GOOD MORNING MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE A MARATHON SESSION TODAY, AND WE ARE GOING TO BEGIN BY HEARING A CONSOLIDATED PETITIONS OF LLOYD CHASE ALLEN, MARK JAMES ASAY, AND JEFFREY ALLEN FARINA, VERSUS THE STATE, OR ROBERT BUTTERWORTH, RESPONDENTS. EACH SIDE HAS AN HOUR. AFTER THE PETITIONERS CONCLUDE ON THEIR INITIAL PRESENTATION, WE WILL TAKE A SHORT RECESS, AND THEN RECONVENE. NOW, I UNDERSTAND THAT MR. MINERVA, YOU ARE GOING TO BEGIN, AND YOU HAVE ASKED FOR FIVE MINUTES. MR. SCHER WILL FOLLOW WITH 15 MINUTES, MR. CHARTLE WITH 15 MINUTES AND THEN MS. PAULDING FOR 15. YOU MAY PROCEED.

THANK YOU, YOUR HONORS. GOOD MORNING. I AM MICHAEL MINERVA, AND I AM ONE OF THE COUNSEL IN THESE CONSOLIDATED CASES. OUR OFFICE REPRESENTS MR. FARINA, MR. PERRY, AND MR. GARCIA, IN THESE CONSOLIDATED CASES. I WOULD LIKE TO INTRODUCE ARGUING COUNSEL THIS MORNING, CHRIS SPALDING, FROM THE PUBLIC DEFENDER'S OFFICE IN MIAMI. TODD SCHER FROM CCR SOUTH AND TIM CHARTL, FROM THE NORTH REGION, AND ARGUING THE MOTION FOR CLARIFICATION. WHEN WE FILED THESE MOTIONS, THE STATE FILED A RESPONSE, QUESTIONING WHY WE ARE HERE. WE ARE HERE, OF COURSE, TO PROTECT THE RITSZ OF OUR -- THE RIGHTS OF OUR CLIENTS, BUT MORE IMPORTANTLY OR JUST AS IMPORTANTLY, WE ARE HERE TO PROTECT THE FLORIDA CONSTITUTION. WE ARE HERE TO ENSURE AND TO MAKE THIS COURT AWARE OF THE BALANCE THAT HAS TRADITIONALLY EXISTED IN THE DIFFICULT PROBLEM OF ADJUDICATING DEATH PENALTY CASES, ESPECIALLY IN POSTCONVICTION, AND IN FACT THAT, IN LIGHT OF THE DEATH PENALTY REFORM ACT, THAT BALANCE IS SERIOUSLY THREATENED, THAT THE BALANCE OF THE POWER AMONGST THREE BRANCHES OF GOVERNMENT IS THREAD END, BECAUSE THE LEGISLATURE HAS -- IS THREATENED, BECAUSE THE LEGISLATURE HAS OVERSTEPPED ITS BOUNDS IN PASSING THE ACT AND INTRUDED UPON THE DOMAIN OF THIS COURT, IN NOT ONLY MAKING RULES BUT IN INTERPRETING AND ENFORCING THE CONSTITUTION OF THE STATE OF FLORIDA. WITH A 20-PAGE DOCUMENT, THE DEATH PENALTY REFORM ACT HAS OVERRULED ABOUT THIRTY YEARS OF DEATH PENALTY JURISPRUDENCE BY THIS COURT. IT HAS ATTEMPTED TO DO THAT. IT HAS TAKEN VIRTUALLY EVERY DECISION OF THIS COURT, ENFORCING THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF DEATH SENTENCE PERSONS IN POSTCONVICTION, AND THROWN THEM OUT THE WINDOW, AND IN EFFECT, HAS THREATENED A TOTAL CHAOS ON THE SYSTEM. BECAUSE NOBODY KNOWS HOW THOSE PROVISIONS WILL BE INTERPRETED. THE GLOSS THAT WAS ON THE RULES AND THE STATUTES BEFORE IS ALL GONE. NOT ONLY THAT, BY PRECIPITOUSLY PASSING THIS ACT, WITH NO PROVISION FOR THE DELAYED EFFECTIVE DATE, THIS COURT HAD NO CHOICE BUT TO STAY THE EFFECT OF THE ACT, UNTIL THESE THINGS COULD BE ASSORTED OUT. -- COULD BE SORTED OUT. DURING THE PROCESS OF CREATING THE STATUTE, THE EXECUTIVE AND THE LEGISLATIVE BRANCHES HAVE, IN EFFECT, TOLD THIS COURT OR TRIED TO TELL THIS COURT THAT DUE PROCESS, UNDER THE FLORIDA CONSTITUTION, DOESN'T MATTER. THAT THE RIGHT TO BE FREE, THE RIGHT TO HAVE EQUAL PROTECTION OF THE LAWS DOESN'T MATTER. THERE ARE OBVIOUS FLAWS IN THIS LEGISLATION. THERE WERE -- THESE FLAWS WERE NOTED AND REPEATEDLY TALKED ABOUT, DURING THE PROCESS OF THE ENACTMENT, EVEN THE LEGISLATIVE STAFF SUMMARIES, CAUTIONED THAT THERE WERE SERIOUS PROBLEMS HERE, IN THIS LEGISLATION, AMONG THEM, MOST SIGNIFICANTLY, SEPARATION OF POWERS. THE LEGISLATION PLAINLY SAYS IT IS ENACTING RULES, WHICH IS THE DOMAIN OF THIS COURT, AND THERE IS A REASON THAT RULES COME UNDER THE JURISDICTION OF THIS COURT. BECAUSE THIS COURT REGULATION THE PROCESS OF THE JUDICIARY AND PROTECTS THE RIGHTS, THE CONSTITUTIONAL RIGHTS, NOT JUST OF THE MAJORITY BUT OF THE MINORITY, AS WELL, PARTICULARLY UNPOPULAR MINORITIES, SUCH AS PEOPLE SENTENCED TO DEATH. IT IS FOR THIS COURT TO KEEP THE BALANCE TRUE. THE LEGISLATE YOUR RESPONDS TO THE WILL OF THE MAJORITY. THAT IS PROPER. HOWEVER, THE COURT MUST STRIKE THE BALANCE, AND WITH THIS ACT, THE BALANCE

IS OUT OF KILTER. NOW, IN ADDITION TO THE SEPARATION OF POWERS AND SEVERABILITY PROBLEMS, WHICH WILL BE EXPLAINED, THE PIPELINE CASES, THERE ARE 85 PEOPLE IN DIRECT APPEAL, WHO ARE SUPPOSED TO GET LAWYERS, AUTOMATICALLY, SOMEHOW, ALL AT ONCE, AND MEET A FILING DEADLINE, WHICH KEEPS DECREASING, AS EVERY DAY GOES BY. THERE IS AN ONE-SIZE-FITS-ALL FILING DEADLINE IN THIS ACT, FOR PIPELINE CASES. THAT IS PEOPLE WHO ARE ON DIRECT APPEAL, WHOSE CASES HAVE NOT YET BEEN DECIDED ON DIRECT APPEAL. THERE IS ABOUT 5 OF THEM. ALL -- THERE IS ABOUT 85 OF THEM. ALL AT ONCE, THESE PEOPLE WILL BE DUMPED INTO THE SYSTEM, WITH NO MECHANISM FOR APPOINTING COUNSEL, YET AN ABSOLUTE INFLECTIONIBLE FILING DEADLINE OF JANUARY 8, 2001.

HAS THERE BEEN ANY STEPS TAKEN BY ANY OF THE CCR'S TO ATTEMPT TO GO INTO THE TRIAL COURTS, TO GET COUNSEL APPOINTED? I DON'T THINK THERE IS ANY MECHANISM THAT PROVIDES FOR THAT, YOUR HONOR. AND --

SO THE ANSWER TO MY QUESTION IS NO?

TO MY KNOWLEDGE, NO, AND THEY WILL ADDRESS THAT.

HAVE REGISTRY COUNSEL BEEN APPOINTED BY THE TRIAL COURTS?

TO MY KNOWLEDGE, NO.

YOU HAVE USED UP YOUR ALLOTED TIME.

THANK YOU, YOUR HONOR. I WOULD LIKE TO ADD ONE ADDITIONAL COMMENT, THAT IN ALL OF THESE, THE RULES THAT YOU WILL HEAR OF LATER AND THE LEGISLATION, THERE ARE THESE COMMON FLAWS. EQUAL PROTECTION IS VIOLATED, BECAUSE THE RIGHT TO BEST SENTENCE PEOPLE, STRANGELY ENOUGH, ARE NOW FEWER THAN THE RIGHTS OF OTHER PEOPLE IN POSTCONVICTION. THAT THE AMENDMENTS THAT, IN A SUCCESSOR STATUS, A PERSON IS UNABLE TO RAISE A FREE-STANDING CLAIM OF INNOCENCE, UNABLE TO RAISE A FREE-STANDING CLAIM OF INNOCENCE OF DEATH. THAT THERE IS AN ELIMINATION OF THE RIGHT TO RAISE ISSUES OF FUNDAMENTAL CHANGES IN THE LAW THAT OCCUR AFTER THE INITIAL PETITION IS FILED.

MR. MINERVA, LET ME ASK YOU A QUESTION, SINCE WE HAVE, EVEN THOUGH IT IS EXPANDED TIME, IT IS STILL LIMITED TIME, AND YOU ALL HAVE DIVIDED IT UP HERE. AS YOU KNOW, THIS COURT HAS RECOGNIZED THAT THERE ARE MANY PRACTICAL PROBLEMS OUT THERE, AND THAT ESPECIALLY WITH REFERENCE TO THE PROCESSING OF THE POSTCONVICTION CLAIMS IN THE TRIAL COURTS, THAT THERE, AT LEAST, IS AN IMPRESSION THAT A LOT OF THOSE CASES HAVE GOTTEN LOST OR FALLEN THROUGH THE CRACKS. INSOFAR AS BRINGING THEM TO FINAL RESOLUTION, THROUGH AN EVIDENTIARY HEARING OR OTHER APPROPRIATE HEARING, IN THIS COURT, HAS BEEN AT WORK, WITH REFERENCE TO TRYING TO CORRECT THOSE KINDS OF PROBLEMS AND HAS BEEN ACTIVE, FOR INSTANCE, AS LONG AS I HAVE BEEN ON THE COURT, IN THAT REGARD. I WANTED TO ASK YOUR VIEW, BECAUSE YOU ARE WELL EXPERIENCED IN THE SYSTEM, THAT ONE OF THE COMMON THEMES THAT SEEMS TO COME OUT, FROM THE COMMISSIONS THAT WE ASKED TO LOOK AT THIS AND, REALLY, FROM THE LEGISLATIVE RESPONSE, TOO, AND THAT HIS TRIAL COURT DOCKET CONTROL, AND I WANTED TO ASK, WHILE I HAD YOU AT THE PODIUM, WHETHER OR NOT, HOWEVER THIS ALL ENDS UP SHAKING OUT, THAT WOULD YOU AGREE THAT THE TRIAL COURT DOCKET CONTROL IS AN ESSENTIAL INGREDIENT IN ANY REFORM OF THE PROCESS? AND JUST ASK YOU TO GIVE US THE BENEFIT OF YOUR EXPERIENCE AND YOUR VIEWS WITH RESPECT TO THAT. UNDERSTAND WHAT I AM ASKING?

YES. YES. AND THERE ARE SEVERAL RESPONSES TO THAT. ONE IS THAT THERE NEEDS TO BE FLEXIBILITY. WHICH THE STATUTE AND THE MORRIS RULE, FOR EXAMPLE, TOTALLY LEAVE OUT, AND THEY LEAVE OUT TRIAL COURT DISCRETION.

FIRST OF ALL, DOES THERE NEED TO BE DOCKET CONTROL?

WELL, YES, YOUR HONOR, THERE NEEDS TO BE DOCKET CONTROL, BUT THE QUESTION IS WHERE DOES THAT CONTROL COME FROM? DOES IT COME FROM THIS COURT? DOES IT COME FROM A SET OF RULES? DOES IT COME FROM THE LOCAL STATE ATTORNEY AND THE LOCAL ATTORNEY GENERAL?

I AM ASKING YOU, IN A SENSE, TO SET ASIDE SOME OF THAT OF WHERE IT SHOULD COME FROM. LET'S ASSUME, FOR INSTANCE, IT SHOULD COME FROM THIS COURT. WOULD YOU AGREE THAT SOME FORM OF MORE ORGANIZED DOCKET CONTROL AT THE TRIAL COURT LEVEL IS NEEDED? FOR INSTANCE A NUMBER OF THE JUDGES ON THIS COURT HAVE EXPRESSED THE VIEW THAT, PERHAPS, WE SHOULD ALMOST EITHER CREATE A PRESUMPTION OR ALMOST A MANDATE THAT THERE GO AHEAD AND BE AN EVIDENTIARY HEARING FOR THE GREAT MAJORITY OF POSTCONVICTION MOTIONS IN DEATH CASES. BECAUSE A LARGE PART OF THE LOST TIME THAT, REALLY, IN A SENSE, SEEMS TO BE WASTED, IF WE REVERSE FOR AN EVIDENTIARY HEARING, SEEMS TO OCCUR IN THAT TWO OR THREE OR FOUR-YEAR PERIOD, BETWEEN THE TIME THAT IT GETS TO THE TRIAL COURT TO DECIDE THE CASE SUMMARILY, THEN IT GOES THROUGH THE APPEAL UP HERE, AND THEN, FINALLY, IT GOES BACK DOWN, YOU KNOW, FOR AN EVIDENTIARY HEARING, AND I WOULD SAY THAT IS PART OF DOCKET CONTROL. THAT IS THAT WHETHER OR NOT WE BEEF UP OR INCREASE THE PRESUMPTION IN FAVOR OF EVIDENTIARY HEARINGS, BUT SOME DEVICES, TO TRY TO FOCUS ON WHAT IS GOING ON AT THE TRIAL COURT LEVEL, BECAUSE IT SEEMS TO ME, AT LEAST IN MY EXPERIENCE UP HERE, THAT THAT IS WHERE THE MOST PROBLEMS HAVE OCCURRED OF CASES FALLING THROUGH THE CRACKS, HAS BEEN AT THE TRIAL COURT LEVEL, NOT TO FAULT ANYBODY IN PARTICULAR, BUT THAT THAT IS WHAT -- SO I AM JUST WONDERING WHETHER THERE MIGHT NOT BE A CONSENSUS OR SOME BROAD AGREEMENT ON THE NEED FOR SOME FORM OF DOCKET CONTROL AT THE TRIAL COURT LEVEL.

I THINK THAT THE CONSENSUS, AMONG US, IS THAT THE AUTOMATIC EVIDENTIARY HEARING, AT THE TRIAL COURT LEVEL, WOULD HELP THAT, AND THERE IS NOT REALLY SUBSTANTIAL OPPOSITION TO THAT. THAT MIGHT BE ONE WAY TO DO IT. ONE OF THE PROBLEMS IS THAT WE ALL TEND TO FINGER POINT, AND IT IS A VERY COMPLEX PROCESS, AND IT IS SUCH, THE AWESOME FINALITY OF IT REQUIRES CAREFUL ATTENTION TO EVERY DETAIL, SO WHILE CONTROL IS GOOD, FLEXIBILITY IS, ALSO, REQUIRED, AND WHAT WE ARE SAYING HERE IS THAT ALL OF THESE MECHANISMS THAT ARE BEFORE THE COURT RIGHT NOW ARE WAY TOO RIGID, SO THE IDEA THAT HAS BEEN ESPOUSED, I THINK, BY AT LEAST TWO JUSTICES OF THIS COURT, JUSTICE WELLS AND JUSTICE PARIENTE, FOR THE NOTION, THE MECHANISM YOU WERE TALKING ABOUT, WOULD PROBABLY WORK, AND WOULD ELIMINATE THE BACK AND FORTH OF THE TRIAL JUDGE MAKING A RULING, DENYING AN EVIDENTIARY HEARING, THEN IT COMING UP HERE AND THEN IT GOING BACK, AND IN THAT PROCESS, THE CASE IS GETTING SHIFTED, GETTING LOST, CROSS ASSIGNMENTS FROM ONE JUDGE TO ANOTHER, FROM ONE SET OF LAWYERS TO ANOTHER SET OF LAWYERS, BUT THIS IS, ALSO, A PROBLEM THAT HAS DEVELOPED, AS A RESULT OF ALL OF THE CHANGES THAT HAVE COME ABOUT IN THE LAST FEW YEARS, IN WHICH THE SYSTEM, ITSELF, HAS NOT STABILIZED, BECAUSE EVERY TIME THE LEGISLATE YOUR COMES UP HERE, THEY MAKE SWEEPING DRASTIC CHANGES, AND NOBODY CAN ADJUST TO THEM, AND BY THAT TIME, THE RULES HAVE CHANGED, AND NOW THEY HAVE CHANGED AGAIN. I AM WAY OVER MY TIME. THANK YOU VERY MUCH.

YEAH. MR. SCHER.

GOOD MORNING. MAY IT PLEASE THE COURT. BEAR WITH ME. I AM FIGHTING A COLD, SO MY VOICE IS A LITTLE SHAKY AT TIMES. I HAD INTENDED ON DISCUSSING TWO --

LET ME FOLLOW-UP, MR. SCHER, ON THIS QUESTION THAT JUSTICE ANSTEAD POSED. I MEAN, DON'T WE, REGARDLESS OF WHETHER YOU ARE SITTING AT THAT TABLE, THAT TABLE, OR THIS

TABLE, HAVE TO AGREE THAT WE GOT A PROBLEM OUT THERE. THAT WE HAVE GOT PEOPLE THAT HAVE SPENT OVER 100 PEOPLE THAT HAVE BEEN ON DEATH ROW SINCE BEFORE 1985, AND THAT PART OF THIS PROBLEM IS IN THE AREA OF CASE MANAGEMENT, IN THAT WE HAVE GOT, OUT OF YOUR AREA, WE HAVE GOT THE JONES CASE, WHICH SAT THERE FOR NINE YEARS IN THE CIRCUIT COURT, WITH NO ONE DOING ANYTHING. WE HAVE GOT, AFTER IT WAS SENT BACK BY THIS COURT FOR AN IN COMPETENCY HEARING, WE HAVE GOT VALLEA, IN WHICH THERE WAS THE KILLING OF A POLICE OFFICER IN 1979, IN DADE COUNTY, AND IN WHICH, WHEN THEY WENT TO POSTCONVICTION, IT WAS THERE FOR SEVEN YEARS, OPPOSE THE CONVICTION, AND THEN SENT BACK BY THIS COURT FOR AN EVIDENTIARY HEARING, BECAUSE THE CCR LAWYER WOULDN'T DIVULGE WHO THE WITNESSES WERE AT THE HEARING. NOW, IT SEEMS TO ME IN LOOKING AT THIS PROBLEM, WHAT I WOULD LIKE TO HEAR FROM YOU, IS WHERE ARE THE -- WHAT HAVE YOU DONE, IN LOOKING THROUGH YOUR LIST OF CASES, TO SEE WHAT THE PROBLEM IS, IN HOW THESE NEW PROCEDURES WOULD FIT WITHIN THOSE INDIVIDUAL CASES, TO GET THOSE MATTERS HEARD?

THAT'S REALLY TWO DIFFERENT QUESTIONS. TURNING TO THE FIRST ONE, IN TERMS OF CASE LOAD MANAGEMENT AND DOCKET CONTROL, I AGREE THAT, I AM PUTTING ASIDE THE SEPARATION OF POWERS ARGUMENT, CERTAINLY THIS IS THE COURT TO HAVE THE AUTHORITY TO DO THAT. I THINK, WHAT WE HAVE TO KEEP IN MIND IS THAT, THESE CASES ARE SERIOUS CASES, AND THERE IS A PRESUMPTION, WHEN PEOPLE GET TOGETHER IN A COMMITTEE, THAT THEY LOOK AT SOMETHING. WHY HAS THIS SAT HERE FOR SO LONG? OVERLOOKING THE FACT THAT YOU HAVE BUSY TRIAL JUDGES. YOU HAVE SERIOUS CASES. THE OTHER THING TO KEEP IN MIND, IN TERMS OF A LOT OF THE CASES THAT ARE CURRENTLY COMING UP BEFORE THE COURT, IS THAT, BECAUSE OF THE SWEEPING CHANGES DUE TO THE LEGISLATURE, REALLY, OVER THE COURSE OF THIS ENTIRE DECADE, BEGINNING WITH RULE 3.851. ACTUALLY THAT WAS FROM THIS COURT MAKING IT FROM TWO YEARS TO ONE. THEN THE ADVENT OF 3.852. THEN THE BREAK UP OF THE THREE CCR OFFICES. ALL OF THIS COMPLETELY PARALYZED THE SYSTEM, AND SO WHEN YOU ARE LOOKING AT CASES THAT ARE COMING UP TO THE COURT NOW, YOU, REALLY, HAVE TO FACTOR IN THE FACT THAT MOST OF THOSE CASES, THE TIMES HAVE BEEN TOLLED, FOR, IN SOME CASES, A NUMBER OF YEARS, BECAUSE OF THESE SIGNIFICANT SWEEPING CHANGES. PART OF THE PROBLEM IS THAT, AS MR. MINERVA ALLUDED TO, WHEN THIS COURT HAS CHANGED A RULE OR WHEN THE LEGISLATURE ENACTS A NEW STATUTE, BEFORE THIS RULE OR THE STATUTE GETS A CHANCE TO KICK IN AND SEE IF IT WORKS THERE IS ANOTHER NEW RULE IN EFFECT OR THERE IS ANOTHER NEW STATUTE, REPEALING THE RULE.

AS A GENERAL RULE, WHERE DO YOU THINK THE RESPONSIBILITY SHOULD LIE, FOR MOVING A CASE? ONCE A POST CONVICTION MOTION IS FILED AND STATE HAS FILED AN ANSWER, WHO, NEXT, HAS THE RESPONSIBILITY TO SET IT FOR A HEARING OR WHATEVER?

I THINK IT IS THE COURT. CLEARLY THE COURT. AND --

DOESN'T THAT ANSWER THE QUESTION THAT THERE NEEDS TO BE SOME FORM OF CASE MANAGEMENT?

