>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CALL TO PLEAD,
DRAW NEAR, GIVE ATTENTION AND
YOU SHALL BE HEARD.
GOD SAVE THESE UNITED
STATES, THE GREAT STATE OF
FLORIDA AND THIS HONORABLE
COURT.
LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
TODAY WE HAVE FOR CONSIDERATION
THE CASE OF GORE VERSUS THE
STATE OF FLORIDA.
>> MAY IT PLEASE THE COURT.
FOR THE RECORD MY NAME IS
MARTIN MCCLAIN, HERE
TODAY ARGUING ON --
>> KEEP YOUR VOICE UP.
>> I ALWAYS START OFF
FORGETTING TO RAISE THAT, I'M
SORRY.
>> YOU'RE SUCH A SHRINKING
VIOLET.
>> I INTEND TO FOCUS MY
ARGUMENT, ARGUMENT ONE IN
PARTICULAR TO BE DISCUSSING
MARTINEZ v. RYAN.
I'M CERTAINLY AVAILABLE TO
ANSWER QUESTIONS ON ANY OTHER
ISSUES IN THE CASE BUT THAT IS
MY FOCUS.
MARTINEZ v. RYAN CAME OUT MARCH
20th.
IT IS A NON-CAPITAL CASE.
I VIEW IT AS A TETONIC SHIFT IN
THE COLLATERAL PROCESS.
>> MR.^McCLAIN, THERE IS NO
QUESTION, I AGREE WITH THE
STATEMENTS IN THE BRIEF THIS
CERTAINLY CONTAINS BROAD,
SWEEPING STATEMENTS IN REGARDS
TO THE WORK THAT YOU DO IN
COLLATERAL REVIEW OF THESE
MATTERS.
BUT I DO HAVE SOME CONCERN OUR
POSTURE IS SO DIFFERENT IN THIS
CASE, AND WHETHER THE MARTINEZ
CASE, NOT WITHSTANDING THAT
LANGUAGE CONTAINS THE

QUALIFICATIONS, THAT IT IS
REALLY SETTING UP AN EQUITABLE
BASIS TO PROHIBIT PROCEDURAL
BARS FOR INDIVIDUALS GOING INTO
THE FEDERAL COURT SYSTEM AND
DOES NOT CREATE A DIFFERENT
LANDSCAPE OR A DIFFERENT PRISM
THROUGH WHICH WE REVIEW THESE
CASES.
COULD YOU HELP, I MEAN, REALLY
ADDRESS THAT PART OF THIS.
>> ABSOLUTELY, YOUR HONOR.
AND I THINK TO DO THAT I
FIRSTLY WANT TO START WITH THE
PRE-MARTINEZ LANDSCAPE AND HOW
THINGS HAVE BEEN FOR MANY
YEARS.
>> BUT WE KNOW HOW THEY HAVE
BEEN.
I THINK, LET'S ANSWER JUSTICE
LEWIS'S QUESTION.
I HAVE READ MARTINEZ.
WE ALL READ MARTINEZ.
WE KNOW THIS CASE.
WE KNOW GORE HAD
POST-CONVICTION COUNSEL.
WE KNOW IN FLORIDA, IN TERMS OF
DEATH CASES IS DIFFERENT THAN
OTHER STATES IN TERMS OF
PROVIDING POST-CONVICTION
COUNSEL AND WHAT I'M HEARING
YOU SAY YOU WANT TO ATTACK THE
2007 OPINION OF THIS COURT
BASED ON THE INEFFECTIVENESS OF
COUNSEL BACK THEN?
IS THAT WHAT -- LET'S GET TO
HOW IT RELATES HERE AND WHAT
YOU'RE ASKING US TO DO.
>> WE'RE SEEKING TO PRESENT NEW
EVIDENCE AS TO THE INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM.
>> WHATEVER WE THINK ABOUT
MARTINEZ, IF THE COURT GOES
BACKWARDS ANY FARTHER WITHOUT
FALLING OVER IT SAID NO RIGHT,
NO CONSTITUTIONAL RIGHT TO --
WELL, YOU KNOW, WE CAN, WE CAN
ARGUE ABOUT IT BUT IN THAT CASE
COUNSEL DIDN'T PRESENT ANY
ARGUMENTS ON BEHALF OF THE
DEFENDANT, IS THAT CORRECT?
>> IN MARTINEZ.
>> IN MARTINEZ.
>> MARTINEZ, YES.
>> HERE YOU'RE SAYING THAT

COUNSEL IN 2005 OR 6 WAS
INEFFECTIVE NOT CALLING OR
LOCATING NICKERSON?
>> YES.
>> AND SO NOW WHAT ABOUT IF
YOU'RE INEFFECTIVE IN
PRESENTING WHAT YOU'RE
PRESENTING HERE, IS THERE
ANOTHER -- HOW WOULD THAT EVER
BE THE LAW IN THIS STATE AS FAR
AS STATE CASES, STATE
POST-CONVICTION CASES?
>> YES, YOUR HONOR, THE POINT
YOU'RE MAKING WAS EXACTLY THE
POINT MADE IN THE ORAL ARGUMENT
DURING MARTINEZ AND THE WAY IT
WAS RESOLVED BY THE MAJORITY IN
MARTINEZ WAS THE INITIAL
REVIEW.
WE NO LONGER SEPARATE ACCORDING
TO DIRECT APPEALS, RIGHT TO
COUNSEL, COLLATERAL, NO RIGHT
TO COUNSEL.
INSTEAD IT IS ISSUE BY ISSUE
UNDER MARTINEZ.
IF A STATE HAS TAKEN AN ISSUE
OUT OF THE DIRECT APPEAL AND
MOVED IT INTO THE COLLATERAL
PROCESS, INEFFECTIVE
ASSISTANCE OF COUNSEL BEING A
SPECIFIC ISSUE IN MARTINEZ, AND
PUT IT IN THE COLLATERAL
PROCESS, THE U.S. COURT WAS
CONCERNED WITH THAT IF THAT
STRIPS THE CLAIM OF THE RIGHT
TO EFFECTIVE REPRESENTATION AS
TO THAT CLAIM.
ALL MARTINEZ IS ADDRESSING IS
THE INITIAL REVIEW.
IT IS NOT SAYING, I HAVE TO BE
EFFECTIVE HERE TODAY.
IT'S SAYING FIRST TIME THE IAC
COUNSEL CLAIM IS PRESENTED IN
MR.^GORE'S CASE, MR.^GORE WAS
ENTITLED TO EFFECTIVE
REPRESENTATION.
>> LET'S JUST SAY, NOW IF YOU
COULD GO BACK TO WHAT JUSTICE
LEWIS ASKED, HAS NOTHING TO DO
WITH THE STATE COURT SYSTEM.
IT HAS EVERYTHING TO DO WITH
THE NIGHTMARE ABOUT TO BE
CREATED IN THE FEDERAL SYSTEM
AND I AM REALLY SORRY FOR
EVERYBODY THAT IS GOING TO HAVE

