James Floyd v. State of Florida

MR. CHIEF JUSTICE: GOOD MORNING. THE FIRST CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS FLOYD VERSUS STATE OF FLORIDA. JUSTICE QUINCE IS RECUSED. THANK YOU.

GOOD MORNING. MY NAME IS PAM IZAKOWITZ. I AM HERE REPRESENTING MR. JAMES FLOYD, ON A SUMMARY DENIAL OF THE RULE 3.850 MOTION IN CIRCUIT COURT IN PINELLAS COUNTY. I WOULD LIKE TO ADDRESS TWO AREAS THIS MORNING. THE FIRST HIS TRIAL COUNSEL'S INEFFECTIVENESS AT RESENTENCING, IN PRESENTING MIDMYTHGATION AND INVESTIGATING MITIGATION, INCLUDING MENTAL HEALTH EVIDENCE AND INCLUDING SKIPPER EVIDENCE, AND I WOULD LIKE TO ADDRESS A BRADY CLAIM. MR. FLOYD IS MENTALLY RETARDED. WHEN HE WAS 15, HE WAS DIAGNOSED AS MENTALLY RETARDED BY THE PINELLAS COUNTY SCHOOL OFFICIALS. THOSE RECORDS WERE AVAILABLE SINCE 1965 AND SAT IN THE SCHOOL, WHEREVER THEY WERE, FOR 20 YEARS. BY THE TIME DEFENSE COUNSEL, WHO REPRESENTED MR. FLOYD AT RESENTENCING, BEGAN TO REPRESENT MR. FLOYD, HE DID NO CURSORY INVESTIGATION INTO MR. FLOYD'S BACKGROUND. HE FAILED TO UNCOVER MR. FLOYD'S MENTAL RETARDATION. HE FAILED TO UNCOVER ANY MENTAL HEALTH MATERIAL ON MR. --

IS THIS ALL ALLEGED IN THE MOTION OR BROUGHT OUT AT THE HUFF HEARING OR BOTH?

BOTH.

ACTUALLY PLED IN THE MOTION.

CERTAINLY IT IS ALLEGED IN THE 3.850 THAT MR. FLOYD SUBPOENA MENTALLY RETARDED AND WAS FIRST DIAGNOSED AT 15, BY PINELLAS COUNTY SCHOOL OFFICIALS, THAT HE WAS SLOW IN ALL AREAS, THAT HE FAILED IN MOST OF THE AREAS IN SCHOOL, THAT HE WAS LARGE FOR HIS AGE. HE WAS RIDICULED BY HIS PEERS. HE HAD NO SOCIAL SCHOOLS. THEY PROMOTED HIM, ONLY BECAUSE OF HIS AGE AND HIS SIZE.

WHAT DOES THE RECORD AFFIRMATIVELY SHOW US ABOUT ANY EVIDENCE OF MENTAL MITIGATION, ACTUALLY PRESENTED AT THE --

OKAY. SEVEN WITNESSES TESTIFIED FOR THE DEFENSE AT RESENTENCING. OF OF THOSE SEVEN WITNESSES, FIVE WERE FAMILY FRIENDS, WHO KNEW THE FAMILY OF MR. FLOYD. THEY KNEW THAT HIS MOTHER WAS AN ALCOHOLIC. THEY KNEW THAT HIS FATHER WAS A HARD WORKER AND HAD A LAWN BUSINESS. THESE FAMILY FRIENDS HAD NO INDICATION THAT FROM FLOYD HAD ANY PRIOR CRIMINAL BACKGROUND. NONE OF THEM WERE ASKED ABOUT HIS MENTAL ABILITIES. THEY ALL DESCRIBED HIM AS BEING HARD WORKER, INDINDUSTRIES AND HAVING A NICE SMILE. ONE WORKER TESTIFIED FOR THE DEFENSE, AND HE TESTIFIED TO THE FOLLOWING. I DIRECT THE COURT'S ATTENTION TO PAGE 854 ON THE APPEAL. HE SAID HE KNEW MR. FLOYD FOR SEVERAL YEARS. THEY WORKED TOGETHER AT THE FIRST BAPTIST CHURCH. HE KNEW THAT HIS MOTHER WAS AN ALCOHOLIC. SIX MONTHS BEFORE THE MURDER, MR. ESTELL SAID HE SAW CHANGES IN FLOYD, AMONG THOSE CHANGES EXTREME MOOD SWINGS, STARING INTO SPACE, BIG DEPRESSION, AND AT TIMES HE APPEARED MANIC. CLEARLY COUNSEL HAD AN OBLIGATION -- THIS WAS A DEFENSE WITNESS -- TO LISTEN TO THIS DEFENSE WITNESS, WHO SAID THERE WERE PROBLEMS HERE.

WERE THERE ANY MENTAL HEALTH EXPERTS SECURED BY THE DEFENSE? IN OTHER WORDS DID

THEY HAVE ANYBODY TO CONSULT WITH, OR WAS THERE ANY MENTAL --

NO MENTAL HEALTH EXPERT WAS HIRED OR RETAINED. MR. FLOYD WAS SEEN BY NOBODY, AS FAR AS MENTAL HEALTH, AND IT IS MR. FLOYD'S CONTENTION THAT, EVEN IF THE DEFENSE COUNSEL DIDN'T GET THE SCHOOL RECORDS, FINE. THERE ARE OTHER INDICATIONS THAT WOULD HAVE SHOWN HIM THAT THERE WERE SOME PROBLEMS HERE. OF COURSE WHAT MR. ES TELL TESTIFIED TO, THE DEPRESSION OR MANIC STATE, THAT IS NOT REALLY NORMAL FOR PEOPLE TO APPEAR TO BE IN MANIC STATES, BUT THERE WAS ALSO OTHER INDICATIONS. MR. FLOYD WAS FOUND WITH MARIJUANA IN HIS POSSESSION WHEN HE WAS ARRESTED, AND THERE, ALSO, IS INDICATION THAT HE MAY HAVE BEEN FOUND WITH ALCOHOL. DRUG AND ALCOHOL ABUSE IS HIS BACKGROUND, AND MR. ESTEL BELIEVED THERE MAY HAVE BEEN SOME ALCOHOL AND DRUG ABUSE, ALTHOUGH HE NEVER SAW MARIJUANA OR SMELLED ALCOHOL ON HIS BREATH. CLEARLY THERE WAS INFORMATION, EVEN IF THE SCHOOL RECORDS WEREN'T OBTAINED, TO SHOW THAT THERE WERE SOME PROBLEMS HERE. SO IF MR. FLOYD WAS FOUND WITH MARIJUANA POSSESSION AND, I BELIEVE, HE WAS CHARGED WITH MARIJUANA POSSESSION AT THE TIME. ALSO IT IS TESTIFIED THAT LIB RIM WAS GIVEN TO MR. FLOYD WHILE HE WAS IN JAIL. ALSO HE WENT TO THE CONVENIENCE STORE TO BUY MALT LIQUOR. THERE WAS NO INDICATION BY THE DEFENSE ATTORNEY TO HAVE MR. FLOYD LOOK AT MENTAL HEALTH PROBLEMS OR TO HAVE AN EXPERT LOOK AT, PERHAPS, AN ALCOHOL AND SUBSTANCE ABUSE PROBLEM.

THE JUDGE SUMMARILY DENIED THIS CLAIM, SAYING THAT IT WAS CUMULATIVE.

NO.

WHAT WAS THE REASON?

HE SAID IT WAS INCONSISTENT WITH WHAT WAS PRESENTED AT THE PENALTY PHASE.

