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Terrell M. Johnson vs State of Florida

GOOD MORNING, AND WELCOME TO THE WEDNESDAY ORAL ARGUMENT CALENDAR FOR THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE COURT'S CALENDAR THIS MORNING IS JOHNSON VERSUS STATE. MR. HENNIS

GOOD MORNING, CHIEF JUSTICE WELLS AND GOOD MORNING, MEMBERS OF THE SUPREME COURT. I AM WILLIAM HENNIS, AND I AM HERE, THIS MORNING, ON BEHALF OF TERRELL JOHNSON, ON A 3.850 APPEAL OUT OF ORANGE COUNTY. BRIEFLY, THIS IS A CRIME THIS RESULTED IN A MURDER CONVICTION FOR MR. JOHNSON. IT OCCURRED IN DECEMBER 1979. THE TRIAL OCCURRED IN 1980. THERE WAS A POSTCONVICTION EVIDENTIARY HEARING, ORANGE COUNTY, BACK IN 1986, AND THERE HAS, ALSO, BEEN A HEARING IN THE EARLY '80s, TO RECONSTRUCT THE RECORD, BASED ON A POSTCONVICTION MOTION, SO THAT THE STATE, AMONG OTHER THINGS, ARGUED IN THEIR BRIEF AND ARGUED BEFORE THE TRIAL COURT, AND THE TRIAL COURT'S ORDER FOUND THAT THE 3.850 MOTION THAT WAS FILED, ORIGINALLY, IN FEBRUARY 1997, WAS UNTIMELY AND SUCCESSIVE. I THINK THAT THIS IS A CASE, FROM MY PERSPECTIVE, THAT IS LARGELY ABOUT FACTS THAT ARE IN DISPUTE, AND I THINK THAT IS REFLECTED BY THE TRIAL COURT'S SUMMARY DENIAL ORDER, WHICH RELIED ON, AMONG OTHER THINGS, REPRESENTATIONS BY THE STATE THAT RESULTED AFTER THE HUFF HEARING. THE RECORD WOULD SHOW THAT, AT THE HUFF HEARING, THE STATE REPRESENTED THAT, AS FAR AS THEY KNEW, THERE WAS ONLY ONE MIRANDA CARD THAT WAS INVOLVED IN MR. JOHNSON'S CASE, BUT WITH THE AGREEMENT OF THEN THEN-COUNSEL PAMELA ZACKOITZ FROM OUR OFFICE, THE STATE ATTORNEY'S OFFICE PROVIDED THE COURT WITH A LETTER, WITH ATTACHMENTS THAT PURPORTED TO SHOW THAT, IN FACT, THERE WAS, REALLY, NO ISSUE, BRADY OR INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE, ABOUT THE SO-CALLED REFUSED-TO-SIGN MIRANDA CARD WHICH IS IN DISPUTE.

AT THE ORIGINAL TRIAL, WAS THERE A MOTION TO SUPPRESS?

YES, JUSTICE QUINCE, THERE WERE TWO MOTIONS TO SUPPRESS, ACTUALLY.

AND DID EITHER OF THOSE MOTIONS ALLEGE THAT THE DEFENDANT HAD INVOKED HIS RIGHTS?

YOUR HONOR, THEY DID NOT. I THINK PRIMARILY BECAUSE TRIAL COUNSEL DIDN'T KNOW ABOUT THE REFUSE-TO-SIGN CARD, FROM JANUARY 6, 1980, AT 12:05 IN THE MORNING, AND I THINK THAT IS REFLECTED PRECISELY BY THE FACT THAT THOSE MOTIONS TO SUPPRESS DIDN'T REFER TO THAT. NEITHER DID ANY OF THE TESTIMONY AT THE SUPPRESSION HEARING, AND THE TWO WITNESSES WHO, REALLY, WERE INVOLVED IN TESTIFYING ABOUT THAT, NAMELY LIEUTENANT PETERSON AND CHIEF MONTE, THEIR TESTIMONY DOESN'T REFLECT THAT. IN FACT, PETERSON FIRST SAW TERRELL JOHNSON FOR ABOUT AN HOUR, AFTER MIDNIGHT, AFTER HIS ARREST, NEVER TESTIFIED, AT ALL, ABOUT THAT THAT OCCURRED.

DID MR. JOHNSON TESTIFY?

NO. MR. JOHNSON DID NOT TESTIFY. NOW, THAT IS AN IMPORTANT POINT, OF COURSE. HE DID HAVE AN OPPORTUNITY TO TESTIFY, AND TRIAL COUNSEL DID SAY, ON THE RECORD, THAT HE HAD DISCUSSED TESTIFYING WITH MR. JOHNSON AND THAT HE WAS NOT GOING TO TESTIFY. NOW, THERE IS A REAL QUESTION ABOUT JUST WHAT MR. JOHNSON RECALLED ABOUT THAT TIME,, TO BEGIN WITH, BECAUSE, AS LATER CAME OUT IN THE EVIDENTIARY HEARING, IN 1986, THE

PSYCHIATRIST THAT COUNSEL CALLED AT THAT EVIDENTIARY HEARING, TESTIFIED THAT HE DIDN'T BELIEVE THAT -- HE BELIEVED THAT MR. JOHNSON HAD IMPAIRED JUDGMENT, AT THE TIME OF THE INTERROGATION, AND, IN FACT, THE MEDICAL RECORDS THAT WERE, ALSO, INTRODUCED IN THAT EVIDENTIARY HEARING, FOR THE MONTH-LONG ALCOHOLISM HOSPITALIZATION THAT ENDED IN NOVEMBER OF '79, JUST A FEW WEEKS BEFORE HIS ARREST, ALSO POINTED OUT THAT ONE OF HIS DIAGNOSIS WAS ALCOHOLIC BLACKOUTS AT THE TIME, SO THERE IS A REAL QUESTION ABOUT WHAT HIS STATE WAS, HIS STATE OF MIND WAS, AT THE TIME.

WHAT DOES THE RECORD REVEAL ABOUT THE LETTER THAT WAS SENT THAT SEEMED TO REVEAL THAT THE CARD WAS, IN FACT, SENT TO THE DEFENDANT?