TO DEAL WITH THAT DECISION
BECAUSE IT'S SWEEPING BUT SO
FAR AS I'M READING IT AND READ
IT AND READ IT HAS NOTHING TO
DO WITH WHAT THE STATES HAVE AN
OBLIGATION TO LOOK AT.
>> I HAVE TWO RESPONSES.
FIRST, THIS COURT'S DECISION IN
LAMBRIX IS PREMISED UPON THIS
COURT'S UNDERSTANDING THAT THE
DEMARCATION IS
A CLEAR CATEGORICAL LINE. YOU
DIDN'T LOOK ISSUE BY ISSUE.
THIS COURT RELIED ON PENNSYLVANIA
V. FINLEY AND
GIRRANTANO HAVING ESTABLISHED
THAT IS THE ANALYSIS.
THAT'S NO LONGER TRUE.
THAT ANALYSIS IS GONE.
THE U.S. SUPREME COURT
SPECIFICALLY IN MARTINEZ SAYS,
WE LOOK TO ADDRESS WHETHER
THERE IS A CONSTITUTIONAL RIGHT
TO HAVE EFFECTIVE
REPRESENTATION WHEN RAISING
TRIAL COUNSEL INEFFECTIVENESS.
WE DON'T NEED TO ANSWER THAT
QUESTION TODAY IN THIS CASE.
SO THIS COURT'S CONCLUSION THAT
THAT HAD ALREADY BEEN
PREVIOUSLY RESOLVED, THAT'S
GONE. THAT'S NOT TRUE.
THE ISSUE HAS NOT BEEN RESOLVED.
THE U.S. SUPREME COURT
SPECIFICALLY LEAVES OPEN
WHETHER OR NOT CONSTITUTIONAL,
WHETHER INEFFECTIVE ASSISTANCE
OF COUNSEL IN THAT INSTANCE IS
CONSCIOUSLY MANDATED.
WHAT THEY SAID ALL WE HAVE TO
DO TODAY IS FIND IT EQUITABLY
MANDATED BECAUSE WE'RE IN THE
FEDERAL HABEAS CONTEXT.
I THINK, SO FIRST, THE BASIS
FOR LAMBRIX IS GONE.
SECOND, ANALYZING WHAT IT
MEANS, YOU'VE GOT TO START WITH
APBA IN THE MID-'90s.
PURPOSE OF THE APBA WAS TO GIVE
DEFERENCE TO THIS COURT, STATE
COURT'S DETERMINATION ON
CONSTITUTIONAL CLAIMS.
TO MOVE THE LITIGATION INTO
THE STATE COURT OUT OF THE
FEDERAL COURTS.

TO SOME EXTENT MARTINEZ IS A CARROT AND STICK SAYING IF YOU WANT TO KEEP IT THAT WAY, THEN YOU SHOULD RECOGNIZE THE EQUITABLE RIGHT TO.
>> THE, LET ME MAKE SURE THAT I DO UNDERSTAND, THAT YOU ARE SAYING THEN THAT THIS NOW IS A NEW, A NEW RIGHT WHETHER YOU CALL IT EQUITABLE OR CONSTITUTIONAL BECAUSE WE DO HAVE OUR INEFFECTIVE ASSISTANCE CLAIMS ADDRESSED IN POST-CONVICTION ONLY, NOT ON DIRECT APPEAL?
>> CORRECT.
>> SO THEREFORE THAT IS NOW, WILL BE IN THE FUTURE, A CLAIM THAT WILL ALWAYS BE OPEN BECAUSE WE ALWAYS DO IT THE FIRST, FOR THE FIRST TIME ON POST-CONVICTION, AM I UNDERSTANDING YOU CORRECTLY?
>> CORRECT.
>> THAT'S YOUR POSITION?
>> FLORIDA, LIKE ARIZONA, HAS TAKEN THE INEFFECTIVE ASSISTANCE COUNSEL CLAIM OUT OF DIRECT APPEAL AND PUT IT IN POST-CONVICTION.
THE COURT MADE CLEAR IN MARTINEZ, TALKING ABOUT THE FIRST, THE INITIAL REVIEW OF THAT CLAIM.
NOT TALKING ABOUT PROCEEDING TODAY.
THEY'RE LIMITING IT TO INITIAL REVIEW BECAUSE THEY'RE SAYING LIKE THE DIRECT APPEAL BECAUSE IT IS THE FIRST TIME AFTER THE TRIAL HE GETS A DRAFT.
>> LET ME ASK YOU THIS, IS THERE A DIFFERENCE -- IN MARTINEZ THERE WAS NO INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM PRESENTED IN THE INITIAL POST-CONVICTION, CORRECT?
>> CORRECT.
>> HERE, WE OF COURSE HAD AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM PRESENTED.
DOESN'T THAT DISTINGUISH THIS CASE SOMEWHAT FROM THE MARTINEZ CASE?

>> FACTUALLY IT'S DIFFERENT
THAN THE SITUATION IN MARTINEZ
BUT THE COURT IN MARTINEZ MADE
IT CLEAR THAT THAT DISTINCTION
DOESN'T MATTER BECAUSE THEY SAY
IT IS NOT JUST THE RIGHT TO
COUNSEL.
IT IS THE RIGHT TO HAVE
COUNSEL EFFECTIVELY LITIGATE
THE CLAIM AND THEY SAID THAT
THE TEST, THE YARDSTICK FOR
MEASURING COUNSEL'S PERFORMANCE
IN THE LITIGATION OF THE CLAIM
IS STRICKLAND.
>> BUT THE COURT ALSO GOES ON,
AS I READ THIS OPINION, THEY
SAY IT ISN'T JUST A MATTER
WHETHER OR NOT COUNSEL
PRESENTED THE CLAIM OR
PRESENTED THE CLAIM
EFFECTIVELY. YOU'VE GOT TO
DEMONSTRATE ALSO IN ORDER TO
GET TO THE -- AND STILL, I
DON'T THINK YOU'VE EFFECTIVELY
ADDRESSED THIS WHOLE NOTION,
THIS IS ADDRESSED TO THE
FEDERAL COURT AND WHETHER OR
NOT THEY'RE GOING TO FIND CAUSE
FOR A PROCEDURAL DEFAULT.
THAT IS WHAT THE MARTINEZ CASE
IS ALL ABOUT, ISN'T IT?
>> THE COURT LIMITED ITSELF TO
THAT, LEAVING OPEN THE QUESTION
OF WHETHER IT IS CONSCIOUSLY
MANDATED.
>> WHETHER OR NOT THEY LEFT
SOMETHING OPEN THE REAL ISSUE
HERE IS WHETHER OR NOT FEDERAL
COURTS CAN FIND THE CAUSE
ELEMENT TO OVERCOME A
PROCEDURAL DEFAULT.
AND NOT ONLY THE CAUSE BUT
THEN YOU'VE GOT TO GET TO THE
PREJUDICE ASPECT OF IT.
>> CORRECT, YOUR HONOR.
LET ME BACK UP FOR ONE, AGAIN
I'M MAKING TWO ARGUMENTS.
ONE, THAT PENNSYLVANIA v.
FINLEY AND MURRAY v.
GIARRANTANO WHICH WERE THE BASIS
OF THIS COURT'S RULING IN
LAMBRIX DON'T SAY WHAT THEY
THOUGHT THEY SAID.
MARTINEZ TOLD US SO.
THERE IS A QUESTION FOR THIS