THIS WAS BASED, PRIMARILY, UPON INFORMATION ABOUT THE WORK HE WAS DOING OR TAKING OVER SOMEONE'S BUSINESS KIND OF THING. THAT IS PRIMARILY THE BASIS?

WELL, THERE WAS SOME TESTIMONY THAT JAMES FLOYD TOOK OVER HIS FATHER'S BUSINESS, AFTER HIS FATHER DIED IN 1983. THERE, ALSO, WAS TESTIMONY FROM ONE DEFENSE WITNESS WHO SAID THAT THE LAWN BUSINESS DIDN'T SURVIVE, THAT HE COULDN'T HANDLE THE LAWN BUSINESS, YET ANOTHER INDICATION THAT THERE MIGHT HAVE BEEN SOME PROBLEMS AND THAT MR. FLOYD MIGHT HAVE BEEN EXAMINED, BY THE DEFENSE ATTORNEY, BY SOMEONE OTHER THAN THAT.

WAS THERE NOT SOMETHING ABOUT HIS BECOMING A JANITOR OR CUSTODIAN AT A CHURCH?

I BELIEVE THERE WAS TESTIMONY FROM THIS MR. ESTEL THAT HE BECAME THE CUSTODIAN.

AND THAT WAS THE PASTOR OF THE CHURCH?

NO. THIS WAS ANOTHER EMPLOYEE OF THE CHURCH, WHO WORKED WITH MR. FLOYD, BUT THE SAME DEFENSE WITNESS, ALSO, TESTIFIED TO MR. FLOYD BEING ACCUSED OF STEALING, ON FIVE OR SIX INDICATIONS, AND LOST HIS JOB, BECAUSE HE ALLEGEDLY WAS STEALING FROM THE PARISHIONERS AND HAD STOLEN SOME VIDEO EQUIPMENT, SO THIS WAS THE DEFENSE WITNESS, WHO CLEARLY THE DEFENSE ATTORNEY DIDN'T UNDERSTAND MITIGATION, BECAUSE IF HE HAD, THIS INFORMATION WOULD NOT HAVE COME OUT VIA A DEFENSE WITNESS, BECAUSE THESE ARE UNCHARGED ACTS THAT THE INJURY WAS -- THAT THE JURY WAS TOLD ABOUT. IT IS PRETTY CLEAR THAT THE DEFENSE ATTORNEY DIDN'T UNDERSTAND WHAT MITIGATION WAS. HE DIDN'T -- [AUDIO TROUBLES]

THERE SHOULD BE AN EVIDENTIARY HEARING TO TEST THE SUFFICIENCYY IS OF THESE

ALLEGATIONS?

THAT'S CORRECT, AND I BELIEVE WE HAVE ALLEGED IT IN THE 3.850 IN DETAIL. IT IS BRIEFED IN THE NIFERBL AND REPLY BRIEF -- IN THE INITIAL AND REPLY BRIEF. THERE WAS NO MENTAL HEALTH EXPERT HIRED TO EVALUATE THE CLIENT. ONE WITNESS TESTIFIED WHO SAID THAT THE WITNESS, I BELIEVE IT WAS A BROTHER, TESTIFIED TO THINGS THAT DIDN'T HELP MR. RAGSDALE, AND IT WAS SENT BACK FOR ANOTHER HEARING, SAYING THAT THERE NEEDED TO BE SOME MENTAL HEALTH AND EVALUATION TESTIMONY PRESENTED. I WOULD, ALSO, LIKE TO POINT OUT THAT THE DEFENSE ATTORNEY DIDN'T UNDERSTAND --

ARE YOU WANTING US TO DRAW A BRIGHT LINE THAT, IN EVERY CASE THERE NEEDS TO BE MENTAL HEALTH TESTIMONY?

NO, BUT I AM NOT HERE ON EVERY CASE. I AM HERE ON MR. FLOYD'S CASE, AND IN MR. FLOYD'S CASE, THERE WERE LARGE INDICATION THAT IS THERE WERE PROBLEMS HERE, FROM THE DEFENSE WITNESSES, THEMSELVES, THERE WERE SOME PROBLEMS HERE, THAT DEFENSE COUNSEL SHOULD HAVE SEEN SOME RED FLAGS THAT SHOULD HAVE SAID I NEED TO HAVE THIS PERSON EVALUATED.

AG OKLAHOMA HAD ALREADY COME OUT, AND THAT WAS AT THE TIME THAT HE WAS ENTITLED TO PSYCHIATRIC ASSISTANCE. AS A SUPPLEMENT, I CITED THE MOHAMMED CASE, NOT FOR THE WAIVER BUT WHERE THIS COURT SAID RECORDS ARE AVAILABLE TO FIND SOMEBODY, THAN COURT LISTED SCHOOL RECORDS, MILITARY RECORDS, HOSPITAL RECORDS FOR WHOEVER DOES A PSI, TO DETERMINE WHAT THE BACKGROUND IS. THAT IS STANDARD PROCEDURE, TO DETERMINE WHAT THE BACKGROUND IS OF A CRIMINAL DEFENDANT, ESPECIALLY A CRIMINAL DEFENDANT WHO IS FACING THE DEATH PENALTY. THERE WAS NO SUCH CURSORY INVESTIGATION IN THIS CASE. NO RECORDS WERE OBTAINED, NO MENTAL HEALTH EXPERTS WERE OBTAINED. ALL THAT HE RELIED ON WERE SIX WITNESSES WHO KNEW THE FAMILY, KNEW THAT THE MOTHER HAD BEEN AN ALCOHOLIC, KNEW THE FATHER WAS HARD WORKER, BUT IF YOU LOOK AT THAT TESTIMONY, THERE ARE QUESTIONS OF THE DEFENSE ATTORNEY. HOW DID THE ALCOHOLISM AFFECT MR. FLOYD, AND THERE WERE NO ANSWERS.

WAS THERE ANY MITIGATION FOUND BY THE TRIAL COURT ORIGINALLY?

NO.

STATUTORY? HOW ABOUT NONSTATUTORY?

NO.

NO NONSTATUTORY MITIGATION?

NONE. I WOULD, ALSO, LIKE --

DID THEY FIND ANY MITIGATION AT ALL?

NO.

AND TWO AGGRAVATORS?

CORRECT. I WOULD, ALSO, LIKE TO POINT OUT THAT THE DEFENSE DIDN'T KNOW WHAT MITIGATION WAS, BECAUSE HE HAD ASKED, IN JURY CHARGE CON FRENS, WHO HAVE -- CONFERENCE, TO HAVE THE JURY INSTRUCTED ON THE MENTAL MITIGATOR OF EXTREME EMOTIONAL AND MENTAL DISTRESS. WHEN THERE WAS NOTHING PRESENTED, HE, STILL, ASKED FOR THAT MENTAL MITIGATOR. HE CLEARLY ASKED FOR IT BUT DIDN'T FIND IT. THAT IS HOW

