Clarence Jones vs Michael Moore

NEXT CASE ON THE COURT'S DOCKET, IS JONES VERSUS MOORE. THANK YOU, COUNSEL.

MAY IT PLEASE THE COURT. MY NAME IS STEVEN SELIGER. I AM HERE ON BEHALF OF MR. JONES. THIS IS ANOTHER CHAPTER ON MR. JONES'S POSTCONVICTION ODYSSEY. HE WAS CONVICTED AND SENTENCED TO DEATH, IN 1989, FOR THE KILLING OF A TALLAHASSEE POLICE OFFICER. IN THAT CASE, AND THIS IS ONLY IMPORTANT BECAUSE OF ONE OF THE ISSUES WE RAISE, THERE WERE FOUR PEOPLE, THREE THAT WERE ACTUALLY INDICTED FOR FIRST-DEGREE MURDER, TWO THAT WENT ON TRIAL. MR. JONES AND A CO-DEFENDANT. MR. GRIFFIN. THE OUTCOME OF THE CASE WAS ONE OF THE CODEFENDANTS ENTERED A PLEA TO THE THIRD-DEGREE. MR. JONES GOT A DEATH RECOMMENDATION AND MR. GRIFFIN GOT A LIFE SENTENCE AND RECOMMENDATION. MR. GRIFFIN GOT A RECOMMENDATION FOR A DEATH SENTENCE AND ULTIMATELY GOT IT. WHAT WE ARE HERE TODAY IS APPELLATE COUNSEL FAILED TO RAISE DIRECT ISSUES IN THE APPEAL THAT THIS COURT DECIDED IN 1991, AND TO THAT END I WOULD LIKE TO TALK ABOUT ONE OF THEM, AND THAT IS THE FAILURE OF APPELLATE COUNSEL, WHO WAS, ALSO, THE TRIAL LAWYER IN THIS CASE. IT WAS THE SAME PERSON, THE SAME PERSON WHO TRIED THE CASE ALSO DID THE DIRECT APPEAL. THE TRIAL COUNSEL, THROUGHOUT THIS CASE, MOVED TO SEVER HIS CLIENT, CLARENCE JONES, FROM THE CO-DEFENDANT GRIFFIN. THAT WAS BECAUSE, RIGHT FROM THE START OF THIS TRIAL, THE STRATEGY OF THE CO-DEFENDANT'S LAWYER WAS TO MAKE IT THAT HIS CLIENT WAS NOT THE PERSON WHO KILLED PONCE DE LEON, THE POLICE OFFICER, AND HOW THE STATE TRIED THIS CASE PRIMARILY WAS BY THE PROCESS OF ELIMINATION. WE HAD FOUR PEOPLE IN A CAR, AND THE POLICE OFFICER WHO COMES UP TO THE CAR TO MAKE SOME INQUIRY, AND ULTIMATELY THE POLICE OFFICER IS KILLED, SO YOU HAVE TO TAKE IT FROM WHICH OF THOSE FOUR PEOPLE WAS THE PERSON WHO ACTUALLY PULLED THE TRIGGER AND KILLED THE POLICE OFFICER, AND ULTIMATELY THAT WAS THE LIFE AND DEATH DECISION, BECAUSE THE JURY THAT MADE THE RECOMMENDATION OBVIOUSLY BELIEVED MR. JONES WAS THE TRIGGER PERSON AND MR. GRIFFIN WAS NOT.

WHO TESTIFIED THAT MR. JONES WAS THE TRIGGER PERSON?

THE CO-DEFENDANT, MR. GOINS.

WAS HE ACTUALLY A CO-DEFENDANT?

HE WAS INITIALLY INDICTED, JUSTICE PARIENTE.

BUT HE WAS NOT TRIED.

THAT'S CORRECT. HE WAS NOT TRIED TOGETHER. HE PLED PRIOR TO TRIAL.

BUT THAT TESTIMONY, JUST SO WE ARE SURE ABOUT THIS, NOT THAT -- EVEN ASSUMING IT WOULD BE -- COULD HAVE BEEN RAISED, WHETHER IT WOULD HAVE BEEN MERITORIOUS, THAT TESTIMONY WOULD HAVE COME OUT, WHETHER THERE WAS A JOINT TRIAL OR NOT.

THAT'S RIGHT. I AM NOT SAYING THERE WAS NO OTHER EVIDENCE THAT MR. JONES SHOT PONCE DE LEON. THERE WAS OTHER EVIDENCE. MUCH OF IT WAS CIRCUMSTANCE. -- CIRCUMSTANTIAL. THERE WAS A PRETTY CHAOTIC SITUATION. THERE WERE A NUMBER OF PEOPLE THERE.

WASN'T THERE ANOTHER WITNESS THAT TESTIFIED, THE FOURTH PERSON IN THIS EPISODE?

I AM SORRY.

WASN'T THERE ANOTHER WITNESS THAT TESTIFIED THAT YOUR CLIENT FIRED THE FATAL SHOT?

I DON'T THINK THERE WAS ANOTHER PERSON, BECAUSE THERE WAS NOT ANOTHER PERSON THERE. THERE WAS --

WHAT DID MISS -- DIDN'T MISS HARRIS IDENTIFY?

WHAT MISS HARRIS SAID, IN ANSWER TO QUESTIONS FROM THE CO-DEFENDANT'S LAWYER, THAT MR. GRIFFIN WAS NOT THE SHOOTER. THAT WAS THE PROCESS OF LIMB THAINGS -- OF ELIMINATION. WHAT SHE KNEW WAS THAT MR. -- ACCORDING TO HER, THAT MR. GRIFFIN WAS NOT THE SHOOTER. SHE DID NOT SAY THAT MR. JONES WAS THE SHOOTER, BUT SHE ELIMINATED MR. GRIFFIN AS THE SHOOTER.

BUT IT IS YOUR POSITION THAT, IF YOU ARE TRYING TWO CODEFENDANTS TOGETHER, IF COUNSEL FOR ONE OF THE CODEFENDANTS ARGUES THAT HIS CLIENT WAS NOT THE SHOOTER, THEN THAT IS AUTOMATICALLY GROUNDS FOR SEVERANCE.

I DON'T THINK THAT IS RIGHT. I DON'T THINK THIS COURT'S CASE LAW SAYS THAT.

AREN'T YOU CAUGHT IN THIS, THAT IF THERE IS SUBSTANTIAL EVIDENCE THAT JONES WAS THE SHOOTER, PLUS THE ONLY THING THE JUDGE SORT OF PUTS IT IN A VERY SIMPLISTIC NATURE. HE SAYS THAT ALL MR. TAYLOR, THE CO-DEFENDANT'S, GRIFFIN'S COUNSEL, HAD DONE, IS TO POINT OUT THAT THE ABSENCE OF EVIDENCE AGAINST HIS CLIENT.

THAT'S RIGHT.

ISN'T THAT ALL THAT HE DID?

WELL, THAT IS -- WHEN YOU SAY THAT IS ALL THAT HE DID, THAT IS PRETTY IMPORTANT, BECAUSE THERE IS A FINITE NUMBER OF PEOPLE WHO COULD HAVE DONE THIS, JUSTICE SHAW. IT IS NOT LIKE YOU HAVE TWO PEOPLE, AND BOTH THE PEOPLE SAYING WE DON'T KNOW WHO DID IT. AND WE DON'T KNOW WHO DID IT, BECAUSE WE WEREN'T THERE OR THERE WAS EVIDENCE TO SUGGEST SOMEBODY ELSE DID IT, BUT WHAT YOU HAVE HERE IS YOU HAVE A FINITE NUMBER OF PEOPLE IN THE CAR, AND MR. GRIFFIN'S LAWYER EXPLICITLY POINTING OUT THAT IT WAS NOT HIS CLIENT, AND THE CONSEQUENCE OF THAT EVIDENCE IS, IF IT WASN'T HIS CLIENT, IT HAD TO BE MR. JONES, SO IT IS JUST MORE THAN THAT.

