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NEXT CASE ON THE COURT'S CALENDAR IS TERRY MELVIN SIMS VERSUS THE STATE OF FLORIDA, AND TERRY MELVIN SIMS VERSUS MICHAEL MOORE. THE CASE IS CONSOLIDATED FOR ORAL ARGUMENT. MR. MALONE.

THANK YOU, CHIEF JUSTICE HARDING. MAY IT PLEASE THE COURT. WE ARE BEFORE THE COURT ON APPEAL FROM THE DENIAL OF THE 3.850 AND AN EVIDENCIARY HEARING FOR A WRIT OF HABEAS CORPUS MUCH THE FIRST ISSUE, AND THE POINT YOU RAISE ON APPEAL, IS THE INNOCENCE OF TERRY SIMS. WE PRESENTED TO THE TRIAL COURT, AND TO THIS COURT, CONTINUALLY ACCUMULATING EVIDENCE OF MR. SIPS ---MR. SIPS ---MR. SIMS' INNOCENCE. AT THE LAST HEARING, THE STIPULATED TESTIMONY ANSWERS THE COURT'S LAST QUESTION FROM THE LAST APPEAL AND CLOSES THE LAST DOOR ON ANY EVIDENCE OF GUILT. IF MR. SIMS WERE RETRIED TODAY ON THIS CASE THERE, IS NO QUESTION THAT HE WOULD HAVE TO BE ACQUITTED. THE CASE AT TRIAL WAS BUILT UPON THE TESTIMONY OF THREE EYEWITNESSES. IT WAS BUILT UPON THE TESTIMONY OF TWO CODEFENDANTS WHO RECEIVED DEALS FOR THEIR TESTIMONY AGAINST MR. SIMS, AND FINALLY ON THE TESTIMONY OF A DOCTOR WHO SAID THAT THERE WAS A WOUND ON MR. SIMS. SINCE THAT FIRST -- SINCE THE TESTIMONY AT TRIAL, WE HAVE SHOWN, THROUGH POST-CONVICTION, THINGS THE JURY DID NOT KNOW. THE JURY DID NOT KNOW THE EYEWITNESSES HAD BEEN HYPNOTIZED. PLAIN THEIR TESTIMONY WOULD EITHER BE EXCLUDED AT A RETRIAL OR, AT THE VERY LEAST, MR. SIMS WOULD BE PERMITTED TO INTRODUCE THE TESTIMONY OF THE POLICE HIPTIST AND OTHER EXPERTS, THAT HIPTIZE TESTIMONY IS UNRELIABLE, AS THIS COURT HAS FOUND.

DID ANY OF THOSE WITNESSES IDENTIFY SIMS, WITHOUT THE AID OF HYPNOSIS? IN OTHER WORDS BEFORE --

SUE KOVACK, I BELIEVE, HAD PICKED OUT A PHOTOGRAPH, BUT EVEN WITH THE PRIOR TESTIMONY, OF THE PRIOR, OF THE OUT OF COURT IDENTIFICATION, TEST -- OUT OF COURT IDENTIFICATION, TESTIMONY ABOUT HYPNOSIS WOULD CERTAINLY BE ADMISSIBLE IN REBUTTAL. INITIALLY SUE KOVACK HAD GIVEN A VERY SPARSE DESCRIPTION AND SAID SHE DIDN'T THINK SHE COULD ASSIST IN DEVELOPING A COMPOSITE OF THE PERSON WHO WAS THE ROBBERY SUSPECT.

BUT SHE DID IDENTIFY A PHOTOGRAPH OF MR. SIMS?

I BELIEVE, YES, I BELIEVE SHE HAD PICKED ONE OUT PREVIOUSLY.

DOES THE RECORD TELL US WHAT HAPPENED TO THE OTHER ALLEGED PARTICIPANT IN THIS CRIME? A FELLOW NAMED ROBINSON.

THE RECORD DOESN'T TELL US. I CAN TELL YOU. THE RECORD DOESN'T TELL US. MR. ROBINSON HAS NEVER BEEN ARRESTED OR CHARGED FOR THIS CRIME.

DID YOUR CLIENT TESTIFY AT THE TRIAL OR AT ANY OF THE SUBSEQUENT PROCEEDINGS?

HE HAS NOT TESTIFIED. BUT --

WHAT DOES THE RECORD TELL US ABOUT AN EXPLANATION FOR THIS INJURY THAT YOUR CLIENT APPARENTLY HAD AROUND THE SAME TIME THAT THIS OCCURRED? TO HIS HIP OR LEG.

THE RECORD TELLS US THAT, IF IT WAS MR. SIMS, THAT DR. DUNBAR SAW, THAT DUNBAR COULD ONLY SAY THAT THERE WAS A WOUND, AN ELONGATION ON THE HIP. HE COULD NOT TELL IF IT

WAS A BULLET WOUND. THE -- THAT, SO THERE WAS ACTUALLY NO TESTIMONY AT TRIAL THAT MR. SIMS HAD A BULLET WOUND, AS THE STATE HAD ADVISED THIS COURT AT THE LAST HEARING, AT THE LAST --.

DID THE RECORD TELL US, WITH REFERENCE TO MR. GALE, INsofar AS WHETHER HE HAS EVER BEEN QUESTIONED OR GIVEN A STATEMENT OR CALLED TO TESTIFY IN ANY OF THE PROCEEDINGS IN THIS CASE?

HE HAS NOT BEEN PRODUCED FOR TESTIMONY.

AND DOES THE RECORD TELL US ANYTHING ABOUT WHETHER HE IS KNOWN OR IS HIS LOCATION KNOWN OR HE IS ALIVE OR DEAD OR ANYTHING LIKE THAT?