CERTAINLY. AND WE HAVEN'T TAKEN THE POSITION THAT THERE SHOULDN'T BE. I THINK THE POSITION IS, HOWEVER, THAT YOU CAN HAVE SUCH A DRACONIAN KIND OF RULE, AS IN THE DPR A, BECAUSE IT DOESN'T ALLOW FOR ANY LOCAL CONTROL BY A PARTICULAR JUDGE, GIVEN THE PARTICULAR CIRCUMSTANCES OF A CASE, TO SET HEARINGS IN AN EXPEDITIOUS FASHION. NOW, THIS COURT, REALLY, HAS NOT SEEN ANY OF THE MID'90s CASES THAT WERE UNDER ALL OF THESE RULES, BECAUSE THEY WERE TOLLED FOR SO LONG. I KNOW PERSONALLY I GO FROM STATUS HEARING TO STATUS HEARING TO STATUS HEARING DOWN IN MIAMI, FT. LAUDERDALE, PALM BEACH ALL OF THE TIME, AND SO THERE ARE A LARGE CLASS OF CASES THAT THINGS ARE MOVING MUCH OR EXPEDITIOUSLY. THE PROBLEM IS THAT, WHEN ALL OF THESE NEW RULES HAVE COME OUT AND ALL OF THESE NEW STATUTES HAVE COME OUT, IT HAS COMPLETELY

SWEPT THE RUG FROM UNDER THE FEET OF ALL OF THESE OTHER CASES, SO WE ARE INTO CATCH-22.

ONCE YOU GO TO A STATUS CONFERENCE, THEN WHAT HAPPENS? YOU JUST SAID YOU GO FROM STATUS CONFERENCE TO STATUS CONFERENCE.

FOR EXAMPLE YOU GO TO A STATUS CONFERENCE AND THE JUDGE WILL SAY WHAT IS THE STATUS OF THE PUBLIC RECORDS ISSUE? JUDGE, WE HAVE THIS AGENCY OUTSTANDING. THIS AGENCY OUTSTANDING. THIS AGENCY HAS COMPLIED. OKAY. LET'S SET A HEARING ON. THAT WE GO TO THE HEARING, AND WE WAIT FOR THE RECORDS, AND THE CASE MOVES IN AN ORDERLY FASHION. THERE IS -- THE DAYS OF THINGS BEING FILED AND JUST SITTING ARE LONG GONE, FRANKLY.

EXCUSE ME. THERE IS NOTHING IN THE ACT THAT, THOUGH, DEALS WITH THE ISSUE OF CASE MANAGEMENT BY THE COURT, IN THE WAY OF ALLOCATING RESOURCES, AND I KNOW, FROM BEING IN THIS CHAIR, THAT BEING ABLE TO GET RELIABLE CASE MANAGEMENT INFORMATION FROM THE 67 COUNTIES, BECAUSE OF THE VAST DIVERSITY OF TECHNOLOGY AND LACK OF TECHNOLOGY, IN THOSE COUNTIES, WE HAVE NO ABILITY TO, FROM THIS POINT, TO MAKE ANY EFFECTIVE CASE MANAGEMENT DECISIONS. NOW, WE HAVE JUST RECENTLY INSTALLED CASE MANAGEMENT, AND I KNOW THAT, FROM THE ACT, THE -- THERE IS AN INDICATION THAT, AS FAR AS THESE CASES ARE CONCERNED, MAY BE THE COMMISSION ON CAPITAL CASES SHOULD HAVE SOME CASE MANAGEMENT, BUT I KNOW YOU ARE HERE ON SOME OTHER ISSUES, AS WELL, AND I THINK, BUT THIS HAS HAD THE EFFECT OF DRAWING OUR ATTENTION TO THE EFFORTS OF THE COURT AND THE EFFORTS OF THE LEGISLATURE TO DEAL WITH THIS TROUBLESOME PROBLEM. HOW BIG ARE THE CELLS ON DEATH ROW?

EXCUSE ME? HOW BIG ARE THE CELLS?

HOW BIG ARE THE CELLS ON DEATH ROW?

NOT VERY BIG.

AND HOW OFTEN DO THOSE FOLKS GET TO GET OUT OF THOSE CELLS?

TWO HOURS A WEEK.

>AND HOW OFTEN DO THEY GET TO SHOWER?

I BELIEVE IT IS ONCE A WEEK. TWICE A WEEK.

AND THAT IS A PRETTY TOUGH EXISTENCE.

I UNDERSTAND THAT, YOUR HONOR.

FOR 20 YEARS OR SO.

SURE. I THINK SOMETHING THAT I HAD TALKED ABOUT BEFORE THE COURT, WHEN WE HAD OUR DECEMBER MEETING, IN TERMS OF THE SUMMARY DENIALS, THE STANDARD FOR GRANTING AN EVIDENTIARY HEARING IS ESSENTIALLY A PRESUMPTIVE STATEMENT IN FAVOR OF EVIDENTIARY HEARING. THE RECORD HAS TO CONCLUSIVELY EXCEED THE ALLEGATIONS. TIME AND TIME AGAIN, THIS COURT HAS BEEN FACED WITH ERRONEOUS SUMMARY DENIALS, WHERE THE STATE HAS TAKEN THE POSITION THAT AFFIDAVITS ARE REQUIRED, WITNESS NAMES ARE REQUIRED, PROFFERS ARE REQUIRED, AND THAT HAS NEVER BEEN THE LAW, AND THEY CONTINUE TO MAKE THAT ARGUMENT, AND JUDGES, UNFORTUNATELY, CHOOSE TO SIDE WITH THE STATE'S ARGUMENTS, AND THEREFORE WE FIND OURSELVES BEFORE THE COURT FIVE, SIX, SEVEN YEARS

DOWN THE ROAD, WITH THAT CASE HAD THAT SHOULD CLEARLY HAVE HAD AN EVIDENTIARY HEARING.

THAT GETS US TO WHAT WE ARE GOING TO TALK ABOUT LATER THIS MORNING, IN THE MORRIS REPORT, THAT PART OF WHAT THE LEGISLATION DOES, AND SHOULDN'T THAT BE THE LAW? THE LAW SHOULD BE THAT, WHEN YOU GET INTO POSTCONVICTION, YOU OUGHT TO -- EVERYTHING ON THE TABLE FROM THE VERY BEGINNING, NOT THAT YOU HAVE GOT SOME WITNESS SOMEWHERE THAT YOU ARE GOING TO DIVULGE AT SOME LATER TIME. WOULDN'T YOU AGREE WITH THAT?

IN TERMS OF LAYING ALL YOUR CARDS ON THE TABLE? THAT HAS NEVER BEEN THE STANDARD. IT CERTAINLY IS SOMETHING THE STATE HAS CONTINUALLY OPPOSED.

THAT SHOULD BE THE STANDARD, SHOULDN'T IT?

I DON'T KNOW. I DON'T AGREE.

HIDE THE EVIDENCE?

NO. NOT HIDE THE EVIDENCE. THE ALLEGATIONS THAT ARE MADE IN A MOTION HAVE TO BE FACTUALLY SUFFICIENT TO GRANT A HEARING. THE NAME OF THE PARTICULAR WITNESS IS NOT -- THAT DOESN'T, IN ANY WAY, CONCLUSIVELY REFUTE OR ALTER, IN ANY WAY, THE GRANTING OF AN EVIDENTIARY HEARING, AND SO -- AND THERE HAS NEVER BEEN A PROBLEM, IN TERMS OF WHEN THE HEARING IS GRANTED, WE STAGE WITNESSES ALL THE TIME. IT HAPPENS ON A ROUTINE BASIS. THE PROBLEM IS THAT THE STATE HAS TAKEN THE POSITION THAT, AS A BOTTOM LINE PLEADING REQUIREMENT, ALL OF THIS INFORMATION HAS TO BE PUT IN THE MOTION, AND THAT IS JUST SIMPLY NOT THE CASE.

WHY WOULDN'T IT BE A GOOD IDEA, THOUGH, TO AID THE COURT IN DETERMINING WHAT AN EVIDENTIARY HEARING WOULD BE APPROPRIATE, THAT THERE BE AN EXCHANGE OF WITNESSES AND EXHIBITS PRIOR TO WHAT, NOW, IS THE HUFF HEARING? BECAUSE I SEE, TOO, I GUESS WE ARE HERE ON SORT OF AN ALL-OR-NOTHING. WE SEE PLEADINGS THAT ARE CONCLUSIARY, AND THEY ARE LONG, AND WE SEE THAT, AND ON THE OTHER HAND WE HAVE THE REQUIREMENT THAT SAYS IF YOU DON'T DOT EVERY I AND CROSS EVERY T, YOU ARE GOING TO BE OUT FOREVER, BUT DOESN'T THERE HAVE TO BE SOME BALANCE BETWEEN THE TWO EXTREMES, SO THAT THE TRIAL JUDGE IS AWARE OF WHAT IS BEING CONTENDED AND MAKE A DECISION THAT THIS ISN'T A RELITIGATION OF WHAT HAPPENED AT TRIAL, BECAUSE ALL TOO OFTEN, SOME OF THE CLAIMS SOUND LIKE THEY ARE RELITIGATING THAT, SO WHY CAN'T THERE BE SOMETHING MORE THAN IS REQUIRED NOW, EVEN THOUGH WE HAVE SAID THE LAW DOESN'T REQUIRE THE LISTING OF WITNESSES, BUT DOES IT MAKE SENSE TO WAIT UNTIL AFTER THE EVIDENTIARY HEARING IS GRANTED? BECAUSE, AGAIN, IN SO MANY CASES, FOR WHATEVER REASON, THESE HAVE BEEN DENIED, AND THEN IT IS TOO LATE FOR THE JUDGE TO SAY, WELL, IF I HAD KNOWN YOU HAD THAT WITNESS, MAYBE I WOULD HAVE GRANTED --

BUT, I MEAN, CERTAINLY I THINK, FROM THE PERSPECTIVE THAT HAD THE CHALLENGE IN THIS CASE, IF THERE IS GOING TO BE SOME KIND OF A BALANCE STRUCK, IT IS GOING TO BE STRUCK BY THE COURT NOT BY THE LEGISLATURE.

THE LEGISLATURE HAS, WHETHER THIS CAN STAND, BUT THEY HAVE SAID THAT, ALTHOUGH THEY HAVE PROMULGATED RULES, IT SAYS THAT THIS ONLY STANDS UNTIL THIS COURT REVISES THE RULES, AND IT DOESN'T SAY THAT THE RULES HAVE TO MIMIC THE STATUTE. IT JUST SAYS THAT THEY HAVE TO REFERENCE THIS SECTION. SO, REALLY, THE LEG YOUR HAS INVITED US TO PASS RULES BUT WITH, PERHAPS, SOME GUIDANCE THAT THEY BE A LITTLE BIT MORE EXPLICIT AND MORE FOCUSED ON MINIMIZING DELAY.

AND CERTAINLY THEY NEED TO BE MORE FLEXIBLE, BECAUSE, FOR EXAMPLE, UNDER THE DPR A, IF I PUT THE WRONG ADDRESS OR SPELL THE PERSON'S NAME WRONG OR SOMETHING, THAT COULD BE NOT FULLY PLED, AND THE PETITION IS JUST GONE OUT THE WINDOW, AND CERTAINLY ANY BALANCE THAT NEEDS TO BE STRUCK, NEEDS TO BE STRUCK ON BOTH SIDES. THE STATE, ALSO, NEEDS TO COME FORTH WITH FULLY FACTUAL ALLEGATIONS AND AFFIDAVITS, IF THEY HAVE THEM, AND ALL OF THE DOCUMENTS TO SUPPORT THEIR POSITION, AS WELL, AND SO IT IS NOT AN ONE-SIDED PROS HE IS HERE.

-- PROCESS HERE.

THE POSTCONVICTION PROCESS, WHILE THE APPEAL IS STILL PENDING, AND YOU ARE SUPPOSED TO BE ABLE TO GET YOUR PUBLIC RECORDS, THEN, AT THAT TIME, EXCEPT FOR EXEMPT RECORDS THAT, THERE IS A EXEMPTION THAT THE STATE CAN CLAIM FOR THEIR RECORDS THAT ARE THE RECORDS THAT YOU RELY ON FOR YOUR POSTCONVICTION, AND THAT RIGHT NOW, THE WAY THE STATUTE IS DRAWN, THOSE CAN'T BE PRODUCED UNTIL AFTER THE APPEAL IS OVER.

THAT'S CORRECT. EXCUSE ME. UNDER KOKOL, THE COURT MADE CLEAR THAT INVESTIGATIVE FILES OR THAT CASES ACTIVE FOR PUBLIC RECORDS PURPOSES, UNTIL THE DIRECT APPEAL IS FINAL, AND SO THEREFORE, UNDER THE DUAL TRACK PROCEDURE, WHICH MS. SPAULING IS GOING TO ADDRESS IN SOME MORE DETAIL, THE RECORDS THAT WE RELY ON ARE HIDDEN, UNTIL THE DIRECT APPEAL IS FINAL,, WHICH OF COURSE, IS SOMETIME AFTER THE POSTCONVICTION PROCESS IS SUPPOSED TO BE COMPLETED, UNDER THE D PRA, AND SO THAT IS SUPPOSED TO BE A SHAM, THAT WE GET THOSE HIDDEN RECORDS.

BUT THAT PROCESS IS REALLY A SHAM, AS OPPOSED TO GOING TO A -- FILE POLICY. CORRECT?

CERTAINLY I DON'T WANT TO SPEAK ON BEHALF OF THE STATE, BUT GIVEN THE FACT THAT THE DIRECT APPEAL IS NOT YET FINAL AND GIVEN THE REVERSAL RATE IN CAPITAL CASES, I DON'T KNOW THAT THE STATE IS GOING TO BE THAT HAPPY WITH TURNING OVER ALL OF THEIR INVESTIGATIVE FILES, GIVEN THE FACT THAT THERE IS A PRETTY GOOD CHANCE OF REVERSAL, EITHER FOR A NEW TRIAL OR RESENTENCING, AND CERTAINLY THE AGENCY'S DEPARTMENT OF CORRECTIONS --

THAT WOULD SOLVE YOUR PROBLEM. AND, IN FACT --.

IT WOULD SOLVE ONE OF THE PROBLEMS. IT WOULDN'T SOLVE PRIVILEGE PROBLEMS, OTHER KINDS OF PROBLEMS WHICH I KNOW MS. SPAULEDING IS GOING TO ADDRESS IN MORE DETAIL.

MR. SCHER, WE TALKED ABOUT THINGS THAT ARE PROBABLY MORE IMPORTANT TO US, AND I KNOW THEY ARE NOT AS MUCH ON YOUR LIST AS THEY ARE ON OURS, BUT WE GIVE YOU AN OPPORTUNITY, NOW, TO TALK ABOUT, I KNOW YOU HAVE PROBABLY DIVIDED THE ISSUES UP.

ONE OF THE REASONS THAT I AM HERE IS TO ANSWER YOUR QUESTIONS, SO I JUST BRIEFLY WANTED TO ADDRESS THE SEPARATION OF POWERS ISSUE AND THE DEATH PENALTY VIOLATIONS AS ARE IN THE REFORM ACT, I THINK THAT PLEADINGS FILED BY MY OFFICE, THE CCR NORTH AND THE PUBLIC DEFENDERS, REALLY, EXPLICITLY DEMONSTRATE THAT IT IS CLEAR THIS COURT HAS THE JURISDICTION TO ENACT RULES OF PROCEDURE AND REGULATE THE CONDUCT OF LAWYERS.

HOW ABOUT THE BROAD PARAMETERS OF SETTING THE TIME LINES, AS FAR AS FROM A BROAD PERSPECTIVE? WHAT IS THE IBTER PLAY BETWEEN THE LEGISLATIVE BRANCH AND THE JUDICIAL BRANCH ON THOSE? VIEWING THE NATURE OF THE COLLATERAL PROCEEDINGS?

WELL, I DON'T THINK, GIVEN, RULE 3.850 WAS THE MECHANISM PROCEDURE BY WHICH A DEFENDANT VINDICATES HIS OR HER RIGHTS FOR HABEAS CORPUS, UNDER IT THE FLORIDA CONSTITUTION, AND SO ANY TIME RESTRICTIONS WHICH AFFECT A CONSTITUTIONAL WRIT

CANNOT BE SET UP IN THE STATUTE OF LIMITATIONS OR STATUTE OF REPOSE, WHATEVER THEY WANT TO CALL IT, BECAUSE WE ARE DEALING WITH SOMETHING THAT IS CONSTITUTIONAL INNATE, A PROCEDURAL WAY BY WHICH OUR CLIENTS ARE TO VINDICATE THEIR RIGHTS UNDER HABEAS CORPUS, AND SO THERE IS A DEFINITE DISTINCTION BETWEEN THIS SCENARIO AND SOME OF THE CASES THAT WERE CITED BY BOTH THE STATE AND, I THINK, BY AMICUS.

HAVEN'T WE PLACED LIMITATIONS ON THAT, BY REQUIRING THE FILING OF A PETITION WITHIN A YEAR?

YES. HOWEVER, THAT IS NOT AN ABSOLUTE LIMITATION. WHAT THE ONE-YEAR RULE WAS, WAS AN ACCOMMODATION, BASED ON THE FACT, ON THE MAJORITY OF THE COURT'S VIEW THAT, BECAUSE DEATH PENALTY DEFENDANTS GET STATE-PAID COUNSEL, THAT THE TIME LIMIT COULD BE CONSTRICTED, BUT THE RULE, COMMENT, MADE IT VERY CLEAR THAT THAT WAS PREMISED ON A NUMBER OF CONDITIONS THAT HAVE TO BE MET. NUMBER ONE, FULL FUNDING. NUMBER TWO, BASED ON THE THEN-GOVERNOR'S PROMISE THAT NO WARRANTS WOULD BE SIGNED THROUGHOUT THE INITIAL STATE AND FEDERAL PROCESS. UNDER THE DPR A, IF A MOTION IS FILED OUTSIDE THE STATUTORY TIME LIMITS, A DEATH WARRANT CAN ISSUE, AND A DEATH WARRANT CAN, ALSO, ISSUE BY A DENIAL OF HABEAS CORPUS ON APPEAL.

SO YOU ARE NOT AS MUCH COMPLAINING ABOUT THE SETTING OF THE TIME LIMITATION AS YOU ARE THAT THE FACT THAT THERE IS NO DISCRETION GIVEN TO THE COURT TO VARY IT.

CORRECT. AND I, ALSO, THINK IT IS WITHIN THIS COURT'S CLEAR JURISDICTION TO SET UP ANY TIME LIMITS IT WANTS. WE CONTINUE TO THINK, AS THE COURT AND JUSTICE HARDING'S ADMINISTRATIVE ORDER, WHICH WE WILL TALK ABOUT LATER ON, THAT IT WOULD BE WISE TO GO BACK TO THE TWO-YEAR TIME FRAME. BE THAT AS IT MAY, WHETHER IT IS ONE OR TWO YEARS, THAT IS SOMETHING THAT THIS COURT, WITH CAREFUL STUDY, NEEDS TO ADDRESS, NOT THE FLORIDA LEGISLATURE. CERTAINLY THE FLORIDA LEGISLATURE HAS NO BUSINESS TELLING THIS COURT WHEN IT HAS TO ADJUDICATE AN APPEAL. SO MUCH OF THE ACT IS PROCEDURAL INNATE THAT IT IS IMPOSSIBLE TO SEVER THE PROCEDURAL FROM THE SUBSTANTIVE, AND SO THEREFORE THE ACT, AS A WHOLE, HAS TO FALL.

LET ME ASK YOU ABOUT THIS TIME PERIOD, THE DUAL TRACK. ASIDE FROM THE CONSTITUTIONAL ISSUES, AS TO WHETHER, BECAUSE IT IS A FORM OF HABEAS THAT WE ARE LOOKING AT, WHAT, AND UNDERSTAND THE LEGISLATURE'S DESIRE TO SPEED UP THE PROCESS, COULD YOU ADDRESS WHETHER THE DUAL TRACK MECHANISM IS AN EFFICIENT AND LOGICAL WAY IN WHICH TO MAKE THIS PROCESS MORE EFFICIENT AND LESS PRONE TO DELAY?

I DON'T THINK IT IS A MORE EFFICIENT WAY. I KNOW, AGAIN, MS. SPALDING WAS PREPARED TO TALK MORE IN DETAIL ABOUT THE DUAL TRACK, BUT SINCE YOU HAVE GIVEN ME THE OPPORTUNITY, I WILL JUST THROW IN MY TWO CENTS. I CERTAINLY DON'T THINK, GIVEN THE NATURE OF SOME OF THE CLEAR CONSTITUTIONAL PROBLEMS THAT ARE RAISED BY THE DUAL TRACK PROCESS, INCLUDING PRIVILEGE PROBLEMS, ATTORNEY-CLIENT PRIVILEGE, FIFTH AMENDMENT PROBLEMS, ALL OF THAT, THAT IS ONE ASPECT THAT IS TROUBLING, AND IN TERMS OF JUST A MORE PRACTICAL NOTION, YOU KNOW, WITH THE REVERSAL RATE THAT HAS BEEN HISTORIC IN FLORIDA, BY THIS COURT, ON DIRECT APPEAL, YOU KNOW, 50%, 60% OF ALL OF THE TIME AND MUST NOT THAT I IS SPENT BY CCR OFFICES GETTING RECORDS, LITIGATING, INVESTIGATING --

IS THAT TO BE A CONSIDERATION BY THE COURT?

I CERTAINLY THINK --

IF THE LEGISLATURE WANTS TO APPROPRIATE THE MONEY TO DO THAT?

WELL, THE LEGISLATURE HASN'T APPROPRIATING ANY MONEY FOR THE CCR OFFICE.

GRANTED THAT IS ALL RECOGNIZED, AND THE COURTS HAVE INDICATED THAT, FOR THIS SYSTEM TO WORK, IT HAS TO BE A WELL-FUNDED SYSTEM, BUT SHOULD THAT BE SOMETHING, UP FRONT, THAT WE SHOULD BE CONCERNED ABOUT?