COURT TO NOW ADDRESS WHETHER
THERE IS CONSTITUTIONAL RIGHT
TO EFFECTIVE REPRESENTATION
BECAUSE THAT QUESTION HAS NOT
BEEN ANSWERED.
THIS COURT THOUGHT IT HAD BEEN.
IT'S NOW CLEAR IT HAS NOT BEEN
ANSWERED.
SECOND AS TO THE CAUSE, YES,
THE WAY THAT IT WORKS, AND I
THINK THE WAY THAT IT WOULD
WORK IF THIS COURT WERE TO
RECOGNIZE THE EQUITABLE RIGHT
IS YOU WOULD PRESENT A CLAIM
THAT MY COLLATERAL COUNSEL
FAILED TO CALL THE KEY WITNESS
TO ESTABLISH INEFFECTIVE
ASSISTANCE OF COUNSEL.
>> LET ME GO TO THAT BECAUSE I
WAS MENTIONING 2007.
THAT'S WHEN OUR OPINION CAME
OUT?
>> YES, YOUR HONOR.
>> IT IS 2012.
>> CORRECT.
>> MR.^NICKERSON IS A LAWYER IN
FLORIDA?
>> HE'S NOT PRACTICING LAW NOW
AND HE LIVES IN THE WASHINGTON,
D.C. AREA.
>> SOMEBODY PICKED UP A PHONE
AND FOUND HIM IN A MATTER OF
HOURS?
>> YES.
>> AND WHEN DID THEY DO THAT?
AFTER THE --
>> AFTER THEY LEARNED HE HAD
BEEN DISBARRED AND INFORMATION
REGARDING UDELL.
>> EVEN UNDER JURISPRUDENCE YOU
WOULD ASK THIS COURT TO ADOPT,
SOMEBODY WAITS, FIVE,
10 YEARS TO WHENEVER THE DEATH
WARRANT WAS ASSIGNED TO ATTACK
THE EFFECTIVENESS OF THE
POST-CONVICTION COUNSEL YEARS
BEFORE?
>> NO.
>> ARE YOU ACTUALLY --
>> I'M NOT MAKING THAT
ARGUMENT.
>> WELL THAT IS WHAT HAPPENED
HERE.
>> THAT IS WHAT HAPPENED HERE
BECAUSE OF ONE PARTICULAR FACT.

THE ISSUE OF MARTINEZ v. RYAN.
>> SO YOUR ARGUMENT WOULD BE
THAT MARTINEZ, BEFORE MARTINEZ
YOU COULDN'T BRING THIS TYPE OF
CLAIM?
>> BEFORE MARTINEZ, LAMBRIX WAS
THE LAW.
>> I THOUGHT YOU TRIED -- WHEN
WAS YOUR POST-CONVICTION MOTION
FILED?
>> THE ORIGINAL ONE?
>> NO. AFTER THE DEATH WARRANT.
>> IT WAS FILED AFTER THE DEATH
WARRANT, IN MARCH OF 2012.
>> BUT BEFORE MARTINEZ?
>> BEFORE MARTINEZ BECAUSE
MARTINEZ, THE ORAL ARGUMENT
HAPPENED IN OCTOBER.
>> YOU DON'T THINK THERE IS ANY
OBLIGATION WHEN YOU SEE THERE
IS NEWLY DISCOVERED EVIDENCE IN
A CASE THAT COULD MAKE THE
DIFFERENCE BETWEEN SOMEONE'S
LIFE OR DEATH, THAT THERE, YOUR
OBLIGATION TO STILL -- YOU
BRING MULTIPLE MOTIONS TO HAVE
BROUGHT THAT UP IN 2008, 2009?
THAT THERE WAS, NOT MR.^UDELL,
BECAUSE IT DIDN'T MATTER WHAT
HE HAD TO SAY.
MR.^NICKERSON NEEDED TO HAVE
BEEN CALLED.
SAID IT IN OUR OPINION THAT HE,
YOU KNOW, DID NOT TESTIFY.
IF SOMEBODY LOOKS AT THAT SAYS
WELL, WE GOT TO GET HIM TESTIFY.
OH, A MISTAKE WAS MADE. WEÆD LIKE
HIM TO TESTIFY.
YOU THINK YOU CAN WAIT FIVE
YEARS TO DO THAT?
>> NOT ANYMORE BUT THE REASON
IT WAS DONE IN THIS CASE IS
BECAUSE THE LAW WAS CLEAR.
IT DIDN'T MATTER.
>> WELL THE LAW -- THIS COURT
HAS NEVER SAID, LIKE SAY,
SOMEBODY MISSED A DEADLINE BY
ONE DAY.
THIS COURT HAS ALWAYS USED
EQUITY TO MAKE SURE THAT FIRST
POST-CONVICTION MOTION IS
HEARD.
I CAN'T THINK OF ONE CASE WHERE
THIS COURT HAS NOT DONE THAT.
>> THIS COURT HAS USED EQUITY

WHEN IT COMES TO FILING 3.850
MISSING A DEADLINE.
THAT IT WAS ADOPTED IN 1999 AND
IT HAS BEEN LIMITED, STEELE v.
KEHOE HAS BEEN LIMITED TO
FILING OR NOT FILING THE 3850
ON TIME.
IT HAS NOT BEEN USED TO GET
AROUND A FAILURE TO LOCATE A
PARTICULAR WITNESS AS TO AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM.
IN FACT THAT'S WHAT LAMBRIX WAS
ABOUT ITSELF.
IN LAMBRIX, LAMBRIX WAS
ALLEGING THAT PCR HAD BEEN
INEFFECTIVE IN THE MANNER THAT
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM HAD BEEN
LITIGATED AND ASKED THIS COURT
IN ESSENCE TO ALLOW A DO-OVER.
THIS COURT SAID, RELYING ON
PENNSYLVANIA v. FINLEY, NO.
IT DOES NOT ALLOW YOU TO GET
AROUND THE PROCEDURAL BAR TO
SAY THAT YOUR PRIOR ATTORNEY
HAD BEEN INEFFECTIVE.
>> NOW YOU THINK THE U.S.
SUPREME COURT IS TELLING STATE
COURTS THAT SHOULD BE A DO-OVER
IN EVERY POST-CONVICTION CASE?
>> I'M NOT SAYING EXACTLY THAT.
>> BUT IT IS BECAUSE THAT'S,
YOU ARE EXACTLY SAYING THAT.
>> THAT IS CERTAINLY WHAT
JUSTICE SCALIA SAID AND --
>> I HAPPEN TO AGREE WITH
JUSTICE SCALIA IN THIS CASE.
>> WHAT I AM SAYING THAT THE
BASIS FOR THIS COURT'S RULING
IN LAMBRIX IS GONE.
THIS COURT HAS TO REVISIT
THAT ISSUE. AND --
>> MR.^McCLAIN I WANT TO LET
YOU KNOW YOU'RE DOWN TO TOTAL
OF ABOUT FIVE 1/2 MINUTES.
AND YOUR REBUTTAL.
YOU MAY CONTINUE.
>> I APPRECIATE THAT, YOUR
HONOR.
I WOULD LIKE TO SAVE THE
REMAINDER OF MY TIME THEN FOR
REBUTTAL, THANK YOU.
>> GOOD MORNING.
MAY IT PLEASE THE COURT.

