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BAILIFF: PLEASE RISE. PLEASE BE SEATED.

WE WILL, NOW, DEAL WITH THE AMENDMENT TO THE FLORIDA RULE OF CRIMINAL PROCEDURE 3.850, AND I BELIEVE JUDGE MORRIS, YOU AND -- ARE GOING TO GO, FIRST, FOR TEN MINUTES, JUDGE PADOVANO FOR TEN MINUTES, MR. LATIMER AND JUDGE EATON FOR 20 MINUTES AND RICHARD MARTELL FOR 10 AND THEN MR. FEENEY AND BYRD FOR TEN. YOU MAY PROCEED.

MAY IT PLEASE THE COURT.

YES.

MY NAME IS STAN MORRIS, AND I AM A CIRCUIT JUDGE FROM GAINESVILLE, AND I WAS APPOINTED BY THIS COURT, AS CHAIRMAN FOR YOUR COMMISSION OR COMMITTEE TO LOOK AT POSTCONVICTION RELIEF IN CAPITAL CASES. WE RECEIVED, FROM THE COURT, IN ITS AMENDED ORDER OF MARCH 31, A NUMBER OF QUESTIONS. THOSE WERE SUPPLEMENTED BY A LETTER OF APRIL 26, AND THE COMMITTEE PROCEEDED TO HOLD NUMEROUS HEARINGS, INCLUDING INPUT FROM THE VARIOUS AGENCIES INVOLVED AND INTERESTED PARTIES, AND TO HOLD A NUMBER OF MEETINGS TO ANALYZE THE MATERIAL WE HAD RECEIVED AND BRING OUR EXPERIENCE TO THE QUESTIONS YOU ASKED OF US, AND TO RENDER A REPORT IN A TIMELY FASHION, WHICH WE DID, I HOPE, ON SEPTEMBER 30 OF LAST YEAR. THE COMMITTEE WAS FAVORED WITH INPUT FROM THE CCRC'S, FROM STATE ATTORNEYS AND ATTORNEYS THAT HAVE HANDLED THESE KINDS OF CASES, FROM VARIOUS OFFICES OF STATES ATTORNEYS, FROM THE ATTORNEY GENERAL AND OTHER INDIVIDUALS AND OTHER STAFF AND PEOPLE FROM THE LEGISLATURE, AND WE ARE VERY PLEASED WITH THE RESPONSES THAT WE GOT. THEY WERE VERY HELPFUL TO US.

JUDGE MORRIS. >> YES. >> DURING THE PREVIOUS ARGUMENT, THERE WAS A NUMBER OF QUESTIONS DIRECTED TO COUNSEL CONCERNING EVIDENTIARY HEARINGS AND THE TIME THAT IS LOST, WHEN THE TRIAL JUDGE DENS AN EVIDENTIARY HEARING, AND THE APPEAL IS SENT HERE, AND THEN WE SEND IT BACK FOR AN EVIDENTIARY HEARING, AND I NOTICE THAT, IN YOUR REPORT, THERE IS NO RECOMMENDATION THAT AN EVIDENTIARY HEARING BE REQUIRED. SO WOULD YOU ADDRESS WHY THE COMMITTEE, CHTION THAT THAT IS NOT A GOOD IDEA -- WHY THE COMMITTEE THANKS THAT IS NOT A GOOD IDEA? -- THINKS THAT THAT IS NOT A GOOD IDEA?

I WILL TELL THAT YOU THIS LETTER IS MY WORK PRODUCT, WITH THE EXCEPTION OF JUDGE SHAFER, WHO INITIALLY CAME TO THE MEETING FAVORING A MANDATORY RULE, AND SHE CHANGED HER MIND AND ASKED TO SPECIFICALLY BE ALLOWED TO WRITE THAT SECTION, AND WHERE YOUR FELLOW JUSTICES HAVE EXPRESSED JUST THAT OPINION. HER CONCERN PARTIALLY WAS, AND I KNOW IT TOUCHED UPON EARLIER ARGUMENTS, WHERE IT IS GOING TO BE VERY HARD TO EXPLAIN WHY YOU ONLY GIVE COMPLETE EVIDENTIARY HEARINGS ON PENALTY PHASE AS OPPOSED TO GUILT PHASE AND ONLY IN CAPITAL CASES AS OPPOSED TO OTHER CASES, IN THAT THE WORKLOAD ON THE COURTS, THE TRIAL COURTS, WOULD BE ENORMOUS. THE OTHER MATTER WAS THIS, THAT, IF THE SUPREME COURT DOES -- IF THE COURT DOES ITS JOB AT THE TRIAL COURT LEVEL TO DETERMINE THAT THE RECORD HAS CONCLUSIVELY BEEN REFUTED, THAT WHICH HAS BEEN OFFERED. MANY OF THESE, THERE ARE NUMEROUS ALLEGATIONS MADE IN THESE, FAN YOU GO THROUGH YOUR CASES AND YOU STUDY WHAT YOU HAVE PRONOUNCED THAT WE SHOULD FOLLOW, VERY OFTEN YOU WILL AGREE TO UPHOLD THE TRIAL COURT'S DENIAL OF THE EVIDENTIARY HEARING ON EIGHT OF THE TEN ISSUES BUT REMAND IT BACK IF A HEARING ON TWO.

