Bennie Demps vs State of Florida

THE FIRST CASE ON THE COURT'S CALENDAR FOR ORAL ARGUMENT, TODAY, IS BENNIE DEMPS VERSUS THE STATE OF FLORIDA.

MAY IT PLEASE THE HONORABLE COURT.

WAIT A MINUTE. COUNSEL FOR THE STATE.

I KNOW THAT THERE HAVE BEEN THINGS FILED OVER THE WEEKEND, AND YOU ARE REQUESTED, IN THE TIME THAT YOU ARE ALLOTED, TO ARGUE ALL OF THE MATTERS PENDING BEFORE THE COURT.

WE WERE INFORMED, THIS MORNING, CHIEF JUSTICE HARDING, THAT A MOTION, A PETITION FOR WRIT OF MANDAMUS, WHICH HAS BEEN FILED, TODAY, ON BEHALF OF MR. DEMPS, WOULD BE RESPECTED BY THE COURT FOR US TO ARGUE THIS MORNING. COULD WE REQUEST AN ADDITIONAL FIVE MINUTES, FOR MR. SHAFER, MY COCOUNSEL, TO ADDRESS THE MATTER?

YOU MAY HAVE THAT MUCH.

MAY IT PLEASE THE COURT. I AM BILL SALMON, ALONG WITH COCOUNSEL FROM GAINESVILLE. WE ARE HERE, THIS MORNING, REPRESENTING MR. BENNIE DEMPS, AN INMATE ON FLORIDA'S DEATH ROW. WE ARE HERE, TODAY, TO ASK THIS COURT TO DO WHAT THE TRIAL COURT THROUGH TWO JUDGES, AFFECTION TENSIVE REVIEW, ORIGINALLY DID, IN COMPLIANCE WITH RULE 3.850, THE FLORIDA RULES OF CRIMINAL PROCEDURE. THE FACTS OF THIS CASE, THE LAW FROM BOTH THIS COURT AS WELL AS THE UNITED STATES SUPREME COURT, WHICH WAS TO GRANT AN EVIDENTIARY HEARING. IN SPITE OF ITSELF, THE TRIAL COURT, THROUGH THE CHIEF JUSTICE ROBERT PCATES, SUMMARILY DENIED MR. DEMPS'S MOTION FOR POSTCONVICTION RELIEF.

DIDN'T THE TRIAL COURT, IN FACT, SAY THAT THEY GRANTED A HEARING TO DETERMINE WHETHER THERE WOULD BE AN EVIDENTIARY HEARING?

PRIOR TO THAT HEARING, JUDGE INDICATES ENTERED ANORD -- JUDGE KAITS ENTERED A -- CATES ENTERED AN ORDER FOR AN EVIDENTIARY HEARING, TO BE GRANTED ON MAY 5 OF THIS YEAR.

DID IT --

I THINK THE JUDGE DID NOT CHANGE UNDERLYING RULING AND IN FACT GRANTED AN EVIDENTIARY HEARING. THE TITLE OF THAT ORDER IS AN ORDER CONTINUING EVIDENTIARY HEARING. I AGREE THAT THERE ARE LIMITATIONS WITHIN THAT ORDER, AN ORDER PREPARED BY MYSELF BUT ONLY TO ADDRESS MATTERS THAT JUDGE INDICATES ADDRESSED AT A VERY BRIEF HEARING, IN LAKE BUTLER, UNION COUNTY, ON THE THIRD OF MAY, AT MY ORIGINAL REQUEST TO CONTINUE THE EVIDENTIARY HEARING, AND GRANT A STAY IN THIS DEATH CASE.

MR. SALMON, THE SUBSTANTIVE ISSUE THAT YOU HAVE RAISED, ONE DEALING WITH THIS MEMORANDUM, IDENTIFYING THE ASSAILANT OF THE VICTIM, WHY, IN THIS CASE, THE TRIAL COURT WOULD BE ENTITLED, IF HE COULD PROPERLY DETERMINE THAT THERE WAS NO ENTITLEMENT TO RELIEVE ON THAT ISSUE, HE COULD DENY THE MOTION FOR EVIDENTIARY

HEARING. IS THAT CORRECT? I AM PUTTING A CONDITION THAT HE PROPERLY DETERMINED THAT. IS THAT CORRECT?

NOT IN LIGHT OF THE VERY LANGUAGE USED BY JUDGE CATES, WHICH CLEARLY EXPRESSES AN UNCERTAINTY AND ASKS FOR --

WOULD YOU DEAL WITH THAT. WHY, IN THIS CASE, DOESN'T THE RECORD AFFIRMATIVELY DEMONSTRATE NO ENTITLEMENT TO RELIEVE ON THAT CLAIM? WHEN IT IS CONSIDERED IN THE LIGHT OF THE RECORD, AND ESPECIALLY THE RECOR1 PORTIONS THAT THE TRIAL COURT RELIED ON?

THE ONLY THING THAT THE TRIAL COURT OR THIS HONORABLE COURT, I WOULD SUBMIT, CAN LOOK AT TO ANSWER THAT QUESTION, WOULD BE THE TESTIMONY THAT WAS PRESENTED AT TRIAL. ALTHOUGH WAS A TRIAL THAT TOOK SEVERAL DAYS, THERE WERE ESSENTIALLY TWO WITNESSES. AN INMATE, LARRY HATHAWAY, WHO WAS DISCREDITED IN THIS MATTER, AND AN OFFICIAL REPORT, IF I CAN CLARIFY THAT, A REPORT TO NONE OTHER THAN THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS, A REPORT SUBMITED TO MR. WAYNE WRIGHT, AFTER HE RETURNED FROM THE HOSPITAL, WHERE MR. STURGIS HAD DIED --

WELL, THE MEMORANDUM NAMES ONE OF THE PERSONS THAT WAS CHARGED AND CONVICTED OF THIS MURDER AS THE ASSAILANT. IS THAT CORRECT?

BY THE CORRECT LAST NAME, I WOULD SAY YES. WHETHER OR NOT THE CORRECT PERSON, WE ARE UNCERTAIN, BECAUSE THE PRISON NUMBER LISTED FOR THE JAMES JACKSON HALVES THAT WAS CONVICTED AT TRIAL, JUSTICE ANSTEAD, WAS NOT THE PRISON NUMBER ASSIGNED TO JAMES JACKSON.

IN YOUR MOTION, HAVE YOU IDENTIFIED ANOTHER JAMES JACKSON JACKSON? THAT WAS THERE AT THE SCENE?

WE HAVE NOT BEEN ABLE TO IDENTIFY THAT, OTHER THAN THE RECORD REFLECTING THAT THERE WERE A MINIMUM OF FOUR JACKSONS ON THE VERY WING WHERE MR. STURGIS WAS KILLED, BEING THE "W QUESTION -- THE "W" WING.

WHY WAS THE ERROR BE --

I THINK THE ERROR WAS THE TELLING MATTER, OTHER THAN SOME CONFUSION ABOUT WHAT MR. SURGEIES ALLEGEDLY TOLD ABOUT THE JACKSON THAT HE CLAIMED WAS ONE OF THE ASSAILANT ASSAILANTS, OR IN THIS REPORT THE ASSAILANT. WHETHER IT IS TOOTHLESS OR TWO FISTS, YOU CAN SEE THAT THE CORRECTIONS OFFICER WENT TO GREAT LENGTHS TO TRY TO DOWNPLAY THAT MR. STURGIS DID NOT, MAYBE, EVEN KNOW WHO HE WAS TALKING ABOUT, SO I THINK THAT, FOR ALL OF THOSE REASONS AND A REVIEW OF THE RECORD AS A WHOLE, HERE, I DON'T SEE HOW JUDGE CATES COULD POSSIBLY HAVE LEGITIMATELY, UNDER THE LAW AND THE RULES THAT ARE APPLICABLE TO THIS CONSIDERATION, COULD HAVE FOUND THAT HE COULD HAVE DENIED THIS?

WHAT DOES THE MOTION SAY ABOUT THIS JACKSON? THAT IS DOES THE MOTION SAY THAT IN LIGHT OF THIS MEMORANDUM THAT YOU HAVE PROOF THAT ANOTHER PERSON, OTHER THAN THE JACKSON THAT WAS CONVICTED AS A CODEFENDANT, WAS THE ACTUAL ASSAILANT, MURDERER? IS THAT WHAT YOUR MOTION SAYS?

NO. WE HAVE ALLEGED, AND I BELIEVE THAT WE CAN PROVE, THIS THAT THE SINGLE-MOSES EVENINGS PIECE OF EVIDENCE THAT WAS PRESENTED AT THIS TRIAL IS THAT BENNIE DEMPS WAS NOT INVOLVED IN THE MURDER OF MR. STURGIS. AS A SECONDARY MATTER --

LET'S STOP RIGHT THERE. I AM HAVING DIFFICULTY. WHAT SINGLE PIECE OF EVIDENCE ARE YOU TALKING ABOUT?