MUCH HE DIDN'T KNOW ABOUT HOW TO MITIGATE AND MENTAL HEALTH TESTIMONY. ALSO THE SKIPPER EVIDENCE, WE ALLEGE THAT COUNSEL FAILED TO PRESENT SKIPPER EVIDENCE ABOUT MR. FLOYD'S GOOD BEHAVIOR IN PRISON FROM 1984 TO 1988. SKIPPER HAD COME OUT IN 1986. IT WAS A LAW AT THE TIME, YET DEFENSE COUNSEL FAILED TO PRESENT ANYTHING OF THAT NATURE TO THE JURY. HE PRESENTED IT TO THE JUDGE, AND HE SAYS, IF I MAY BRIEFLY DIRECT THE COURT'S ATTENTION TO THE RECORD ON APPEAL AT 1057, HE SAID HE TALKED TO MR. FLOYD A NUMBER OF TIMES AND HE DIDN'T HEAR ANYTHING THAT MR. FLOYD DIDN'T HAVE ANY BAD PRISON RECORD. HE IS TELLING THIS TO THE JUDGE. HOW IS THE JUDGE OR THE JURY SUPPOSED TO KNOW THAT THERE IS NOT A BAD PRISON RECORD, UNLESS THE DEFENSE LOOSE FOR IT AND FINDS IT AND PRESENTS IT TO THE JURY. THE STATE DIDN'T KNOW THIS INFORMATION. IT WOULD NOT HAVE COME OUT AS A STRATEGIC MEASURE, ON THE PART OF THE DEFENSE, BECAUSE HE DIDN'T WANT THE JURY TO KNOW THAT MR. FLOYD HAD BEEN IN PRISON, BUT THE DEFENSE WITNESSES, THEMSELVES, TESTIFIED OF HIM HAVING BEEN ACCUSED OF STEALING FROM PARISHIONERS ON FIVE OR SIX OCCASIONS AT THE CHURCH AND LOST HIS JOB, SO I THINK THE STATE'S ARGUMENT IS INVALID.

YOU SAID YOU WERE GOING TO ADDRESS THE BRADY CLAIM.

YES.

I AM SPECIFICALLY INTERESTED IN THE WITNESS STATEMENT, CONCERNING THE OTHER SUSPECTS.

THERE HAS BEEN NO INDICATION IN THE RECORD THAT DEFENSE COUNSEL, EITHER THE FIRST DEFENSE COUNSEL OR THE SECOND DEFENSE COUNSEL, HAD THIS INFORMATION, THAT A WOMAN WHO LIVED ACROSS THE STREET FROM THE VICTIM SAW TWO WHITE MEN, THE DAY OF THE CRIME, ENTER THE VICTIM'S HOUSE. DEFENSE COUNSEL -- FIRST DEFENSE COUNSEL, IN 1983, HAD ASKED FOR DISCOVERY, AND I DIRECT THE COURT TO PAGE 10 OF THE RECORD ON APPEAL, PAGE 20 OF THE RECORD ON APPEAL, SHOWS THE STATE'S ACKNOWLEDGMENT OF WHAT WAS GIVEN IN DISCOVERY, AND NOWHERE IS THAT SUPPLEMENTAL REPORT LISTED, AS TO WHAT DEFENSE GOT IN DISCOVERY. IN 1984, DETECTIVE CROTTY, IN HIS DEPOSITION, TESTIFIED THAT A BLACK MALE WAS SEEN IN THE NEIGHBORHOOD. JUST A BLACK MALE. NO INFORMATION, AT THE DEPOSITION, THAT ANY WHITE MEN WERE SEEN IN THE NEIGHBORHOOD, WHITE MEN SEEN IN THE WOMAN'S HOUSE. THIS INFORMATION WAS NOT AVAILABLE TO EITHER DEFENSE COUNSEL. IT ONLY BECAME AVAILABLE IN POSTCONVICTION IN THE LATE 1990s. I BELIEVE THIS INFORMATION WAS EXCULPATORY AND TOLD BY THE STATE, AND I BELIEVE IF THIS INFORMATION HAD HAD THIS, THE OUTCOME WOULD HAVE BEEN DIFFERENT AND CLEARLY WOULD HAVE RAISED SOME REASONABLE DOUBT. THIS CLEARLY IS A CIRCUMSTANTIAL EVIDENCE CASE. IF THE --

YOU SAY IT WAS CIRCUMSTANTIAL. THERE WAS, I GUESS, CALLED THE CONFESSION -- WHAT ABOUT ANDERSON? I MEAN THE STATEMENTS TO ANDERSON, GREGORY ANDERSON.

JAILHOUSE SNITCH.

SO YOU WOULD DISCOUNT HIM, BECAUSE OF HIS STATUS?

WELL, BECAUSE HE WAS WORKING FOR THE STATE, AND THE STATE KNEW, THE STATE ACTUALLY PUT HIM IN THE CELL WITH MR. FLOYD, SO THAT THERE WOULD BE STATEMENTS, AND PINELLAS COUNTY IS KNOWN FOR USING SNITCHES ON THESE DEATH PENALTY CASES. THE OTHER EVIDENCE THAT CONVICTED MR. FLOYD WAS THAT HE WAS FOUND WITH HER CHECKS MENTD.

IT -- CHECKS.

IT IS PRETTY POWERFUL EVIDENCE.

HIS STORY IS THAT HE FOUND CHECKS AT THE DUMPSTER AND WAS WRITING CHECKS ON HER ACCOUNT. I THINK THAT THE INFORMATION IN THE BRADY -- THE BRADY INFORMATION, HAD DEFENSE COUNSEL HAD IT, COULD HAVE CLEARLY RAISED SOME REASONABLE DOUBT. MR. FLOYD WAS NOT PHYSICALLY FOUND IN THAT HOUSE. TWELVE NEGRO HAIRS WERE FOUND IN THE HOUSE AT THAT TIME, BUT, AND I DON'T KNOW IF YOU CAN EVEN DO IT NOW, EVIDENCE AS TO WHETHER THOSE HAIRS SPECIFICALLY MATCHED MR. FLOYD.

THERE WAS AN ALLEGATION IN YOUR GUILT PHASE, INEFFECTIVE ASSISTANCE THAT, THE DEFENSE SHOULD HAVE HIRED A HAIR OR A BLOOD EXPERT. ARE YOU ALLEGEING ANYTHING CONCERNING THAT THE HAIR EXPERT HAS BEEN OBTAINED, AND THAT THIS WOULD ACTUALLY SHOW THESE HAIRS WERE NOT MR. FLOYD?

I BELIEVE IF WE HAD AN EVIDENTIARY HEARING, WE COULD PROVE THAT.

BASED ON WHAT? JUST THAT YOU WOULD TRY TO FIND A HAIR EXPERT AND HAVE IT EXAMINED?

I BELIEVE THERE ARE HAIR EXPERTS THAT DEFENSE COUNSEL DIDN'T HIRE, WHO COULD HAVE TALKED ABOUT THE VOODOO OF HAIR, AND JUST BECAUSE TWELVE NEGRO HAIRS WERE FOUND IN THE VICTIM'S HOUSE DOESN'T MEAN THAT THEY WERE MR. FLOYD'S HAIRS. IT IS ALMOST IMPOSSIBLE TO DETERMINE WHETHER THE HAIR FOUND IN THAT HOUSE WAS MR. FLOYD'S. ALL THAT AN EXPERT COULD SAY WAS IT IS POSSIBLY MR. FLOYD.

THAT IS WHAT THE TESTIMONY WAS DURING THE TRIAL, THAT IT WAS POSSIBLE?

YES, BUT HE DIDN'T HAVE ANYBODY TO REBUT THAT, TO SAY THAT THIS WAS VOODOO AND THAN HAIR FIBER IS THOUGHT TO BE SORT OF VOODOO EVIDENCE THAT HAS NO BEARING IN FACT.

CAN THEY TEST, NOW, THE DNA?

I BELIEVE THEY CAN. I DON'T KNOW WHAT THE NATURE OF THE EVIDENCE IS, AS THE CRIME GOES BACK TO 1984, AND I DON'T KNOW WHAT THE NATURE OF THE EVIDENCE IS THAT HAS BEEN KEPT BY THE STATE ATTORNEY AND THE CLERK OF COURT, FOR ALL OF THESE MANY YEARS.