BUT IN MOST CASES, EVIDENTIARY HEARINGS SEEM TO BE REQUIRED, AND INEFFECTIVE

ASSISTANCE OF COUNSEL CLAIMS, BRADY CLAIMS, NEWLY-DISCOVERED EVIDENCE CLAIMS, SO WHY WOULDN'T IT AT LEAST BE A GOOD IDEA TO REQUIRE EVIDENTIARY HEARINGS, WHEN THOSE KINDS OF ISSUES ARE, IN FACT, PRESENTED?

BECAUSE, I THINK, IF YOU STUDY YOUR CASES, AT LEAST AS I HAVE STUDIED YOUR CASES, THAT YOU HAVE UPHELD TRIAL COURTS NUMEROUS TIMES, WHERE THE MAJORITY OF CLAIMS IN A MOTION HAVE BEEN DENIED WITHOUT HEARING.

BUT WHAT IS IT, I GUESS THE TRADE-OFF IS THIS. HOW LONG DOES THAT PROCESS TAKE, AND I KNOW YOU SUGGEST THAT THE COURT HAVE A SUMMARY DENIAL PROCEDURE, BUT THAT IS TIME INTENSIVE AND LABOR INTENSIVE, WHETHER WE WRITE A FULL OPINION OR AN ORDER, WHEREAS AN EVIDENTIARY HEARING, ESPECIALLY IF WE INSTITUTE RULES THAT WILL REQUIRE EXCHANGES OF WITNESSES BEFORE A STATUS CONFERENCE OR A HUFF HEARING OR WHATEVER, SO THAT, I MEAN, ISN'T A LOT OF THE PROBLEMS BEFORE THAT WE HAVE HAD BAD PLEADINGS, POOR PLEADINGS, CON COLLUSION AREA PLEADINGS, AND -- CONCLUSIORY PLEADINGS, AND IT WAS AIMED, THAT PART OF THE RULE, WAS AIMED TO TRY TO GET MORE EXPLICIT ALLEGATIONS? FOR EXAMPLE IF THE ALONGATION IS THAT COUNS-- IF THE ALLEGATION IS THAT COUNSEL DID NOT INVESTIGATE PROPERLY AND DISCOVER THESE WITNESSES, THAT THAT IS NOT ANYTHING THAT CAN BE DETERMINED FROM THE RECORD. NOW, CERTAINLY THE STATE WANTS TO KNOW WHAT WITNESSES, A DOES THE TRIAL COURT, BUT -- AS DOES THE TRIAL COURT, BUT ON ITS FACE, THAT IS THE BASIS FOR AN EVIDENTIARY HEARING.

I AGREE WITH YOU.

AS LONG AS YOU ARE -- SEE, SOME THINK THAT, WHEN YOU HAVE A SITUATION WHERE A TRIAL COURT IS SPENDING OUT ALL OF THIS TIME FINDING OUT TO HAVE AN EVIDENTIARY HEARING ON THESE THREE CLAIMS BUT NOT ON THOSE FOUR, AND GENERALLY THAT IS UPHELD, BUT THAT, ALSO, SEEMS TO BE LABOR INTENSIVE, AND IF YOU HAD IT ALL ONE HEARING, IF THERE IS NO EVIDENCE, THEY HAVE TO PRESENT EVIDENCE, SO IF THEY DON'T HAVE EVIDENCE TO PRESENT, HOW LONG CAN A HEARING TAKE, BUT IF THERE IS EVIDENCE, THEN WE GET IT ALL OUT, ON THE RECORD, AT ONE TIME, AND WE CAN MOVE ON WITH THE PROCESS.

IT IS COST BENEFIT ANALYSIS FORM YOU ARE ABSOLUTELY ENTITLED TO MAKE THAT -- ANALYSIS. YOU ARE ABSOLUTELY ENTITLED TO MAKE THAT DECISION.