THE OFFICIAL REPORT FOR MR. CECIL SEWEL, WHICH WE CALL THE SEWELL REPORT, WHICH IDENTIFIES.

YOU ARE TALKING ABOUT THE REPORT THAT SAYS MY ASSAILANT WAS JACKSON.

RIGHT.

AND WE KNOW A JACKSON WAS AN ASSAILANT AND WAS CONVICTED OF THIS MURDER. IS THAT CORRECT?

WAS CERTAINLY CONVICTED OF IT YES, SIR.

S A THE ACTUAL PERSON THAT ADMINISTERED THE DEATH BLOWS.

VERY CORRECT. THE PERSON THAT INSERTED THE KNIFE.

WELL, YOU HAVE JUST SAID THAT YOU HAD EVIDENCE THAT, IN ADDITION TO THIS, THAT MR. DEMPS WAS NOT -- WAS INNOCENT OF THIS CRIME, WAS NOT THE MURDERER. WHAT EVIDENCE HAVE YOU ALLEGED THAT MR. DEMPS WAS NOT INVOLVED?

IN OUR THIRD MOTION FOR POSTCONVICTION RELIEF, ALLEGED AND INCORPORATED INTO OUR FOURTH AND MADE PART OF THE FOURTH MOTION FOR POSTCONVICTION RELIEF WE HAVE, ALSO, PROVIDED THE AFFIDAVITS OF SEVERAL INMATES WHO WOULD, IF THEY HAD BEEN ALLOWED TO TESTIFY, WITHOUT PHYSICAL THREATS, INCLUDING THOSE ADMINISTERED WITH A HANDGUN, WOULD HAVE TESTIFIED FAVORABLY ON BEHALF OF MR. DEMPS.

YOU ATTACHED AFFIDAVITS THAT SAY THAT MR. DEMPS WASN'T INVOLVED?

AND THAT THEY WERE PRESSURED INTO EITHER TESTIFYING, TRYING TO MAKE THEM TESTIFY OR NOT TESTIFY. A NUMBER OF VARIETY OF PRESSURES THAT WERE PLACED UPON THESE WITNESSES, AND THE COURT WILL RECALL THAT THAT WAS SUMMARILY DENIED. THIS COURT AFFIRMED THAT, BUT I MUST POINT OUT THAT, OF THE WITNESSES THAT WE LISTED AS NEWLY-DISCOVERED AND UNSUPPLIED WITNESSES, THERE WERE AT LEAST TWO, TWO WITNESSES THAT WE NAMED AND PROVIDED AFFIDAVITS FROM THAT WERE NOT ON THAT STATE'S DEFENSE WITNESS LIST, EXCUSE ME, THAT JUDGE CATES SOLELY RELIED ON TO SUMMARILY DENY THE THIRD MOTION FOR POSTCONVICTION RELIEF.

THIS COURT REVIEWED THAT.

THIS COURT REVIEWED THAT.

IN FACT, YOU MADE THE ARGUMENT.

UNDER THE DICTATES OF KYLE V WHITLEY, IT IS CLEAR THAT, WHEN EVIDENCE IS RAISED IN A SUBSEQUENT MOTION THAT ALL PREVIOUS ALLEGATIONS OF NEWLY-DISCOVERED EVIDENCE MUST, ALSO, BE RECONSIDERED, SO THAT THIS COURT AND THE TRIAL COURT CONDUCTING THE EVIDENTIARY HEAR HEARING, WHICH WE SUBMIT CLEARLY NEEDS TO BE ENTERED IN THIS CASE CAN CLEARLY CONSIDER THE RECORD AS A WHOLE. THAT IS WHAT POSTCONVICTION LITIGATION TELLS US, THROUGH THIS COURT, THROUGH THE UNITED STATES SUPREME COURT, AND THIS COURT, IN ANY NUMBER OF ITS OWN OPINIONS, HAS ENCOURAGED TRIAL COURTS TO DO THAT. TIME AFTER TIME IN RAGSDALEV STATE, IN JONES V HENRY, IN --

HAS MR. DEMPS CLAIMED INNOCENCE OF THIS?

HE NOTARIZED, HE ATTESTTED AND HIS SIGNATURE WAS NOTARIZED ON THE FOURTH MOTION FOR POSTCONVICTION RELIEF, WHICH IS BEFORE THIS COURT, SO I THINK THE ANSWER TO THAT QUESTION IS YES, SIR. HE HAS SUBMITTED HIS AFFIDAVIT, THROUGH SWEARING TO THE TRUTH AND ACCURACY OF HIS FOURTH SUCCESSIVE MOTION FOR POSTCONVICTION RELIEF.

AS FAR AS THE ADMISSIBILITY OF THE, WHAT YOU ARE CALLING THE SEWELL DOCUMENT, IS IT YOUR CONTENTION THAT THAT WOULD HAVE BEEN ADMISSIBLE AS DIRECT EVIDENCE, AS A BUSINESS RECORD, OR AS IMPEACHMENT?

CLEARLY. BOTH.

CLEARLY WHAT?

BOTH, BUT MOST CLEARLY AS A BUSINESS RECORD EXCEPTION, JUSTICE PARIENTE, NOTWITHSTANDING THE STATE'S EFFORTS, COMING UP TO THE TRIAL COURT ON MAY 12, IN A NUN NONRECORD HEARING THAT WAS CON -- IN A NONRECORD HEARING THAT WAS CONDUCTED BEFORE JUDGE CATES. THEY CITED THESE CASES, SAYING VAN ZANDT AND OTHER CASES CLEARLY SHOW THAT THE DOCUMENT IS INADMISSIBLE. THEY COMPLETELY FAILED TO CONVINCE THE TRIAL COURT THAT THE CASES STAND FOR THE OPPOSITE PRINCIPLE, THAT WHEN ALL EMPLOYEES IN THE SAME AGENCY, WHICH REFERENCE TO EVERY PERSON IN THAT OFFICIAL REPORT IS, THEN THOSE INDICIA OF REALIBILITY THAT ALLOW IT COME TO IN AS AN EXCEPTION TO THE HEARSAY BUSINESS RULE COME INTO PLAY AND THAT ARGUMENT DOES NOT STAND, AS THE STATE WAS TRYING TO MAKE ON THAT ISSUE.

IF WE DON'T THING THAT IT IS ADMISSIBLE AS A BUSINESS RECORD, FOR VARIOUS REASONS, INCLUDING THE FACT THAT THE PERSON MAKING THE REPORT HAD NO DIRECT KNOWLEDGE OF THE INCIDENT, WHO WOULD IT HAVE IMPEACHED? HOW COULD YOU HAVE USED IT AS IMPEACHMENT?

IMPEACHMENT IS A VERY BROAD TERM. CONTRADICTION, SHOWING RELIABILITY. I WOULD SUBMIT THAT, UNDER THE RUBRIC OF IMPEACHMENT, ALL OF THOSE TERMS OF IMPORTANT TO THE COURT'S CONSIDERATION OF THAT MATTER IN THIS DEATH CASE, AND WHAT WOULD BE QUESTION, WHAT WOULD BE CONTRA ADDICTED AND WHAT WOULD BE ULTIMATELY IMPEACHED WOULD BE THE DYING DECLARES RELAYED BY AV ROAD I KNOW AT TRIAL.

-- RODIN AT TRIAL.

FOLLOWING UP ON WHAT JUSTICE ANSTEAD SAID, IS DOES IT REALLY CONTRADICT ANYTHING AT TRIAL, OTHER THAN THAT YOU ARE SAYING THAT HE IS ONLY MENTIONING ONE ASSAILANT, BUT ASSAILANT MEANS, AS THE MURDERER, THE ACTUAL PERSON THAT DID THE KILLING, THAT WAS THE PERSON NAMED JACKSON. CORRECT?

FOR SEVERAL REASONS, THANK IS NOT SO, JUSTICE PARIENTE. FIRST OF ALL, WE HAVE TO HAVE AN EVIDENTIARY HEARING TO FLESH THIS OUT, AND I THINK IT IS IMPERATIVE FOR ME TO DO SO, EVEN THOUGH I HATE TO SAY IT. THE WAY THEY DEFINE THE DEFINITION OF THE WORD ASSAILANT IS, ALSO, AN OPPOSITE, I SUBMIT, TO ANY REGULAR DICTIONARY DEFINITION OF THE WORD ASSAILANT ASSAILANT. ASSAILANT DOES NOT MEAN TO KILL. IT MEANS TO ASSAULT A PERSON. BENNIE DEMPS, IF CONVICTED OF ANYTHING, WAS CONVICTED OF BEING AN ASSAILANT OF MR. STURGIS. THE TESTIMONY, THE DEPOSITIONS, THE TRIAL TESTIMONY IS REPLETE WITH INCONSISTENCY AND UNCERTAINTIES ABOUT WHAT HAPPENED, WHEN MR. STURGIS CLAIMED -- WHEN MR. ROAD I KNOW HE -- MR. RODIN CLAIMED TO HEAR THIS DYING DECLARATION. WHAT WE DO KNOW IS THAT AV RODIN WAS NOT DISTINGUISHS. HE WAS TOLD THROUGH DEPOSITIONS OF OTHER PEOPLE AND THROUGH HIS DEPOSITION, THAT STURGIS NAMED ASSAILANTS, NOT AN

ASSAILANT, WITH TWO OTHER PEOPLE PLAYING SOME PRINCIPAL ROLE IN THAT ATTACK.