CECELIA TERENZEO,
ASSISTANT ATTORNEY
GENERAL ON BEHALF OF THE PEOPLE
OF FLORIDA.
JUSTICE LEWIS, STARTING WITH
YOUR QUESTION, YOU'RE
ABSOLUTELY RIGHT, MARTINEZ IS
EXTREMELY LIMITED AND IF IT IS
TO BE A NIGHTMARE, IT IS AS
JUSTICE PARIENTE PREDICTS, IT IS
GOING TO HAPPEN IN FEDERAL
COURT.
IT IS LIMITED TO A STATE
WHO WILL THEN BRING A FEDERAL
HABEAS CLAIM THAT MAY BE,
MAYBE WILL
BE ALLOWED UNDER EQUITIABLE
PRINCIPLES TO OVERCOME A CAUSE,
EXCUSE ME, OVERCOME A
PROCEDURAL BAR THROUGH CAUSE
AND PREJUDICE.
IT HAS NO BEARING ON WHAT
HAPPENS IN COURT AND AS A
MATTER OF FACT, THIS COURT, OUR
LEGISLATURE, THE RULE CODIFIED
IN 3.850, OUR PUBLIC RECORDS
RULE, CHAPTER 27 AND THIS
COURT'S EQUITABLE POWERS HAVE
BEEN IN PLACE FOR YEARS AND
OFFERS MUCH, MUCH MORE THAN
MARTINEZ WOULD OFFER A FEDERAL
HABEAS PETITIONER.
>> WHAT ABOUT, WHAT ABOUT,
MR.^McCLAIN'S ARGUMENT THAT THE
UNDERPINNINGS OF LAMBRIX HAVE
BEEN, HAVE BEEN DAMAGED?
>> I DISAGREE, YOUR HONOR,
BECAUSE ALL OF THIS IS ABOUT
THE REAL QUESTION AND THAT IS
ACCESS TO THE COURTS.
AND IF LAMBRIX WAS THE END
ALL, THEN THE LEGISLATURE
WOULD NOT HAVE ESTABLISHED
CHAPTER 27, GIVE THE STATUTORY
RIGHT TO COUNSEL.
THIS COURT WOULD NOT HAVE
CODIFIED ALL OF THE PROCEDURES
THAT ARE ALREADY IN PLACE IN
3.851 REGARDING MONITORING THESE
CASES, GETTING COUNSEL AS SOON
AS A DIRECT APPEAL IS FINAL,
ESTABLISHING PUBLIC RECORDS
PROCEDURES TO ENABLE
POST-CONVICTION COUNSEL TO GET
THOSE AS SOON AS POSSIBLE.

TO REQUIRE TRIAL COURTS TO TAKE
THE CLASSES TO BE ABLE TO BE
DEATH QUALIFIED.
>> LET ME ASK YOU THIS.
I AM REALLY CONCERNED ABOUT
MARTINEZ TO THE EXTENT THAT
WHILE THE COURT SAYS IT IS NOT
DECIDING THE ISSUE OF WHETHER
OR NOT YOU SHOULD HAVE A CLAIM
OF INEFFECTIVE ASSISTANCE OF
POST-CONVICTION COUNSEL,
IT SEEMS TO ME BY GOING THROUGH
THIS MECHANISM OF WHETHER OR
NOT THERE IS CAUSE FOR
PROCEDURAL DEFAULT YOU ARE
STILL IN ESSENCE READDRESSING
WHAT POST-, THE INITIAL
POST-CONVICTION COUNSEL BROUGHT
TO THE COURT.
AND SO TO SOME EXTENT IT SEEMS
TO ME THAT THAT STATEMENT THEY
MADE REALLY ISN'T TRUE AND THAT
WE'RE GOING TO HAVE TO BE
LOOKING AT WHAT POST-CONVICTION
COUNSEL DID.
>> YOU ALREADY DO BUT,
THAT'S MARTINEZ.
THE STATE'S POSITION THAT
MARTINEZ DEALS ONLY WITH A
CLAIM OF INEFFECTIVE ASSISTANCE
OF COUNSEL, THAT HAS NEVER BEEN
HEARD BY ANY COURT.
THE OPINION SAYS THAT TWICE
AND WHEN DISCUSSING WHETHER OR
NOT THEY HAVE OVERRULED
COLEMAN, THEY SAID THEY HADN'T
BECAUSE IN COLEMAN THE ISSUE
HAD BEEN ALREADY REVIEWED BY A
TRIAL COURT.
SO WE ARE NOT TALKING ABOUT
WHAT A POST-CONVICTION COUNSEL
HAD DONE WITH A CLAIM ON THE
MERITS.
MARTINEZ ITSELF IS ABOUT A
BRIEF THAT WAS FILED AND NO
COURT AT ANY TIME WILL EVER
HEAR THAT ISSUE.
THAT IS WHAT MARTINEZ IS
CONFINED TO AND EVEN THE CASES
CITED IN MARTINEZ, MAPLES WAS
AN ABANDONMENT CASE.
HOLLINS WAS AN ABANDONMENT
CASE.
>> THAT IS WHERE MR.^McCLAIN IS
GOING, HE SEEMS TO BE SAYING

AND THEY MAKE THIS REFERENCE TO
ISSUE WHERE YOU PUT THE ISSUE
WITH REGARD TO THE
EFFECTIVENESS OF COUNSEL,
WHEREVER AT ITS FIRST LEVEL,
AND MAYBE IT IS FROM THE DIRECT
APPEAL AS THEY'RE DISCUSSING IN
THAT CASE BUT IN THOSE SYSTEMS
THAT PUSH IT OFF. THAT THERE
WILL BE, THAT THE RIGHT TO HAVE
EFFECTIVE REPRESENTATION
REVIEWED SEEMS TO BE WHAT
THEY'RE SAYING.
>> BUT AGAIN, I THINK THAT IS A
CONCERN FOR THE STATES OR OUR
STATE AND EVEN IN THE MAJORITY
OPINION THEY TALKED ABOUT,
WELL, WE DON'T HAVE TO SOLVE
THIS PROBLEM.
WE DONÆT HAVE -- DON'T HAVE TO
REQUIRE CONSTITUTIONAL
REPRESENTATION AT
POST-CONVICTION.
THEY COULD HAVE DONE THAT AND
THEY DIDN'T DO THAT.
>> I'M NOT CONCERNED WITH WHAT
THEY DIDN'T DO.
I'M REALLY CONCERNED TO
UNDERSTAND WHAT THEY DID DO.
PLEASE HELP US WITH THAT, AND
THEY DO TALK ABOUT IN THAT
OPINION THE FIRST, ABOUT THE
FIRST TIME IT'S REVIEWED.
>> WELL IN THAT SENSE WE ARE
LIKE ARIZONA.
THAT'S IN TERMS OF GLOBALLY
WHAT THE PROCEDURE IS IN
FLORIDA.
>> RIGHT.
>> YES, THAT IS THE FIRST
REVIEW.
THE, AGAIN I THINK IT'S LIMITED
TO, NOT I THINK, I MEAN IT'S
CLEAR FROM THE OPINION IT'S
LIMITED TO AN ISSUE, IAC CLAIM
ONLY, THAT HAS NEVER BEEN
REVIEWED IN ANY COURT EVER.
>> WHAT'S AMAZING ABOUT THIS
OPINION IS THAT THE NON-DEATH
CASE, WHAT IT IS THEY SAY IN THAT
OPINION ABOUT PRISONERS WHO
DON'T GET COUNSEL IN NON-DEATH
CASES AND MAY NOT KNOW HOW TO
BRING THEIR CLAIM.
THAT IS THE OTHER NIGHTMARE