IN OTHER WORDS IF OUR TIME TAKES SEVEN MEMBERS OF THIS COURT WEEKS TO REVIEW A RECORD AND THEN TO HAVE STAFF MEMOS AND ARGUMENT AND OPINIONS WRITTEN, IN ORDER TO HAVE, SAVE THE TRIAL COURT A COUPLE OF DAYS OF A HEARING, THAT WOULD BE THE KIND OF COST --

WHAT I AM SAYING IS I THINK THAT IS A DECISION THAT YOU HAVE TO MAKE, OVERALL, FOR THE WHOLE SYSTEM. YOU MAKE IT NOT ONLY FOR THE COURT. YOU MAKE IT FOR THE TRIAL COURTS. YOU DETERMINE HOW WE ARE GOING TO BEST SPEND OUR TIME DOWN THERE TO DO THAT. IF YOU IMPOSE THAT RULE, WE ARE SIMPLY RESPECTFULLY SUBMITTING TO YOU THAT IT MIGHT NOT BE A GOOD IDEA IN A LOT OF CASES, BUT IF YOU FIND IT IS MORE BENEFICIAL TO DO THAT, IN THE OVERALL JUSTICE OF THE SYSTEM, YOU ARE NOT GOING TO GET A STRONG OPPOSITION.

DON'T WE HEAR, I KNOW THERE HAS BEEN A LOT OF REFERENCE THAT IF WE DO ONEENING THING IN THESE CASES, THEN WE HAVE -- ONE THING IN THESE CASES, THEN WE HAVE TO DO IT IN ALL POSTCONVICTION, BUT HAVEN'T WE RECOGNIZED IN NUMERABLE WAYS SINCE FURMAN, THAT DEATH IS DIFFERENT. IN FACT, IT IS DIFFERENT IN THE PROCEDURES, BECAUSE, ONE, ALL OF THESE DEATH ROW INMATES HAVE LAWYERS. TWO, BECAUSE THE APPEAL IS NOT TO THE DISTRICT COURT OF APPEAL, THE APPEAL IS TO THIS COURT, THAT THERE IS -- AND SO WE ARE, REALLY, TRYING TO TALK ABOUT A RULE THAT IS A SYMBIOTIC RELATIONSHIP, IN HANDLING THE CASES BETWEEN THE TRIAL COURT AND THIS COURT, THAT IS DIFFERENT THAN A .8.

THAT IS GOING TO GO TO A -- THAN A.850 IN A FELONY CASE AND A CASE THAT IS GOING TO GO TO THE COURT?

I DON'T AGREE WITH THAT.

-- I AGREE WITH THAT.

IN LOOKING AT THIS PROBLEM, WOULDN'T YOU AGREE THAT, INORDER FOR US TO WRAP OUR ARMS AROUND IT, THAT WHAT WE REALLY NEED TO HAVE IN PLACE IS A PUBLIC RECORDS RULE, AND A HANDLING OF THE PUBLIC RECORDS? IS THAT NOT WHERE THE TRIAL JUDGE IS SPENDING SO MUCH TIME?

I THINK IMPLICIT IN OUR SUGGESTIONS TO YOU, IN OUR RECOMMENDATIONS TO YOU, WE UNDERSTAND THAT THERE ARE CUT OFFS, CUT OFFS HERE THAT THE BAR IS NOT USED TO. WE UNDERSTAND THAT THERE IS AN ARGUMENT THAT THERE OUGHT TO BE AMENDMENTS. I CAN JUSTICE PARIENTE HAS POINTED THAT OUT, IN USING PUBLIC RECORDS AS AN EXAMPLE. WHAT THE THROUGHS OF THIS COMMITTEE'S RECORD WAS -- REPORT WAS TO SAY IS THAT YOU HAD PROMULGATED A RULE, 3.852, AND IT IS THE DUTY OF THE TRIAL COURT TO MAKE THAT RULE WORK. THERE ARE TIME LIMITATION IN HIS THAT RULE. THERE ARE SANCTION IN HIS THAT RULE. YOU HAVE PROMULGATED IT. IT IS OUR DUTY TO CAREY IT OUT. AND -- TO CARRY IT OUT, AND THAT THESE TWO MATTERS ARE NOT DIVORCED IN THAT SENSE. YOU HAVE TO HAVE THE PREDICATE OPPORTUNITY, AS A DEFENSE COUNSEL, TO DISCOVER THE CASE, AS YOU SAID, BUT THEN PROCEED FORWARD INTO THE POSTCONVICTION RELIEF IN A FULLY-PLED MANNER. NOW, YOU ARE RIGHT THAT, IF THE PUBLIC RECORDS ACQUISITION IS JUST NOT WORKING, THAT THERE IS NO OPPORTUNITY TO DO THAT, THEN YOU ARE GOING TO HAVE PROBLEMS IMPLEMENTING THE TIME STANDARDS IN OUR RULE. THERE IS, ALSO, AN OPPORTUNITY, AT LEAST WITHIN THIS RULE, TO ALLOW FOR CONTINUEANCES FOR MANIFEST INJUSTICE. THERE IS, ALSO, THE OPPORTUNITY FOR A SUBSEQUENT OR SUCTION OR MOTION, AND I THINK THAT -- OR A SUCCESSOR MOTION, AND I THINK THAT YOU HAVE TO UNDERSTAND THAT THE COMMITTEE WAS GRAN LINK WITH THIS PROBLEM, AND THAT IS -- WAS GRAPPLING WITH THIS PROBLEM, AND THAT IS THAT WE FIRMLY BELIEVE THERE IS UNWARRANTED DELAY IN THIS PROCESS. YOU POINTED IT OUT THIS MORNING, THAT THERE ARE CASES HANGING OUT THERE, WITH NO ONE PAYING AT THINKS TO THEM. WE DON'T KNOW WHY IT HAPPENED. WE JUST KNOW IT DID HAPPEN.