AS FAR AS THIS DOCUMENT IS CONCERNED, THIS IS SOMETHING THAT, ACCORDING TO THE STATE, HAS BEEN IN THE DEFENSE POSSESSION FOR SEVERAL YEARS.

THAT'S ONE OF THE --

SHOULD THAT NOT CAUSE US A GREAT DEAL OF CONCERN, EVEN LOOKING AT THIS, AND I UNDERSTAND THAT JUDGE CATES GAVE THE BENEFIT OF THE DOUBT THAT THIS WAS NEWLY-DISCOVERED EVIDENCE, BUT FROM THIS COURT'S POINT OF VIEW, THERE IS THE UNCONTRADICTED AFFIDAVIT CONCERNING THE FACT OF HAD WHEN THIS WAS PRODUCED, WHICH WAS YEARS AGO. WHAT IS YOUR RESPONSE TO THAT?

MY RESPONSE IS THAT THIS COURT SIMPLY MAY NOT, CANNOT, AND SHOULD NOT CONSIDER THAT ARGUMENT. THAT IS JUST ONE OF THE WHOPPERS THAT THE STATE HAS PUT TO THIS COURT IN THEIR BRIEF AND TO JUDGE DR. ATES, IN THAT NONRECORD HEARING OF MAY 12, 2000. THAT IS NOT CORRECT. THEY TRIED TO SUBMIT THOSE TWO AFFIDAVITS. VAGUE, IN SPECIFIC, ONE AUTHORED BY A PERSON WHO DIDN'T EVEN WORK FOR THE DEPARTMENT OF CORRECTIONS IN 1976. THEY WERE OBJECTED TO IMMEDIATELY. WITHOUT HESITATION, JUDGE CATES SUSTAINED THAT OBJECTION. THEY ARE NOT PART OF THIS RECORD. IT IS DISINGENIOUS FOR THE STATE TO ARGUE THAT IN THIS BRIEF. I SUBMIT THE COURT CANNOT CONSIDER THAT AFFIDAVIT.

AS AN OFFICER OF THE COURT, CAN YOU REPRESENT THAT THE DEFENSE ONLY CAME INTO POSSESSION OF THE MEMORANDUM WITHIN A YEAR BEFORE THE MOTION WAS FILED?

AS STATED IN MY AFFIDAVIT, WHICH, UNFORTUNATELY MY COCOUNSEL INFORMED ME THIS MORNING MAY NOT BUT CERTAINLY STHOO BE PART OF THE RECORD THAT WAS -- SHOULD BE PART OF THE RECORD THAT WAS SENT TO THIS COURT. HE TELLS ME THAT, IN MY AFFIDAVIT, ANSWERING EACH ONE OF THE ISSUES RAISED BY THE STATE, ENJOINING THIS ISSUE OF NEWLY-DISCOVERED EVIDENCE. THEY WANTED TO KNOW WHEN, THEY WANTED TO KNOW HOW, AND THEY WANTED TO KNOW WHY NOT SOONER, AND I ANSWERED THAT QUESTION. I TOLD THEM HOW I FOUND IT. I TOLD THEM WHEN I FOUND IT.

THE QUESTION IS YOU WEREN'T COUNSEL IN 1982. RIGHT?

NO, SIR.

THAT IS WHEN CLEMENCY WAS FIRST HEARD.

THAT'S CORRECT.

AND THE QUESTION IS HAVE YOU ALLEGED, IN THE MOTION, THAT YOU REVIEWED THE FILE THAT WAS WITHIN COUNSEL'S POSSESSION IN 1982 AND AFFIRMATIVELY ASSERTED, IN YOUR MOTION, THAT THERE WAS NO DOCUMENTS TURNED OVER?

I COULD FIND NO INDICATION OF ANY KIND OF, WHETHER IT BE A REPORT, A REFERENCE TO THE REPORT, ANY OF THE FIVE OR SIX PEOPLE THAT ARE COPIED ON THAT REPORT, WENT TO THE PRISON, WENT THROUGH EVERY SINGLE FILE OF MR. DEMPS, DEPARTMENT OF CORRECTIONS FILE. IT IS NOT THERE. IN AN EVIDENTIARY HEARING, I BELIEVE THAT WE COULD SHOW THAT A PUBLIC RECORDS ATTEMPT WAS MADE BY AN ATTORNEY FOR CCR IN ONE OF MR. DEMPS' MANY PLEADINGS THAT HAVE BEEN FILED, IT TO TRY AND ESTABLISH HIS INNOCENCE, WHICH I BELIEVE WE CAN DO, AND THAT, I BELIEVE, WE WILL SHOW, ALTHOUGH I CAN'T DO IT HEAR, BUT IN AN EVIDENTIARY HEARING, THE APPROPRIATE FORUM FOR THAT, I THINK IT COULD BE ESTABLISHED THAT EVEN A PUBLIC RECORDS REQUEST WAS MADE AS LATE AS 1990 OR 1991, AND NO REPORTS WERE SUBMITTED. THOSE ARE DISINGENIOUS, VERY VAGUE, BROAD, INCONCLUSIVE, AND DO NOT

STATE -- FOR INSTANCE, THEY SAY THAT THE REASON THAT MR. CAROL, WHO WAS, THEN, MR. DEMPS' CLEMENCY COUNSEL, IS THAT THEY GOT A RETURN RECEIPT. THAT DOESN'T PROVE ANYTHING. JUST BECAUSE THEY CAN PROVE THAT THEY SENT A LETTER TO MR. CAROL DOES NOT IN ANY WAY ESTABLISH TO THIS COURT'S SATISFACTION THAT THIS DEATH CASE, AND I SUBMIT THAT THE REPORT LIKEWISE DOES THAT. IT SAYS NOT ONLY WHAT HIS REACTION WOULD HAVE BEEN, HAD HE GOTTEN IT BUT HOW HE WOULD HAVE USED IT AND HOW IT WOULD HAVE BEEN IMPORTANT TO THE DEFENDANT, BENNIE DEMPS. THE AFFIDAVITS OF THE TWO KO COCOUNSEL IN THIS CASE CLEARLY -- OF THE TWO COCOUNSEL IN THIS CASE CLEARLY SAY THE SAME THING. THIS REPORT WAS NEVER DIVULGED, UNTIL I FOUND IT GOING THROUGH APPROXIMATELY AN ON 0 PAGES OF MATERIAL -- APPROXIMATELY 2500 PAGES OF MATERIAL, FOR THIS HEARING, AND NOBODY WAS COPIED AT THE BOTTOM OF THAT DOCUMENT. IT IS WHOLLY AND CLEARLY A CONCERN, I SUBMIT.

YOUR LIFE IS ON -- YOUR LIGHT IS ON. I WILL ALLOW YOU TO CONTINUE, BUT YOU ARE IN REBUTTAL AT THIS TIME.

OUR MOTION GOES NOT ONLY TO THE GUILT PHASE BUT WHICH, AT A NEW TRIAL, WE BELIEVE WE COULD ESTABLISH MR. DEFERS' INNOCENCE, BUT OUR MOTION, ALSO, GOES TO THE SENTENCING PHASE, AND IF THAT OFFICIAL SENTENCING REPORT FROM THE DEPARTMENT OF CORRECTIONS WOULD NOT HAVE SWAYED BOTH THE JURY AND THE COURT, IN THIS CASE, NOT TO HAVE ADVISED OR IMPOSED A DEATH SENTENCE, ESPECIALLY IN LIGHT OF THE FACT THAT THE JURY IN THIS CASE WAS OUT FOR FIVE HOURS, HUNG ON BEING ABLE TO RETURN A VERDICT OF ANY KIND IN THIS CASE. IT TOOK TWO ALLEN CHARGES AND ANOTHER FIVE HOURS OF DELIBERATION BY THE JURY IN THIS CASE, BEFORE THEY RETURNED ANY VERDICT AT ALL! ALMOST 11 HOURS BEFORE DELIBERATION IN A PRISON CASE?

MR. SALMON, JUST ONE OTHER QUESTION CONCERNING COUNSEL'S KNOWLEDGE OR LACK OF KNOWLEDGE OF THIS SEWELL MEMO. DID YOU OFFER ANY AFFIDAVITS FROM ANY OF THE PREVIOUS ATTORNEYS ON THIS CASE, INDICATING THAT THEY DID NOT HAVE ANY KNOWLEDGE OF THIS MEMO?

