISES THE FOLLOWING CLAIMS. LIST FIVE OF THEM. ONE, THESE PROCEEDINGS SHOULD BE STAYED, PENDING ANOTHER DETERMINATION THAT FERGUSON IS COMPETENT TO PROCEED. THAT WAS THE ISSUE HE RAISED. IN THAT ISSUE, IN THE BRIEF AND IN THE STATE'S BRIEF, IT TALKED ABOUT THE STANDARD THAT THE TRIAL COURT USED. THE EVIDENCE THAT SUPPORTED THE TRIAL COURT.

YOU ARE SUBMITING TO US THAT WE CAN HAVE CONFIDENCE IN WHAT THE TRIAL JUDGE DID, IN MAKING THAT COMPETENCY DETERMINATION, DESPITE THE FACT THAT THE TRIAL JUDGE BELIEVED THAT HE DIDN'T HAVE TO MAKE A COMPETENCY DETERMINATION IN POSTCONVICTION?

YOUR HONOR, I AM NOT SURE THAT THIS IS TRUE. THIS CASE, ONE THING, AT THE END OF THIS PARAGRAPH IN DIRECT APPEAL, HE SAID, QUOTE, THESE CLAIMS ARE WITHOUT MERIT. IT IS REALLY OFFENSIVE TO SAY THAT THIS COURT DID NOT CONSIDER THIS FULLY-BRIEFED ISSUE ON DIRECT APPEAL, ON THE 3.850 APPEAL.

SO GETTING BACK TO WHETHER THE TRIAL JUDGE BELIEVED, UNDER JACKETS ONE, HE DID NOT HAVE TO MAKE A -- UNDER JACKSON, HE DID NOT HAVE TO MAKE A COMPETENCY DETERMINATION --

JUSTICE, THIS CASE ANTICIPATES CARTER. IT IS AN INITIAL 3.850, ACCOMPANIED BY A SUGGESTION OF INCOMPETENCE. THAT IS EXACTLY THE SCENARIO IN CARTER. IF THE TRIAL JUDGE, IN THIS CASE, HAD BELIEVED THAT JACKSON PRECLUDED EVERYTHING, I DON'T UNDERSTAND WHY THEY WOULD HAVE APPOINTED ALL OF THESE EXPERTS AND HELD A THREE-DAY EVIDENTIARY HEARING. IT IS OBVIOUS, ON THE FACE OF IT, THIS, GRANTED, THEIR ALTERNATIVE RULINGS, THE STATE TOTALLY DISAGREES WITH COUNSEL'S ARGUMENT OF COLLATERAL ESTOPPEL, THAT IF THERE ARE TWO RULINGS, YOU HAVE TO BE RIGHT ON BOTH OF THEM. WE WILL RELY ON THE RIGHT FOR ANY REASON RATIONALE. THE FIRST RULING, IT CANNOT BE IGNORED, IS THIS COMPETENCY DETERMINATION BY THE TRIAL COURT. HE GOES THROUGH THE EVIDENCE THAT WAS PRESENTED, THE HISTORY OF THE CASE, THE LEGAL STANDARD, MAKES FINDINGS AND CONCLUSIONS. IT IS TO THE DEFERENCE OF THIS COURT --

LET ME ASK YOU THIS. COUPLED WITH THE PROBLEMS THAT WE HAVE BEEN REVIEWING AND DISCUSSING, IT APPEARS THAT, WHEN IT WAS UP BEFORE US, FOR REVIEW OF THE 3.850, WE GAVE IT A RATHER SHORT SHRIFT. DO YOU THINK WE REVIEWED IT ON THE MERITS?

JUDGE, FROM WHAT YOU HAVE SAID IN THAT OPINION, I HAVE TO ASSUME THAT YOU DID SO. IT WAS BRIEFED --

WE LUMPED IT WITH OTHER --

-- STATED IN OPINION AND YOU SAID IT HAD NO MERIT. YOU LUMPED IT IN WITH OTHER NONMERITORIOUS ISSUES. I AM SURE EVERYONE OF YOU WHO IS ON THE BENCH HAS DECIDED, AT SOME POINT IN SOME OPINION, TO SUMMARILY DEAL WITH AN ISSUE. THERE IS NO RULE OF JURISPRUDENCE THAT REQUIRES THIS COURT TO WRITE A TREATISE ON EACH AND EVERY ISSUE THAT IS PRESENTED TO IT.