THAT IS AN INTERESTING QUESTION, AND I THINK IT GETS PRECISELY TO MY EARLIER POINT, ABOUT FACTS IN DISPUTE. SEVERAL POINTS I WANT TO MAKE ABOUT THIS LETTER THAT WAS SENT BY THE STATE ATTORNEY, TO JUDGE HIHOK, BEFORE HIS SUMMARY DENIAL. NUMBER ONE, THE LETTER REPRESENTED THAT THERE WERE, IN FACT, NOT JUST ONE CARD, AS THEY HAD REPRESENTED AT THE HUFF HEARING, BUT THEY PROVIDED FOUR DIFFERENT MIRANDA CARDS TO THE JUDGE. ONE OF THOSE WAS A MIRANDA CARD THAT WAS ACTUALLY SIGNED BY TERRELL JOHNSON'S GIRLFRIEND, FOR A SEARCH, SO IT IS NOT PARTICULARLY RELEVANT, FOR OUR DISCUSSION HERE. THE OTHER THREE MIRANDA CARDS THAT THEY PROVIDED WERE CARDS THAT THEY SAID CAME OUT OF THEIR FILES AND SHOULD HAVE BEEN PROVIDED TO COUNSEL, BACK AT THE TIME OF THE TRIAL, THROUGH DISCOVERY, AND THEY BELIEVED WERE PROVIDED TO CCR, DURING THE DISCOVERY PERIOD. NOW, THE PROBLEM WITH THAT, OF COURSE, IS THAT THERE WERE THREE MIRANDA CARDS -- PARDON ME, FOUR MIRANDA CARDS THAT EXIST AT TRIAL, AND THAT IS REFLECTED IN THE EVIDENCE, BACK IN THE COURT RECORD FOR THE 1980 TRIAL. OF THOSE FOUR EXHIBITS, THEY WERE STATE'S EXHIBITS 19-A, B AND C, AND STATE EXHIBIT 17. ONLY TWO OF THOSE CARDS ARE REPRESENTED IN THE FILE THAT THE STATE ATTORNEY'S OFFICE HAD IN THEIR FILE AND, IN FACT, PROVIDED TO JUDGE HIHOK AS PROVE OF THAT DISCOVERY. IN FACT, THE MIR AND A CARDS, BOTH IN THE RECORD AND WHAT THE STATE ATTORNEY IS PROVIDING, BACK IN THAT LETTER, SAID THAT THERE ARE THREE CARDS THAT THEY DON'T EVEN HAVE IN THEIR FILES THAT ARE REFLECTED IN THE RECORD AS EXISTING, AND, IN FACT, A COUPLE OF THOSE CARDS WERE INTRODUCED INTO EVIDENCE BACK AT THE TRIAL.

DIDN'T THE DEFENDANT MAKE A CULPATORY STATEMENT AT OTHER TIMES THAT WERE PROPERLY ADMITTED INTO EVIDENCE?

WELL, CERTAINLY THAT WAS -- THAT HAS BEEN THE FINDING OF THE COURTS, UP UNTIL THIS TIME.

AND THE COURT, BELOW, MADE THAT FINDING, IN THIS PROCEEDING, DID HE NOT?

THAT'S RIGHT, JUSTICE HARDING.

SO HOW CAN WE REVIEW THIS? WOULD IT MAKE ANY DIFFERENCE TO THE OUTCOME OF THE CASE, IF THERE WERE THESE INCULPATORY STATEMENTS PROPERLY ADMITED?

WELL, I THINK THAT THERE HAS TO BE A TOTALITY OF THE CIRCUMSTANCES, UNDER MORE AND, LOOKING AT ALL OF THE STATEMENTS, AND I THINK THAT THE PROBLEM IS THAT WE DON'T KNOW WHAT TERRELL JOHNSON TOLD LIEUTENANT PETERSON AT MIDNIGHT, THAT NIGHT, BECAUSE LIEUTENANT PETERSON HAS NEVER BEEN ASKED, BECAUSE NO ONE KNEW THAT HE HAD MEMORIALIZED THE FACT THAT HE HAD THIS CONVERSATION WITH TERRELL JOHNSON. NOW, CHIEF MONTE TESTIFIED, AT THE SUPPRESSION HEARING, THAT HE HAD READ EVERYTHING THAT IS ON THE CARD, AND THAT IS IN THE RECORD.

WE DON'T KNOW -- WHAT DO YOU MEAN, WE DON'T KNOW WHAT?

OUR POSITION IS THAT THE MEMORIZATION IS CERTAINLY A MEMORLANDOIZATION THAT HE DIDN'T WANT TO TALK TO POLICE. CERTAINLY HE WAS INVOKING HIS RIGHT TO SILENCE, AND WE BELIEVE THERE WAS, ALSO, A REQUEST FOR LEGAL ADVICE, BASED ON WHAT HAPPENED AFTER THAT. WHAT HAPPENED AFTER LIEUTENANT PETERSON READ HIM HIS RIGHTS AND MEMORIALIZED IT, THE NEXT CONTACT THAT HE HAD WAS WITH MONTE, ABOUT AN HOUR LATER, AND MONTE'S TESTIMONY IS THAT HE JUST DIDN'T WANT TO ANSWER ANY QUESTIONS. THE NEXT THING THEY DO IS THAT, AT NOON, THE FOLLOWING MORNING OR LATE MORNING, THEY TAKE HIM TO A POLICE PSYCHIATRIST, WHO TALKS TO HIM ABOUT HIS MENTAL STATE. NOW, LIEUTENANT PETERSON SAYS THAT IS STANDARD PROCEDURE, BUT IT SEEMS TO ME THAT, IF YOU LOOK AT WHAT HAPPENED TO TERRELL JOHNSON, OVER THE 39 HOURS, FROM THE TIME THAT LIEUTENANT PETERSON FIRST CONTACTED HIM, UNTIL 39 HOURS LATER, THERE IS A CONFESSION. THERE ARE TWO MORE MIRANDA CARDS, DURING THAT PERIOD OF TIME, THAT HE DOES SIGN. THOSE ARE, BOTH, BY CHIEF MONTE, AND OUR POSITION IS THAT THE -- WE DON'T KNOW IF TERRELL JOHNSON ASKED QUESTIONS OF LIEUTENANT PETERSON. WE DON'T KNOW IF HE ASKED ABOUT HIS RIGHTS. WE DON'T KNOW IF HE ASKED ABOUT AN ATTORNEY. PETERSON HAS NEVER TESTIFIED.

WHAT IS YOUR ARGUMENT FOR MEETING THE SECOND PRONG, THAT EVEN IF THERE IS A BRADY VIOLATION, THAT A RETRIAL WOULD PROBABLY RESULT IN AN ACQUITTAL. HOW DO YOU PROPOSE TO SATISFY THAT PRBLEM?