THERE IS NOTHING IN THE RECORD. ABOUT THAT. BUT THE CODEFENDANT TESTIMONY, WHEN THIS COURT UPHELD, ON THE FIRST POST-CONVICTION HEARING, UPHELD THE HYPNOTIZED WITNESSES' TESTIMONY, SAID THAT BEBE HALSELL AND CURTIS BOWDEN WHO, TESTIFIED AGAINST MR. SIMS, WERE THE STRONGEST IDENTIFICATIONS IN THE RECORD. SINCE THEN WE KNOW THAT BEBE HALSELL GOT AFTERNOON BETTER DEAL THAN HAD BEEN TOLD AT TRIAL. HE GOT TIME SERVED, ESSENTIALLY, FOR TURNING AGAINST MR. SIMS, AND WHEN THE JURY WAS TOLD HE WOULD GET TEN YEARS. WE KNOW, FROM THE FIRST POST-CONVICTION, THAT IS CONSISTENT WITH THE DEFENSE TESTIMONY AT TRIAL, THAT TERRY GALE AND GENE HAD PURCHASED LOCKS TOGETHER AND A RECEIPT FOUND AND THIS COURT FELT IT WAS NOT MATERIAL AT THAT TIME, BUT IT CERTAINLY TAKES ON MORE MATERIALITY, IN SIGNIFICANCE WITH THE EVIDENCE. THE REASON FOR THE LOCK PULLER IS THE LOCK PULLER WAS USED TO STEAL THE HOT CAR OR THE GETAWAY CAR THAT WAS USED IN THE ROBBERY AT THE LONGWOOD VILLAGE PHARMACY. PRIOR TO POST CONVICTS, THE EVIDENCE CONTINUED TO -- TO POST-CONVICTION, THE EVIDENCE CONTINUED TO ACCUMULATE. WE PRESENTED EVIDENCE THAT BEBE HALSELL HAD TOLD SEVERAL PEOPLE THAT HE HAD LIED ABOUT THE ACTION AND THAT IT WAS TERRY GALE WHO WAS THE FOURTH PARTICIPANT IN THE CRIME IN THIS CASE. ON APPEAL, ONE OF THIS COURT'S CONCERNS, THE TRIAL JUDGE'S CONCERNS, AND WHEN THIS COURT ADOPTED THE TRIAL COURT'S ORDER, ITS CONCERN, AS WELL, WAS THAT, WELL, THAT IS ALL WELL AND GOOD. YOU HAVE UNDERMINED BEBE HALSELL BUT WHAT ABOUT CURTIS BALDWIN? WELL, IN THIS LATEST HEARING, THE TESTIMONY OF CURTIS BALDRY HAS BEEN SUBSTANTIALLY UNDERMINED. WE SUBMITTED THE TESTIMONY OF GEORGE GRAY, WHO -- OF GEORGIA GRAY, WHO SAID THAT CURTIS BALDRY HAD TOLD HER, IN THE YEAR BEFORE HIS DEATH, THAT HE HAD TO LIE AGAINST TERRY SIMS, AND THAT HE HAD TO DO IT TO PROTECT HIMSELF AND THAT ACTUALLY IT WAS TERRY GALE WHO WAS THE FOURTH PARTICIPANT IN THIS CRIME. THAT TESTIMONY IS CORROBORATED BY THE TESTIMONY OF JERRY LAWRENCE, WHOSE AFTERWARD EIGHT OF WAS, ALSO -- WHOSE AFFIDAVIT WAS ALSO SUBMILTED -- SUBMITTED AT THE POST-CONVICTION HEARING, WHICH WAS THE CONVERSATION WITH DAN GRAY AND CURTIS BALDRY, AT THE FAMOUS RESTAURANT IN JACKSONVILLE, WHERE BALDRY HAD MADE SIMILAR COMMENTS. THAT IS CORROBORATED BY OTHER EVIDENCE THAT WE PRESENTED IN THE POST-CONVICTION HEARING, THE PHYSICAL EVIDENCE THAT TERRY GALE WAS PART OF GALE AND ROBINSON REPOS, AS WE CALL T.

DID JOYS GRAY TESTIFY AT TRIAL?

SHE TESTIFIED AT THE ORIGINAL TRIAL, YES.

SO IS THERE ANY TESTIMONY AS -- EXPLANATION AS TO WHY SHE DIDN'T COME FORWARD AT THAT TIME?

YES. THE EXPLANATION WAS THAT SHE FLEW IN AT THE LAST MINUTE. THAT THE TRIAL ATTORNEYS SPOKE WITH HER VERY BRIEFLY. THEY ASKED HER WHETHER SHE HAD EVER MET TERRY GALE. SHE COULD HAVE, HAD SHE BEEN ASKED, GIVEN A MUCH OR DETAILED ACCOUNT

OF THE MEETING THAT SHE HAD HAD WITH TERRY GALE, IN WHICH THEY HAD DISCUSSED THE LONGWOOD VILLAGE PHARMACY ROBBERY. SHE, ALSO, COULD HAVE FAUCKD ABOUT THE FACT -- COULD HAVE TALKED ABOUT THE FACT, HAD IT NOT BEEN FOR THE HURRY-UP PREPARATION FOR HER TESTIMONY AT TRIAL, THAT SHE HAD SEEN TERRY GALE AT THE TIME OF THE ARREST. JOYS FWRA WAS ARRESTED IN JACKSONVILLE, WITH HALSELL AND BALDRY. ON JANUARY 12, WITHIN TWO WEEKS OF THE TIME THIS CRIME OCCURRED, JANUARY 12, 1979. AND THAT TERRY GALE WAS PRESENT AT THE TIME. HE HAD DRIVEN BY DURING THE ARREST. THAT TERRY GALE HAD SAID, MADE COMMENTS THAT INDICATED THAT HE KNEW ABOUT THE REASON FOR THE ARREST WAS, IN HIS WORDS, IT MUST BE THE LONGWOOD VILLAGE JOB.

I GUESS WHAT I AM THINKING, NOT ONLY WAS JAIS GRAY A WITNESS AT TRIAL -- NOT ONLY WAS JOYCE GRAY A WITNESS AT TRIAL, BUT THERE IS NOTHING IN THE INFORMATION, IN THE REPORT THAT LED YOU TO THE ROBBERY, THAT LED TO YOU JOYCE GRAY AND SHE WAS A POTENTIAL WITNESS OR A WITNESS ALL ALONG IN THIS CASE, RIGHT?

THE REASON FOR THE POST-CONVICTION PROCEEDING ABOUT THE SEQUENCE OF EVENTS THAT LED DIRECTLY FROM THE MACKELBERRY REPORT, THAT LED FROM ONE WITNESS TO THE NEXT, AND THAT LED US TO JERRY LAUREN, AND THAT FAMOUS CONVERSATION, WHEN REFERENCED TO SOMEONE NAMED JAIS, TO JAIS CRAIG -- SO THIS COURT AND THE TRIAL COURT BOTH FOUND THAT THERE WAS DUE DILIGENCE IN THE UNCOVERING OF THOSE WITNESSES AND THAT THERE WAS DUE DILIGENCE IN THE UNCOVERING OF JOYCE GRAY. THERE WAS NO OTHER -- THE ONLY ALTERNATIVE WOULD BE FOR THE COURT TO SAY THAT WE SHOULD BE INTERVIEWING EVERY WITNESS IN THE CASE EVERY SIX MONTHS OR A YEAR AFTER THE TRIAL, TO SEE IF THEY HAVE ANY NEW INFORMATION, AND I DON'T THINK THAT IS THE STANDARD UNDER JONES. SO THE TRIAL COURT DID FIND, GRACIOUSLY GAVE THE DEFENSE THE BENEFIT OF THE DOUBT AND FOUND THAT DUE DILIGENCE HAD BEEN EXERCISED IN PRODUCING JOYCE GRAY'S STIPULATED TESTIMONY. THE ONLY PROBLEM JUDGE EATON HAD WITH THE JOYCE GRAY AFFIDAVIT WAS ITS ADMISSIBILITY, AND WE PRESENTED SEVERAL REASONS IN THE BRIEF WHY JOYCE GRAY'S TESTIMONY IS ADMISSIBLE. IT PLAINLY WOULD BE ADMISSIBLE TO IMPEACH THE TESTIMONY OF CURTIS BALDRY THAT, IT WAS TERRY SIMS WHO WAS AT THE ROBBERY.