JUDGE MORRIS, TO GO TO SOME OF THE SPECIFICS, AND I DON'T KNOW WHETHER YOU AND SOME OF THE OTHER PEOPLE PRESENTING HAVE BROKEN UP THE TOPICS, AS DID THE PETITIONERS IN THE OTHER CASE, OR NOT, BUT I HAVE A QUESTION ABOUT NOT SECTION CITATION BUT DEALING WITH SUCCESSIVE MOTIONS. YOU INDICATE THAT NO SUCCESSIVE MOTION SHALL BE ENTERTAINED. I HAVE A QUESTION. WHO MAKES A DETERMINATION AS TO WHETHER IT WILL BE ENTERTAINED OR NOT?

AND IF -- AND IF THAT IS THE LANGUAGE, AND AND IF THE JUDGE IS TO DO THAT, ISN'T THAT NECESSARILY MEANING THAT THE JUDGE SHOULD RULE ON THE MEIR SNITS ON-ON THE MERITS?

WELL, -- SHOULD RULE ON THE MERITS?

NOT NECESSARILY. THERE ARE OTHER STANDARDS FOR SUCCESSOR MOTIONS. IF DENIED THE COURTS ON NEW OR DIFFERENT GROUNDS, IT WOULDN'T AND RULING ON THE MERITS. WE HAVE TRIED TO INCORPORATE A LOT OF IT.

BUT THE JUDGE MAKES THE DETERMINATION AS TO WHETHER OR NOT THERE ARE SUFFICIENT ALLEGATIONS.

ABSOLUTELY. AND I GUESS THE POINT I WANT TO MAKE, IN CLOSING, IS THIS. SEE, THERE WAS

QUESTIONS ABOUT JUDICIAL MANAGEMENT. THIS SCHEME CALLS FOR ACTIVE JUDICIAL MANAGEMENT. WE HAVE TO UNDERSTAND THAT THERE ARE TIMES WHEN IT MAY NOT BE IN THE BEST INTEREST OF EITHER PARTY TO MOVE THESE CASES. IT IS THE OBLIGATION OF THE COURT TO MOVE THE CASES, AND WE HOPE --

DO WE HAVE THE REORZ -- THE RESOURCES FOR THE COURTS TO DO THAT?

I THINK, IF WE WERE TO IMPLEMENT THIS RULE, THAT YOU TALK ABOUT REALTIME COURT REPORTING OR HOW LONG IT WILL TAKE TO GET THESE COURTS TO PROCESS, 30 DAYS AFTER THE HEARING, ISSUE A RULING --

WE WERE RECENTLY ADVISED OF A JUDGE WHO TOOK OFFICE IN JANUARY AND WAS ASSIGNED TO A CRIMINAL DIVISION AND WANTED A LIST OF THE CASES THAT WERE ASSIGNED TO HIS GIGS DWIINGS AND WAS TOLD THAT HE COULD NOT -- TO HIS DIVISION AND WAS TOLD THAT THERE WAS NO ABILITY TO PROVIDE HIM WITH THAT.

I DON'T HAVE THAT PROBLEM.

BUT I KNOW THAT THE PROBLEM EXISTS, IN VARYING DEGREES OF SEVERITY AROUND THE STATE, DEPENDING ON THE AVAILABILITY OF TECHNOLOGY, TO THE CLERK'S OFFICE AND TO THE COURT, BUT THERE IS NO UNIFORMITY, WOULD THAT BE A PROBLEM IN YOUR CIRCUIT, AND HOW --

IN MY CIRCUIT, IT WOULDN'T AND PROBLEM. WE HAVE THE SUPPORT STAFF, AND WE HAVE THE REALTIME COURT REPORTING, AND WE HAVE THE ORGANIZATION THAT WILL ALLOW US TO DO WHAT IS NECESSARY. IN OTHER CIRCUITS, I CAN'T ANSWER FOR THEM. IN OUR CIRCUIT, WE CAN.

WOULD YOU ENVISION THE BEST CASE MANAGEMENT PLAN TO COME FROM THIS COURT, PROBABLY FROM THE OFFICE OF CHIEF JUSTICE TO THE CHIEF JUDGE OF THE CIRCUIT?