MY INITIAL QUESTION, YOU ARE ALMOST SAYING THAT IT IS A PER SE, ONCE HE TAKES THAT POSITION.

WELL, IT IS NOT PER SE, BECAUSE IT IS MORE -- BECAUSE OF THE CONTEXT OF THIS CASE, JUSTICE SHAW, IT IS NOT JUST SAYING SOMEBODY DIDN'T DO IT. IT IS IN THE CONTEXT OF THE CASE, WHERE THERE IS ONLY TWO PEOPLE, APPARENTLY, THAT COULD DO IT, SO IF YOU ARE SAYING IT COULDN'T HAVE BEEN ONE, THEN YOU ARE, BY DEFINITION, POINTING THE FINGER AT THE OTHER PERSON. YOU ARE ACCUSING THE OTHER PERSON, IN THAT CONTEXT.

IF YOU ONLY HAD TWO PEOPLE IN THE CAR, AND COUNSEL ARGUES THAT MY CLIENT DIDN'T DO IT, WOULD IT BE PER SE IN YOUR OPINION?

NO, BECAUSE THAT IS SIMPLY ARGUMENT, AND LAWYERS ARGUE ALL THE TIME, BUT ARGUMENT IS NOT EVIDENCE, JUSTICE SHAW. THAT IS POINTING OUT THE LACK OF EVIDENCE THAT THE

STATE PRODUCED, BUT WHAT MR. JONES WAS ENTITLED TO WAS NOT JUST TO HAVE TO GO UP AGAINST THE STATE IN THIS CASE BUT, ALSO, NOT HAVE TO GO AGAINST HIS CO-DEFENDANT.

BUT, AS A MATTER OF FACT, THIS COURT, IN ITS OPINION ON THE DIRECT APPEAL, MAKES THE STATEMENT, HARRIS TESTIFIED AT TRIAL FOR THE STATE AND IDENTIFIED JONES AS THE PERSON WHO SHOT PONCE DE LEON. THAT IS WHAT THIS COURT SAID.

THAT MAY BE TRUE, JUSTICE. I JUST DON'T REMEMBER, FROM THE RECORD, THAT SHE DID THAT.

THAT IS A VERY SIGNIFICANT FACT, IS IT NOT? IN OTHER WORDS WE NEED A LITTLE BIT MORE HELP THAN THAT YOU DON'T REMEMBER THAT. THAT IS, THAT IS OBVIOUSLY A FACTOR IN THIS ANALYSIS ABOUT THIS ISSUE, THAT IS VERY, VERY IMPORTANT, AND I WOULD PRESUME IF THIS COURT SAID THAT IN AN OPINION, IT IS, ALMOST, TAKING A FACTUAL ISSUE AND MAKING IT, NOW, A MATTER OF LAW. SO DON'T YOU HAVE TO MORE OR LESS TAKE IT THAT WAY?

YES, SIR. IF THAT IS AN HISTORICAL FACT THAT THIS COURT HAS FOUND.

WHAT HAPPENED IN THE TRIAL COURT, WITH REFERENCE TO SEVERANCE? IN OTHER WORDS GIVE US A PROCEDURAL CATCH UP ABOUT WHAT DID HAPPEN ABOUT WHAT DID HAPPEN ABOUT SEVERANCE IN THE TRIAL COURT. ANOTHER HISTORY IS THAT MR. JONES'S LAWYER REPEATEDLY RAISED THE ISSUE BEFORE THE TRIAL JUDGE. EVERY TIME THERE WAS AN OPPORTUNITY WHERE IT WAS CLEAR THAT MR. GRIFFIN'S LAWYER WAS GOING AFTER MR. JONES AS THE PERSON WHO ACTUALLY COMMITTED THE MURDER --

BUT WHAT HAPPENED? WAS THERE A MOTION BEFORE TRIAL, FILED FOR A SEVERANCE AND THERE WAS A HEARING ON THAT AND IT WAS DENIED, AND THEN THERE WAS A MOTION RENEWED AT THE BEGINNING OF TRIAL OR JUST BEFORE TRIAL? YOU KNOW WHAT I AM -- IN OTHER WORDS HELP ME WITH WHAT HAPPENED, WITH REFERENCE TO THE ISSUE OF SEVERANCE.

THERE WAS NOT A MOTION BEFORE TRIAL, BECAUSE THE INFORMATION THAT PRESENTED ITSELF THAT THE LAWYER BELIEVED THAT THE SEVERANCE WAS PROPER OCCURRED, BEGINNING AT OPENING STATEMENT. THE OPENING STATEMENT OF THE CO-DEFENDANT LAWYER WAS THAT THE EVIDENCE WILL SHOW THAT MY CLIENT DIDN'T DO IT.

WELL, I MEAN, IS THAT A FAIR -- I AM A LITTLE CONCERNED, HERE, THAT YOU CAN SAY THE LAWYER DIDN'T HAVE AN OBLIGATION TO SEEK A SEVERANCE. TO PRESERVE THAT ISSUE, ON THE BASIS THAT THE OTHER CO-DEFENDANT WAS GOING TO DENY HIS GUILT, AFTER HE HAS ENTERED AN INNOCENT PLEA AND UNTIL THE LAWYER'S STATEMENT, ACTUALLY, IN OPENING STATEMENT, SAYS I DIDN'T DO IT OR MY CLIENT DIDN'T DO IT, THAT IS A LITTLE -- IT WOULD SEEM TO ME THAT YOU ARE ON SOME NOTICE THAT YOUR CO-DEFENDANT HAS DENIED DOING IT. THAT IS HE HAS PLED INNOCENT, AND WE CAN ASSUME THAT HE IS NOT GOING TO, YOU KNOW, ADMIT DOING IT, THAT -- AND SO HOW DOES THAT RELIEF YOU OF AN OBLIGATION TO SEEK A SEVERANCE? WHAT DID HE THINK THE DEFENSE WAS GOING TO BE OF THE -- YOU KNOW?

I THINK THERE IS A DISTINCTION BETWEEN SAYING "I DIDN'T DO IT", WHICH IS WHAT A NOT GUILTY NOT GUILTY PLEA DOES, BUT WHAT THAT DOES TO IS PUT THE BURDEN ON THE STATE TO SAY YOU DID DO IT. I THINK THAT IS A DIFFERENT CHARACTER, AND TO THAT EXTENT, PEOPLE GET TRIED, TOGETHER, ALL THE TIME, BECAUSE YOU BELIEVE WHAT THE THEORY OF DEFENSE IS GOING TO BE IS THAT THE STATE HAS TO PROVE THAT WE COMMITTED THIS CRIME AND THAT THERE IS NO INDICATION THAT THERE IS ANY DIFFERENCE OF OPINION ABOUT HOW THE DEFENDANTS ARE GOING TO REACT TO THAT STATE BURDEN.

DID YOUR CLIENT OR -- WAS IT YOUR CLIENT OR MR. GRIFFIN, WHO WAS ARGUING THAT THERE WAS SOME OTHER PERSON WHO WAS POSSIBLY AT THE SCENE, THAT THIS ALL INVOLVED DRUGS, AND THIS WAS A DRUG, AND THIS OTHER PERSON ACTUALLY DID THE SHOOTING.

THAT WAS MR. JONES. THAT WAS MY CLIENT.

THAT WAS YOUR CLIENT.

THAT WAS YOUR CLIENT.

YES, MA'AM.

