State of Florida v. Gregory Mills

MR. CHIEF JUSTICE: NEXT CASE ON THE COURT'S DOCKET, THANK YOU, COUNSEL, THE NEXT CASE ON THE COURT'S DOCKET IS MILLS. STATE VERSUS MILLS. MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM KEN NUNNELLEY, AND I REPRESENT THE STATE OF FLORIDA. THIS APPEAL IS FROM THE SEMINOLE COUNTY CIRCUIT COURT'S ERRONEOUS GRANT OF STATE'S RELIEF TO GREGORY MILLS, BASED UPON NO FACT OTHER THAN THE TESTIMONY OF SEVEN-TIME CONVICTED FELON JOHN HENRY ANDERSON AND UPON THE CIRCUIT COURT'S GRANT OF A NEW 3.850 PROCEEDING, BASED UPON WHAT THE COURT CHARACTERIZED AS AN IMPROPERLY-DRAFTED 3.850 ORDER. IF I COULD FOCUS,, TO BEGIN WITH ON JOHN HENRY ANDERSONS JOHN HENRY ANDERSON WAS THE BASIS UPON AN ORDER, AND IN AN AFFIDAVIT, JOHN HENRY ANDERSON SWORE, UNDER OATH, THAT HE WAS IN THE SEMINOLE COUNTY JAIL IN 1979, ALONG WITH MILLS'S CODEFENDANT VINCENT ASHLEY, AND AT THAT TIME ON THE YARD AT THE SEMINOLE COUNTY JAIL, VINCENT ASHLEY TOLD HIM THAT HE, ASHLEY, NOT MILLS, WAS THE REAL KILLER. JUDGE EATON ORDERED AN EVIDENTIARY HEARING FOLLOWING A HUFF HEARING, AND I MIGHT POINT OUT AT THE HUFF HEARING, THE ARGUMENT WAS THIS CONVERSATION TOOK PLACE IN 1979. BEFORE MILLS'S TRIAL. JOHN HENRY ANDERSON TESTIFIES, AT THE EVIDENTIARY HEARING, NO, IT WASN'T 1979. IT WAS 1980. IT WAS THE FIRST LIE JOHN HENRY ANDERSON TOLD IN HIS AFFIDAVIT. THE STATEMENT DID NOT TAKE PLACE IN 1979. THE EVIDENCE SHOWS THAT JOHN HENRY ANDERSON WAS NOWHERE IN THE SEMINOLE COUNTY JAIL IN 1979. IT GETS BETTER. THE AFFIDAVIT IS A BARE BONES STATEMENT. ASHLEY TOLD ME I DID IT. WE GET TO COURT. AND NOW WE SUPPLY A MOTIVE FOR WHY MR. ASHLEY TOLD JOHN HENRY, TOLD THE STORY HE TOLD IN COURT, AND THAT IS THAT ASHLEY SAYS, TO ANDERSON, I FIGURED MIMS WOULD PUT IT ON ME -- MILLS WOULD PUT IT ON ME, SO I BETTER PUT IT ON HIM FIRST. JOHN HENRY ANDERSON GOES FURTHER, IN THE EVIDENTIARY HEARING LAST ONTH NSEMINOLE COUNTY. HE WENT ON TO TESTIFY THAT NOT ONLY DID THIS CONVERSATION OCCUR IN 1980, HAVING SAID PREVIOUSLY IT WAS 1979, BUT A YEAR OR SO LATER, IN A POOL HALL IN SANFORD ASHLEY REITERATED THE STATEMENT.

ARE YOU ASKING US TO EVALUATE? WHAT ARE YOU ASKING US TO DO? ARE YOU ASKING US TO EVALUATE THE CREDIBILITY OF THIS WITNESS?

NO, JUSTICE SHAW, I AM NOT. WHAT I AM ASKING THE COURT TO DO AND IF I COULD HAVE THE COURT'S INDULGENCE TO FINISH LAYING OUT THE PROBLEMS WITH THE TESTIMONY, WHAT WE HAVE IS AN ORDER GRANTING SENTENCE STAGE RELIEF THAT IS BASED UPON A MERE POSSIBILITY, AND THAT IS INSUFFICIENT TO OVERCOME THE PROBABILITY OF A DIFFERENT SENTENCING RESULT REQUIRED UNDER JONES AND THE NEW EVIDENCE STANDARD. WHAT WE HAVE, AND WHILE I CONTEND, AND THE STATE'S POSITION, OR SECONDARY POSITION IS, THAT IT WAS AN ABUSE OF DISCRETION TO RESOLVE THE CREDIBILITY ISSUES AS THEY WERE RESOLVED, IT IS ALSO WRONG, AS A MATTER OF LAW, FOR THE COURT TO HAVE REACHED THE RESULT THAT IT DID. AND THE PROBLEM HERE, AGAIN, WITH THE POOL HALL STATEMENT, VINCENT ASHLEY WAS IN THE FLORIDA DEPARTMENT OF CORRECTIONS. A YEAR OR SO AFTER 1980. HE WASN'T SHOOTING POOL IN SANFORD, FLORIDA, AND THAT STATEMENT CANNOT BE TRUE. WHAT YOU HAVE IN THE BOTTOM LINE TO THIS IS YOU HAVE A STATEMENT BY JOHN HENRY ANDERSON THAT, IN 1980, VINCENT ASHLEY TOLD ME THIS.

WERE ALL OF THESE ARGUMENTS BEING MADE TO THE TRIAL JUDGE? WAS IT POINTED OUT TO THE TRIAL JUDGE THAT MR. ANDERSON COULDN'T HAVE BEEN IN THIS POOL HAL, ET CETERA?

YES, YOUR HONOR. IT WAS, AND THE TRIAL JUDGE IGNORED IT. THAT APPEARS NOWHERE IN THE SENTENCING ORDER. THE ORDER GRANTING RELIEF, TO MY RECOLLECTION.

BUT DOESN'T THIS ALL COME BACK TO JUSTICE SHAW'S QUESTION ABOUT THE TRIAL JUDGE WAS THERE. HE HEARD THE TESTIMONY. HE WAS APPOINTED TO THE DISCREPANCIES IN THE TESTIMONY OR THE ADDITIONS IN THE TESTIMONY, AND HE WAS IN THE BEST POSITION TO DETERMINE THE CREDIBILITY OF THAT WITNESS?

ONE ARGUMENT TAKES IT BACK THAT DIRECTION, BUT JUSTICE QUINCE, THE OTHER ARGUMENT IS THAT IT WAS WRONG, AS A MATTER OF LAW, FOR JUDGE EATON TO GRANT RELIEF, BASED UPON THIS POSSIBILITY, AND I AM --

WHY DO YOU SAY A POSSIBILITY, WHEN WE HAVE A WITNESS WHO SAYS, SPECIFICALLY, THAT THIS MAN TOLD ME THAT? SO WHY DO YOU CHARACTERIZE THAT AS A POSSIBILITY?

OKAY. I AM SORRY. LET ME CLARIFY THAT. THE REASON I CALLED IT A POSSIBILITY, THAT IS NOT MY WORD. THAT IS JUDGE EATON'S WORD. HE SAID, IN HIS ORDER THAT, IT IS POSSIBLE THE CONVERSATION TOOK PLACE. THERE WERE THREE DAYS THAT THAT CONVERSATION --

WERE YOU TRYING TO SAY THAT THEY WERE NOT? YOU BROUGHT IN PEOPLE TO TRY TO DEMONSTRATE THAT THEY WERE NOT OR POSSIBLY WERE NOT IN PRISON TOGETHER OR IN JAIL TOGETHER, WHATEVER FACILITY IT WAS. ISN'T THAT PART OF WHAT THE STATE TRIED TO DO, AT THE EVIDENTIARY HEARING?

