Lloyd Duest v. State of Florida

THE NEXT CASE ON THE COURT'S DOCKET IS DUTY VERSUS STATE. -- IS DUEST VERSUS STATE. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. COUNSEL. MY NAME IS MARTIN McCLAIN, AND I AM HERE TODAY ON BEHALF OF MR. LLOYD DUEST. THIS IS APPEAL FROM A RESENTENCING PROCEEDING. THIS IS A DIRECT APPEAL, AND MY INTENT IS TO FOCUS, IN MY TIME, ON ARGUMENT ONE, AND ARGUMENT THREE, AND IF TIME PERMITS, I MAY HAVE A COUPLE OF CHENTS TO MAKE AN ARGUMENT 11, WHICH RELATES TO RING V ARIZONA.

COULD YOU TELL US WHEN, IN THE RECORD, THE DEFENDANT LEARNED OF THE CHANGE IN DR. WRIGHT'S TESTIMONY?

IT FIRST STARTS COMING UP DURING THE DIRECTION.

DID, AT THAT TIME, DID THE DEFENSE LAWYER ASK FOR A RICHARDSON HEARING, TO SAY THAT THEY WERE SURPRISED BY THIS CHANGE IN DR. WRIGHT'S --

HE DID NOT.

SO THERE WAS NOTHING, THERE WAS NO ANALYSIS AS TO WHETHER THIS WAS A DISCOVERY VIOLATION OR ANYTHING OF THAT NATURE?

CORRECT, AND I MEAN, I THINK, ALSO, IN CONTEXT, KEEP IN MIND THE DIRECTION HAPPENS ON A, I BELIEVE IT WAS WEDNESDAY. THERE IS A BIG LONG WEEKEND RECESS IN THE MIDDLE OF THE RESENTENCING, AND THE CROSS STARTS FRESH MONDAY MORNING, AND IT IS REALLY IN THE CROSS THAT THE CHANGE BECOMES MOST CLEAR.

ALL RIGHT. NOW, AS I AM UNDERSTANDING YOUR POINT ONE, YOU ARE NOT ASKING FOR REVERSAL OF THE PENALTY PHASE BECAUSE OF BEING SURPRISED BY DR. WRIGHT'S TESTIMONY.

CORRECT.

YOU ARE ASKING, SAYING THAT THAT IS A, WAS A BRADY VIOLATION.

AS TO THE GUILT PHASE.

AND SINCE THE QUESTION ABOUT WHEN, HOW WOULD WE EVER BE ABLE WILL TO DETERMINE THAT ON A DIRECT APPEAL, WHEN WE DON'T KNOW WHEN THE STATE FIRST FOUND OUT THAT DR. WRIGHT'S TESTIMONY, I MEAN, TESTIMONY WAS AS HE TESTIFIED TO AT THE TRIAL?

WELL, DR. WRIGHT WAS A STATE ACTOR. HE WAS THE MEDICAL EXAMINER, SO HE IS LIKE A LAW ENFORCEMENT OFFICER, AND SO TO THAT EXTENT, IT DOESN'T MATTER WHEN THE PROSECUTOR PERSONALLY, HIMSELF ARE FOUND OUT ABOUT IT. THE QUESTION IS IT IS LIKE A POLICE OFFICER. IF THE POLICE OFFICER HAS INFORMATION, THAT --

BUT DR. WRIGHT TESTIFIED. I DIDN'T KNOW, THIS IS SOMETHING THAT I DIDN'T THINK, IN 19, WHENEVER THE FIRST TRIAL WAS --

'83.

I, NOW, IN LOOKING AT IT, IN PREPARATION FOR THIS TRIAL --

CORRECT.

-- SO AT THE MOST IT WOULD BE, YOU WOULD SAY IT IS NEWLY-DISCOVERED EVIDENCE?

BUT HIS TESTIMONY, HE INDICATES HIS TESTIMONY IN 1983 WAS INCORRECT, ERRONEOUS.

BUT EXPERT CAN CHANGE THEIR TESTIMONY FROM ONE PLACE, FROM ONE TRIAL TO ANOTHER.

WELL, HE INDICATED THAT THE REASON IT WAS ERRONEOUS IS HE HAD NEVER LOOKED AT THE CRIME SCENE PHOTOS AND THE CRIME SCENE PHOTOS CLEARLY ESTABLISHED, WHEN HE LOOKED AT THEM, THAT HE WAS STABBED IN THE BED. HE STOPS THE BLEEDING AND GETS UP AND GOES INTO THE BATHROOM. AT THE ORIGINAL TRIAL, HE TESTIFIED THAT THE STABBING HAPPENED IN THE BATHROOM.

WELL, ISN'T THAT THE PURPOSE OF RICHARDSON, THOUGH, IN OTHER WORDS, DOESN'T RICHARDSON REQUIRE THAT, IF YOU ARE SURPRISED AND IT APPEARS TO BE A WITNESS THAT WASN'T LISTED BEFORE OR, IN EFFECT, WHEN THE WITNESS CHANGES HIS TESTIMONY, IT IS ALMOST AS IF ITNi IS A DIFFERENT WITNESS KIND OF THING?

I DON'T DISAGREE WITH THAT. IN THIS SITUATION, THE RICHARDSON HEARING WOULD JUST BE GOING TOWARDS THE RESENTENCING, AND THE ATTORNEY DEALT WITH IT AS TO THE RESENTENCING. HE BROUGHT OUT THE INFORMATION. SO THAT IT IS REALLY, IT IS AN ODD SITUATION OF A BRADY CLAIM ARISING IN THE COURSE OF A RESENTENCING, AS RELATED TO THE GUILT PHASE, AND IT IS NOT CLEAR TO ME WHAT, EXACTLY, IS THE BEST PROCEDURE. THIS COURT, IN ROSE V STATE AND WADE V STATE HAD SIMILAR CIRCUMSTANCES ARISE, AND IN ROSE V STATE, THIS COURT ADDRESSED THE BRADY CLAIM IN THE DIRECT APPEAL OF THE RESENTENCING. IN WADE, THERE WAS A 3.850 THAT WAS FILED AND THIS COURT REMANDED FOR AN EVIDENTIARY HEARING ON IT. I DID ASK, I DID FILE A MOTION ASKING FOR RELINQUISHMENT TO PRESENT A 3.850. THE STATE OPPOSED AND THIS COURT DENIED THAT, SO I AM PRESENTING IT, IF THE PROCEDURE, IF THE MANNER I AM PRESENTING IT IS WRONG, I WOULD ASK FOR RELINQUISHMENT, SO I CAN PRESENT IT IN A 3.850, IF THIS COURT BELIEVES --

YOU STILL HAVE AN OPPORTUNITY TO BRING A 3.850. I THINK WHAT WE ARE STRUGGLING HERE WITH, IS HOW, A BRADY CLAIM IS A SPECIFIC DISCREET CLAIM, WHERE YOU HAVE TO DEMONSTRATE THAT THE STATE WITHHELD SOME INFORMATION.

YES.

ON THIS RECORD, HOW DO WE KNOW THAT THE STATE, HOW CAN WE TELL THAT THE STATE WITHHELD ANY INFORMATION? WE DON'T KNOW WHEN THE STATE HAD THE INFORMATION. WE DON'T EVEN KNOW WHEN THIS DOCTOR -- I MEAN, HE COULD HAVE LOOKED AT THAT INFORMATION THE VERY MORNING THAT HE TESTIFIED AND DECIDED IN HIS MIND OOPS, I HAVE MADE A MISTAKE HERE, AND SO HOW CAN WE, THEN, SAY THAT THIS WAS INFORMATION THAT THE STATE WITHHELD FROM --

THERE WAS TESTIMONY FROM HIM, TO CLARIFY, THAT HE SAID IT WAS RECENTLY, IN ANTICIPATION OF HIS TESTIMONY IN THE RESENTENCING, THAT HE LOOKED AT THE PHOTOGRAPHS.