ALL THREE OF THEM, YOUR HONOR. YES. ALL THREE OF THEM. THERE ARE OTHER POINTS I WOULD LIKE TO MAKE, BUT I WILL RESERVE IT FOR MY REBUTTAL. THANK YOU VERY MUCH.

COUNSEL. MR. SHAFER.

MAY IT PLEASE THE COURT. I AM GEORGE SHAFER. I AM COCOUNSEL FOR BENNIE DEMPS. THIS MORNING, MR. DEMPS FILED A PETITION FOR WRIT OF MANDAMUS, NAMING THE RESPONDENTS, GOVERNOR JEB BUSH AND ATTORNEY GENERAL ROBERT BUTTERWORTH, AND THE PETITIONER IS IN AN EXTRAORDINARY POSITION, WHICH HAS LED THIS PETITION TO HAVE TO BE FILED. THIS COURT, ON MAY 27, STAYED THE EXECUTION THAT HAD PREVIOUSLY BEEN SET FOR MAY 31, AND THE STAY IS TO EXPIRE ON JUNE 7, THIS WEDNESDAY, AT FIVE O'CLOCK P.M. COUNSEL FOR MR. DEMPS LEARNED, FROM THE NEWSPAPERS, ON MAY 31, OF THE NEW EXECUTION DATE. NO NOTICE OF ANY TYPE WAS GIVEN TO PETITIONER'S COUNSEL OF THE NEW EXECUTION DATE.

WAS THAT SUBSEQUENTLY CONFIRMED BY A TELEPHONE CALL?

AFTER MYSELF, AFTER I READ THESE ARTICLES IN THE TALLAHASSEE DEMOCRAT AND THE GAINESVILLE SUN, ABOUT THE NEW EXECUTION DATE, THE NEXT DAY I CALLED MR. FRENCH, TO ASK WHAT IS GOING ON HERE? I AM READING IN THE PAPER THAT MY CLIENT IS SCHEDULED TO BE EXECUTED ON JUNE 7 AT SIX O'CLOCK P.M., AND HE SAID HE WOULD LOOK INTO IT. I FAXED HIM A LETTER. HE CONFIRMED THAT THE DATE IS NOW SIX P.M., ONE HOUR AFTER THIS COURT'S STAY EXPIRES, AND FAXED ME WHAT IS ATTACHED AS ATTACHMENT E, INDICATING THAT IT WAS ON MAY 30 THAT THE GOVERNOR MADE THE DECISION TO RESCHEDULE THE EXECUTION OF MR. DEMPS, AFTER CONFERRING WITH THE WARDEN AT SIX O'CLOCK P.M. THE GOVERNOR'S STAFF

AND THE ATTORNEY GENERAL SHOULD HAVE NOTIFIED COUNSEL IMMEDIATELY. WE SHOULD NOT BE READING ABOUT A NEW EXECUTION DATE IN THE PAPER. THIS IS A VIOLATION OF THE 14th AMENDMENT. WHEN YOU ARE DEALING WITH SOMEONE'S LIFE, FUNDAMENTAL THAT COUNSEL BE NOTIFIED OF THE NEW EXECUTION DATE, AND IT IS A VIOLATION OF THE FLORIDA CONSTITUTION, AND CLEARLY IT IS A VIOLATION OF THE STATUTES GOVERNING NOTICE REQUIREMENTS FOR EXECUTIONS. THOSE STATUTES, AS WE POINTED OUT IN THE PETITION, REQUIRE THAT, AFTER THE STAY EXPIRES, AFTER IT IS LIFTED OR DISSOLVED, THEN THE ATTORNEY GENERAL MUST CERTIFY THAT TO THE GOVERNOR, AND THEN THE GOVERNOR MUST SCHEDULE THE EXECUTION, WITHIN A TEN-DAY PERIOD. NONE OF THESE STATUTES HAVE BEEN COMPLIED WITH.

WELL, IF YOU LOOK AT THE LANGUAGE, B, I THINK THAT, SEX B I THINK THAT IS THE SECTION SHUN I BELIEVE YOU ARE RELYING UPON. IF EXECUTION IS STAYED, EVIDENT TO APPEAL ON CERTIFICATION BY THE ATTORNEY GENERAL THAT THE STAY HAS BEEN LIFTED OR DISSOLVED, WITHIN TEN DAYS AFTER SUCH CERTIFICATION, THE GOVERNOR MUST SET THE NEW DATE. ET CETERA. DO YOU READ THAT TO SAY THAT THE GOVERNOR CANNOT ISSUE A STAY, ABSENT SUCH A LETTER OF CERTIFICATION, EVEN THOUGH THE STAY, IT IS NOT AN INDEFINITE STAY. THE STAY RUNS OUT. I THINK DEFENSE COUNSEL AND EVERYBODY ELSE KNEW WHEN THAT STAY RAN OUT.

YES, JUSTICE SHAW, BUT DEFENSE COUNSEL DID NOT KNOW WHEN THE NEW EXECUTION DATE WAS GOING TO BE.

I UNDERSTAND. BUT YOU DID KNOW THAT THE STAY -- IT WAS A STAY FOR A DEFINITE PERIOD OF TIME.

WE KNEW FROM THIS COURT'S ORDER, MAY 27, IT WAS SCHEDULED TO BE DISSOLVED, TO BE LIFTED AT FIVE O'CLOCK P.M. ON JUNE 7. WE DID NOT KNOW THAT THE STATE WAS NOT GOING TO WAIT UNTIL THAT TIME, BEFORE RESCHEDULING THE EXECUTION. THERE WOULD BE NO NEED FOR THE LEGISLATURE TO HAVE THIS LANGUAGE IN HERE, IF THEY INTENDED THAT THE GOVERNOR COULD SIMPLY RESCHEDULE AN EXECUTION DURING THE PENDENCY OF A STAY. I WILL THEY INCLUDE THE -- WHY WOULD THEY INCLUDE THE LANGUAGE THAT THE STAY IS LIFTED OR DISSOLVED?

IF YOU HAD AN INDEFINITE STAY THAT LANGUAGE WOULD BE MEANINGFUL THERE.

JUSTICE SHAW, I THINK THE LEGISLATURE WOULD HAVE MADE THAT DISTINCTION, IF THAT IS WHAT THEY INTENDED. THEY DON'T REFER TO DIFFERENT TYPES OF STAYS. THEY SIMPLY SAY THAT ONCE THE STAY LIFTED OR DISSOLVED, AT THAT POINT THE ATTORNEY GENERAL MUST CERTIFY THAT, AND WITHIN THE TEN DAYS AFTER THAT, THE GOVERNOR MUST RESCHEDULE THE EXECUTION, TO OCCUR IN THAT TEN-DAY PERIOD.

I UNDERSTAND.

AND SO YOUR RELIEF, THE RELIEF THAT YOU ARE REQUESTING IS?

THE RELIEF THAT THE PETITIONER IS REQUESTING IS THAT THE RESPONDENTS BE DIRECTED TO COMPLY WITH THESE LAWS THAT THE LEGISLATURE HAS ENACTED, THAT THEY WAIT UNTIL THIS COURT'S STAY IS DISSOLVED OR LIFTED, WHICH IS CURRENTLY JUNE 7 AT FIVE P.M. IMMEDIATELY AFTER THAT IS DONE, THE ATTORNEY GENERAL COMPLY BY CERTIFYING THAT THE STAY HAS BEEN DISSOLVED OR LIFTED, BY ITS OWN TERMS, AND THAT THE GOVERNOR, THEN, SET THE EXECUTION, IF THIS COURT HAS -- AND WE ARE VERY CONFIDENT THIS COURT WILL NOT, WE CERTAINLY HOPE NOT, IF THIS COURT, THOUGH, HAS AFFIRMED THE APPEAL IN THIS CASE. WE ARE TALKING ABOUT A CONTINGENCY HERE. AND THAT COUNSEL, AS THE STATUTE REQUIRES, BE GIVEN NOTICE, AS TO THE NEW EXECUTION DATE. WITHOUT THAT KIND OF NOTICE, IT IS IMPOSSIBLE FOR US TO CONSTANTLY BE -- TO CONFIDENTLY BE REPRESENTING THIS DEATH ROW INMATE, IN TERMS OF ANY OTHER RELIEF THAT WE MAY HAVE TO SEEK.

COULD THE CERTIFICATION BE GIVEN DURING THE TERM OF THE STAY?

WELL, THAT IS NOT HOW THE STATUTE READS.

DOES THE STATUTE REINCLUDED THAT?

WELL, THE -- DOES THE STATUTE PRECLUDE THAT?

IT SAYS THE ATTORNEY GENERAL, THAT THE STAY HAS BEEN LIFTED OR DISSOLVED. THE ATTORNEY GENERAL WOULD NOT BE ABLE TO CERTIFY THAT THE STAY HAS BEEN LIFTED OR DISSOLVED, IF IT IS IN EFFECT.