YES. IN THE SENSE THAT I THINK WHAT YOU HAVE TO DO IS WE HAVE TO BE ACCOUNTABLE FOR WHERE THOSE CASES ARE AT EACH MOMENT, BUT THERE HAS TO BE A SYSTEM IN PLACE WHERE YOU, AS A CHIEF JUSTICE OR ANY MEMBER OF THE COURT, CAN GO AND PULL UP THAT CASE AND SAY WHERE ARE WE AT RIGHT NOW ON THAT CASE? IT WAS FILED ON THIS DATE. WHAT IS THE PENDING HEARING? THERE HAS GOT TO BE SOMETHING PENDING IN THIS CASE.

AND IF IT IS FOUND THAT THERE IS SOME KIND OF LAG, THEN --

THEN IT GOES TO THE CHIEF JUDGE, WHO IS YOUR COMMANDER IN THE FIELD, AND THAT PERSON SHOULD TAKE THE APPROPRIATE ACTION TO MOVE THAT CASE ALONG. I MEAN, I THINK WE ARE GOING TO HAVE TO HAVE JUDICIAL ACTIVISM IN THIS.

THANK YOU.

WHAT IS CONTEMPLATED IN YOUR RULE, AS FAR AS THE INTERPLAY, AGAIN, BETWEEN THE PUBLIC RECORDS LITIGATION AND THE FILING OF THE FIRST MOTION FOR POSTCONVICTION RELIEF,, WHICH UNDER YOUR RULE, IS ONE YEAR AFTER THE MANDATE FROM THIS COURT ISSUES, I BELIEVE?

WHAT IS CONTEMPLATE SD THAT YOUR RULE WILL BE FOLLOWED. THE RULE THAT YOU PROMULGATED WILL BE FOLLOWED.

AND THAT, WHEN WOULD THE PUBLIC RECORDS LITIGATION START, UNDER YOUR RULE? WE DON'T HAVE A RULE.

YOU HAVE READOPTED AT LEAST TEMPORARILY, 3.852, AND YOU DO HAVE A RULE OF WHEN IT

COMMENCES, AND DO YOU HAVE AN OBLIGATION FOR THE IMMEDIATE COLLECTION OF THOSE DOCUMENTS, INTO THE LOCATIONS THAT YOU HAVE ORDERED THEM TO BE PLACED.

SO HAVE YOU FOUND, THOUGH, IN TERMS OF THE TIME PERIOD, SO THAT WE DETERMINE WHETHER REALISTIC TIME PERIODS ARE BEING SET, WHAT PERIOD OF TIME, ON AN AVERAGE, IT TAKES TO LITIGATE THE PUBLIC RECORDS ISSUES?

NO.

AND WHERE THE EXACT CAUSE OF DELAY IS?

WE DON'T KNOW YET, BECAUSE QUITE FRANKLY, I DON'T THINK THE RULE HAS BEEN IN EFFECT LONG ENOUGH TO GATHER STATISTICS. THAT IS MY OPINION.

IT WAS TAKEN OUR PRIOR RULE 3.856.

RIGHT.

WOULD YOU SHARE WITH US THE PHILOSOPHY AND DISCUSSIONS SURROUNDING THE NONAMENDMENT, AFTER THE ANSWER HAS BEEN FILED? BECAUSE THIS SYSTEM SEEMS TO DISCOURAGE SUCCESSIVE MOTIONS. WE HAVE ADDITIONAL STANDARDS THAT ARE DISCUSSED WITH REGARD TO THOSE, AND IT DOESN'T SEEM, AS I READ THEM, TO HAVE THE SAME MANIFEST INJUSTICE KIND OF EXCEPTION AS YOU ARE DISCUSSING WITH OTHER AREAS. COULD YOU SHARE WITH US THE THOUGHTS, THE ABUSES, WHAT IT IS THAT WE THEAD TO KNOW TO REACH A DECISION ON THAT?

WOULD IT BE DISCOURTEOUS OF ME TO YIELD MY TIME TO JUDGE PADOVANO, WHO IS PREPARED TO ANSWER A LOT OF THESE? WE HAVE DIVIDED IT UP IN THAT FASHION.

YES.

THANK YOU.