EXACTLY. AND WHAT DOES THAT MEAN? RECENTLY?

OBVIOUSLY, I MEAN, THE IMPLICATION WAS SOMETIME AFTER IT WAS REMAINEDED OR SENT BACK FOR THE RESENTENCING, HE DIDN'T SPECIFY A DATE BUT IT WAS IN ANTICIPATION OF HIS TESTIMONY.

THAT IS THE PROBLEM, AT LEAST THE PROBLEM I AM HAVING, IS TRYING TO DECIDE HOW CAN WE SAY THE STATE WITHHELD SOMETHING, WHEN WE DON'T KNOW WHEN THE STATE HAD IT?

WELL, MY RESPONSE TO THAT, THE BEST RESPONSIVE IS THAT THE DOCTOR SAYS HIS TESTIMONY AT THE ORIGINAL TRIAL IS FALSE. THAT TESTIMONY IS THE BASIS FOR THE PREMEDITATION FINDING. THE PROSECUTOR --

WAIT A SECOND. FIRST OF ALL, HE DIDN'T SAY IT WAS FALSE.

HE SAID IT WASER -- HE SAID IT WAS ERRONEOUS AND INCORRECT.

SECOND OF ALL, IN OUR DIRECT APPEAL, THE LINES ON PREMEDITATION HAS TO DO WITH A VARIETY OF FACTS, INCLUDING THE FACT THAT THE DEFENDANT STATED HE GETS HIS MONEY BY ROLLING GAY GUYS, A THAT HE INTENDED TO DO THAT SAME ON THE DATE. I MEAN, WE GO THROUGH MANY, MANY THINGS, AND NONE OF IT HAS TO DO WITH HOW LONG THE DEFENDANT LIVED AFTER HE WAS STABBED.

I WOULD POINT OUT THE PROSECUTOR'S CLOSING ARGUMENT AT THE ORIGINAL TRIAL, 1429, 1430, HE ULTIMATELY SAYS I SUBMIT TO THAT YOU THE EVIDENCE ABOUT, THE EVIDENCE SHOWS THIS IS A MURDER BY PREMEDITATED DESIGN. YOU JUST LOOK AT THE NATURE OF THE WOUNDS, AND YOU CAN FIND THAT OUT. THAT IS WHAT HE SAYS. AND --

DOES THIS TESTIMONY ACTUALLY CHANGE THE NATURE OF THE WOUNDS?

IT CHANGES WHERE THEY HAPPENED, BECAUSE --

BUT IT DOESN'T CHANGE THE NATURE OF THE WOUNDS.

WELL, IN, IT CHANGES THE NATURE OF THE WOUNDS, TO THE EXTENT THAT THE MEDICAL EXAMINER INDICATED BEFORE THAT HE STABBED AND THEN HE KEELS OVER AND HE DIES. THAT THE DEATH HAPPENS WITHIN 15 SECONDS OF THE END OF THE STABBING, TWO UP TO FIVE MINUTES AT THE MOST AND HE IS UNCONSCIOUS DURING THAT TIME PERIOD. NOW, WE HAVE THAT THE INJURIES ARE SUCH THAT HE IS CONSCIOUS FOR 15-TO-20 MINUTES, AND HE DOESN'T DIE FOR PROBABLY A HALF AN HOUR.

I GUESS I AM STILL STRUGGLING WITH HOW THAT CHANGED THE, ACTUALLY CHANGES THE WOUNDS, THE NATURE OF THE WOUNDS, THEMSELVES, BUT GO ON.

OKAY. HOW DOES THAT CHANGE THE PREMEDITATION ANALYSIS? COULDN'T, UNDER THE SECOND BRADY CLAIM, WHERE THERE WAS PREJUDICE, EVEN IF YOU COULD RAISE IT NOW, HOW DOES, COULDN'T A JURY CONCLUDE THAT THE DEFENDANT KNEW THAT HE WAS BLEEDING TO DEATH AND HE LEFT HIM THERE TO PLEAD TO DEATH?

IT IS POSSIBLE THE -- TO BLEED TO DEATH?

IT IS POSSIBLE THE JURY COULD CONCLUDE THAT, BUT THAT DOESN'T UNDERMINE A BRADY CLAIM, WHERE UNDERMINING OUTCOME, AND HERE THE JUDGE AT RESENTENCING DOES NOT FIND COLD, CALCULATED AND PREMEDITATED AND FINDS CIRCUMSTANCES THAT HE HAD INTENT TO KILL.

BUT THE COLD, CALCULATED -- I MEAN, HE WAS PLANNING THIS FOR WEEKS, AND UNDER

PREMEDITATION, YOU HAVE TO PLAN IT FOR ONLY A FEW MOMENTS. HOW DOES THAT CHANGE THE ANALYSIS WITHIN THAT ROOM, WHERE HE STABBED THE PERSON TWELVE TEAMS? -- TWELVE TIMES?

I ACKNOWLEDGE THAT. BASED ON CCP AT THE FIRST TRIAL, THIS COURT AFFIRMED IT AND IT WAS FOUND. THE SECOND TRIAL DID NOT FIND IT AND THE MITIGATING CIRCUMSTANCE NO INTENT TO KILL, SO THIS DOES GO TOWARDS PREMEDITATION, AND I WILL HIM ARGUING THAT IT -- AND I AM ARGUING THAT IT UNDERMINES -- UNDERMINES THE OUTCOME. IT IS POSSIBLE PREMEDITATION, BUT THAT DOES NOT UNDERMINE THE OUTCOME, THE BRADY ANALYSIS, THAT THERE WAS NO INTENT TO DO IT. THE QUESTION BECOMES IF THERE WAS NO INTENT, THEY WOULDN'T.

THE CCP, THE ORIGINAL OUTCOME, THE ORIGINAL OPINION OF THIS COURT, IN FINDING THE BASIS FOR CCP AND WHAT THE TRIAL COURT FOUND, EVERYTHING THAT THE TRIAL COURT FOUND ABOUT CCP DOES NOT HAVE TO DO WITH THE NATURE OF THE WOUNDS. IT HAD TO DO WITH WHAT HAD HAPPENED TWO DAYS BEFORE, WHAT HE DID ON THE DAY, THAT HE HAD A DAGER WHEN HE -- A DAGGER WHEN HE LEFT.

I UNDERSTAND AND MAKE THE POINT THAT THIS DIRECT APPEAL WAS PRIOR TO THIS COURT'S OPINION IN ROGERS V STATE, INDICATING THAT THERE HAD TO BE A PREEXISTING PLAN TO KILL, AND SO WHAT THIS COURT SAID, IN AFFIRMING THE DIRECT APPEAL INITIALLY IN THIS CASE, WAS THERE IS THIS PREEXISTING PLAN TO ROB, AND I MAKE THAT DISTINCTION, JUST BECAUSE THE COURT'S ANALYSIS NOW, ON CCP, IS A BIT DIFFERENT THAN THE COURT'S ANALYSIS PRIOR TO THE ROGERS CASE IN 1987. AND SIMPLY ON THIS ARGUMENT, BEFORE I GO TO THE NEXT ARGUMENT, IF I AM WRONG IN PRESENTING IT NOW, I WOULD ASK THIS COURT TO RELINQUISH JURISDICTION, SO THAT A HEARING COULD HAPPEN ON THE BRADY CLAIM IN A 3.850. TURNING TO ARGUMENT THREE, WHICH IS THE ARGUMENT IN CONNECTION WITH THE FACT THAT, AT THE RESENTENCING, THE PROSECUTOR SOUGHT TO PROVE ROBBERY, AS THE HOMICIDE HAPPENED IN THE COURSE OF ROBBERY. FIRST OF ALL, THERE HAD NOT BEEN A SEPARATE COUNT ON ROBBERY.