SO IF WE ORDERED A NEW TRIAL IN THIS CASE, WHAT EVIDENCE DO YOU CONTEND WOULD COME IN AT THE NEW TRIAL? AS I UNDERSTAND, A PART OF THE TRIAL JUDGE'S ORDER IS THAT, OF THESE AFFIDAVITS, WOULD NOT BE ADMISSIBLE, AT LEAST, EVEN IF THE PERSON WAS THERE. THAT PARTICULAR TESTIMONY WOULD NOT BE ADMISSIBLE. SO WHAT DO YOU CONTEND WOULD SHOW AT A NEW TRIAL THAT MR. SIMS IS INNOCENT?

WELL, I AM -- STARTING WITH THE JOYCE GRAY AFFIDAVIT, JOYCE GRAY'S AFFIDAVIT THAT CURTIS BALD RIYADH MIGHTED HE WAS LYING AND SAID TERRY SIMS WAS INVOLVED WHEN ACTUALLY IT WAS TERRY GALE IS PLAINLY ADMISSIBLE AS IMPEACHMENT EVIDENCE AND AS SUBSTANTIVE EVIDENCE OF INNOCENCE. BACKING UP FROM THERE, AT A RETRIAL --

IMPEACHMENT EVIDENCE OF?

OF CURTIS BALDRY'S TESTIMONY AT TRIAL THAT IT WAS TERRY SIMS, WHO WAS THE FOURTH PARTICIPANT IN THE ROBBERY AND WHO COMMITTED THE KILLING.

NOW, IS HE ONE OF THE PEOPLE THAT IS NOW DEAD, MR. BALDRY?

YES. CURTIS BALDRY AND BEBE HALSELL ARE BOTH DEAD.

AND WHO ELSE?

BALDRY AND HALSELL ARE, BOTH, DECEASED NOW. IS THAT CORRECT?

YES. SO PRESUMABLY THE STATE WOULD BE PERMITTED TO INTRODUCE THEIR FORMER TESTIMONY.

SO REALLY THERE COULDN'T BE IMPEACHMENT IN ANY NORMAL SENSE, BECAUSE YOU COULDN'T DIRECTLY IMPEACH BALDRY OR HALSELL WITH ANY OF THIS TESTIMONY.

NO. COULD NOT ASK THEM THE SPECIFIC QUESTION ABOUT THE SPECIFIC STATEMENT. BUT THE TESTIMONY WOULD PRESUMABLY BE ADMITTED, UNDER THE EXCEPTION FOR FORMER TESTIMONY, WOULD BE DECLARED NOT AVAILABLE, AND THIS TESTIMONY DIRECTLY CONTRADICTS THE TESTIMONY, JOYS GRAY'S TESTIMONY DIRECTLY CONTRADICTS THE TESTIMONY OF CURTIS BALDRY MR. SIMS' INVOLVEMENT. IT SHOWS HIS MOTIVE FOR LYING. IT SHOWS THE FACT THAT HE DID LIE. AND IT SHOWS DIRECT EVIDENCE THAT IT WAS TERRY GALE WHO WAS NOT -- WHO WAS THE FOURTH PARTICIPANT AND NOT TERRY SIMS. IT WOULD, ALSO, BE ADMISSION OF AN ADVERSE PARTY. MR. HALSELL AND BALDRY WERE, BOTH, CODEFENDANTS AND WERE PARTIES TO THE PROCEEDING. THE T. IS A DECLARATION AGAINST INTEREST THERE. -- IT IS A DECLARATION AGAINST INTEREST. THERE ARE A NUMBER OF WAYS IN WHICH CURTIS BALDRY, RELATED BY JOYCE GRAY, WOULD BE ADMISSIBLE. THERE WOULD BE OTHER EVIDENCE, JUSTICE QUINCE, IN ANSWER TO YOUR QUESTION. I STARTED TO SUM ARISE IT, THE HYPNOTIZED WITNESSES' TESTIMONY IS MOST LIKELY EXCLUDEABLE. IF IT ISN'T, IT COULD BE UNDERMINED WITH THE EVIDENCE THAT HIP TISM IS UNRELIABLE. THERE IS THE EVIDENCE OF THE LOCK PULLERS WERE PURCHASED BY TERRY GALE AND GENE ROBINSON. THERE IS THE EVIDENCE FROM THE MACKLE BERRY REPORT THAT TERRY GALE AND BEBE HALSELL HAD BEEN COMMITTING ROBBERIES FOR WEEKS, JUST A FEW HOURS AWAY, IN GAINESVILLE, AND I THINK THAT EVIDENCE SHOWS THAT THOSE ARRESTS OR THOSE CRIMES ONLY ENDED ABOUT NOVEMBER 30 OF 199 -- 1977, AND THIS OCCURRED IN DECEMBER 29 OF 1977, AND SO THERE IS THE EVIDENCE OF THE OTHER WITNESSES AND THE PRIOR POST-CONVICTION HEARING, THAT BEBE HALSELL HAD SAID THAT HE LIED. THAT IT WAS TERRY GALE, NOT TERRY SIMS. THERE ARE SEVERAL WITNESSES WHO ATTESTED TO THAT. WE HAVE SET OUT JUST LINE BY LINE IN THE BRIEF, THE TESTIMONY THAT WE COULD OFFER TO DEMONSTRATE THAT IT WAS MR. GALE AND NOT MR. SIMS, AND IT WOULD HAVE TO RESULT IN ACQUITTAL, IF THE STATE COULD ACTUALLY RECHARGE OR RETRY MR. SIMS AT ALL.

YOU HAVE RAISED AN ISSUE, WITH REFERENCE TO THE USE OF LETHAL INJECTION, TO EXECUTE YOUR CLIENT. BECAUSE WE HAVE LIMITED TIME, WOULD YOU ADDRESS THE FACT THAT THE STATUTORY SCHEME, NOW, IS YOUR CLIENT'S CHOICE OF WHETHER OR NOT TO HAVE ELECTROCUTION OR LETHAL INJECTION. THIS COURT, IN ITS PREVIOUS DECISIONS, HAS UPHELD THE CONSTITUTIONALITY OF CARRYING OUT THE DEATH PENALTY BY ELECTROCUTION. AND YOUR CLIENT APPARENTLY HAS MADE THE CHOICE FOR LETHAL INJECTION, BY NOT MAKING A CHOICE, UNDER THE SCHEME, SO WHY WOULDN'T, INSOFAR AS THE CONSTITUTIONALITY, THEN, OF USING LETHAL INJECTION, IN VIEW OF YOUR CLIENT HAVING THE CHOICE OF ELECTROCUTION, BE CONSTITUTIONAL?