THAT THE STATE I THINK IS GOING
TO HAVE TO DEAL WITH BEFORE
THIS COURT.
IN THIS CASE, LET ME -- LET'S
JUST TALK ABOUT THIS CASE.
>> OKAY.
>> FIRST OF ALL, NOTHING ABOUT
THIS IS ATTACKING THE GUILT
PHASE OF MR.^GORE AND THE, THE
MURDER.
>> RIGHT.
>> SO WE'RE TALKING ABOUT THE
PENALTY PHASE.
IF WE, WITHOUT, SINCE THIS IS
IN THIS POSTURE, WITHOUT
REACHING THE APPLICABILITY OF
MARTINEZ CAN YOU MAKE THE
ARGUMENT WHY ON THE FACE OF THE
RECORD NO PREJUDICE CAN BE
SHOWN?
CAN YOU MAKE THAT ARGUMENT?
>> I CAN MAKE THAT ARGUMENT,
YOUR HONOR, BASED ON THIS
COURT'S 2007 OPINION AND THE
TRIAL COURT'S ORDER FROM THE
DENIAL OF RELIEF AND ON THOSE
SPECIFIC FIVE CLAIMS OF
INEFFECTIVENESS THAT WERE
RAISED, THIS COURT FOUND THAT
IN EVERY SINGLE ONE OF THEM NO
PREJUDICE HAD BEEN ESTABLISHED
AT THE 3850 HEARING.
>> DIDN'T WE KEEP ON SAYING
THAT NICKERSON --
>> SURE, YES, YOU DID.
>> TESTIFY, WE SAID THAT LIKE
SEVERAL TIMES?
>> YES, YOU DID, AND THAT'S WHEN
YOU WERE DISCUSSING THE
DEFICIENCY PRONG. BUT THIS COURT
ALSO SAID IN THE SAME OPINION
THAT IT'S TALKING ABOUT, GEE, I
WISH WE HEARD FROM JEROME
NICKERSON.
THIS COURT ALSO SAID, BUT YOU
KNOW WHAT?
BASICALLY IT DOESN'T MATTER
BECAUSE THE EVIDENTIARY
PRESENTATION, YOU MADE IT AT
3.851, WILL NOT AND DID NOT
ESTABLISH ANY PREJUDICE
REGARDLESS IF, IF NICKERSON
WANTS TO POINT FINGERS AT UDELL
OR UDELL WANTS TO POINT FINGERS
AT NICKERSON IN TERMS OF WHAT

WAS DONE OR WHAT WAS NOT DONE.
WHATEVER THEY DID OR DIDN'T DO,
THEY STILL AT THE 3.851 DID NOT
ESTABLISH THERE WAS SOMETHING
DIFFERENT THAT WOULD HAVE EVER
MADE A DIFFERENCE.
>> DON'T WE ALSO REALLY HAVE,
DESPITE WHAT MR.^McCLAIN SAID, A
PROCEDURAL DEFAULT ISSUE IF WE
RECOGNIZE THAT SOMETHING
TERRIBLY WRONG WENT ON AT THE
POST-CONVICTION?
YOU SAY WE ARE DEALING WITH A
LAWYER WHO WAS ON THE VERGE OF,
YOU KNOW, A NERVOUS BREAKDOWN
OR SOMETHING AND WE'VE SEEN IT,
WE SORT OF SEEN THOSE KINDS OF
ATTACKS AND BASICALLY NOTHING
WAS PRESENTED AND YET THERE WAS
A WEALTH OF NEW INFORMATION
THAT SHOULD HAVE BEEN
PRESENTED.
DON'T WE STILL WANT TO SAY, IF,
YOU LOOK AT THAT, YOU CAN'T
WAIT YEARS?
NOW, MR.^McCLAINÆS ARGUMENT IS, I
DIDN'T KNOW I COULD EVEN BRING
THIS UNTIL MARTINEZ WAS DECIDED
WHICH WAS I GUESS ABOUT A WEEK
AGO BUT HOW DO WE DEAL WITH
THAT ISSUE?
>> BECAUSE MARTINEZ ISN'T WHAT
WOULD GIVE HIM RELIEF.
AGAIN MARTINEZ REALLY HAS NO
IMPACT IN FLORIDA.
THE IMPETUS FOR THIS CLAIM, AS
YOU SAID, JUSTICE PARIENTE, WAS
YOUR 2007 OPINION.
SO THE WHEREWITHALL TO HAVE
BROUGHT SUCH A CLAIM, HEY, WE
CALLED THE WRONG GUY, WAS BACK THEN.

>> WHAT HE SAYS WAS, WE HAD
LAMBRIX, SO YOU COULDN'T BRING
A CLAIM ON THAT, YET HE'S
ACTUALLY BROUGHT IT AS A NEWLY
DISCOVERED CLAIM INVOLVING
UDELL WHICH WE HAVE THE
KURTZ CASE
WHICH WAS ARGUED THERE TOO.
>> RIGHT.
>> WHETHER UDELL HIMSELF BEING
DISBARRED, WHETHER THAT SOMEHOW
MADE HIM NOT A CREDIBLE
WITNESS.

>> RIGHT.
>> THAT IS ALSO --
>> SO THE ARGUMENT IS THAT THE LEGAL UNDERPINNING, NOT THE FACTUAL, DIDN'T MATERIALIZE UNTIL THREE WEEKS AGO AND THAT IS ABSOLUTELY FALSE.
TO FIND THAT YOU WOULD HAVE TO IGNORE CHAPTER 27, ALL OF THE RULES IN PLACE CODIFIED IN 3.851 AND THIS COURT'S EQUITABLE PRINCIPLES AND THIS COURT HAS NEVER BEEN SHY TO GRANT EQUITABLE RELIEF IN A PARTICULAR CASE.
WE CITED VENTURA, WE CITED COLEMAN, AND KOKAL, AND FOTOPOULOS.
THERE WAS ALWAYS A LEGAL AVENUE UNDER THIS COURT'S EQUITABLE POWERS, STATUTORY POWERS AND UNDER THE RULE TO ADDRESS --
THERE HAS ALWAYS BEEN A LEGAL VEHICLE TO BRING THIS CLAIM LONG BEFORE MARTINEZ CAME OUT.
AND --
>> IF WE JUST LIMIT THE APPROACH IN THIS CASE TO PREJUDICE, IS THAT NOT TANTAMOUNT TO CONCEDING THAT THERE IS, AT LEAST A VIABLE CLAIM AND WE WOULD HAVE TO LOOK EVERY CASE THAT PROCEEDED THIS FOR THE PREJUDICE ANALYSIS?
>> I THINK --
>> ISN'T THAT WHAT THE RESULT WOULD BE IF WE DO THIS?
>> THAT WOULD BE AN ALTERNATIVE ARGUMENT YOU'RE MAKING BEFORE THAT.
>> I UNDERSTAND.
>> YES, SIR, AS A MATTER OF FACT OUR FIRST ARGUMENT STILL IS TODAY THAT THERE STILL IS NO CONSTITUTIONAL RIGHT TO POST-CONVICTION COUNSEL AND MR.^GORE HAS NOT MET THE REQUIREMENTS OF THE BEING ABLE TO FILE OF A SUCCESSFUL MOTION.
THAT IS THE THRUST OF OUR ARGUMENT.
OUR ALTERNATIVE ARGUMENT WHICH IS ONE, EITHER PRACTICAL MATTER BUT THE STATE MAINTAINS