ONE THING, SO YOU ARE NOT CLAIMING THE CHANGE IN TESTIMONY IS NEWLY-DISCOVERED EVIDENCE.

WELL, I AM CLAIMING IT AS BRADY, AND I SUPPOSE I JUST, BECAUSE THE DOCTOR WAS A STATE EMPLOYEE --

BRADY WOULD MEAN THAT THE, YOU WOULD HAVE TO SHOW THAT THE STATE OR DR. WRIGHT KNEW ABOUT THAT, BACK AT THE TIME OF THE FIRST TRIAL. I DON'T KNOW HOW YOU, IT SEEMS TO ME THAT THE BEST YOU ARE GOING TO GET IS THAT THIS IS A DMANING TESTIMONY THAT WOULD CONSTITUTE -- IS A CHANGE IN TESTIMONY THAT WOULD CONSTITUTE NEWLY-DISCOVERED EVIDENCE.

SINCE I AM ENCOUNTERING SOME RESISTANCE ON THAT I WOULD PLEAD IT ALTERNATIVE AS TO THE BRAID OR RESENTS, AND PREMEDITATION, AND ALSO TO MAKE A POINT IN TERMS OF CUMULATIVE ANALYSIS, WHETHER IT IS PLED AS BRADY OR ABSENCE OF INNOCENCE, THIS COURT IN ROBERTS JUST THIS PAST WEEK INDICATED THAT IT HAS TO BE EVALUATED CUMULATIVELY WITH THE OTHER BRADY MATERIAL, THE BUS TICKET THAT WAS PRESENTED TO THIS COURT BACK IN 1989, AND I SUBMIT THAT THIS,, IN ORDER FOR THAT CUMULATIVE ANALYSIS TO BE CONDUCTED PROPERLY UNDER KYLES, IT HAS TO BE A DE NOVO ANALYSIS OF THE BUS TICKET, EVEN THOUGH THIS COURT DENIED RELIEF BACK THEN. YOU CAN'T RELY ON THAT DENIAL OF RELIEF AND GIVE TRUE CUMULATIVE ANALYSIS, SO IT HAS TO BE SORT OF DE NOVO.

THAT WAS ON THE BUS TICKET RELATING TO THE ALIBI?

RIGHT. OKAY.

I HAVE ANOTHER QUESTION BEFORE YOU GO O.

SURE.

WHY WASN'T -- BEFORE YOU GO ON.

SURE.

WHY WASN'T THIS ISSUE WAIVED, WHEN THE DEFENSE COUNSEL MADE THE QUITE POSSIBLY CORRECT STRATEGY DECISION NOT TO CLAIM A BRADY VIOLATION OR NOT TO SURPRISE BUT SIMPLY TO IMPEACH THE MEDICAL EXAMINER WITH HIS PRIOR TESTIMONY.

I AM NOT ARGUING FOR A NEW RESENTENCING ON THE BASIS OF IT, AND TO THE EXTENT THAT --

YOU ARE GOING FURTHER THAN A NEW RESENTENCING.

I AM SAYING THAT THERE SHOULD -- I AM SAYING IT GOES TO THE GUILT PHASE, AND TO THAT EXTENT, PERHAPS A RULE 3.850 MOTION, BUT UNDER RULE 3.850, IT IS ONE YEAR FROM WHEN THE CONVICTION AND SENTENCE BECOME FINAL, AND AT THIS POINT IN TIME THEY HAVEN'T BECOME FINAL, SO TO THAT EXTENT --

YOU ARE ARGUING TWO BITES OF THE APPLE. IF YOU DON'T OBJECT AT THE TIME AND YOU DON'T SAY, JUDGE, WE ARE SURPRISED. THIS IS INCREDIBLE. I HAVE NEVER HEARD THIS BEFORE. WE NEED THIS TESTIMONY. WE NEED A MISTRIAL RIGHT NOW. I AM GOING TO FILE DISCOVERY AND A MOTION FOR A NEW TRIAL THIS. IS NEWLY-DISCOVERED EVIDENCE, AND INSTEAD HE TOOK THE TACTICAL TACT OF IMPEACHING THE MEDICAL EXAMINER WITH HIS PRIOR TESTIMONY. HAVING TAKEN THAT ROUTE, ISN'T HE PRECLUDED NOW FROM SAYING THAT HE WAS SURPRISED?

I THINK THAT THAT PUTS A RESENTENCING ATTORNEY IN A REALLY DIFFICULT SITUATION, TO BE FOCUSED ON HANDLING THE RESENTENCING AND DEALING WITH THE EVIDENCE THAT COMES IN AS TO THE RESENTENCING, AND AT THE SAME TIME HAVE TO KNOW IN TERMS OF THE GUILT PHASE, IF THIS NEW INFORMATION RAISES SOME ISSUE ABOUT THE GUILT PHASE, AND TO MAKE THE DECISION IN THE MIDDLE OF THE RESENTENCING, ON THE SPOT.

THEY MAKE THOSE KINDS OF DECISIONS ALL THE TIME. DECIDE WHETHER TO OBJECT OR NOT, WHETHER TO SEEK EVIDENCE OR NOT. THAT IS WHY THEY ARE PAID THE GREAT MONEY THAT THE PUBLIC DEFENDERS ARE PAID TO DEFEND CLIENTS.

BUT IF RULE 3.850 SAYS YOU HAVE ONE YEAR FROM WHEN THE CONVICTION IS FINAL TO RAISES IT, I DON'T THINK THAT A REASONABLE ATTORNEY WOULD THINK HE IS GIVING UP THAT ONE YEAR BY NOT MAKING THAT CLAIM NOW, AT THIS VERY MOMENT, AND THE REASON THAT ONE YEAR IS ALLOWED, IS BECAUSE IT IS SOMETHING THAT DOES TAKE SOME CONSIDERATION OF THE RECORD, SOME TIME TO MAKE THE CASE AND TO PUT IT TOGETHER, AND SO THAT WOULD END UP, HE WOULD, HE HAD WAIVED HIS RIGHT UNDER 3.850.

ISN'T THE REASON THAT THEY WAIT ONE YEAR IS BECAUSE SOMETIME AFTER THE TRIAL, YOU EITHER, A, YOU ARE CLAIMING THAT YOUR COUNSEL AT THE TRIAL WAS INEFFECTIVE OR B, YOU DISCOVER SOME TIME AFTER THE TRIAL, THAT THERE WAS SOME EVIDENCE THERE THAT YOU DIDN'T KNOW ABOUT. NEITHER OF THOSE CIRCUMSTANCES EXIST HERE, WHERE YOU FOUND OUT AT THE TRIAL ABOUT THIS EVIDENCE.