SO YOUR CLIENT WAS ACTUALLY SAYING THE SAME THING THAT MR. GRIFFIN WAS SAYING, IS THAT I WAS NOT THE SHOOTER.

THAT'S RIGHT. MR. JONES GOT ON THE WITNESS STAND AND SAID THERE WAS SOMEBODY ELSE, UNKNOWN PERSON THERE, WHO COULD HAVE COMMITTED THE MURDER. THAT'S CORRECT.

NOT GRIFFIN.

NOT GRIFFIN. THAT'S RIGHT.

SO HIS STORY WAS CONSISTENT WITH GRIFFIN'S STORY.

WELL, NO, BECAUSE THE STATE'S POSITION WAS THERE WAS NO OTHER PERSON THERE.

BUT INSOFAR AS GRIFFIN SAYING THAT MY DEFENSE IS I DIDN'T DO IT. I WASN'T THE SHOOTER, YOUR CLIENT ACTUALLY TESTIFIED AND, IN ESSENCE, TESTIFIED THAT'S RIGHT. GRIFFIN DIDN'T DO IT. IT WAS ANOTHER PERSON, AND SO HOW WAS THAT INCONSISTENT WITH GRIFFIN SAYING I DIDN'T DO IT?

BECAUSE YOU HAVE TO LOOK AT IT FROM THE STATE PERSPECTIVE OF PROVING THIS CASE, AND THE STATE PERSPECTIVE IS THERE WAS NO OTHER PERSON, AND THAT IT WAS LIMITED TO THE POTENTIAL FOR THE PERSON WHO SHOT THE POLICE OFFICER, WAS LIMITED WITHIN THE CONFINES OF THE PEOPLE SITTING IN THE CAR.

BUT THAT IS GOING TO EXIST IN ANY CASE, IS IT NOT? THAT IS GOING TO BE THE SCENARIO? I AM COMING BACK TO WHAT KNOWLEDGE WAS GAINED THAT WOULD EXCUSE THE FILING OF A MOTION FOR SEVERANCE EARLIER IN THE CASE. IN OTHER WORDS WHAT -- THIS THING ABOUT, UNTIL OPENING STATEMENT, WHEN GRIFFIN'S LAWYER SAID THAT I DON'T BELIEVE THE STATE IS GOING TO BE ABLE TO PROVE THAT I SHOT THE POLICE OFFICER, THAT SOMEHOW THAT WAS A SURPRISE TO YOUR CLIENT AND HIS TRIAL LAWYER, THAN NOW THE BELL GOES OFF, AND HE SAYS OH, WELL, NOW I AM GOING TO HAVE TO SEEK A SEVERANCE, WHERE I DIDN'T THINK I WAS GOING TO HAVE TO SEEK A SEVERANCE BEFORE. I AM NOT SURE I UNDERSTAND, CLEARLY, HOW THAT JUSTIFIES NOT FILING A MOTION FOR SEVERANCE BEFORE.

I CAN TELL YOU WHAT I READ IN THE RECORD, BECAUSE I WAS NOT THE PERSON WHO TRIED THE CASE, JUSTICE, BUT I MEAN, I HAVE TO BELIEVE, FROM WHAT THE LAWYER SAID IMMEDIATELY UPON HEARING THIS OPENING STATEMENT, WAS THAT WAS NOT WHAT I BELIEVE WHAT WAS GOING TO HAPPEN. THAT THERE WAS SOME CONSISTENCY ABOUT WHAT THE DEFENSE WOULD HAVE BEEN, WHETHER WE DIDN'T DO IT OR SOMEBODY ELSE DID IT BUT NOT --

DID HE PLAYS SOMETHING ON THE RECORD THAT WOULD ESTABLISH THAT? THAT IS, IN OTHER WORDS, DID HE SAY, JUDGE, ALL YOU NEED TO DO IS TAKE THE EARLIER HEARING WE HAD, WHEN WE WERE TRYING TO GET ALL THE ISSUES MARTIALED FOR TRIAL OR WHATEVER, YOU KNOW, STATUS CONFERENCE OR LOOK AT THIS DEPOSITION OR WHATEVER, AND SAY THIS IS, NOW, WE HAVE BEEN THROWN A CURVE, AND THAT WE WOULD HAVE FILED A MOTION FOR SEVERANCE BEFORE, IF WE HAD KNOWN THIS.

HERE IS WHAT, I BELIEVE, THE RECORD SAYS ABOUT THAT, JUSTICE. IMMEDIATELY AFTER THE CO-DEFENDANT'S OPENING STATEMENT, MR. JONES'S LAWYER GOT UP AND MOVED FOR A SEVERANCE, AND HE SAID IT APPEARS THERE ARE GOING TO BE ANTAGONISTIC DEFENSES IN THIS CASE, AND MR. JONES WOULD MOVE FOR A SEVERANCE. WHATEVER WOULD ACCOMPLISH THE PURPOSE OF NOT HAVING TO BE JOINED, PREJUDICIALLY, WITH A CO-DEFENDANT, UNDER THESE CIRCUMSTANCES.

THAT CIRCLES BACK TO JUSTICE SHAW READING THE BRIEF, THE COGENT STATEMENT OF THE TRIAL COURT, SAYING ALL THAT GRIFFIN'S LAWYER WAS DOING WAS ASSERTING THE STATE WASN'T GOING TO BE ABLE TO PROVE THAT GRIFFIN WAS THE SHOOTER.

WELL, I THINK -- I MEAN, I AM BEATING A DEAD HORSE HERE, BUT MY POINT, SIMPLY, IS YOU HAVE TO -- I THINK YOU HAVE TO UNDERSTAND IT IN THE CONTEXT OF THE CASE.

OKAY. YOU THINK THAT WILL CLEARLY SHOW THAT THE LAWYER WAS JUSTIFIED IN NOT SEEKING A SEVERANCE BEFORE TRIAL?

I THINK SO, JUSTICE ANSTEAD. THE OTHER THING IS, YOU HAVE TO REMEMBER THAT WE ARE TALKING ABOUT THE STATE'S CASE HERE, NOT WHAT WAS GOING TO, MAYBE, HAPPEN IN THE DEFENDANT'S CASE. YOU ARE TALKING ABOUT DEALING WITH STATE WITNESSES, AND DEFENDANTS MAKE DECISIONS ABOUT WHETHER TO TESTIFY OR NOT TESTIFY ALL THE TIME, AFTER THE STATE HAS FINISHED THEIR CASE, AFTER TALKING TO THEIR LAWYER AND SEEING HOW STRONG THE STATE'S CASE IS.

BUT AT ANY RATE FOR PURPOSES OF THIS HABEAS, WHAT WE ARE DEALING WITH IS WHETHER THE APPELLATE PROCEEDING WAS INEFFECTIVE. THE LAWYER WAS INEFFECTIVE IN THE APPELLATE PROCEEDING, FOR FAILING TO RAISE THE ISSUE OF SEVERANCE IN THE APPELLATE PROCEEDING.

THAT IS ALL WE ARE HERE TODAY, JUDGE. I MEAN, HERE IS THE LAWYER WHO PRESERVED THE ISSUE, WE BELIEVE, AND I THINK THE TRIAL JUDGE SAID YOU PRESERVED THE ISSUE, REGARDLESS OF WHETHER HE FILED IT PRETRIAL.

BUT THERE WAS AN ISSUE THAT THE COURT DEALT WITH ON THE DIRECT APPEAL THAT HAD TO DO WITH WHETHER THESE PEOPLE WERE BEING TRIED TOGETHER.