WELL, JUSTICE SHAW, THIS WAS A 7-5 JURY RECOMMENDATION AT BEST, AND, OF COURSE, THE HISTORY OF THE RECONSTRUCTION OF THIS RECORD AND WHETHER OR NOT THAT 7-5 JURY RECOMMENDATION WAS, REALLY, WHAT THE JURY RECOMMENDED, IS, ALSO, SOMETHING THAT IS MENTIONED IN OUR BRIEF. WE BELIEVE THAT THE WILLIAMS VERSUS TAYLOR CASE, FROM THE SUPREME COURT, LAST TERM, PROVIDES A REASONABLE PROBABILITY THAT RESULTS IN THE SENTENCING PROCEEDING WOULD HAVE BEEN DIFFERENT, IS GROUNDS FOR CONSIDERING EITHER THE BRADY OR INEFFECTIVE ASSISTANCE OF COUNSEL VIOLATION, IN THIS CASE. WE DON'T THINK THAT THE STANDARD IS AS HIGH AS WHAT HE JUST PROPOSED. WE THINK THAT, PER WILLIAMS, WE DON'T EVEN HAVE TO REACH A PREPONDERANCE OF THE EVIDENCE LEVEL, IN ORDER TO GET TO THE POINT WHERE WE GET TO HAVE A RESENTENCING HEARING, AND I THINK WHAT IS VERY IMPORTANT, TOO, TO CONSIDER ABOUT THIS, IS IT IS NOT JUST FACT THAT WE DON'T KNOW HOW MANY MIRANDA CARDS THERE WERE. THE STATE, ALSO, REPRESENTED, IN A LETTER TO JUDGE HIHOK, AFTER THE HEARING, THAT CCR HAD THESE FILES BACK IN THE EARLY 1990s. HE POINTED TO A 1990 RECEIPT BY A COPYING SERVICE, AND A 1992 RECEIPT BY SOMEONE NAMED DELORES WHIDDEN, WHO IS SOMEBODY THAT WAS REPRESENTED AT THE HUFF HEARING BY CCR. ACTUALLY THE RECORD REVEALS THAT, FROM THE EARLIER HEARING, DELORES WHIDDEN WAS A SECRETARY IN THE STATE ATTORNEYS OFFICE, SO EVIDENCE THAT THE CCR HAD THE RECORDS, THEY ARE PROVIDING A RECEIPT FROM THE STATE ATTORNEYS OFFICE AND A RECEIPT FROM A COPING SERVICE. IT CERTAINLY IS NOT PROOF OF THAT.

YOU HAVE NOT RESPONDED TO JUSTICE SHAW'S QUESTION. THAT IS HE HAS ASKED YOU WHO -- HOW, ON THIS RECORD, YOU CAN DEMONSTRATE PREJUDICE, AND IN THE CONTEXT, HERE, YOU HAVE ATTACKED EVIDENCE GOING TO THE GUILT PHASE. NOW, IN THE FACE OF WHAT EXISTS HERE, TELL US WHAT YOU ARE -- HOW EVERYTHING COMES UNRAVELED, BECAUSE OF THIS ONE STATEMENT BEING CALLED INTO QUESTION, IN THE FACE OF ALL OF THE OTHER STATEMENTS AND THE EVIDENCE THAT THE TRIAL COURT HAS POINTED TO HERE. HOW IS IT THAT THE WHOLE THING COMES UNRAVELED, IN THE FACE OF ALL OF THAT?

ITIS, REALLY, A WAIVER QUESTION. WHY IS THE LATER WAIVER OF RIGHTS THAT I THINK IS IMPLICATED BY HIS SIGNING THE MIR AND A CARDS WITH MONTE, TWICE, BEFORE HE CONFESSES, WHY IS THAT NOT IN FORCE? WELL, TRIAL COUNSEL JONES WAS NEVER QUESTIONED ABOUT THIS ISSUE, EITHER, AND IT IS UNCLEAR WHETHER TRIAL COUNSEL JONES DID OR DIDN'T HAVE THAT MIRANDA CARD. IF HE DID HAVE THE MIR AND A CARD, THEN CLEARLY IT IS AN INEFFECTIVE

ASSISTANCE OF COUNSEL CLAIM. IF HE DIDN'T HAVE THE MIR AND A CARDS, IF IT WASN'T -- THE MIR AND A CARD, IF IT -- THE MIRANDA CARD, IF IT WASN'T PROVIDED --

JUSTICE SHAW'S QUESTION IS TALKING ABOUT YOUR ABILITY TO MAKE OUT A CASE OF DEMONSTRATING, WHETHER WE ARE GOING TO CALL IT THE RESULT WOULD HAVE BEEN DIFFERENT OR HOW YOU WANT TO CATEGORIZE IT, BUT AS I PHRASE IT, EVERYTHING COMES UNRAVELED BECAUSE OF THIS ONE PARTICULAR PIECE OF EVIDENCE, IN THE FACE OF ALL OF THE OTHER EVIDENCE THAT IS THERE AND IS NOT BEING CHALLENGED IN THE RECORD, AND IT APPEARS, ON THIS RECORD, HERE, THAT YOU HAVE NOT MADE OUT A CASE OF DEMONSTRATING HOW EVERYTHING ELSE WOULD COME UNRAVELED, AS A RESULT OF THIS ONE PROBLEM. THAT IS WHAT I AM-- THAT IS WHAT WE ARE ASKING, IS WHAT IS YOUR BEST CASE SCENARIO FOR DEMONSTRATING THAT YOU WOULD -- THAT THE RESULT IN THE GUILT PHASE WOULD BE DIFFERENT OR THAT EVERYTHING ELSE WOULD BE UNDERMINED HERE? WHAT -- BECAUSE THAT DOES NOT PPAR CLEARLY IN YOUR ARGUMENT TO THE COURT.

WELL, THIS WAS ARGUED AS A FELONY MURDER CASE OR A PREMEDITATED MURDER CASE, IN THE ALTERNATIVE. THERE WERE TWO VICTIMS IN THE CASE. ONE VICTIM ENDED UP WITH A SECOND-DEGREE MURDER CONVICTION FOR TERRELL JOHNSON. THAT IS ACTUALLY THE VICTIM WHO WAS SHOT MORE THAN ONCE, WHO, ACCORDING TO THE TESTIMONY, HE WENT BACK --

LET ME RESTATE THE QUESTION, MAYBE, TO HELP YOU. IF WE TAKE THIS STATEMENT OUT AND WE JUST ACCEPT YOUR ARGUMENT ABOUT THIS, AND THEREFORE THIS ONE STATEMENT IS GONE, YOU ARE STILL LEFT WITH A RECORD THAT IS OVERWHELMING, IN TERMS OF THE EVIDENCE AGAINST YOUR CLIENT. IS THAT NOT CORRECT?

THAT IS CERTAINLY CORRECT, YOUR HONOR.

SO HOW IS THERE A REASONABLE INTERPRETATION OF THAT EVIDENCE, THAT YOU WOULD BE ENTITLED TO A NEW GUILT PHASE PROCEEDING, BECAUSE THE CHANCES ARE THE OUTCOME OF THAT PROCEEDING WOULD BE DIFFERENT?