THE STATE DEMONSTRATED THAT THERE WERE THREE DAYS UPON WHICH THIS CONVERSATION COULD HAVE CONCEIVABLY TAKEN PLACE, AND THAT IS A STRETCH, TO MAKE THAT CONCLUSION, BECAUSE ANDERSON WAS A MISDEMEANOR ARREST', IN SEMINOLE -- ARRESTEE IN SEMINOLE COUNTY JAIL. ASHLEY CAUSE WAS AWAITING TRANSPORT TO THE FLORIDA DEPARTMENT OF CORRECTIONS.

WHAT DOES THAT MEAN?

THE POINT BEING, YOUR HONOR, AND THERE IS NO EVIDENCE IN THE RECORD, BUT IT DOESN'T TAKE A LOT TO FIGURE OUT THAT YOU DON'T MIX PRETRIAL MISDEMEANORS IN WITH FELONS WHO ARE WAITING TRANSPORT TO DOC. YOU, ALSO, HAVE ANDERSON OUT TO COURT ON TWO SEPARATE, TWICE OVER A LESS THAN 48-HOUR PERIOD, BUT JUDGE EATON DIDN'T FIND THE, MAKE THE CREDIBILITY DETERMINATION, AND BY NOT, BY THE WAY THIS IS PLAYED OUT, AND IT IS, I ADMIT IT IS VERY CONVOLUTED, YOU DON'T HAVE, STATEMENT ABOUT SOMETHING THAT MIGHT HAVE HAPPENED AGAINST UNCHALLENGED EVIDENCE OF GUILT. THE UNCHALLENGED EVIDENCE OF GUILT --

SO, BEFORE, BEFORE YOU GO ON TO THE UNCHALLENGED EVIDENCE, SO IF JUDGE EATON HAD SAID THAT HE BELIEVES, BASED ON MR. ANDERSON'S TESTIMONY, THAT THIS CONVERSATION TOOK PLACE, WE WOULD BE IN A DIFFERENT POSTURE? INSTEAD OF SAYING THIS CONVERSATION POSSIBLY TOOK PLACE?

I THINK I WOULD HAVE A HARDER ROW TO HOE ON THE CREDIBILITY ISU THAN I DO, BECAUSE OF THE SPECULATIVE NATURE OF THE ORDER. A POSSIBILITY CANNOT EQUAL A PROBABILITY OF A DIFFERENT RESULT, AS REQUIRED BY JONES. IT SIMPLY CAN'T ANALYTICALLY DO THAT. BUT THE EVIDENCE OF GUILT, AND I KNOW WE ARE BLENDING THINGS OVER AND THAT IS BECAUSE ANDERSON GOES TO A RESIDUAL DOUBT, LINGERING DOUBT ARGUMENT, NOT BECAUSE HE GOES YOU HAVE SYLVESTER DAVIS, AND IT IS NOTHING KNEW ABOUT HOW HE TOOK THE SHOTGUN SHELLS AND TOOK THE SHOTGUN DOWN FROM THE PLACE WHERE HE LEFT IT AND HOW HE TOOK IT DOWN ON A TEN SPEED AND LEFT WITH IT ON THE HANDLEBARS AND CAME BACK LATER AND

SAID, GEE, I KILLED A CRACKER WITH MY SHOTGUN AND I HAVE GOT TO GET MY SISTER TO GO FIGURE OUT HOW TO GET IT. YOU HAVE NO GUNSHOT RESIDUE WHATSOEVER FOUND ON VINCENT ASHLEY BUT YOU HAVE GUNSHOT RESIDUE FOUND ON GREGORY MILLS. YOU HAVE THE CITY OFSANFORD WORKER, GLORIA ROBINSON, WHO FOUND THE MURDER WEAPON. SHE TESTIFIED THAT SHE SAW THE DEFENDANT'S SISTER DRIVE BY IN A CAR. WHY DO WE KNOW IT WAS THE DEFENDANT'S SISTER? BECAUSE SHE KNOWS HER AND BECAUSE THE DEFENDANT'S SISTER'S INITIALS ARE ON THE DOOR OF THE CAR. YOU HAVE THE DEFENDANT'S SISTER, WHO TESTIFIES, YEAH, I SAW THIS GLORIA ROBINSON. I KNOW HER. I DROVE BY. I SAW HER. SAME PLACE WHERE THE GUN WAS FOUND. AND THEN YOU HAVE VINCENT ASHLEY TESTIFY THAT GREGORY MILLS WAS THE KILLER. YOU HAVE ALL OF THAT CONVERGEENT CONVERGENTLY VALID, INTERLOCKING CORROBORATIVE EVIDENCE, JUXTAPOSEED AGAINST JOHN HENRY ANDERSON, WHO SHOWS UP 20 YEARS LATER, GOING TO SAVE THE LIFE OF HIS LONG TIME FRIEND.

BUT ISN'T THAT WHY THE JUDGE, IN TERMS OF WHAT HE FOUND, WOULD HAVE BEEN INFLUENCED, DID NOT FIND THERE WAS A REASONABLE PROBABILITY OF AN ACQUITTAL, BUT FOUND THAT, BASED ON THIS TYPE OF EVIDENCE, THAT THIS WOULD HAVE IMPEACHED ASHLEY, AND WOULD HAVE BEEN ENOUGH TO JUSTIFY A RECOMMENDATION OF LIFE, AND THAT IS WHAT WE ARE LOOKING AT IN THIS CASE, NOT WHETER THE JURY WOULD HAVE STILL CONVICTED HIM OF MURDER BUT WHETHER A LIFE SENTENCE WOULD HAVE BEEN IMPOSEED BASED ON THIS NEWLY-DISCOVERED EVIDENCE?

YOU ARE EXACTLY RIGHT, JUSTICE PARIENTE, AND THE DEFICIENCY WITH WHAT JUDGE EATON DID IS HE DIDN'T CONSIDER THE OTHER EVIDENCE. HE GRANTED RELIEF, BASED UPON JOHN HENRY ANDERSON AND NOTHING ELSE. HE DIDN'T LOOK AT THE OTHER EVIDENCE THAT POINTS OUT, A, THAT ANDERSON IS LYING. HE DIDN'T ACKNOWLEDGE THE FACT THAT ANDERSON LIED TWICE UNDER OATH. HE DIDN'T ACKNOWLEDGE THE OTHER CONSISTENT EVIDENCE, AND WHAT IS MORE, HE WENT AND PASSED ON THE CREDIBILITY OF VINCENT ASHLEY AND SYLVESTER DAVIS AND DID EXACTLY WHAT THIS COURT SAID YOU WEREN'T GOING TO DO, IN. THE ASE FROM THE SAME COUT, AND THAT IS TO RULE ON THE CREDIBILITY OF WITNESSES, BASED UPON A COLD RECORD! THAT IS EXACTLY WHAT HE DID. THIS COURT REFUSED TO DO THAT, IN STATE VERSUS SPAZIANO, WHENI WAS BACK UP HERE ABOUT FOUR YEARS AGO, ARGUING ABOUT THE SAME THING, AND WHAT WE HAVE HERE IS A CREDIBILITY DETERMINATION ON SYLVESTER DAVIS AND VINCENT ASHLEY, WHO DIDN'T TESTIFY BEFORE JUDGE EATON, BUT YET HE FOUND, I GUESS, THAT THEY WEREN'T CREDIBLE. HE IGNORED THEIR TESTIMONY. HE IGNORED THE UNCHALLENGED TESTIMONY OF THE GUN SHOT RSIDUE AND THE OTHER CIRCUMSTANCES AND THE OTHER EVIDENCE THAT POINTS TO GREGORY MILLS'S GUILT AND DOES NOT ESTABLISH A REASONABLE BASIS FOR A DIFFERENT SENTENCE. NONE OF THE EVIDENCE, NOTHING PRESENTED PROVIDES A BASIS THAT WOULD GUT THE TETTER OVERRIDE. AT BEST, IT IS LINGERING DOUBT, AND THAT DOES NOT PLAY, AS FAR AS TETTER IS CONCERNED.