THAT MARTINEZ HAS CHANGED
ABSOLUTE NOTHING IN FLORIDA.
>> BUT IF WE USE EQUITY, WHICH
IS WHAT THE FEDERAL COURT
USED --
>> RIGHT.
>> -- THERE'S NO EQUITABLE
PRINCIPLE HERE THAT WOULD ALLOW
RELIEF.
>> CORRECT.
>> AND I GUESS, AGAIN, THE HARD
THING IS TO TRY TO LITIGATE
THIS QUESTION.
I MEAN WE'RE DEALING WITH A
MAN'S LIFE OR DEATH BUT TO SAY
NOTHING ABOUT MARTINEZ HAS
CHANGED THE DEATH SENTENCE AND
THE CONFIDENCE IN THE DEATH
SENTENCE BY WHAT'S BEEN SAID
AND I GUESS, AND I AGREE --
>> YES.
>> WE HAVE GOT TO BE CAREFUL
BECAUSE WE DON'T WANT -- I
DON'T WANT TO OPEN THE DOOR TO
HAVE EVERY TIME A SUPREME COURT
OPINION COMES OUT HAVE WHAT
WE'VE GOT NOW WITH A WALTON
SERIES OF CASES.
>> AND YOUR HONOR, AGAIN, NOT
ONLY HAS MARTINEZ NOT AFFECTED
ANYTHING, THIS COURT HAS ALWAYS
UNDER THE STATE CONSTITUTION,
YOU COULD HAVE DONE IT THEN BUT
THIS COURT NEVER HAS.
HAS SAID IT WON'T BECAUSE IT
DOESN'T WANT TO OPEN UP THE
FLOODGATES.
AND BACK TO EQUITY, EQUITY
REQUIRES SOME, REQUIRES CLEAN
HANDS OF THE DEFENDANT.
YOU CAN'T GET THAT, YOU CAN'T
GET THERE IN THIS CASE AS THIS
COURT HAS SAID.
YOUR HONOR, AS YOU POINTED OUT,
THEY WAITED FIVE YEARS AFTER
THE SIGNING OF A DEATH WARRANT
TO BRING UP THIS CLAIM.
AND THE LEGAL UNDERPINNINGS
HAVE ALWAYS BEEN AVAILABLE AS
YOU UNDER THE STATUTE --
>> EVEN IF UNDER
MARTINEZ THE PARTY WAITED FIVE
OR 10 YEARS?
>> I'M SORRY.
>> EVEN IN THE MARTINEZ CASE,

LET'S LOOK AT THAT ONE.
IF THE DEFENDANT HAD WAITED
FIVE YEARS, I DON'T KNOW THAT'S
THE BASIS, WOULD MARTINEZ BE
DIFFERENT?
IS THAT WHAT YOU'RE SAYING?
>> IT MAY BE BECAUSE IN THE
OPINION ITSELF, UNITED STATES
SUPREME COURT MENTIONED THAT
MARTINEZ SAYS, HE WASN'T AWARE
THAT THERE HAD BEEN AN ANDERS
BRIEF FILED.
NOTHING HAD BEEN EXPLAINED TO
HIM.
AND IN THE ORAL ARGUMENT THERE
WAS, IN THE REBUTTAL BY
MR.^MARTINEZ, THEY MENTIONED
THAT THERE WAS A LANGUAGE
BARRIER BETWEEN MR.^MARTINEZ
AND HIS COUNSEL.
AS A MATTER OF FACT, IN
MARTINEZ IT ONLY HAS BEEN SENT
BACK DOWN TO DEAL WITH
EVERYTHING THAT WE'RE TALKING
ABOUT.
I MEAN MARTINEZ, HE DIDN'T GET
RELIEF.
AND THE REASON IS BECAUSE OF
FINLEY AND GIARRANTANO THE
FEDERAL COURTS SAID, GO AWAY,
WE'RE NOT EVEN GOING TO
ENTERTAIN IT.
NOW WHAT THE U.S. SUPREME COURT
SAID UNDER EQUITABLE
PRINCIPLES MAY BE POSSIBLE,
MAY BE, IN THIS CASE BUT WE
DON'T KNOW.
AND THAT'S WHY IT WAS REMANDED.

SO I STILL THINK, AND WHEN YOU
USE THE PHRASE, EQUITY, THERE
IS AN OBLIGATION ON THE PART OF
THE OTHER, ON THE PART OF THE
DEFENDANT TO COME IN WITH CLEAN
HAND.
SO I DON'T THINK EVEN UNDER
MARTINEZ IN YOUR SCENARIO I
DON'T THINK HE WOULD GET RELIEF
AFTER FIVE YEARS.
>> BUT LET ME ASK YOU THIS
ABOUT THE LANGUAGE IN MARTINEZ
IS REALLY TROUBLING.
THERE'S A SECTION HERE THAT
SAYS, WHERE UNDER STATE LAW
CLAIMS OF INEFFECTIVE

ASSISTANCE OF COUNSEL MUST BE
RAISED IN AN INITIAL REVIEW
COLLATERAL PROCEEDING, A
PROCEDURAL DEFAULT WILL NOT BE
A BAR TO FEDERAL HABEAS CORPUS
FROM HEARING A SUBSTANTIAL
CLAIM OF INEFFECTIVE ASSISTANCE
AT TRIAL, IF, AND THIS IS THE
LANGUAGE, IN THE INITIAL REVIEW
COLLATERAL PROCEEDING THERE IS
NO COUNSEL.
>> RIGHT.
>> OR, COUNSEL IN THAT
PROCEEDING WAS INEFFECTIVE.
SO YOU KNOW, WHEN YOU THINK
ABOUT WHAT IT IS THAT THE COURT
IS ACTUALLY GOING TO HAVE TO
LOOK AT, I MEAN ISN'T THAT
BASICALLY WE'RE LOOKING AT
WHETHER OR NOT POST-CONVICTION
COUNSEL WAS EFFECTIVE, AT LEAST
IN THE CONTEXT OF AN
INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM?
>> YOU'RE RIGHT, HOWEVER, I
THINK WHAT THAT MEANS IS, AND
I'M BASING, YOU KNOW, MY
INTERPRETATION ON WHAT ELSE THE
COURT SAID AND I THINK THAT IS
IF A LAWYER DOES NOT EVER FILE
THE INEFFECTIVE ASSISTANCE OF
TRIAL COUNSEL CLAIM.
>> I THINK IT COULD HAVE BEEN
SO EASY TO PUT THE MODIFICATION
IN THAT COUNSEL IN THE
PROCEEDING WAS INEFFECTIVE.
I DON'T SEE ANY PLACE IN THIS
OPINION WHERE THEY ACTUALLY DO
A MODIFICATION OF THAT PHRASE.
AND SO THAT'S WHAT'S TROUBLING
TO ME.
>> OTHER WAY.
FOR OR AGAINST, WOULD --
>> IF THE COURT, IF THE COURT
HAD WANTED TO STOP THERE
BECAUSE IN THIS CASE NOTHING
WAS PRESENTED, THE COURT COULD
HAVE CERTAINLY CITED THIS CASE
RIGHT THERE AND NOT GONE ON AS
SHE SUGGESTS, TO USE THAT, OR,
LIKE YOU HAVEN'T PROVIDED
COUNSEL, IN THAT CASE THEY
DIDN'T MAKE ANY CLAIMS.
>> BUT I'M NOT SURE I
UNDERSTAND THE DIFFERENCE