I CERTAINLY THINK SO, BECAUSE THE LEGISLATURE, WHEN ALL OF THIS WAS IN THE WORKS IT INDICATED THAT THE MONEY WOULD BE FREE-FLOWING, IN TERMS OF BEING ABLE TO FINANCE THIS KIND OF UNDERTAKING, AND, OF COURSE, WHAT TURNED OUT WAS THAT CCR WAS NOT GOING TO GET ANY OF THAT MONEY. AND THAT WOULD ESSENTIALLY GO TO THE REGISTRY, AND SO ONE PROMISE, ALREADY, HAS NOT BEEN KEPT, AND IN TERMS OF SOME OF THE OTHER PROBLEMS, YOU HAVE GOT, OF COURSE, A WARRANT PROBLEM. YOU HAVE A NUMBER OF PROBLEMS ASSOCIATED WITH THE DUAL TRACK, WHICH, AGAIN, I AM REALLY GOING TO DEFER TO MS. SPAULDING, WHO IS, REALLY, MORE PREPARED TO ADDRESS THAT.

JUSTICE HARDING HAD A QUESTION AND THEN YOU CAN CONCLUDE.

YOU CERTAINLY MENTIONED DUAL TRACK, AND IT CERTAINLY HAS ATTRACTIVENESS AND COULD WELL BE THE WAVE OF THE FUTURE. HOW, IN YOUR OPINION, CAN IT BE TWEAKED? IT HAS PRACTICAL PROBLEMS. THE COURT, PROBABLY -- POSSIBLY, WOULD CONCEDE THERE ARE SOME TREMENDOUS PRACTICAL PROBLEMS WITH DUAL TRACKING. BUT WHEN YOU CAME TO FLORIDA AND KNEW THAT DUAL TRACKING WAS COMING ABOUT, HOW WOULD YOU SAY THAT IT COULD BE TWEAKED TO ACCOMMODATE IT?

THIS IS A PERFECT TIME FOR YOU TO DEFER TO -- [LAUGHTER]

I, ALSO, ADVOCATE -- ABDICATE MY ROLE AS KING OF FLORIDA. I REALLY WOULD DEFER TO MS. SPAULDING. I JUST DON'T THINK THAT, ALTHOUGH IT IS ATTRACTIVE, PERHAPS, IN THE ABSTRACT SENSE, IT CANNOT WORK. I KNOW THAT IT HAS NOT WORKED IN A NUMBER OF STATES, WHICH IS HAVE TRIED IT.

HAVE THEY ABANDONED IT?

YES, THEY HAVE.

WHAT STATES ARE THOSE?

I BELIEVE MISSOURI AND ARKANSAS.

OKAY.

THANK YOU. YOU CAN DEFER TO HER.

STATES THAT HAVE INITIATED IT, I KNOW THEY HAVE HAD TO TWEAK IT ON A NUMBER OF INDICATIONS, TO GET IT TO WORK, AND IT IS SORT OF LIKE THE STATE OF CALIFORNIA, WHERE THERE IS A BACKLOG OF SEVERAL HUNDRED CASES, IN TERMS OF FINDING COUNSEL, SO I DON'T THINK THAT IS, GIVEN THE SYSTEM THAT WE HAVE, AS IMPERFECT AS IT MIGHT BE, THAT SYSTEM REALLY NEEDS A CHANCE TO WORK ITSELF OUT, WITHOUT CONSTANTLY BEING INTERRUPTED BY RULE CHANGES AND STATUTORY CHANGES AND BREAK UP OF OFFICES AND RUNNING OUT OF MONEY AND DEATH WARRANTS AND THINGS LIKE THAT. SO I HAD INTENDED ON ADDRESSING SOME OF THE DUE PROCESS PROBLEMS WITH THE ACT. I AM GOING TO LET MR. CHARL TAKE OVER. I KNOW THAT A LOT OF THE PROBLEMS WITH THE DUE PROCESS ACT ARE, ALSO, ASSOCIATED WITH JUDGE MORRIS'S RULE.

BEFORE YOU SIT DOWN, THERE HAS BEEN A LOT OF TALK ABOUT THE JONES STANDARD BEING

ALTERED FOR NEWLY-DISCOVERED EVIDENCE. THERE HAS BEEN -- I HAVEN'T SEEN, BUT ALL OF THIS MATERIAL, WHAT EFFECT EITHER THE ACTOR THE RULE WOULD HAVE ON THE CONSTITUTIONAL BRADY, JILIO, HENRY CLAIMS, WHICH HAS A DIFFERENT STANDARD, ANYWAY, THAN JONES? DO YOU SEE THOSE AS HAVING TO, BECAUSE THEY DERIVE FROM THE U.S. CONSTITUTION, THAT THOSE CLAIMS CANNOT BE COVERED BY THIS ACT, NO MATTER WHETHER IT IS UPHELD OR NOT?

THOSE KINDS OF CLAIMS CERTAINLY RAISED IN AN INITIAL 3.850, I THINK, WOULD REMAIN. I MEAN THAT IS FEDERAL LAW.

SUBSEQUENT. DISCOVERED, FOR FOUR YEARS, YOU FOUND OUT THE PROSECUTION SUPPRESSED A KEY BIT OF EVIDENCE. THEY PUT IT -- SOMEONE TOOK IT HOME. THE POLICE OFFICER TOOK IT HOME. DIDN'T BRING IT BACK. YOU WANT TO RAISE THAT. WOULD THAT -- WOULD THE ACT EFFECT BE THE BRADY STANDARD OF MATERIALITY?

IT WOULDN'T NECESSARILY AFFECT THE BRADY STANDARD. WHAT IT WOULD DO, THOUGH IS PUSH THAT ANALYSIS OFF, SO MANY STEPS DOWN THE ROAD, BECAUSE THE WAY THAT THE STANDARD IS SET UP FOR SUCCESSOR POETS IN -- PETITIONS IN THE ACT, IS THAT YOU HAVE TO SHOW A CONSTITUTIONAL VIOLATION, IN ORDER TO EVEN RAISE A SUCCESSOR.

A BRADY WOULD BE A CONSTITUTIONAL.

EXACTLY. A BRADY. AND SO THERE IS, REALLY, NOTHING IN THERE, IN TERMS OF HOW ALL OF THAT IS SUPPOSED TO WORK. OF COURSE THE OTHER MAJOR PROBLEM WITH GETTING RID OF JONES IS THAT THERE IS NO PROVISION FOR RAISING A SUCCESSIVE CLAIM THAT INVOLVES A SENTENCING ISSUE. THERE IS NO PROVISION FOR RAISING A SUCCESSIVE CLAIM WHERE THERE HAS BEEN A CHANGE OF LAW. AND ONE OTHER THING I DID WANT TO TOUCH ON, IN TERMS OF THE ACT, IS THAT IT COMPLETELY EVISCERATES THIS COURT'S POSITION IN CARTER, WHICH IS INCOMPETENT CLIENT. I DID NOTE THAT THE FLORIDA BAR PROPOSAL DID INCLUDE A SECTION ON THAT, BUT THE ACT IS COMPLETELY DEVOID OF THAT. IN FACT, UNDER THE ACT, IF THE CLIENT IS INCOMPETENT, IT WOULD APPEAR THAT THE CLIENT WOULD BE COMPLETELY OUT OF RECOURSE, TO SEEK POSTCONVICTION RELIEF.

THANK YOU. DO YOU WANT TO DEFER TO MR. CHARTLE?

GOOD MORNING. TIM CHARTLE FROM THE OFFICE OF MARK OLIVE. I AM GOING TO TALK ABOUT THE PROBLEMS WITH THE STATUTE, SORT OF PICKING UP WHERE MR. SCHER LEFT OFF, WHICH REFERS TO ANY KIND OF DUAL TRACK SYSTEM AND THE PROBLEMS YOU HAVE DISCUSSED HERE. THERE ARE THREE BROAD CATEGORIES OF EQUAL PROTECTION VIOLATIONS FOR YOU TO INVOLVED, WHERE YOU WOULD DON'T ANY KIND OF REVIEW. THAT IS DISCRIMINATION WITH PEOPLE COMPARED TO DEATH, WHEN COMPARED TO PEOPLE SENTENCED NONCAPITALLY, EVEN FOR A NONCAPITAL OFFENSE. THERE IS THE DISPAR AT TREATMENT OF PEOPLE RECEIVING STATE-FUNDED COUNSEL UNDER THE STATUTE AND EVEN GREATER DISPARITY FOR PEOPLE RECEIVING STATE-FUNDED COUNSEL UNDER THE REGISTRY, EVEN OPPOSED TO COUNSEL REPRESENTING THEM.

IT IS A FACT THAT, UNDER CHAPTER 27, ALL DEFENDANTS IN POSTCONVICTION RECEIVE STATE-FUNDED COUNSEL?

IT IS NOT A FACT. AN IMPERICAL FACT. IT IS A STATEMENT OF THE LAW THAT THEY ARE ENTITLED TO IT.

THAT IS WHAT CHAPTER 27 SAYS.

IT STATES THAT THEY ARE ENTITLED TO IT, JUSTICE WELLS. THEY DO NOT ALL RECEIVE IT. I

REPRESENT PEOPLE WITHIN THE STATE THAT DO NOT RECEIVE FUNDING FROM THE STATE OF FLORIDA IN POSTCONVICTION CAPITAL CONVICTION OR APPOINTED BY FEDERAL COURTS. CERTAINLY IT IS NOT THE CASE THAT EVERYONE IN THE STATE IS PROVIDED STATE-FUNDED COUNSEL NOR THAT THEY NEED STATE-FUNDED COUNSEL. SOME PEOPLE HAVE RETAINED COUNSEL.

BUT DO YOU AGREE THAT, UNDER THE ACT, EVERYONE IS ISN'T -- THAT IS ON DEATH ROW AND IS IN POSTCONVICTION, IS ENTITLED TO STATE-FUNDED COUNSEL.

ABSOLUTELY. I BELIEVE THAT THE STATE OF FLORIDA HAS CREATED A DUE PROS HE, LIBERTY INTEREST IN COUNSEL, AND THAT IT HAS THE APPROPRIATE CONTUSIONAL PROTECTIONS THAT -- CONSTITUTIONAL PROTECTIONS THAT GO WITH IT. IT IS AN ABSOLUTE RIGHT. THERE ARE SPECIFIC CONSIDERATIONS, AND ONLY IN THOSE CONSIDERATIONS CAN THE COUNSEL BE TAKEN AWAY, SO NOT ONLY IS IT STATUTORY, WE THINK THAT IT HAS CONSTITUTIONAL STATURE, AS WELL. WITH RESPECT TO THE INITIAL POSTCONVICTION REVIEW, WHETHER UNDER THE DPR A OR UNDER THE MORRIS COMMITTEE'S PROPOSALS OR THE PODOVANO PROPOSAL, THERE IS A SYSTEMATIC DISADVANTAGE IMPOSED ON EVERYONE SENTENCED TO DEATH. IT IS SIMPLY NOT FACED BY PEOPLE SENTENCED NONCAPITALLY, WHETHER IT IS FOR A TRAFFIC OFFENSE OR FOR A CAPITAL OFFENSE. MR. SCHER TOUCHED ON THE PUBLIC RECORDS PROBLEM, THAT THIS STATUTE AND THE RULE ARE DESIGNED TO SUPPRESS ALL RELEVANT INFORMATION, UNDER A BLANKET PUBLIC RECORDS EXEMPTION, FOR LAW ENFORCEMENT FILES. WITH RESPECT TO YOUR QUESTION, JUSTICE WELLS, ABOUT A -- FILE POLICY, I THINK YOU ARE RIGHT. SAY WE HAVE TO LOOK BACK, HISTORICALLY, AT HOW THESE CASES HAVE OPERATED IN THE TRIAL COURTS, AND WHEN WE DO THAT, WE WILL SEE THAT THE PROBABILITY OF A -- FILE POLICY WORKING IN THE TRIAL COURTS IS SO REMOTE THAT, I THINK, IT IS NOT REALLY WORTHY OF ANY CONSIDERATION IN A RULE-MAKING SITUATION, UNLESS THERE IS AN ENFORCEMENT MECHANISM THAT IS TIED TO IT, AND SO FAR WE JUST HAVEN'T HAD THAT.

WHAT SAFEGUARDS WOULD YOU WANT IN? SUPPOSE THE COURT SAID, ALL RIGHT, IT IS GOING TO MAKE RULES. WHAT SAFEGUARDS WOULD YOU WANT IN, RELATIVE TO DUAL TRACKING? SINCE IT WAS DEFERRED TO YOU.

WELL, I GUESS I GET TO PASS IT ALONG DOWN THE ROW. DUAL TRACKING, OR AS IT IS REFERRED IN OTHER STATES, UNITARY REVIEW, DOESN'T WORK. THE FIRST STATE TO DON'T IT WAS MISSOURI. MISSOURI WAS THE FIRST STATE TO ABANDON T THE SECOND STATE TO DON'T IT WAS ARKANSAS. ARKANSAS WAS THE SECRETARY STATE TO ABANDON IT -- WAS THE SECOND STATE TO ABANDON IT. PROBABLY THE UNIONTARY ATTEMPT WAS CALIFORNIA, AND IT WAS AN UTTER DISASTER. UNDER REDS AND HUNDREDS OF CASES SAT IN THE CALIFORNIA SUPREME COURT AND SIT THERE TO THIS DAY, BECAUSE THEY COULD NOT IMPLEMENT THAT SYSTEM, BECAUSE OF THE DEMANDS IT PLACES ON THE POOL OF LAWYERS AVAILABLE TO TAKE IT, BECAUSE OF THE DEMANDS IT PLACES ON THE COURTS. IT IS SIMPLY AN IMPRACTICAL SYSTEM.

YOU ARE SAYING THAT WE SHOULD NOT GIVE THIS, THE LEGISLATURE, THE OPPORTUNITY TO SEE FAILURE?

I THINK THAT THE STATUTE, ITSELF, IS THAT OPPORTUNITY, AND ITS RULE-MAKING ATTEMPT, THEIR OPPORTUNITY TO SEE FAILURE. HOWEVER, NO, I DON'T THINK SO, BECAUSE THE CONSTITUTIONAL RIGHTS THAT ARE PROTECTED THROUGH HABEAS, WHICH IS, IN ITSELF, A CONSTITUTIONAL RIGHT, CAN'T BE PROTECTED, UNDER THAT SYSTEM. BECAUSE OF THE PUBLIC RECORDS PROBLEM.

DID THE -- EXCUSE ME, JUSTICE SHAW.

RATHER THAN TAKING AN ABSOLUTEIES POSITION THAT IT CANNOT BE DONE, WE ARE OFFERING YOU THIS OPPORTUNITY TO TELL US WHAT YOU WOULD WANT IN, IF WE SAID IT WILL BE DONE.

I THINK, AGAIN, I WILL DEFER TO MS. SPALDING ON THE PARTICULARS OF IT, BECAUSE SHE IS PREPARED TO ARGUE THIS MORE THAN I AM, BUT THERE WOULD HAVE TO BE SOME MECHANISM FOR DEALING WITH, FOR EXAMPLE, THE PROBLEM THAT YOU ARE PITTING THE SIXTH AMENDMENT PRIVILEGE THAT EXISTS BETWEEN COUNSEL AND HIS CLIENT, ON ANY KIND OF RETRIAL OR RESENTENCING, AGAINST THE CLIENT'S CONSTITUTIONAL RIGHT TO PURSUE HABEAS CORPUS RELIEF, WHICH, IRONICALLY, HE NEEDS TO ENFORCE THAT SIXTH AMENDMENT RIGHT. IN THIS STATE WE HAVE A 50% REVERSAL RATE, ON DIRECT APPEAL, SO IF YOU HAVE THIS DUAL TRACK, ANY PERSON SENTENCED TO DEATH, THE DECISION-MAKING CALCULUS HE GOES THROUGH, AS WELL, I AM SITTING HERE. I HAVE TO DECIDE. AM I GOING TO -- WHO AM I GOING TO TRUST? AM I GOING TO TRUST THE LAWYER WHO REPRESENTS ME IN THE HABEAS MATTERS, OR AM I GOING TO TRUST MY DIRECT APPEAL LAWYER?

WELL, IS THIS A CONSTITUTIONAL ISSUE?

ABSOLUTELY.

THAT YOU ARE DEALING WITH?

YES.

HAS -- I GUESS THE ONLY OTHER PLACE, NOW, THAT HAS DUAL TRACKING IN -- OF A SIMILAR NATURE TO THIS PROPOSED BY THE LEGISLATURE, IS TEXAS. HAS THAT ISSUE BEEN CHALLENGED AND TAKEN TO THE SUPREME COURT OF THE UNITED STATES?

I DO NOT -- I CAN'T ANSWER THAT. I DON'T KNOW THAT THE SUPREME COURT HAS RULED ON IT. THERE IS, CERTAINLY, THE MORRIS VERSUS LAFFE DECISION, WHICH IS SOMEWHAT TANGENTIALLY RELATED, IN THAT IT DISCUSSES WHETHER THE RELATIONSHIP BETWEEN AN ATTORNEY AND HIS CLIENT AT TRIAL IS CONSTITUTIONALLY PROTECTED.

YOU SAID THAT THE RIGHT OF HABEAS IS ALTERED, BECAUSE THERE IS -- BECAUSE THE ATTORNEY-CLIENT PRIVILEGE IS LOST, BUT THAT EXISTS, NOW, POSTCONVICTION. YOU HAVE GOT TO, WHEN YOU MAKE A DECISION TO BLAME EFFECTIVE ASSISTANCE OF COUNSEL, YOU ARE WAIVING YOUR ATTORNEY-CLIENT PRIVILEGE. EXPLAIN HOW IT BECOMES A DIFFERENT CONSTITUTIONAL ISSUE, WHEN THAT WAIVER MUST OCCUR WHILE THE DIRECT APPEAL IS PENDING. DOES IT INFRINGE ON A DEFENDANT'S RIGHT TO APPEAL, BECAUSE NOW THEY HAVE GOT A DUAL TRACK BOTH CASES. THEY HAVE GOT TO TAKE THE HABEAS AT THE SAME TIME AS THE DIRECT APPEAL, AND THEREFORE AS A CONDITION OF HABEAS, THEY HAVE GOT TO WAIVE THAT PRIVILEGE. HOW DOES THE -- WHERE DO YOU -- CAN YOU SUCCINCTLY STATE WHERE THE CONSTITUTIONAL ISSUE ARISES WITH THE DUAL TRACK MECHANISM, WHEN IT IS PUSHED BACK TO THE APPEAL PERIOD.

AGAIN, AS TO THE PARTICULARS OF HOW YOU WOULD DEAL WITH THAT PROBLEM, I WILL DEFER TO MS. SPAULDING, BUT IN TERMS OF THE VIOLATIONS, ITSELF, YES, I THINK I CAN. AS I SAID, YOU ARE PITTING THE TWO ATTORNEYS AGAINST EACH OTHER, AND THE CLIENT IS PLACED IN THE MIDDLE. SO THE CLIENT -- THE REASON IT IS A GREATER PROBLEM IN FLORIDA, A SIXTH AMENDMENT PROBLEM, IS BECAUSE YOU HAVE THIS 50% REVERSAL RATE. SO I AM FORCED, AS A PERSON SENTENCED TO DEATH WITH AN APPEAL PENDING BEFORE THIS COURT, BEFORE MY CONVICTION AND SENTENCE HAVE BECOME FINAL, AS A MATTER OF FEDERAL LAW, I AM FORCED TO SAY, WELL, I AM GOING TO HAVE TO ROLL THE DICE, AND THINK, WELL, MAYBE MY CASE WILL NOT BE REMANDED TO THE TRIAL COURT, AS 50% OF THEM ARE.

BUT LET ME ASK YOU THIS. WE HAVE SET STANDARDS FOR COUNSEL, IN DEATH PENALTY REPRESENTATIONS. WE HAVE ESTABLISHED COURSES FOR JUDGES TO TAKE AND REQUIRED THEM TO TAKE THOSE COURSES. WE WOULD CERTAINLY HOPE THAT THOSE ISSUES WOULD BE

ADDRESSING THE HIGH REVERSAL RATE AND BRING IT DOWN.

WELL, SOME OF THOSE PROVISIONS HAVE BEEN IN EFFECT, I BELIEVE, FOR A COUPLE OF YEARS. I THINK THAT, CERTAINLY, THE NEW RULES, WITH RESPECT TO COUNSEL, HAVE NOT. BUT LAST YEAR, WE HAD SOMETHING LIKE A 70%.

YEAH. BUT THOSE CASES WERE TRIED SEVERAL YEARS BEFORE. BEFORE THE ORDER DEALING WITH EDUCATION OF JUDGES AND CAPITAL CASES AND BEFORE THERE HAS BEEN THIS EMPHASIS.

AND THAT IS A POINT THAT WE HAVE TRIED TO MAKE, CHIEF JUSTICE HARDING, IS YOU HAVE THIS COURT, HAS DONE SO MUCH TO IMPROVE THE PROCESS, AND THAT IS JUST ONE EXAMPLE. WHAT WOULD THE PROCESS LOOK LIKE, IF THOSE REFORMS WERE ALLOWED TO OPERATE? WOULD IT WORK AS QUICKLY AS THE LEGISLATURE WANKTS IT TO WORK? WE SIMPLY DON'T KNOW.

AND MAYBE WE NEVER WILL.

MAYBE WE NEVER WILL.

BUT WE DO HAVE TO DEAL WITH WHAT WE HAVE AT THIS POINT IN TIME.

CORRECT. AND WHAT I AM SAYING IS THAT THE OPPORTUNITY EXISTS TO SEE IF THOSE REFORMS WOULD WORK, WITHOUT COMPROMISING THE CONSTITUTIONAL RIGHTS OF MY CLIENTS.

LET ME GET ANOTHER ISSUE. YOU TALK ABOUT THE EQUAL PROTECTION AND THE DISCRIMINATION BETWEEN CAPITAL SENTENCE DEFENDANTS AND OTHERS. HOW COULD THAT BE REMEDIED? WOULD WE JUST SAY THAT THE PRESENT RULES APPLY ONLY TO BOTH CAPITAL AND NONCAPITAL, OR DO WE RAISE THE STANDARD FOR NONCAPITAL?

I THINK YOU SAY THAT THE PRESENT RULES THAT YOU HAVE IN EFFECT ESTABLISH THE CONSTITUTIONAL FLOOR FOR HABEAS CORPUS RELIEF IN THIS STATE.

WERE THEY PREMISED ON ESTABLISHING THE CONSTITUTIONAL FLOOR?