TRIAL COUNSEL ESSENTIALLY CONCEDED GUILT IN THIS CASE, TO BEGIN WITH, SO THAT I GUESS WHERE WE START WITH IS AT THE SUPPRESSION HEARING. IF TRIAL COUNSEL HAD HAD THIS INFORMATION, WOULD THAT HAVE GIVEN HIM AN ADDITIONAL PIECE OF -- AN ADDITIONAL ARROW IN HIS QUIVER, TO ATTACK THE CONFESSION COMING IN. IF IT WOULD HAVE AND THE CONFESSION DIDN'T COME IN, THERE IS VERY LITTLE OTHER EVIDENCE AGAINST TERRELL JOHNSON, EXCEPT HIS OWN CONFESSION, AND IN A SITUATION IN WHICH ARGUABLY THE MORE AGGRAVATED HOMICIDE ENDED UP WITH A SECOND-DEGREE MURDER CONVICTION, INSTEAD OF A FIRST-DEGREE MURDER CONVICTION, AND THE JURY DELIBERATED FOR A LONG TIME ABOUT THAT, ARGUABLY THAT WOULD HAVE MADE ENOUGH DIFFERENCE, WITHOUT THE CONFESSION IN, TO LEAD TO A SECOND-DEGREE MURDER CONVICTION FOR BOTH HOMICIDES, INSTEAD OF JUST FOR ONE HOMICIDE.

YOU ARE IN YOUR REBUTTAL TIME.

I BELIEVE I PROBABLY SHOULD SAVE THE REST OF MY TIME FOR REBUTTAL, AND I WILL TRY AND RESPOND TO SOME OF THE QUESTIONS.

THANK YOU VERY MUCH. MR. NUNNELLEY.

MAY IT PLEASE THE COURT. I AM EN NUNNELLEY, AND I REPRESENT THE STATE IN ARGUING THIS APPEAL. THE PRIMARY ISSUE UPON WHICH THE TRIAL COURT BASED ITS DENIAL OF RELIEF, THAT PRIMARY, OVERRIDING BASIS FOR DENIAL WAS THAT THE MIRANDA CLAIM IS PROCEDURALLY BARRED. THE MIRANDA CLAIM HAS BEEN, TO THIS COURT, THREE TIMES, ALREADY. IT CAME ON DIRECT APPEAL. IT CAME ON HIS FIRST 3.850, AND IT CAME IN HIS FIRST STATE HABEAS, AND THIS

COURT, ON DIRECT APPEAL, FOUND THAT CLAIM MERITLESS AND UNWORTHY OF MURT DISCUSSION.

THIS IS -- OF FURTHER DISCUSSION.

THIS IS THE ISSUE REGARDING THIS PARTICULAR CARD?

I AM NOT -- IT DOESN'T INVOLVE THIS PARTICULAR CARD, I DON'T BELIEVE, JUSTICE HARDING. IT IS THE MIRANDA ISSUE, PER SE.

BUT IF THIS IS NEWLY-ISCOVERED OR SUBSQUENT TO THESE OTHER PROCEEDINGS, WOULD THAT NOT OPEN THE DOOR, AGAIN, FOR IT?

NO, YOUR HONOR, IT WOULD NOT, BECAUSE THIS EVIDENCE COULD AND SHOULD HAVE BEEN DISCOVERED, THROUGH DUE DILIGENCE, AT THE FIRST 3 .850. -- 3.850.

AND DOES THAT GO TO THE COURT'S FINDING THAT THE DEFENDANT KNEW WHAT HAD HAPPENED AT THE INTERROGATION AND ABOUT HIS REFUSAL TO SIGN THE CARD

YES, SIR. THAT IS ONE PART OF IT. THE OTHER PART OF IT IS THAT THEY SHOULD HAVE USED IT THE FIRST TIME, AT THE 3.850 PROCEEDING.

I THOUGHT THE ALLEGATION WAS THAT THIS WAS BRADY MATERIAL THAT THE STATE HAD AN OBLIGATION TO TURN OVER.

I AM NOT SURE. I PROBABLY -- I AM NOT --

UNDER STRICKLER, IT APPEARS THAT THE PRONG THAT YOU ARE TALKING ABOUT WOULD BE DUE DILIGENCE, IS NOT PART AND PARCEL OF A SEPARATE PRONG OF BRADY, BUT THE QUESTION IS WHETHER IT WAS UPHELD. NOW, THE QUESTION AS TO WHETHER THE DEFENDANT HAD IT IN HIS POSSESSION OR SHOULD HAVE HAD IT IN HIS POSSESSION, WOULDN'T THAT BE SOMETHING THAT WOULD BE DEVELOPED AT AN EVIDENTIARY HEARING?

I HAVE TO KIND OF EXPLAIN IT A LITTLE BIT HERE. THE ANSWER TO YOUR QUESTION DEPENDS UPON WHETHER THIS IS A NEWLY-DISCOVERED EVIDENCE CLAIM OR AN INEFFECTIVE ASSISTANCE CLAIM OR A BRADY CLAIM.

I THOUGHT THEY WERE RAISING A BRADY CLAIM.

IT SEEMS TO KIND OF VARY.

COULD IT BE -- LET'S GO BACK TO THIS. IF THIS WAS IN THE STATE'S POSSESSION, BACK IN 1979, THAT IS THAT THE DEFENDANT REFUSED TO SIGN A MIRANDA CARD. WOULD THAT HAVE BEEN EVIDENCE THAT THE STATE SHOULD HAVE TURNED OVER TO THE DEFENSE? WOULD THAT BE CONSIDERED FAVORABLE EVIDENCE THAT THE DEFENDANT REFUSED TO SIGN A MIRANDA CARD AT SOME POINT IN THE QUESTIONING?

ARGUABLY IT WOULD BE. I AM NOT ENTIRELY CERTAIN THAT THAT WOULD QUALIFY AS EXCULPATORY EVIDENCE, BUT THE FACT REMAINS THE TRIAL COURT FOUND, AS A FACT, BASED UPON THE DOCUMENTARY EVIDENCE BEFORE IT, THAT THAT THAT WAS, IN FACT, TURNED OVER. THE TRIAL COURT WENT ON TO FIND, AND THIS GOES BACK TO, I BELIEVE, JUSTICE HARDING'S QUESTION TO MY OPPONENT, THAT --

YOU SAID THAT THIS TRIAL COURT FOUND, AS A FACT, WITHOUT AN EVIDENTIARY HEARING, THAT THE CARD HAD BEEN TURNED OVER.

BASED POP THE EVIDENCE, THE -- BASED UPON THE EVIDENCE, THE DOCUMENTARY ATTACHMENTS PROVIDE BY THE STATE ATTORNEYS OFFICE, WHICH WOULD BE APPROPRIATE.