BECAUSE AGAIN IN THAT CASE
THERE WAS AN, IN ESSENCE AN
ANDERS CASE,
WHICH DID NOT GO FORWARD.
THE COURT SAID ON TWO
OCCASIONS, OH, MY GOSH, IF WE
LET THIS GO THROUGH NO COURT
WILL EVER HAVE HEARD THIS CLAIM
AND I THINK IT'S IMPORTANT THAT
THEY ALSO SAID THAT'S WHY THIS
ISN'T COLEMAN BECAUSE IN
COLEMAN A COURT HAD CONSIDERED
IT. AND I WOULD ALSO POINT THIS
COURT TO THE NAPLES VERSUS
THOMAS CASE THAT WAS ARGUED THE
SAME DAY AS MARTINEZ AND CAME
OUT IN JANUARY AND IN THAT
CASE, THEY TALKED ABOUT
ABANDONMENT AGAIN, ABANDONMENT
OF COUNSEL, NOT FOLLOWING
THROUGH WITH THE CLAIM AND
THERE THEY SAID, THERE IS NO
CLAIM OF NEGLIGENCE OF
POST-CONVICTION COUNSEL BUT
THAT DIDN'T APPLY THERE BECAUSE
UNDER AGENCY LAW, HE WAS
ABANDONED.
IN EFFECT NOTHING WAS
PRESENTED.
AND SO I THINK THERE IS ENOUGH,
BASED ON THAT CONTEXT AND ON
THE CONTEXT OF THE FACTS IN
MARTINEZ, THAT THIS IS LIMITED
TO POST-CONVICTION COUNSEL
BEING INEFFECTIVE FOR NOT
BRINGING THE CLAIM AT ALL.
>> THAT'S MY CONCERNS.
THE PHRASE THAT JUSTICE QUINCE
READ DIDN'T SAY THAT.
>> BUT -- NO, IT DIDN'T,
YOU'RE RIGHT.
>> BUT IT SPOKE IN TERMS OF
INEFFECTIVE ASSISTANCE OF THAT
COUNSEL.
>> RIGHT.
BUT YOU HAVE TO LOOK AT, I
THINK, THE CONTEXT OF
MARTINEZ WHEN IT WAS SAYING THAT.
IT WAS SPEAKING,
IT IS PREMISED ON THE FACTS OF
MARTINEZ, RIGHT?
THERE IT WAS COMPLETE, IT WAS
AN ANDERS BRIEF.
>> STILL SEEMS THAT MAYBE THE
BEST WAY TO GO THIS DOESN'T

HAVE APPLICATION TO WHAT
HAPPENS IN THIS STATE AND LET
THE FEDERAL COURT DEAL WITH IT
BECAUSE THE OTHER CASE, MURRAY,
WAS, TO ME, YOU KNOW, THESE
PROCEDURAL BARS FOR ADPA ARE
HARSH AND THERE THE LETTER WENT
TO THE MAILROOM AND THEN THE
GUY DIDN'T --
>> MAPLES.
>> CORRECT. WHETHER IT WAS
CALLED ABANDONMENT OR JUST
NEGLECT, I MEAN I THINK THAT
EQUITY WOULD HAVE ALLOWED IN
THE FEDERAL COURT FOR THAT TO
BE BROUGHT.
SO I THINK THAT I AGREE WITH
YOU THAT THIS DOES NOT HAVE
APPLICATION TO A STATE COURT.
I THINK OUR STATE COURT
PROCEDURES ARE AS GOOD AS OR
BETTER THAN ANY STATE IN THIS,
YOU KNOW, IN THIS COUNTRY IN
TERMS OF WHAT THE LEGISLATURE'S
PROVIDED AND WHAT THIS COURT
HAS PROVIDED.
>> I WOULD AGREE.
BUT ALSO, WE DARE SAY THAT, I
DON'T THINK MARTINEZ IN THE
CAPITAL CONTEXT IN FLORIDA
COULD HAPPEN.
SO BASED ON OUR ARGUMENTS WE
ASK THAT COURT AFFIRM THE TRIAL
COURT'S RULING IN ALL RESPECTS.
THANK YOU.
>> FIRST LET ME POINT MAPLES
WAS NOT ABOUT THE INITIAL
REVIEW OF AN INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM.
IT WAS ABOUT THE ENTIRE
COLLATERAL PROCESS AND INCLUDED
ALL OTHER CLAIMS THAT MARTINEZ
DOESN'T APPLY TO.
>> BUT DIDN'T MAPLES APPLY TO
FILING IN FEDERAL COURT AND
MISSING THE DEADLINE?
>> MISSED THE NOTICE OF APPEAL
DEADLINE IN STATE COURT.
AS A RESULT THE FEDERAL HABEAS
WAS UNTIMELY AND THE U.S.
SUPREME COURT FOUND EQUITY,
EQUITIABLY, YOU CAN GO AHEAD
AND PRESENT IT.
>> IN FEDERAL COURT?
>> IN FEDERAL COURT.

>> NOTHING TO DO WITH THE STATE COURT.
AND IN THIS COURT IF HE HAD MISSED THAT DEADLINE UNDER ALL THOSE CASES HAVE LET HIM FILE IT BECAUSE THAT'S WHAT WE DO.
>> THAT IS CORRECT.
BUT AGAIN MAPLES IS NOT ABOUT AN INEFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL CLAIM.
IT'S NOT.
MAPLES HAS NOTHING TO DO WITH ISSUES IN THIS CASE.
MARTINEZ DOES.
>> HOW ABOUT COLEMAN?
>> COLEMAN v. THOMPSON CAME OUT IN 1991.
WAS A MISSED NOTICE OF APPEAL IN VIRGINIA AND THE U.S. SUPREME COURT SAID, TOO BAD.
>> THEY DIDN'T, OVERALL FROM COLEMAN, WHAT DO WE TAKE FROM THAT?
>> THEY SAID SPECIFICALLY IN COLEMAN THEY LEFT OPEN THE QUESTION OF EFFECTIVE REPRESENTATION ON THE INITIAL REVIEW OF AN ISSUE.
CONSTITUTIONAL CLAIM AND THEY SPECIFICALLY, THAT'S WHAT THEY RELY ON.
THEY RELY ON THAT LANGUAGE IN COLEMAN SAYING THIS QUESTION HAS NEVER BEEN ANSWERED CONTRARY TO WHAT EVERYBODY THOUGHT ABOUT PENNSYLVANIA v. FINLEY.
>> IF YOU'RE RIGHT I GUESS YOU WILL HAVE A FEDERAL DISTRICT COURT TO GIVE YOU RELIEF BECAUSE I JUST DON'T SEE ABOUT FRANKLY, AND, YOU KNOW I UNDERSTAND YOU'RE ADVOCATING.
I JUST DON'T SEE HOW WE CAN HAVE WHATEVER THEY SAID IN THAT CASE APPLY AND CHANGE THE PROCEDURES IN FLORIDA.
RESPECTFULLY TO YOU AND TO YOUR ADVOCATE.
>> FIRST I WANT TO MAKE THE POINT THAT THE STATE'S POSITION AS AN INHERENT, INHERENTLY INCONSISTENT.
FIRST THE STATE SAYS, CHAPTER 27, ALL THOSE PROCEDURAL BARS