SOME OF THEM WERE. FOR EXAMPLE, THE HOGG CASE, WHICH REQUIRES FLEXIBILITY, WHICH REQUIRES THAT PEOPLE NOT BE ARBITRARILY DENIED ACCESS TO HABEAS CORPUS RELIEF, BECAUSE OF SOMETHING LIKE A MAILING ERROR, WHICH, CERTAINLY, IN THIS STATUTE, YOU WOULD BE. I THINK THAT JONES ESTABLISH ES A CONSTITUTIONAL FLOOR, WITH RESPECT TO INNOCENCE OR SENTENCING RELIEF OR NEWLY-DISCOVERED -- AND THAT RICHARDSON ESTABLISHEST CONSTITUTIONAL FLOOR FOR NEWLY-DISCOVERED CONSTITUTIONAL VIOLATIONS. ALL OF THOSE THINGS WOULD BE SWEPT AWAY, WERE YOU TO IMPOSE THE SAME REQUIREMENTS ON NONCAPITALLY SENTENCED PEOPLE. SIMPLY PUT, THE QUALITY OF JUSTICE IN THIS STATE WOULD PLUMMET, IF YOU WERE TO DO THAT FOR ALL CAPITAL AND NONCAPITALLY-SENTENCED PEOPLE.

A THEME THAT SEEMS TO RUN THROUGH CCR'S BRIEFS AND PUBLIC DEFENDER'S BRIEFS, IS THE INFLEXIBILITY OF THE RULE.

YES, JUSTICE.

IF SOME EQUITABLE TOLLING WAS BUILT INTO IT, WOULD THIS CURE A GREAT DEAL OF THE PROBLEMS?

THOSE KINDS OF EQUITABLE CONSIDERATIONS, YES, THEY WOULD. THEY WOULD CURE A GREAT DEAL OF THE PROBLEM. OBVIOUSLY THE FLEXIBILITY, SUCH AS REQUIRING THAT IF SOMETHING

IS FILED LATE BECAUSE OF A PROBLEM WITH THE MAIL, THAT HAS TO EXIST, AND IF YOU SAID IT COULD BE TOLLED, AS IN THE HOGG CASE, YEAH, THAT WOULD CURE A PROBLEM. IF, FOR EXAMPLE, THE DUE PROCESS RIGHT THAT YOU RECOGNIZED IN STEELE AND MADRANO WERE PRESENT, IF A LAWYER FAILED TO FILE A PETITION IN A TIMELY WAY, AS WE HAVE SEEN IN A SHOCKING NUMBER OF REGISTRY CASES, YES, THAT WOULD SOLVE SOME OF THE PROBLEMS.

WELL, FOR INSTANCE, INNOCENCE HAS TO BE COUPLED WITH SOMETHING ELSE, I GATHER, NOW, UNDER THESE RULES, TO BE ADDRESSED, AT A CERTAIN POINT. THERE MIGHT BE A CONSTITUTIONAL PROBLEM WITH THAT. BUT IF THESE TYPES OF THINGS WERE IRONED OUT, THEN ARE THERE TOO MANY OF THEM TO TALK ABOUT?

I THINK, JUSTICE SHAW, THAT WE HAVE TALKED ABOUT SO MANY, THAT IT BECOMES A QUESTION OF CAN YOU COMPLETELY REWRITE THIS STATUTE, IN THE GUISE OF SAVING IT, AND I THINK THAT IT WOULD JUST SIMPLY NOT LOOK LIKE WHAT THE LEGISLATURE INTENDED. A BUT THEY HAVE INVITED US, THE LEGISLATURE HAS INVITED THE COURT TO DRAFT RULES. AND SO WHY COULDN'T -- COULD OUR RULES TRY TO ACCOMMODATE THESE ISSUES AND/OR ADDRESS THESE ISSUES AND STILL UPHOLD THE ACT? MAYBE CHANGE IT.

CHIEF JUSTICE, SPEAKER THRASHER'S BRIEF SPOKE TO THAT DIRECTLY, AND HE ASKED YOU TO DON'T RULES -- TO ADOPT RULES THAT WOULD CREATE A SYSTEM THAT IMPLEMENTS THE INTENT OF THE LEGISLATURE, AND THAT INTENT, AND THEY MADE IT PRETTY CLEAR, WAS TO LOOK LIKE TEXAS, A SYSTEM THAT HAS THE INTEGRITY OF A PROFESSIONAL WRESTLING MATCH. THEY HAVE INVITED YOU TO DO THAT, BUT THEY VICE PRESIDENT -- IT ISN'T THAT OPEN AN INVITATION, AS I UNDERSTAND IT. CAN YOU ADOPT RULES THAT WOULD MOVE THESE CASES QUICKER THROUGH THE TRIAL COURTS? CERTAINLY YOU COULD. CERTAINLY THE KIND OF CASE MANAGEMENT THAT YOU HAVE TALKED ABOUT SO FAR COULD ACHIEVE THAT, WITHOUT DIMINISHING ACCESS TO JUSTICE, BY MAKING INNOCENCE NOT COMINGNIZEABLE, IN A -- NOT COGNIZABLE, IN A STATE HABEAS CORPUS SITUATION.

WHERE ARE THE RULES NOT ADOPTED?

THERE ARE ONLY TWO SECTIONS OF THE STATUTE THAT SAY UNLESS SOME LATER RULES COME INTO PLAY. IF I AM NOT MISTAKEN, THOSE ARE SECTIONS SIX AND EIGHT, BUT I AM NOT QUITE CERTAIN OF THAT. AS I SAID, IT IS NOT AN OPEN INVITATION. THERE ARE SOME CLASSES OF CASES OVER WHICH THE LEGISLATURE SAID IT DOES NOT WANT TO YOU ADOPT CONTRARY RULES, AND EVEN TAKING SPEAKER THRASHER'S BRIEF, IF YOU LOOK AT THE CONCLUSION TO THAT BRIEF, HE SAYS WHAT I WANT IS A STATUTE OF LIMITATIONS, SOME KIND OF TIME BAR, AND IF YOU ARE GOING TO ADOPT RULES TO IMPLEMENT WHATEVER YOU ARE GOING TO ADOPT AS RULES, MAKE SURE THAT THAT TIME BAR, THAT THAT ABSOLUTE BAR AND THE ABILITY TO RAISE THESE CLAIMS OUTSIDE OF THE PERIODS I HAVE PRESCRIBED FOR YOU, AFFECT WAITS THAT END. -- AFFECTUATES THAT END.

THANK YOU. YOUR LIGHT IS O -- YOUR LIGHT IS ON.

THANK YOU. I WILL PASS TO MS. SPAULDING.

MS. SPAULDING, YOU HAVE BEEN REFERRED TO TWICE.

I THINK THEY ULTIMATELY ADDRESSED MOST OF THE QUESTIONS. I WILL TRY TO ANSWER A COUPLE OF THEM. FIRST OF ALL, IN RESPONSE TO JUSTICE SHAW SHAU'S QUESTION ABOUT WHAT COULD BE DONE TO MAKE A PARALLEL TRACK SYSTEM WORK. THE RIGHT TO COUNSEL IS THE SINGLE-MOST OVERWHELMING PROBLEM, AND ESSENTIALLY AS MR. CHARTL SPOKE, WE HAVE MODELED TWO DIFFERENT SIZES OF DEATH ROW, AND THOSE ARE THE TRACK WHERE, IN CALIFORNIA, THEY INSIST ON HAVING QUALIFIED COUNSEL, THEY STILL ARE STRUGGLING WITH ENORMOUS BACK LOADS, BECAUSE THERE SIMPLY AREN'T ENOUGH LAWYERS TO TAKE THE

CASES.

DID THOSE STATUTES FAIL BECAUSE IT WAS UNCONSTITUTIONAL?

I AM SORRY?

BECAUSE THE SYSTEM WAS UNCONSTITUTIONAL? OR DID IT FAIL BECAUSE THERE WAS INADEQUATE FUNDING, AND IT TURNED INTO AN ADMINISTRATIVE NIGHTMARE?

I THINK THE TWO ISSUES GO HAND-IN-HAND, YOUR HONOR. I THINK, TO MAKE ANY CONSTITUTIONAL RULE OF PROCEDURE THAT WOULD IMPLEMENT A PARALLEL TRACK PROCEDURE, IT WOULD HAVE TO, AS THIS COURT DID, IN REDUCING THE TIME FRAME IN RULE 3.851, HAVE TO BE CONDITIONED UPON THE PROVISION OF QUALIFIED COUNSEL. I THINK THAT HAS TO BE AN ABSOLUTE PREREQUISITE, AND SECONDLY, ON A SYSTEM IN WHICH THERE IS ENOUGH FLEXIBILITY FOR THIS COURT TO ENGAGE IN A KIND OF EQUITABLE TOLLING THAT JUSTICE SHAW WAS TALKING ABOUT, SO THAT IF THOSE OBLIGATIONS ARE NOT BEING MET, THIS COURT HAS THE MEANS TO TOLL THE TIME.

BUT HAS THE SYSTEM BEEN RULED UNCONSTITUTIONAL IN CALIFORNIA?

NO. IT HAS NOT. OBVIOUSLY CALIFORNIA AND TEXAS --

AS THE SHIELD, THE COURT IS TO ENSURE THAT THE DUE PROCESS RIGHTS, AND THE FACT IS THAT, WHAT, THE LEGISLATURE HAS NOT ADEQUATELY FUNDED OR ADEQUATE RESOURCES, CANNOT COME FORTH TO REPRESENT THESE CASES?

RIGHT, AND WHAT HAS HAPPENED IN CALIFORNIA HAS BEEN THAT THERE ARE FOUR-YEAR DELAYS TO GET ATTORNEYS APPOINTED FOR DIRECT APPEAL, BUT YOU ARE RIGHT. THE COURT HAS, AT LEAST, HELD THE LINE, AS FAR AS THEY HAVE NOT GONE THE ROUTE OF TEXAS AND APPOINTED UNQUALIFIED COUNSEL, BUT WE WA WE ARE CONCERNED ABOUT IS THAT WE ARE ON THE BRINK, THOUGH, OF DOING THAT HERE AND FOLLOWING IN THE STEPS OF TEXAS, BECAUSE AT LEAST THE GOVERNOR'S BUDGET, RIGHT NOW, DOES NOT REQUEST FUNDING FOR ANY ADDITIONAL CCR POSITIONS. INSTEAD IT IS APPARENTLY THE EXPECTATION OF THE EXECUTIVE AND LEGISLATIVE BRANCHES THAT THE ENTIRE INCREASE IN CASE LOAD AS A RESULT OF PARALLEL TRACKING IN THE DPR A WILL BE ASSUMED BY REGISTRY LAWYERS, AND THE FACT THAT IS CRUCIAL, BEFORE ANYTHING GOES FORWARD WITH THIS TO RECOGNIZE --

LET HER FINISH HER ANSWER.

I AM SORRY.

IS THAT WE HAVE ALREADY HAD TWICE AS MANY MISSED FEDERAL HABEAS DEADLINES, MISSED IN FLORIDA, SINCE THE REGISTRY WENT INTO PLACE, AS THERE HAVE BEEN IN TEXAS. AND IF ALL OF THOSE CASES ARE DUMPED ON THE REGISTRY, AS IT STANDS, WE WILL HAVE IRREPARABLE HARM TO OUR CLIENTS, AND I THINK THIS GETS INTO THE RULES ISSUE, BUT WE HAVE RAISED CONCERNS ABOUT IT IS A DIFFICULT BALANCE, IN TERMS OF ASSURING QUALIFIED COUNSEL, WHETHER YOU CAN DO IT THROUGH QUANTITATIVE EXPERIENCE STANDARDS, WHETHER YOU CAN DO IT THROUGH QUALITATIVE STANDARDS, OR AS MOST EXPERTS AGREE, WHAT YOU REALLY NEED IS ADEQUATELY FUNDED PROFESSIONAL DEFENDER OFFICES, LIKE THE CCR'S.

HAVE YOU PROPOSED A, WHAT YOU BELIEVE TO BE THE NECESSARY BUDGET, TO THE LEGISLATURE?

I AM NOT A PART OF CCR ACTION. I AM WITH THE PUBLIC DEFENDER'S OFFICE.

DO YOU KNOW?

I AM WITH THE PUBLIC DEFENDER'S OFFICE.

HAS THE PUBLIC DEFENDER'S OFFICE SUBMITTED BUDGETS TO TAKE INTO ACCOUNT THE RESPONSIBILITY OF THE PUBLIC DEFENDERS, UNDER THIS ACT?

I DON'T THINK THAT IT WILL HAVE. ALTHOUGH I AM NOT INVOLVED INVOLVED IN THAT SIDE OF THINGS, I DON'T THINK THAT -- ALTHOUGH I AM NOT INVOLVED IN THAT SIDE OF THINGS, I DON'T THINK THAT THE EFFECT ON OUR OFFICE, ON THE DIRECT APPEAL AND TRIAL LEVEL, THAT IT IS GOING TO BE THAT MUCH MORE SIGNIFICANT THAN OURS. I AM ASSUMING THEY HAVE REQUESTED THE FUNDING. OUR CONCERN IS THAT WE ARE ON THE BRINK AT THIS POINT, WHERE IT LOOKS LIKE THERE IS AN INTENTION TO HAVE THE ADDITIONAL CASE LOAD ASSUMED, ENTIRELY, BY THE REGISTRY. AND IT IS VERY IMPORTANT FOR THIS COURT TO BE AWARE OF THE PROBLEMS THAT HAVE ARISEN WITH THE REGISTRY COUNSEL, AND, I THINK, AS JUSTICE ANSTEAD EMPHASIZED, IN HIS CONCURRENCE IN THE ARBARES CASE, OUR INTEGRITY DEPENDS ON THE QUALITY OF COUNSEL AND ON THIS COURT'S VIGILANT SUPERVISION, AND THIS COURT HAS BEEN VIGILANT IN ITS SUPERVISION. WE ARE ASKING YOU TO CONTINUE TO BE SO, AND THAT THE MOST SIGNIFICANT RED FLAG OUT THERE, FOR THE PARALLEL TRACKING, IS TO ENSURE QUALIFIED COUNSEL.

BUT IT SEEMS TO ME IF WHAT YOU ARE TALKING ABOUT AND WHAT I HEAR YOU TALKING ABOUT IS LACK OF FUNDING.

RIGHT.

THAT THE PLACE TO DO THAT IS WHILE THE LEGISLATURE IS PRESENTLY IN SESSION, AND, I MEAN, I THINK, AND THAT IS THE REASON THAT I AM INTERESTED IN KNOWING WHAT YOU KNOW ABOUT WHAT HAS BEEN REQUESTED OR NOT REQUESTED, IN ORDER TO TAKE CARE OF THIS PROBLEM.

RIGHT. I MEAN, WE ARE AT THE BEGINNING OF THE SESSION, AND I AM NOT COMPETENT TO SPEAK TO THAT, BUT IF THEY GO HAND-IN-HAND, AGAIN, IT IS ALSO THE IMPORTANCE OF HAVING STANDARDS THAT ARE FLEXIBLE ENOUGH, SO THAT WHICH IS NOT THE CASE IN DPR A , CAN WHICH PURPORTS TO STRIP THIS COURT OF ITS AUTHORITY TO EXERCISE EQUITABLE TOLLING, IN THE EVENT THAT QUALIFIED COUNSEL CAN'T BE FOUND. THOSE TWO ISSUES GO HAND-IN-HAND. THAT IS OUR CONCERN, IS THAT THIS COURT NEEDS TO HAVE THE FLEXIBILITY TO TOLL DEADLINES, TO ADMINISTER ANY PROCEDURE FAIRLY, TO TAKE INTO ACCOUNT THE OVERRIDING ISSUE OF ENSURING THAT THERE ARE QUALIFIED COUNSEL.

NOW, YOU SAID THAT THERE IS NOT A PROBLEM OR YOU DON'T KNOW OF A PROBLEM WITH THE APPELLATE SIDE OF THIS, SO THAT YOU DON'T -- THERE IS A PROVISION THAT REQUIRES A DIFFERENT APPELLATE PUBLIC DEFENDER'S OFFICE, FROM A DIFFERENT DISTRICT, TO HANDLE THE APPEAL.

RIGHT.

I WOULD ASSUME THAT THERE HAS BEEN SOME SYMBIOTIC RELATIONSHIP BETWEEN THE APPELLATE DIVISIONS OF THE DIFFERENT DISTRICTS AND THE PUBLIC DEFENDERS' OFFICES. CAN YOU ADDRESS WHETHER THAT WOULD CAUSE A DISRUPTION IN SWITCHING CASES THAT WOULD SAY GO HERE TO THE FIRST DISTRICT AND DOWN TO THE SECOND DISTRICT OR THE THIRD DISTRICT?

RIGHT. I MEAN ABSOLUTELY, YOUR HONOR. THAT HAS BEEN OUR POSITION, THAT I THINK IT IS CERTAINLY, IN OUR APPELLATE DIVISION, WE ENDEAVOUR TO WORK VERY CLOSELY WITH OUR

TRIAL DIVISION. IF THE CASE COMES BACK FOR RESENTENCING, THE APPELLATE LAWYER CONTINUES TRYING TO WORK WITH THE TRIAL LAWYERS, AND I THINK THAT THAT HAS WORKED, GENERALLY, VERY WELL AND RESULTED IN POSITIVE OUTCOME.

WHY COULD THAT NOT BE DONE, UNDER THE SYSTEM PROPOSED BY THE LEGISLATURE?

NOW THE APPEAL WOULD GO, TO IF IT WAS A CASE THAT WAS TRIED BY OUR OWN OFFICE, WOULD, THEN, HAVE TO BE FARMED OUT TO ANOTHER OFFICE, AND SO YOU WOULDN'T HAVE THAT KIND OF CONTINUITY.

SO IF THE CASE IS TRIED IN JACKSONVILLE AND THE PUBLIC DEFENDER'S SECOND CIRCUIT IS HANDLING THAT APPEAL, YOU WOULD STILL HAVE THAT PROBLEM.

IT VARIES FROM OFFICE TO OFFICE, BECAUSE UNLIKE THE MIAMI OFFICE, WE ONLY HAVE TWO COUNTIES, WHEREAS SOME OF THE OTHER APPELLANT -- OUR SPECIFIC CONCERN IS RAISED IN THE FARINA CASE, THAT THE DISRUPTION OF DPR A MEANS DISRUPTION OF ESTABLISHED ATTORNEY-CLIENT RELATIONSHIPS. WE HAVE CASES THAT ARE FULLY BRIEFED THAT ARE CASES PENDING BEFORE THIS COURT,, WHICH UNDER DPR A, TECHNICALLY, THE OFFICE THAT DID THE APPEAL, WOULD NOW HAVE TO WITHDRAW AND ANOTHER OFFICE WOULD HAVE TO STEP IN AND ASSUME RESPONSIBILITY FOR THE CASE, UNDER THE CROSS CIRCUIT CONFLICT PROVISION, AND WE HAVE ARGUED THAT THAT PROVISION IS UNCONSTITUTIONAL, PARTICULARLY ASAP APPLIED.

YOU WERE DEFERRED TO AS HAVING SOME KNOWLEDGE ABOUT THE WHOLE DUAL TRACKING SYSTEM. IF WE TAKE -- IF WE ARE OF THE OPINION THAT WE SHOULD, AT LEAST, TRY TO GIVE THIS DUAL TRACKING SYSTEM A TRY IN THE STATE BUT, MAYBE, SOMETHING NOT QUITE AS DRACONIAN AS YOU SEEM TO THINK, THAT THIS PARTICULAR PIECE OF LEGISLATION IS, WHERE WOULD YOU SAY, IN THE SYSTEM, COULD WE BEGIN, AT LEAST, THE POSTCONVICTION PROCESS, SHORT OF A FINAL, OR IS THERE A PLACE, SHORT OF THE FINAL DETERMINATION ON THE DIRECT APPEAL, THAT WE COULD BEGIN THE POSTCONVICTION PROCESS?

I THINK, CERTAINLY, IT COULD -- I MEAN, IF YOU LOOK AT THE OPTIONS BETWEEN THE DPR A, OR JUDGE POD ON VAN-'S -- PODOVANO'S PROPOSAL, CERTAINLY IT IS ESSENTIAL THAT THAT TIME NOT START UNTIL AFTER THE POSTCONVICTION BRIEF, BECAUSE CERTAINLY COUNSEL MUST HAVE TO KNOW WHAT ISSUES HAVE BEEN RAISE ODD A DIRECT APPEAL, AT A MINIMUM, BEFORE YOU COULD PROCEED.

WOULD THAT ENTAIL SOME KIND OF CHANGE TO THE PUBLIC RECORDS PORTION OF THIS ACT?

YES. IT WOULD. I MEAN, BECAUSE YOU WOULD NEED TO MAKE THOSE RECORDS AVAILABLE. THE OTHER ISSUE, WHICH JUSTICE PARIENTE ASKED ABOUT, WAS THE FLIP SIDE OF THAT, WHICH IS THE PRIVILEGE ISSUES, BECAUSE THE DEFENSE WOULD, LIKEWISE, BE REQUIRED TO DISCLOSE CONFIDENTIAL INFORMATION, WORK PRODUCT INFORMATION, WHILE THE APPEAL IS PENDING, SPECIFICALLY YOU ARE ASKING WHAT CONSTITUTIONAL RIGHTS WERE IMPLICATED, UNDER UNITED STATES VERSUS SIMMONS, DEFENDANT'S EXERCISE OF ONE RIGHT CAN'T BE CONDITIONED ON GIVING UP ANOTHER RIGHT, SO AT A MINIMUM, IF THAT WERE TO BE THE CASE, YOU WOULD NEED SOME SORT OF MECHANISM IN PLACE, SO THAT ANY OF THAT INFORMATION CANNOT BE SUBSEQUENTLY USED AGAINST THE DEFENDANT, IN THE EVENT OF A NEW TRIAL OR NEW SENTENCING.

ISN'T THAT WHAT HAPPENS, THOUGH, WHEN THERE IS A NEW TRIAL ORDERED IN POSTCONVICTION? ALL THOSE SAME MATTERS ARE OUT THERE ON THE TABLE, BECAUSE EVIDENCE HAS COME OUT IN POSTCONVICTION. WHAT DIFFERENCE DOES IT MAKE, WHETHER IT COMES OUT IN POSTCONVICTION OR ON DIRECT APPEAL?