WOULD YOU AGREE THAT THE EVIDENCE CONCLUSIVELY REFUTES THAT IT WAS TURNED OVER. WHAT IS -- AND WE FIND THAT THIS IS FAVORABLE EVIDENCE. COULD YOU ADDRESS THE ISSUE THAT YOU HAVE BEEN ASKING ABOUT, IS WHETHER THIS MEETS THE THIRD PRONG OR THE FOURTH PRONG OF BRADY. THAT IS DOES IT UNDERMINE CONFIDENCE IN THE OUTCOME?

WELL, THAT GOES BASICALLY TO THE CORE OF THE WHOLE ISSUE, WHICH IS THAT REGARDLESS OF WHETHER OR NOT THIS WAS TURNED OVER, AND I AM NOT CONCEDING ANY ERROR, BUT ASSUMING FOR THE SAKE OF ARGUMENT, THAT IT WASN'T, JUST ASSUME THAT IT WASN'T, YOU, STILL, HAVE PROPERLY ADMITTED INCULPATORY STATEMENTS, THAT WERE MADE FOLLOWING PROPER MIRANDA WARNINGS, THAT -- WHICH IS A FACT THAT HAS BEEN FOUND ALL THE WAY THROUGH THIS CASE. SO WHAT IT COMES DOWN TO IS THE MOST WE HAVE, GIVING THE DEFENDANT EVERY POSSIBLE BENEFIT OF THE DOUBT, IS A HARMLESS ERROR. THE EVIDENCE, THE RECORD OF THIS CASE DOES NOT BEAR OUT ANY ERROR AT ALL, BUT EVEN ASSUMING ARGUENDO THERE WAS AN ERROR, WHAT YOU COME DOWN TO, BOTTOM LINE, YOU HAVE A PROPERLY ADMITTED STATEMENT THAT WAS INCULPATORY, AND THE TRIAL COURT MADE THE FINDING, ITS RECORD, PAGES 287 THROUGH 89, THAT YOU THERE WAS A PROPERLY ADMITTED INCULPATORY STATEMENT MADE, WITH RESPECT TO THE ORLANDO CRIME, TO POLICE CHIEF MONTE, WHO, I BELIEVE, WAS THE CHIEF OF POLICE IN OREGON, AND ANOTHER INCULPATORY STATEMENT MADE, TO OFFICER ROBERT PETERSON, WHO WAS TRANSPORTING MR. TERRELL JOHNSON TO A PSYCHIATRIC EXAMINATION. SO --

WHAT WAS THE --

I WAS JUST GOING TO ASK WHEN WAS THAT STATEMENT? WAS THAT THE FOLLOWING DAY, OR WAS IT SOMETIME LATER?

THE JOHNSON STATEMENT?

YEAH.

THAT WAS MADE ON FEBRUARY 7 OF 1980.

AND WHAT WAS THE SUBSTANCE OF THE STATEMENT THAT WAS MADE, WHEN HE WAS BEING TRANSPORTED, VERSUS THE SUBSTANCE OF THE STATEMENT THAT WE ARE TALKING ABOUT HE HAD INVOKED HIS RIGHTS. WHAT DID HE SAY, WHEN HE WAS BEING TRANSPORTED, THIS SPONTANEOUS STATEMENT THAT HE SUPPOSEDLY MADE ON HIS WAY TO THE PSYCHIATRIC EXAMINATION?

I DO NOT SPECIFICALLY RECALL, JUSTICE QUINCE, OTHER THAN THAT IT WAS AN INCULPATORY STATEMENT THAT WAS ESSENTIALLY AN ADMISSION OF THE CRIMES IN THE ORLANDO AREA. I DON'T RECALL THE EXACT SPECIFICS OF THAT PARTICULAR STATEMENT.

AND YOU DON'T RECALL WHETHER IT DIFFERS, AT ALL, FROM WHAT WAS SAID OR ON WHEN HE ALONGLY -- LEDGELY INVOKED HIS MILES AN HOUR -- ALLEGELY INVOKED HIS MIRANDA RIGHTS. THE DIFFERENCE IN THE TWO STATEMENTS TODAY, YOU CANNOT TELL US THE DIFFERENCE IN THOSE TWO STATEMENTS.

I AM NOT SURE WHAT YOU ARE TALKING ABOUT "BEING EXCLUDED". AND THAT IS WHERE I AM HAVING TROUBLE WITH YOUR QUESTION, JUSTICE QUINCE. ' SIGNED A CARD THAT HE WOULD NOT WAIVE HIS MIRANDA RIGHTS, CORRECT, AND THAT THEREAFTER, STATEMENTS WERE MADE. I WANT TO KNOW THE DIFFERENCE BETWEEN THE SUBSTANCE OF THOSE STATEMENTS AND THE SUBSTANCE OF THE STATEMENTS MADE, WHEN HE WAS BEING TRANSPORTED, FOR THE

PSYCHIATRIC EXAM.

WELL, HE MADE A STATEMENT, AT -- HE REFUSED TO MAKE A STATEMENT AT 12:0 5 A.M.. BASED UPON -- THIS IS COMING FROM THE TRIAL COURT'S FINDINGS. HE, SUBSEQUENT TO THAT, WAIVES HIS MIRANDA RIGHTS AND MADE A STATEMENT TO POLICE CHIEF MONTE.

WHAT TIME WAS THAT

I THINK WHAT WE ARE TRYING TO GET AT, IS LET'S ASSUME, IN A LIGHT MOST FAVORABLE TO THE DEFENDANT, THAT THIS CARD IN EVIDENCE THAT HE REFUSED TO MAKE A STATEMENT. AT THAT POINT, IF QUESTIONING THEREAFTER CONTINUED, THAT MAY HAVE VIOLATED HIS MIRANDA RIGHTS, BECAUSE OF WHAT HAPPENED AT TWELVE O'CLOCK. I THINK THAT IS THE PREJUDICE THAT -- AND THAT IS WHAT WE ARE TRYING TO GET TO. LET'S ASSUME THAT THIS WAS AN INVOKEATION. HOW WOULD -- WHAT WOULD HAVE HAPPENED, IN TERMS OF THE REST OF THE STATEMENT, AND THAT IS GOOD JUSTICE QUINCE IS SAYING, OBVIOUSLY, A MONTH LATER, THIS SPONTANEOUS WOULDN'T BE AFFECT AFFECTED BY WHETHER HE INVOKED HIS RIGHTS.