ON ARGUMENT IN WRITING, I THINK IT IS PRETTY CLEAR. WE BELIEVE THAT WAS PRETTY MARGINALLY RELATED. IT HAD TO DO WITH THE ADMISSIBILITY OF WHETHER SOME TESTIMONY ABOUT THE CO-DEFENDANT, THAT DEALT, STRICTLY, WITH THE CO-DEFENDANT, AND THAT WAS ANOTHER POINT WHERE THE LAWYER FOR MR. JONES MADE A MOTION TO SEVER THE CASE, BECAUSE IT WAS CLEARLY INADMISSIBLE EVIDENCE AGAINST MR. JONES, AND THAT IS THE WAY IT WAS RAISED ON DIRECT APPEAL.

ALL RIGHT.

IT WAS NOT RAISED DIRECTLY THIS CASE SHOULD HAVE BEEN SEVERED FROM THE CO-DEFENDANT, AND HERE ARE THE TEN REASONS WHY.

DID THE STATE EVER CONTEND THAT THERE WAS MORE THAN ONE SHOOTER?

NO, MA'AM.

SO IT SEEMS TO ME THAT, AT THE OUTSET, THEN, BOTH DEFENDANTS WERE ON NOTICE THAT THE STATE WAS ONLY CONTENDING THAT ONE OF THEM WAS THE PRIMARY SHOOTER, AND THE OTHER WAS, BASICALLY, AT THE COFELON, BECAUSE THEY WERE INTO THIS THING TOGETHER?

YES.

AND WOULDN'T THAT HAVE PUT YOUR CLIENT ON NOTICE -- THE ATTORNEY ON NOTICE TO DO A SEVERANCE BEFOREHAND?

WELL, I DON'T KNOW WHETHER IT WOULD OR WOULDN'T, JUSTICE QUINCE. I JUST THINK THAT THE LAWYER IN THIS CASE, AND THIS IS PRETTY COMMON, LAWYERS WORK TOGETHER, REPRESENTING DEFENDANTS ALL THE TIME, WITH THE UNDERSTANDING THAT THIS IS HOW WE THINK THE CASE IS GOING TO GO, AND IT WAS CLEAR THIS LAWYER BELIEVED THAT THE INFORMATION THAT WAS PRESENTED, BEGINNING DURING OPENING STATEMENTS, AND THEN, SUBSEQUENTLY, AFTER THE CASE, WAS NOT CONSISTENT WITH WHAT HIS UNDERSTANDING WAS WHAT WAS GOING TO HAPPEN BEFORE TRIAL.

YOU ARE IN YOUR REBUTTAL.

THANK YOU.

MR. FRENCH.

MAY IT PLEASE THE COURT. I AM CURTIS FRENCH, REPRESENTING THE STATE OF FLORIDA IN THIS CAUSE. SINCE COUNSEL HAS SPENT HIS TIME TALKING ABOUT SEVERANCE, I WILL BEGIN WITH THAT. THE SEVERANCE ISSUE COMES UP IN CLAIM ONE OF HIS HABEAS POET -- OF HIS HABEAS PETITION, WHICH IS, IN EFFECT, A CLAIM THAT CLIENT FAILED TO RAISE CERTAIN ISSUES ON HIS APPEAL BY WAY OF SEVERANCE. WITH REGARD TO THE SUPPLEMENTAL THAT I FILED LAST EVENING, WE RECOGNIZE THE STATE VERSUS MacCRAY, WHICH IS 1997. LET ME POINT OUT THAT THIS COURT AFFIRMED THE CONVICTION AND SENTENCE ON MAY 16, 1991. THIS CONVICTION BECAME FINAL AT THAT TIME. THE INSTANT HABEAS PETITION WAS FILED NOT QUITE NINE YEARS LATER, IN MARCH 27 OF 2000. WHAT MacCRAY HOLDS IS THIS, AND I WILL QUOTE FROM THE OPINION, IF I MAY. "WE CONCLUDE, AS A MATTER OF LAW, THAT ANY PETITION FOR A WRIT OF HABEAS CORPUS, CLAIMING INEFFECTIVE ASSISTANCE OF COUNSEL, IS PRESUMED TO BE THE RESULT OF AN UNREASONABLE DELAY AND TO PREJUDICE THE STATE, IF THE PETITION HAS BEEN FILED MORE THAN FIVE YEARS FROM THE DATE THE PETITIONER'S CONVICTION BECAME FINAL. WE, FURTHER, CONCLUDE THAT THIS INITIAL PRESUMPTION MAY BE OVERCOME, ONLY IF THE PETITIONER ALLEGES, UNDER OATH WITH A SPECIFIC FACTUAL BASIS, THAT THE PETITIONER WAS AFFIRMATIVELY MISLED ABOUT THE RESULTS OF THE APPEAL BY COUNSEL." THE REBUTTAL HAS NOT OCCURRED. WE THINK THAT, UNDER MacCRAY, QUITE CLEARLY ALL OF CLAIM ONE IS PROCEDURALLY BARRED. IT IS TIME BARRED, BECAUSE IT WAS FILED FOUR YEARS TOO LATE.

IS THAT HOW YOU ARE BRINGING THAT CLAIM TO THE COURT'S ATTENTION? IN OTHER WORDS, YOU HAD OPPORTUNITY TO FILE A RESPONSE TO THIS HABEAS, AND NOW A SUPPLEMENTAL AUTHORITY, THE FRIDAY BEFORE ORAL ARGUMENT, YOU ARE, FOR THE FIRST TIME, ASSERTING THAT IT IS PROCEDURALLY BARRED.

I CERTAINLY THINK THAT THIS CASE SHOULD HAVE BEEN BROUGHT TO THE COURT'S NOTICE SOONER AND I APOLOGIZE FOR THE DELAY. HOWEVER, WE DO RELY ON IT AND WE DO FEEL THAT IT IS RIGHT ON POINT, AND CERTAINLY MR. --

HE HASN'T HAD A CHANCE TO RESPOND, BECAUSE IT IS NOT IN ANY OF YOUR PLEADINGS.

THAT'S CORRECT. ON THE OTHER HAND, HE WAS PUT ON NOTICE BY THE EXISTENCE OF THIS CASE, WHAT THE STANDARD WAS.

THIS IS -- THIS CASE AND SEVERAL OTHERS ARE IN AN UNIQUE POSTURE, BECAUSE, REALLY, STARTING AT A CERTAIN POINT IN TIME, INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IS

BEING BROUGHT TO THIS COURT AT THE SAME TIME AS THE APPEAL OF THE 3.851, CORRECT?

THAT'S CORRECT.

SO HAVE WE, IN OTHER CASES, AS I UNDERSTAND THE STATE, REALLY, HAS BEEN DOING THIS, IS THIS IS -- WHEN DID WE AFFIRM ON THE 3.8.

OR 3.851 IN THIS CASE?

IN THIS CASE WE AFFIRMED THE DENIAL OF 3.850, WHICH WAS FILED IN 1992, BY THE WAY, AND THERE WERE SOME AMENDMENTS. THE DENIAL WAS AFFIRMED ON MARCH 25, 1999.

SO THIS WAS FILED. THEN WHEN WAS THE HABEAS FILED?