SIGNIFICANTLY YOU WOULD BE DEALING WITH A SIGNIFICANT INCREASE IN THE NUMBER OF

CASES WHERE THAT OCCURS, AND, I THINK, AND THIS MAY BE MORE OF A POLICY ARGUMENT, BUT YOU ARE GOING TO HAVE, I THINK, THERE ARE A LOT OF HIDDEN COSTS INVOLVED IN THAT, AND IT IS A VERY CUMBERSOME EXPERIENCE, MUCH LIKE CASTAGAR, WITH IMMUNIZED TESTIMONY OR CASES THAT HAD TO BE USED IN THE IRAN CONTRA CASE OF CANNING EVIDENCE BEFOREHAND, SO THAT THE PROSECUTION COULD ESTABLISH THAT THEY WEREN'T RELYING ON ANY OF THE COMPELLED, THE INFORMATION THAT WAS COMPELLED TO BE DISCLOSED, SO IT IS VERY COMPLICATED. THERE IS, ALSO, SORT OF ADDITIONAL DELAYS BUILT IN, UNDER THE DUAL TRACK, WHEN YOU HAVE A CLAIM ASSERTED AGAINST A TRIAL ATTORNEY. THAT MEANS IF A CASE DOES COME BACK FOR RESENTENCING, YOU CAN NEVER HAVE THE SAME ATTORNEY DO THE CASE AT THE RETRIAL OR RESENTENCING, BECAUSE OF THE CONFLICT. SO THOSE ARE SOME OF THE PRACTICAL CONSIDERATIONS.

THANK YOU VERY MUCH. WE HAVE HEARD THE PETITIONER'S SIDE, AND WE ARE GOING TO TAKE A TEN-MINUTE RECESS. THANK YOU. BAILIFF: PLEASE RISE. BAILIFF: PLEASE RISE. PLEASE BE SEATED.

I WILL BET YOU DIDN'T BELIEVE WE COULD DO IT IN TEN MINUTES TAX A TEN-MINUTE RECESS. ALL RIGHT. FOR THE STATE.

GOOD MORNING. MAY IT PLEASE THE COURT. RICHARD MARTELL ON BEHALF THE STATE OF FLORIDA. WITH ME AT THE COUNSEL TABLE IS CAROLYN SNURKOWSKI. PROBABLY THE BEST NEWS THAT YOU WILL HEAR FROM ME THIS MORNING IS THAT I DON'T HAVE AN HOUR'S WORTH OF PRESENTATION PREPARED. IN FACT I AM, REALLY, HERE TO RESPOND TO THE THOUGHTFUL QUESTIONS SUCH AS YOU HAVE ASKED MY OPPONENTS. IT IS OUR POSITION THAT THE CONSTITUTIONAL CHALLENGES TO THE NEW ACT FAIL, THAT MOST OF THE CONCERNS WHICH ARE RAISED ARE SIMPLY VALUE JUDGMENTS BY OPPOSING COUNSEL, WHO DO NOT WISH THE SYSTEM CHANGED, BUT THE FACT IS THAT ALL THREE BRANCHES OF GOVERNMENT DO SEEM TO BE IN AGREEMENT THAT WE HAVE TO CHANGE OUR CAPITAL COLLATERAL PROCESS. AS YOU WILL HEAR LATER, WE HAVE, OF COURSE, THE DEATH PENALTY REFORM ACT OF THE LEGISLATURE. WE WILL BE MOVING FORWARD, AND WE WILL BE CUTTING DELAY, AND, OF COURSE, THIS COURT WILL BE MINEDFUL OF THE CONSTITUTIONAL RIGHTS TO ALL PARTIES TO THOSE PROCEEDINGS, AND WE WILL SEE TO IT THAT THOSE PROCEEDINGS AND THOSE CHANGES ARE IMPLEMENTED IN A FAIR AND EQUITABLE FASHION.

LET'S DIRECT OUR ATTENTION, FOR A MOMENT, MR. MARTELL, TO THE PUBLIC RECORDS PART OF THIS PROCEDURE. UNDER THE WAY THAT THE NEW ACT READS, THE PUBLIC RECORDS PART OF THIS PROCEDURE IS MOVED UP INTO THE DIRECT APPEAL.

RIGHT.

THE OTHER SIDE WAS TALKING ABOUT, THIS MORNING, THAT THAT IS GOING TO HAVE A DETRIMENTAL EFFECT ON DEFENDANTS, BECAUSE THERE WILL BE CERTAIN RECORDS THAT CANNOT BE DIVULGED. NOW, ISN'T IT CORRECT THAT, BECAUSE OF BRADY AND BECAUSE OF OUR RULES, WE SHOULD CONSIDER THESE PUBLIC RECORDS MATTERS AS GOING FORWARD WITH A -- FILE POLICY, WHICH REACHES DOWN INTO THE INVESTIGATIVE AGENCY?

I THINK IT IS FAIR, FROM ALL YOUR PRECEDENT THAT, BRADY HAS, ALWAYS, SUPERSEDED PUBLIC RECORDS, IN THE SENSE THAT IT HAS ALWAYS BEEN AN INDEPENDENT BASIS FOR THE SECURING OF RECORDS, AND THAT STATE ATTORNEYS OR OTHER POLICE AGENCIES HAVE OBLIGATIONS, BOTH UNDER PUBLIC RECORDS AND UNDER BRADY. AS YOU ARE POINTING OUT, THE BRADY OBLIGATION WOULD EXIST AT ANY TIME IN THE PROCEEDING.

WHAT IS THE STATE'S POSITION ON, IF THIS IS MOVED -- IF WE GO FORWARD ON A DUAL-TRACKING SYSTEM, AS SET FORTH IN THE STATUTE, AS TO THE DISCOVERY OF PUBLIC RECORDS THAT ARE INVOLVED IN LAW ENFORCEMENT INVESTIGATION FILES?

YES, SIR.

WHAT IS YOUR -- WHAT IS THE STATE'S POSITION ON THAT?

ALL I CAN SAY IS THAT, PRIOR TO THE TOLLING OF THE PROVISIONS OF THE ACT, THE STATE ATTORNEYS HAD BEGUN TO SEND OUT THEIR NOTICEES TO, SOME OF THE STATE ATTORNEYS HAD BEGUN TO SEND OUT THEIR NOTICEES TO THE LAW ENFORCEMENT AGENCIES, AND WE HAVE NOT RECEIVED ANY OBJECTIONS. GRANTED IT WAS SOMEWHAT EARLY IN THE PROCESS, BUT THE STATE ATTORNEYS, THEMSELVES, SEEMED MORE THAN WILLING TO COMPLY WITH THE STATUTE, WHICH WAS WRITTEN, WHICH THEY WERE READING TO ME DISCLOSURE OF THEIR RECORDS.

BUT THERE HAVE BEEN SOME ASSERTIONS TO THE CONTRARY TO THAT, HAVE THEIR NOT?

OUR OPPONENT IS ASSUMING THAT THE LAW ENFORCEMENT AGENCIES OR OTHER AGENCIES WILL BE MAKING OBJECTIONS, BASED ON THE COPLE CASE.

WHAT DO WE DO WITH COPLE?

I BELIEVE THE FOCUS OF COPLE WAS TELLING THE STATE ATTORNEY THAT, DURING THE POSTCONVICTION PROCEEDING, HE DIDN'T HAVE TO TURN OVER HIS RECORDS THAT RELATED SPECIFICALLY TO THE DEFENSE IN THAT PROCEEDING. IN THE CONTEXT WE WOULD BE IN, THE TRIAL COURT, OF COURSE, WOULD BE OVER. THE APPEAL WOULD BE PENDING. THE STATE ATTORNEY WOULDN'T HAVE ANY RECORDS THAT WOULD PERTAIN TO THE APPEAL, PER SE, SO IT WOULD GO BACK TO THE INVESTIGATIVE MATTERS THAT JUSTICE WELLS HAS BEEN DISCUSSING.

WHAT SHOULD WE DO WITH THE EXEMPTION, OR DOES THE EXEMPTION HAVE ANY PART IN THIS?

WELL, I GUESS THERE IS ANOTHER PUBLIC RECORDS EXEMPTION RECEIPTING -- RELATING TO LACK OF FINALITY OR PENDENCY ON APPEAL. THAT IS SOMETHING I WOULD ASSUME THE LEGISLATURE CONSIDERED THAT, WHEN THEY ENACTED THE STATUTE AND FELT THAT MOVING THE POSTCONVICTION PROCESS FURTHER WAS TO TAKE PRIORITY OVER THAT MATTER.

WE WOULD HAVE TO -- WHAT YOU ARE SAYING IS WE WOULD HAVE TO CONSTRUE THAT EXEMPTION AS TO MEAN THAT, FINALITY MEANS WHEN THE DEATH SENTENCE IS IMPOSED, WHICH IS WHEN THE CCR IS APPOINTED, NOT WHEN THE APPEAL IS CONCLUDED.

THAT'S CORRECT, YOUR HONOR.

OKAY. BUT THAT WOULD BE -- SO IS IT A STRETCH, OR WOULD WE BE REWRITING THE STATUTE TO BE DOING THAT?

I THINK IT WOULD BE IMPLEMENTING THE LEGISLATURE'S INTENT, GIVEN THE FACT THAT THEY HAVE SAID PUBLIC RECORDS DISCLOSURE NEEDS TO OCCUR AT THIS POINT IN THE PROCESS.

IT WOULD BE UPHOLDING THE CONSTITUTIONALITY, BY CONSTRUING THE STATUTE TO CHANGE THE LANGUAGE OF THE EXEMPTION, EVEN THOUGH THE LEGISLATURE DIDN'T CHANGE THE LANGUAGE?

I DON'T KNOW THAT THERE IS A CONSTITUTIONAL QUESTION HERE.

THE CONSTITUTIONAL QUESTION WOULD BE DUE PROCESS, THAT IF THE VERY RECORDS THAT POSTCONVICTION COUNSEL RELY ON, IN ORDER TO RAISE THE VARIOUS CLAIMS, COULD NOT BE HAD UNTIL AFTER THE APPEAL.

I UNDERSTAND. OKAY. THAT HASN'T BEEN ASSERTED IN THOSE TERMS, BUT, YES, IF YOU DID CHANGE THE EXEMPTION, IT WOULD BE NECESSARY TO CARRY THAT OUT.

BUT AT THE TIME THAT WE ADOPTED 3.852, SUBSEQUENT TO THE LEGISLATIVE CHANGE IN 1998, WE SAID THAT THE RULE WAS ANSWER LATER TO POSTCONVICTION -- WAS ANCILLARY TO POSTCONVICTION CAPITAL PROCEEDINGS, UNDER 3.851. NOW, I WOULD AS THAUM THERE WOULD BE A BASIS, IN ADOPTING A -- I WOULD ASSUME THERE WOULD AND BASIS, IN ADOPTING THE RULE, THAT WOULD DO WHAT THE LEGISLATURE HAS NOW DONE, UNDER 119.19, AND HAVE IT JUST TIME PERIODS MOVED UP BUT HAVE IT HAVE THE SAME EFFECT AS THE PRIOR RULE, INSOFAR AS THE REACH OF DISCOVERY WAS CONCERNED.

YES, SIR. AND I WOULD IMAGINE THAT IN CAMERA REVIEW WOULD BE FELT THAT, FOR WHATEVER REASON, THE RECORDS WERE SO SENSITIVE, DISCLOSURE WAS NOT APPROPRIATE AT THAT TIME, THAT THAT IS SOMETHING THAT THE JUDGE COULD BALANCE. I THINK WHAT THIS IS PART OF AND TALKS ABOUT SOMETHING THAT JUSTICE ANSTEAD RAISED THERE, IS A COMMON THEME BETWEEN THE LEGISLATION AND THE MORRIS CONVICTION, WHICH IS THAT WE HAVE TO START THE POSTCONVICTION EARLIER, BECAUSE WE ARE JUST LOSING TOO MUCH TIME.

BUT THE MORRIS COMMISSION STARTS IT AFTER THE APPEAL IS FINAL, AND MY QUESTION, BECAUSE YOU CERTAINLY HAVE HANDLED A NUMBER OF POSTCONVICTION CASES, I AM TRYING TO ENVISION AN ACTUAL HEARING BEING HELD, AN EVIDENTIARY HEARING ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, WHEN THE DIRECT APPEAL IS STILL PENDING, AND WHAT TYPES OF HYPOTHETICAL QUESTIONS WOULD HAVE TO BE ASKED, BECAUSE SOMETIMES, AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS BASED ON THE FAILURE TO OBJECT, AND WITHOUT KNOWING HOW THIS COURT WILL DISPOSE OF THE DIRECT APPEAL, WHETHER THEY WILL FIND THAT A POINT WAS PROCEDURALLY BARRED BECAUSE IT WASN'T OBJECTED TO, WHETHER IT WAS FUNDAMENTAL ERROR, WHETHER IT WAS HARMLESS ERROR, HOW DO YOU, AS A REAL LIFE SENSE, HAVE A MEANINGFUL EVIDENTIARY HEARING, WHILE THE DIRECT APPEAL IS PENDING, REGARDLESS OF THE ISSUE OF HOW MANY CASES ARE REVERSED OR AFFIRMED? ISN'T THE OPINION OF THIS COURT USUALLY THE STARTING POINT FOR EVALUATING WHAT KIND OF, AT LEAST AS TO THE INEFFECTIVE CLAIMS, INEFFECTIVE ASSISTANCE CLAIMS, WHAT WILL SHAPE THAT, THE POSTCONVICTION CLAIM? HOW DO YOU SEE THE PRACTICAL PART OF THIS WORKING? AND MY CONCERN, THERE, IS THAT WE DON'T, ASSUMING IF THERE ARE THE CONSTITUTIONAL IMPEDIMENTS REMOVED, EITHER BY STATUTORY CONSTRUCTION OR OTHERWISE, WE DON'T PUT OURSELVES IN A SYSTEM THAT WILL DO WHAT THIS COURT DOESN'T WANT TO DO, WHAT THIS TRIAL COURT DOESN'T WANT TO DO, BECAUSE IT WILL DOUBLE THEIR WORK, AND WHAT THE LEGISLATURE DIDN'T WANT TO DO, WHICH IS, PERHAPS, FURTHER DELAY THE PROCESS?

WELL, I SEE, ALTHOUGH I HAVE SOME OF THE SAME INITIAL AUTHORITIES THAT -- INITIAL THOUGHTS THAT YOU DID IN APPROACHING, THIS BUT I THINK THAT WE MAY HAVE MORE WHAT WE CALL A PURE INEFFECTIVENESS, BECAUSE THE WAY THE CASES COME DOWN NOW IS THE APPELLATE OPINION WILL COME DOWN AND, FOR INSTANCE, THE APPELLATE ATTORNEY WILL RAISE A CERTAIN NUMBER OF ISSUES, AND THIS COURT MAY FIND THEM PROCEDURALLY BARRED, SO BY THE TIME WE GET TO THE HEARING, THAT WILL SHAPE HOW THE INEFFECTIVENESS CLAIMS ARE DONE. IN OTHER WORDS ANYTHING THAT, FROM THE CHAIR FACE OF YOUR OPINION, THAT TRIAL COUNSEL DIDN'T PRESERVE, WILL BECOME A BADGE OF INEFFECTIVENESS IN 3.850. THAT DOESN'T HAVE TO DO WITH PERFORMANCE. IF YOU HAVE SOMEONE WHO JUST READS THE TRANSCRIPT AND WHO DOESN'T KNOW WHAT IS GOING TO HAPPEN IN APPEAL, BUT HE, THE COLLATERAL ATTORNEY CAN DECIDE FOR HIM OR HERSELF, I THINK, WHETHER THAT PERFORMANCE MEETS THE STRICKLAND STANDARD AND WHAT THE DEFICIENCIES ARE, WITHOUT KNOWING WHAT THE APPELLANT RESULT IS, AND IN FACT IT MAY BE MORE ACCURATE, BECAUSE IT WON'T BE SKEWED BY THINGS THAT ARE LATER TALKED ABOUT.

BUT THIS COURT HASN'T DECIDED WHETHER SOMETHING IS HARMLESS BEYOND A REASONABLE DOUBT, THEN HOW DOES THE TRIAL COURT EVALUATE THE INEFFECTIVENESS, IF WE HAVEN'T YET DETERMINED WHAT THE OUTCOME OF THE CASE IS GOING TO BE?

I GUESS, FOR PURPOSES OF POSTCONVICTION HEARINGS THAT WILL GO ON BEFORE THE APPEAL IS OVER, THE COURT HIM HAVE TO ASSUME THAT IT -- THE COURT WILL HAVE TO ASSUME THAT IT IS GOING TO BE AFFIRMED, BUT THE COURT WILL HAVE THE ENTIRE TRANSCRIPT, TOO. THE COURT WILL HAVE BEEN THE JUDGE WHO PRESIDED OVER THE TRIAL, AND HIS DETERMINATION OF LACK OF PREJUDICE, YOU KNOW, IS USUALLY MADE IN A VACUUM OR IN HIS OWN DETERMINATION, ANYWAY. IN THE COURSE OF THIS COURT'S APPELLANT -- APPELLATE OPINION, YOU WOULD DISCUSS CERTAIN ISSUES, BUT YOU WOULDN'T NECESSARILY FORM AN OPINION ABOUT HOW A PARTICULAR PIECE OF EVIDENCE --

DO YOU THINK IT WILL AND BETTER HEARING BECAUSE OF -- IT WILL BE A BETTER HEARING BECAUSE OF THIS EVIDENCE, NOT JUST A QUICKER HEARING? YOU THINK IT WILL WORK BETTER, WITHOUT THIS COURT HAVING YET MADE THE DETERMINATION AS TO WHETHER THE DEATH PENALTY IS AFFIRMED OR REVERSED OR WHETHER THE SENTENCE IS BEING REDUCED TO LIFE OR NOT NOT?

I AM SAYING IT CAN BE LESS RESULT ORIENTED. WE HAVE CERTAINLY HAD A LINE OF CASES THAT SAY YOU CAN'T RERAISE APPELLATE ISSUES AND YOU CAN'T RERAISE APPELLATE ISSUES AS INEFFECTIVENESS CLAIMS, SO IF YOU HAVE SOMEONE WHO RAISES WHAT HE OR SHE PERCEIVES TO BE THE IN EFFICIENCYIES OF COUNSEL, THEY DO THAT SIMPLY BASED ON THE CASE AND THE CASE LAW, AND THEY DON'T DO IT FROM KIND OF READING TEA LEAVES ABOUT THIS COURT'S OPINION OR WHETHER OR NOT YOU WOULD HAVE REVERSED OR WHATEVER. IT SIMPLY THE CASE.

THE INEFFECTIVENESS IS WHAT YOU DO THE A TRIAL. IT SNOT -- WHAT YOU DO AT TRIAL. IT IS NOT LIKE TEA LEAVES. IT IS, IN EFFECT, WHAT HAPPENED AT THIS TRIAL THAT RESULTED IN AFFIRMANCE OR REVERSAL.

NO. THE TEST THAT THE TRIAL COURT IS APPLYING IS NOT AN APPELLATE TEST. IT IS WHETHER OR NOT THE RESULT OF THE PROCEEDING, I.E. THE JURY'S CONVICTION OF THE DEFENDANT OR SENTENCING OF DEATH IS AFFECTED BY THE DEFENSE COUNSEL'S ALLEGED ERRORS, AND THE JUDGE CAN MAKE THOSE DETERMINATIONS WITHOUT KNOWLEDGE OF THE APPEAL. I MEAN, THE ONLY PART WHERE THIS COURT'S APPELLATE RULE COMES IN IS INEFFECTIVENESS OF APPELLATE COUNSEL, WHICH THIS COURT RAISES DIFFERENTLY, AND IT IS DIFFERENTLY STRUCTURED, SO THAT THAT IS RAISED AFTER THE APPEAL IS OVER, SO THAT TAKES CARE OF THAT.

JUSTICE SHAW HAD A QUESTION.

WOULD THE STATE AGREE THAT YOU CAN'T TREAT CAPITAL AND NOT CAPITAL DEFENDANTS DIFFERENTLY FOR DUE PROCESS PURPOSES?

WELL, I KNOW THAT, WHEN THIS COURT SHORTENED THE TIME, UNDER 3.851, ORIGINALLY THERE WAS AN EQUAL PROTECTION AND A DUE PROCESS ARGUMENT THAT DEATH-SENTENCED INDIVIDUALS WERE BEING DISADVANTAGED, AND THIS COURT ADDRESSED THAT CONCERN AND POINTED OUT THE DIFFERENCE IN POSITION BETWEEN CAPITAL AND NONCAPITAL DEFENDANTS. IE THAT ALL CAPITAL DEFENDANTS ARE REPRESENTED BY COUNSEL, AND I THINK TO THE EXTENT THAT THAT CASE, THAT ARGUMENT IS BEING PRESENTED HERE, THAT IS A SIMPLE ANSWER, THAT WE SPEND MILLIONS AND MILLIONS OF DOLLARS FOR FUNDING AND ENSURING REPRESENTATION FOR EVERYONE ON DEATH ROW.

DOES THAT INCLUDE RAISING THE STANDARD OF WHAT -- OF INNOCENCE, WITH A CONSTITUTIONAL ERROR? AS WELL? DOES THAT HAVE ANYTHING TO DO WITH COUNSEL?

WELL, THE STANDARD FOR SUCCESSIVE MOTIONS COULD CERTAINLY BE APPLIED EQUALLY TO NONCAPITAL CASES.

BUT THEY ARE NOT. AND I THINK THAT IS THE ISSUE, AS I HAVE INDICATED. WHAT DO YOU DO? DO WE MAKE THEM APPLY TO NONCAPITAL CASES?

THE BURDEN OF PROOF IS HEAVIER, IN THE CAPITAL CASES, UNDER THIS ACT, IN CERTAIN INSTANCES, THAN IT IS IN NONCAPITAL CASES.

FOR THE DEFENSE. FOR THE DEFENSE. CORRECT?

IS THAT A PROBLEM?

WELL, AGAIN, I THINK, OBVIOUSLY, IT MAKES MORE SENSE TO EXPECT THAT AN ATTORNEY, A DEFENDANT WHO IS REPRESENTED BY COUNSEL WILL HAVE THE ABILITY TO COMPLY WITH COURT DEADLINES, WILL HAVE THE ABILITY TO FILE A FULLY-PLED MOTION, AND WILL HAVE THE RESOURCES TO -- WHICH ARE NECESSARY TO COMPLY WITH THE LEGISLATION.