DOES ANDERSON HAVE ANY EXPLANATION AT THE HEARING, AS TO THE INCONSISTENCY BETWEEN THE 79 '79 AND THE '80 -- THE '79 AND THE '80 AND THE OTHER INCONSISTENCY IN HIS AFFIDAVIT AND THE TESTIMONY? WHAT WAS THE EXPLANATION?

HE SAID HE GOT CONFUSED. THE CCR INVESTIGATOR WHO TOOK THE AFFIDAVIT FROM HIM, SAID HE WAS REAL SURE OF 1979 WHEN HE TOLD ME THAT. IF I COULD VERY, VERY BRIEFLY TOUCH ON THE EXPARTE ORDER ISSUE THIS IS, PERHAPS, ONE OF THE MORE CONFUSING ISSUES I HAVE EVER ENCOUNTERED, BECAUSE OF THE STACKED-UP NATURE OF WHAT WE ARE DEALING WITH. THE ORDER THAT JUDGE EATON SET ASIDE, BASED UPON THE EXPARTE COMMUNICATION, WAS NOT THE ORDER THAT WAS ALLEGEDLY PREPARED EXPARTE. THE ORDER THAT WAS SET ASIDE WAS THE JANUARY 3, 1991, ORDER, WHICH WAS A TWO-PAGE ORDER ENTERED BY THE CIRCUIT COURT, FOLLOWING THE EVIDENTIARY HEARING, THAT THIS COURT ORDERED ON THE PENALTY PHASE AND IN EFFECT I EVER ASSISTANCE OF COUNSEL CLAIM AND WHETHER THE UNPRESENTED MITIGATION, IN QUOTATION MARKS, WOULD HAVE PRECLUDED THIS COURT FROM SUSTAINING

THE REJECTION OF THE PENALTY PHASE ADVISORY VERDICT.

BUT WOULDN'T THAT ISSUE, REALLY, BE MOOT, IF WE AFFIRM ON ISSUE ONE?

-- I MEAN, IF WE AFFIRM ON ISSUE ONE, WHICH MEANS HE WOULD GET A NEW PENALTY PHASE, DOES IT REALLY MATTER ABOUT THE, THIS, WHICH ORDER IS BEING VACATED, BECAUSE HE WOULD HAVE A NEW PENALTY PHASE? AND DIDN'T THAT ORDER THAT THE TRIAL JUDGE VACATED, GO TO JUDGE PENALTY-PHASE ISSUES?

YES, MA'AM. THE ORDER THAT THE JUDGE VACATED EFFECTIVELY VACATED, THIS COURT'S 1992 DECISION, AFFIRMING THE OVERRIDE DERTH SENTENCE, THERE WAS -- DEATH SENTENCE, THERE WAS A TETTER ISSUE, AND IT WAS THE TETTER CLAIM, AND I HAVE DISCUSSED THAT IN MY BRIEF, AND I AM NOT GOING TO BELABOR THE POINT HERE, BUT I DO WANT TO POINT OUT A COUPLE OF THINGS, WITH RESPECT TO THE ORDER. I WOULD TO ARGUE THAT THERE IS A REVERSAL WITH RESPECT TO THE EXPARTE REVERSAL OF ORDER AND WITH RESPECT TO THAT I WOULD RESPECTFULLY SUBMIT THAT THERE WAS NO RULE THAT WOULD APPLY BECAUSE THERE WERE NO MERITS ON THE CASE. JUDGE WILSON REVIEWED THE MOTION REVIEWED THE STATE'S RESPONSE, DECIDED HE WAS GOING TO SUMMARILY DENY A RELIEF AND DIRECTED THE STATE TO PREPARE THE ORDER DOING SO. THIS IS BEFORE HUFF. IT IS BEFORE ROSE. THAT WAS AN ACCEPTED PRACTICE THAT IS DONE IN CIVIL CASES. IT IS NOT AT ALL UNCOMMON FOR A JUDGE TO ASK TE PREVAILING PARTY TO DRAFT THE ORDER. THERE WAS NO COMMUNICATION ON THE MERITS OF THE CASE, AND JUDGE --

IN THOSE SITUATIONS, ARE YOU SUPPOSED TO SERVE OPPOSING COUNSEL WITH A COPY OF THE PROPOSED ORDER?

THAT IS CERTAINLY THE PRACTICE FOLLOWED NOW, JUSTICE QUINCE.

WASN'T, ISN'T HUFF, WHICH WAS AFTER THIS, BUT DIDN'T WE REVERSE FOR A NEW HEARING IN HUFF, BECAUSE OF AN EXPARTE SENTENCING ORDER?

IT WAS AN EXPARTE 3.850 ORDER.

YEAH. AN EXPARTE 3.850.

I BELIEVE THAT IS CORRECT, BUT AT THE TIME THAT THIS CASE WAS DECIDED AND THAT MILLS WAS MOVING THROUGH THE SYSTEM, THIS WASN'T ERROR. THIS IS LIKE SUAVEORD THAT IS CITED IN MY -- THIS IS LIKE WAFFORD THAT IS CITED IN MY BRIEF.

THIS ISN'T LIKE SWOFFORD. IN SWOFFORD IT WAS MORE LIKE AN OPPORTUNITY TO BE HEARD FOR DENIAL. ISN'T THIS MORE LIKE HUFF, WHICH WAS SET ASIDE OPPOSE THE CONVICTION, DECIDED TO SET ASIDE AN ORDER BECAUSE OF AN EXPARTE ADMISSION --

HUFF IS NOT RETROACTIVE TO CASES.

HUFF WASN'T RETROACTIVE. HUFF JUST DECIDED IT ON THE POSTCONVICTION MOTION. IT CAME UP, JUST LIKE MILLS WOULD HAVE COME UP.

LET ME RESPOND BY SAYING THIS THERE IS NO FEDERAL CONSTITUTIONAL ISSUE UNDER ANDERSON, WE DECIDEDED THAT IN THE -- WE CITED THAT IN THE STATE'S BRIEF, AND I AM INTO MY REBUTTAL TIME, AND ONE MORE POINT, AN UNSIGNED ORDER, AND IT SEEMS LIKE THAT WAS DECIDED YESTERDAY AS WELL, STANDING ALONE, A STATEMENT IN A FILE DOESN'T MEAN ANYTHING, AND WE CAN'T GO DOWN THE ROAD OF SAYING THAT UNSIGNED ORDER EQUALS THE STATE DID SOMETHING WRONG. AND THAT IS WHERE THIS IS TRYING TO LEAD. AND I WOULD TRULY IMPLORE THIS COURT NOT TO GO DOWN THAT ROAD.

IN THIS CASE WE DON'T HAVE JUST THAT. THE TRIAL JUDGE AGREED THAT HE TOLD THE STATE ATTORNEY TO DO IT THAT HE TOLD THE TRIAL ATTORNEY TO DO THAT.

I WILL GIVE AWE EXAMPLE HERE. IN THIS CASE, IN MILLS, WITH CONNECTION WITH THE WARRANT LITIGATION, JUDGE EATON E-MILED THE PARTIES AN ORDER. THAT ORDER IS NOT SIGNED, AND IT IS STILL IN MY FILES. IF, TEN YEARS DOWN THE ROAD, SOMEBODY LOOKS AT MY FILES, AND I DON'T REMEMBER HOW I GOT THAT ORDER, THEY COULD CONCEIVABLY COME BACK UP HERE AND SAY, LOOK HERE, UNSIGNED ORDER, MR. NUNNELLEY DID SOMETHING WRONG, TAN WOULDN'T BE TRUE, AND THERE MIGHT NOT BE ANY WAY TO REBUT IT SO WE HAVE TO BE CAREFUL WHERE WE GO WITH THIS. I WILL RESERVE THE REMAINDER OF MY TIME.