WELL, HE WAS NOT SENTENCED TO A CHILES. HE WAS NOT SENTENCED TO POISON MR. PRESIDENT SIMS WAS SENTENCEED TO BE ELECTROCUTEED TO DEATH. OUR CONTENTION, JUSTICE ANSTEAD, IS THAT MR. SIMS, THE NEW STATUTE CANNOT, FIRST, APPLY TO HIM, UNDER SUBTLE PRECEDENT OF THIS COURT AND WASHINGTON --

THE LEGISLATURE HAS LEFT THE OPTION TO HIM. YOU SAY HE HAS BEEN SENTENCED TO ELECTROCUTION, AND SINCE THE LEGISLATURE HAS LEFT THE OPTION TO HIM TO, STILL, CHOOSE THAT, ACCEPT THAT, THEN WHY WOULD THAT -- WHAT CONSTITUTIONAL PRINCIPLE WOULD THAT VIOLATE?

IT VIOLATES, FIRST, THE STATE CONSTITUTIONAL PROVISION OF ARTICLE 10 SEX 9, THE -- SECTION 9, THE SAVINGS CLAUSE. MR. SIMS WAS NOT SENTENCED TO AN ELECTION OF WHICH WAY THE

STATE IS GOING TO PUT HIM TO DEATH. THIS COURT HAS SAID THAT A JUDICIAL CHANGE IN THE METHOD OF EXECUTION, IN WASHINGTON VERSUS DOWLING ANDERS PART' IN -- AND EXPARTE IN BROWN, HAS SAID THAT EXECUTION CANNOT INVOLVE ELECTROCUTION.

WASHINGTON VERSUS DOWLING WAS A DIRECT CHANGE. IS THAT CORRECT?

THAT'S CORRECT. THIS IS A CHANGE FROM DIRECT DEATH OF DEATH BY ELECTROCUTION TO CHOOSE YOUR POISON. THAT KIND OF A GROTESQUE CHOICE EQUALLY AFFECTS MR. SIMS' PUNISHMENT, AS ANY CHOICE, AS ANY CHANGE IN THE METHOD OF EXECUTION. AND THERE IS -- WE HAVE, ALSO, PRESENTED EVIDENCE THAT THERE WAS 48 HOURS UNDER THE NEW LEGISLATION, FOR MR. SIMS TO ELECT OR WAIVE. WE HAVE, ALSO, CHALLENGED THE WAIVER PROVISIONS IN THE BRIEF. YOU WILL SEE THERE IS NO REAL DUE PROCESS IN THE WAIVER PROVISIONS. BUT WE DON'T KNOW WHAT TIME THE ACTUAL EXECUTION DATE WAS SET, BUT WE DO KNOW THAT DO THAT DOC WAS NOT ADOPTING ANY PROTOCOLS WHATSOEVER, AND WHAT DID IT INTEND TO DO WITH LETHAL INJECTION, UNTIL AFTER THE 28th, UNTIL AFTER THE 48 HOURS HAVE EXPIRED, SO MR. SIMS REALLY COULD NOT MAKE ANY KNOWING OR INTEL SECRETARY WAIVER OR ELECTION.

HAS THERE BEEN AN ATTEMPT TO EXERCISE AN ELECTION SINCE THAT PERIOD OF TIME AND IT HAS BEEN REJECTED, BEYOND -- 48 HOURS.

NO. BUT ON THE OTHER HAND, THE STATE HAD WARDEN CROSBY AT THE EVIDENTIARY HEARING, AND THERE WAS NO INDICATION BY HIM THAT HE HAD MADE ANY ATTEMPT, EITHER. WE HAD, ALSO, PRESENTED EVIDENCE THAT THE D. O. C. IS UNPREPARED TO PROCEED WITH THE LETHAL INJECTION, AND WE HAVE SET FORTH THE FACTS AND ARGUMENT IN THE BRIEF, AND JUST TO BRIEFLY BRING IT TO YOUR HONORS' ATTENTION, IT DEPENDS ON WHO YOU ASKED IN D. O. C. AS TO WHAT EACH PERSON IS GOING TO DO AT D. O. C., AND THE LETHAL INJECTION DEPENDS ON WHO YOU ASK. SECRETARY MOORE IS RELYING ON A PHYSICIAN'S -- ON A PHYSICIAN'S ASSISTANT, TO DEMONSTRATE IF THERE IS PROBLEM, AND WE HAVE DEMONSTRATED THAT THERE IS A PROBLEM WITH LETHAL INJECTION THROUGHOUT THE COUNTRY. THE PHYSICIAN'S ASSISTANT HAS TESTIFIED, HOWEVER, THAT HE WAS GOING TO BE AN OBSERVER. IF IT CAME UP, HE COULD TAKE NO ACTION, BECAUSE IT WENT AGAINST EVERYTHING THAT HE WAS TRAINED TO DO. THE PROBLEMS THAT ARISE ARE ENORMOUS AND HORRIFYING. IF THERE IS A KINK IN THE TUBE OR -- IF THERE IS A KINK IN THE TUBE OR IF THE NEEDLE DOES NOT GO PROPERLY INTO THE VEIN AND THE SODIUM OPPONENT THOL, HAD WHICH IS IMPROPERLY ADMINISTERED, AND THE SECOND DRUG, PAN CURE OWNIUM BROMIDE, IF IT WERE ADMINISTERED, THERE COULD BE AN APPLICATION. IF THE SODIUM PENT ON THOL, THE PHARMACOLOGIST THE HAS TESTIFIED THAT IT WOULD FEEL LIKE A HOT IRON GOING THROUGH THE PERSON'S VEINS.

I THINK THE TIME IS EXPIRED. I HAVE ONE QUESTION, IF I MAY. BUT FOR THE SAVINGS CLAUSE, DO YOU AGREE THAT THERE IS NOT A RETRO ACTIVITY PROBLEM, AS FAR AS --

NO.

-- THE CONSTITUTION IS CONCERNED?

NO. IT LOOKS LIKE THERE IS SOME -- THERE IS A CLOSE PRECEDENT, BUT THIS KIND OF A -- FIRST, THIS COURT COULD NOT, CONSISTS WENT DUE PROCESS, RETROACTIVELY CHANGE THE LAW IN WASHINGTON VERSUS DOWLING AND ALSO THE CITY OF COLUMBIA.

WAS THAT THE SAME KIND OF LAW REGARDING EXECUTION?

YES, BUT NOT THE SAME KIND OF STATUTE THAT FLORIDA HAS, FOR THE SAME KINDS OF WAIVER PROVISIONS, AND AS JUSTICE WELLS HAS SAID IN PROVEENS ZAHN-THAT, THE LEGISLATION SHOULD REQUIRE AN EXPRESS ELECTION AND WAIVE OF THE CHALLENGE OF THE METHOD OF

EXECUTION, AND THIS ONE DOES NOT.