DO WE, ALSO, HAVE SOME FLOYD EVIDENCE AS A NEXUS IN THIS CASE, THOUGH, THAT WE WE MUST, ALSO, ACCOUNT FOR?

NO. THE SOCK WAS FOUND IN FROM FLOYD'S POCKET, AND IT HAD SIMILAR TO THE BLOOD TYPE OF THE VICTIM AT THAT TIME, ALTHOUGH THERE WAS NO DNA. THERE WAS NO CONCLUSIVE DETERMINATION THAT, YES, THAT BLOOD WAS THE VICTIM'S. I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM THE ATTORNEY GENERAL'S OFFICE, REPRESENTING THE STATE OF FLORIDA. THE ISSUE ABOUT THE DEFENDANT'S MENTAL CAPABILITIES AT THE TIME OF THE TRIAL IS AN IMPORTANT ONE, BECAUSE AT THE TIME OF THIS TRIAL, THIS COURT WAS REAFFIRMING THAT MENTAL HEALTH IS NOT NECESSARILY AN ISSUE IN EVERY CASE. YOU NEED TO LOOK AT WHAT DEFENSE COUNSEL HAD, AND WHAT THEY ARE SAYING, NOW, IS THEY HAD THIS WITNESS, REX ESTELL. THEY ARE PUTTING A LOT ON MR. ESTELL'S TESTIMONY ABOUT MR. FLOYD'S BEHAVIOR AROUND THE TIME OF THE CRIME. WHAT IS IMPORTANT ABOUT HIS TESTIMONY IS HE SAYS HE WORKED FOR US. MR. ESTELL WAS THE SUPERVISOR AT THE CHURCH WHERE MR. FLOYD WORKED. HE IS SAID HE WORKED FOR US FOR ABOUT A YEAR AND THAT HE WAS VERY HARD-WORKING, INDINDUSTRIES, ALWAYS HERE ON TIME AND VERY DEPENDABLE. AFTER HIS FATHER DIED, IN MARCH OF 1983, AND MR. ESTELL SAYS AT THAT TIME I NOTICED A CHANGE IN HIM. HE APPEARED TO HAVE MOOD SWINGS. WE NOTICED THINGS DISAPPEARING FROM THE CHURCH AND HE WAS NOT COMING ON TIME, AND HE NOTICED SEVERAL FACTORS THAT HE SAID HE WAS FAMILIAR WITH PEOPLE WHO HAD BEEN ON DRUGS

BEFORE. HE CONCLUDEDED THAT MR. FLOYD WAS ON DRUGS. HE CERTAINLY DID NOT SUGGEST THAT THERE WERE MENTAL HEALTH PROBLEMS THAT NEEDED TO BE EXPLORED, AND THE FACT THAT HE NOTICED THIS IS A CHANGE IN MR. FLOYD SUGGESTION THAT IS THIS WASN'T A LONG-STANDING MENTAL HEALTH PROBLEM THAT NEEDED TO BE INVESTIGATED.

WHY ISN'T THE VERY FACT, THOUGH, THAT WE ARE DISCUSSING THIS AT THIS LEVEL THAT, IS THAT WE ARE TRYING TO TAKE TESTIMONY THAT WAS PRESENTED AND EVALUATE THAT AND COMPARE IT WITH THE ALLEGATIONS THAT ARE MADE IN THE MOTION, WHY ISN'T THE VERY FACT WE ARE DISCUSSING IT AT THIS LEVEL INDICATIVE OF THE NEED FOR AN EVIDENTIARY HEARING? THAN, YOU KNOW, WHY DOESN'T THAT BRING IT, REALLY, WITHIN THIS COURT'S MOST RECENT PRONOUNCEMENTS ABOUT THE NEED, IT IF THERE IS ANY DOUBT, HAVE AN EVIDENTIARY HEARING, AND, YOU KNOW, THEN WE WILL GET AN EXPLANATION FROM THE LAWYER ABOUT WHAT HE DID, AND WE WILL GET AN EXPLANATION, IF YOU HAVE GOT SERIOUS ALLEGATIONS HERE, IF I UNDERSTAND IT CORRECTLY, THEY DO HAVE SPECIFIC ALLEGATIONS ABOUT IQ TESTS OR WHATEVER, THAT WOULD BRING THIS DEFENDANT INTO A CATEGORY THAT ALMOST EVERYBODY AGREES THAT IS VERY CLOSE TO MENTAL RETARDATION, AND A VERY SERIOUS MITIGATION, BUT IT IS THIS, YOU KNOW, TRYING TO RESOLVE THIS ON A BASIS OF DISCUSSING IT, ABOUT WHAT THE FACTS WERE THAT WERE PRESENTED, AND I GET THE UNEASY FEELING THAT I AM, REALLY, SORT OF CONDUCTING AN EVIDENTIARY HEARING HERE, YOU KNOW, AND TRYING TO COME TO A CONCLUSION, BASED ON WHAT IS THERE, BUT YOU UNDERSTAND MY CONCERN?

CERTAINLY. WHAT THIS COURT HAS DONE, HAS GRANTED DISCRETION TO TRIAL JUDGES, TO LOOK AT THE ALLEGATIONS IN A POSTCONVICTION MOTION, AND MAKE A DETERMINATION AS TO WHETHER OR NOT AN EVIDENTIARY HEARING IS WARRANTED. WHEN THE JUDGE RULED ON THIS PENDING MOTION BELOW, AT THE TIME OF THE HUFF HEARING AND AFTER THE HUFF HEARING, THIS COURT HAD VERY RECENTLY DECIDED THE LOUISIANA CROIX CASE, WHICH HAD VERY SIMILAR ALLEGATIONS, AND THIS COURT UPHELD THE SUMMARY DENIAL OF THAT CASE, AND THE TRIAL JUDGE, IN HIS ORDER, CITES LOUISIANA CROIX AND CITES MENDICK AND CITES RECENT CASES OUT -- CITES LACROIX AND CITES MENDICK ANDRIESENT CASES OUT OF THIS COURT, AS TO WHETHER HE CAN HAVE AN EVIDENCIARY HEARING.

IS THAT ABUSIVE TO DISCRETION? THE RULE, BACK THEN, SAID -- DOES IT, ALSO, SAY THEN WHAT IT SAYS NOW, WHICH IS UNLESS --

IT HASN'T CHANGED.

-- REFUTED. SO WE ARE UP HERE NOT ONLY ON WHETHER THE JUDGE ABUSED HIS DISCRETION IN DENYING THE EVIDENTIARY HEARING, BUT AS A MATTER OF LAW, WHETHER THE ALLEGATIONS THAT ARE MADE ARE CONCLUSIVELY REFUTED BY THE RECORD. NOW, THE QUESTION AS TO WHETHER IT WAS REASONABLE, BACK IN 1984, TO NOT DISCOVER SCHOOL RECORDS, NOT TO KNOW THAT YOUR CLIENT HAS A FIFTH TO SIXTY IQ AND A MENTAL ABILITIES OF A TEN-YEAR-OLD, DOES IT NOT HAVE TO BE EVALUATED AT EVIDENTIARY HEARING, AS TO WHETHER THAT WAS REASONABLE FOR THAT LAWYER TO HAVE NOT EXPLORED THOSE ALTERNATIVES?