THANK, MR. NUNNELLEY. MR. SCHER.

MORNING. TODD SCHER ON BEHALF OF MR. MILLS. JUST BRIEFLY, AS TO THE RELIEF GRANTED AS TO BOTH CLAIMS, THE COURT IS CORRECT THAT THE RELIEF AS TO THE EXPARTE CLAIM WOULD BE MOOTED OUT BY AFFIRMANCE ON THE CLAIM ON NEWLY-DISCOVERED EVIDENCE, WHICH IS ALSO WHAT JUDGE EATON FOUND. YOUR HONORS, THIS IS A CLASSIC CASE THAT THE COURT HAS SEEN NUMEROUS OCCASIONS.

ON THAT POINT, JUDGE EATON, REALLY, DIDN'T FIND, IN HIS ORDER, THAT THE PROBLEM WAS LIKE THIS COURT FOUND IN HUFF, THAT THERE WAS NO OPPORTUNITY TO RESPOND TO IT. HE FOUND THAT IT WAS AN IMPROPER EXPARTE COMMUNICATION, AND THERE WAS SOME TYPE OF SUBSTANTIVE DUE PROCESS VIOLATION, BY REASON OF THAT COMMUNICATION. ISN'T THAT RIGHT?

CORRECT. HE RELIED ON ROSE. AS WELLAS HUFF.

AND ROSE DIDN'T FIND REVERSE ON THE BASIS AFTER DUE PROCESS VIOLATION. ROSE REVERSED ON THE BASIS THAT THERE HAD BEEN A CONCESSION BY THE STATE THAT THERE WAS A REQUIREMENT FOR AN EVIDENTIARY HEARING.

NO. ROSE REVERSED ON THE LACK OF, THE APPEARANCE OF IMPROPRIETY, BECAUSE IN ROSE THERE WAS NO DIRECT EVIDENCE OF AN EXPARTE COMMUNICATION. THE COURT SPECULATED THAT, UNDER THE CIRCUMSTANCES AS IT OCCURRED IN ROSE, THAT ONE MUST HAVE HAPPENED, BUT THERE WAS NO DIRECT EVENCE OF IT. OF COURSE IN THIS CASE, THERE IS A FAR MORE EGREGIOUS SITUATION, WHERE WE ACTUALLY HAVE THE EVIDENCE OF THE EXPARTE COMMUNICATION, SO ROSE WENT BACK ON THE DUE PROCESS VIOLATION, WITH RESPECT TO THE FAILURE OF ROSE TO OBJECT AND TO BE HEARD ON THE MOTION, SO, OF COURSE, IT DID GO BACK, AND THERE WAS A HEARING GRANTED, BUT THE MAIN REASON WHY ROSE WAS SENT BACK, LIKE HUFF, WAS BECAUSE OF A LACK OF DUE PROCESS. I WOULD, ALSO, ADD THE SAME THING OCCURRED IN THE FRANK LEE SMITH CASE, SO THAT IS THE THRUST OF BOTH ROSEANNE HUFF. AND WHILE WE ARE ON THAT --

WHAT EVIDENCE DO WE HAVE HERE OF ANY IMPROPER EXPARTE COMMUNICATION?

WELL, WHAT WE HAVE HERE IS JUDGE WOODSON CONTACTING THE STATE ATTORNEYS OFFICE, TELLING THEM HE IS GOING TO DENY THE MOTION, SEND ME AN ORDER, AND THEN THE ORDER --

CONTACTING THEM DIRECTLY?

CONTACTING THEM DIRECTLY. HE INDICATED HE SPOKE DIRECTLY TO THE STATE ATTORNEYS OFFICE, THE PROSECUTOR, INFORMED THE PROSECUTOR THAT HE WANTED TO DENY THE MOTION AND TO PLEASE SEND HIM AN ORDER. THE STATE EVEN, EXCUSE ME, JUDGE WOODSON EVEN ACKNOWLEDGED THE STATE WAS TRYING TO GET THE JUDGE TO SAY, WELL, COULDN'T THIS

HAVE BEEN AN UNSOLICITED ORDER, BECAUSE THERE HAD ALREADY BEEN A DEATH WARRANT PENDING, AND JUDGE WOODSON FLATLY SAID, NO, THEY WOULDN'T HAVE SENT ME AN ORDER, UNLESS I HAD ASKED FOR ONE.

WAS THERE A WARRANT?

THERE WAS A WARRANT AT THE TIME THAT THE ORDER WAS ENTERED, BUT ONE OF THE THING THAT IS THE STATE HAS BEEN RELYING ON IS SORT OF ANALOGIZING THE SITUATION TO BLOCK, WHICH IS COMPLETELY FACTUALLY DISTINGUISHABLE, HOWEVER MR. MILLS'S 3.850 WAS PENDING BEFORE JUDGE WOODSON FOR A YEAR AND-A-HALF BEFORE A WARRANT WAS SIGNED. THE 3.850 WAS FILED IN NOVEMBER OF '88 AND THE WASHINGTON WAS NOT SIGNED UNTIL NOVEMBER OF '89 AND IT WAS AT THAT POINT THAT THIS EXPARTE COMMUNICATION HAPPENED. THE STATE TOLD THE COURT THAT THERE WAS NOTHING WRONG, BECAUSE JUDGE WOODSON HAD MR. MILLS'S PLEADINGS AND ALSO HAD THE STATE'S RESPONSE. MR. MILLS'S COUNSEL DID NOT HAVE THE STATE'S RESPONSE. THE RESPONSE WAS NOT FILED, UNTIL AFTER THE 3.850 HAD ALREADY BEEN DENIED, SO HERE MR. MILLS AND HIS COUNSEL WERE COMPLETELY SHUT OUT OF THE POSTCONVICTION PROCESS.

WHAT WAS THE EVIDENCE? IN OTHER WORDS THERE WAS A RESPONSEFILED BY THE STATE? A CONVICTION MOTION?

CORRECT AND THE CERTIFICATE OF SERVICE WAS, I THINK IT WAS 1990, AFTER THE 3.850 HAD ALREADY BEEN DENIED. THAT WAS ONE OF THE BASIS THAT MR. NOEL HAS FILED THE REHEARING BEFORE JUDGE WOODSON, BECAUSE THE ORDER INDICATED THAT JUDGE WOODSON HAD REVIEWED A RESPONSE FROM THE STATE, WHICH MR. 'NOLES HAD NOT RECEIVED.

DO -- WHICH MR. 'NOLES HAD NOT RECEIVED.

DO WE KNOW WHEN THAT WAS PROVIDED TO THE JUDGE, AS OPPOSED TO THE OTHER?

NO. WE DON'T. THERE IS NOTHING IN THE RECORD.

HE WAS NOT ASKED ABOUT THAT?

I DON'T BELIEVE THERE WAS REALLY AN ISSUE. THE ONLY ISSUE, IN TERMS OF THE STATE'S RESPONSE EVEN BEING AN ISSUE WAS BECAUSE THE STATE HAS ARGUED THAT SOMEHOW THE FAILURE OF MR. KNOWLES TO HAVE A RESPONSE SHOULD HAVE PUT HIM ON NOTICE THAT THERE WAS AN EXPARTE COMMUNICATION, SO THAT IS REALLY THE ONLY CONTEXT IN WHICH THE ISSUE OF THE STATE'S RESPONSE CAME UP, SO, AND OF COURSE JUDGE WOODSON ALSO INDICATED THAT HE DIDN'T EVEN REMEMBER WHETHER HE HAD THE CLERK'S FILE, WHEN HE DENIED THE 3.850, BECAUSE HE WAS IN A DIFFERENT COUNTY.