THANK YOU. MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY. I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING. SEATED WITH ME AT COUNSEL TABLE IS CAROL OSTENKOWSKI. LET ME TRY TO EXPLAIN THE CLAIM AS REGARDS TO THE TWO CODEFENDANTS AND THE HYPNOSIS. IN 197 IT, REGARDING THE -- IN 1972, REGARDING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM THAT WAS PENDING IN COUNTY COURT THEN BUT IS NOT PENDING NOW. IN THAT CASE, THE COURT HAS SAID, THE PINPOINT CITE, MOREOVER, HE HAVE EASTBOUND IF THE BUNDY -- EVEN IF THE BUNDY ANALYSIS AS TO HIP NODES -- AS TO HYPNOSIS, AS IS THE CASE, MUCH OF THE HYPNOSIS TESTIMONY WOULD STILL HAVE BEEN INADMISSIBLE, AND THIS REMAINING TESTIMONY CORROBORATED THE STATEMENTS OF THE TWO CODEFENDANTS. WITH THAT IN MIND, IT APPEARS THAT THE ISSUE SHOULD BE DISPOSED OF. THE CODID DEFENDANTS ARE -- THE CODEFENDANTS ARE BOTH DEAD. THE JOYCE GRAY AFFIDAVIT REFERS TO A STATEMENT THAT WAS MADE, PURPORTEDLY, IN 1981, WHILE THIS CASE WAS STILL PENDING BEFORE THIS COURT ON DIRECT APPEAL, AND THE SHORT ANSWER TO THE GRAY AFFIDAVIT, WHICH IS THE ONLY THING BEFORE THIS COURT, IS THAT JUDGE EATON, AS HE MUST DO, AS THE FINDER OF FACT, CONSIDER THE CREDIBILITY OF THE WITNESSES AND RULED THAT THEY WERE NOT CREDIBLE. JOYCE GRAY, BAY THE WAY, IS A CONVICTED FELON. UNDER SPASIAN-. -- UNDER SPAZIANO, THAT HOLDING MUST STAND. IT IS NOT AN ABUSE OF DISCRETION.

DID JOYCE GRAY TESTIFY AT THE HEARING?

NO, MA'AM. HER AFFIDAVIT WAS PRESENTED BY AGREEMENT.

I WAS CONCERNED AS TO WHAT YOUR LAST POINT WAS THAT JUDGE EATON MADE, THE DETERMINATION CREDIBILITY, HOW DO YOU DO THAT, WHEN YOU DON'T HAVE A WITNESS?

WELL, YOUR HONOR, TY TIPCALLY THE STATE IS, TO KIND OF BACK UP A LITTLE BIT, TYPICALLY WE ARE THE ONES COMPLAINING ABOUT AN AFFIDAVIT BEING BROUD, AND WE ARE TYPICALLY SAYING THAT WE WANT THE JUDGE TO BE ABLE TO SEE THE WITNESS AND WATCH THEM TESTIFY AND GAUGE THEIR CREDIBILITY AND THIS AND THAT. WE GAVE THAT UP, AND WE LET THE DEFENSE GO WITH AN AFFIDAVIT THAT WE HAD NO OPPORTUNITY TO CROSS-EXAMINE. THE LACK OF CREDIBILITY COMES THROUGH IN THE AFFIDAVIT, AND I BELIEVE THAT IT IS ENTIRELY PROPER AND ENTIRELY WITHIN THE TRIAL COURT'S PURVIEW TO MAKE THOSE KINDS OF CREDIBILITY DETERMINATIONS. AND TO SOME DEGREE, MAYBE WE ARE GETTING THE CART BEFORE THE HORSE A LITTLE BIT. THE DEFENDANT HAS THE BURDEN OF PROVING DUE DILIGENCE, AS TO A NEWLY-DISCOVERED EVIDENCE CLAIM. THERE IS NO SHOWING, AT ALL, OF ANY SORT OF DUE DILIGENCE, WITH RELATIONSHIP TO JOYCE GRAY.

SO YOU DON'T WANT US TO ACCEPT JUDGE EATON'S FINDINGS?

YES, MA'AM. I WANT YOU TO ACCEPT JUDGE EATON'S FINDINGS AND, ALSO, FIND THAT THERE HAS BEEN A SHOWING OF NO DUE DILIGENCE AND THE STATE WINS ON EITHER BASIS. JUDGE EATON GAVE THEM THE BENEFIT OF THE DOUBT. CUT PAST THE PROCEDURAL ARGUMENT AND WENT STRAIGHT TO THE MERITS AND RULED THAT THE STATE WINS. JUST BECAUSE HE RULED ON THE MERITS DOESN'T MEAN THAT THIS COURT CAN'T, ALSO, RULE ON THE PROCEDURAL GROUNDS WHICH ARE QUITE LITERALLY A TOTAL FAILURE OF PROOF TO PRESENT A WITNESS WHO HAS BEEN KNOWN, SINCE TRIAL AND UNDER THIS COURT'S PRECEDENT, MOSESENTLY THE MILLS DECISION, IN THE ABS OF SOME SHOWING, WHICH THERE IS NONE IN THIS CASE. THIS CAN'T BE NEWLY-DISCOVERED EVIDENCE. THAT WITNESS HAS BEEN KNOWN IF A VERY, VERY LONG TIME.

DO YOU AGREE WITH THE ANSWER OF YOUR OPPOSITION, HERE, THAT ROBINSON'S TESTIMONY OR STATEMENTS HAVE NEVER BEEN INTRODUCED IN ANY OF THE PROCEEDINGS IN THIS CASE?

ROBINSON, SIR? A ROBINSON.

GENE ROBINSON?

WASN'T ROBINSON THE FOURTH PARTS SNANT.

YES, SIR. ROBINSON WAS THE FOURTH, AND I DON'T RECALL EVER SEEING HIM. I DON'T BELIEVE THEY HAVE BEEN. I DON'T KNOW. BUT I DON'T REMEMBER SEEING HIM. I DON'T KNOW ANYTHING ABOUT GENE ROBINSON.

THE SAME WITH GALE? THAT IS THAT THEY HAVE NOTHING, AT LEAST IN THIS STATEMENT OR THE TESTIMONY, EVER, FROM A PERSON DESCRIBED AS TERRY GALE?

TERRY GALE HAS NEVER BEEN PRODUCED AT ONE OF THESE HEARINGS, SIR.

IS THIS A CASE, ALSO, WHERE DNA EVIDENCE IS RELEVANT AT ALL?

NO, SIR.

THAT IS WAS THERE ANY BLOOD EVIDENCE TAKEN? THE KILLER, THE FOURTH PARTICIPANT IN THIS, WAS WUBDED AT THE SCENE -- WAS WOUNDED AT THE SCENE, RIGHT?

THAT IS CORRECT, YOUR HONOR.

WAS THERE ANY RECOVERY OF ANY BLOOD OF THAT PERSON THAT WAS WOUNDED?