THERE HAVE BEEN MANY INSTANCES WHERE I HAVE BEEN ADVISED BY THE DIRECT APPEAL ATTORNEY OF A BRADY VIOLATION THAT I PUT IN THE 3.850 AND THIS COURT HAS NEVER HELD THAT INFORMATION THAT THE DIRECT APPEAL ATTORNEY LEARNS HAS TO BE PRESENTED IN THE

COURSE OF THE DIRECT APPEAL AND THAT WE CAN'T WAIT AND PUT IT IN THE 3.850.

CHIEF JUSTICE: THE MARSHAL HAS PUT ON THE WARNING LIGHT TO REMIND YOU OF REBUTTAL.

IN TERMS OF THE 3.850, WHAT I WANTED TO SAY IS AGAIN, THERE HAD BEEN NO CONVICTION FOR ROBBERY SO THE PROSECUTOR INDICATED THAT HE WANTED TO PRESENT THE EVIDENCE OF THE ROBBERY AT THE RESENTENCING, AND THE JUDGE IS CONCERNED ABOUT THAT, BUT HE, ULTIMATELY, PREVAILS AND CONVINCES THE JUDGE THAT HE NEEDS TO PRESENT ALL OF THE WITNESSES, TO IDENTIFY MR. DUEST AS DANNY, AS BEING IN TOWN IN FT. LAUDERDALE THAT WEEKEND. THE PROSECUTOR, THEN, ASKS THE JUDGE AND GOT THE JUDGE TO PRECLUDE THE DEFENSE FROM PRESENTING ANY EVIDENCE IMPEACHING THOSE WITNESSES, BY INDICATING THAT IT COULDN'T HAVE BEEN MR. DUEST. MR. DUEST WAS IN MASSACHUSETTS. AS A RESULT, I SUBMIT THIS, THERE IS NO DUE PROCESS HERE. FOR THE STATE TO BE ABLE TO PRESENT THE EVIDENCE AND THEN PRECLUDE THE DEFENSE FROM ATTACKING IT, IS DENIAL OF DUE PROCESS. AND WITH THAT, I WOULD RESERVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MELANIEDALE ON BEHALF OF THE STATE. WITH RESPECT TO ISSUE ONE, THE AN ISSUE IS NOT PROPERLY BEFORE THE COURT. THE ISSUE IS RESENTENCING NOT THE CONVICTION.

SO IS THE STATE'S POSITION THAT THE ALTERNATIVE IS THAT, IF, TO THE EXTENT IT IS EITHER A BRAID OR NEWLY DISCOVERED EVIDENCE AS TO THE -- A BRADY OR NEWLY-DISCOVERED EVIDENCE AS TO THE GUILT PHASE, THAT THAT SHOULD BE RAISED IN A 3.850 ?

THAT IS EXACTLY THE STATE'S POSITION, AND I THINK IF WE LOOK TO DEFENSE COUNSEL'S REPLY BRIEF, THERE ARE A NUMBER OF CASES CITED WITH RESPECT TO AN ELEVENTH CIRCUIT DECISION, AND THEN A DECISION BY THIS COURT ON THE 3.850, AND ALL OF THOSE CASES WITH RESPECT TO NEWLY-DISCOVERED EVIDENCE OR BRADY VIOLATION, THE DEFENDANTS THERE FILED A SUCCESSIVE MOTION. WHICH WAS EITHER DENIED SUMMARILY OR DENIED BASED ON A HEARING. HOWEVER, THAT IS HOW JURISDICTION CAME TO THIS COURT. I WOULD DISAGREE THAT RELINQUISHMENT IS REQUIRED. THIS COURT CAN PASS JUDGMENT ON THE RESENTENCING. DEFENDANT STILL HAS THE RIGHT TO FILE THE SUCCESSIVE MOTION.

WE DON'T WANT TO PUT THE DEFENDANT IN A POSITION OF SOMEBODY SAY HAD GONE THAT IT WAS TIME-BARRED, BECAUSE IT WAS BROUGHT WITHIN ONE YEAR OF WHEN IT WAS DISCOVERED AND HE IS ON TRIAL AND THEN RELINQUISHED, SO YOU DON'T WANT TO PUT THE DEFENDANT IN THAT POSITION.

THE STATE WOULD ARGUE IT IS A PROPER METHOD OF 3.850, BECAUSE WE DON'T KNOW WHAT THE DEFENDANT IS GOING TO RAISE IN THAT MOTION. WE MAY HAVE TIME BAR ARGUMENTS OR PROCEDURAL ARGUMENTS. IT DEPENDS ON WHAT IS RAISED IN THAT SUCCESSIVE 3.850, AND I THINK HERE IT IS VERY TELLING THAT DURING TRIAL, DEFENSE COUNSEL IMPEACHED THE DOCTOR WITH A PRIOR DEPOSITION. IT IS IMPORTANT, IF WE LOOK AT THE MERITS OF WHAT WENT ON AT TRIAL, TO REMEMBER THE DOCTOR, DR. WRIGHT, NEVER TESTIFIED AT THE PRIOR TRIAL, THE TIME OF DEATH. THE DOCTOR TESTIFIED, TALKED ABOUT THE TIME OF DEATH IN THE DEPOSITION, WHICH WAS PROPERLY USED AT TRIAL TO IMPEACH HIM. THE REMEDY --

YOU SAY THE TIME OF DEATH. ARE YOU TALKING ABOUT THE TIME THAT MR. McCLAIN WAS TALKING ABOUT, THE 15 SECONDS TO FIVE MINUTES FOR DEATH, OR ARE YOU ACTUALLY, BECAUSE WHEN YOU SAY TIME OF DEATH, I AM THINKING OF TIME OF DAY.

YES. HOW LONG IT TOOK FOR MR. POPE TO DIE WAS NEVER DISCUSSED AT THE ORIGINAL TRIAL. AND I WOULD EVEN POINT THIS COURT TO THE IMPEACHMENT AT THE RESENTENCING. THERE IS SOME CLARIFICATION THAT NEEDS TO BE MADE. INITIALLY, DEFENSE COUNSEL SOUGHT TO

IMPEACH THE DOCTOR, BASED ON THE FIVE-TO-15 SECONDS. THE DR. TESTIFIED I NEVER SAID IT TOOK 5-TO-15 SECONDS, AND IF WE LOOK AT THE DEPOSITION, THAT IS TRUE. THE DOCTOR SAID IT TOOK 5-TO-15 SECONDS FOR THE BLOOD PRESSURE TO DROP. THE DR. THEN WENT ON IN HIS DEPOSITION AND TALKED ABOUT A PERIOD OF TWO-TO-FIVE MINUTES FOR DEATH. AT RESENTENCING, THE DOCTOR SAID IT COULD HAVE TAKEN 15-TO-20 MINUTES AND HE HAVE HEN IN ONE INSTANCE I THINK 30 MINUTES WAS USED. HOWEVER, THE DOCTOR, ALSO, TESTIFY THAT, AFTER THE FIRST FIVE MINUTES, THE CHANCES OF SURVIVAL WERE GREATLY DIMINISHED, SO I DON'T THINK THERE IS AN ERROR, EVEN IF WE LOOK AT ALL OF THE TESTIMONY IN THE CONTEXT.