ARE IN PLAY.
SO YOU COULD HAVE DONE
SOMETHING AND AT THE SAME TIME,
THEY'RE ARGUING THERE IS NO
CONSTITUTIONAL RIGHT AND WE
SHOULD LOSE ON THAT GROUNDS, ON
THE BASIS OF LAMBRIX.
THE LOWER COURT RELIED ON
LAMBRIX.
YOU CAN'T BE BOTH WAYS.
IT CAN'T BE THAT WE LOSE
BECAUSE THE LAW SAYS WE LOSE
AND IT CAN'T BE WE LOSE BECAUSE
WE SHOULD HAVE KNOWN THAT THE
LAW REALLY WASN'T SERIOUS.
THAT WE HAVE EQUITABLE RIGHT
AND WE DIDN'T DO ANYTHING ABOUT
IT.
I MEAN, WHEN YOU'RE ON THE
REGISTRY YOU HAVE TO JUSTIFY
THE MONEY YOU GET PAID FOR YOUR
HOURS. THE STATE HAS TAKEN THE
POSITION THAT IF WE RAISE A
FRIVOLOUS CLAIM THAT'S CLEARLY
FORECLOSED WE'RE NOT GETTING
PAID AND WE'RE GOING TO GET
THEN OFF THE REGISTRY.
WHEN IT COMES TO LAMBRIX,
LAMBRIX COULD NOT HAVE
BEEN CLEAR.
IN LAMBRIX THEY WERE RELYING ON
CCR'S INADEQUATE FILING ON A
CLAIM, A SHELL MOTION.
LAMBRIX SAID --
>> I NEVER KNOWN YOU,
MR.^McCLAIN, AGAIN I SAY THIS
IN ALL, IN RESPECT FOR YOUR
ADVOCACY, IF YOU THINK THERE
HAS BEEN AN INJUSTICE, TO RAISE
IT AS A NEWLY DISCOVERED
EVIDENCE CLAIM YOU CONTINUE TO
DO THAT IN HILDWIN AND
SWAFFORD.
I DON'T THINK ANYBODY, MAYBE
THEY ACCUSED YOU OF FRIVOLOUS
FILINGS BUT I NEVER KNOWN YOU
TO DO THAT.
SO I DON'T, I THINK YOU WOULD
HAVE BEEN SHY I GUESS IN THIS
CASE BRINGING SOMETHING THAT
YOU THOUGHT WAS, HAD BEEN AN
INJUSTICE TO MR.^DAVID ALAN
GORE.
>> AFTER, AGAIN THE SITUATION
IN 2007 WAS THAT THE REGISTRY

ATTORNEY WHO HAD FAILED TO MAKE
ANY EFFORT TO FIND JANE
NICKERSON, WHICH IS CLASSIC
INEFFECTIVENESS UNDER
STRICKLAND, CLASSIC, WOULDN'T
HAVE REPRESENTED MR.^GORE IN THIS
COURT AND CONTINUED TO
REPRESENT MR.^GORE UNTIL THE
OPINION CAME OUT.
ONLY AFTER THAT MR.^ABATECOLA
WAS APPOINTED.
THEN IT GOES INTO FEDERAL AND
COURT AND THE ISSUE ARGUED IN
FEDERAL COURT.
DEFERENCE WAS GIVEN TO THIS
COURT'S RESOLUTION.
LAMBRIX WAS CLEARLY IN PLACE
AND CLEARLY PRECLUDED.
I TRIED TO DO THAT IN
JIMENEZ WHEN I WAS APPOINTED
REGISTERED COUNSEL WHO WAVED
THE IAC CLAIM AND THIS COURT IN
RELIANCE ON WHAT THE STATE
ARGUED DISMISSED IT.
SO, I COULD NOT ALLEGE THAT THE
REGISTRY ATTORNEY WAS
INEFFECTIVE WHEN HE DIDN'T VET
THE IAC CLAIM AND WAIVED IT.
>> SO NOW IN EVERY
POST-CONVICTION MOTION,
JUSTIFIED OR NOT, YOU NEED TO
RAISE AND WOULD SEEM TO ME
UNDER THIS, YOU NEED TO RAISE
AN INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM AND EVEN IF YOU
RAISED THE INEFFECTIVE
ASSISTANCE OF COUNSEL CLAIM YOU
BETTER RAISE IT EFFECTIVELY.
THAT'S IN ESSENCE YOUR
INTERPRETATION OF WHAT MARTINEZ
SAYS?
>> THAT IS MY UNDERSTANDING OF
MARTINEZ AND MARTINEZ, THE
ISSUE IS, AFTER MARTINEZ, WHEN
IT IS REMANDED TO LOWER COURT,
HAS MARTINEZ SHOWN THAT THE
ATTORNEY WHO FILED THAT ANDERS
BRIEF WAS INEFFECTIVE.
>> JUST A QUESTION, I SEE,
WOULD THE STATE HAVE TO PAY FOR
THE SECOND OR THIRD COUNSEL TO
ATTACK WHAT THE POST-CONVICTION
COUNSEL DID?
>>> YEAH.
>> YES. YOU ARE SAYING THAT?

>> ACCORDING TO MARTINEZ
BECAUSE THE STATE --
>> WHAT IF THAT COUNSEL IS
INEFFECTIVE?
>> THIS IS THE --
>> THIS IS INFINITE REGRESS.
>> THIS IS THE PRECISE QUESTION
DISCUSSED DURING THE MARTINEZ
ORAL ARGUMENT.
WHERE WE DRAW THE LINE WHAT THE
COURT WAS GRAPPLING WITH AND
THAT'S WHAT MARTINEZ IS
ATTEMPTING TO DO.
YOUR HONOR, I THINK THIS ISSUE
SHOULD BE UNDER EXIGENCY OF A
DEATH WARRANT BECAUSE IT
AFFECTS NOT JUST MR.^GORE, NOT
JUST PEOPLE ON DEATH ROW BUT
ALL CRIMINAL DEFENDANTS IN THE
STATE OF FLORIDA AND FOR THAT
REASON I WOULD ASK THAT A
STAY BE GRANTED AND THAT,
ADDITIONAL BRIEFING OR AMICUS
FROM INTERESTED PARTIES BECAUSE
THIS IS ALL ABOUT WHAT DOES
MARTINEZ MEAN IN FLORIDA.
THANK YOU.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
THAT CONCLUDES THIS SESSION OF
THE COURT.
ALL RISE.