WELL, IT DIDN'T HAVE TO BE EXPLORED IN L.A. CROIX. I BELIEVE IT -- IN LA CROIX. I BELIEVE IT IS AN ABUSE OF DISCRETION AND YOU HAVE GIVEN THE JUDGE THE OPPORTUNITY TO LOOK AT FACTUAL ALLEGATIONS AND EMOTION AND TO MAKE A DETERMINATION, AFTER HAVING HEARD THE TESTIMONY AND AFTER HAVING SEEN THE LETTER FROM THE VICTIM'S DAUGHTER THAT HE WASN'T ON DRUGS, THAT HE DIDN'T TAKE DRUGS, THAT HE SOMETIMES CONSUMED BEER, THEY ARE GRABBING AT A LOT OF THINGS THAT REALLY DIDN'T SUPPORT THE RECORD. THEY WERE ON NOTICE, BECAUSE HE WAS AT THE CONVENIENCE STORE, BUYING MALT LIQUOR, WHEN HE USED THE CHECKS, AND THAT SHOULD HAVE PUT THEM ON NOTICE THAT HE WAS BUYING BEER, AND YET THAT WAS ENTIRELY REFUTED AT TRIAL, SO IF YOU GO BACK AND LOOK AT WHAT WAS

PRESENTED, WHICH IS THE PERSPECTIVE THAT THE TRIAL JUDGE HAS, YOU HAVE TO LOOK AT HOW, YOU KNOW, HIS DEALING WITH THE ISSUE, AND WHETHER HE MADE A MIGHT TAKE IN MAKING THE DETERMINATION THAT THERE DID NOT NEED TO BE AN EVIDENTIARY HEARING.

BUT THERE IS AN ALLEGATION, HERE, IN THE 3.850, OF SUBSTANCE ABUSE, AN EMOTIONALLY-DEPRIVED CHILDHOOD, AN IQ OF 51. WHAT WOULD THE TRIAL JUDGE HAVE THAT WOULD EQUIP HIM TO MAKE A DECISION THAT AN EVIDENTIARY HEARING WAS NOT NEEDED? HE HAS AN ALLEGATION OF USING QUAALUDES AND HUFFING AS A CHILD.

WELL, HE HAD THE TESTIMONY FROM THE PENLED PHASE THAT FLOYD -- FROM THE PENALTY PHASE THAT FLOYD DID HAVE EMOTIONAL DEPRIVATION IN HIS UP BRINGS, THAT HIS MOTHER WAS ALCOHOLIC, THAT HIS FATHER HAD DIED AND THAT HAD A GREAT EFFECT ON HIM AND HIS MOTHER'S ALCOHOLISM HAD AN EFFECT ON HIM. THE PENALTY-PHASE WITNESSES DISCUSSES THAT, AND WHAT THE TRIAL JUDGE, BELOW, IN SUMMARILY DENYING THIS, TO SAY THAT THERE WASN'T ANY PREJUDICE, BECAUSE THE STUFF ABOUT HIS BACKGROUND WAS PRESENTED. WE HAD THESE WITNESSES THAT TALKED ABOUT IT. SECONDLY, SAYING THAT HE FUNCTIONS, WHICH REPEATEDLY THE ALLEGATION IN THIS CASE HAS BEEN THAT HE FUNCTIONS AS A THIRD GRADER. HE FUNCTIONS ON THE LEVEL OF A TEN-YEAR-OLD, AND YET THE CRIME THAT HE COMMITTED IN THIS CASE SHOWED THAT HE HAD THE INTELLECT TO BE ABLE TO STEAL THE CHECKS, KNOW HOW TO ENDORSE THEM, KNOW HOW TO SIGN THEM FRAUDULENTLY, WHERE TO TAKE THEM TO THE BANK, HOW TO GET THEM CASHED, THINGS THAT REFUTE THE TESTIMONY THAT IS NOW OFFERED THAT THE MENTAL PROBLEMS WERE SO SEVERE THAT HE COULDN'T HAVE DONE THIS. HE HAD THE -- THE TRIAL JUDGE HAD THE LETTERS THAT MR. FLOYD HAD WRITTEN, TO CONSIDER THOSE. HE HAD THE TESTIMONY ABOUT HIM BEING HARDWORKING, AND ALTHOUGH THE TESTIMONY WAS ABOUT THAT HE HAD TAKEN ON HIS FATHER'S LAWN BUSINESS, WHEN HIS FATHER HAD BECOME DISABLED, WHICH WAS EVEN BEFORE HIS FATHER DIED, HE BASICALLY TOOK OVER THE BUSINESS, THAT HE BECAME THE PROVIDER FOR THE OTHER CHILDREN IN THE HOME, THAT HE WAS THE FOURTH -- MR. FLOYD WAS THE FOURTH OF SIX CHILDREN, BUT HE, REALLY, TOOK OVER THE FATHER FIGURE FOR THE OTHER CHILDREN IN THE HOME, AND ALTHOUGH HE WAS WORKING THIS OTHER JOB AT THE CHURCH, AND NOW THE ARGUMENT IS MADE, WELL, BECAUSE OF HIS MENTAL PROBLEMS HE COULDN'T KEEP UP THAT JOB AT THE CHURCH. THAT IS NOT WHAT REX ESTELL SAID. WHAT HE SAID WAS HE WAS STEALING AND WE DIDN'T WANT TO BRING CHARGES, SO WE DECIDED TO TERMINATE HIM.

ISN'T THE PURPOSE OF AN EVIDENCIARY HEARING TO FLUSH THIS OUT, SO YOU DON'T HAVE THIS SUPPOSITION, GUESSWORK, IN SOME INSTANCES? ISN'T THAT THE PURPOSE OF AN EVIDENTIARY HEARING, WHERE YOU HAVE THESE ALLEGATIONS THAT COULD OR MIGHT BE OR MIGHT NOT BE, SO WHAT HARM IS DONE IN HAVING AN EVIDENTIARY HEARING, WHERE YOU HAVE THIS SCENARIO?

WELL, I DON'T KNOW THAT --

DO YOU HAVE TO CONCEDE THAT IS THE BEST WAY TO HANDLE IT, BY AN EVIDENTIARY HEARING?

I DON'T THINK WE SHOULD BE CONCERNED ON THE APPEAL OF THE BEST WAY TO DO ANYTHING. I THINK WE SHOULD BE CONCERNED WITH WHETHER THE TRIAL COURT COMMITTED ERROR AND WHAT THE TRIAL COURT DID.

BUT WE HAVE SAID, IN CASE LAW, THAT IF THE RECORD DOESN'T REFUTE IT, THEN WE HAVE AN EVIDENTIARY HEARING.

YOU HAVE, ALSO, ALLOWED THE TRIAL JUDGE TO MAKE A DETERMINATION AS TO WHETHER OR NOT THE RECORD REFUTED IT. AND, AGAIN, THIS -- THE JUDGE IN THIS CASE WAS RELYING ON LA CROIX, WHICH HAD JUST COME OUT A FEW MONTHS BEFORE HE WAS DENYING THE MOTION IN

THIS CASE, AND HE HAD THE ALLEGATIONS.

IN TERMS OF THE TRIAL COURT ORDER IN THIS CASE, ARE WE TO CONSIDER IT AT ALL SIGNIFICANT THAT, BASED ON WHATEVER WAS PRESENTED AT THE ORIGINAL PENALTY PHASE, THAT THE TRIAL JUDGE FOUND NO STATUTORY OR NONSTATUTORY MITIGATION? BECAUSE I KNOW IN SOME OF THESE CASES, THE ARGUMENT IS MADE, WELL, IT IS CUMULATIVE. THEY HAD THESE FAMILY MEMBERS. NOW THEY WANT TO HAVE ADDITIONAL FAMILY MEMBERS THAT THEY WANT TO HAVE. THERE WAS SOME EVIDENCE ABOUT THE SEXUAL ABUSE AS A CHILD. NOW THEY WANT TO -- IT IS JUST QUALITY OF IT. BUT MY CONCERN, HERE, IN TERMS OF LOOKING AT BOTH PRONGS OF STRICKLAND AND WHAT EFFECT IT MIGHT HAVE, AND JUST SUMMARILY DENYING THIS CLAIM, IS THAT THE TRIAL JUDGE THAT ORIGINALLY EVALUATED THIS SAID, BASED ON WHATEVER WAS PRESENTED, THAT NOTHING WAS MITIGATING, AND THAT IS SOMEWHAT OF A CONCERN. COULD YOU ADDRESS THAT?