WAS THERE SOME CHANGE IN WHAT THE NATURE OF THE WOUNDS WERE? BECAUSE I GUESS IT IS PRETTY STARTLING TESTIMONY TO THINK THAT SOMEBODY, IF THEY HAD, WHETHER, WHETHER THIS GOES TO PREMEDITATION OR NOT, THAT HE WAS, IT IS A PRETTY DIFFERENT THING OF SOMEONE BEING INCAPACITATED AND, I THINK, THERE WAS SOMETHING IN THE DIRECT APPEAL ABOUT HOW MR. DUEST WAS STILL THERE WHEN HE DIED VERSUS THAT HE, HIMSELF, THE VICTIM, GOT UP AND WAS ABLE TO GO INTO THE BATHROOM WHERE HE, THEN, PASSED OUT. I MEAN, IS THAT -- DO YOU AGREE THAT IS A CHANGE? NOW, WHETHER IT WAS SIGNIFICANT TO ANY OF THE ISSUES, I AM JUST TRYING TO GET A FEEL FOR THE DIFFERENCE IN THE QUALITY OF DR. WRIGHT'S TESTIMONY.

I THINK THE QUALITY OF THE TESTIMONY DOESN'T CHANGE. IT IS APPARENT FROM THE RECORD THAT THE DOCTOR ADMITS HE MADE A MISTAKE BEFORE, WITH RESPECT TO HOW LONG IT TOOK FOR MR. POPE TO DIE. HOWEVER, IF YOU READ THE PRIOR DIRECT APPEAL TESTIMONY, THE DEPOSITION TESTIMONY, AND THE TESTIMONY OF DR. WRIGHT AT THE RESENTENCING, THE CONTEXT DOESN'T CHANGE. PREMEDITATION IS NOT AFFECTED. THAT IS APPARENT FROM THIS COURT'S OPINION, FROM THE ORIGINAL DIRECT APPEAL. THIS COURT RELIED UPON THE TESTIMONY OF MS. DUGAN, MS. WONSACK, OR AVERY AS SHE IS, AND MR. DEMESIO.

ARE YOU ASKING US TO CONSIDER THE BRADY CLAIM AND DENY IT UNDER THE THIRD CLAIM OR NOT TO CONSIDER IT? BECAUSE NOW I HEAR YOUR --

MY POSITION IS IT IS PROPERLY BEFORE THIS COURT. THE CLAIM IS BASED ON A JOHNSON V MISSISSIPPI CLAIM. THE CASE CAME BACK TO THE RESENTENCING COURT AS RESENTENCING AND IT IS NOW BEFORE THIS COURT AS A DIRECT APPEAL OF A RESENTENCING. IT DOES NOT OPEN THE CONVICTION. IF WE ARE GOING TO LOOK AT IT, IT NEEDS TO BE FILED IN A SUCCESSIVE 3.850. NOT ON DIRECT APPEAL OF A RESENTENCING.

BUT YOU MENTIONED BEFORE THAT, THERE MAY BE TIME BAR ISSUES. THE STATE ISN'T ARGUING THAT THE DEFENDANT HAS TO WAIT TO THE END OF THE DIRECT APPEAL ON RESENTENCING AND THEN FILE A 3.850, AND THEN IT IS GOING TO CLAIM HEY, YOU ARE OUTSIDE THE ONE-YEAR PERIOD. YOU CAN'T FILE A 3.850 ANYMORE.

I THINK THAT YOUR HONOR'S QUESTIONS PREVIOUSLY SHEDS LIGHT ON THIS ISSUE. THE STATE DOES NOT KNOW WHAT WOULD BE CLAIMED IN A SUCCESSIVE 3.850, SO I COULDN'T EVEN ADDRESS WHAT I MIGHT ARGUE. I AM NOT FORECLOSING MYSELF FROM MAKING ANY ARGUMENTS THAT WOULD BE AVAILABLE. HOWEVER, THIS CAME UP AT THE RESENTENCING. WE ARE AWARE OF IT. THERE IS A SUCCESSIVE 3.850 MOTION THAT CAN BE MADE. DEPENDING ON WHETHER IT IS A BRADY VIOLATION OR A NEWLY-DISCOVERED EVIDENCE VIALS, THE CLAIM CAN BE MADE, AND THE STATE WILL -- VIOLATION, THE CLAIM CAN BE MADE AND THE STATE WILL HAVE THEIR ARGUMENTS AVAILABLE, BUT WE DON'T KNOW WHAT WILL BE PUT IN THAT MOTION.

WE REALLY SHOULD GET THIS STRAIGHT, BECAUSE IT DOES ON COME UP FROM TIME TO TIME ABOUT WHETHER WE SHOULD RELINQUISH OR NOT. A DEFENDANT HAS ONE YEAR FROM WHEN THEY KNOW ABOUT IT, TO FILE A 3.850 NORMALLY, OR AS MR. McCLAIN IS SAYING, WHEN THE CONVICTION IS FINAL. IF A DEFENSE LAWYER IN THE MIDDLE OF A TRIAL, IN A RESENTENCING

FINDS SOMETHING OUT THAT RECEIPTS TO THE GUILT PHASE -- OUT THAT RELATES TO THE GUILT PHASE, IS THE STATE SUGGESTING THE LAW SHOULD BE AT THAT POINT, THEY SHOULD SIMULTANEOUSLY FILE A 3.850, CLAIMING BRADY, EVEN THOUGH THE CONVICTION IS NOT FINAL? BECAUSE EITHER, WE CAN'T, YOU KNOW, IT HAS GOT TO BE ONE OR THE OTHER. WE DON'T WANT TO PUT SOMEBODY IN A PROCEDURAL TRAP HERE OR IS IT, SO, BECAUSE CERTAINLY IF THE DEFENDANT HAD RAISED THIS IS NOT ONLY RICHARDSON BUT IT IS BRADY, NOW I WANT YOU TO REOPEN THE CONVICTION, I THINK THE STATE WOULD SAY BUT WE ARE IN THE MIDDLE OF RESENTENCING. LET'S, IT IS PREMATURE TO DO ANYTHING WITH THE CONVICTION.

I CAN'T SAY WHAT WOULD HAPPEN AT THAT TIME AT TRIAL, BUT I CAN SAY DIRECT APPEAL OF THE RESENTENCING IS NOT THE PROPER PLACE TO RAISE THE ISSUE, AND I AM NOT SUGGESTING THAT WE FORECLOSE THE DEFENDANT. I AM SUGGESTING THE DEFENDANT NEEDS TO FILE IT IN THE PROPER MANNER. FILE THE SUCCESSIVE 3.850 AND LET THE TRIAL COURT LOOK AT IT. IN THIS CASE, THE TRIAL COURT HAS NEVER EVEN ADDRESSED THIS INFORMATION.

WHAT IF THE STATE OPPOSE -- WHY DID THE STATE OPPOSE RELINQUISHMENT THEN?

BECAUSE TO RELINQUISH A DIRECT APPEAL IN THE MIDDLE OF RESENTENCING, THAT DOESN'T OPEN THE DOOR TO HAVE A 3.850 ON THE CONVICTION ISSUE. THE CONVICTION AND SENTENCE ARE FINAL. FILE THE SUCCESSIVE 3.850.

SO I GUESS THE LOGICAL IMPLICATION FROM THAT ARGUMENT IS THAT THE DEFENDANT SHOULD HAVE ONE YEAR FROM THE DATE THAT THE CONVICTION AND SENTENCE BECOMES FINAL, WHICH WOULD BE WHENEVER WE ISSUE A DECISION IN THE CASE NOW.

I MEAN, THAT COULD BE A REMEDY. WHAT I AM SAYING IS THE DEFENDANT HERE HAS AN ADEQUATE REMEDY AT LAW. HE CAN FILE THE SUCCESSIVE MOTION. HE CAN FILE THE 3.850 AND HAVE IT BEFORE THE TRIAL COURT. THIS HAS NEVER BEEN DONE IN THE CASE. THE TRIAL COURT HAS NEVER HAD AN OPPORTUNITY TO ADDRESS THIS ALLEGED BRADY INFORMATION.