I SIMPLY DON'T KNOW, SIR. JUSTICE ANSTEAD, THAT, WHEN YOU STARTED ASKING THE QUESTION, AND SAID DNA, THAT HAS COME UP SOMEWHERE BUT I CAN'T REMEMBER IF IT WAS A PRIOR ARGUMENT OR WHERE THAT CAME UP. I DON'T -- I DON'T KNOW. THAT IS THE BEST I CAN SAY.

OKAY. BUT SO FAR AS THE RECORD SHOWS, WE DON'T HAVE ANYTHING IN THIS CASE LIKE THAT THE KILLER BLEED ON THE FLOOR OR SOME OTHER OB? THAT WAS RECOVERED AND PRESERVED IN THIS SOME WAY? SO THAT THAT WOULD BE AVAILABLE FOR DNA TESTING TODAY?

I SIMPLY DON'T KNOW THE ANSWER. I SIMPLY DON'T KNOW. I WOULD POINT OUT, JUST KIND OF AS AN ASIDE HERE, THERE WAS TESTIMONY FROM -- AT TRIAL, THAT SIMS HAD A WOUND IN HIS HIP THAT WAS CONSISTENT WITH THE GUN SHOT WOUND THAT WAS DESCRIBED BY THE DOCTOR OR THE DESCRIPTION GIVEN BY THE DOCTOR. THE STATE SAW THE SEARCH WARRANT TO REMOVE THE BULLET, AND THAT MOTION WAS DENIED, I BELIEVE, AS THE PROCEDURE BEING ONE THAT WAS TOO INVASIVE, I BELIEVE. THIS GOES BACK TO THE ORIGINAL TRIAL, AGAIN, AND THIS IS ALL -- THESE ARE ALL ISSUES THAT HAVE BEEN LITIGATED OR COULD HAVE BEEN LITIGATED LONG AGO, AND NOW WHAT WE LITERALLY HAVE, NOW, IS AN AFFIDAVIT OF JOYCE GRAY, WHO TESTIFIED AT TRIAL, WHO PURPORTS TO TALK ABOUT SOMETHING THAT HAPPENED CONTEMPORANEOUS WITH THE TRIAL AND DIRECT APPEAL OF THIS CASE, AND WE HAVE EVIDENCE THAT, ONCE SIMS DECIDED OH, I WANT TO GO TALK TO JOYCE GRAY, HE FOUND HER. PART OF THAT TIME SHE WAS IN FEDERAL PRISON, AND I DON'T SUSPECT SHE WOULD HAVE BEEN TOO HARD TO FIND THERE, BUT THE BOTTOM LINE TO ALL OF THIS IS THAT JOYCE GRAY, UNDER MILLS, IS NOT NEWLY-DISCOVERED EVIDENCE. SHE HAS BEEN A FIXTURE IN THIS CASE FOR YEARS. SHE IS NOT FRIENDLY TO THE DEFENSE. SHE OBVIOUSLY COOPERATES WITH THEM. AND TO COME IN AT THIS LATE DATE AND ARGUE THAT FURTHER LITIGATION IS NECESSARY, IS QUITE SIMPLY AN ABUSE OF PROCEDURE. JOYCE GRAY IS NOT NEWLY-DISCOVERED EVIDENCE. SHALL IS HE OLD EVIDENCE, TO THE FACT THAT INEFFECTIVE ASSISTANCE OF COUNSEL IS AN ARGUMENT THAT COULD HAVE BEEN HONORED, BACK IN THE 19863.850 PROCEEDING, BUT I DON'T BELIEVE IT WAS, AND YOU CAN'T COME IN NOW AND DO IT!

WHILE BALDRY AND HALWELL WERE A LIVE, IS THERE ANY INDICATION THAT IT WAS SIMS THAT WAS WITH THEM THAT DAY AND COMMITTED THE MURDER?

I AM NOT SURE WHAT YOU MEANT. BEYOND THE GRAY AFFIDAVIT?

IN OTHER WORDS THEMSELVES MAKING A STATEMENT, AN AFFIDAVIT OR A STATEMENT IN ANY CONTEXT.

NO, SIR.

YOU MENTIONED, JUST A MOMENT AGO, ABOUT THE STATE HAVING SOUGHT A MOTION TO TRY TO GET THE BULLET REMOVED, AND I RECALL YOU MAY HAVE BROUGHT THAUP IN THE FALL.

I THINK I DID.

DO WE HAVE, IN THE RECORD, THAT THE STATE DID TRY TO SEEK THAT FROM THIS DEFENDANT AND IT WAS REFUSED, OR YOU JUST SORT OF --

YES, MA'AM. THAT IS IN THE ORIGINAL DIRECT APPEAL RECORD THAT I PRESUME IS BEFORE THE COURT.

YOUR POINT IS THAT HE WOULD HAVE IT, MR. SIMS WOULD HAVE A WAY OF ESTABLISHING HIS ACTUAL INNOCENCE BY SHOWING THAT THERE IS NO BULLET IN HIS HIP.

THAT WOULD TEND TO GO IN THAT DIRECTION, YOUR HONOR, YES. BUT MY POINT TO ALL OF THAT WAS THAT, WAS MERELY TO REFERENCE THE WE HAD, THE STATE SOUGHT TO OBTAIN THAT BIT OF EVIDENCE AT THE TIME OF THE TRIAL, AND WAS DENIED THE OPPORTUNITY TO DO SO.

DID THE STATE EVER TRY TO REQUEST AN X RAY OF THE DEFENDANT? DID THE BULLET SHOW BY X RAY?

NOT THAT I AM AWARE OF. I DON'T KNOW. NOT THAT I KNOW ABOUT.

DID THE X RAY THAT THE DEFENDANT WAS RELYING ON AT THAT TIME, WAS THE DOCTOR FROM JORDAN?

NOT THAT I REMEMBER. I DON'T KNOW THE ANSWER TO THAT QUESTION. AGAIN, THIS IS A LITTLE BIT OUTSIDE WHAT WE REALLY ARE COMING UP HERE ON, AND IT REALLY MORE GOES BACK TO THE OCTOBER PROCEEDING, AND I DON'T WANT TO BE, REALLY, REARGUING OCTOBER, BUT, OTHER THAN TO POINT OUT THAT THE STATE REVEILED AT THAT PROCEEDING -- PREVAILED AT THAT PROCEEDING, AND AS FAR AS THE "NEW EVIDENCE", IN QUOTATION MARKS, THE POSTURE IN THAT CASE, AS TO THE COMPONENT OF IT IS ESSENTIALLY THE SAME THING AS WAS HERE BEFORE. I DON'T MEAN TO BE FLIPPANT ABOUT IT, BUT IT REALLY IS.

IN ADDITION TO THE TESTIMONY FROM THE DOCTOR IN GEORGIA, WHO TESTIFIED AT THE TRIAL, RIGHT?