MAY IT PLEASE THE COURT. I WILL PHIL PADOVANO, A MEMBER OF THE COMMITTEE. LET ME START WITH THAT QUESTION. I THINK THE QUESTION, IN IT IS ONE THAT WAS -- A THEME HAS BEEN REPEATED THROUGH THE EARLIER ARGUMENTS, COMES DOWN TO THIS. AT SOME POINT YOU HAVE TO HAVE A FIXED RULE THAT THE PLEADINGS ARE DONE. OTHERWISE THE PROCESS CAN GO ON FOREVER. IF YOU DON'T ALLOW AMENDMENTS ON THE ONE HANDLED, THEN YOU HAVE THE POSSIBILITY THAT SOMEBODY HAS A LEGITIMATE CLAIM THAT WILL NOT BE HEARD. ON THE OTHER HAND, IF YOU ALLOW THIS, AN OPEN ENDED POLICY OF HAVING AMENDMENTS TO PLEADINGS, AND FILING THEM, DELING THE TIME FOR FILING THEM, THEN THE PROCESS CAN GO ON AD INFINITUM, AND SO WHAT THE COMMITTEE DID WAS IT TRIED TO STRIKE A BALANCE BETWEEN THOSE TWO THINGS, AND WHAT WE TRIED TO DO WAS TO SET UP A PROCEDURE THAT WOULD GIVE THE DEFENDANT EVERYTHING THE DEFENDANT NEEDED TO MAKE A FULLY-PLED CLAIM, AT THE TIME THAT CLAIM IS FILED, SO THAT THERE WOULD BE NO NEED FOR AN AMENDMENT. LET ME MAKE ONE OTHER POINT ABOUT THIS, AND I THINK IT IS A POINT THAT MAY HAVE BEEN MISSED, IN SOME OF THE EARLIER ARGUMENTS, AND THAT IS THIS. WE CAN'T LOSE SIGHT OF THE FACT THAT, IN A POST CONVICTION, WHEN A DEFENDANT FILES A POST CONVICTION MOTION, THE DEFENDANT SHOULD KNOW THE BASIS OF THAT MOTION, AT THE TIME THE MOTION IS FILED. IT IS NOT LIKE A CIVIL SUIT, WHERE YOU CAN FILE THE SUIT AND THEN GO DO DISCOVERY AND SEE IF YOU CAN GET THE EVIDENCE TO ESTABLISH THE ESSENTIAL OF YOUR CLAIM. UNDER OUR -- THE ESSENCE OF YOUR CLAIM. UNDER OUR RULES AND THE PROCEDURE WE HAVE ALWAYS HAD, THE DEFENDANT SHOULD KNOW THE BASIS OF THAT MOTION WHEN THE MOTION IS FILED. IT IS NOT TO BE FILED, WITH THE IDEA THAT, WELL, I WILL DO SOME CHECKING AROUND AND FIND SOME THINGS IT TO AMEND. SO I CERTAINLY SEE THE POINT OF YOUR

QUESTION, JUSTICE LEWIS. IT IS A DIFFICULT PROBLEM, BUT THE ONLY WAY I CAN ANSWER IT IS THE COMMITTEE TRIED TO STRIKE A BALANCE, IN AVOIDING THE POSSIBILITY THAT LITIGATION WOULD GO ON INDEFINITELY, IF WE DIDN'T DO. THAT.

LET ME ASK YOU, THE RULE, STATUTE, THAT IS NOW, THAT THE LEGISLATURE HAS ENACTED, BECAUSE THAT STARTS AT -- MEANS THAT THE MOTION HAS TO BE FILED 180 DAYS AFTER THE DEATH SENTENCE, KNOWING WHAT YOU KNOW ABOUT RECORDS ON APPEAL, BOTH AS A TRIAL JUDGE AND APPELLATE JUDGE, KNOWING WHAT YOU KNOW ABOUT THE PUBLIC RECORDS PROCESS, CAN -- DO YOU SEE THE PROCESS, BECAUSE YOURS STARTS AFTER THE APPEAL IS FINAL, SO YOU HAVE GOT A PERIOD THAT IS FILTERED OUT OF THE SITUATION.

I THINK THERE IS NO QUESTION, AND THE COURT HAS EXPRESSED ITS CONCERN ABOUT THIS EARLIER. I THINK THERE IS NO QUESTION THAT OTHER SYSTEMS WE CONTROL WOULD HAVE TO BE GREATLY IMPROVED, IN ORDER FOR THIS TO WORK. I DON'T DOUBT THAT FOR A MOMENT. WE WOULD HAVE TO MAKE SURE, IF WE WERE GOING BACK, NOW, TO THE ACT, I THINK, IF IT IS PREMISED ON THE NOTION THAT COUNSEL, COLLATERAL COUNSEL IS GOING TO GET THE RECORD IN 60 DAYS OR 90 DAYS, WE NEED TO MAKE SURE THAT IS GOING TO HAPPEN, AND I THINK WE ALL KNOW THAT, RIGHT AT THE MOMENT, IT PROBABLY ISN'T HAPPENING, WHICH ISN'T TO SAY THAT WE CAN'T IMPROVE THAT AREA AS WELL, BUT I THINK, TO ANSWER YOUR QUESTION, I THINK WE WOULD HAVE TO MAKE IMPROVEMENTS IN OTHER AREAS, TO MAKE THIS WORK.