CAN YOU THINK OF ANOTHER CASE THAT, ON A COMPETENCY ISSUE, THAT HAS BEEN BEFORE US, THAT HAS -- WE HAVE NOT REVIEWED THAT PARTICULAR ISSUE? NOT OFF THE TOP OF MY HEAD --

NOT OFF THE TOP OF MY HEAD, BECAUSE I HAVEN'T LOOKED FOR IT, BUT IF YOU WANT ME TO, I WILL LOOK AND SEND YOU SOME. I AM SURE IT HAS HAPPENED BEFORE.

IS IT POSSIBLE IN THIS CASE, NOW, THAT WE HAVE NOT GIVEN FULL CONSIDERATION TO THE TRIAL JUDGE'S CALL ON --

NO, JUDGE. NO.

-- COMPETENCY HERE?

THE STATE DEFINITELY DISAGREES WITH YOUR PREMISE COMPLETELY. BECAUSE IT IS SO OBVIOUS, FROM THE FACE OF THIS ORDER, FROM THE FACE OF THE RECORD, ON THE 3.8.

, THAT THIS WAS -- ON THE 3.850, THAT WAS GIVEN EVERY CONSIDERATION BY THE TRIAL COURT, AND THERE SIMPLY WAS NO ABUSE OF DISCRETION FOR WHAT THE TRIAL COURT DID.

I THOUGHT THAT, WHERE YOU WERE GOING WAS THAT YOU WERE SUGGESTING THAT WE SHOULD REVIEW THIS, AT THIS POINT, IF IT DIDN'T APPEAR THAT WE HAD REVIEWED IT BEFORE, BUT THAT --

OH, HEAVENS NO. THAT IS OVER AND DONE WITH, JUDGE. THIS COURT HAS FULLY CONSIDERED IT. ALL THEY ARE SEEKING IS ANOTHER BITE OF THE APPLE. THEY HAVE PRESENTED ABSOLUTELY NOTHING THAT WOULD WARRANT GIVING THEM THAT.

IF, INFERRING YOU SON, WE DIDN'T RECEDE FROM JACKSON, THEN HOW, AND IN -- HOW COULD WE HAVE CONSIDERED IT? I MEAN, WHEN WE SAY THINGS NONMERITORIOUS, IF THE LAW SAID THERE IS NO RIGHT TO -- FOR YOU TO BE COMPETENT, IN ORDER TO ASSIST COUNSEL, AND WE DIDN'T RECEDE FROM JACKSON INFERRING YOU SON, THEN, WOULDN'T -- I MEAN AT THE VERY LEAST, I GUESS I THOUGHT WHERE YOU WERE GOING IS SAYING, LISTEN, THIS JUDGE DID A GREAT JOB. HE DIDN'T EXCLUDE ANY EVIDENCE. HE CONSIDERED EVERYTHING, UNDER THE PROPER STANDARD, AND WE COULD, AT THIS POINT, LOOK AT THAT AND SAY THAT THERE WAS SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT HIS FINDING, BASED ON CARTER. BUT YOU ARE NOT -- THAT IS WHERE I THOUGHT YOU WERE GOING.

YOUR HONOR, THAT IS EVENTUALLY WHERE WE END UP WITH, BECAUSE THEY ARE ASKING FOR, BECAUSE OF CARTER, THEY ARE SAYING YOU SHOULD MAKE IT RETROACTIVE. IT WON'T MAKE ANY DIFFERENCE IN THIS CASE, BECAUSE HE GOT EVERYTHING THAT HE WOULD BE ENTITLED TO, UNDER CARTER, IN THIS CASE ORIGINALLY.

SO YOU DON'T HAVE ANY OBJECTION, THEN, TO THIS COURT SAYING, IF CARTER IS TO BE RETROACTIVELY APPLIED, AND SINCE JACKSON WAS AND IRNL -- WAS APPARENTLY THE LAW WE WERE APPLYING, WHEN WE REVIEWED FERGUSON, SAYING THIS WAS A FULL HEARING. THEY ARE NOT ASKING FOR ADDITIONAL EVIDENCE TO BE PLACED IN OR ADDITIONAL WITNESSES, SO THAT WE SHOULD GIVE THE TRIAL COURTS -- YOUR DISTINCTION IS THAT WE SHOULD GIVE THE TRIAL

COURT'S ORDER -- WE SHOULD GIVE IT DEFERENCE.