YES. I THINK YOU HAVE TO BE CAREFUL ABOUT ACCEPTING THE STATEMENT THAT THE TRIAL JUDGE MADE A CONCLUSION THAT THERE WAS NO MITIGATION AT FACE VALUE, BECAUSE WHAT THE TRIAL JUDGE DID IS, AT THE CONCLUSION OF THE SENTENCING HEARING, WHICH WAS AT A LATER TIME AFTER THE PENALTY PHASE PROCEEDINGS HAD BEEN CONCLUDED, THERE WAS A SENTENCING HEARING WHERE MR. FLOYD WAS PERMITTED TO ADDRESS THE COURT AND ARGUMENT OF COUNSEL AND THE COURT TOOK A RECESS AND CAME BACK, AND THE COURT DISCUSSED THE MITIGATION AND SAID THAT I FOUND FIND THAT HE IS REMORSEFUL. I FIND THAT HE HAD THE PROBLEMS WITH HIS MOTHER BEING AN ALCOHOLIC AND, BASICALLY, MADE THE CONCLUSION THAT THAT MITIGATION DID NOT RISE TO THE LEVEL OF OUTWEIGHING THE AGGRAVATING FACTORS. NOW, IN THE WRITTEN SENTENCING ORDER, WHAT HE SAYS IS THERE ARE NO MITIGATING FACTORS THAT OUTWEIGH THE AGGRAVATING FACTORS, AND SO THAT IS READ AS BEING THE JUDGE DIDN'T FIND ANY MITIGATION, BUT CLEARLY HE RECOGNIZED HE WAS AWARE OF THIS TESTIMONY AND THE FACT THAT HE DID NOT FIND IT COMPELLING, THEN, I THINK, SUPPORTS THE FACT THAT HE WOULDN'T FIND IT ANYMORE COMPELLING NOW.

BUT, REALLY, WHAT IS HAPPENING IS THAT WE ARE ACCEPTING, AT FACE VALUE, FOR PURPOSE OF THIS MOTION THAT IS WELL PLED, SOUNDS LIKE IT IS WELL PLED. I HAVEN'T GOT A LOOK AT IT AGAIN, THAT THIS IS A DEFENDANT THAT HAS AN IQ OF SOMEWHERE BETWEEN 50 OR 650 -- OR 60, THAT IS MENTALLY RETARD. THAT IS A FAIRLY SIGNIFICANT MITIGATOR. THE JUDGE, IT SOUNDS LIKE, SAID, YOU KNOW, I HEARD WHAT WENT ON. I AM JUST FINDING THAT THAT JUST DOESN'T SOUND CREDIBLE TO ME, THAT THIS DEFENDANT CAN BE MENTALLY RETARD. THAT SOUNDS LIKE AN EVIDENTIARY DETERMINATION, AND THAT IS MY CONCERN, IS THAT THAT IS NOT WHAT THE JUDGE SHOULD BE DOING AT THE -- WHATEVER DISCRETION WE GAVE A JUDGE TO HOLD AN EVIDENTIARY HEARING OR NOT. THE JUNK CAN'T BE EVALUATING THE -- WHETHER THE TRUTHFULNESS OF THE ASSERTIONS. WE HAVE GOT TO ACCEPT THE FACT THAT THIS IS A MENTALLY RETARDED DEFENDANT, DON'T WE?

WELL, I THINK IF YOU READ THE ORDER DENYING THE 3.850, THAT THE JUDGE ISN'T MAKING ACCREDITIBILITY DETERMINATION AND SAYING THIS ISN'T TRUE. WHAT HE IS SAYING IS LOW IQ, MAYBE, NONSTATUTORY MITIGATION, BUT IF YOU LOOK AT THE FACTS IN THIS CASE, IT IS NOT GOING TO MAKE ANY DIFFERENCE IN THE RESULT, IN THE IMPOSITION OF SENTENCE, BECAUSE OF THE OTHER EVIDENCE THAT SHOWS HE DID HAVE THESE MENTAL ABILITIES TO BE ABLE TO HANDLE LIFE SITUATIONS AND TO COMMIT THIS CRIME AND TO BE A GOOD WORKER, AND HE IS NOT, REALLY, MAKING THE TYPE OF CREDIBILITY DETERMINATION THAT YOU ARE TALKING ABOUT, WHERE IT IS A FACTUAL THING. WHAT HE IS TALKING ABOUT IS HE IS TALKING ABOUT PREJUDICE. HE SAYS, IN HIS ORDER, I FIND THAT THERE IS NO PREJUDICE, BECAUSE I AM ALREADY -- KNEW ABOUT THE FAMILY BACKGROUND STUFF, AND THE MENTAL HEALTH STUFF IS JUST NOT COMPELLING ON THE FACTS OF THIS CASE, GIVEN THE OTHER EVIDENCE ABOUT HIS MENTAL ABILITIES, SO I DON'T THINK YOU ARE IN THE SITUATION WHERE YOU ARE TALKING ABOUT, WHERE YOU HAVE A TRIAL JUDGE WHO IS ACTUALLY MAKING CREDIBILITY DETERMINATIONS,