YES, SIR.

WERE THERE OTHER WITNESSES THAT TESTIFIED THAT SIMS HAD AN INJURY TO HIS LEG OR HIP AT AROUND THIS TIME, WITHOUT IDENTIFYING WHAT IT WAS?

YES, SIR. THERE WAS TESTIMONY THAT, AND I AM NOT SURE I CAN GET THE NAMES CORRECT. THESE WERE DEFENSE WITNESSES. ONE WITNESS TESTIFIED THAT ONE OF THE TWO CODEFENDANTS, AND, AGAIN, I DON'T REMEMBER WHICH ONE, BROUGHT SIMS TO HIS HOUSE. THE

CODEFENDANT'S HOUSE. PUT HIM IN THE BACK ROOM AND TOLD GIRLFRIEND, I PRESUME IT WAS, COMMON LAW WIFE OR WHATEVER, DON'T GO BACK THERE. LEAVE HIM ALONE. THE GUY IS HURT. THE INFERENCE, HERE, OBVIOUSLY BEING, YOU KNOW, IT IS NOT -- IT IF SOMEBODY HAS FALLEN OFF A ROOF, WHY ARE YOU TELLING SOMEBODY "DON'T GO BACK THERE". THE INFERENCE IS THAT IT IS OBVIOUSLY SOMETHING MORE THAN AN INNOCENT ACCIDENT, AND THERE IS ANOTHER WITNESS, AND I THINK THE FIRST NAME MAY HAVE BEEN JILL OR JENNIFER OR SOMETHING ALONG THOSE LINES, WHO ACTUALLY DID TESTIFY THAT SIMS HAD AN INJURY TO HIS HIP. THAT PERSON WAS SIMS' GIRLFRIEND AT THE TIME, I BELIEVE, AND, AGAIN, I AM REALLY TRYING TO REACH BACK AND REMEMBER WHAT THE TRIAL RECORD SAYS, BUT THAT PERSON, THAT WOMAN HAD TO REALLY BE, I BELIEVE, PRESSED ON CROSS-EXAMINATION, AND ULTIMATELY DID, IN FACT, ADMIT THAT SIMS HAD AN INJURY IN THE APPROPRIATE PLACE.

WOULD YOU ADDRESS THIS COURT'S DECISION IN WASHINGTON VERSUS DOWLING?

IN THIS APPLICATION HERE.

THE SHORT ANSWER IS THAT WASHINGTON VERSUS DOWLING DOESN'T PRECLUDE THE EXECUTION OF MR. SIMS BY LETHAL INJECTION. TO FLESH THAT OUT OF IT, THE SAVINGS CLAUSE DOES NOT EXIST AS A MEANS BY WHICH THE CRIMINAL DEFENDANT CAN EVADE PUNISHMENT FOR HIS CRIME.

WHAT HAPPENED TO THE DEFENDANT IN WASHINGTON VERSUS DOWEL SOMETHING.

I BELIEVE HE WAS ULTIMATELY EXECUTED.

BY HANGING.

BY HANGING. THE DIFFERENCE, THERE ARE A COUPLE OF DIFFERENCES BETWEEN THE WASHINGTON V DOWLING CASE AND THE SITUATION PRESENTED HERE. FIRST OF ALL, AS YOU ALL POINTED OUT, IN MAY OPPONENT'S ARGUMENT, WASHINGTON V DOWLING DEALT WITH A STRAIGHT UP CHANGE IN METHOD OF EXECUTION. IT WASN'T A CHOICE METHOD AT ALL. IT WAS A CHANGE FROM HANGING TO ELECTROCUTION. WHAT WE HAVE HERE IS A STATUTE THAT, UP UNTIL YESTERDAY, GAVE MR. SIMS AND EVERYONE ELSE ON DEATH ROW THE OPPORTUNITY TO ELECT TO BE EXECUTED BY ELECTROCUTION. OTHERWISE, UNDER THE TERMS OF THE STATUTE, THE SENTENCE OF DEATH IS CARRIED OUT BY LETHAL INJECTION.

WHAT DO YOU MEAN UP UNTIL YESTERDAY?

THEY HAD, UNDER THE TERMS OF THE STATUTE, 30 DAYS TO ELECT.

OKAY. YESTERDAY WAS THE LAST?

YESTERDAY WAS THE LAST DAY, AND TO MY KNOWLEDGE, THERE HAVE BEEN NO ELECTIONS. TO BE EXECUTED BY ELECTROCUTION. THE CHOICE COMPONENT DOESN'T CREATE THE CONSTITUTIONAL ISSUE, DESPITE THE CLAIMS TO THE CONTRARY. THERE IS AMPLE CASE LAW, FROM THE FEDERAL CIRCUITS AND FROM THE VARIOUS STATES THAT HAVE DEALT WITH THIS, THAT SAY, AND ARE VERY CLEAR, THAT IF THE CONDEMNED IS GIVEN A CHOICE BETWEEN TWO METHODS OF CARRYING OUT A SENTENCE OF DEATH, THAT HAS NO CONSTITUTIONAL IMPLICATIONS.

EVEN IF THE SENTENCE SPECIFICALLY PRESCRIBED THE METHOD OF DEATH.

WELL, JUSTICE HARDING, I THINK THIS IS WHERE IT BECOMES VERY MUCH A PHILOSOPHICAL ARGUMENT. BUT ILL SUGGEST, SIR -- BUT I WOULD SUGGEST, SIR, THAT THE DEFENDANT WAS SENTENCED TO DEATH. UNDER THE SAVINGS CLAUSE, THAT SENTENCE IS WHAT STANDS NOT THE

MEANS BY WHICH IT IS CARRIED OUT.

ISN'T THAT PART OF THE SENTENCE, THE MEANS BY WHICH IT IS TO BE CARRIED OUT? CAN YOU DISASSOCIATE THE TWO?