YOU SHOULD BEFORE AND YOU SHOULD AGAIN. YOU DID NOT MENTION JACKSON, YOU CAN'T, REALLY, GO BACK AND RECONSTRUCT THIS. IF YOU LOOK AROUND AND LOOK AT THIS OPINION, THERE ARE ONLY TWO CURRENTLY SITTING MEMBERS ON THIS COURT, AND THIS WAS, WHAT, EIGHT YEARS AGO. IT IS HIGHLY UNLIKELY IF EITHER OF YOU ALL REMEMBER EXACTLY WHAT HAPPENED. FROM THE FACE OF THIS OPINION, YOU HAVE TO ASSUME THAT, IF THIS COURT SAW A PROBLEM, WHEN IT WAS HERE, IN THE EARLY '90s, IT WOULD HAVE CORRECTED IT, REGARDLESS OF THE LAW. AS I SAID --

WAS THERE ANY CONTENTION, AT THE EVIDENTIARY HEARING, WHICH FOLLOWED THE COMPETENCY HEARING, THAT ON THE 3.850, THAT COUNSEL CONTENDED THAT, ON BEHALF OF THE -- FERGUSON, THAT THERE WAS SOMETHING THAT COULD NOT BE DONE BY REASON OF --

THEY HAVE NEVER ACKNOWLEDGED JUDGE SNYDER'S FINDING OF COMPETENCY, JUST LIKE THEY NEVER DO IN THIS PROCEEDING. THEY HAVE ALWAYS ASSUMED --

DID THEY MAKE A RECORD THERE? IS THERE A RECORD, THERE, IN THAT PROCEEDING, SAYING, YOU KNOW, IF HE WILL -- IF FERGUSON WAS COMPETENT, THEN WE WOULD BE ABLE TO PRESENT THIS --

IT IS THE SAME THING THAT IS BROUGHT UP IN ISSUE FOUR IN THE INSTANT BRIEF, THAT HE WOULD BE ABLE TO PROVIDE THEM INFORMATION ABOUT THE BAD COPS. HE MIGHT BE ABLE TO PROVIDE THEM INFORMATION ABOUT BEING ABUSED. THEY MAY NOT OBTAINED ALL OF THESE THINGS IN THE INITIAL 3.850, AND THAT THEY WENT AHEAD AND PRODUCED EVIDENCE AT AN EVIDENTIARY HEARING. IT WAS MERE SPECULATION THEN. IT IS MERE SPECULATION NOW. THIS COURT DOESN'T NEED TO ADDRESS RETRO ACTIVITY. THIS COURT COULD, AT THE TIME IT DID THIS OPINION IN EARLY NIBTIES, REACH THE SAME -- NINETIES, REACH THE SAME CONCLUSION IT DID IN CARTER THREE YEARS AGO, BECAUSE IT IS EXACTLY THE SAME CASE, AND IT IS PROCEDURAL POSTURE. IT DID NOT DO SO. IT IS -- THIS IS THE TYPE OF HINDSIGHT THAT COURTS, REALLY, SHOULD NOT ENGAGE IN. IF --

THIS MATTER IS --

IT IS IMPOSSIBLE TO OPEN IT NOW.

FERGUSON'S CASE, YOUR OPPONENT SAYS IS PRESENTLY PENDING IN THE DISTRICT COURT --

RIGHT.

NOW, WHAT IS THE STATUS OF THAT -- OF THE CONTENTION?

IT HAS BEEN HELD IN ABEYANCE AT FERGUSON'S REQUEST, UNTIL THE STATE PROCEEDINGS IN THIS CASE ARE FINISHED. THEN IT WILL BE REACTIVATED.

AFTER CARTER CAME OUT, THEY MOVED TO --

YES. THEY HAD TO FILE THEIR PETITION IN FEDERAL COURT IN 1995. THE STATE, STILL, HASN'T RESPONDED. IT HAS BEEN GOING BACK AND FORTH AND ALL OVER THE PLACE.

THERE HASN'T BEEN ANY COMPETENCY PROCEEDINGS IN FEDERAL COURT?