THE HABEAS WAS FILED MARCH 27, 2000, WHICH WAS JUST OVER A YEAR AFTER THIS COURT AFFIRMED THE DENIAL OF 3.850 RELIEF. GOING TO THE -- ADDRESSING THE ISSUE OF SEVERANCE, FIRST OF ALL, I WOULD JUST, TO CLARIFY THINGS, I WOULD REFER TO THE ORIGINAL TRIAL TRANSCRIPT, AT PAGES 2394 TO 2395, WHICH IS THE TESTIMONY OF BEVERLY HARRIS, TO THE EFFECT THAT SHE SAW CLARENCE JONES POINT A GUN AT THE OFFICER TOWARDS THE REAR OF THE CAR AND THEN HEARD GUNSHOTS. IN ADDITION TO BEVERLY HARRIS'S TESTIMONY, THERE WAS OTHER EVIDENCE, CHIDFIED MR. JONES -- WHICH IDENTIFIED MR. JONES AS THE PERSON WHO KILLED OFFICER PONCE DE LEON IN THIS CASE. THERE WERE TWO GUNS USED IN THIS INCIDENT, AND BY THE WAY, BOTH GUNS WERE FIRED. GRIFFIN WAS A SHOOTER. HE JUST DIDN'T SHOOT OFFICER PONCE DE LEON. THEY, ALSO, SHOT AT OFFICER ARMSTRONG, WHO WAS THE OTHER OFFICER AT THE SCENE. THERE WERE TWO GUNS AT THE SCENE. ONE OF THEM WAS A RUGER AND THE OTHER ONE WAS ANOTHER KIND OF GUN. GRIFFIN'S FINGERPRINT WAS ON THE GUN THAT WAS NOT THE MURDER WEAPON. IN ADDITION, THERE WAS OFFICER ARMSTRONG'S TESTIMONY, IDENTIFYING JONES AS THE SHOOTER IN THIS WAY, WHICH IS THAT HE SAW A PERSON IN A GREEN SMOCK, FROM THE CHEST UP, SHOOT OFFICER PONCE DE LEON. OFFICER ARMSTRONG FIRED AT THIS PERSON IN THE GREEN SMOCK AND TESTIFIED THAT HE COULD NOT HAVE SHOT HIM BELOW THE WAIST, AND IT TURNS OUT LATER, WHEN THEY WERE ARRESTED, THAT JONES WAS WEARING A GREEN SMOCK. HE WOULD HAVE BEEN SHOT IN THE FACE. GRIFFIN WAS WEARING SOME KIND OF MULTI-COLORED SHIRT. HE WOULD HAVE BEEN SHOT IN THE LEG. ALL THAT EVIDENCE CLEARLY POINTS TO JONES AS BEING THE SHOOTER. IN ADDITION, HE, ALSO, ADMITTED TO TWO PERSONS IN JAIL, JONES DID, THAT HE HAD BEEN THE PERSON WHO HAD KILLED THE OFFICER. OUR ALTERNATIVE PROCEDURAL BAR CLAIM, HERE, IS THAT BASICALLY THIS ISSUE OF SEVERANCE WAS RAISED ON DIRECT APPEAL. AND IT WASN'T RAISED SPECIFICALLY AS A SEVERANCE ISSUE, BUT THE PROBLEM WAS THAT TRIAL COUNSEL HAD NOT FILED A WRITTEN MOTION TO SEVER. BEFORE THE TRIAL, HE WAITED UNTIL AFTER THE TRIAL HAD BEGUN TO RAISE IT. HE RAISED IT SEVERAL TIMES. JUDGE PADOVANO WAS CONCERNED THAT HE HAD NOT RAISED TIMELY, BUT BESIDES THAT, HE SAW NO INCONSISTENCY, BECAUSE BASICALLY ALL GRIFB DID WAS CONTEND THAT HE WAS -- ALL GRIFFIN DID WAS CONTEND THAT HE WAS NOT GUILTY OF THIS OFFENSE. JONES CONTENDED THAT HE WAS NOT GUILTY. THERE WAS NO INCONSISTENCY. THE ONLY POSSIBLE PREJUDICE THAT MAY HAVE OCCURRED OR ANY INCONSISTENCY, WAS THAT AT SOME POINT DURING THE TRIAL, THE STATE OFFERED EVIDENCE THAT GRIFFIN HAD ATTEMPTED MURDER IN SOME TEN YEARS BEFORE TRIAL, AND THAT EVIDENCE WAS PRESENTED WITH INSTRUCTIONS TO THE JURY THAT IT WAS ONLY TO BE CONSIDERED AGAINST GRIFFIN AND NOT AGAINST JONES, BECAUSE JONES HAD NO PART IN THAT, SO WHAT TRIAL COUNSEL DID, AND, OF COURSE, THE SAME COUNSEL HAD -- THE TRIAL COUNSEL WAS, ALSO, THE APPELLATE COUNSEL. HE RAISED, AS POINT THREE OF HIS BRIEF ON APPEAL, THE INTRODUCTION OF THAT EVIDENCE THAT GRIFFIN HAD COMMITTED THIS OTHER CRIME. HE CITED SEVERAL CASES, ALL OF WHICH HAD TO DO WITH SEVERANCE, AND HE ARGUED THAT APPELLANT RECEIVED THE EVIDENCE PROPERLY ADMITTED AGAINST HIM AND HAD TO CONTEND WITH THE EVIDENCE PROPERLY ADMITTED AGAINST GRIFFIN, WITH WHOM HIS CASE WAS JOINED, SOLELY TO

ACCOMMODATE THE CONVENIENCE AND EXPENSE TO THE STATE OF SEPARATE TRIALS AND CLAIMED THAT THERE WAS A PREJUDICIAL SPILL OVER INTO HIS CASE FROM THIS PRIOR CONVICTION, AND THIS COURT ADDRESSED THAT ON DIRECT APPEAL, AND FOUND THAT, ON THE TOTALITY OF THE CIRCUMSTANCES, WE SEE NO ERROR REGARDING THIS ISSUE. OUR VIEW IS THAT, WHAT HE HAS DONE IS TAKEN THIS CLAIM WHICH HE RAISED ON DIRECT APPEAL AND DRESS IT UP WITH A DIFFERENT NAME AND IS TRYING TO REPRESENT IT NOW, AND HE SHOULD NOT BE ABLE TO DO THAT.

WHAT DOES OUR PLAU OF -- WHAT DOES OUR LAW OF SEVERANCE SAY ABOUT A SEVERANCE, IN A SITUATION LIKE THIS, WHERE YOU HAVE TWO CODEFENDANTS, AND THE STATE IS ASSERTING THAT ONE OR THE OTHER OF THEM BUT NOT BOTH, DID FIRE THE FATAL WOUNDS? WHAT -- DOES OUR LAW OF SEVERANCE ADDRESS THAT SITUATION?

AS, I THINK, MY UNDERSTANDING OF THE LAW OF SEVERANCE IS THAT, IF THE DEFENSES ARE NOT INCONSISTENT, THAT THE TWO DEFENDANTS MAY BE TRIED TOGETHER.

AREN'T THESE DEFENSES INCONSISTENT, IN THE SENSE THAT, IF THE STATE IS ASSERTING ONE OR THE OTHER OF THESE CODEFENDANTS DID FIRE THE FATAL WOUNDS, WE ARE NOT ASSERTING THAT THEY BOTH DID. WE ARE ASSERTING THEY ARE BOTH GUILTY OF FIRST-DEGREE MURDER, BECAUSE THEY, BOTH, PARTICIPATED IN THIS VENTURE, BUT WE ARE ONLY -- THEY WERE ONLY ASSERTING THAT ONE OF THEM FIRED THE FATAL WOUNDS, AND FOR THE JURY TO DETERMINE THAT, SO ISN'T THAT INHERENTLY A CONFLICT, AMONGST THOSE TWO DEFENDANTS WHO ARE, EACH, CLAIMING THAT I DIDN'T DO IT? THE STATE SAYS ONE OF US DID IT, AND THAT THAT IS FOR SURE, BECAUSE THE POLICE OFFICER IS DEAD, YOU KNOW, SO, NOW, BY ONE OF THEM, THEN, SAYING, WELL, IT WASN'T ME, THE OBVIOUS CONCLUSION TO THAT IS THAT IT WAS -- IF B SAYS IT WASN'T ME, THEN IT HAD TO BE A? SO ISN'T THAT --