I REALIZE THAT, IF WE UPHOLD JUDGE EATON'S ORDER ON THE FIRST ISSUE, WE DON'T GET TO THIS, BUT I DO HAVE A CONCERN AS TO WE ARE ASKED TO SET ASIDE THE ISSUE ON AN EVIDENTIARY HEARING, BECAUSE THAT SETS ASIDE A MATTER OF LAW AS TO WHETHER THE JUDGE SETTING ASIDE A PREPARED ORDER SHOULD HAVE CAUSED HIS RECUSAL.

I THINK THAT IS WHAT JUDGE EATON --

THAT WOULD BE AS MATTER OF LAW THAT, IN ANY CASE WHERE THERE HAS BEEN A REQUEST TO SUBMIT AN ORDER, THAT THE JUDGE IS REQUIRED TO BE RECUSEED?

WELL, CERTAINLY IF IT IS DONE IN AN EXPARTE FASHION AND THERE IS NO DUE PROS THESE ATTACHES TO THE PROCEDURE. THAT IS, IN FACT, WHAT HAPPENED AND BY NEGATIVE IMPLICATION THAT IS WHAT HAPPENED IN SWOFFORD. CERTAINLY AN EXPARTE COMMUNICATION

WOULD HAVE BEEN FACIALLY SUFFICIENT TO WARRANT A JUDGE'S RECUSAL. NOW, IF THERE IS GOING TO BE A JUDGE'S -- A DISPUTE AS TO WHETHER R NT AN EXPARTE COMMUNICATION HAPPENED, OBVIOUSLY THERE WOULD HAVE TO BE AN EVIDENTIARY HEARING AND THE JUDGE WOULD BE A WITNESS, WHICH IS WHAT HAPPENED IN SWOFFORD, WHICH IS WHAT LED UP TO THE TRIAL JUDGE'S ULTIMATE RECUSAL, BECAUSE HAD HE TO TESTIFY AT THE EVIDENTIARY HEARING. CERTAINLY I HAD ASKED JUDGE EATON TO VACATE THE '89 ORDER, SO IT IS NOT LIKE JUDGE EATON HAD GIVEN MR. MILLS ALL THAT HE ASKED FOR. HE DENIED A NEW TRIAL AND I HAD, ALSO, ASKED THAT HE DENY AN ORIGINAL ORDER, BUT BE THAT AS IT MAY, I THINK THAT CONCLUSION IS SUPPORTED BY THE LAW. FOR EXAMPLE IN SUAREZ VERSUS DUGGAR, THE COURT VACATED. THERE HAD BEEN A FULL EVIDENTIARY HEARING. SUAREZ HAD ASKED THAT THE TRIAL JUDGE BE RECUSED FROM THE PROCEEDINGS. THE JUDGE REFUSED. I BELIEVE THERE WAS EVEN A WRIT TAKEN UP. THE WRIT WAS DENIED. THE EVIDENTIARY HEARING TOOK PLACE, AND ON THE PLENARY APPEAL SUAREZ AGAIN RAISED THE ISSUE THAT THE JUDGE SHOULD HAVE QUALIFIED HIMSELF. THIS COURT AGREED AND REMANDED FOR AN ENTIRE NEW EVIDENTIARY HEARING, SO THAT WOULD BE THE RELIEF, AT LEAST THAT JUDGE EATON BELIEVED THAT MR. MILLS WAS ENTITLED TO.

COULD YOU ADDRESS THE JUDGE'S THE STATEMENT THAT THE JUDGE ONLY FOUND THAT THIS CONVERSATION POSSIBLY MIGHT HAVE TAKEN PLACE?

YES. AS JUSTICE QUINCE POINTED OUT, AND I THINK AS IS MADE CLEAR BY THE ORDER, ENTERED BY JUDGE EATON, IS THAT THAT STATEMENT IS MADE IN THE CONTEXT OF THE STATE'S ARGUMENT THAT THE CONVERSATION COULD NOT HAVE TAKEN PLACE, BECAUSE THE TWO OF THEM ONLY SPENT A TOTAL OF THREE I THINK, DAYS, ITWAS, TOGETHER IN THE JAIL. JUDGE EATON CLEARLY INDICATED THAT, CERTAINLY SSIBLE, BECAUSE THE STATE, ITSELF, PUT ON EVIDENCE TO SHOW THAT THEY BOTH HAD BEEN IN JAIL. NOW, THE STATE COMES UP WITH THIS THEORY TODAY, WELL, MISDEMEANOR PEOPLE ARE KEPT IN DIFFERENT PARTS OF THE JAIL, AND AGAIN, THEY EVEN ACKNOWLEDGED THERE IS NO EVIDENCE TO. THAT WE ARE TALKING ABOUT THE SEMINOLE COUNTY JAIL IN 1979, 1980. CERTAINLY NO EVIDENCE TO SUGGEST THAT IT S PHYSICALLY IMPOSSIBLE FOR THE TWO OF THEM TO HAVE COME ACROSS EACH OTHER. OF COURSE THEY KNEW EACH OTHER.

WAS THERE TESTIMONY, THOUGH, PUT ON THAT THE PRACTICE AT THAT TIME WAS TO SEGREGATE PRISONERS, ACCORDING TO --

NO. THAT IS SOMETHING THE STATE HAS JUST COME UP WITH FOR THE FIRST TIME HERE. THAT IS NOT EVEN AN ARGUMENT THAT THEY MADE BELOW. THEY SIMPLY ARGUED THAT IT WAS DOUBTFUL THAT, GIVEN THE SHORT PERIOD OF TIME THAT THE TWO WERE TOGETHER THAT, THEY COULD HAVE COME ACROSS EACH OTHER AND WOULD HAVE HAD THIS CONVERSATION, AND SO THAT IS THE CONTEXT IN WHICH I THINK THE JUDGE'S STATEMENT THAT IT IS POSSIBLE THIS CONVERSATION COULD HAVE OCCURRED HAS TO BE SEEN.

I GUESS THE STATE'S ARGUMENT, REALLY, IS THAT THE JUDGE SHOULD HAVE FOUND THAT THE CONVERSATION TOOK PLACE, AS OPPOSED TO A POSSIBILITY THAT THE CONVERSATION TOOK PLACE.

WELL, I THINK HE DID, BECAUSE HE EXPLICITLY FINDS ANDERSON'S TESTIMONY TO BE CREDIBLE, AND THAT IS WHY I THINK THE POSSIBLE THE WORD "POSSIBLE" IS EFERING TO A REFUTEATION OR REJECTION OF THE STATE'S ARGUMENT, IN TERMS OF THE FACT THAT THEY COULD NOT HAVE POSSIBLY COME ACROSS EACH OTHER, BECAUSE THEY WERE, AS THE STATE INDICATED, TOGETHER IN THE JAIL FOR SEVERAL DAYS. THE STATE'S ARGUMENT SEEMS TO BE AND I FACE THEIR POSITION ON A NUMBER, MORE THAN A NUMBER OF OCCASIONS, THE STATE'S ARGUING THAT JUDGE EATON IGNORED ALL OF THIS EVIDENCE, IGNORED ALL OF THEIR ARGUMENTS. THERE IS A BIG DIFFERENCE BETWEEN IGNORING IT AND REJECTING IT, AND THAT IS WHAT JUDGE