IT IS DISSOLVED AT FIVE O'CLOCK.

IT IS SCHEDULED TO DISSOLVE. BUT THAT DOESN'T PRECLUDE THE COURT FROM CONTINUING THAT, IF THERE WERE REASONS THAT JUSTIFIED THAT.

THIS DOES NOT CREATE ANY ACTION BY THIS COURT. IT IS AUTOMATICALLY DISSOLVED.

THAT'S CORRECT. THAT'S CORRECT, JUSTICE SHAW, BUT IT IS PRESUMPTUOUS, I THINK, FOR THE ATTORNEY GENERAL TO ASSUME THAT THERE ARE NO CIRCUMSTANCES THAT MIGHT CHANGE THAT, AND THE LEGISLATURE, CERTAINLY, REALIZED THAT, AND I THINK THAT IS WHY THEY WISELY PUT IN THERE, ONCE IT HAS BEEN DISSOLVED OR LIFTED, THEN THE ATTORNEY GENERAL MAKES THE CERTIFICATION.

DO YOU CONTEND THAT THERE IS A CERTAIN PERIOD OF TIME THAT HAS TO ELAPSE, AFTER THE CERTIFICATION, BEFORE THE EXECUTION CAN BE SET?

IT IS THE PETITIONER'S CONTENTION THERE ISN'T A PARTICULAR AMOUNT OF TIME AFTER, BUT QUALIFIED WITH THERE HAS TO BE AT LEAST REASONABLE NOTICE, AS REQUIRED BY ARTICLE I SECTION 9 OF THE FLORIDA CONSTITUTION TO THE NEW EXECUTION DATE. FOR INSTANCE, IF IT WERE TO EXPIRE AT FIVE OKAY JUNE 7, AND AT 5 ONE 01, THE ATTORNEY GENERAL CERTIFIED IT AND THE GOVERNOR SCHEDULE IT WITHIN AN HOUR, THAT WOULD NOT BE REASONABLE IN COMPLIANCE WITH THE FLORIDA CONSTITUTION.

THANK YOU, COUNSEL

I DON'T WANT TO DISRUPT YOUR FLOW OF ARGUMENT, BUT WAS ANY LETTER OF CERTIFICATION SENT AT ALL?

YOU ARE TALKING ABOUT IN TERMS OF A NEW EXECUTION DATE?

IN TERMS OF THIS STATUTE.

YES, SIR, AND I BELIEVE A COPY WAS SENT TO THE COURT. I HAVE A LETTER TO WARDEN CROSBY FROM JEB BUSH, A COPY TO CHIEF JUSTICE MAJOR HARDING, DATED MAY 30. WHICH BASICALLY SAYS THAT THE NEW EXECUTION DATE IS SET. A COPY OF THAT, ALSO, IS SHOWN HAVING BEEN SENT TO MR. WILLIAM SALMON ON THAT DATE.

IS THAT IN THE RECORD? A COPY OF THAT LETTER?

IT IS NOT EXPLICITLY IN THE RECORD ON APPEAL, PER SE, BUT IT IS PRESUMABLY, IF IT WAS SENT AS SHOWN, WITHIN THE BREADTH OF THIS COURT.

SUMMARIZE IT.

I CAN READ IT. PURSUANT TO STATUTES IS A COPY OF THE DEATH WARRANT AND A COPY OF THE RECORD OF BENNIE DEMPS. I HAVE DESIGNATED THE WEEK BEGINNING AT 5:0 1:00 P.M. JUNE 72000, THROUGH THE WEEK OF JUNE 14, AT 5:301, AT 1:00 P.M., AND WEDNESDAY, JUNE 7, AT SIX P.M., IS THE DATE AND TIME OF THE EXECUTION. A COPY WAS SENT TO WARREN HARDING, CHIEF JUSTICE. THE PLEADING, ITSELF, FOR PETITION OF WRIT OF MANDAMUS, SHOWS, ON ITS FACE, THIS THAT ON JUNE 1, WHICH IS ONLY TWO DAYS AFTER THE LETTER, THAT I FAXED A COPY OF THAT LETTER TO MR. SHAFER, SO MR. SALMON AND MR. SHAEFER, BOTH, SHOULD HAVE NOTICE, AT LEAST FOUR DAYS AGO, OF THIS NEW EXECUTION DATE. IN TERMS OF --

YOU SAID THAT THAT LETTER THAT YOU JUST READ HAD SOME CC'S ON IT?

YES. CHIEF JUSTICE HARDING, JUDGE ROBERT CATES, JUDGE LARRY TURNER RICHARD MARTELL --

IS THAT THE SECOND PAGE?

SECOND PAGE. THE COPY OF THAT I HAVE OF THAT. LEWIS FARGO AND JANET KEELS, WHO IS THE EXECUTIVE DIRECTOR OF THE BOARD CLEMENCY.

THE PETITION, THE ONE THAT YOU FAXED, IS ONE PAGE. IT HAS THE FAX FROM, IT SAYS, TALLAHASSEE, CAPITAL APPEALS, BUT THERE IS NO COPIES SHOWN, BUT YOU ARE SAYING THE SECOND PAGE. SO THIS COURT SHOULD HAVE RECEIVED THAT, ALSO.

THIS COURT SHOULD HAVE RECEIVED THE SECOND PAGE. I HAVEN'T SEEN THE COURT'S COP, I BUT I HAVE THIS COPY, HERE, WHICH WAS FURNISHED TO ME BY THE COUNSEL FOR THE GOVERNOR THIS MORNING. AS FOR ANY ARGUMENT CONCERNING WHETHER OR NOT THE GOVERNOR CAN SET A DATE BEFORE THE STAY, LIFT I DON'T KNOW THAT THERE IS ANY AUTHORITY ON. THAT THE STATUTE CONTEMPLATES THERE SEEMS TO BE AN INDEFINITE STAY AND WHEN THAT IS LIFTED, SOMEBODY HAS TO NOTIFY THE GOVERNOR, THAT BEING THE ATTORNEY GENERAL. IN THIS CASE THERE WAS A STAY WITH A DEFINITE ENDING POINT, AND OUR OFFICE DID SEND A LETTER TO THE GOVERNOR, WHICH WE THINK COMPLIES WITH THE STATUTE, LETTING HIM KNOW THAT THERE WAS A STAY THAT ENDED AT FIVE P.M. ON THE SEVENTH, AND THAT WE DIDN'T SEE ANY REASON WHY A DATE COULDN'T BE SET. IF WE WERE WRONG IN THAT, THEN WE CAN, ALWAYS, SEND ANOTHER LETTER AT 5:0 1:00 P.M. ON THE SEVENTH -- AT 5:01 P.M. ON THE SEVENTH, AND I DON'T KNOW THAT THERE IS ANY PARTICULAR TIME THAT HE HAS TO WAIT. OTHERWISE A STAY WITH A DEFINITE ENDING POINT WOULD BE A LONGER STAY FOR HOWEVER MUCH NOTICE WOULD BE REQUIRED. AT ANY RATE, AT THIS POINT DEFENSE COUNSEL CERTAINLY HAS NOTICE OF THE STAY OF THE END OF THE STAY, AND SETTING OF THE DATE, AND IF HE THINKS MORE TIME IS REQUIRED, WHAT HE REALLY NEEDS TO DO, INSTEAD AFTER PETITION FOR MANDAMUS, IS TO SEEK A FURTHER STAY, WHICH HE HAS NOT DONE.

COUNSEL HAS ARGUED THAT CERTIFICATION LETTER CANNOT BE SENT UNTIL AFTER THE EXPIRATION?

WE WOULD TAKE THE CONTRARY POSITION. I DON'T BELIEVE THERE IS ANY AUTHORITY. I HAVE JUST SEEN THIS THING FOR THE FIRST TIME, PROBABLY, AN HOUR AGO, BUT AS FAR AS I KNOW, THERE IS NO AUTHORITY THAT SAYS WE CANNOT GO AHEAD AND SEND OUT THE LETTER THAT WE ARE SUPPOSED TO SEND, BEFORE THE STAY ACTUALLY LIFTS, WHEN YOU HAVE GOT A STAY WITH A DEFINITE TERMINATION DATE. AGAIN, THE STAY MEANS THAT THE EXECUTION CANNOT OCCUR BEFORE 5:00 P.M. ON JUNE 7, AND WE HAVE A NEW EXECUTION SCHEDULED FOR ONE HOUR AFTER. THAT THE STAY, THERE IS NO STAY IN EFFECT AT THAT POINT. ADDRESSING SOME OF THE ARGUMENTS THAT HAVE BEEN MADE, LET ME, FIRST, START OFF CONCERNING THIS WHAT MR. SALMON CHARACTERIZES AS AN OFFICIAL REPORT, BY SEWELL. IF YOU ACTUALLY AT THE CONCLUSION OF THAT IT SAYS A REPORT WILL BE SENT WHEN FINALIZED. IT IS NOT MEANT TO BE ANYTHING BUT A FINAL REPORT. IT IS DATED THE DAY AFTER THIS HAPPENED. IT IS A

PRELIMINARY INFORMATIONAL MEMORANDUM FROM SOMEBODY IN TALLAHASSEE, WHO HAS OVERALL SUPERVISION OVERALL OF THE PRISONS TARNTION IS WRITTEN TO THE SECRETARY OF THE DEPARTMENT OF CORRECTIONS, JUST TO LET HIM KNOW WHAT IS GOING ON AND IT IS NOT ANY KIND OF INVESTIGATIVE REPORT.