I AM SORE I I APOLOGIZE. I MISSED -- DIDN'T CATCH THE QUESTION CORRECTLY. IF WE ASSUME THAT THE REFUSAL KNOCKS OUT THE MONTE -- SOMEHOW KNOCKS OUT THE MONTE STATEMENTS, JUST MAKING THAT ASSUMPTION, IT DOESN'T AFFECT THE FEBRUARY STATEMENT TO OFFICER JOHNSON, WHICH WAS A VOLUNTARY SPONTANEOUS STATEMENT, AS JUSTICE PARIENTE NOTED. THE TWO STATEMENTS, AS I RECALL, WERE ESSENTIALLY, IN SUBSTANCE, THE SAME. AGAIN, I DON'T RECALL THE SPECIFICS OF THE TWO STATEMENS.

BUT THE PROBLEM IS, IF THE GIST OF THIS, AND WE ARE SUFFERING FROM NOT HAVING A LOOK AT THE WHOLE ORIGINAL RECORD, IF THE SUBSTANCE OF THE CONFESSION THAT WAS GIVEN, AFTER THIS REFUSAL, WAS THE SUBSTANCE OF WHAT THE GIST OF WHAT THE STATE RELIED ON, IN THIS CASE, IN THE GUILT CASE, THEN IT BECOMES, THE QUESTION, THEN, BECOMES WOULD IT UNDERMINE OUR CONFIDENCE IN THE RUTS, IN THE OUTCOME.

I FOLLOW WHAT YOU ARE SAYING.

THE QUALITY -- THIS ISN'T JUST HOW MUCH EVIDENCE THERE IS TO CONVICT. THE QUESTION IS WAS THIS THE LINCHPIN, THE CONFESSION, AND RIGHT NOW, WE ARE JUST LOOKING AT IT FROM A NONEVIDENTIARY POINT OF VIEW, BECAUSE THERE WAS NO EVIDENTIARY HEARING.

AS I RECALL THE STATEMENTS, JUSTICE PARIENTE, AND, AGAIN, I APOLOGIZE. I DON'T RECALL THE PRECISE VERBIAGE OF THE TWO STATEMENTS, THEY WERE EQUALLY INCULPATORY, IS MY RECOLLECTION OF THEM, AND I DON'T BELIEVE THAT THE QUALITATIVE NATURE OF THE EVIDENCE THAT WAS BEFORE THE JURY AT THE GUILT PHASE, WOULD BE AFFECTED IN ANY WAY, EVEN ASSUMING YOU DO KNOCK OUT THE MONTE STATEMENTS.

LET ME ASK YOU A MORE SPECIFIC QUESTION ABOUT THAT. THAT IS, IN TRYING TO FOCUS ON ANY DIFFERENCE IN THE STATES, FOR INSTANCE, ONE OF THE MOST EGREGIOUS ACTS HERE APPARENTLY IS EVIDENCED BY HIS STATEMENT THAT, AFTER HE LEFT THE RESTAURANT, WHERE THE SHOOTINGS INITIALLY OCCURRED, THAT HE HEARD SOUNDS THAT ONE OF THE VICTIMS WAS STILL ALIVE. AND HE WENT BACK IN THE RESTAURANT AND KILLED THAT VICTIM, TO MAKE SURE THAT THAT VICTIM -- THAT IS ONE OF THE MOST EGREGIOUS THINGS THAT WE HAVE IN THIS RECORD HERE. IS THAT IN HIS HAVELITIONAL STATEMENT THAT HE -- IN HIS VOLITIONAL STATEMENT THAT HE GAVE TO THE POLICE OFFICER LATER?

I UNDERSTAND EXACTLY YOUR QUESTION, AND LET ME ANSWER IT THIS WAY. WHETHER OR NOT YOU HAVE THE STATEMENT, BEFORE THE JURY, THAT JOHNSON WENT BACK TO THE RESTROOM AND SHOT MR. HIMES, AGAIN, TO PUT HIM OUT OF HIS MISERY, DOESN'T AFFECT THE DEATH SENTENCE, BECAUSE MR. JOHNSON, SOMEHOW, GOT A GIFT, AND GOT SECOND-DEGREE MURDER

FOR THAT CASE. HE DIDN'T GET FIRST-DEGREE MURDER FOR EXECUTING HIS SECOND VICTIM, CHARLES HIMES.

THAT WASN'T CONSIDERED AS AGGRAVATION FOR THE DEATH PENALTY IN THAT CASE?

THE SECOND-DEGREE MURDER, I AM SURE IT WAS CONSIDERED AS CONTEMPORANEOUS PRIOR VIOLENT CRIME, BUT EVEN IF YOU TAKE THAT ONE OUT, YOU HAVE OTHER VIOLENT CRIMES THAT SUPPORT THE PRIOR VIOLENT FELONY AGGRAVATOR.

WELL, WE ARE, REALLY, GETTING A LITTLE -- YOU DON'T KNOW WHETHER OR NOT HE REPEATED THAT STATEMENT, IN HIS SECOND STATEMENT TO THE OFFICER.

NO, SIR. I SIMPLY DON'T REMEMBER.

WE JUST HAVE TO LOOK.

I APOLOGIZE. I HATE TO PUT THAT OFF ON YOU ALL, BUT I JUST SIMPLY DON'T REMEMBER THE PRECISE SUBSTANCE OF THE TWO STATEMENTS, BUT THE BOTTOM LINE, WITH RESPECT TO YOUR QUESTION, AGAIN, THOUGH, IS THAT, EVEN IF THE JURY, SOMEHOW, SHOULDN'T HAVE HEARD THAT HE DID THIS HUMANITARIAN ACT AND PUT MR. HIMES OUT OF HIS MISERY WITH A SECOND, LATER, GUNSHOT, IT DOESN'T AFFECT THE FIRST-DEGREE KMARSD. BECAUSE --

AS FAR AS HIS ATTACK ON THE GUILT, THE FINDINGS.

IT DOESN'T AFFECT THE GUILT, AS TO THE FIRST-DEGREE MURDER CASE. IT IS OUT THERE. YOU KNOW, I CAN'T TELL YOU WHY THE JURY DIDN'T CONVICT HIM OF FIRST-DEGREE MURDER ON BOTH OF THESE, TO BE HONEST WITH YOU. I DON'T KNOW. I DON'T KNOW THE ANSWER TO THAT. NOBODY DOES.

JUSTICE SHAW HAS A QUESTION.

PART OF THE STATE'S ARGUMENT IS THAT THERE IS NOT A BRADY VIOLATION, BECAUSE THE DEFENDANT KNEW OR SHOULD HAVE KNOWN WHETHER HE SIGNED THE CARD OR NOT. THE MIRANDA CARD.

YES, SIR.

ISN'T THAT BROUGHT INTO SUSPECT, THOUGH, BY THE CIRCUMSTANCES, UNDER WHICH HE WAS ARRESTED AND HELD, AT THE TIME? WASN'T THERE AN INDICATION THAT HE WAS INTOXICATED? HIS EYES WERE RED? HE WAS DISHEVELED AND ET CETERA AND ET CETERA?