EATON DID, AND THAT WHAT IS TRIAL JUDGES, AS THIS COURT HAS HELD ON NUMEROUS OCCASIONS, HAVE THE OBLIGATION TO DO. HE REJECTED THE STATE'S ARGUMENTS. HE REJECTED THE STATE'S ARGUMENTS ABOUT THE DATES. THE STATE CERTAINLY BROUGHT UP THE FACT THAT THERE WERE SOME CONFUSION. MR. ANDERSON'S PART AS TO DATES. MR. ANDERSON CLEARLY EXPLAINED THAT HE WAS NOT VERY GOOD WITH DATES. AND WHEN HE WENT BACK TO HIS CELL AFTER THE INITIAL VISIT, HE THOUGHT ABOUT IT SOME MORE, AND HE WAS HONEST, IN TERMS OF RECOGNIZING THAT HE WAS INITIALLY OFF ON THE DATES. AS TO THE POOL HALL, EXCUSE ME, CONVERSATION, IT IS THE SAME THING. HE CLEARLY SAID THEONVRSATION OCCURRED A YEAR OR SO LATER. ASHLEY AND ANDERSON, AS THE STATE'S EVIDENCE SHOWED, WERE BOTH OUT IN THE MID-- 80. I THINK IT WAS BEFORE '84, WHERE THIS CONVERSATION, WHERE THEY BOTH WOULD HAVE BEEN OUT AT LEAST AND COULD HAVE MET EACH OTHER. OF COURSE THEY WERE ALL FRIENDS. THIS ALL GOES BACK TO THE FACT THAT JUDGE EATON HAS THE DISCRETION TO MAKE THE FINDINGS THAT HE DID, AND DISAGREEMENT BY A PARTY IS NOT SUFFICIENT TO SHOW ABUSE OF DISCRETION. THE STATE, ALSO, PRETTY VOCIFEROUSLY LAMBASTED JUDGE EATON FOR APPLYING THE WRONG LEGAL STANDARD TO THE CLAIM, AT LEAST, TO THE SENTENCING PHASE OF RELIEF. AS I POINTED OUT IN MY BRIEF, THE STATE NEVER SAYS WHAT THE CORRECT STANDARD IS, YET THEY ATTACK JUDGE EATON FOR APPLYING THE WRONG STANDARD. THE CORRECT STANDARD IS THE STANDARD THAT IS SET FORTH OBVIOUSLY EMANATING FROM JONES, IN THIS COURT'S LAST OPINION ON APRIL 25 IN MR. MILLS'S CASE, WHICH IS WHETHER THE NEW EVIDENCE WOULD PROBABLY HAVE CHANGED THE CRIME JUDGE'S DECISION ON THE JURY OVERRIDE ISSUE. THAT IS THE STANDARD THAT THE STATE ACKNOWLEDGED BELOW, TO JUDGE EATON, AS BEING THE PROPER STANDARD. JUDGE EATON QUESTIONED MR. NUNNELLEY, HIMSELF, ON THIS ISSUE. HE SAID WHAT IF I FIND ANDERSON CREDIBLE, MR. NUNNELLEY? WHAT IS YOUR POSITION AS TO WHAT THE STANDARD IS, AND THAT IS THE STANDARD THAT MR. NUNNELLEY ARTICULATED, AND NOW THE STATE COMES TO THIS COURT AND ATTACKS JUDGE EATON FOR DOING EXACTLY WHAT THE STATE ARGUED BELOW THAT HE COULD DO. I THINK THE STATE HAS JUST OBVIOUSLY DISPLEASED WITH THE RESULT, THAN IS NOT SUFFICIENT TO SHOW AN ABUSE OF DISCRETION WHICH IS A VERY, VERY HIGH STANDARD TO MEET, AS A THE STATE HAS CONCEDED. -- AS THE STATE HAS CONCEDED. THE STATE POINTS TO ALL OF THE ALLEGED OVERWHELMING EVIDENCE. OF COURSE THAT THE CLAIM DOES GO TO BOTH THE GUILT AND THE PENALTY PHASE, AND, AGAIN, THE STATE FIRST TELLS THIS COURT THAT JUDGE EATON PASSED ON THE CREDIBILITY OF SYLVESTER DAVIS. SIMPLY NOT TRUE. JUDGE EATON'S ORDER EXPLICITLY SAID HE NEVER HAD THE OPPORTUNITY TO PASS ON DAVIS'S CREDIBILITY, BECAUSE HE HAS NEVER PERSONALLY SEEN DAVIS. HOWEVER, IN DISCUSSING DAVIS'S TESTIMONY, JUDGE EATON DISCUSSES THE FACT THAT DAVIS WAS IMPEACHED WITH HIS DEAL THAT HE GOT, IN EXCHANGE FOR HIS TESTIMONY. THE STATE WOULD HAVE AN ANALYSIS UNDER JONES, ONLY LOOKING AT THE DIRECT TESTIMONY OF A WITNESS, NOT THE CROSS-EXAMINATION OF THE WITNESS.

BUT HE DID PASS ON, TO SOME EXTENT, THE CREDIBILITY OF MR. ASHLEY.

VINCENT ASHLEY. HOWEVER, JUDGE EATON HAD AN OPPORTUNITY TO VIEW VINCENT ASHLEY AT THE PREVIOUS PROCEEDING. OF COURSE PART OF WHAT JUDGE EATON HAS TO DO, IN THIS PROCEEDING, IS EVALUATE THE CUMULATIVE EFFECT OF ALL OF THE EVIDENCE IN THIS CASE, AND CERTAINLY VINCENT ASHLEY'S PERFORMANCE AT THAT PREVIOUS PROCEEDING, PUT JUDGE EATON IN A POSITION TO PASS ON HIS CREDIBILITY. CERTAINLY IN THE PREVIOUS PROCEEDING, THE STATE ARGUED TO THIS COURT, WHEN I WAS ON THE OPPOSITE SIDE OF THE TABLE HERE, THAT JUDGE EATON HAS THE DISCRETION. HE PASSED ON. HE WAS IN THE BEST POSITION TO VIEW ASHLEY'S DEMEANOR AND CREDIBILITY AT THAT HEARING, WHICH HE -- WHEN HE SAID WHAT HE SAID, WHICH IS, OF COURSE, IN MY BRIEF, AND NOW, OF COURSE, THEY ARE TAKING THE POSITION THAT HE DIDN'T HAVE THAT CHANCE. THE STATE IS TALKING OUT OF BOTH SIDES OF THEIR MOUTH. OBVIOUSLY THEY HAVE THEIR POSITION THAT THEY WANT TO ADVANCE, BUT THEY ARE REALLY STUCK WITH THE FACT THAT TRIAL JUDGES ARE IMBUED WITH THE DISCRETION TO DO WITH WHAT JUDGE EATON DID, AND THERE IS NOTHING THAT THE STATE HAS COME UP WITH,

OTHER THAN ANGER AND DISAGREEMENT, THAT WARRANTS A FINDING OF ABUSE OF DISCRETION AS AN EXTREMELY HIGH BURDEN.

NOW, JOHNSON DIDN'T EXONERATE. HE DIDN'T SAY ASHLEY EXONERATED MILLS, DID HE?

ANDERSON. EXCUSE ME. ANDERSON.

I AM SORRY.