WAS THERE A FINAL REPORT?

I BELIEVE THAT GRIFFITH DID ISSUE WHAT WAS CALLED A PRELIMINARY REPORT LATER THAT IS NOT IN THE TRIAL RECORD, BUT THERE WAS A RECORD, THEN HE GOT OUT, AND INSPECTOR BEARDSLY GOT INTO THE CASE AND ISSUED A REPORT, WHICH I THINK WE ACTUALLY ATTACHED OR SENT A COPY TO THE TRIAL COURT, IN RESPONSE TO HIS ORDER TO SUPPLEMENT THE RECORD.

WHAT DOES THAT SAY ABOUT WHO WAS INVOLVED IN THE MURDER OF STURGIS?

THAT REPORT BASICALLY SUM ARISES THE POTENTIAL TESTIMONY OF ALL OF THE WITNESSES, INCLUDING MR. ROAD I KNOW, OF COURSE, AND -- MR. RODIN, VORZ, AND THE DYING DECLARATION THAT HE HEARD. ALSO, THAT REPORT STATES THAT CORRECTION OFFICERS RAULERSON AND WILSON, ALSO, HEARD STURGIS IDENTIFY THREE ASSAILANTS. IN ADDITION, BEARDSLY STATES, IN THERE, THAT INMATE WT JACKSON HEARD ALL THREE INMATES, JACKSON DEMPS AND MUNCHIN. THE STATE --

LET ME SEE IF I AM STRAIGHT ON THE POSTURE OF THIS. HASN'T THE TRIAL COURT, ALREADY, DETERMINED THAT THERE WAS, IN EFFECT, NEWLY-DISCOVERED EVIDENCE?

THE TRIAL JUDGE --

THE TRIAL COURT TREATED IT AS NEWLY-DISCOVERED EVIDENCE, SO THAT PUTS THE POSTURE THAT NOW WE HAVE THE TO DETERMINE THE SIGNIFICANCE OR IN SIGNIFICANCE OF THIS NEWLY-DISCOVERED EVIDENCE?

THE TRIAL JUDGE, IN HIS FINAL ORDER, ASSUMED, WITHOUT DECIDING THAT IT WAS NEWLY-DISCOVERED, SO HE DID NOT MAKE A FINDING, ONE WAY OR THE OTHER ON. THAT OUR POSITION IS THAT IT IS NOT NEWLY DISCOVERED. AS FAR AS THE AFFIDAVITS THAT WE GOT FROM THE PAROLE COMMISSION, OUR VIEW IS WHAT THEY DO IS AUTHENTICATE CLEMENCY RECORDS OF MR. DEMPS, RECORDS OF HIS CLEMENCY PROCEEDINGS, AT WHICH HE WAS REPRESENTED BY COUNSEL AND HAD THE RIGHT TO PRESENT EVIDENCE AT WHICH TIME IS NOT RECORDS OF THIS COURT, PER SE. AT THE SAME TIME THEY ARE, CERTAINLY, RECORDS, I THINK, OF THIS CASE. AND I RECOGNIZE THAT THE JUDGE DID NOT ADMIT THOSE PAROLE COMMISSION RECORDS, BUT WHETHER OR NOT YOU CONSIDER THEM, THE FACT OF THE MATTER IS MR. DECHES HAS NEVER MADE ANY DEMONSTRATION OF WHY HE COULD NOT HAVE PRESENTED THIS MEMORANDUM YEARS AND YEARS AND YEARS AGO, AND IN THE FIRST PLACE, THE RECORD DOES CLEARLY, SHOW THAT IN 1998, WHEN MR. SALMON REPRESENTED MR. DEMPS IN HIS CLEMENCY PROCEEDINGS, THAT THIS DOCUMENT WAS GIVEN TO HIM. HE DIDN'T HAVE TO ASK FOR IT. HE DIDN'T HAVE TO MAKE AN OFFICIAL DEMAND. IT WAS JUST GIVEN TOM, AND IT WAS PART OF HIS CLEMENCY RECORD AT THAT TIME, AND MR. SALMON HAS NOT DEMONSTRATED WHY THAT DOCUMENT WOULD NOT HAVE BEEN AVAILABLE IN 1998 BUT NOT IN 1982. THERE IS NO ALLEGATION ABOUT THAT AT ALL, EXCEPT SOME BARE, CONCLUDES OTHER ALLEGATION THAT IT WAS -- CONCLUSORY ALLEGATIONS THAT IT WAS HIDDEN. IF YOU LOOK AT THE FIRST 3.850 PROCEEDING, YOU WILL SEE THAT HE SUBPOENAED ALL FIVE, THEN, MEMBERS OF THE PAROLE COMMISSION AND WAS ABLE TO TAKE THEIR DEPOSITIONS, AND TWO OF THEM ACTUALLY TESTIFIED AT THAT HEARING, AND HE OBTAINED THE PAROLE COMMISSION FILES OF WILLIAM SQUIRES, AND IF HE COULD HAVE OBTAINED THOSE FILES, HE HASN'T EXPLAINED WHY YOU COULD NOT HAVE OBTAINED HIS OWN, IN 1982.

ARE THEY PAROLE COMMISSION RECORDS OR DEPARTMENT OF CORRECTION ACTION RECORDS?

-- DEPARTMENT OF CORRECTIONS RECORDS?

INITIALLY IT IS A DEPARTMENT OF CORRECTIONS RECORD. I AM NOT SURE WHAT IT IS, BUT AT ANY RATE THIS DOCUMENT GOT INTO THE PAROLE COMMISSION RECORDS. IT IS OUR INTENT THAT IT WAS FURNISHED TO MR. DEMPS' ATTORNEY IN 1982.

WOULD THAT HAVE BEEN PROTECTED, DURING THE PENDENCY OF THE ORIGINAL CASE, THOSE, THIS PARTICULAR MEMUM?

IT WAS MADE -- IT IS OUR CONTENTION THAT, UNDER THE RUSE OF THE FLORIDA PAROLE COMMISSION THAT IS MADE AVAILABLE TO THE DEFENDANT FOR HOWEVER HE WANTS TO USE T.

NOT THE PAROLE CASE. I MEAN THE ORIGINAL TRIAL IN THE CASE.

NOT AT THE ORIGINAL TRIAL OF THE CASE. THERE WAS NO CLEMENCY PROCEEDING AT THAT TIME. I HAVE BEEN INFORMED THAT THE DEPARTMENT OF CORRECTIONS HANDLES THE CLEMENCY RECORDS. YOU KNOW, I DON'T KNOW IF THIS -- WHAT I WAS ASKING IS, FOR THE ORIGINAL TRIAL, IF THERE WAS PRODUCTION OF RECORDS, WOULD IT BE THE KIND OF RECORD THAT WAS PRODUCED, IF THE DEPARTMENT OF CORRECTIONS INVESTIGATIVE REPORT OF THE INCIDENT, SINCE THIS COURT, SINCE THERE IS NO OUTSIDE AGENCY INVESTIGATING IT, IT IS THE DEPARTMENT OF CORRECTIONS DOING THE INVESTIGATION.