HOW ABOUT IDENTIFYING THOSE AIRS, BECAUSE YOU PREFACED YOUR -- THOSE AREAS, BECAUSE YOU PREFACED YOUR ANSWER TO JUSTICE LEWIS, WITH THE COMMITTEE WANTED TO PROVIDE COUNSEL, WITH ALL OF THE FUNDAMENTAL THINGS THAT WOULD BE NECESSARY, IN ORDER FOR COUNSEL TO FILE THIS FULLY-PLED MOTION, AND, OF COURSE, THAT IS, YOU HAVE HIT IT RIGHT ON THE NOSE, THAT IS WHAT IS CONTEMPLATED BY THIS COURT'S PREVIOUS ACTIONS. THAT IS NOT ONLY DO WE EXPECT THERE TO BE A FULLY-AIRED APPEAL, BUT THERE, ALSO, BE A COUNSEL-ASSISTED, YOU KNOW, REVIEW, IN THE FORM OF POSTCONVICTION, AND THAT THAT GET DONE IN A QUALITY WAY. WHAT WOULD -- WHAT ARE THE ESSENTIAL INGREDIENTS, IF YOU ALL HAVE IDENTIFIED THEM, THAT GO INTO THAT? THAT IS COUNSEL, FIRST OF ALL, COUNSEL APPOINTED, QUALIFIED COUNSEL APPOINTED EARLY ON, THAT CAN GIVE HER UNDIVIDEDED ATTENTION TO DOING THIS? THE TOOLS, YOU KNOW, FOR INVESTIGATION AND DISCOVERY, AND THEN A REASONABLE PERIOD OF TIME, YOU KNOW, THOSE ARE THING THAT IS SEEM TO JUMP OUT. ARE THOSE THE FACTORS THAT THE COMMITTEE SAYS HAVE TO BE THE ESSENTIAL PREDICATE?

YES, SIR. ABSOLUTELY. AND THAT IS WHY WE PUT A FAIRLY DETAILED LIST OF THINGS, CHRONOLOGY. FOR EXAMPLE, ONE OF THE THINGS WAS IDENTIFYING COUNSEL CONFLICTS EARLY IN THE GAME. WE COULD MESS THE ENTIRE PROCESS UP, IF WE ENTERTAINED A CLAIM OF COUNSEL CONFLICT, EIGHT MONTHS INTO THE ONE-YEAR PERIOD. HOW UNFAIR WOULD THAT BE, IF IT WAS A LEGITIMATE CLAIM SOME SO WE HAVE TRIED TO SET UP A PROCEDURE THAT RESOLVES THIS, BY FORCING THE LAWYERS TO IDENTIFY POTENTIAL CONFLICTS EARLY IN THE PROCESS, TO THE EXTENT THAT THAT CAN BE DONE, SO I THINK THE RULE IS PREMISED ON THE FACT THAT RESOURCES WILL BE AVAILABLE AND THAT COUNSEL WILL BE APPOINTED.

I WAS GOING TO ASK A COUPLE OF SPECIFIC QUESTIONS REGARDING WHY DID YOU SET CLEAR AND CONVINCING STANDARD OF REVIEW?

WELL, THIS MAY COME AS A GREAT SHOCK TO MY COLLEAGUES AT THE BAR, BUT THIS IS ONE POINT THAT I AM GOING TO CONCEDE TO THE DEFENSE, THAN IS THAT, REALLY, WE COPIED THE ANTI-TERRORISM EFFECTIVE DEATH PENALTY ACT, ALTHOUGH AS YOU CAN SEE, THERE ARE SOME MAJOR DIFFERENCES. WE DIDN'T TIE OUR CONSTITUTIONAL, OUR CLAIM OF INNOCENCE TO A CONSTITUTIONAL VIOLATION. IT CAN BE A FREE-STANDING CONSTITUTIONAL CLAIM. WHETHER WE USE CLEAR AND CONVINCING -- I THINK, TO ANSWER YOUR QUESTION, WE DID IT BECAUSE WE WANTED TO RESTRICT SUCCESSORS. BECAUSE, AGAIN, IF YOU HAVE A PROCESS THAT CAN GO ON

AD INFINITUM, THEN YOU NEVER GET THE CASES RESOLVED, BUT I THINK THAT THE PUBLIC DEFENDER'S ASSOCIATION HAD MADE AT LEAST AN ARGUABLE POINT THAT WE SHOULD KEEP THESE STANDARDS THE SAME, AND SO I GUESS I AM NOT -- AND I HAVE TALKED TO MY FELLOW COMMITTEE MEMBERS ON THIS, NOT REALLY OPPOSED, IF THE COURT WISHED TO CHANGE THAT, TO THE MORE LIKELY THAN NOT STANDARD THAT THE U.S. SUPREME COURT HAS APPLIED FOR ACTUAL INNOCENCE CLAIMS.

DOES YOUR -- DID YOUR RULES, ALSO, CONTEMPLATE A FUNDAMENTAL CHANGE IN THE LAW? AND WE HAVE SEEN THAT TIME AFTER TIME, WITH THE SUPREME COURT ANNOUNCE THAT, AFTER MANY AFFIRMATIONS, THEY HAVE SAID OUR INSTRUCTION WAS INAPPROPRIATE.