THERE WILL NOT BE A COMPETENCY PROCEEDING IN THE FEDERAL COURT. THEY ADMIT IT IN THEIR FEDERAL PETITION, THAT HIS COMPETENCY IN POSTCONVICTION PROCEEDINGS, IS NOT A CLAIM IN THE FEDERAL COURTS. THEY ADMIT IT IS A CLAIM OF FIRST IMPRESSION. THERE HAS

NEVER BEEN A FEDERAL COURT THAT HAS RULED AS THIS COURT DID IN CARTER.

IT SEES NO PROBLEM WITH CARTER BEING RETROACTIVE, DESPITE THE FACTOR DO YOU AGREE THAT IT IS NOT -- IT DOES REST UPON A CONSTITUTIONAL BASIS?

JUDGE, I DON'T KNOW THAT YOU ALL WANT TO GET INTO RETROACTIVE IN HERE. THE STATE WOULD PREFER YOU SAY THAT CARTER IS NOT RETROACTIVE. HOWEVER, IF YOU DO FIND IT RETROACTIVE, UNDER DICTION OBV STATE IN -- UNDER DIXON V STATE, IT WOULD START THE TIME PERIOD OF ONE YEAR, UNDER 3.850, RUNNING, FOR BRINGING CARTER CLAIMS. WELL, THE STATE CAN LIVE WITH THAT, TOO, BUT, REALLY, YOU DON'T NEED TO ADDRESS RETRO ACTIVITY HERE. WHEN YOU THINK ABOUT IT, I AM NOT SURE THAT YOU ARE GOING TO WANT TO, BECAUSE WHATEVER PROTECTION CARTER MAY GIVE TO SOMEONE, FERGUSON HAD THE BENEFIT OF ALMOST TEN YEARS BEFORE YOU RELEASED CARTER. AS JUDGE FEHR ARE A, THE CIRCUIT COURT -- FERRER, THE CIRCUIT COURT JUDGE BEFORE WHOM THIS SHOWED UP YEARS LATER, JUDGE FEHRER SAID DIDN'T JUDGE SNYDER MAKE THE COMPETENCY DETERMINATION DICTA? YOU SHOULD NOT ASSUME THAT THE SECONDARY RULING THAT JUDGE SNYDER MADE WAS HIS PRIMARY RULING, FROM EVERYTHING THAT HAPPENED, FROM THE ORDER. IT OBVIOUSLY IS NOT. AND JUDGE FERRAR, AT THE END OF THE HEARING THAT WAS HELD LAST YEAR, HE GOES ON AND GOES THROUGH. HE MENTIONS THAT JUDGE SNYDER CONDUCTED A FULL AND COMPLETE EVIDENTIARY HEARING. HE HAS HIS CONCLUSIONS. HE HAS THE BASIS FOR HIS CONCLUSIONS. HIS FINDINGS OF FACT AND CONCLUSIONS OF LAW. AND THEN HE MAKES AN ALTERNATIVE RULING, BUT BY THAT POINT, HE ALREADY ANALYZED THE TESTIMONY, MADE HIS FINDINGS AND CONCLUSIONS. I DON'T SEE ANY REASON FOR REVISITING THE ISSUE. I DON'T THINK YOU HAVE A LEGAL BASIS, AND THAT IS EXACTLY WHAT THIS COURT SHOULD HOLD. AS I SAID BEFORE, THIS COURT HAS HELD JAMES V STATE, IN 478 SO.2D, THAT PEOPLE WITH ORGANIC BRAIN DAMAGE ARE NOT NECESSARILY INCOMPETENT. IN MUHAMMAD V STATE, 487 SO.2D, THIS COURT POINTED OUT YOU DON'T HAVE TO BE MENTALLY HEALTHY TO BE COMPETENT TO PROCEED. COUNSEL'S STATEMENT EARLIER, THE RECORD IN THIS COURT FULLY SUPPORTS DR. HABER AND DR. MILLER'S CONCLUSIONS THAT HE DID NOT EXHIBIT THE SIGNS OF PARANOID SCHIZOPHRENIA. BECAUSE HE DID HAVE A GOOD MEMORY. HE APPEARED TO BELYING ANIMAL I THINK ERRING, TO THEM. THIS WAS SUPPORTED BY THE TESTIMONY OF THE LAY QUIT W WITNESSES. THERE WERE FIVE CORRECTIONS OFFICERS WHO TESTIFIED, ONE FROM THE DADE COUNTY LOCK UP. THEY TOTALLY REFUTED WHAT DOCTORS SUCH AS ELANUSKY AND MARACANGIS RELIED ON, TO BASE THEIR OPINION THAT HE COULD NOT COOPERATE WITH HIS ATTORNEYS.