AND I DON'T THINK YOU HAVE A SITUATION WHERE THE JUDGE FAILED TO ACCEPT, AS TRUE, THE ALLEGATIONS IN THE MOTION. NOW, YOU BRING UP A GOOD POINT. I THINK YOU TALKED ABOUT THIS BEING A WELL-PLED MOTION. I THINK ONE THING THAT IS REALLY DIFFICULT FOR TRIAL JUDGES IS THAT, TEN OR TWELVE YEARS AGO, POSTCONVICTION MOTIONS THAT WERE FILED WERE VERY FACT SPECIFIC. THEY FREQUENTLY HAD APPENDIXES ATTACHED TO THEM THAT WERE VERY LENGTHY. VOLUMES AND VOLUMES OF APPENDIXES, WHERE THERE WERE RECORDS ATTACHED. THERE WERE AFFIDAVITS FROM OTHER WITNESSES, FROM TRIAL COUNSEL, AND MORE AND MORE, WE HAVE SEEN THE 3.8 50s BECOME VERY VAGUE AND CONCLUSORY, AND THE AFFIDAVITS AREN'T THERE, THE SPECIFIC WITNESSES AREN'T IDENTIFIED, AND I THINK THAT MAKES IT DIFFICULT FOR A JUDGE TO DETERMINE WHAT, EXACTLY, THE 3.850 IS SAYING, BUT WHEN HE LOOSE AT THE ALLEGATIONS, AND THESE ARE, REALLY, I THINK, MORE CONCLUSIONS THAN THEY ARE FACTS. HE TALKS ABOUT THE SCHOOL RECORDS, BUT, AGAIN, THAT DOESN'T SHOW DEFICIENCY ON THE PART OF COUNSEL, AND TO THE EXTENT WE DID HAVE MOHAMMED SENT IN AS SUPPLEMENTAL AUTHORITY, TALKING ABOUT, WELL, THERE ARE RECORDS OUT THERE AVAILABLE, THIS IS SOMETHING THAT WE ARE TALKING ABOUT TODAY, FOR CASES THAT ARE BEING TRIED TODAY, BUT IT IS NO REASON TO GO BACK AND SAY, TODAY, THAT IN 1988 THAT EVERY DEFENSE ATTORNEY ABSOLUTELY HAD TO GO BACK AND GET SCHOOL RECORDS OR YOU ARE GOING TO BE DEFICIENT. WHAT THIS COURT HAS, ALWAYS, SAID, AND WHAT YOU SAID, AT THE TIME, WAS IT IS UP TO COUNSEL TO DETERMINE WHAT A REASONABLE INVESTIGATION IS, BASED ON THE FACTS THAT THEY HAVE IN FRONT OF THEM. IF THEY HAVE FACTS THAT THE DEFENDANT IS WRITING LETTERS, SAYING I DRINK BEER EVERY NOW AND THEN BUT I DON'T DO DRUGS. I DON'T TAKE DRUGS, AND YOU HAVE FACTS THAT SEEM TO SUPPORT THAT RNKTS -- SUPPORT THAT, THEN YOU NEED TO CONSIDER HOW MUCH DEFENSE COUNSEL NEEDS TO USE THAT AS A SPRINGBOARD TO HAVE HIM SAYING I NEED HIM TO BE EXAMINED BY A MENTAL HEALTH EXPERT, BECAUSE HE MAY BE RETARDED, SO YOU HAVE TO LOOK AT WHAT IS AVAILABLE IN EACH CASE. I DO WANT TO ADDRESS THE BRADY CLAIM AS WELL. FIRST OF ALL, AS TO THE ALLEGATION THAT THERE WAS A WITNESS THAT IDENTIFIED THESE WHITE MALES AS BEING PRESENT AT THE SCENE OR AROUND THE HOUSE, WHAT THE POLICE REPORT REFLECTED WAS THAT THE WITNESS WAS UNABLE TO I IDENTIFY THESE PEOPLE -- TO IDENTIFY THESE PEOPLE. THE TRIAL JUDGE, IN REJECTING THIS CLAIM, RELIED ON A NUMBER OF THINGS. FIRST OF ALL HE SAID THE LEAD DETECTIVE WAS DEPOSED AND WAS NOT ASKED ABOUT OTHER SUSPECTS, AND IF HE HAD BEEN ASKED ABOUT OTHER SUSPECTS, THIS WOULD HAVE BEEN AVAILABLE TO THE DEFENSE ATTORNEY, BUT THEY DIDN'T PURSUE THAT.

YOU MAKE THIS SEEM AS THOUGH THEY COULD NOT EVEN IDENTIFY THE RACE OR WHAT THEY LOOKED LIKE OR ANYTHING. I GET THE DISTINCT IMPRESSION THAT, FROM THIS RECORD THAT, CERTAINLY THE WITNESS WOULD TESTIFY AS TO SEEING CAUCASIAN MALES FORCIBLY ENTER.

RIGHT.

AND THE IDENTIFICATION, SHE MAY NOT HAVE BEEN ABLE TO PLACE A FACE ON THIS, BUT WOULD THAT NOT BE IN CONSISTENT, AT LEAST WITH THE FACTS THAT WE HAVE HERE?

WELL, THEIR ALLEGATION WAS THAT A WITNESS WOULD IDENTIFY A PARTICULAR SUSPECT, WHO HAD BEEN IDENTIFIED BY POLICE AS SOMEONE WHO WAS BILKING ELDERLY CLIENTS, HAD A SPECIFIC PERSON THAT THE WITNESS WAS IDENTIFYING, AND THAT IS NOT WHAT THE POLICE REPORT ACTUALLY SAYS.

BUT THE POLICE REPORT DOES SAY, WAS I CORRECT IN --

THAT THE WITNESS HAD MADE A STATEMENT.

TO THAT EFFECT? WHITE MALES FORCIBLY ENTERING THE PROPERTY.

I DON'T REMEMBER THE FORCIBLY ENTERING THE PROPERTY. I WOULD HAVE TO GO BACK AND

LOOK AT IT AGAIN.

WHY WOULD THAT NOT BE EXCULPATORY, UNDER THESE CIRCUMSTANCES?

WELL, THE FACT THAT THERE MAY BE OTHER SUSPECTS, THIS COURT HAS SAID, IS NOT NECESSARILY EXCULPATORY. YOU HAVE TO LOOK AT THE OTHER EVIDENCE AVAILABLE AND THE SITUATION N THIS CASE, THERE WAS A GREAT DEAL OF EVIDENCE. IT WAS A STRONG GUILT PHASE CASE AGAINST MR. FLOYD, AND WHICH THE TRIAL JUDGE OUTLINED NOT ONLY WAS, YOU KNOW, HIS INITIAL STATEMENT WAS, WELL, I FOUND THESE CHECKS, AND SO I WENT AND CASHED ONE AND GOT ARRESTED. HE WAS AT THAT POINT, CONFRONTED WITH THE FACT THAT THEY HAD HIM ON A VIDEO CAMERA AT THE BANK TWO DAYS EARLIER, WHICH WAS THE DAY THAT MRS. ANDERSON WAS KILLED, CASHING A CHECK, WITHIN A COUPLE OF HOURS OF HER MURDER, SO, THEN, HE CHANGES HIS STORY A LITTLE BIT, AND HE COMES UP WITH A NEWAL BITE. WELL, THE PEOPLE HE WILL THAT -- THE PEOPLE THAT HE TALKED ABOUT COULD NOT CONFIRM THAT ALIBI. YOU HAVE NOT ONLY THE NEGRO HAIRS AT THE SCENE. YOU HAVE THE TIRE TRACK WHICH WAS IN HER DRIVEWAY WHICH MATCHED HIS MOTORCYCLE. YOU HAVE THE BLOOD, THE SOCK ON THE BLOOD THAT WAS FOUND -- THE BLOOD ON THE SOCK THAT WAS FOUND IN HIS JACKET OUTSIDE THE BANK. YOU HAVE HIM CASHING HER CHECKS RIGHT AWAY, AND THEN, OF COURSE, YOU HAVE HIS STATEMENTS TO THE OTHER INMATE, ABOUT HAVING COMMITTED THIS MURDER AND THE CRIME, SO IT WAS A STRONG CASE, AND THE FACT THAT SOME OTHER WITNESS MAY HAVE SEEN SOMEBODY ELSE ON THE STREET, JUST IS NOT COMPELLING, AND THE TRIAL COURT FELT LIKE IT WAS NOT EXCULPATORY, THAT IT WAS CERTAINLY NOT MATERIAL, AND THAT, FURTHERMORE, IF THE DEFENDANT HAD EXERCISED DUE DILIGENCE IN ASKING ABOUT OTHER SUSPECTS, THAT THIS INFORMATION WOULD HAVE BEEN OBTAINED. ON THE -- I, ALSO, WANT TO SPEAK A LITTLE BIT TO THE ALLEGATION ABOUT NOT HAVING HIRED AN EXPERT ON THE HAIR AND FIBER EVIDENCE. IF THERE IS A DEFENSE EXPERT THAT SAYS HAIR AND FIBER EVIDENCE IS VOODOO AND YOU CAN'T BELIEVE IT, I HAVEN'T HEARD AN EXPERT SAY THAT. I HAVEN'T ACTUALLY SEEN. THAT THE STATE WITNESSES, AT THE TIME OF TRIAL, ADMITTED THAT THIS WAS NOT A POSITIVE IDENTIFICATION. THEY ADMITTED THE LIMITATIONS ON THE SCIENTIFIC EVIDENCE THAT WAS THERE. PRESENTING A DEFENSE EVIDENCE, PRESENT A DEFENSE EXPERT TO SAY YOU JUST CAN'T RELY ON SIBTIFIC EVIDENCE AT ALL BECAUSE -- ON SCIENTIFIC EVIDENCE AT ALL, BECAUSE IT IS VOODOO, I THINK WOULD HAVE, REALLY, DISENFRANCHISED A LOT OF THE JURY, BECAUSE IT JUST DOESN'T MAKE SENSE. WHAT THEY ARE SAYING, AND THEY HAVE NEVER MADE ANY ALLEGATION THAT THE HAIRS NEED TO BE TESTED OR THAT ANYTHING FURTHER NEEDS TO BE DONE IN THIS REGARD. THEY HAVE NEVER MADE AN ALLEGATION THAT THEY HAVE AN EXPERT THAT HAS SEEN THE HAIRS OR WILL OFFER TESTIMONY. TODAY IS THE FIRST TIME I HAVE HEARD ABOUT THIS BEING VOODOO, BUT, CERTAINLY, THE WITNESSES AT TRIAL WERE VERY CANDID ABOUT THE LIMITATIONS OF THE SCIENTIFIC EVIDENCE THAT THE STATE WAS PRESENTING. FOR ALL OF THESE REASONS, I WOULD ASK THIS COURT TO AFFIRM THE SUMMARY DENIAL. THANK YOU.