CORRECT. I DON'T KNOW, BECAUSE I AM NOT SO SURE THAT THIS CAN BE CHARACTERIZED AS ANY KIND OF INVESTIGATIVE REPORT. I DON'T KNOW IF THIS DOCUMENT WAS FURNISHED AT THE TRIAL OR NOT. THE TRIAL RECORDS, BASICALLY, IS PRETTY SILENT. I HAVE READ THE PRETRIAL DEPOSITIONS, AND THERE ARE REFERENCES TO THIS REPORT AND THAT REPORT BUT NOT TO THIS PARTICULAR MEMORANDUM, SO IT MAY NOT HAVE BEEN PRODUCED AT TRIAL. HOWEVER, IF IT WAS PRODUCED IN 1982, CERTAINLY IF HE HAD ANY BRADY CLAIM ARISING OUT OF THIS, HE COULD HAVE PRESENTED AT THAT TIME, AND THE REASON HE DIDN'T IS BECAUSE HIS THEORY, NOW, IS THAT WHAT THIS SHOWS IS THAT JACKSON WAS THE LOAN ASSAILANT. WELL, HIS THEORY AT TRIAL AND IN 1982 WAS THAT ARTHUR COPELAND WAS THE ONE THAT COMMITTED THE CRIME AND DEMPS AND JACKSON, THEY WERE ALL INNOCENT. IN FACT, THEY WERE ALL TRY TRIED TOGETHER. IT WAS A JOINT TRIAL, AND THEIR DEFENSE WAS THAT ARTHUR COPELAND DID IT. A THIRD 3.850 PROCEEDING IN 1990 HE HAD A NEW THEORY OF WHO THE KILLER WAS, IN THIS CASE ROGER CULBREATH, AND THAT WAS 1999, AND HE ASKED US TO CONSIDER ALL OF THOSE THINGS CUMULATIVELY. THE PROBLEM WITH A TIMETIVE REVIEW IS THAT I DON'T UNDERSTAND HOW YOU CONSIDER, CUMULATIVELY THREE TOTALLY DIFFERENT THEORIES ABOUT WHO IS GUILTY, AND IT SEEMS TO ME THAT THIS THEORY HE IS PRESENTING NOW IS NOT PURSE YUNLT TO ANY THEORY THEORY% USED PREVIOUSLY. AND IN FACT IN 1992, IT DIDN'T FIT IN WITH ANYTHING HE WAS PURSUING AT THAT TIME. ONE THING THAT WAS MENTIONED TODAY, AND THAT CONCERNS THE PRISON NUMBER OF JACKSON, AND, AGAIN, THIS ARGUMENT SEEMS KIND OF CONTRARY TO HIS ORIGINAL ARGUMENT OR HIS ORIGINAL CLAIM IN THE 3.850 MOTION, ITSELF, TO SAY, WELL, MAYBE IT IS NOT JACKSON AFTER ALL, INSTEAD OF JACKSON IS THE LOAN ASSAILANT, BUT IF YOU LOOK AT THE PRISON NUMBERS OF JACKSON AND THE NUMBER IN THE MEMO, IT IS ONE NUMBER OFF. THE MEMO IS 029667. JACKSON'S ACTUAL NUMBER IS 029657. I AM SURE THAT WAS JUST A TYPOGRAPHICAL ERROR. AT ANY RATE, WHETHER IT IS OR NOT, IT STILL DOESN'T EXONERATE DEMPS. I WOULD, ALSO, LIKE TO POINT OUT BECAUSE MR. SALMON KEEPS ALLEGING THAT WE FAILED TO ATTACH COPIES OF THE RECORD TO OUR RESPONSE BACK IN JANUARY, AND IF YOU LOOK AT THE CERTAIN PICTURE OF SERVICE TO OUR RESPONSE, IT SHOWS THAT WE SENT BIRX FEDERAL EXPRESS, A COPY OF THE ORIGINAL TRIAL TRANSCRIPT AND THE FIRST 3.850 HEARING TRANSCRIPT.

WHAT DOES THE STATE READ THE TRIAL JUDGE'S ORDER AS SAYING, RELATIVE TO WHETHER OR NOT THIS IS NEWLY-DISCOVERED EVIDENCE?

HOW DO YOU --

I HIM ASKING GOING TO HAVE TO LOOK AT MY BRIEF FOR THE EXACT PHRASEOLOGY.

YOU CAN SUMMARIZE IT. DOES IT SAY THAT IT IS OR IT ISN'T?

WELL, THE WAY WE INTERPRET THE ORDER IS THAT HE ACCEPTED, WITHOUT FINDING, AND YOU KNOW, THERE WAS -- THE MECHANICS OF THIS WERE THAT THE JUDGE ISSUED A PRELIMINARY UNSIGNED ORDER, JUST TO GET IT OUT, AND SENT A COPY OF IT TO THIS COURT AND TO THE PARTIES. THAT WAS ON FRIDAY AND ON MONDAY HE SENT ASSIGNED ORDER, AND ON A SIGNED ORDER, HE ADDED THAT IT IS SIGNIFICANT WITHOUT FINDING. ASSUMING THE ARGUMENT IS WITHOUT FINDING, AND HE GOES RIGHT STRAIGHT TO THE MERITS OF IT AND WHETHER OR NOT HE WOULD BE ENTITLED TO --

THAT IS THE FACT FINDER, AND ARE WE BOUND BY THAT? WE ARE NOT FACT FINDERS ON THAT ISSUE OF WHETHER OR NOT IT IS NEWLY-DISCOVERED. SO DON'T WE HAVE TO ACCEPT THAT AS A GIVEN?

THERE WAS -- I DON'T CONSIDER THAT A FINDING. IN FACT, TO ME, WHETHER OR NOT THIS IS PROCEDURALLY BARRED, WHETHER OR NOT HIS 3.850 MOTION IS SUFFICIENTLY PLELD, AS TO DUE DILIGENCE, IS STRICTLY A QUESTION OF LAW, AND THIS COURT CAN'T ANSWER THAT AT THIS POINT. I CAN'T IMAGINE, FRANKLY, A 3.850 MOTION MORE PROCEDURAL BARRED THAN THIS IS, BECAUSE THIS IS NOT SOMETHING THAT HAS BEEN AROUND A YEAR AND-A-HALF OR TWO YEARS OR FOUR YEARS. IT HAS BEEN AROUND, WE SUBMIT, FOR 18 YEARS, AT LEAST, IT HAS BEEN AVAILABLE. AND I REALLY CAN'T IMAGINE WHAT MR. SALMON WOULD PUT UP TO REFUTE THE PAROLE COMMISSION RECORDS THAT WE HAVE, AND HE HAS NEVER INFORMED US AND STILL HASN'T. HE HASN'T ALLEGED HOW HE HAS ACTED WITH DUE DILIGENCE. HE HASN'T ALLEGED ANY FACTS FROM WHICH WE CAN CONCLUDE THAT HE HAS ACTED WITH DUE DILIGENCE OR THAT HE COULD NOT HAVE OBTAINED THIS MEMO OR DID NOT OBTAIN IT YEARS AND YEARS AND YEARS AGO. YOU KNOW, IN THE PREVIOUS APPEAL IN THIS CASE, AND ACTUALLY, NOT ONLY THE THIRD 3.850 BUT, ALSO, THE SECOND 3.850, WERE BOTH FOUND PROCEDURALLY BARRED, BECAUSE DEMPS HAD HAD CHAPTER 119 AVAILABLE TO HIM AND HAD NOT SHOWN WHY HE COULDN'T HAVE GOTTEN THOSE RECORDS THROUGH A CHAPTER 119 PUBLIC RECORDS REQUEST, AND IN FACT NOT ONLY IS THIS MEMO IN THE PAROLE COMMISSION FILES, THE CLEMENCY FILES, BUT IT IS, ALSO, IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS. HE HAS NOT ALLEGED WHY HE COULD NOT HAVE MADE A 119 DEMAND TO THE DEPARTMENT OF CORRECTIONS.

IF I UNDERSTAND IT, GO THROUGH WHAT THE TRIAL COURT CONCLUDED, PARAPHRASING THERE, HE SAID THAT IT IS ACCEPTED AS NEWLY-DISCOVERED, AND IN VIEW OF THE RECORD --

HE, ALSO, ASSUMED, FOR PURPOSES OF ARGUMENT, THAT IT MIGHT BE USED FOR POSSIBLE IMPEACHMENT, BUT WHAT THE TRIAL JUDGE FOUND IS THAT IT WOULD NOT HAVE MADE ANY DIFFERENCE, ANYWAY.

DOES THE RECORD AFFIRMATIVELY REBUT ANY CLAIM ON THE MERITS HERE?

OUR CONTENTION IS THAT IT DOES.

IN WHAT PARTS OF THE RECORD AND HOW DOES IT REBUT?

WELL, THE MEMO, REALLY, HAS VERY LITTLE PROBATIVE VALUE. HIS THEORY IS THAT HE COULD SOMEHOW USE THIS MEMORANDUM TO SHOW THAT STURGIS TOLD SOMEONE, WE DON'T KNOW WHO, BECAUSE THE MEMORANDUM DOESN'T IDENTIFY IT. THE MEMORANDUM, REALLY, IS SILENT AS TO WHO PROVIDED THIS INFORMATION TO INSPECTOR SEWELL. HE DOES MENTION HAVING

TALKED TO INSPECTOR GRIFFITH. AND IF INSPECTOR GRIFFITH IS THE ONE WHO GAVE HIM THE INFORMATION WE STILL DON'T KNOW WHO INSPECTOR GRIFFITH HAD TALKED TO. BASICALLY WE HAVE GOT A MEMORANDUM THAT HE SAYS STURGIS IDENTIFIED ONLY ONE ASSAILANT TO SOMEBODY. WE DON'T KNOW WHO, AND WHAT TRIAL COUNSEL, WE ARE SAYING NOW IS THAT THEY KNEW FROM PRETRIAL DEPOSITIONS, AND THESE ARE DEFENSE DEPOSITIONS THAT WE PUT IN IN THIS CASE, IS THAT A NUMBER OF OTHER PEOPLE HAD HEARD STURGIS IDENTIFY THREE ASSAILANTS T WASN'T JUST RODIN, AND IN FACT OUR POSITION IS, IF HE TRIED TO USE THIS MEMO TO SHOW THAT ONLY ONE ASSAILANT HAD BEEN IDENTIFIED, THAT WE COULD PUT ON ALL OF THESE WITNESSES TO SHOW THAT HE CONSISTENTLY IDENTIFIED THREE ASSAILANTS, AND WE CAN'T COME UP WITH ANYBODY THAT SAID THAT HE ONLY IDENTIFIED ONE ASSAILANT. ASIDE FROM THE MEMORANDUM, MR. SALMON HAS NOT LET THIS COURT OR THE STATE KNOW WHAT HE WOULD OFFER IN EVIDENCE. WE DON'T KNOW WHAT WITNESSES WOULD TESTIFY OR WHAT THEY WOULD SAY.