LET ME ASK YOU THIS. PROCEDURALLY, HOW DID THIS CASE GET TO THIS POINT? WAS THERE -- IS THIS A SUBSEQUENT 3.850, OR --

YES, MA'AM. IT SURE IS. AND THAT IS ANOTHER REASON IT SHOULD BE DENIED. THEY ARE ASKING FOR THE FIRST 3.850 TO BE REOPENED AND FOR THEM TO BE ALLOWED TO ATTACK FERGUSON'S COMPETENCY, UNDER CARTER. THERE IS ABSOLUTELY NO REASON TO DO THAT, BECAUSE HIS COMPETENCY WAS FULLY EXPLORED AND EVALUATED AND DETERMINED, IN 1988. THEY ARE JUST WANTING THE SECOND BITE OF THE APPLE, AND THEY SHOULDN'T BE GIVEN IT. I WILL MENTION, AGAIN, COMPETENCY TO BE EXECUTED. IF IT MEANT THERE IS A DEATH WARRANT SIGNED ON MR. FERGUSON, I AM SURE, AT THAT POINT, WE WILL BE BACK BEFORE SOME COURT TO HAVE ANOTHER JUDICIAL DETERMINATION OF HIS COMPETENCY. BUT FROM NOW UNTIL THEN, THERE IS NO POINT IN THIS. IT HAS ALREADY BEEN DETERMINED.

THE ISSUE OF HIS COMPETENCY HAS BEEN SOMETHING THAT WAS RAISED FROM THE OUTSET, EVEN IN THE ORIGINAL PROCEEDING. CORRECT?

YES. YES. HE HAS, ALWAYS, HAD MENTAL PROBLEMS. THE STATE DOESN'T DENY I THAT, BUT AS WE STATED IN OUR BRIEF, COMPETENCY IS A FLUID THING. DOCTORS TESTIFIED, YOU CAN BE COMPETENT AT ONE TIME AND IN COMPETENT AT ANOTHER. -- AND INCOMPETENT AT ANOTHER.

BUT HE SPECIFICALLY FOUND THAT HE WAS COMPETENT AT THE TRIAL IN THIS CASE?

HE WAS TRIED FOR TWO DIFFERENT SETS OF MURDERS. INCIDENTALLY HE IS ON DEATH ROW FOR EIGHT MURDERS THAT COUNSEL HASN'T REFERRED TO. HE HAD A COMPETENCY DETERMINATION IN BETWEEN THE TWO TRIALS, AND I BELIEVE HAD HE A COMPETENCY DETERMINATION PRIOR TO THE FIRST TRIAL, AND TWO WEEKS WAS FOUND COMPETENT. TWO WEEKS AFTER THAT, THERE WAS A SUPPRESSION HEARING, AND THEN, AFTER THAT FIRST TRIAL, THERE WAS NO COMPETENCY HEARING. THEY RAISED INSANITY AS A DEFENSE IN THE TRIAL. THAT WAS ABANDONED, I BELIEVE, IN THE FIRST TRIAL, SO THERE WAS NO ACTUAL COMPETENCY HEARING. THERE WAS, HOWEVER, A TRUE COMPETENCY HEARING BEFORE THE SECOND TRIAL. THESE THINGS WERE RAISE ODD DIRECT APPEAL AND ARE DISCUSSED IN YOUR TWO OPINIONS THAT ARE IN 417 SO.2D. THAT WAS DECIDED BACK THEN. AND THE STATE DOES NOT DISPUTE THAT HE HAS MENTAL PROBLEMS. THE STATE DOES DISPUTE, HOWEVER, THE CLAIM THAT HE IS CURRENTLY IN COMPETENT AND THAT -- INCOMPETENT, AND THAT, SOMEHOW, MADE HIM INCOMPETENT, IN SPITE OF THE TRIAL COURT'S FINDING FROM THE 1988 HEARING. THEREFORE WE ASK YOU TO AFFIRM THE CIRCUIT COURT'S DENIAL OF RELIEF AT THIS POINT.