GRIFFIN DIDN'T ACTUALLY TESTIFY. THEIR DEFENSE WAS, THOUGH, THAT THEY WEREN'T THE SHOOTERS. JONES ACTUALLY TESTIFIED AND IDENTIFIED CINDY EARL AS THE SHOOTER AND CLAIMED HE WAS A DRUG DEALER THERE THAT GOT PANICKED AND SHOT THE OFFICER. IN FACT, CINDY EARL WAS THE PERSON IN WHOSE HOUSE THEY HID, FOLLOWING THE MURDER. THEY RAN AWAY, AND THAT IS THE ONLY WAY THAT HE WAS INVOLVED. CERTAINLY, AT ANY RATE, THE STATE CONTENDS THAT JONES WAS THE SHOOTER. IT WOULD SEEM TO ME THAT GRIFFIN HAD A STRONGER ARGUMENT FOR SEVERANCE THAN JONES. I DON'T SEE HOW JONES WAS PREJUDICED BY ANY EVIDENCE THAT JONES WAS THERE AND PARTICIPATED, WHEN THE STATE'S EVIDENCE SHOWS THAT JONES WAS THE ONE WHO FIRED THE FATAL WOUND. THE FACT THAT THE JURY WAS ABLE TO DIFFERENTIATE, I THINK, WAS EVIDENT BY THE JURY SENTENCE RECOMMENDATION. THE 12-0 FOR LIFE FOR GRIFFIN AND DEATH FOR JONES, I THINK THEY CLEARLY UNDERSTOOD WHO WAS THE TRIGGERMAN, AND I DON'T THINK JONES WAS PREJUDICED BY IT.

DIDN'T WE END UP, THOUGH, WITH TWO PEOPLE ACTUALLY ARGUING AGAINST JONES. IN OTHER WORDS THE STATE MAKING A CASE AGAINST JONES, AND WE HAVE IDENTIFIED THE EVIDENCE HERE, AND WE, ALSO, END UP, THOUGH, WITH GRIFFIN AND HIS LAWYER MAKING A CASE AGAINST JONES?

I DON'T AGREE THAT GRIFFIN'S LAWYER MADE A CASE AGAINST JONES. GRIFFIN'S LAWYER DID NOT ARGUE, AT ANY POINT, THAT JONES WAS GUILTY, EVEN BY OMISSION OR INFERENCE.

WHAT IS HE DOING, IF HE IS ARGUING THAT, IF THE STATE IS SAYING THAT ONE OF THESE TWOO DID IT, AND -- ONE OF THESE TWO DID IT AND GRIFFIN IS SAYING, WELL, IT CLEARLY WASN'T ME, AND THAT LEAVES SOMEBODY SIT HAD GONE IN THE CORNER OVER THERE, AND GRANTED THE STATE HAS --

THE ATTORNEY ARGUES REASONABLE DOUBT AND THE LACK OF EVIDENCE AGAINST HIM, AS

SHOWING HIM BEING INVOLVED IN THIS MURDER, I, AGAIN, I AM NOT SURE I SEE THE CONFLICT.

WHAT DOES OUR LAW OF SEVERANCE SAY? LET'S TAKE JUST A HYPOTHETICAL, WHERE THE DEFENDANTS, THE CODEFENDANTS ARE POINTING THE FINGER, ONE AT THE OTHER. THAT IS THAT THE CO-DEFENDANT B IS SAYING A DID IT, AND CO-DEFENDANT A IS SAYING B DID IT, AND THEY TESTIFY TO THAT EFFECT AT THE TRIAL, DOES OUR LAW OF SEVERANCE SAY ANYTHING ABOUT THAT?

IF THEY HAVE INCONSISTENT DEFENSES, I THINK THE SEVERANCE WOULD BE WARRANTED. YES.

SO THE LAW OF SEVERANCE SAYS, IF "B" CLEARLY SAYS "A" DID IT, AND "A" SAYS "B" DID IT, THEN THAT IS SEVERANCE.

I THINK THAT WAS JUDGE PADOVANO'S UNDERSTANDING, AND CERTAINLY THAT IS THE RECORD. YOU SEE THAT JUDGE PADOVANO RECOGNIZED THAT, IF THEY HAD INCONSISTENT DEFENSES, SEVERANCE MIGHT BE WARRANTED, BUT THEY SIMPLY DIDN'T HAVE ANY, AND, AGAIN, THIS ISSUE, IN EFFECT -- THE ONLY WAY WE GET TO SEVERANCE IS NOT DIRECTLY ON THE MERITS, BUT THE QUESTION IS WHETHER TRIAL COUNSEL IS INEFFECTIVE FOR NOT RAISING IT IN A DIFFERENT MANNER THAN HE DID. HE DID RAISE AN ISSUE WHICH WAS CLEARLY PRESERVED AND CHOSE NOT TO RAISE AN ISSUE OF SEVERANCE THAT WASN'T CLEARLY PRESERVED, BECAUSE THERE WAS NO PRETRIAL MOTION FOR SEVERANCE. AND I THINK IT WAS A REASONABLE DECISION ON HIS PART. ANOTHER ATTORNEY, PERHAPS, COULD HAVE RAISED IT A DIFFERENT WAY, BUT HE DID GET THE ISSUE OF SEVERANCE BEFORE THIS COURT, AND HE DID GET THE ISSUE OF THE MURDER THAT GRIFFIN HAD COMMITTED PREVIOUSLY BEFORE THIS COURT, AND THE QUESTION IS --

IS THERE ANYTHING ON THIS RECORD TO SHOW THAT THE LAWYER FOR JONES KNEW SOMETHING ELSE, AFTER THESE OPENING STATEMENTS, BY GRIFFIN THAT HE DIDN'T KNOW BEFORE?

NOT ACCORDING TO JUDGE PADOVANO.

I AM NOT ASKING ABOUT ACCORDING TO JUDGE PADOVANO. I AM ASKING ABOUT ACCORDING TO THE RECORD.

ALL I CAN GO BY IS WHAT TRIAL COUNSEL SAID TO JUDGE PADOVANO. AS FAR AS EVIDENCE, I AM NOT AWARE OF ANY.

SO THERE WAS NO CLAIM, IN OTHER WORDS, BY THE LAWYER, THAT HE KNEW SOMETHING NOW, AFTER OPENING STATEMENTS, THAT HE DIDN'T KNOW BEFORE?

HE CLAIMED THAT HIS OPENING STATEMENT CLUED HIM INTO THE FACT THAT GRIFFIN WAS CLAIMING HE WAS INNOCENT, BUT JUDGE PADOVANO, WHO HEARD THE SAME STATEMENT, SAID I DON'T SEE HIM TRYING TO PIN THE MURDER ON YOUR CLIENT. HE IS JUST SAYING HE IS NOT GUILTY, WHICH HE IS ENTITLED TO. I THINK JUDGE PADOVANO PROBABLY -- I DON'T KNOW. I HATE TO SPECULATE ON WHAT HE THOUGHT, BUT I THINK CERTAINLY THERE IS AN INFERENCE TO BE DRAWN THAT THE WHOLE BUSINESS OF SEVERANCE WAS AN AFTERTHOUGHT AND RAISED AT TRIAL WITHOUT ISSUE AS ANY VALID SUPPORT.

WHEN WE LOOK AT WHAT ISSUES OF WHAT TRIAL COUNSEL DOES, WE HAVE, OFTENTIMES, A RECORD OF WHETHER THE IN ACTION OR ACTION WAS A PRODUCT OF REASONABLE TRIAL STRATEGY OR NOT. WHAT MECHANISM DO WE HAVE HERE, IF WE, REALLY, WERE CONCERNED, HYPOTHETICALLY, ABOUT WHY AN ISSUE WASN'T RAISED? DO WE HAVE -- HAVE WE HAVE -- DO WE HAVE THE AUTHORITY TO REMAND SOMETHING FOR AN EVIDENTIARY HEARING?