REBUTTAL?

TO RESPOND TO JUSTICE LEWIS'S QUESTIONS ABOUT THE POLICE REPORT, A NEIGHBOR ACROSS THE STREET SAW A CAR DRIVE UP. SHE DESCRIBED ONE SUSPECT, WHITE MALE, THIRTY YEARS OLD, THIN, TALL, DARK HAIR, WITH BIG CURLS, MUSTACHE, HIS EYES STOOD OUT IN CONTRAST TO HIS SKIN. SUBJECT NUMBER TWO, WHITE MALE, THIRTY, SAME HEIGHT, MEDIUM BUILD, STRAIGHT, SHORT HAIR, CLEAN SHAVEN. BOTH SUBJECTS WENT A FAST STRIDE UP TO THE VICTIM'S DOOR, AND ALTHOUGH SHE DID NOT SEE THE VICTIM, THEY WERE LED INTO THE HOUSE. NOWHERE DOES THIS INFORMATION COME OUT. WHEN DETECTIVE CROTTY, ONE OF THE CHIEF INVESTIGATORS, TALKS ABOUT OTHER SUSPECTS IN THE NEIGHBORHOOD, ALL HE SAYS IS THERE WAS A BLACK MALE IN THE NEIGHBORHOOD, NOT TWO WHITE MEN, WALKING AROUND THE VICTIM'S NEIGHBORHOOD.

WAS THIS ON THE DAY OF THE CRIME?

THIS WAS 1984. THIS WAS THREE DAYS LATER THAN THE 15th OF JANUARY. THIS WAS THREE MONTHS --

THREE DAYS LATER THAT THEY OBTAINED THE STATEMENT. ANOTHER REPORT, HERE, WAS WRITTEN ON JANUARY 19, 1984.

MY QUESTION WAS, DID THE NEIGHBOR ASSERT THAT THIS OCCURRED? HER OBSERVATION OF THESE OTHER TWO, ON THE DAY OF THE CRIME?

IT IS MY UNDERSTANDING. YES. THAT SHE WAS WATCHING "ALL MY CHILDREN" ON TELEVISION, BETWEEN 1:30 AND TWO O'CLOCK ON THE DAY OF THE CRIME. I WOULD, ALSO, LIKE TO POINT OUT IT THAT 4 -- OUT THAT, WHEN JUDGE DULUTH DENIED MR. FLOYD'S SUMMARY DENIAL, THAT RAGSDALE HAD BEEN OUT. MR. LA CROIX WASN'T THE ONLY CASE COMING OUT ABOUT AN EVIDENTIARY HEARING. IN FACT, RAGSDALE CAME OUT IN 1988, INDICATING THAT, WHEN THERE IS NO MENTAL HEALTH MITIGATION PRESENTED AND NO MENTAL HEALTH BACKGROUND PRESENTED ON A DEFENDANT, THAT THAT AN EVIDENTIARY HEARING WAS REQUIRED, AS IN RAGSDALE, SO CLEARLY THAT WASN'T THE ONLY EVIDENCE OUT THERE TO LOOK AT. AND WHAT WE PRESENTED IN THE 3.850, IT IS NOT CONCLUSORY, AND THE DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING. IN FACT JUDGE DULUTH SAYS WHY HE DECIDED NOT TO GIVE US AN EVIDENTIARY HEARING. THE COURT SAID HE KNEW ABOUT MR. FLOYD'S TROUBLED LIFE AND THAT HE MAY HAVE TURNED TO DRUGS AND ALCOHOL, AND THAT THE EVIDENCE PRESENTED IN THE 3.850 DIRECTLY REFUTES MENTAL ILLNESS OR RETARDATION. WHAT WE ALLEGE IN THE 3.850, MENTAL RETARDATION, ORGANIC BRAIN DAMAGE, FETAL ALCOHOLISM, THAT MR. FLOYD WAS SLOW IN ALL AREAS OF SCHOOL, THAT HE WAS LARGE FOR HIS AGE, RIDICULED BY HIS PEERS. HE HAD NO SOCIAL SKILLS. HAD HE AN ALCOHOLIC MOTHER WITH SIX KIDS WHO WAS SUPPOSED TO TAKE CARE OF THE KIDS. HIS FATHER HAD AN EXPLOSIVE TEMPER, WHO PLAYSED DEMANDS ON THE CHILDREN. HE WAS JEALOUS AND HE VIOLENTLY TOOK OUT HIS JEALOUS RAGES ON THE MOTHER, IN FRONT OF THESE KIDS. THE MOTHER WAS A PRIMARY CAREGIVER, BUT SINCE SHE WAS SUCH A SEVERE ALCOHOLIC, SHE COULDN'T FEED OR DRESS HER KIDS. SHE EXTRAMARITAL AFFAIRS AND BROUGHT THOSE AFFAIRS INTO THE HOUSE. THE KIDS WERE LEFT TO FEND FOR THEMSELVES. JAMES FLOYD RAN AWAY, HAD DIFFICULTIES IN SCHOOL. HE HAD LEARNING DISABILITIES, EMOTIONAL PROBLEMS, PLACED IN A SPECIAL CLASS, AND MISSED WEEKS OF SCHOOL AT A TIME. I DON'T BELIEVE THAT THESE ALLEGATIONS ARE CONCLUSORY. I BELIEVE, IF WE -- IF THE TRIAL JUDGE HAD DONE HIS JOB, WE WOULD HAVE BEEN GRANTED AN EVIDENTIARY HEARING, AND I ASK THIS COURT TO REMAND THIS CASE FOR AN EVIDENTIARY HEARING ON MR. FLOYD'S CLAIMS. THANK YOU.

THANK YOU, COUNSEL. WE WILL TAKE A BRIEF RECESS AT THIS TIME, AND THEN WE WILL HEAR THE CASTILLO CASE AND TM VERSUS STATE AND THEN BOWL I KNOW WILL FOLLOW THE -- AND THEN BOLIN WILL FOLLOW THE TM CASE. THE COURT WILL BE IN RECESS FOR THREE OR FOUR MINUTES. THE MARSHAL: PLEASE RISE.