THANK YOU, MISS YATES. REBUTTAL.

THANK YOU. A COUPLE OF POINTS. AS TO THE ISSUE OF WHETHER COMPETENCY IS FLUID, THERE ARE MANY MENTAL ILLNESSES THAT DO COME AND GO. SCHIZOPHRENIA IS NOT ONE OF THEM. ONCE IT ON SETS, AS IT DOES IN THE LATE TEENS OR EARLY TWENTIES AND AS IT DID WITH MR. FERGUSON, A PERSON IS MENTALLY ILL WITH SCHIZOPHRENIA FOR THE REST OF HIS LIFE, BECAUSE AT THIS POINT THE ONLY THING YOU CAN DO IS TO TREAT THE DISEASE.

AND HE IS BEING TREATED OR HE IS NOT BEING TREATED?

HE IS BEING TREATED WITH A NUMBER OF ANTI-PSYCHOTIC DRUGS, WHICH, ALSO, HAVE VERY SEVERE SIDE EFFECTS, INCLUDING REPRESSION OF HIS MEMORY AND DULLING OF HIS SENSES AND THINGS LIKE THAT.

AND SO, AT THE TIME THAT YOU REQUESTED THE COMPETENCY HEARING IN '87, HE WAS ON MEDICATION.

I BELIEVE SO.

BUT YOU, STILL, CLAIM THAT, BECAUSE OF THE -- YOU ARE CLAIMING THAT, BECAUSE OF THE EFFECTS OF THE DRUG, HE, STILL, COULD NOT AID HIS ATTORNEY?

THAT'S CORRECT. EVEN WHEN --

AND SO HE NEVER WOULD BE?

THAT'S CORRECT. BASED ON THE NATURE OF SCHIZOPHRENIA, AND THE FACT IS THAT, EVEN WHEN HE IS ON THE MEDICATIONS NOW, HE, STILL, IS EXTREMELY PARANOID, ACTIVELY PARANOID. HE IS, STILL, IS VERY FEARFUL, AND HE, STILL, IS NOT COMMUNICATIVE. THAT IS WHEN HE IS ON THE DRUGS, DOING WELL. WHEN HE IS NOT ON THE DRUGS, AS THE STATE HAS FOUND OUT, HE BECOMES CAT A TON I CAN.

IS THAT THE -- AT THE ORIGINAL TRIAL AND THE APPEAL, I LOOK THROUGH YOUR OPINIONS THAT YOUR ARGUMENT WOULD HAVE BEEN THAT HE WASN'T COMPETENT TO ASSIST HIS ATTORNEYS AT ANY TRIAL OR RESENTSS. THE STATE FOUND THAT HE WAS COMPETENT AT THAT TIME.

THAT IS NOT AN ISSUE THAT WAS BEFORE THE COURT IN 3.850. IT IS ONE THAT WE ARE NOT SEEKING TO REVISIT NOW, BECAUSE, IN FACT, WE COULD NOT SEEK MR. FERGUSON'S ASSISTANCE,

IF HE WAS INCOMPETENT. THE FACTS, AS THEY EXIST NOW, WE ARE SEEKING IT TO REOPEN 3.850 TO DEAL WITH NEW CLAIMS. WE ARE ESSENTIALLY DEALING WITH FACT-BASED CLAIMS, WHICH WE HAVE BEEN ALL ALONG, WAS THAT MR. FERGUSON IS NOT ABLE TO ASSIST US.

YOU DID NOT FILE A NEW 3.850 MOTION. THIS IS A MOTION TO REOPEN.

WE CAPTION IT AS A MOTION TO REOPEN. WE, ALSO, NOTED THAT, IN THE ALTERNATIVE, IT COULD BE TREATED AS A SUCCESSIVE PETITION, UNDER THE RULE, BASED ON CARTER, WHICH IS A FUNDAMENTAL CHANGE IN THE LAW AND WHICH THIS COURT, THROUGH THIS CASE, COULD DECLARE HAS RETROACTIVE EFFECT. I SEE THAT MY TIME IS UP. THANK YOU VERY MUCH.

THANK YOU VERY.