I AM NOT AWARE THIS THIS COURT HAS EVER DONE THAT. I WOULD SAY THIS, ALSO --

IN THIS SITUATION, YOU ARE SAYING, WELL, HE PROBABLY THOUGHT IT WAS A GOOD IDEA NOT TO RAISE THAT ISSUE, VERSUS A LAWYER THAT GOES OH, MY GOODNESS, I WAS UNDER A LOT OF PRESSURE, AND I BLEW IT. HOW DO WE DETERMINE THAT?

IF HE TOTALLY OMITTED THAT, IT WOULD BE A DIFFERENT QUESTION, BUT HE DID RAISE --

IF WE WERE CONCERNED ABOUT THAT, WHAT WOULD WE DO?

I AM NOT SURE I SHOULD HAVE GOTTEN SIDETRACKED INTO THAT. I AM NOT SURE THAT THIS COURT HAS EVER DONE THAT, BUT I WOULD SAY THIS, TOO, THE WHOLE ISSUE, IF HE IS CONTENDING, IF HE WANTED TO CONTEND THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE SEVERANCE AT THE RIGHT TIME AND IN THE PROPER WAY, HE CERTAINLY COULD HAVE HAD THE OPPORTUNITY AND HE DID NOT. HE HAD THE OPPORTUNITY TO GET INTO THAT ON HIS FIRST POSTCONVICTION MOTION.

SO WHAT YOU ARE SAYING, THAT WE DETERMINE THESE ISSUES AS A PARTY OF LAW. SO WOULDN'T WE HAVE TO, ALMOST, GO BACKWARDS AND SAY IF THIS WAS A WINNER -- IN OTHER WORDS IF WE SAW A POINT THAT WASN'T RAISED, WE WOULD SAY, YOU KNOW, IF THIS HAD BEEN RAISED IN BRIEF, WE WOULD HAVE GIVEN THIS PERSON A NEW TRIAL.

I THINK THIS COURT HAS DONE SOMETHING SIMILAR TO THAT. IF THIS WAS A MERITORIOUS ISSUE AND WOULD HAVE WON ON APPEAL AND HE TOTALLY FAILED TO RAISE IT, THEN YOU MIGHT HAVE THAT, BUT YOU DON'T HAVE THAT HERE.

SO IN OTHER WORDS WE, REALLY, DO HAVE TO ALMOST LOOK, FIRST, AT THE MERITS OF THE POINT THAT IS BEING ARGUED WASN'T RAISED, AND IF WE DECIDE THAT IT WASN'T -- IF IT IS NOT MERITORIOUS, THEN THAT IS THE INQUIRY.

IF IT IS NOT MERITORIOUS, THEN THAT DOES END THE INQUIRY. YES.

LET -- LET ME GO INTO JUST A COUPLE OF OTHER THINGS, REAL QUICKLY, IF I MAY, BECAUSE THERE IS, ALSO, AN ISSUE OF CLOSING ARGUMENT. WE WOULD RELY ON MacCRAY AS TO THAT, BUT THERE IS, ALSO, PROCEDURALLY BARRED FOR ANOTHER REASON. FIRST OF ALL TRIAL COUNSEL IS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE WHICH WAS NOT PRESERVED AT TRIAL. THERE WAS NO OBJECTION TO THE TRIAL PROSECUTOR'S PENALTY-PHASE ARGUMENT. IT WAS NOT RAISED. FURTHERMORE JONES COULD HAVE RAISED THIS ISSUE IN 3.850 AND SHOULD HAVE RAISED IT AND, IN FACT, DID RAISE IT IN CLAIM EIGHT. WHAT HE DID RAISE IN THE CLAIM EIGHT WAS, IN HIS INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE, WAS THAT TRIAL COUNSEL WAS NOT EFFECTIVE IN HIS CLOSING ARGUMENT. JUDGE PADOVANO FIND FOUND THAT THAT CLAIM, CLAIM A, WAS PROCEDURALLY BARRED, IN ATTEMPT TO ADDRESS A CLOSING ARGUMENT PER SE, THAT HE WAS RAISING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. IT WAS INSUFFICIENTLY PLED. THE DENIAL OF JUDGE PADOVANO, DENIAL OF CLAIM A TO 3.850 WAS NOT APPEALED TO THIS COURT, SO THAT THIS ISSUE THAT HE IS TRYING TO RAISE, NOW, IS BASICALLY THE SAME ISSUE THAT HE RAISED IN CLAIM 3.850, EXCEPT NOW HE IS ARGUING THAT COUNSEL WAS INEFFECTIVE AS TRIAL COUNSEL. I THINK, UNDER THIS COURT'S PRECEDENCE, HE SHOULDN'T BE ALLOWED TO DO THAT.

CAN TRIAL COUNSEL BE INEFFECTIVE FOR FAILING TO RAISE INEFFECTIVE ASSISTANCE IN ERROR, IF THE ERROR CUMULATIVELY AMOUNTS TO FUNDAMENTAL ERROR?

HAS THIS COURT EVER SAID THAT?

IN OTHER WORDS IF SOMETHING IS FUNDAMENTAL ERROR, THEN COULD APPELLATE COUNSEL BE INEFFECTIVE FOR FAILING TO VISIT IT?

I THINK THE BETTER APPROACH WA-WA WOULD BE TO RAISE -- THE BETTER APPROACH WOULD BE TO RAISE IT IN 3.850 AND SAY THAT TRIAL COUNSEL WAS INEFFECTIVE. IN THIS CASE IT COULD HAVE BEEN RAISED IN THE 3.850, WHICH WAS NINE YEARS AGO AND, AS A MATTER OF FACT, HE DID RAISE THAT TRIAL COUNSEL FAILED TO OBJECT TO THIS ARGUMENT. IF THE ARGUMENT WAS FUNDAMENTAL ERROR, THEN HE WOULD HAVE, PERHAPS, HAD A GOOD CASE, BUT HE DIDN'T PURSUE IT BY GETTING THE CLAIM DENIED BY JUDGE PADOVANO AND RAISE IT ON APPEAL, SO IT IS OUR POSITION THAT HE IS BARRED FOR TRYING TO RAISE THIS ISSUE.

ISN'T HIS CLAIM EFFECTIVE FOR WHY TRIAL COUNSEL MIGHT OR MIGHT NOT HAVE OBJECTED DURING THE TRIAL, VERSUS THE REASONS THAT AN APPELLATE COUNSEL DECIDES TO RAZOR NOT RAISE AN ISSUE?

IF THE PROSECUTOR IS MAKING AN ARGUMENT WHICH IS SO BAD THAT IT IS FUNDAMENTAL ERROR, I CANNOT IMAGINE WHAT STRATEGY THE TRIAL COUNSEL WOULD HAVE FOR NOT RAISING IT, WHICH MEANS THAT, AT 3.850, THAT IS THE APPROPRIATE TIME TO RAISE THAT ISSUE AND SAY THAT TRIAL COUNSEL WAS INEFFECTIVE, FOR FAILING TO OBJECT TO THIS FUNDAMENTAL ARGUMENT.