WE REALIZE MAYBE YOU CAN'T ANSWER FOR THE STATE, BUT IT SEEMS TO ME THAT, IF WE SAY THAT, AND IF THE STATE IS TAKING THIS POSITION FOR THE STATE TO, THEN, AT THE TIME IT IS RAISED TO SAY IT IS TIME-BARRED, BECAUSE IT SHOULD HAVE BEEN RAISED AT SOME TIME BEFORE THAT, WHEN WE ARE SAYING HERE, IT COULDN'T HAVE BEEN RAISED AT SOME TIME BEFORE THAT, WE REALLY DON'T WANT TO PUT, WE WANT TO BE CLEAR AS TO WHAT IS THE BEST PROCEDURE TO GO ON.

I UNDERSTAND THAT. HOWEVER, I DON'T THINK WE HAVE ENOUGH FACTS IN THIS CASE TO KNOW WHETHER OR NOT THAT IS THE PROPER REMEDY TO RELINQUISH JURISDICTION. AS JUSTICE QUINCE POINTED OUT, WE DON'T KNOW WHEN THE TESTIMONY WAS CHANGED. WE KNOW TWO DAYS BEFORE THE DOCTOR BEGAN HIS TESTIMONY, THE STATE POINTED OUT TO THE TRIAL COURT THAT THE DOCTOR WAS GOING TO TESTIFY THAT IT TOOK TWO TO FIVE MINUTES FOR MR. POPE TO DIE, SO TWO DAYS BEFORE DR. WRIGHT TESTIFIED, THE STATE DIDN'T ANTICIPATE A CHANGE, SO, REALLY, I THINK THE MERITS DO HAVE SOMETHING TO DO WITH THIS CASE, AND THE EFFECT THAT IT IS NOT BRADY MATERIAL. HOWEVER, IF THE DEFENDANT WANTS TO CLAIM BRAID MATERIAL, THE PROPER PROCEDURE IS TO FILE A SUCCESSIVE 3.850, AND I THINK, IF THIS COURT LOOKS AT ALL OF THE CASES CITED BY THE DEFENDANT IN THE REPLY BRIEF, I BELIEVE IT IS MILLS, ROBERTS, SCOTT, AND LIGHTBOURNE. THAT IS EXACTLY PROCEDURE THAT HAPPENED. THE ELEVENTH CIRCUIT AFFIRMED THE CONVICTIONS AND SENTENCE, WHICH SLIGHTLY DIFFERENT, BECAUSE HERE WE HAD A REVERSAL BASED ON THE RESENTENCING. THE RESENTENCING HAS OCCURRED. WE ARE ON APPEAL OF THE RESENTENCING. THE WAY TO ATTACK THE CONVICTION IS TO FILE THE SUCCESSIVE MOTION, WHICH IS EXACTLY WHAT HAPPENED IN ALL FOUR OF THOSE CASES.

YOU ARE URGING US, HERE, TO NOT ONLY NOT TREAT THE ISSUE AS APPROPRIATE

PROCEDURALLY HERE, BUT, ALSO, TO NOT RENDER ANY KIND OF AN ADVISORY OPINION ABOUT WHETHER OR NOT AN AMENDED 3.850 MAY BE TIME-BARRED OR WHETHER IT NOT BE TIME-BARRED, OR TO RELINQUISH JURISDICTION, TO MERELY RULE THAT WILL IT IS -- TO IMMEDIATELY RULE THAT IT IS AN INAPPROPRIATE VEHICLE RIGHT NOW.

I THINK THAT THIS COURT CAN STILL FIND THAT AN APPROPRIATE REMEDY AT LAW WOULD BE TO FILE A SUCCESSIVE 3.850. THE STATE IS NOT FORECLOSED FROM MAKING ARGUMENTS BECAUSE WE DON'T KNOW WHAT IS GOING TO BE RAISED IN THAT MOTION. ALL WE KNOW IS ON DIRECT APPEAL OF A RESENTENCING, THE DEFENDANT IS CLAIMING THAT A BRADY VIOLATION OCCURRED AT THE RESENTENCING. IT DOESN'T APPLY TO THE RESENTENCING ISSUES IN THIS CASE. AND I WOULD JUST, AGAIN, STRESS THAT IT IS NOT A BRADY VIOLATION, BASED ON THE FACTS OF THIS CASE!

CAN YOU ADDRESS THE ISSUE? I THINK RAISE IN YOUR ANSWER BRIEF THAT THEY DIDN'T PRESERVE THIS ERROR.

WELL, IN ORDER TO MAKE THE CLAIM ON APPEAL, THE DEFENDANT WOULD HAVE HAD TO HAVE OBJECTED TO SOME ERROR BELOW. THERE WAS NO OBJECTION. THERE WAS IMPEACHMENT. DEFENSE COUNSEL STOOD UP WITH THE PRIOR DEPOSITION AND IMPEACHED DR. WRIGHT AND SAID, WELL, WASN'T THIS YOUR POSITION BEFORE? DR. WRIGHT ADMITTED I CHANGED MY MIND. SO IT WAS CURED AT THE RESENTENCING, WITH RESPECT TO THE RESENTENCING. IT IS STILL THE STATE'S POSITION THAT CONVICTION IS NOT PROPERLY BEFORE THIS COURT AT THIS TIME.

SO YOU ARE ARGUING THAT THEY WAIVED ANY OBJECTION TO THIS CHANGE IN TESTIMONY AT THE HEARING. ARE YOU, ALSO, SAYING, MAYBE YOU ARE GETTING READY TO SAY IT, WHETHER THEY WAIVED THE BRADY VIOLATION BY IMPEACHING HIM.

THE STATE IS STILL ARGUING A SUCCESSIVE 3.850 IS THE PROPER REMEDY. WHAT WE ARE ARGUING IS WITH RESPECT TO RESENTENCING. EXCUSE ME. THE BRADY VIOLATION IS NOT PRESERVED.

MY QUESTION IS, FURTHER, DOES THE STATE ARGUE THAT THEY HAVE WAIVED 3.850 CLAIM BECAUSE THEY DIDN'T OBJECT AT THE RESENTS SOMETHING.

NO. THAT IS NOT OUR ARGUMENT. OUR ARGUMENT IS THE ADEQUATE REMEDY WITH RESPECT TO A BRADY VIOLATION, IS TO FILE IT IN THE SUCCESSIVE 3.850. WE STILL WOULD HAVE OUR SAME ARGUMENTS, IF THE ISSUE WAS RAISED AND DISCUSSED. HOWEVER, HERE THE BRADY ISSUE WAS NOT PROPERLY PRESERVED FOR VEPTSING ONLY ON DIRECT APPEAL. -- FOR RESENTENCING ONLY ON DIRECT APPEAL.

THEY ARE NOT CLAIMING, AS MR. McCLAIN WAS CANDID ABOUT THIS, THAT THE CHANGE IN HIS TESTIMONY WAS A SURPRISE, SO THAT RICHARDSON VIOLATION OR ANY ERROR THAT WOULD, IN ITSELF, MANDATE A NEW SENTENCING PROCEEDING. COULD YOU ADDRESS THE ISSUE THAT MR. McCLAIN TOUCHED ON, ON ISSUE THREE, AS TO, I THINK WE ALWAYS, IN THESE RESENTENCING CASES, WE WALK THIS FINE LINE BETWEEN NOT RETRYING THE PRIOR CASE AND, ALSO, THOUGH, HOW MUCH DOES THE STATE GET TO DO, AND THEN DOES THE DEFENDANT GET TO DO ANYTHING IN DEFENSE, BECAUSE IT IS TOUCHING ON GUILT PHASE, AND WHERE IS THAT LINE DRAWN, AND WAS IT DRAWN TO TIGHTLY HERE TO IMPROPERLY LIMIT THE DEFENDANT?