WELL, IF -- I GUESS TO DO THAT, JUSTICE SHAW, THE SHORT ANSWER IS, YES, YOU CAN. THE DEFENDANT WAS SENTENCED TO BE EXECUTED. HE WAS HE WAS ON NOTICE OF WHAT THE SENTENCE WAS, WHICH WAS DEATH, AT THE TIME HE COMMITTED THE CRIME. THERE IS SIMPLY NO EXPOSE FACT FACT-COMPONENT TO THIS, AND THERE IS NO COURT, I WOULD POINT OUT, THAT HAS EVER SAID THAT CHANGING FROM WHAT IS PERCEIVED AS A LESS HUMANE MEANS OF EXECUTION OF A SENTENCE OF DEATH TO WHAT IS PERCEIVED AS A MORE HUMANE MEANS OF EXECUTION STATES ANY CLAIM AT ALL. IF LETHAL INJECTION IS A MORE HUMANE MEANS OF CARRYING OUT A SENTENCE OF DEATH, AND THAT IS NOT NECESSARILY WHAT WE ARE HERE TO DECIDE, IT STANDS REASON ON ITS HEAD TO SUGGEST THAT THE DEFENDANT CAN SAY, NO, I AM ENTITLED TO BE EXECUTED BY THE LESS HUMANE METHOD, BUT YOU CAN'T APPLY A MORE HUMANE METHOD TO ME, SO THEREFORE I WIN. THAT IS THE KIND OF THING THAT THIS COURT ULTIMATELY REJECTED WITHOUT COMMENT, WHEN IT DECIDED THAT THE POST FURMAN DEATH PENALTY STATUTE COULD, IN FACT, BE APPLIED TO MR. DOBERT, WITHOUT BEING VIOLATE I HAVE OF THE SAVINGS CLAUSE -- VIOLATING OF THE SAVINGS CLAUSE, AND THAT SIMPLY THE ANSWER HERE. THERE IS NO CONSTITUTIONAL ISSUE. IT IS MUCH ADD DO ABOUT NOTHING THIS. SENTENCE IS VALID, THE DENTS THE SENTENCE OF DEATH, IT IS UPHELD AND TIME TO BE CARRIED OUT. BY OPERATION OF THE STATUTE, MR. SIMS HAS CHOSEN TO HAVE THAT SENTENCE CARRIED OUT BY LETHAL INJECTION,, WHICH UNDER ALL OF THE CASE LAW FROM ALL OF THE COURTS THAT HAVE EVER CONSIDERED THAT CLAIM, IS A MEANS OF EXECUTION THAT COMPORTS FULLY WITH THE EIGHTH AMENDMENT. TO THE EXTENT, AND LET ME JUST KIND OF BRUSH OVER SOME OF THE TECHNICAL MATTERS THAT CAME OUT AT THE HEARING BELOW, THE DOSAGE, THE DRUGS TO BE EMPLOYED, FIRST OF ALL, IN CARRYING OUT A SENTENCE OF DEATH BY LETHAL INJECTION, ARE SODIUM PENT ON THAT WILL -- PENT THAT WILL -- PENTOTHAL, PANCURMONIUM AND CHLORIDE. THE DOSAGE OF PA. NCURMONIUM, PENT ON THAT WILL, IS TWO GRAMS. THAT IS MORE THAN FIVE TIMES THE LETHAL DOSE. SODIUM PENT ON THAT WILL -- PENTOTHAL, AS EVIDENCED BELOW, IS TYPICALLY USED IN SURGERY THOUSANDS OF TIMES EVERYDAY T PRODUCES RAPID LOSS OF CONSCIOUSNESS, RAPID IN SENSIBILITY IN THE WORDS OF THE DEFENSE EXPERT, DR. LIPPMAN, AND AT THE DOSAGE TO BE EMPLOYED BY THE DEPARTMENT OF CORRECTIONS, IS LETHAL IN AND OF ITSELF.

BUT TEXAS AND VIRGINIA ADMITTEDLY HAVE HAD PROBLEMS WITH IT, HAVEN'T THEY?

THAT DEPENDS ON HOW YOU DEFINE PROBLEMS, JUSTICE SHAW. THEIR EXPERT, DR. --

IT HAS NOT GONE SMOOTHLY IN EVERY INSTANCE, AS CONTEMPLATED.

THEY HAD ONE TIME, TEXAS HAD ONE, A NUMBER OF YEARS AGO, AND IT IS REFERRED TO SOMEWHERE IN THE MATERIALS, WHERE THE IV CATHETER ACTUALLY CAME OUT OF THE DEFENDANT'S ARM. THEY HAVE HAD INSTANCES WHERE THEY HAD DIFFICULTY FINDING VEINS, BUT -- A VEIN IN WHICH TO INSERT THE IV CATHETER, BUT THE TESTIMONY BELOW WAS THAT THAT IS NOT UNCOMMON IN THE USE OF IS THERAPY IN THE HOSPITAL SETTING OR IN THE MEDICAL SETTING. MY LIGHT IS ON. I AM ON YOU ALL'S TIME, IF I COULD HAVE A BIT MORE.

WE WOULD LIKE, HAS THERE EVER BEEN ANY -- WAS ANY TESTIMONY PRESENTED THAT THERE WAS TROUBLE AFTER THERE WAS A CORRECT INSERTION OF THE NEEDLE IN THE VEIN, AND THE ADMINISTRATION OF THE DRUGS?

THE TESTIMONY DEMONSTRATES, I BELIEVE, AND THE TESTIMONY OF -- I AM TRYING -- I HAVE GOT TO GIVE A TWO-PART ANSWER TO THAT. DR. VADOLAY TESTIFIED ABOUT WHAT HE REFERRED TO AS BOTCHED EXECUTIONS. HIS DEFINITION OF BOTCHED EXECUTIONS IS SOMEWHAT

CONVOLUTED. AT LEAST ONE COURT OF THE NINTH CIRCUIT FOUND HIS AFFIDAVIT IN THAT CASE THAT, I BELIEVE RESPECT WAS VERY SIMILAR TO THE -- THAT, I BELIEVE, WAS VERY SIMILAR TO THE TESTIMONY HERE, NOT TO BE PROBATIVE AT ALL. DOCTOR VADOLAY, AMONG OTHER THINGS, DESCRIBES A BOTCHED EXECUTION IN WHICH THEY HAVE TROUBLE FINDING A VEIN IN WHICH TO START THE IV LINES. JUST TO MAKE IT CLEAR, THAT IS NOT A CIRCUMSTANCE WHERE THERE IS A LOT OF POKING AND PRODDING IN THE DEFENDANT'S ARM, TRYING TO INSERT THE CATHETER. THAT IS WHERE THEY HAVE A TOURNIQUET IN HIS ARM AND ARE TRYING TO TEST THE VEIN IN HIS ELBOW OR THE BACK OF HIS HAND OR WHATEVER, TO TRY TO GET THE VEIN TO COME UP TO INSERT THE IV. THAT IS HARDLY AN EIGHTH AMENDMENT PROBLEM. ABOUT -- BUT AFTER THAT HAS BEEN DONE, HAS THERE BEEN ANY EVIDENCE THAT THERE HAS BEEN, QUOTE, A BOTCHED EXECUTION, IN THE ADMINISTRATION OF THE CHEMICALS?

NO, SIR. ALL OF THE EVIDENCE, ALL OF THE TESTIMONY, AND ALL OF THE PRIOR HISTORY WITH LETHAL INJECTION, WHICH HAS BEEN AROUND AS A MEANS OF EXECUTION, SINCE THE EARLY 1980s, IS THAT IT PRODUCES RAPID UNCONSCIOUS UNCONSCIOUSNESS IN A PAINLESS DEATH, AND THAT CLEARLY COMPORTS WITH THE EIGHTH AMENDMENT AND WITH FLORIDA CONSTITUTION.

THANK YOU VERY MUCH. YOUR TIME IS UP. THANK YOU, COUNSEL.