SO YOUR ANSWER, REALLY, WOULD BE THAT APPELLATE COUNSEL DOES NOT HAVE TO --

WE OBTO --

-- REALLY, UNDER THE FLIP SIDE, WOULD BE THAT APPELLATE COUNSEL SHOULD NEVER RAISE UNOBJECTED TO ARGUE UNITE --

I AM NOT SAYING THAT AT ALL. IF I WAS TRIAL COUNSEL AND HAD APPELLATE ARGUMENT, I MIGHT VERY WELL RAISE IT, BUT THE DEFENDANT DOES NOT HAVE THE OPPORTUNITY TO ADDRESS THESE ISSUES PIECEMEAL, AND WE DID RAISE THE WHOLE INEFFECTIVE ISSUE IN 1992, AND THAT WAS RESOLVED, AND IT WASN'T DENIED WITHOUT HEARING, THEN IT SEEMS TO ME THAT THAT SHOULD BE THE END OF IT, AND HE SHOULDN'T BE ABLE TO RAISE THAT ISSUE NOW.

THAT CAN'T BE AN ISSUE, BECAUSE HIS FAILURE TO OBJECT IS NOT A PROCEDURALLY-BARRED QUESTION.

PROCEDURALLY BARRED, BECAUSE IT HAS ALREADY BEEN RAISED AND DEALT WITH.

YOU ARE SAYING JUDGE PADOVANO'S STATEMENT THAT THIS WAS PROCEDURALLY BARRED.

IN 1992, IN DENYING THAT CLAIM SUMMARILY, YES. HE FOUND IT PROCEDURALLY BARRED, IN THAT HIS INEFFECTIVE ASSISTANCE OF COUNSEL WAS INSUFFICIENT TO OVERCOME THAT PROCEDURE BARRED. IF YOU ARE SUGGESTING THAT RULING WAS ERROR, HE DIDN'T APPEAL THAT RULING.

HE DIDN'T APPEAL IT IN THE 3.850?

NO, SIR, HE DIDN'T, AND I WOULD REFER THIS COURT TO ITS PREVIOUS OPINION IN THIS CASE, 7.32. FOOTNOTE -- 732, FOOTNOTE ONE, WHICH THE COURT POINTS OUT THAT ONE OF HIS CLAIMS, CLAIM EIGHT OF HIS 3.850 WAS INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE INEFFECTIVE ARGUMENT. IF, IN FACT, HE FAILED TO RAISE THAT ON APPEAL, THEN THE CLOSING ARGUMENT IS NOT THE ARGUMENT. WHAT HE DID RAISE WAS COUNSEL WAS INEFFECTIVE IN FAILING TO PRESENT MITIGATING EVIDENCE AND FAILED TO ADDRESS A COMPETENT MENTAL HEALTH EXAMINATION AND FAILING TO GO BACK TO HIV.

LET ME GO BACK TO THE MacCRAY ARGUMENT. ARE YOU MAKING AN ARGUMENT ON MacCRAY, ON THE BASIS OF LATCHES OR ON THE BASIS THAT IT WASN'T FILED IN TWO YEARS?

ON THE BASIS OF LATCHES, BECAUSE IT WASN'T FILED IN MacCRAY. IF MORE THAN FIVE YEARS HAVE ELAPSED, THEN IT IS TOO LATE.

IT DOESN'T SAY "TOO LATE". IT SAYS THERE IS A PRESUMPTION.

A PRESUMPTION WHICH IS NOT, YET, OVERCOME HERE.

THANK YOU, MR. FRENCH.

COUNSEL, YOU HAVE RAISED SEVERAL POINTS, AND AS YOU SUGGESTED, WE HAVE BEAT ONE HORSE TO DEATH HERE. WE HAVE FOCUSED ON ONE TO THE EXCLUSION OF THE OTHERS. WOULD YOU WANT TO ADDRESS YOUR FLEX POINTS -- WOULD YOU WANT TO ADDRESS YOUR NEXT POINTS OR WOULD YOU WANT TO CONTINUE TO BEAT THE DEAD HORSE?

I DON'T WANT TO BEAT THE DEAD HORSE, BUT I DO WANT TO RESPOND TO THE FACTS I GOT AT 5:15 -- TO THE FAX I GOT AT 5 SCHRN 15 ON FRIDAY AFTERNOON -- AT 5:15 ON FRIDAY AFTERNOON, WHICH I HAPPENED TO BE IN MY OFFICE, BECAUSE I HAD TO GO TO FEMP HE WILL THAT -- TO TEMPLE THAT NIGHT, BECAUSE IT WAS OUR NEW YEARS. THE RULE THAT WAS YITED IN MacCRAY, WHICH IS -- THAT WAS CITED IN MacCRAY, WHICH IS 9.140-B -- WELL --

YOU ARE ENTITLED TO FILE A WRITTEN RESPONSE TO THAT VERY RECENTLY-FILED NOTICE OF SUPPLEMENTAL AUTHORITY, SINCE THE STATE DIDN'T RAISE THIS IN THEIR SMONS, BUT -- IN THEIR RESPONSE, BUT I WOULD URGE YOU TO DO THAT POSTHASTE.

LET ME SEE IF I HAVE GOT IT RIGHT, AND IF I DON'T, YOU CAN TELL ME. THERE IS A RULE THAT IS CITED IN MacCRAY, ABOUT THE TWO YEARS, BUT IF YOU GO AND LOOK AT 9.140-B-6-E, IT SAYS IN DEATH PENALTY CASES, ALL PETITIONS FOR EXTRAORDINARY RELIEF, INCLUDING HABEAS CORPUS, SHALL BE FILED SIMULTANEOUSLY WITH THE INITIAL BRIEF IN THE APPEAL, FROM THE LOWER TRIBUNAL'S ORDER OF THE 3.850. FLORIDA RULE OF CRIMINAL PROCEDURE -- THEN IT SAYS SUBDIVISION J, WHICH IS THE TWO-YEAR TIME LIMIT, SHALL NOT APPLY TO DEATH PENALTY CASES, SO I TAKE THAT FROM THE INNER PLAY, THAT THE HABEAS CORPUS TWO-YEAR LIMITATION DOESN'T APPLY IN DEATH PENALTY CASES.

MacCRAY WAS NOT A DEATH PENALTY CASE.

MacCRAY WAS NOT A DEATH PENALTY CASE. THEN WHAT YOU DO IS YOU GO LOOK AT A CASE THAT THIS COURT RECENTLY DECIDED, ROBINSON VERSUS MOORE, ON AUGUST 31, WHERE WE ARE IN THE EXACT SAME PROCEDURAL POSTURE. ROBINSON'S CASE WAS AN APPEAL OF A DEATH SENTENCE AFFIRMED IN 1991. IN FOOTNOTE ONE OF THAT OPINION, YOU SAY THAT THE FILING THE HABEAS PETITION, WITH AN APPEAL OF A 3.850, DOES NOT APPLY IN CASES DECIDED BEFORE THE EFFECTIVE DATE OF THE RULE, WHICH WAS JANUARY 1, 1994. MR. JONES'S CASE WAS DECIDED BEFORE THE EFFECTIVE DATE OF THE RULE. SO HE OUGHT TO COME WITHIN THE ROBINSON VERSUS MOORE RULE, WHICH ELIMINATES THE APPLICATION OF, EITHER, THE TWO-YEAR TIME LIMIT, WHICH I THINK THE RULE, ITSELF, DOES, OR THE FACT THAT YOU HAVE TO FILE YOUR HABEAS PETITION SIMULTANEOUSLY WITH YOUR APPEAL OF YOUR 3.850 MOTION. I HOPE THAT IS THE WAY I READ THIS COURT'S DISPOSITION OF THIS -- OF THE PROCESS. AND I AM -- WOULD BE GLAD TO FILE A WRITTEN RESPONSE TO THAT EFFECT, BUT I THINK THAT IS RIGHT.

I THINK YOUR WRITTEN RESPONSE SHOULD ADDRESS THE ISSUE OF LATCHES.

OKAY. THANK YOU, SIR.

THANK YOU. THE COURT WILL TAKE ITS MORNING RECESS NOW. WE WILL BE IN RECESS FOR 15 MINUTES.