JUSTICE SHAW, THAT TIES BACK INTO THE CONTINUAL LITIGATION OF THE MIRANDA ISSUE. THE DEFENDANT, AND THIS IS KIND OF A MULTIPART RESPONSE, AND I APOLOGIZE, BUT THE DEFENDANT WAS THERE, WHEN IT HAPPENED.

BUT IF HE DOESN'T KNOW WHAT HAPPENED, THAT WOULDN'T HELP THE STATE.

JUSTICE SHAW, THAT SHOULD HAVE BEEN BROUGHT UP, EITHER AT THE MOTION TO SUPPRESS OR AT THE 3.850 HEARING. THIS MAN HAS HAD AN EVIDENTIARY HEARING. HAD HE A FULL AND FAIR OPPORTUNITY TO LITIGATE THE MIRANDA ISSUE, NOT ONCE BUT TWICE! IF THERE IS -- WHAT WE ARE, REALLY, HEARING, AND I HOPE I AM ANSWERING YOUR QUESTION, SIRS, BUT WHAT WE ARE -- WHAT WE ARE, REALLY, HEARING IS THE EXPRESS DESIRE TO GO BACK AND LITIGATE THE MIRANDA ISSUE ANOTHER TIME! HE HAS HAD THE CHANCE TO DO THIS IN 1980, AT THE TIME OF HIS TRIAL, IN 1986, OR '85, IN CONNECTION WITH THE 3.850 HEARING, WHEN HE WAS REPRESNTED, I BELIEVE, BY MARK OLIVE, WHO HAD -- PRESENTED WHATEVER EVIDENCE HE WANTED TO

PRESENT. NOW HE HAS GOT ANOTHER LAWYER, AND THEY ARE WANTING TO LITIGATE THE 3.850 ANOTHER TIME, ON ANOTHER THEORY, BECAUSE THE ONE THEY HAD DIDN'T WORK. THEY SHOULD HAVE DONE THIS AT THE ABSOLUTE LATEST, AT THE FIRST 3.850. AND THEY DIDN'T DO IT. THEY PROCEDURALLY DEFAULTED THAT CLAIM AT THAT POINT IN TIME. AND WE CAN'T COME BACK. WE CAN'T -- IT IS A FUNDAMENTAL PREMISE, A POSTCONVICTION LITIGATION -- OF POSTCONVICTION LITIGATION, THAT WE DON'T KEEP REOPENING CASES AND TRYING OUT NEW THEORIES ON THE TRIAL COURT AND ON THE FLORIDA SUPREME COURT, WHEN THE ONE THEY USED BEFORE DIDN'T WORK, AND THAT IS WHAT THEY ARE DOING. A COUPLE OF OTHER POINTS THAT I WANT TO MAKE, AND I AM, REALLY, KIND OF RUNNING OUT OF SOMETHING TO SAY, THE DEFENSE ARGUES THAT, SOMEHOW, WILLIAMS VERSUS TAYLOR HAS SOME BEARING ON THIS CASE. WILLIAMS V TAYLOR, AS THIS COURT IS WELL AWARE, A UNITED STATE SUPREME COURT CASE THAT AROSE FROM THE FOURTH CIRCUIT, I BELIEVE, OUT. STATE OF VIRGINIA, AND THAT CASE DEALT WITH A VERY SPECIFIC PROVISION OF THE ANTI-TERRORISM AND THE EFFECTIVE DEATH PENALTY ACT OF 1996. THE ANTI-TERRORISM ACT HAS NO APPLICATION AT ALL TO THIS COURT. IT HAS NO APPLICATION AT ALL TO THE 3.850 LITIGATION. THE HABEAS INTERPRETATION OF A NARROW SPECIFIC PROVISION OF THE ACT, AND THAT NARROW SPECIFIC PROVISION HAS NO TO THIS CASE. IN ANSWER TO JUSTICE ANSTEAD'S QUESTION ABOUT WHAT COMES UNRAVELED, AND I LIKE PUTTING IT THAT WAY, THERE IS ABSOLUTELY NOTHING BECOMES UNRAVELED IN THIS CASE. THE PROOF OF GUILT WAS OVERWHELMING. THIS COURT AFFIRMED THE CONVICTION AND SENTENCE IN 1983, AND SUBSEQUENTLY DENIED OR SUBSEQUENTLY AFFIRMED THE TRIAL COURT'S DENIAL, FOLLOWING AN EVIDENTIARY HEARING, OF RULE 3.850 RELIEF. SUBSEQUENT TO THAT, THIS COURT AFFIRMED THE DENIAL AND DENIED MR. JOHNSON'S 3.850 APPEAL, I AM SORRY, I CAN'T GET THAT RIGHT, STATE HABEAS APPEAL. I CAN'T GET THAT ONE RIGHT. I APOLOGIZE. THIS CLAIM IS DEFAULTED. IT IS ABSOLUTELY MERITLESS. THE TRIAL COURT DISPOSED OF IT WITHOUT AN EVIDENTIARY HEARING. WITH RESPECT TO THE REMAINING CLAIMS RAISED IN MR. JOHNSON'S APPEAL, THE STATE WILL RELY ON ITS BRIEF. IF THERE ARE NO FURTHER QUESTIONS, THANK YOU.