WELL, THAT IS ONE THING. GETTING IT TO THE COURT. BUT WHEN YOU RAISE THE STANDARD SIGNIFICANTLY, AND MAKE A DIVERGENCE, BETWEEN CAPITAL AND NONCAPITAL CASES, DOESN'T THAT HAVE SOME EQUAL PROTECTION IMPLICATIONS?

I AM NOT SURE IF THAT WAS RAISED IN THE FELKER OPINION, BUT, AGAIN, THIS LEGISLATION WAS MODELED ON WHAT THE U.S. CONGRESS DID, IN WHICH THE U.S. SUPREME COURT APPROVED IN FELKER VERSUS TURBIN, AND EVERY DEATH APPEAL THROUGHOUT THE COUNTRY WILL HAVE TO MEET THE SAME THRESHOLD WHICH WE HAVE, NOW, SET IN OUR STATUTE.

BUT DOESN'T --

GO AHEAD.

ON THAT, THOUGH, YOU AGREE THAT THE STATUTE, AS DRAFTED, REMOVES THE DEFENDANT'S ABILITY TO MAKE THIS SO-CALLED FREE-STANDING CLAIM OF INNOCENCE THAT IS SEPARATE FROM A CONSTITUTIONAL RIGHT, AND SO THE EXAMPLE WOULD BE DNA EVIDENCE EXONERATING THE DEFENDANT, BECAUSE IT IS TIED, AS IT IS DRAFTED, TO A CONSTITUTIONAL RIGHT. DO YOU AGREE THAT, AS DRAFTED, IT REMOVES A DEATH PENALTY, DEATH SENTENCE DEFENDANT'S ABILITY TO RAISE A FREE-STANDING CLAIM OF INNOCENCE, AND EVEN THOUGH THAT MAY BE WHAT IT IS MODELED ON THE FEDERAL STATUTE, THE FEDERAL STATUTE IS FEDERAL HABEAS FOR CONSTITUTIONAL RIGHTS. THE STATE HAS OTHER OBLIGATIONS, BECAUSE WE ARE THE PRIMARY PLACE WHERE THE RIGHTS OF THE DEFENDANT IN STATE COURT ARE PROTECTED. SO HOW DO YOU SEE THAT PROBLEM, EQUAL PROTECTION, AND DUE PROCESS, BY REMOVING THE ABILITY OF THE DEFENDANT TO MAKE A FREE-STANDING CLAIM OF INNOCENCE, WITHOUT HAVING TO TIE IT TO A CONSTITUTIONAL RIGHT? IN OTHER WORDS A WITNESS SAYING I WAS LYING. HE DIDN'T DO IT. THIS GUY DID IT. DNA SHOWING THE OTHER PERSON DID IT.

WELL, OF COURSE, THAT TYPE OF CLAIM WILL ALWAYS BE COGNIZABLE IN THE INITIAL, IN THE FIRST ROUND --

THIS IS ONLY DISCOVERED -- THEY ONLY COME FORTH THREE YEARS AFTER THE FACT.

THE ACTUAL INNOCENCE IS A THRESHOLD, AND IF YOU CROSS THAT, YOU GET INTO COURT, SO IF YOU MEET THAT STANDARD, THEN YOU RAISE YOUR ISSUES.

IS THAT WHAT THE STATUTE SAYS?

LET ME PULL UP THE EXACT LANGUAGE.

I THOUGHT IT SAYS IT TIES --

REQUIRES A CONSTITUTIONAL ERROR APPLIES ACTUAL INNOCENCE.

THAT IS THE WAY THAT THE FEDERAL SYSTEM HAS BEEN WORKING, SO, IN OTHER WORDS, IF YOU HAD A BRADY CLAIM OR AN INEFFECTIVENESS CLAIM OR EVIDENCE OF OTHER MATTERS OR SIMPLY RAISED A CONSTITUTIONAL ISSUE, YOU COULD HAVE THEM HEARD ON THE MERITS HAD, IN A SUCCESSIVE PETITION, IF YOU MET THAT --

THAT PURE, SIMPLE INNOCENCE ISSUE CANNOT BE RAISED, UNDER THIS LEGISLATION, UNLESS IT IS COUPLED WITH A CONSTITUTIONAL ERROR?

THAT IS THE FEDERAL STANDARD. WE ARE IN ACCORD WITH THAT.

YOU ARE SUGGESTING TO THIS COURT TO APPLY THAT TO ALL DEFENDANTS IN THE STATE OF FLORIDA.

I AM SAYING IT COULD BE. AT THE MOMENT IT IS LIMPLY -- IT IS SIMPLY APPLIED TO CAPITOL DEFENDANTS, BUT THAT WOULD BE --

IS THAT A PROBLEM?

WE HAVE ALREADY HAD ONE FULL ROUND OF COLLATERAL LITIGATION BY THIS POINT IN TIME. WE DO HAVE A CLEMENCY PROCESS, WHICH IS DESIGNED TO PICK UP ISSUES WHICH THE COURTS ARE NOT THE BEST VENUE TO HAVE AIRED. ALL I CAN SAY IS IT HAS WORKED WITHIN THE FEDERAL SYSTEM, SINCE IT WAS ENACTED IN 1996.

AND ISN'T THE VERY REASON THE STATE, THE FEDERAL SYSTEM WENT TO WHAT IT DID, BECAUSE WHAT WAS HAPPENING IS STATES WERE ALMOST -- EVERYONE WAS SAYING WE WILL TAKE CARE OF IT IN FEDERAL COURT, AND FEDERAL COURT WAS BECOMING THE DUMPING GROUND, AND THE PHILOSOPHY OF THE FEDERAL ACT IS TO SAY, NO, THIS TYPE OF LITIGATION MUST GO ON IN THE STATE COURTS, AND DOESN'T THAT MAKE IT MORE IMPORTANT, BECAUSE OF THE CLOSING OF THE DOOR FOR FEDERAL HABEAS, THAT STATE HABEAS, GUARANTEED BY THE CONSTITUTION, REMAINS VITAL, FOR THOSE CLAIMS, SUCH AS ACTUAL INNOCENCE, CLAIM OF INELIGIBILITY FOR THE DEATH PENALTY, A VIOLATION OF A FUNDAMENTAL CONSTITUTIONAL RIGHT THAT HAS RETROACTIVE EFFECT. PROSECUTORIAL MISCONDUCT, WHERE THERE HAS BEEN AN ACTUAL SUPPRESSION OF THE EVIDENCE, ACTUAL JUDICIAL BIAS, WHICH HAS OCCURRED IN PORTER, IMPORTANT RIGHTS THAT ARE BASED IN THIS COURT'S JURISPRUDENCE, THAT ARE JUST ERASED BY THE ACT THAT IS BEFORE US?

I DON'T SEE IT THAT WAY, BECAUSE, AGAIN, WE ARE READING -- WE HAVE TO REMEMBER THAT THIS PROVISION COMES INTO EFFECT AFTER THERE HAS BEEN A FULL ROUND OF STATE AND FEDERAL LITIGATION. AND OBVIOUSLY IN PASSING THIS, THE LEGISLATURE, AS WELL AS THE MORRIS COMMISSION, FELT THAT THE JONES STANDARD FOR NEWLY-DISCOVERED EVIDENCE WAS TOO LOW.

BUT EVEN THE MORRIS COMMISSION HAS THE CLAIM OF INELIGIBILITY FOR THE DEATH PENALTY AND HAS THE CLAIM OF INNOCENCE, WITHOUT IT BEING TIED TO A CONSTITUTIONAL RIGHT, SO THOSE ARE VERY SIGNIFICANT DIFFERENCES, AREN'T THEY?

WELL, CONGRESS DOES NOT HAVE INNOCENCE OF THE DEATH PENALTY AS PART OF THE FEDERAL LEGISLATION, EITHER, AND, AGAIN, I THINK THOSE ARE CHOICES WHICH THE LEGISLATURE CAN MAKE, BASED ON ITS AUTHORITY TO SET SUBSTANTIVE LAW, AND BASED ON THE FACT THAT

THERE HAS BEEN NUMERABLE DELAYS IN SUCCESSIVE PETITIONS IN THIS STATE. THIS IS A DECISION WHICH THEY CAN MAKE. IT IS NOT ONE THEY CRAFTED OUT OF WHOLE CLOTH. IT IS ONE THAT CAME FROM FEDERAL PRECEDENT, WHICH HAS BEEN FOUND CONSTITUTIONAL AND APPLIED THROUGHOUT THE COUNTRY.

JUSTICE SHAW HAD ANOTHER QUESTION. I CUT HIM OFF. I AM SORE I.

I RECOGNIZE THAT IT IS YOUR POSITION TO DEFEND THE ACT, AND I APPRECIATE THAT, BUT IS IT THE STATE OF FLORIDA'S POSITION THAT, IF DNA ACTUALLY PROVED A PERSON INNOCENT, THAT UNLESS IT IS COUPLED WITH CONSTITUTIONAL ERROR, THE STATE WOULD GO AHEAD AND EXECUTE HIM?

WELL, YOUR HONOR, I DO BELIEVE THAT THIS ACT PROVIDES ENOUGH PROCEDURAL SAFEGUARDS TO DEAL WITH THAT, BECAUSE IT HAS PROVISIONS THAT SPECIFICALLY ALLOW A DEFENDANT TO BRING A CLAIM OF EVIDENCE OF THAT TYPE WITHIN, I BELIEVE, 90 DAYS OF ITS DISCOVERY, AND CERTAINLY A DEFENDANT WHO HAS THAT TYPE OF --

I AM NOT SURE. HOW DO YOU READ THAT LANGUAGE? WHAT DOES THAT LANGUAGE MEAN TO YOU THEN? IT MEANS, TO ME, THAT IT HAS TO BE COUPLED WITH CONSTITUTIONAL ERROR. AM I WRONG?

NO, SIR. BUT, AGAIN, ALL OF THE FEDERAL DEFENDANTS WHO HAVE SOUGHT TO FILE SUCCESSIVE PETITIONS HAVE HAD A CLAIM TO COUPLE WITH THEIR INNOCENCE CLAIM, AND I DON'T THINK THAT IT IS INCONCEIVABLE THAT A FLORIDA DEFENDANT WOULD HAVE, TOO.

BUT THAT IS BASED ON A STATE PROCESS, ISN'T IT?

AT LEAST ONCE.

THEY HAVE GONE THROUGH THE STATE PROCESS, AND THAT ISSUE HAS BEEN DETERMINED BY THE STATE COURT. ISN'T THAT THE RATIONALE?

THEIR CLAIM THAT THEY WANT TO HAVE REVIEWED COULD BE ANY ONE OF THEIR CLAIMS. IT IS SIMPLY COUPLED WITH THE ACTUAL INNOCENCE TO GET THEM THERE.

I TAKE IT THE PROBLEM THAT WE ARE STRUGGLING WITH IS THE, SORT OF THE SAME PROBLEM THAT WAS OUTLINED AS LONG AGO AS WHITT, AND THAT IS THIS PROBLEM OF DEALING WITH FINALITY ON KIND OF BOTH SIDES, HERE, THE FINALITY OF THE DEATH PENALTY BUT, ALSO, TRYING TO COME TO GRIPS WITH THE FACT, WHICH HAS DEVELOPED IN THE 20 YEARS SINCE WHITT, THAT SUCCESSIVE MOTIONS CAN BECOME THE EXCEPTION THAT CONTROLS POSTCONVICTION. DOES THE STATE HAVE ANY OTHER SUGGESTIONS ALONG THAT LINE, AS TO WHAT CAN BE PUT INTO A RULE? DOES THE STATE IN FAVOR OF SETTING ASIDE, AND WE WILL TALK ABOUT IT LATER, I KNOW, BUT THE TYPE OF ANALYSIS THAT THE MORRIS COMMITTEE PROPOSED, AS FAR AS SUCCESSIVE MOTIONS?

I COULD PASS ALONG WHAT THE SUPREME COURT SAID IN HERRERA, WHICH IS IT WAS THEIR EXPECTATION THAT CLAIMS OF ACTUAL INNOCENCE WOULD BE VERY FEW. UNFORTUNATELY THAT HASN'T BEEN THE CASE, SINCE THIS BECAME A COGNIZABLE CLAIM OPPOSE THE CONVICTION, BUT ON THE OTHER HAND, I DON'T BELIEVE THAT THEY WERE JUST KNIFE WHEN THEY SAID THAT, BUT THEY BELIEVED THAT, THROUGH THE FORCE OF VIGOROUS CAPITAL COLORADO LATERALIZATION, THAT THAT WOULD BE FERRETED OUT, AND AT A STATE COURT WE HAVE ALREADY HAD AN EVIDENTIARY HEARING AT WHICH A CLAIM OF INNOCENCE WOULD BE COGNIZABLE AND THAT WOULD BE PASSED ON AND IN THE FEDERAL AND DISTRICT COURT, THAT WOULD BE SCRUTINIZED, SO AS YOU SAY, WE ARE TRYING TO SEE AWAY THAT THE EXCEPTION DOESN'T RULE THE ROOST COMPLETELY, IN THIS RESPECT.

BUT THE WHOLE IDEA OF SUBSEQUENT BRADY CLAIM OR NEWLY-DISCOVERED EVIDENCE, IS THAT BECAUSE OF SOMETHING NOT ATTRIBUTABLE TO THE DEFENDANT, SOMETHING THAT THEY WOULD HAVE WANTED TO HAVE AT TRIAL, WASN'T AVAILABLE, IN A BRADY, IT WAS THE OBLIGATION OF A PROSECUTION THAT WASN'T -- OR THE LAW ENFORCEMENT AGENCIES, THE NEWLY-DISCOVERED EVIDENCE, THE ISSUE THAT THIS EVIDENCE COULD NOT HAVE BEEN DISCOVERED, WITH THE EXERCISE OF REASONABLE DILIGENCE BEFORE, SO THAT WE, ALREADY, HAVE THAT BAR THAT, ALTHOUGH WE HAVE A LOT OF SUCCESSIVE MOTIONS, THE TRUTH OF THE MATTER IS VERY FEW OF THOSE SUCCESSIVE MOTIONS ARE SUCCESSFUL, BUT WE ARE, NOW, LOOKING AT A SITUATION AND A CONCERN THAT, WHERE THE CLAIM IS ONE OF ACTUAL INNOCENCE, THAT RATHER THAN SAY, WELL, MAYBE THE SYSTEM WILL WORK. MAYBE THERE WILL BE CLEMENCY OR MAYBE THERE WILL BE THAT, SHOULDN'T THE DUE PROCESS RIGHTS THAT ARE GRANTED BY THIS CONSTITUTION AND THE RIGHT OF HABEAS BE THE WAY THAT THOSE CLAIMS ARE PRESENTED? BUT -- SO THAT WE DON'T, WHILE WE HAVE, MAYBE, ABUSES THAT ARE OCCURRING IN THE SYSTEM, IN OUR RULES SUPPOSEDLY SAYS, ALLOWS A JUDGE THAT, IF IT IS A SUCCESSIVE MOTION AND THEY FIND THERE WAS ABUSE, TO STRIKE THE PLEADING, SO WE HAVE GOT THAT, BUT TO SAY, WELL, BECAUSE WE HAVE THIS SUCCESSIVE MOTIONS, WHAT WE ARE GOING TO DO IS MAKE THE STANDARD FOR RELIEF SO HIGH THAT EVEN IF THERE IS ACTUAL INNOCENCE, WE ARE GOING TO REQUIRE THE COURTS TO IGNORE IT, SEEMS TO ME, TO BE A YOU KNOW, THE WRONG WAY TO ATTACK A PROBLEM OF DELAY.

BUT THE INNOCENCE IS YOUR GATEWAY INTO THE COURT. THE COURT IS ALWAYS GOING TO HEAR IT. I MEAN I GUESS THE WAY IT IS DRAFTED, THOUGH, IT IS KIND OF STRANGE. THE TAG ALONG ISSUE ALMOST SEEMS TO BE BECOMING MORE IMPORTANT THAN THE INNOCENCE, BECAUSE THE NBS WILL GO BE THERE -- THE INNOCENCE WILL BE THERE, AND THAT WILL GIVE THE COURT THE JURISDICTION TO HEAR IT.

TELL ME WHAT WE ARE ASKING FOR.

I AGREE WITH JUSTICE PARIENTE, THAT THE WORST SCENARIO WOULD BE IF THE EVIDENCE WAS SUPPRESSED ALL ALONG. I WOULD THINK THAT THAT WOULD GIVE YOU YOUR CONSTITUTIONAL BRADY CLAIM THAT WOULD GET YOUR HEARING ON YOUR INNOCENCE. THAT WOULD GET YOUR CONSTITUTIONAL VIOLATION AND THAT WOULD --

THAT WOULD BE THE BRADY STANDARD. IS THE BRADY STANDARD CHANGED, UNDER THE DEATH PENALTY REFORM ACT? DOES IT PURPORT A CHANGE, NUMBER ONE? TWO, CAN IT DO IT, BECAUSE BRADY IS CONSTITUTIONALLY CONSTITUTIONALLY-BASED. YOU KNOW, THE KYLE STANDARD OF MATERIALITY?

NO. IT DOESN'T CHANGE AT WHICH TIME YOU HAVE THE THRESHOLD, BUT ONCE YOU ARE BEFORE THE COURT, THE TRADITIONAL CASE LAW WOULD APPLY.

SO THE JONES CASE ON NEWLY-DISCOVERED EVIDENCE HAS CHANGED BUT NOT BRADY AND JULIO. THEY WOULD HAVE TO REMAIN WHATEVER THEY ARE RIGHT NOW, UNDER THE LAW.

WOULD YOU ADDRESS WHAT IS RAISED BY PETITIONERS REGARDING THE JANUARY 8, 2001, FILING DEADLINE AND THE CASES IN THE PIPELINE THAT HAVE -- ARE IN THE APPELLATE PROCESS, AND NO COUNSEL HAS BEEN APPOINTED?

YES, SIR. THESE ARE THE PIPELINE CASES, AND AS COUNSEL HAS INDICATED, THERE ARE APPROXIMATELY 85 OF THEM. THEY ARE IMPORTANT, BUT THEY CAN'T SKEW WHAT WE ARE GOING TO DO, IN REGARD TO THE ENTIRE 367 CAPITAL CASES, APPROXIMATELY, THAT WE HAVE NOW. CERTAINLY WHEN THE LEGISLATURE SETS THAT DEADLINE, THEY DID NOT CONTEMPLATE ANY SPECIFIC TOLLING BY THIS COURT, WHICH HAS OCCURRED. THERE HAS BEEN SOME DISCUSSION OF EQUITABLE TOLLING, AND I JUST HAVE TO BE VERY CAREFUL WHAT I SAY ABOUT

THIS, BECAUSE I ONCE WENT INTO FEDERAL COURT AND STATED THE TRUTH, THAT THERE WERE IN COMPLETES, THREE OF THOSE BEING FILED IN THE STATE.

STATED THE TRUTH OF WHAT?

THAT THERE WERE INCOMPLETE 3.8 50s BEING FILED IN THE STATE, AND EVER SINCE THEN I HAVE BECOME THE FATHER OF SHELL MOTIONS, WHICH I DISAVOW THE PATERNITY OF THAT THE. BUT IN ANY EVENT, NO AGENCY OF GOVERNMENT IS SEEKING TO CUTOFF THIS COURT'S EQUITABLE POWERS, AND CERTAINLY WITHIN THE COURSE OF THE TRANSITION TO THIS ENTIRE SYSTEM, IF THIS COURT DEEMS IT APPROPRIATE THAT THOSE PIPELINE CASES RECEIVE A DEADLINE THAT IS MORE IN ACCORDANCE WITH THE TIME EVERY OTHER INMATE HAS, THE STATE IS NOT GOING TO ARGUE THAT YOU SHOULDN'T DO THAT.

ARE WE -- SO I UNDERSTAND THAT THESE CASES ARE BEING, HAVING A COUNSEL APPOINTED, AT THIS POINT, BY THE TRIAL COURTS, UNDER THE ACT, ON IS THAT -- YOU INDICATE THAT THAT HAS BEEN TOLLED?

I BELIEVE THAT HAS BEEN TOLLED. I THINK THERE WERE ARRANGEMENTS FOR A COUPLE OF CASES, RIGHT AFTER THE STATUTE WAS PASSED, BUT I DON'T BELIEVE THOSE POINTS HAVE GONE FORWARD.

IS IT YOUR POSITION, THEN, THAT WE NEED TO TAKE THAT MATTER UP ON A CASE BY CASE SPECIFIC BASIS?

YES, SIR.

LET ME MOVE YOU TO A, THE MATTER WE STARTED OFF THE MORNING WITH MR. MINERVA ABOUT, AND THAT IS THIS PART OF THE STATUTE, WHICH, NOW, PUTS UPON THE COMMISSION, A CASE MANAGEMENT RESPONSIBILITY, BUT WHAT IS THE STATE'S POSITION ON HOW THESE CASES CAN BE CASE MANAGED? ONE OF THE THINGS THAT HAS OCCURRED, TO ME, IN MY SIX YEARS ON THIS COURT, AND I HAVE SPOKEN ABOUT IT IN OPINIONS AND FROM THE BENCH, SEVERAL TIMES, AND THAT IS THAT THE STATE HAS A RESPONSIBILITY IN SEEING THAT THESE MATTERS BE TIMELY HEARD, AND WHAT IS THE ATTORNEY GENERAL'S OFFICE DOING, IN THIS AREA OF GOING BACK, IN COOPERATION, PERHAPS, WITH THE COMMISSION, AND LOOKING AT EACH CASE, AND COMING TO A DETERMINE NATION AS TO WHY THAT CASE HAS BEEN IN THIS SYSTEM SO LONG? IS THE ATTORNEY GENERAL ATTEMPTING TO DO THAT?