IN TERMS OF ANALYZING THIS, GOING BACK TO YOUR POINT THAT AT TRIAL, THE DEFENSE WAS SOMEONE ELSE ENTIRELY DIFFERENT THAN JACKSON DID IT, WE HAVE TO COMPARE WHAT EFFECT, WHAT YOU ARE SAYING IS, REALLY, THIS COULDN'T HAVE BEEN USED AT TRIAL BECAUSE IT WAS INCONSISTENT WITH THE DEFENSE.

THEY WOULD HAVE -- DEMPS WOULD HAVE HAD TO ABANDON HIS JOINT DEFENSE WITH JACKSON AND PURSUED AN ENTIRELY NEW ONE THAT WAS SUPPORTED ONLY BY A PRELIMINARY MEMO FROM SOMEBODY WHO WASN'T INVOLVED IN THE CASE.

IT WOULD HAVE BEEN A LIMITED IMPEACHMENT VALUE, AT BEST, TO ASK ONE OF THE PEOPLE ABOUT WHAT THEY HEARD.

HIS OWN THEORY OF IMPEACHMENT IS SPECULATIVE AT BEST, AND HE ANNOUNCED AT THE MAY 12 HEARING THAT, WELL, RODIN WOULD TESTIFY AND THEN I WOULD CALL GRIFFITHS AND HE WOULD TESTIFY TO THIS AND THIS AND THEN MAYBE I WOULD CALL SEWELL AND HE WOULD TESTIFY TO THIS AND THIS, AND AT THAT POINT WHO IS HE GOING TO IMPEACH? SEWELL?

WE HAVE TO LOOK AT THE TRIAL, BACK AT THE TIME OF THE TRIAL, NOT PRETEND THERE IS A NEW TRIAL UNLESS THERE IS OTHER NEWLY-DISCOVERED EVIDENCE. WE HAVE GOT TO COMPARE THIS MEMO AND PUT IT AS TO WHETHER IT WOULD HAVE PRODUCED A DIFFERENT RESULT AT THAT TILE. -- AT THAT TRIAL.

KNOWING WHAT WE KNOW NOW. YES. THE STANDARD HAS BEEN EXPRESSED IN JONES THAT THERE IS A NEW POSSIBILITY OF A RESULT OF A RETRIAL. YOU CAN FOCUS ON THE RETRIAL OR THE NEW TRIAL. I AM NOT SURE EXACTLY WHAT THE DIFFERENCE IS, BUT THE POINT IS IN THE ORIGINAL TRIAL HERE IS WHAT THE STATE'S RESPONSE AND HERE IS WHAT HE WOULD HAVE TO DO AND HE WOULD HAVE TO GIVE UP AND THIS THIS AND HAVE THIS TEENY TINY BENEFIT. I THINK THE MEMO, FRANKLY, AMOUNTS TO ABOUT A HILL OF BEANS. ALL RIGHT. I BELIEVE I HAVE COVERED ABOUT ANYTHING. I WILL RELY ON MY BRIEF AS TO ANYTHING I MIGHT HAVE OMITTED. THANK YOU.

MR. SALMON, WOULD YOU ADDRESS THE STATE'S POSITION THAT, THROUGH ALL OF THE INFORMATION, IT IS ALL VERY, VERY CONSISTENT, EVERYTHING THAT I HAVE READ THAT HAS BEEN ATTACHED THAT HAS COME ACROSS MY DESK SO FAR, SEEMS TO SUGGEST THAT ALL OF THE TESTIMONY IN THIS CASE, AT THE ORIGINAL TRIAL, INVOLVED OR IMPLICATED THREE INDIVIDUALS AND WAS NEVER, HAD NOT ONE HINT THAT THERE WAS ONLY ONE ASSAILANT INVOLVED. AM I INCORRECT IN WHAT I HAVE SEEN SO FAR? WHERE ARE WE WITH REGARD TO THAT?

ALL OF THE EVIDENCE, WE HAVE TO REMEMBER, JUSTICE LEWIS, CONSISTS OF TWO WITNESSES. DESPERATELY DISCREDITED AT THIS POINT BY A DOCUMENT, WHICH MR. FRENCH REFERS TO AS

THE PRELIMINARY REPORT, BUT IF YOU WILL READ THE REPORT, I BELIEVE THAT IT MENTIONS THAT THIS INFORMATION WAS SENT TO THE STATE ATTORNEY. AS SOON AS IT HIT HIS DESK, THE NEXT PLACE THAT SHOULD HAVE BEEN FIRED OFF TO WAS JOHN CAROL, MR. DEMPS, THEN, TRIAL COUNSEL, BECAUSE THIS IS QUINTESSENTIAL QUINTESSENTIALALLY EXCULPATORY EVIDENCE. MR. FRENCH SUGGESTS THAT, BECAUSE A DIFFERENT THEORY WAS PURSUED, THAT SOMEHOW THIS WOULDN'T BE UTILIZED. THAT IS NOT CORRECT. WHEN YOU ARE CHARGED WITH FIRST-DEGREE MURDER, WHEN YOU HAVEN'T BEEN GIVEN THE KEY EVIDENCE THAT CAN, PERHAPS, SAVE YOUR LIFE, AND INDEED IN THIS CASE, BY VIEWING THE JURY DELIBERATIONS IN THIS CASE, MAY HAVE PRODUCED AN ACQUITTAL, HAD THEY HAD THIS DOCUMENT, I SUBMIT TO THIS COURT THAT THE STATE KNEW HOW IN CREDIBLY EXPLOSIVE THIS REPORT WAS, ON ITS FACE, AND WOULD HAVE BEEN, AFTER A MINIMUM OF INVESTIGATION AS TO WHAT SHOWED, THROUGH INMATES, THROUGH OTHER CORRECTIONAL OFFICERS, I SUBMIT. MR. FRENCH SUGGESTS WE DON'T KNOW WHO IS TALKED TO IN THAT REPORT. WELL, WE KNOW THAT SEWELL TALKED TO GRIFFITHS. GRIFFITHS' DEPOSITION WILL TELL THIS COURT THAT HE TALKED TO RODIN. THAT IS WHERE IT CAME FROM. THIS IS NOT A PRELIMINARY REPORT. THE DEPARTMENT OF CORRECTIONS CREATED IT. UNDER THE BUSINESS RECORDS OF THIS STATE, WHEN AN AGENCY CREATES A DOCUMENT, IT BECOMES AN OFFICIAL RECORD. WE MUST, ALSO, FORGET THAT THIS WHOLE THING TIES BACK INTO THIS COURT'S 1981 OPINION, WHEN IT ADDRESSED THE DISCOVERY ISSUE THERE, AND I SUBMIT THAT A CLEAR READING OF THAT OPINION, WITH THIS AT HAND, WOULD HAVE ANSWERED THE QUESTION ASKED BY THIS COURT IN 1981, AND THAT WAS WHY THEY DIDN'T ADDRESS THE DISCOVERY VIOLATION OF EXCULPATORY INFORMATION, INCLUDING THE HANDWRITTEN REPORT OF AV ROAD I KNOW, AND WHO KNOWS WHAT -- OF AV RODIN, AND WHO KNOWS WHAT THAT WOULD HAVE SHOWN. THERE IS CLEAR THAT THERE IS NOTHING IN THE RECORD TO SUGGEST THAT THE DYING STATEMENT WAS NOTHING DIFFERENT THAN WHAT HE WOULD HAVE TESTIFIED TO. THIS ADDS THE MISSING PIECE TO THE PUZZLE. I SUBMIT THAT, IN 1981, HAD THAT INFORMATION BEEN DEVELOPED, AS IT CERTAINLY WOULD HAVE BEEN, THIS COURT WOULD HAVE HONORED MR. DEMPS' APPEAL TO THE CONVICTION OF DEATH BACK IN 1981.

THANKS TO ALL OF YOU FOR YOUR ASSISTANCE. WE WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.