CORRECT. ANDERSON INDICATED THAT ASHLEY HAD TOLD HIM THAT THEY BOTH HAD BEEN THERE BUT ASHLEY WAS THE ONE THAT WENT IN THE HOUSE AND PULLED THE TRIGGER,AND THAT IS WHAT JUDGE EATON FOUND, IN TERMS OF, IF ANYTHING, THIS WOULD BE SUBSTANTIAL IMPEACHMENT EVIDENCE OF ANDERSON, AND, OF COURSE, THIS GOES TO, OF COURSE, ALSO CLAIMING GUILT, BUT CERTAINLY AS TO PENALTY. OF COURSE THIS IS AN OVERRIDE CASE. THERE WAS MITIGATION PRESENTED, EXCUSE ME, IT TO THE PENALTY PHASE JURY. WE HAVE THE KEY WITNESSES'S TESTIMONY IMMUNIZED OR DEALS WERE GIVEN, BOTH SYLVESTER DAVIS VIOLA STAFFORD, WHO DIDN'T TESTIFY BUT HER INFORMATION CAME IN THROUGH DAVIS, AND VINCENT ASHLEY, OF COURSE. THESE ARE THE TWO KEY WITNESSES TO THIS TRIAL, AND THEY RECEIVED SUBSTANTIAL BENEFITS IN EXCHANGE FOR THEIR TESTIMONY. THAT EVENT, ITSELF, OF COURSE, WE HAVE ALWAYS CONTENDED SHOULD HAVE BEEN REASONABLE BASIS ALL ALONG, BUT OF COURSE THE MAJORITY OF THE COURT HAS DISAGREED, OVER THE YEARS ABOUT THAT. CERTAINLY ALL OF THIS RECORD, AS IT NOW STANDS, FULLY SUPPORTS THE FACT THAT THERE IS A LIKELIHOOD THAT IS REASONABLE THAT THIS JURY RECOMMENDATION WOULD NOT HAVE BEEN OVER RID EN, UNDER THE PRE -- OVERRIDDEN UNDER THE PREVAILING STANDARDS. OF COURSE KEEN IS THE PREVAILING STANDARD. UNDER THE OVERRIDING PERSPECTIVE FROM THE TRIAL JUDGE'S PERSPECTIVE, FROM THE LOWER COURT'S PERSPECTIVE OR CERTAINLY UNDER APPEAL OF PREVAILING STANDARDS, AND THOSE ARE THE STANDARDS THAT CLEARLY APPLY. NOW, THE STATE HAS ARGUED IN ITS BRIEF JUDGE EATON HAS NO BUSINESS SUBSTITUTING HIS OWN JUDGMENT FOR THAT OF WOODSON. WELL THAT, IS WHAT JONES REQUIRES JUDGE TO SAY DO. IF YOU HAVE TO PRESUME, AS I ARGUE IN THE BRIEF, THAT THE JUDGE IS FOLLOWING, THAT THE JUDGE IS IMPARTIAL AND THAT THEY ARE FOLLOWING PREVAILING STANDARDS.

HOW WAS ANDERSON DISCOVERED?

ANDERSON WAS DISCOVERED, WHEN WE HAD TALKED TO ASHLEY, AND HE HAD PROVIDED US ANDERSON'S NAME, ALONG WITH OTHER PEOPLE TO LOOK FOR, AND WE HAD TRIED TO DETERMINE THIS PERSON'S PSITION N, OF COURSE, ALL WE HAD GOING WAS JOHN ANDERSON. WE CHECKED DOC AND ALL OF THAT KIND OF STUFF AD WE FOUND ANDERSON, AND I SENT MY INVESTIGATOR TO SEE HIM.

WAS THAT PRESENTED TO JUDGE EATON HERE?

YES. ALL OF THE CIRCUMSTANCES SURROUNDING THE DISCOVERY OF JOHN ANDERSON WERE PRESENTED BELOW. JUDGE EATON FOUND BOTH PRONGS OF JONES HAD BEEN SATISFIED, BOTH THE NEWLY-DISCOVERED EVIDENCE AND THE DUE DILIGENCE PRONG, AS WELL AS THE REQUIREMENT IN TERMS WHAT HAVE THE ACTUAL STANDARD S THE STATE CONTINUES TO CHALLENGE BOTH THE DILIGENCE AND THE MERITS OF BOTH CLAIMS. THEY REALLY HAVEN'T MADE ANY ARGUMENT, TODAY, IN TERMS OF PARTICULARLY AS TO THE EXPARTE ORDER CLAIM, BUT I THINK MY POSITION, IN TERMS OF BOTH THE ABUSE OF PROCESS DEFENSE AND THE DILIGENCE ARGUMENT THAT THEY HAVE MADE ARE COMPLETELY SPECIOUS AND THAT JUDGE EATON WAS CORRECT IN ADDRESSING JUST MERITS.

THERE IS NO TESTIMONY THAT ANDERSON AND ASHLEY WERE IN COMMUNICATION IN THE LAST TEN, FIFTEEN YEARS?

NO. ACTUALLY QUITE THE OPPOSITE. ANDERSON INDICATED THE LAST TIME HE HAD EVER SEEN ASHLEY WAS AT THE POOL HALL, WHEN THEY HAD THIS LAST CONVERSATION. THAT WOULD HAVE BEEN SOMETIME IN THE EARLY '80s. THEY HAVE BOTH BEEN, SINCE '85, ASHLEY HAS BEEN INCARCERATED CONTINUOUSLY AND ANDERSON IN AND OUT.

THERE IS NO TESTIMONY, ANYTHING ABOUT ANDERSON BEING IF IN TOUCH WITH MILLS DURING THIS PERIOD OF TIME?

NO. JUST OPPOSITE. MR. ANDERSON INDICATED THAT THE LAST TIME HE SAW MR. MILLS WAS WHEN THEY WERE 13 OR 14 YEARS OLD AND THEY WERE BUDDIES AND THE STATE IS CLAIMING HE IS COMING TO THE RESCUE OF HIS POOR FRIEND. OF COURSE ANDERSON WAS, ALSO, A FRIEND OF MR. ASHLEY'S.

IT WASN'T ANDERSON COMING FORWARD. IT WAS ASHLEY MIXING THIS TO -- MENTIONING THIS TO YOUR INVESTIGATOR.

CORRECT. OUT OF THE BLEW JUST MENTIONING IT, AND WE -- OUT OF THE BLUE, JUST MENTIONING IT, AND WE ALSO PUT ON EVIDENCE, WITH JUDGE CANOLIS, WHO DETAILED HIS -- WITH INVESTIGATOR CANOLIS, BACK IN 1989, HIS UNSUCCESSFUL EFFORTS TO SPEAK TO MR. ASHLEY.

MR. ASHLEY HAD BEEN UNCOOPERATIVE.

CORRECT.

AND CERTAINLY HAD REMAINED UNCOOPERATIVE.

SURELY. SO CLEARLY BOTH PRONGS HAVE BEEN MET THERE. IS NO ABUSE OF DISCRETION AS TO EITHER CLAIM.

ARE YOU GOING TO ADDRESS YOUR CROSS APPEAL?

I SAVED TWO MINUTES FOR MY CROSS APPEAL. I THINK I GOT TWO MINUTES OF REBUTTAL FROM THEIR ARGUMENT, SO I HAVE NEVER BEEN IN THIS POSITION BEFORE. MR. CHIEF JUSTICE: KIEF MR. SCHER, WHY-. MR. CHIEF JUSTICE: MR. SCHER, WHY DON'T YOU GO AHEAD AND MAKE WHATEVER ARGUMENT YOU ARE GOING TO MAKE.

CERTAINLY I PUT IN THERE THAT JUDGE EATON MADE THE FINDINGS, CERTAINLY, AS TO THE PENALTY PHASE. CERTAINLY IT GOES TO THE GUILT PHASE. ALL OF THE KEY EVIDENCE COMES FROM THE MOUTHS OF TWO WITNESSES.

BUT YOU WOULD AGREE THAT MR. ANDERSON'S STATEMENT, SUCH AS IT IS, DOES NOT EXONERATE MR. MILLS FROM ACTUALLY BEING THERE AT THE SCENE OF THE CRIME.

THAT'S CORRECT. THAT IS WHAT ANDERSON SAID.

I MEAN, IN FACT, IT IS IMPEACHMENT OF ASH WILLLY, I MEAN -- OF ASHLEY. I MEAN, WHATEVER WEIGHT IT IS GIVEN, BUT IT IS IMPEACHMENT EVIDENCE.

CORRECT. IT IS IMPEACHMENT EVIDENCE, YES.

BUT THEY BOTH PARTICIPATING IN THE -- PARTICIPATED IN THE BURGLARY.