WELL, I KNOW THAT, WHEN THE MORRIS COMMISSION FIRST CAME OUT, WE VERY MUCH AGREED WITH THEIR RECOMMENDATIONS OF THE PERIODOTIC STATUS CONFERENCES TO KEEP THE CASE ON TRACK. THAT IS NOT REALLY A.AL PART OF THE LEGISLATION, BUT, REALLY, WHAT IS IN THE LEGISLATION, IS THE CIRCUIT COURT'S LACK OF ABILITY TO EXTEND THE FILING DEADLINE, WHICH, IN EFFECT, WILL FORCE THE CASES TO BE TIMELY. AS I SAID, OUR BIGGEST PROBLEM IS IN THE BEGINNING. ONCE WE GET THE FULLY-PLED MOTION, WE CAN GO FROM THERE, AND THAT IS NOT USUALLY WHERE THE DELAYS HAPPEN IN THE POSTCONVICTION PROCESS FORM THE DELAYS ARE IN GETTING THAT MOTION, WHICH LITERALLY TAKES YEARS AND YEARS AND YEARS TO GET, AND BOTH THE THING THAT THE LEGISLATION AND THE MORRIS COMMISSION AGREE ON IS THAT PUBLIC RECORDS IS NOT AN IPSA FACT-MADGE -- IPSA FACTO MAGIC WORD, AND IF THAT IS FULLY ENFORCED, THAT WILL HAVE THE SINGLE LARGEST EFFECT IN KUTH DOWN --

WHAT I SUGGEST IS THAT EACH ONE OF THESE PEOPLE THAT IS ON DEATH ROW HAS A SPECIFIC HISTORY OF THEIR CASE, AND WE OUGHT TO ATTACK THIS PROBLEM.

RIGHT.

THAT WE HAVE, ON THE BASIS OF LOOKING AT WHAT HAS HAPPENED IN THOSE INDIVIDUAL

CASES, TO SEE WHAT THE COMMON PROBLEM IS, AND, THEN, ATTACK THAT, AND I WANT TO -- WHAT HAVE WE DONE TO COME UP WITH THAT INFORMATION? WEEL, I DO KNOW, I BELIEVE THAT, THE CIRCUIT JUDGES ARE STILL SUPPLYING THIS COURT WITH, WHAT IS IT QUARREL OR MONTHLY REPORTS?

QUARREL.

IT WOULD BE HELPFUL IF WE RECEIVED THOSE, ALSO, BECAUSE WE WOULD BE MORE THAN HAPPY TO ASSIST THE COURT. THE COURT WOULD HAVE PERIODIC STATUS CONFERENCES, MAYBE NOT WITHIN THE CONTEXT OF THE CASE BUT BY LEGREGION. IN OTHER WORDS WITH THE CCR COUNSEL AND WITH REPRESENTATIVES OF THE ATTORNEY GENERAL'S OFFICE AND THIS COURT AND, POSSIBLY, TELEPHONICALLY WITH THE JUDGE OR THE CHIEF JUDGE, JUST TO SEE TO IT THAT THE CASES ARE NOT FALLING THROUGH THE CRACKS, BECAUSE I AGREE WITH YOU THAT THAT IS THE WORST PROBLEM, BUT THE PROBLEM IN THE BEGINNING IS THAT NOBODY REALLY KNOWS WHAT THE DEADLINE IS. AT PRESENT WE HAVE BEEN OPERATING WITH THE YEAR FROM FINALITY, BUT THAT GETS TOLLED. THAT GETS EXTENDED. THE DEFENDANT COME IN AND SAY, UNDER THE SUPREME COURT PRECEDENT, YOU CAN'T HOLD ME TO A DEADLINE UNTIL I HAVE EVERY SINGLE PUBLIC RECORD. THE JUDGES DON'T FEEL COMFORTABLE TRUMPING OR OVERRULING THAT, SO THEY DON'T, SO IT GOES OFF WITHOUT A SPECIFIC TIME LIMIT, BUT WE HAVE A PARTIALLY PLED MOTION, AND YOU HAVE SAID BECAUSE IN THIS CASE YOU HAVE GOT RECORDS, SO YOU GET ANOTHER 60 DAYS TO AMEND. THAT IS TAKEN TO BE THAT THERE WOULD BE AN ENTITLEMENT OF RIGHTS, OF 60 DAYS, ON AN AMENDMENT.

THERE IS ENOUGH BLAME TO GO AROUND, BUT IN PUBLIC RECORDS, YOU HAVE THE SITUATION THAT, IF THE STATE TOOK THE POSITION THAT THEY WERE GOING TO MAKE SURE ALL THE AGENCIES GAVE THE DEFENDANT WHAT WAS ASKED FOR, THAT WOULD ELIMINATE A LOT OF THE LITIGATION, WOULDN'T IT?

WELL, IN EFFECT, THAT IS WHAT IS GOING ON IN CIRCUIT COURTS THROUGHOUT THE STATE, BUT, AGAIN, BECAUSE WE HAVE NEVER REALLY HAD A CONSISTENT RULE ABOUT THE SPECIFICITY AND RELEVANCY OF PUBLIC RECORDS REQUESTS, WE ARE STILL STUCK WITH ONES WHERE OUR AGENCIES ARE ASKED TO RUN 73 NAMES WITHOUT DATES OF BIRTH OF RELEVANCE THAT NO ONE CAN FIGURE OUT.

HOW LONG DOES -- WOULD YOU SAY THAT, ON AVERAGE, THAT IT TAKES UNTIL, IF IS THERE REASONABLE COOPERATION BUT SOME PROBLEMS FOR PUBLIC RECORDS LITIGATION OR, YOU KNOW, PRODUCTION, HOW LONG DOES THAT TAKE? CAN YOU GIVE ME AN AVERAGE?

NOT REALLY. I WOULD SAY, THOUGH, THAT SINCE WE KIND OF HAVE GENERATIONS OF CASES, I WOULD SAY THAT THE GENTLAINGS CAME AFTER THE REPOSITORY, IS -- THE GENERATION THAT CAME AFTER THE REPOSITORY IS GOING BETTER THAN THE EARLIER GENERATION.

LATER THAN THIS YEAR?

I BELIEVE SO.

SAY SIX MONTHS?

I BELIEVE SO.

WOULD IT MAKE SENSE TO HAVE THE POSTCONVICTION MOTION WHILE THE APPEAL IS PENDING? WOULD IT MAKE SENSE TO HAVE THE PUBLIC RECORDS ASPECT OF THE LITIGATION GO ON WHILE THE APPEAL IS PENDING, BECAUSE THAT SEEMS TO BE YOUR BIGGEST PROBLEM, UNTIL YOU GET TO YOUR FULLY-PLED MOTION, AND THEN HAVE THE DEADLINE BE AS SOON AS THE APPEAL COMES DOWN, HAVE THE MOTION? THAT WOULD, THEN, ELIMINATE THE PROBLEM WITH THOSE

CASES THAT ARE REVERSED, AND IT WOULD SAVE THE ATTORNEY GENERAL'S OFFICE TIME IN LITIGATING THOSE, BUT THE BIGGEST, WHAT SEEMS TO BE THE BIGGEST PROBLEM IN GETTING THESE TO A PLACE WHERE THEY ARE FULLY PLED MIGHT BE ELIMINATED. HOW WOULD THAT BE, AS A LOGICAL WAY THAT WOULD SAVE TIME BUT -- WOULD SAVE TIME IN THE PROCESS BUT, ALSO, BE EFFICIENT OVERALL?

WELL, I THINK THAT IS WHAT THE LEGISLATION CONTEMPLATES.

THEY CONTEMPLATE THAN WHEN YOU HAVE TO FILE YOUR POSTCONVICTION MOTION FULLY PLED?

SIX MONTHS AFTER THE INITIAL BRIEF.

AND SO, IF THE BEST OF EVERYTHING GOES ON, AND SOMEBODY IS LITIGATING PUBLIC RECORDS FOR SIX MONTHS FROM THE DATE THE FINAL JUDGMENT, YOU KNOW, MAYBE YOU GET THERE, AND THAT CREATES THAT TENSION, AND THEN THE PROBLEM I SEE IS THAT, ALTHOUGH I UNDERSTAND THERE HAS GOT TO BE A DIFFERENCE BETWEEN A SHELL MOTION, BUT MY QUESTION, WITH THE FULLY PLED, IS WHAT WE SEE IS A LOT OF APPEALS COME UP HERE IN SUMMARY DENIALS OR THINGS THAT YOU SAY HOW COULD THE TRIAL -- WHY DID THIS HAPPEN? WHY WAS THIS NOT ALLOWED BACK THEN? AND I AM CONCERNED THAT WE WILL SEE A HOST OF CASES THAT ARE DISMISSED, BECAUSE THEY ARE NOT FULLY PLED, AND THAT THAT IS GOING TO END UP DELAYING THINGS EVEN FURTHER, BECAUSE THE FULLY-PLED REQUIREMENTS COULD BE, WELL, IF YOU DIDN'T ATTACH THAT AFFIDAVIT AND YOU HAD THAT WITNESS, YOU DIDN'T FULLY PLEAD IT, AND SO IT HIS MIND BOGGLING WHAT ALL THE -- WHAT THAT COULD CREATE, SO I GUESS THAT IS WHAT I AM LOOKING TO IS NOT MAKING THIS, NOT ONLY NOT DRACONIAN, BECAUSE IT IS NOT FAIR TO THE DEFENDANT, BUT FOR THE PROCESS, IT MAY MAKE THE PROCESS MORE IN EFFICIENT, BY CREATING ALL OF THESE OTHER TECHNICALITIES THAT YOU WILL FEEL OBLIGATED. YOUR OFFICE WILL FEEL OBLIGATED. I HAVE GOT TO FILE A MOTION TO DISMISS BECAUSE OF THIS. BUT THEN WE END UP REVERSING IT, TWO YEARS DOWN THE ROAD.

I THINK, TO THE EXTENT THE COURT WILL BE ADOPTING RULES, AND WE HAVE ALL RECOGNIZED THAT THIS IS GOING TO MOST LIKELY OCCUR IN A NUMBER OF CIRCUMSTANCES, I AM SURE THAT YOU WILL DO IT AS CLOSE TO THE MIDDLE AS YOU POSSIBLY K AT THE MOMENT WE HAVE NOTHING, AS FAR AS THE MOTIONS ARE CONCERNED, AND YOU KNOW, THE STATE CAN'T MAKE AN INTELLIGENT RESPONSE TO A SHELL MOTION, AND A JUDGE CAN'T MAKE AN INTELLIGENT RESPONSE AS TO WHETHER OR NOT TO HAVE A HEARING, SO HAVING VARIOUS TIME FRAMES RUNNING WHILE THIS AMBIGUITY OCCURS, SERVES NO ONE, SO BOTH -- I MEAN, I WOULD POINT OUT, THOUGH, THAT IN DEFINING A FULLY-PLED MOTION, THE LEGISLATURE TOOK, ALMOST ENTIRELY FROM THE MORRIS COMMISSION, AND THOSE WERE EXPERIENCED JUDGES WHO REGARDED THIS AS POSSIBILITIES, REASONABLE POSSIBILITIES FOR CAPITAL DEFENDANTS TO COMPLY WITH.

WHAT IS THE STATE'S POSITION, WITH REFERENCE TO THE CONNECTION BETWEEN THE PUBLIC RECORDS DISCLOSURE AND THE FILING OF THE INITIAL FIRST FULLY-PLED PETITION, AS WE ARE CALLING? THAT IS WHAT -- OBVIOUSLY THE FIRST OBLIGATION OF POSTCONVICTION COUNSEL IS TO INVESTIGATE. IS THAT CORRECT?

CORRECT.

WOULD YOU ASSUME THAT PUBLIC RECORDS PRODUCTION WOULD BE AN ESSENTIAL INGREDIENT, THAT THAT INVESTIGATION?

IT HAS BECOME THAT.

AND WOULDN'T -- ORDINARYLY WE CONDEMN PEOPLE WHO FILE PETITIONS, BEFORE THEY HAVE

MADE A PROPER INVESTIGATION. IS THAT RIGHT?

NO. THAT IS CORRECT. AND WE ARE --

SO WHAT WOULD THE STATE'S SCHEME BE, WITH REFERENCE TO PUBLIC RECORDS PRODUCTION, CONNECTED TO THE OBLIGATION OR DEADLINES FOR FILING THAT FIRST MOTION?

WELL, I THINK THE LEGISLATURE HAS SET THE MATTER ALREADY, AND THE PROCESS WILL BE BEGINNING VERY SHORTLY AFTER IMPOSITION OF THE DEATH SENTENCE, WHICH WILL UTILIZE WHAT HAS TRADITIONALLY BEEN DEAD TIME, WILL HAVE THE APPOINTMENT OF COLLATERAL COUNSEL, AND COLLATERAL COUNSEL WILL HAVE ACCESS TO PUBLIC RECORDS IN THE REPOSITORY, AND THAT WILL ENHANCE HIS OR HER ABILITY TO FILING WITHIN THE 3.850. PRETTY MUCH THE LEGISLATURE PUTS IT AS EARLY AS THEY POSSIBLY CAN, AND THEY THINK IT IS -- AND WE THINK IT IS WORKABLE AS IT IS SET OUT OO. MY QUESTION IS, WOULD YOU EXPECT A PETITION TO BE FILED, BEFORE THE PUBLIC RECORDS DISCLOSURE HAS BEEN COMPLETEED?

WELL, YOU KNOW, PUBLIC RECORDS HAVE GOTTEN TO REPLACE DISCOVERY. THEY HAVE BEEN -- AND WE USE THE TWO TERMS INTERCHANGEABLY. THE FACT TAKE THAT A DEFENDANT MAY NOT GET EVERY PUBLIC RECORD THAT HE OR SHE PERCEIVES IS RELEVANT IS CERTAINLY NECESSARY FOR THE DEFENSE.

LET'S SAY THAT YOU REPRESENT THE DEFENDANT, AND YOU ARE GOING TO DO THIS INVESTIGATION. NOW, WHAT WOULD YOU EXPECT AS REASONABLE, IN TRYING TO TAKE BOTH SIDES OF THIS, SO THAT WE CAN COME UP WITH A BALANCED SCHEME? WHAT INVESTIGATION, INSOFAR AS PUBLIC RECORDS IS DISCLOSED, YOU, AS A LAWYER, GOOD FAITH, REPRESENTING A DEFENDANT, WHAT INVESTIGATION WOULD YOU WANT COMPLETED, BEFORE YOU FELT IT WAS REASONABLE TO EXPECT YOU TO FILE THIS POSTCONVICTION, IN TERMS OF PUBLIC RECORDS PRODUCTION?

WELL, UNDER A PRIOR VIRINGS OF 3.-- UNDER A PRIOR VERSION OF 3.852, THIS COURT HAD DIVIDED THE VARIOUS AGENCIES INTO TIERS, AND I WOULD EXPECT THAT ANYONE REPRESENTING SOMEONE ON COLLATERAL ACTION WOULD NEED THE RECORDS FROM THE STATE ATTORNEY AND ALL OF THE LAW ENFORCEMENT AGENCIES INVOLVED, AT A MINIMUM.

SO YOU WOULD EXPECT THAT TO BE COMPLETED.

YES, SIR.

BEFORE A PETITION WOULD BE EXPECTED TO BE FILED.

YES, SIR.

OKAY. WHAT ABOUT THE SITUATION WHERE IT TURNS OUT THAT SOME OF THE PUBLIC RECORDS WERE NOT PROVIDED OR DISCLOSED, AND THERE IS, ALREADY, A PLED PETITION, AND NOW THERE IS AN ALLEGATION THAT THERE IS A DISCOVERY OF NEW RELEVANT MATERIAL IN PUBLIC RECORDS PRODUCTION, AFTER THE FILING OF THE INITIAL PETITION? WHAT SHOULD THE RULE BE, ABOUT ALLOWING AMENDMENTS, IF SOMETHING IS DISCOVERED IN SUBSEQUENT PUBLIC RECORDS DISCOVERY?

THE LEGISLATION DOESN'T CONTEMPLATE AMENDMENTS. I WOULD THINK, IF THIS COURT WERE AT ALL INCLINED TO DO IT, THEY SHOULD BE -- THERE SHOULD BE A VERY HIGH SHOWING OF VERY WELL VAENS -- OF RELEVANCY AND NECESSITY. IT SHOULDN'T BE I BELIEVE THERE IS MORE RECORDS IN THE LEON COUNTY SHERIFF'S --

I AM TALKING ABOUT AFTER THE EVENTUAL PRODUCTION AND THE DISCOVERY AND SOMETHING

IN THERE THAT WOULD GIVE RISE, FOR INSTANCE, TO A BRADY CLAIM OR WHATEVER. SHOULD THERE BE AN AMENDMENT ALLOWED, IF THERE HAS BEEN SOMETHING LIKE THAT DISCOVERED AFTERWARDS?

AGAIN, THE LEGISLATION DOESN'T CONTEMPLATE THAT. I WOULD THINK, THOUGH, THAT THE JUDGES WILL HAVE TO MAKE A DECISION ON A CASE BY CASE BASIS, WHETHER THIS IS SOMETHING THAT THE LEGISLATURE WOULD PREFER COMES AS A SUCCESS I HAVE MOTION, AS -- AS A SUCCESSIVE MOTION AS OPPOSED TO AN ORIGINAL, BUT IF IT IS SOMETHING THAT WE COMPLY IN THE BEGINNING, WE SHOULDN'T ASSUME AUTOMATICALLY THAT THESE RECORDS WILL CREEP IN, BECAUSE THESE RECORDS, OVER THE YEARS, HAVE NO EVIDENCE WHATSOEVER, AND SOMETHING IN THE POSTCONVICTION PROCESS IS GOING TO HAVE TO BE SOMETHING THAT RAISES A REASONABLE LIKELIHOOD OF RELIEF AND NOT SIMPLY SOMETHING FOR COMPLETENESS, COUNSEL WOULD LIKE TO HAVE RECORDS EVER CONTACT WITH EVERY CORRECTION OFFICER WHILE THE DEFENDANT IS INCARCERATED.

LET ME BE SURE THAT WE HAVE IT CLEAR HERE. WHEN IS IT THAT THE STATE IS REPRESENTING, NOW, THAT IT FEELS THAT IT WOULD BE OBLIGATED, DESPITE THE PREVIOUS STATUTORY SCHEME AND OUR DECISION IN KOKLE, WHEN IS IT THAT THE STATE SAYS, NOW THAT, THE TRIGGERING OF ITS OBLIGATION TO HE UP ITS RECORDS WOULD OCCUR? IN THE STATE'S REPRESENTATION TO US NOW?

WE ARE FOLLOWING STATUTE. THE SCHEDULE THAT THE STATUTE SETS FORTH FOR DISCLOSURE OF RECORDS IS THE SCHEDULE THAT WE WILL FOLLOW.

WHAT WOULD THAT BE? IN OTHER WORDS WHEN IS THAT EVENT OR THAT DATE THAT THE STATE SAYS, NOW WE HAVE TO OPEN UP OUR RECORDS OF THE STATE ATTORNEYS OFFICE, THE POLICE AGENCIES, AND ALL OF THE OTHERS? WHEN WILL THAT OCCUR NOW? I BELIEVE THE PROSECUTION --

I BELIEVE THE PROSECUTION DOES IT WITHIN 60 DAYS OF THE RECORDS.

WHAT ABOUT THE EXEMPT RECORDS, RECORDS THAT ARE CLAIMED EXEMPT?

THE, I BELIEVE, I WILL DEFER TO THE ACTUAL WORDING OF THE STATUTE, BUT THEY WOULD BE REQUIRED TO BE SUBMITED FOR IN CAMERA OR EXEMPTION, AS CLAIMED WITHIN THAT TIME PERIOD, AS WELL.

IS THE STATE STILL CLAIMING AN EXEMPTION, AS WE RULED IN KOKLE, THAT WOULD NOT END UNTIL THE END OF THE APPEAL, UNTIL THE END OF THE APPEAL BECAME FINAL. WHEN WOULD IT OCCUR, UNDER THE STATE'S VIEW?

IT COULD HAVE OTHER EXEMPTIONS, UNRELATED TO THE PENDENCY OF THE APPEAL.

YOU DID SAY, THIS HOUR, THAT WE WOULD HAVE TO CONSTRUE THE EXEMPTION TO MEAN THIS HE NOW HAVE TO -- TO MEAN THEY NOW HAVE TO PRODUCE THOSE RECORDS THAT OTHERWISE WOULDN'T HAVE HAD TO HAVE BEEN PRODUCED DURING THE 6 ON-DAY APPEAL PERIOD.

THAT'S CORRECT.

LET ME ASK YOU ANOTHER QUESTION ABOUT THE TOLLING OF THE DEADLINES SET IN THE LEGISLATION. THE LEGISLATION DOES NOT GIVE THE COURT ANY DISCRETION ABOUT THE TOLLING OF DEADLINES. IS THAT CORRECT?

THAT'S CORRECT, SIR.

WHAT IF ANDREW HIT AND DESTROYED A LAWYER'S OFFICE, WHO WAS PREPARING A FULLY-PLED MOTION IN POSTCONVICTION RELIEF? AND THERE WOULD BE NO PROVISION, THEN, FOR TOLLING OF THE DEADLINE FOR HIM TO RECANT YOUR THE RECORD AND START OVER AGAIN?

WELL, AGAIN, THAT WOULD BE SOMETHING THAT WOULD BE LITIGATED ON A CASE BY CASE BASIS.

BUT THE STATUTE IS VERY CLEAR THAT THERE IS NO TOLLING. AND SO YOU AREY ISING THAT, REGARDLESS OF WHAT THE -- AND SO YOU ARE SAYING THAT, REGARDLESS OF WHAT THE STATUTE SAYS, THE COURT STILL HAS DISCRETION IN GRANTING AN EXTENSION TO ENSURE THAT MANIFEST JUSTICE IS DONE.

WELL, POSSIBLY AS PART OF YOUR RULES, YOU COULD CONSIDER WHETHER ACTS OF GOD OR SOMETHING COULD ACT UPON THE DEADLINES WHICH ARE SET FORTH IN THE STATUTE.

WHAT ABOUT A FIRE?

THAT WOULD PROBABLY FALL IN THE SAME CATEGORY.

AN ACT OF GOD, IF IT WASN'T BY LIGHTNING?

ALL NATURAL DISASTERS. ANYTHING INVOLVING THE ELEMENTS.

WHAT IF THE ATTORNEY DIED? AND THE NEW ATTORNEY HAD TO BE APPOINTED?

ALL I CAN SAY, YOUR HONOR, IS THAT YOU HAVE BEEN AT THE BENCH FOR YEARS, AND YOU HAVE HEARD A LOT OF PARTIES ARGUE, TO YOU, THAT THE PLAIN MEANING OF A RULE OR THE SEAMINGLY PLAIN MEANING OF A RULE OR STATUTE JUST CAN'T POSSIBLY MEAN WHAT IT SEEMS TO SAY, WITHIN THE CONTEXT OF THEIR CASE, SO YOU WILL HEAR THAT AGAIN.