I SUBMIT THAT THE TESTIMONY WAS PROPERLY LIMITED HERE. THE DEFENDANT HAD THE OPPORTUNITY TO ATTACK WHETHER OR NOT A ROBBERY OCCURRED. TIMMY DUGAN, JOE ARRANGE -- JOE ANN DEMONTECK, ALL OF THAT TESTIMONY HAD TO DO WITH WHETHER HE WAS SEEN WITH MR. POPE'S JEWELRY BOX. THE DEFENSE WAS NOT FORECLOSED FROM ARGUING. WHAT THE DEFENDANTS WAS FORECLOSED FROM DOING WAS ARGUING THAT HE WAS IN FT. LAUDERDALE AT THE TIME.

ISN'T THAT ARGUMENT ALSO THERE?

THAT MAY BE SO. HOWEVER, THE BEST TO ARGUE THE CONVICTION, AND THE CONVICTION, IT HAS ALREADY BEEN ESTABLISHED THAT MR. DUEST IS THERE.

HERE YOU HAVE GOT THE DEFENDANT. YOU DIDN'T PROSECUTE. HE DIDN'T GET CONVICTED OF ROBBERY IN THE ORIGINAL CASE, WHICH WOULD HAVE OBVIATED THIS PROBLEM. YOU NOW HAVE A RESENTENCING JURY WHO IS TRYING TO GET FAMILIAR WITH THE FACTS OF THE CASE, AND YOU ARE HEARING ALL THIS BAD STUFF ABOUT WHAT HAPPENED, BUT THE BEST ARGUMENT ABOUT THE BAD STUFF IS IT WASN'T ME! AND I GUESS I AM A LITTLE CONCERNED. YOU KNOW, I MEAN, THE, THE ORIGINAL JURY VOTE IN THIS CASE WAS, WHAT, 7-5?

YES.

AND THIS TIME AROUND IT WAS?

10-2.

ABOUT WHAT EFFECT WHEN YOU HAVE A RESENTENCING JURY THAT HASN'T BEEN THE ORIGINAL JURY, THAT THEY HAVE LOST SOMETHING ABOUT WHATEVER THEY THOUGHT IN THE GUILT PHASE, AND YET WE ARE PRECLUDING THE DEFENDANT FROM PUTTING THAT INFORMATION BEFORE THE JURY, RESENTENCING JURY.

WELL, I THINK THE CASE LAW IS CLEAR. THE DEFENDANT IS PRECLUDED FROM ARGUING THAT HE DIDN'T COMMIT THE CRIME. HOWEVER, OF MURDER. HOWEVER, HE IS NOT PRECLUDED FROM ARGUING THAT HE DIDN'T TAKE THE CAMARO AND THAT HE DIDN'T TAKE THE JEWELRY BOX.

BUT BY SAYING THAT HE DIDN'T COMMIT THE CRIME OF ROBBERY, BE ABLE TO SAY THAT HE DIDN'T GET COMMIT IT BECAUSE HE WASN'T THERE?

I THINK THAT THE CASE LAW IS CLEAR THAT THIS TYPE OF RESIDUAL DOUBT EVIDENCE IS IMPROPER. I THINK IT IS PARENT FROM THE WATERHOUSE CASE AND I THINK -- I THINK IT IS APPARENT FROM THE WATERHOUSE CASE AND I THINK THE RESIDUAL HAS BEEN ADDRESSED, FROM DARLING --

I THINK THE STATE, HERE, HAS SAID WE NEED TO PUT ON EVIDENCE OF ROBBERY, SO, YOU KNOW, IF THE STATE HADN'T, IT IS A QUESTION OF WHETHER THE STATE HAS OPENED THE DOOR PARTIALLY TO ALLOW THE DEFENDANT, THEN, TO GIVE THEIR BEST DEFENSE TO WHY ROBBERY DIDN'T OCCUR.

AND I THINK THE BEST DEFENSE IS I DIDN'T COMMIT THE ROBBERY, AND THEY ARE NOT, THEY DIDN'T FORECLOSE THE DEFENDANT FROM SAYING I DIDN'T TAKE THE CAM ARE A -- THE CAMO-I DIDN'T TAKE THE CAMARO AND I DIDN'T TAKE THE -- I DIDN'T TAKE THE CAMARO AND I DIDN'T TAKE THE JEWELRY BOX.

THAT WENT TOO WHAT HE WAS DOGS.

HE DIDN'T COMMIT THE MURDER. HE HAD TO BE THERE. WE HAD TESTIMONY FROM MS. DUGAN AND FROM OTHERS THAT THEY SAW THE JEWELRY BOX. THE DEFENDANT WAS NOT FORECLOSED FROM TRYING TO REBUT THAT TESTIMONY. THE DEFENDANT WAS FORECLOSED FROM REBUTTING THE TESTIMONY THAT MR. DUEST WAS THERE, BECAUSE THE CONVICTION ESTABLISHES THAT HE WAS THERE. BECAUSE IF WE, IF WE ARE ABLE TO ARGUE THAT HE WASN'T THERE IN FT. LAUDERDALE TO COMMIT THE ROBBERY, THEN WE OPEN UP THE CAN OF WORMS THAT HE WASN'T THERE TO COMMIT THE MURDER, AND IT HAS ALREADY BEEN DECIDED HE WAS CONVICTED OF

THE CRIME, SO I THINK THAT IS THE FINE LINE, AND I THINK THAT IS EXACTLY WHAT HAPPENED IN THIS CASE. THE DEFENDANT COULD HAVE REBUT THE CLAIM THAT HE TOOK MR. POPE'S JEWELRY BOX AND HE TOOK MR. POPE'S CAMARO. AT THIS POINT, IF THERE ARE NO FURTHER QUESTIONS, THE STATE WOULD REST ON ITS BRIEF.

CHIEF JUSTICE: THANK YOU. MR. MARSHAL, HOW MUCH TIME IS LEFT FOR REBUTTAL? OKAY. COUNSEL.

QUICKLY, THEN, FIRST I WOULD JUST MAKE THE POINT AS TO ARGUMENT ONE, THIS COURT DEALT WITH THE SITUATION IN A CASE OF FRED WAY AND IN JAMES ROSE. IN FRED WAY, A 3.850, THIS COURT HELD THE DIRECT APPEAL IN ABEYANCE, REMANDED FOR PROCEEDINGS ON 3.850. WHEN THOSE 3.850 PROCEEDINGS WERE CONCLUDED, IT WAS ALL CONSOLIDATED FOR ONE APPEAL IN THIS COURT. IN THE CASE OF JAMES ROSE, THIS COURT ADDRESSED THE MERITS OF THE BRADY CLAIM THAT AROSE AS A RESULT OF THE RESENTENCING IN THE DIRECT APPEAL OF THE RESENTENCING. I ASKED FOR A RELINQUISHMENT TO PRESENT A 3.850. THE STATE OPPOSED IT. THIS COURT DENIED IT. SO THE NEXT THING FOR ME TO DO IS TO DO LIKE WAS DONE IN JAMES ROSE AND RAISE IT IN MY BRIEF. THAT IS WHAT I DID. ALSO I WOULD JUST MAKE THE POINT THE STATE WAS ARGUING THAT IT WOULD BE A SUCCESSIVE 3.850 AFTER RESENTENCING. IT WOULD NOT BE A SUCCESSIVE 3.850, BECAUSE THAT IS WHEN IT BECOMES FINAL, SO I WOULD JUST MAKE THE POINT THAT IT IS REALLY NOT TECHNICALLY A SUCCESSIVE 3.850.