TERMS OF ANDERSON, WHAT WE HAVE TO REMEMBER IS THIS IS ALL COMING FROM ASHLEY, BUT BE THAT AS IT MAY, WHAT ANDERSON TESTIFIED TO WAS THAT MR. MILLS WAS PRESENT. I WOULD CERTAINLY SUBMIT THAT THAT, CERTAINLY, GOES TO LESSENING HIS CULPABILITY, IN

TERMS OF I MEAN WE ARE TALKING ABOUT WHETHER THERE IS AN ACQUITTAL OR RETRIAL. I THINK PART OF THAT ANALYSIS SHOULD, ALSO, ENTAIL WHETHER THERE IS THE REQUISITE LEVEL OF CULPABILITY FOR FELONY MURDER IN THE FIRST DEGREE OR WHETHER THERE SHOULD BE SOME KIND OF LESSER-INCLUDED OFFENSE, THINGS OF THAT NATURE. I UNDERSTAND THAT JUDGE EATON DID NOT, REALLY, ADDRESS A LOT OF THIS BELOW. THE STATE, IN ITS BRIEF, HAS SUGGESTED TO THE COURT THAT I ABANDONED THIS ISSUE BELOW, WHICH IS FLATLY FALSE, AS I SET FORTH IN MY CROSS REPLY BRIEF, AND SO CERTAINLY I DID NOT ABANDON THAT ISSUE. I ARGUED IT STRENSSLY BELOW AS TO THE GUILT -- STRENUOUSLY BELOW AS WELL TO THE PENALTY AND THE GUILTY PHASE.

BUT AS FAR AS MR. ANDERSON'S STATEMENT IS CONCERNED AT THE TRIAL LEVEL, YOU WOULD STILL HAVE TO SHOW THAT, UNDER THE NEWLY-DISCOVERED EVIDENCE PRONG THAT, THIS WOULD PRODUCE AN ACQUITTAL AT A RETRIAL.

CORRECT. AND, AGAIN, I WOULD JUST SUBMIT THAT, BECAUSE THIS IS SUCH SUBSTANTIAL IMPEACHMENT OF VINCENT ASHLEY, BECAUSE YOU HAVE TO REMEMBER VINCENT ASHLEY WAS EXPLICITLY ASKED BY DEFENSE COUNSEL, AREN'T YOU THE SHOOTER, MR. ASHLEY? HE SAYS, NO, I AM NOT. I MEAN, THIS CASE NOW COMES DOWN EVEN MORE SO TO A BATTLE OF CREDIBILITY, AND I JUST THINK THAT ALL OF THESE FACTS, BEGIN THE DIFFERENCE IN THE RECORD NOW NEED TO BE PROVIDED TO THE CRUISEIBLE OF A JURY, IN MATERIALS OF MAKING AN ULTIMATE DETERMINATION.

THANK YOU, MR. SCHER. REBUTTAL.

WITH RESPECT TO JUDGE EATON AND HIS PASSING ON THE TESTIMONY OF VINCENT ASHLEY, THE COURT POINTS OUT THAT IT DID NOT HAVE THE OPPORTUNITY TO HEAR OR CECIL VESTER DAVIS TESTIFY AND THEREFORE IT DID DAMAGE HIS CREDIBILITY. THE JUDGE GOES TO TALK ABOUT ANDERSON'S DEMEANOR ON THE WITNESS STAND BEING BETTER THAN ASHLEY'S. ASHLEY, BY THE WAY, WASN'T ON A WITNESS STAND IN FRONT OF JUDGE EATON ONE -- EAT ONE, EXCEPT -- JUDGE EATON, EXCEPT WHEN HE REFUSED TO TESTIFY, AND CERTAINLY HIS TESTIMONY AT TRIAL BEFORE THE SENTENCING JUDGE AND THE TRIAL JUDGE, IT DOES NOT GO OTHE CREDIBILITY OF THAT.

IN A LOT OF SITUATIONS WHERE THERE ARE SUCCESSOR JUDGES, AND WE REQUIRE THE JUDGES, UNDER THE JONES'S SECOND PRONG, TO MAKE THIS EVALUATION AS TO WHETHER THERE IS A PROBABILITY OF A DIFFERENT RESULT. WHAT YOU ARE REALLY SAYING IS THAT A SUCCESSOR JUDGE WILL NEVER BE ABLE TO DO THAT, BECAUSE ONLY THE ORIGINAL JUDGE WAS THERE TO OBSERVE THE CREDIBILITY OF THE WITNESSES. ISN'T THAT ESSENTIALLY YOUR ARGUMENT?

NOT DIRECTLY, BUT IT CERTAINLY POINTS UP THE DESIRABILITY OF THE TRIAL JUDGE HEARING THE 3.850, BUT AT THE SAME TIME, LET ME, I AM NOT TRYING TO AVOID YOUR QUESTION, BUT LET ME GO ON OVER TO PAGE 6, WHERE JUDGE EATON SAYS THIS, TALKING ABOUT ASHLEY AND DAVIS. THE JURY HAD TO WEIGH THE CREDIBILITY OF THESE INCREDIBLE WITNESSES. IF THAT IS NOT A CREDIBILITY FINDING, BASED UPON A COLD RECORD, I DON'T KNOW WHAT IT CAN POSSIBLY BE. THAT IS A CREDIBILITY FINDING THAT IS MADE IN PRECISELY THE CONTEXT THAT THIS COURT REFUSES TO MAKE THEM! AND THE CIRCUIT COURT, I WOULD SUGGEST, IS IN NO BETTER POSITION TO PASS UPON CREDIBILITY, BASED UPON A PAPER RECORD, THAN THIS COURT IS.

WELL, CERTAINLY HE IS IN A BETTER POSITION TO PASS ON ANDERSON'S CREDIBILITY, AND THEN WE LOOK AT THE TRIAL, AND WE DO KNOW THAT THE TWO WITNESSES THAT TESTIFIED OR THREE, ALL, HAD DEALS OR IMMUNITY, AND I MEAN, THAT IS ON THE COLD RECORD.

OF COURSE IT IS.

THAT IS NOT ON THE QUESTION OF WHETHER THEY AVERTED THE JURY'S EYES OR NOT. THAT IS THE FACTS THAT THIS IS THE TESTIMONY, THE WITNESSES, WERE, ALL HAD A MOTIVE TO NOT TELL THE TRUTH.

AND THE JURY EVALUATED THEIR CREDIBILITY AND CONVICTED GREGORY MILLS OF FIRST-DEGREE MURDER. AND THAT IS THE BOTTOM LINE ANSWER. THEIR CREDIBILITY, THE CREDIBILITY OF THOSE WITNESSES HAS BEENDTRMED, AND IT CAN'T BE REOPENED THIS WAY.

WELL, THEY, ALSO, DETERMINED THAT MR. MILLS SHOULD, THEY MADE AN ADVISORY DETERMINATION, ANYWAY THAT, MR. MILLS SHOULD GET A LIFE SENTENCE, BASED ON THESE SAME EVIDENCE.

YES, MA'AM, THEY DID, AND THIS COURT WENT ON, IN ITS DIRECT APPEAL OPINION, AND FOUND THAT THERE WAS EVIDENCE OF MR. MILLS'S VIOLENT CRIMINAL TENDENCIES IN THE TWO MONTHS BETWEEN HIS RELEASE FROM PRISON AND HIS ARREST FOR MURDER THAT THE JURY DIDN'T KNOW ABOUT. I AM IN MY REBUTTAL TIME. I WOULD ASK THE COURT TO REVERT THE LOWER COURT'S GRANT OF RELIEF AND REINSTATE THE STAY OF EXECUTION. MR. CHIEF JUSTICE: THANK YOU. THANK YOU, COUNSEL.