JUSTICE ANSTEAD, I WILL TRY AND, BRIEFLY, ANSWER YOUR QUESTION, NOW THAT I HAVE HAD A CHANCE TO COLLECT MY THOUGHTS. THE ANSWER, I THINK, LIES IN A CUMULATIVE ANALYSIS, BECAUSE THERE IS -- THIS RECORD IS SO HUGE, AND SO MUCH HAS HAPPENED OVER THE YEARS, THAT, UNLESS THE TRIAL COURT WENT BACK AND LOOKED AT SOME OF THE THINGS THAT WE POINTED OUT, BOTH IN OUR 3.850 AND, LATER, IN OUR MOTION FOR REHEARING, AND CONSIDERED THEM, ALONG WITH THAT ISOLATED ISSUE THAT YOU POINTED OUT, THERE IS NO WAY TO REACH THE POINT THAT YOU WERE ASKING ABOUT, AND SOME OF THOSE OTHER THINGS ARE THE STATE ATTORNEYS OFFICE, AT THE HUFF HEARING, ACKNOWLEDGED THAT THE POLICE OFFICER NOTES THAT WE GOT FROM ORANGE COUNTY SHERIFF'S OFFICE THAT WERE, ALSO, BRADY MATERIAL AND NEWLY-DISCOVERED EVIDENCE, WERE MATERIAL THAT THEY DIDN'T EVEN HAVE IN THEIR FILES, SO AT THAT HUFF HEARING, THEY ARE ACKNOWLEDGING THAT THERE IS YET MORE BRADY MATERIAL AND NEWLY-DISCOVERED EVIDENCE. THERE IS THE MIRANDA CARD THAT WE WERE TALKING ABOUT. THERE IS THE FACT THAT THIS IS A COMPLETELY UNRELIABLE RECORD AS, I THINK, HAS BEEN LITIGATED BEFORE, AND ONE MEMBER OF THIS COURT, IN DISSENT, POINTED OUT GRAVE CONCERNS ABOUT, AND I THINK THE SUPPRESSION HEARING TRANSCRIPT IS PART OF THAT RECORD THAT WAS RECONSTRUCTED AND RECONSTRUCTED VERY POORLY, IS SOMETHING THAT NEEDS TO BE LOOKED AT, IN HI THIS CUMULATIVE CONTEXT. THERE IS, ALSO, THE JURY RECOMMENDATION THAT I MENTIONED BEFORE THERE. IS THE DISCOVERY VIOLATION BY THE STATE ATTORNEYS OFFICE THAT OCCURRED AT TRIAL, THAT, AT THE 1986 EVIDENTIARY HEARING, TRIAL COUNSEL SAID HE WAS COMPLETELY SHOCKED AND SURPRISED, TO FIND THAT THERE HAD BEEN A BALLISTICS TEST THAT HAD BEEN DONE BY THE STATE, THAT HAD BEEN COMPLETELY CONCEALED FROM HIM, SO I WOULD SAY THAT THERE IS A PATTERN, HERE, THAT IS DEVELOPING. THE STATE ATTORNEYS OFFICE AT TRIAL IS KEEPING INFORMATION FROM THE TRIAL ATTORNEY. THERE IS MATERIAL IN THE SHERIFFS OFFICE FILE THAT IS NEVER TURNED OVER, UNTIL 1997, AND THEN THERE IS THE MIRANDA CARD, WHICH, AS I POINTED OUT BEFORE, THE HENSELWOOD LETTERS AND THE ATTACHMENTS DON'T, AT ALL, DO WHAT THE TRIAL COURT CLAIMED. IF FACT -

- IN FACT, IN TWO OF THE LETTERS, POINTED OUT THAT THERE ARE 187 PAGES OF ATTACHMENTS THAT AREN'T INCLUDED IN WHAT THE STATE SUBMITTED!

HOW DO YOU RESPOND TO JUDGE MIHOK'S ANALYSIS THAT THIS CARD, REALLY, ALTHOUGH IT WAS A REFUSAL TO SIGN THE CARD, DOES NOT, IN ITSELF, CONSTITUTE AN AFFIRMATIVE ASSERTION OF HIS RIGHT TO REMAIN SILENT OR A REQUEST TO SPEAK TO AN ATTORNEY, AND THAT, AT MOST, IT COULD BE TAKEN THAT HE JUST DIDN'T UNDERSTAND HIS RIGHTS AT THAT TIME AND THAT THERE FOR THE CARD DID NOT POSE AN ADDITIONAL QUESTION. AND THAT SEEMS TO BE, IN TERMS AFTER LEGAL ANALYSIS, A GREATER BARRIER, BECAUSE WHAT JUDGE MIHOK IS SAYING, IN THIS PART OF THE ORDER, IS THAT, ASSUMING THAT IT WAS IN THERE, IT WOULDN'T HAVE CAUSED STATEMENTS LATER ON TO BE SUPPRESSED AT ALL. THERE WOULD NOT HAVE BEEN ANY ADMISSION, BECAUSE HE DIDN'T MAKE ANY STATEMENTS IMMEDIATELY AFTER THE REFUSAL TO SIGN THAT WERE REVIEWED BY THE STATE?

JUSTICE PARIENTE THAT, IS EXACTLY WHY WE WANTED A HEARING ON THIS ISSUE, BECAUSE, AS I MENTIONED BEFORE, PETERSON HAS NEVER TESTIFIED ABOUT WHAT TOOK PLACE IN THE COLLOQUY BETWEEN HIM AND TERRELL JOHNSON.

HAVE YOU TRIED TO TAKE HIS DEPOSITION? HAVE YOU TRIED TO GET A STATEMENT FROM HIM?

NO. WE HAVE NOT TRIED TO DO THAT, AND ONE THING, I THINK, IS IMPORTANT TO POINT OUT, IN RESPONSE TO WHAT THE STATES ATTORNEY GENERAL SAID, IS THAT DURING THE 1986 EVIDENTIARY HEARING, THE TRIAL COURT REFUSED TO ALLOW FUNDS FOR OLIVE TO BRING EITHER PETERSON OR MONTE TO THE EVIDENTIARY HEARING TO TESTIFY, AND I THINK THE RECORD WILL REFLECT THAT, SO THEY NEVER WERE HEARD AT THE EVIDENTIARY HEARING, ON THE MIRANDA ISSUE, BECAUSE OF FUNDING ISSUES AT THAT TIME, AND I THINK THE RECORD REFLECTS THAT PRETTY CLEARLY. I SEE I AM RUNNING VERY SHORT OF TIME. I THINK YOU POINTED OUT, JUSTICE PARIENTE, THAT -- HOW IMPORTANT LOOKING AT THE WHOLE RECORD IN THIS CASE IS, BECAUSE YOU HAVE TO LOOK AT THE WHOLE RECORD, AND THE QUESTION, THERE HAS TO BE BRADY MATERIAL THAT IS FAVORABLE TO THE DEFENSE. NEEDS TO BE CONSIDERED, IN THE CONTEXT OF THE ENTIRE CASE. OTHERWISE, IT IS MEANINGLESS, AND I HOPE THAT I HAVE BEEN ABLE TO PROVIDE AT LEAST SOME CONTEXT, AS TO WHY BOTH THE MIRANDA CARD AND, ALSO, THE MATERIAL THAT THE ORANGE COUNTY SHERIFFS DEPARTMENT TURNED OVER, WEREN'T MEANINGLESS. THIS IS NOT A SUCCESSIVE 3.850, IN THE SENSE THAT IT IS PLEADING PROCEDURALLY-BARRED CLAIMS. THE INFORMATION THAT WE RECEIVED, BASED ON OUR PUBLIC RECORDS REQUEST IN FEBRUARY 1986, WERE PLED IN FEBRUARY 1987, IN A TIMELY FASHION, AND THE FACT THAT THERE WERE PRIOR 3.8 50s THAT WEREN'T BASED ON THE NEWLY-DISCOVERED EVIDENCE IN THE BRADY MATERIAL THAT WE HAD, MAKES THE FACT THAT THIS IS SUCCESSIVE JUST A DEFINITIONAL ISSUE.

MR. HENNIS, YOUR TIME IS UP. THANK YOU.

THANK YOU.