THAT IS KIND OF A CHICKEN AND EGG SITUATION, BECAUSE THERE ALWAYS HAS BEEN A 3.850 PROCEEDING ON THE GUILT PHASE.

BUT, I UNDERSTAND, TO THE EXTENT THAT THE STATE IS ARGUING SUCCESSIVE, THE STATE IS OPENING THE DOOR WHEN IT IS FILED, TO CONTEND IS NOT TIMELY.

WAS THERE ANY REASON WHY THE DEFENDANT COULD NOT GO IN AND COULD NOT HAVE GONE IN THREE MONTHS AGO, AND FILED THIS 3.850?

I ASKED, I THOUGHT --

WITHOUT RELINQUISHING JURISDICTION, I DON'T KNOW WHAT THAT HAS TO DO WITH IT.

THIS COURT, IN THE CASE OF STATE VMENSES, WHICH IS NOT IN MY BRIEF BUT IN RESPONSE TO YOUR QUESTION, INDICATED MANY YEARS AGO THAT YOU COULDN'T HAVE A 3.850 PENDING IN CIRCUIT COURT WHILE AN APPEAL IS IN THIS COURT. THE CIRCUIT COURT DOESN'T HAVE JURISDICTION TO RETAIN IT, AND SO BECAUSE OF THAT, OVER THE MANY YEARS I HAVE LEARNED TO DO THAT.

IN THE CASE --

IN THE CASE OF MICHAEL REBERA, THAT IS THE FIRST TIME WHERE IT HAPPENED TO ME BUT THAT IS THE FIRST TIME I MADE THAT REQUEST.

BUT WE SAID PROCEED.

BUT THAT WAS A COUPLE OF MONTHS AFTER YOU DENIED MY REQUEST IN THIS CASE, IN MR. DUEST'S CASE.

SINCE WE DID THAT, HAS THERE BEEN ANY REASON WHY YOU COULDN'T GO AHEAD AND FILE IT?

I WOULD BE HAPPY TO DO IT TOMORROW, BUT I WOULD ASK THIS COURT TO RELINQUISH, BECAUSE I THINK THE WHOLE CASE SHOULD BE HEARD TOGETHER, BECAUSE I DO THINK THERE IS AN OVERLAP BETWEEN ARGUMENT ONE AND ARGUMENT THREE, BECAUSE IN ARGUMENT THREE

THE STATE DIDN'T GET A CONVICTION OF ROBBERY BEFORE. THEY HAVE CONCEDED THAT AND NOW WE ARE TRYING TO PROVE IT.

THAT IS KIND OF, THAT IS SHIFTING HORSES A LITTLE BIT, FROM THE STANDPOINT OF WHAT I UNDERSTOOD THE RELINQUISH WISH -- THE RELINQUISHMENT WAS ABOUT WAS ARGUMENT ONE AND NOT ARGUMENT THREE.

BUT I THINK THERE IS A SYNERGISTIC AFFECT AND THEY AFFECT EACH OTHER, BECAUSE I HAVE ALWAYS WONDERED IF THE STATE WAS GOING TO TURN AROUND AND SAY, WELL, AN INDICTMENT FOR FIRST-DEGREE MURDER CARRIES WITH IT FELONY MURDER. I, BUT THAT WAS NOT THE THEORY, CERTAINLY IN THIS COURT. THAT IS NOT THE THERE ANY THE PROSECUTOR'S CLOSING ARGUMENT, AND SO YOU KNOW, WHEN I HAVE DIFFERENT THINGS GOING ON IN DIFFERENT COURTS, I AM AFRAID THE STATE WILL TAKE INCONSISTENT POSITIONS IN THE DIFFERENT PROCEEDINGS, AND SO IT ALWAYS HAS MADE SENSE TO ME, CONSISTENT WITH STATE V MEN'SES, TO HAVE EVERYTHING IN ONE -- STATE VMENSES, TO HAVE EVERYTHING IN ONE PROCEEDING, SO THAT THE STATE GETS TO -- SO THAT THE COURT GETS TO HEAR ALL ASPECTS OF IT AND NOT HAVE DIFFERENT PROCEEDINGS. IN TERMS OF ARGUMENT THREE, I WOULD MAKE THE POINT THAT THE EVIDENCE HE WAS IN MASSACHUSETTS IS IMPEACHMENT EVIDENCE OF THE WITNESSES WHO SAID HE WAS IN FORT LAUD DATE.

-- IN FT. LAUDERDALE.

BUT THE DEFENDANT CAN'T COMMIT THE MURDER FROM BOSTON, CORRECT?

CORRECT.

IN ORDER TO CONVICT THE DEFENDANT, THE JURY HAD TO FIND THAT HE WAS IN FLORIDA AT THE TIME OF THE MURDER.

CORRECT, AND IF THE STATE WANTED, THEY COULD HAVE INDICTED ROBBERY BACK THEN AND GOT A CONVICTION, AND IF THE STATE DOESN'T WANT THIS EVIDENCE TO COME IN AT THE RESENTENCING, THEN THEY SHOULDN'T BE SEEKING THIS AGGRAVATING CIRCUMSTANCE. LINGERING DOUBT IS NOT PRECLUDED BECAUSE THE CONSTITUTION PRECLUDES IT. THIS COURT HAS SAID LOCKET DOESN'T REQUIRE THAT A DEFENDANT BE ABLE TO PRESENT LINGERING DOUBT. THAT IS AN ENTIRELY DIFFERENT MATTER THAN WHETHER THE DEFENDANT IS ENTITLED TO DUE PROCESS, WHEN THE STATE SEEKS TO PROVE ROBBERY, TO RESPOND TO IT BY SAYING I WASN'T THERE!

I THOUGHT THAT THIS WAS NOT LINGERING DOUBT EVIDENCE BUT SIMPLY EVIDENCE TO REBUT THE ROBBERY AGGRAVATOR.

I AGREE. THE STATE'S ARGUMENT I HEARD WAS THAT THE REASON THIS CAN'T COME IN IS BECAUSE IT IS LINGERING DOUBT EVIDENCE, AND IT IS THAT RULE AGAINST LINGERING DOUBT THAT IS WHAT THE STATE IS RELYING UPON, IN SAYING IT WAS CORRECT TO EXCLUDE THE EVIDENCE, AND SO MY POSITION IS THIS ISN'T ABOUT LINGERING DOUBT. THIS IS ABOUT IMPEACHING THE STATE'S CASE, WHICH THE DEFENDANT WAS PRECLUDED FROM DOING IN VIOLATION OF DUE PROCESS.

CHIEF JUSTICE: ALL RIGHT. ON THAT NOTE, WE WILL HAVE TO END THE ARGUMENT.

THANK, YOUR HONORS. CHIEF CHEE THE COURT WILL NOW TAKE ITS REGULAR 15 MINUTE MORNING RECESS BEFORE HEARING THE NEXT CASE. WE WILL STAND IN RECESS.

MARSHAL: PLEASE RISE.4'