BUT WE ARE -- I DON'T KNOW THAT THERE IS MUCH DOUBT ABOUT THE PLAIN MEANING OF THAT STATUTE, IS THERE? THAT SECTION?

IT IS NOT CONTEMPLATED THAT THERE WILL BE EXCEPTIONS TO THE FILING TIMES. NO, SIR. BUT I THINK IMPOSSIBILITY IS A CIRCUMSTANCE WHICH COULD BE TAKEN UP.

AND WE HAVE -- WE WOULD, THEN, NOT HAVE BEEN ABLE, UNDER THIS CIRCUMSTANCE, TO TOLL THE FILING OF THESE, WHEN LEGISLATURE BROKE UP THE CCR'S AND THAT HAD TO TAKE PLACE BEFORE THE PEOPLE COULD GET BACK UP? WE WOULD NOT, UNDER THIS STATUTE, HAVE BEEN ABLE TO HAVE GRANTED A TOLLING OF THAT, AND THESE PEOPLE WOULD NOT BE ABLE TO PRESENT THEIR CLAIMS TO THE COURT. IS THAT CORRECT?

WELL, TECHNICALLY THIS DOES NOT HAVE A TOLLING POWER FOR THE COURT, AND I WOULD NOTE NEITHER DO THE MORRIS COMMISSION RECOMMENDATIONS. IT WAS REPRESENTED EARLIER, THAT ALLEGEDLY SOME DEFENDANTS REPRESENTED BY REGISTRY COUNSEL HAD LOST THEIR FEDERAL TIME. THAT IS NOT TRUE. THERE IS NO FEDERAL COURT WHICH HAS SO FAR FAILED TO ENTERTAIN ANY CLAIM ON BEHALF OF A FLORIDA PETITIONER, BASED ON THE INABILITY TO FILE -- FOLLOW A STATE FILING DEADLINE.

DOES IT MAKE ANY DIFFERENCE WHETHER WE TREAT THESE PERIODS AS STATUTES OF LIMITATIONS, AS SUCH, OR ARE THEY STATUTES OF REPOSE? WHAT, EXACTLY, ARE THEY, THESE DEADLINES?

THEY ARE STATUTES OF LIMITATIONS. WE MADE ONE ALTERNATIVE REFERENCE TO REPOSE, WHICH WE SHOULD HAVE EDITED OUT, BUT STATUTE OF LIMITATIONS IS A CONSTRUCTION THAT

THE STATUTORY TIME FRAMES FALL WITHIN, AND UNDER THIS COURT'S CASE LAW, THAT IS PERMISSIBLE FOR THE LEGISLATURE TO DO THAT.

MY CONCERN IS THAT, WITH THIS INFLEXIBILITY, AND YOU SAY, WELL, THE COURTS COULD STILL HAVE EQUITABLE POWERS, THAT YOU GOT A SITUATION WHERE SOMETHING IS TWO DAYS LATE. THE JUDGE DISMISSED, DISMISSES IT ON THE MOTION OF THE ATTORNEY GENERAL. IT, THEN, COMES UP HERE. AREN'T WE, AGAIN, BUILDING IN, BY THE VERY PURPOSE OF THE INFLEXIBILITY, WHICH IS TO REDUCE DELAY, AREN'T WE, BY CREATING MORE, THESE INFLECTIONIBLE REQUIREMENTS, NOT ONLY POTENTIALLY IMPACTING DUE PROCESS BUT, AGAIN, ACTUALLY CAUSING MORE DELAY? AND I GIVE THIS EXAMPLE, YOU KNOW, AS SOMEONE HAD MENTIONED. I HAVE WRITTEN ON IT AND OTHER JUSTICES, THE DELAY THAT I HAVE SEEN UP HERE, THE BIGGEST DILL I HAS BEEN NOT GIVING EVIDENTIARY HEARINGS, AND THE DELAY BEING A YEAR, TWO YEARS, THREE YEARS, FOUR YEARS, WHERE THE RULE HAS BEEN CLEAR TO GIVE AN EVIDENTIARY HEARING, UNLESS THE RECORD IS CLEARLY REFUTED, BUT OVER AND OVER AGAIN COURTS ARE DENYING EVIDENTIARY HEARINGS ON THE REQUEST OF THE ATTORNEY GENERAL'S OFFICE, AND WE HAVE, THERE, THREE OR FOUR YEARS' DELAY, SO MY CONCERN IS SBON IS TAKEN TWO DAYS LATE, AND THAT WILL TURN INTO ANOTHER TWO-YEAR DELAY, SO DOESN'T THERE HAVE TO BE SOME SENSIBILITY TO THIS AND TRAIN PEOPLE THAT ARE ON BOTH SIDES AND THE TRIAL COURT THAT CAN, REALLY, MAKE CASES MOVE ALONG, WITHOUT IMPOSING INFLECTIONIBLE REQUIREMENTS THAT -- INFLECTIONIBLE REQUIREMENTS THAT -- INFLEXIBLE REQUIREMENTS THAT CAUSE DELAY?

ONE OF THE CASES IS MURRAY VERSUS CARRIER, I THINK IT IS, COLEMAN VERSUS THOMPSON. IT CAME FROM VIRGINIA, AND THE U.S. SUPREME COURT UPHELD THE VIRGINIA SUPREME COURT'S FINDING OF PROCEDURAL BAR, BECAUSE THE DEFENSE COUNSEL WAS ONE DAYLIGHT LATE IN FILING HIS STATE -- ONE DAY LATE IN FILING HIS STATE PETITION, AND IT MAY SEEM LIKE A HARSH RESULT, BUT IT IS ONE THAT THE COURT CONCLUDED COULD BE DONE CONSTITUTIONALLY.

WAS THERE AN OPPORTUNITY TO EXPLAIN THE CAUSE OF THE DELAY?

I DON'T RECALL THE CIRCUMSTANCES.

WAS IT DETERMINED THAT IT WAS DILL ATORY TACTICS, ON THE PART OF --

NO. I THINK IT WAS ACCIDENTAL. I HAVEN'T REREAD IT, BUT I DO KNOW THOSE ARE THE FACTUAL CIRCUMSTANCES.

ONE OF THE WAYS THAT THE SYSTEM CAN WORK IS IF THERE ARE ADEQUATE RESOURCES. YOUR OFFICE HAS REQUESTED HOW MUCH, IN THE WAY OF ADDITIONAL RESOURCES, IN ORDER TO BE ABLE TO RESPOND TO THE, WHAT COULD BE A DOUBLING OF POSTCONVICTION MOTIONS, AT A MUCH EARLIER STAGE. HAVE YOU CALCULATED WHAT THAT ADDITIONAL MANPOWER OR WOMAN POWER, PEOPLE POWER WOULD BE?

LIKE MS. SPAULDING, I AM NOT REALLY INVOLVED IN THE BUDGETARY PROCESS OF MY OFFICE, BUT I CAN TELL YOU THAT THE LEGISLATURE, OR AT LEAST ONE HOUSE, ISAL GAIT A. INDICATINGS -- IS ALLOCATING $5.8 MILLION TO THE REGISTRY, TO SEE TO IT THAT COUNSEL WILL BE AFFORDED TO THESE INDIVIDUALS, AND MR. MOSS HAS WRITTEN A LETTER, WHICH WE WILL FILE WITH THIS COURT, INDICATING THAT THERE ARE 122 ATTORNEYS ON THE REGISTRY, PRESENTLY, EVEN WITHOUT ANY ADDITIONAL BEING HIRED, DUE TO THAT FUNDING, TO REPRESENT THE INMATES ON DEATH ROW, AND OBVIOUSLY AS WE POINTED OUT, THE LEGISLATIVE PROCESS IS BEGINNING, AND CERTAINLY THE COLLATERAL COUNSEL AND THE PUBLIC DEFENDER CAN SUBSTITUTE WHATEVER BUDGETARY REQUESTS THEY HAVE.

WON'T THIS, ALSO, REQUIRE MORE JUDICIAL POWER? RESOURCES?

WELL, THE DUAL TRACK SYSTEM ARGUABLY WOULD, BECAUSE IT WOULD HAVE THE PROCESSING OF POSTCONVICTION CASES, WHICH WOULD NOT OTHERWISE BE FILED. ON THE OTHER HAND, ALL THE OTHER CASES ALREADY EXIST. WE ARE SIMPLY GOING TO DISPOSE OF THEM FASTER, AND TO SOME EXTENT, BY CUTTING DOWN ON SUCCESSIVE MOTIONS AND BY REQUIRING MORE RIGOROUS FILINGS, THERE MAY BE MORE JUDICIAL TIME AVAILABLE FOR THE CASES WHICH ARE ACTUALLY FILED.

I AM SORRY.

THERE ARE SOME CIRCUIT JUDGES HERE THAT WILL BE TALKING, PROBABLY, IN THE NEXT SECTION, BUT IN MY CONVERSATIONS WITH THE CHIEF JUDGES, EVERY TIME WE SET TIME LIMITS UP HERE, IN WHICH SOMETHING HAS TO BE DONE, IN THE TRIAL COURT, IT GENERALLY CREATES CHAOS, AND I THINK OUR RULE IS THAT, UNLESS THE CHIEF JUSTICE GRANTS AN EXTENSION, AND I JUSTINULELY GET REQUESTS FOR EXTENSION, BECAUSE OF THE UNVEILABILITY OF THE STATE OR THE UNAVAILABILITY OF THE DEFENSE OR THE UNAVAILABILITY OF TIME ON THE JUDGE'S CALENDAR, AND THESE ARE JUST LOGISTICAL PROBLEMS THAT, AND I KNOW WE HAVE RECENTLY HAD A CASE SCHEDULED FOR ORAL ARGUMENT ON THIS CALENDAR FOR FOUR DIFFERENT TIMES, THREE EXTENSIONS, I THINK, AT THE REQUEST OF THE STATE, AND THOSE, WE DON'T -- THAT IS NOT FAULTING ANYONE, BUT THAT IS JUST BOLD REALITY OF LIFE, 32 YEARS ON THE BENCH. I KNOW THAT IT IS VERY DIFFICULT TO GET ALL OF THE PLAYERS TOGETHER AT A SPECIAL TIME, AND IF WE ARE REQUIRED TO SET TIME LIMITS AND ENSURE THAT THEY CANNOT BE BREACHED, WE ARE GOING TO HAVE TO HAVE A LOT MORE RESOURCES, FROM THE STATE, FROM THE DEFENSE, AND, ALSO, FOR THE COURT. AND FOR COURT SUPPORT. AND I DON'T KNOW THAT WE CAN GET THOSE FIGURES. WE HAVE GONE THROUGH A LONG ACTION TENSION OF -- A LONG EXTENSION OF DEVELOPING A NEW MEANS OF DEVELOPING A CASE WAITING SYSTEM, BUT WE DID NOT FACTOR IN THESE ISSUES, WHEN WE MADE OUR CERTIFICATION TO THE LEGISLATURE, SO HOW CAN WE ADDRESS THAT?

THAT IS REALLY BEYOND MY EXPERTISE. THERE MAY BE SPEAKERS LATER IN THE DAY, WHO WOULD BE BETTER APARTMENT TO DISCUSS THAT, BUT I WOULD LIKE TO SAY THIS. I THINK WHAT WE ARE COMING DOWN TO IS KIND OF THE ESSENTIAL TENSION OR AMBIGUITY OF 3.8350, ITSELF, BECAUSE IT -- OF 3.850, ITSELF, BECAUSE IT ATTACKS THE QUASI-LEVEL AND NOT THE AMBIGUITY. IF THE STATE WASN'T MOVING FAST ENOUGH, THEN THE SPEEDY TRIAL WOULD RUN, AND THE PROSECUTOR WOULD BE OUT, BUT HERE WE HAVE A CIRCUMSTANCE WHERE THIS IS INITIATED BY THE DEFENDANT, WHO TRADITIONALLY DOESN'T REALLY WANT TO LITIGATE, BECAUSE THE SOONER ELITE GATES AND LOSES, THEN THE CLOSER HE COMES TO EXECUTION, SO WE HAVE A SYSTEM THAT IS DIFFERENT FROM MOST OF THE OTHER ONES WITHIN THE LEGAL SYSTEM, AND IT IS ONE THAT WE TRY TO CONTAIN AND CHANNEL AND PROGRESS, SO I THINK THE POINT WITH THE MORRIS COMMISSION REACHED IS IT IS ONLY WHEN YOU HAVE ABSOLUTE DEADLINES, WITHOUT EXCEPTIONS, THAT YOU ARE GOING TO HAVE THESE CASES PROCEED, BECAUSE I THINK, ONCE DEFENSE COUNSEL REALIZES THAT THEY HAVE TO REALLY FILE THIS MOTION BY THIS DAY, IT WILL BE FILED. IF THIS EVENING THERE IS WIGGLE ROOM AND THEY DON'T NECESSARILY HAVE TO, THEY WILL TAKE ADVANTAGE OF THAT. I AM NOT SAYING THAT IT IS ANYTHING OTHER THAN HUMAN NATURE.

ONE OF THE QUESTIONS THAT I WAS GOING TO ASK IS THAT RIGHT NOW THE STATUTE REQUIRES THE CLERK TO PROVIDE THE RECORD ON APPEAL, WITHIN 60 DAYS OF APPOINTMENT OF POSTCONVICTION COUNSEL, WITH A 30-DAY EXTENSION FOR EXTRAORDINARY CIRCUMSTANCES, AND THAT WOULD MAKE IT, THE RECORD, BEING TO 7 A DAYS AFTER, CAN YOU GIVE US AN ESTIMATE OF HOW MANY TRANSCRIPTS ARE PREPARED WITHIN 75 DAYS OF THE DEATH SENTENCE BEING IMPOSED? I WAS VERY INTERESTED IN THAT STATISTIC AND WONDERED IF THE COURT REPORTER'S UNION HAD BEEN IN CONTACT WITH THE LEGISLATURE, BUT I DO KNOW THAT, WHEN WE DO DEATH PENALTY LITIGATION AND DEATH WARRANT LITIGATION, WE TRADITIONALLY

HAVE IT HOUR BY HOUR DONE. WE HAVE TRANSCRIPTS READY WITHIN DAYS.

YOU HAVE REALTIME.

BUT THAT IS, REALLY, A RECENT INNOVATION, AND THAT, ALSO, IS VERY EXPENSIVE.

NO. I AGREE.

SO IT IS GOING TO HAVE TO, IN ORDER FOR US TO SPEEDTHE FILING OF THE RECORD, I DON'T KNOW WHAT -- SPEED UP THE FILING OF THE RECORD, I DON'T KNOW WHAT THE TIME IS NOW, BUT IT TAKES A LONG TIME TO GET A RECORD ON APPEAL FROM THE TRIAL COURT, AND YOU NEED RESOURCES TO PAY FOR REALTIME REPORTERS.

WELL, I WOULD ASSUME THE LEGISLATURE IS AWARE OF THAT, IN SHORTENING THE TIME FRAMES.

WHAT THE CONCERN IS, THAT -- BECAUSE IF THE TRANSCRIPT TAKES MORE THAN THE TIME THAT YOU HAVE TO FILE THE POSTCONVICTION MOTION, ONCE AGAIN, YOU HAVE AN INABILITY OF POSTCONVICTION COUNSEL TO DO ANYTHING ABOUT IT, AND IT BECOMES ESSENTIAL THAT SOMEONE IS GOING TO HAVE TO MANDATE THAT THESE TRANSCRIPTS BE FILED WITHIN THE 75 DAYS, AND I GUESS MY EXPERIENCE WAS, EVEN AT THE FOURTH DISTRICT, IS THAT IT WAS APPALLING, THE DELAY IN FILING TRANSCRIPTS. LIKE YEARS.

AGAIN, WE ARE HERE FOR A NUMBER OF REASONS, OSTENSIBLY HERE ON THE CONSTITUTIONAL CHALLENGES TO THE STATUTE, BUT WE ARE, REALLY, HERE TO DISCUSS HOW WE THINK THE PROCESS SHOULD AND CAN WORK, AND AS I SAID, THERE WILL BE RULES TO IMPLEMENT THE LEGISLATURE'S INTENT AND CERTAINLY URINES' EXPERIENCE WILL -- AND CERTAINLY YOUR HONORS' EXPERIENCE WILL BE CRITICAL.

THE RECORD ON APPEAL WILL NEED TO HAVE IT BEFORE A COUPLE OF MONTHS, TO DO ALL OF THAT WORK BEFORE THE FULLY-PLED MOTION IS FILED.

IF I WERE CONFRONTED WITH A PLEADING FOR A DEFENDANT THAT SAID HE COULDN'T FILE A 3.850 BECAUSE HE DIDN'T HAVE THE RECORD, I WOULD FIND THAT A REASONABLE PLEADING ON HIS PART.

DO THE STATES SEE ANY PROBLEM WITH DUAL TRACKING, OR IS IT --

I THINK THAT THERE PROBABLY WILL BE SOME LOGISTICAL DIFFICULTIES IN THE BEGINNING, BUT THERE IS NO CONSTITUTIONAL DEFECT, AND IT IS PRESENTLY USED NOT ONLY IN TEXAS BUT, ALSO, IN VIRGINIA AND OKLAHOMA, A AND TO MY KNOWLEDGE, WITH GOOD RESULTS IN THOSE STATES.

ARE YOU SURE ABOUT VIRGINIA?

I WAS JUST ADVISED OF THAT. IT IS NOT MY PERSONAL KNOWLEDGE.

I UNDERSTAND THAT THE MOTION DOESN'T HAVE TO BE FILED UNTIL AFTER THE APPEAL, BUT I AM SURE THAT MEANS THAT POSTCONVICTION COUNSEL IS APPOINTED WHILE THE APPEAL IS IN PROCESS.

YES, SIR. I WILL DOUBLECHECK THE LOGISTICS OF THAT.

DOESN'T IT PLACE COUNSEL IN SOME COMPROMISING POSITIONS AT TIMES?

NO. I DON'T SEE THAT. MOST OF WHAT OUR OPPONENTS TALKED ABOUT WAS THE SITUATION OF

PIPELINE CASES, WHERE THE CIRCUMSTANCES THEY ARE COMPLAINING ABOUT IS NOT GOING TO HAPPEN. CERTAINLY WITHIN THE PROTECTED ONES, THE ROLES OF THE VARIOUS COUNSEL ARE WELL-DEFINED. THE COMPETENCY OF APPELLATE COUNSEL IS NOT CHALLENGED UNTIL AFTER THE APPEAL. I DON'T SEE A RUN-IN BETWEEN THE POSTCONVICTION COUNSEL AND APPELLATE COUNSEL, AND THIS DUAL TRACK, JUST LIKE SOME OF THE MORRIS COMMISSION RECOMMENDATIONS, ALL DESIGNED TO START THE COLLATERAL PROCESS EARLIER, AND I THINK IF WE AGREE ON ANYTHING, IT HAS TO SIMPLY BE DONE THAT WAY, AND I THINK THAT THE LEGISLATURE DID THAT IN A FASHION THEY THOUGHT WAS MOST EFFICIENT TO DO THAT AND THEY DID THAT.

WHY DO YOU THINK OTHER STATES HAVE MOVED AWAY FROM IT AFTER TRYING IT?

WE HAVE HEARD THAT A NUMBER OF STATES THAT GAVE IT UP THAT EXPERIENCED IT. I REALLY DON'T KNOW. THAT I DO KNOW THAT OTHER STATES HAVE PROCEEDED, AND WHILE IT IS TRUE THAT CALIFORNIA CURRENTLY HAS PROBLEMS, IT IS NOT DUE TO THE NATURE OF THE SYSTEM, ITSELF, BUT DUE SIMPLY TO A STAFFING PROBLEM FOR GETTING COUNSEL, WHICH IS DEFINITELY NOT OUR PROBLEM IN STATE OF FLORIDA.

DO YOU COMMENT THAT THE ORDER ON THE POSTCONVICTION WOULD BE ENTERED BEFORE THE FINAL APPEAL WOULD BE DISPOSED OF?

IT CAN BE, BUT IT PROBABLY WILL VARY FROM CASE TO CASE.

WHAT I AM THINKING IS THAT, FROM THIS COURT'S REVIEW, THAT ONE OF THE ADVANTAGES WOULD BE IF WE COULD REVIEW THE CASE TOGETHER, RATHER, NOW, WE HAVE GOT ONE APPEAL OF THIS DEATH PENALTY. THEN WE HAVE GOT A SECOND APPEAL. IS THERE ANY MECHANISM THAT HAS BEEN CONSIDERED, BECAUSE NOW, UNDER THE NEW STATUTE, THE INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS AT A DIFFERENT TIME, SO THIS THEORETICALLY WE WOULD BE -- SO THEORETICALLY WE WOULD BE LOOKING AT THE CASE AT THE SUM REGARD I DAN EEL STAGE, ONE, AT THE DIRECT STAGE, TWO, NUMBER THREE IN DIRECT APPEAL, NUMBER FOUR, THE TOLLING OF TIME.

THAT IS KIND OF THE PROBLEM, THAT IT TAKES SO LONG TO GET THE CASE ANYWHERE THAT IT BECOMES STALE. YOU WILL SEE THE APPEAL IN '97 AND A POST CONVICTION APPEAL IN '94 AND A STRAIGHT HABEAS IN '97 AND A DEATH WARRANT LITIGATION IN 2005. THAT REALLY IS THE PROBLEM. NOT TO BE FACETIOUS, BUT IN THE STATES THAT HAVE IT, I DO KNOW THAT ALMOST THE DIRECT APPEAL OPINION IS FIRST. I DON'T KNOW OF AN INSTANCE WHERE THE COLLATERAL OPINION WAS FIRST, AND I SUSPECT THAT FORMALLY OR IN FORMALLY, THEY CONSIDER THE CASES TOGETHER AND I KNOW THEY DO ON COLLATERAL APPEAL.

THEY DO CONSIDER THEM TOGETHER.

THE TWO OPINIONS WILL COME OUT WITHIN DAYS OF EACH OTHER, SO THAT IS THE INFERENCE THAT IS RAISED.

MR. MARTELL, THANK YOU. WE WILL TAKE A SHORT RECESS. I BELIEVE, PETITIONERS, YOU HAVE USED UP ALL OF YOUR HOUR, AND WE WILL BEGIN WITH THE CONSIDERATION OF THE CRIMINAL PROCEDURE RULES. BAILIFF: PLEASE RISE.