RIGHT.

IN CCP AND HAC.

IT DOES NOT. BUT THERE AGAIN, I THINK THE COMMITTEE IS OPEN TO, CERTAINLY, YOU KNOW, REDRAFTING THAT PART, IF THAT IS THE COURT'S INTENTION INTENTION, BUT LET ME EXPLAIN TO YOU WHY IT DIDN'T. WE THOUGHT THAT WHAT WE REALLY OUGHT TO DO IS TO SAY THERE ARE ADEQUATE POSTCONVICTION REMEDIES. WE HAVE, AND BEAR IN MIND WE ARE TALKING ABOUT SUCCESSOR MOTIONS, WHICH SHOULD BE GOVERNED BY PRINCIPLES OF ADJUDICATION PROCESS AND RACE ADJUDICATA. WE ARE NOT TALKING ABOUT CURTAILING RIGHTS IN A GENERAL SENSE, BUT WE THOUGHT THAT WE WOULD LIMIT THOSE AND ACTUALLY HAVE A SITUATION IN WHICH WE WOULD SAY, ALL RIGHT, THERE IS GOING TO COME A POINT IN TIME WHERE WE WILL QUIT TALKING ABOUT YOUR JURY INSTRUCTIONS. WE ARE GOING TO QUIT TALKING ABOUT THE CLOSING ARGUMENTS. WE ARE GOING TO QUIT TALKING ABOUT THE THING THAT IS OCCURRED IN YOUR TRIAL, AND WE ARE GOING TO SAY HERE IS THE ONE SAFETY VALVE THAT IS OUT HERE AT THE END F YOU ARE INNOCENT, WE ARE GOING TO HEAR YOUR CLAIM.

DOESN'T "F", RIGHT NOW, SAY THAT? IT SAYS A SECOND OR DISMISS MOTION MAY BE ALLOWED, IF NEW GROUNDS FOR RELEASE ARE FOUND. DON'T WE, ALREADY, HAVE A RULE THAT COVERS -- CAN'T STOP SOMEONE FROM FILING IT BUT FROM DENYING IT. I DON'T KNOW HOW MANY -- WE MAY GET A LOT OF SUCCESSOR -- OOP I THINK, AND JUSTICE HARDING POINTED THIS, I THINK THERE IS PROBABLY SOME PROBLEM WITH THE TERMINOLOGY OF WHO ENTERTAINS IT. OF COURSE IT IS GOING TO BE ENTERTAINED. I THINK THE QUESTION IS, IS THE COURT GOING TO REACH THE MERITS OF IT, AND THE ANSWER --

YOU DON'T THINK THAT THE CURRENT RULE, ADDRESSED ADEQUATELY, ALLOWS THE TRIAL COURTS TO DENY A SUCCESSOR MOTION THAT REALLEGESS WHAT HAS ALREADY BEEN ALLEGED?

I TEND TO AGREE WITH YOUR EARLIER OBSERVATION, THAT THIS SUCCESSOR MOTION IS NOT REALLY THE HEART OF OUR PROBLEM. BUT BE THAT AS IT MAY, THE COMMITTEE, AND I SUPPORT WHAT THE COMMITTEE DID, FELT THAT IT WAS NECESSARY TO RESTRICT IT.

ISN'T THAT IMPORTANT, IF IT IS NOT THE HEART OF THE PROBLEM, THAT WHAT WE DON'T WANT TO DO IS TAKE THOSE TRUE CLAIMS, WHERE SOMEBODY HAS GOT NEWLY-DISCOVERED EVIDENCE, AND IT COULD LEAD TO, HAVE HAD THEM EXONERATED, OR THERE HAS BEEN A FUNDAMENTAL CHANGE IN THE LAW AND THEY ARE SBILTED TO THAT, AND TAKE, YOU KNOW -- AND THEY ARE ENTITLED TO THAT, AND TAKE, BECAUSE THERE ARE A LOT OF MOTIONS BEING FILED, AND MAKE THE BAR SO HIGH THAT WE, THEN, DON'T HAVE TRIAL COURTS RECOGNIZING LEGITIMATE CLAIMS, AND THEN THEY COME UP HERE. WE HAVE GOT TO REVERSE, AND THEN THEY GO BACK DOWN AGAIN.

I DO SEE THAT POINT, BUT I DON'T THINK THAT WE SHOULD HAVE A SYSTEM THAT ALLOWS THE DEFENDANT TO WAIT AROUND FOR 12 YEARS, UNTIL THE LAW CHANGES. WE ARE TRYING TO STOP, WE ARE TRYING TO PREVENT THE KIND OF UNNECESSARY DELAYS IN THE PROCESS THAT, I

MEAN --

REALLY NOTHING REQUIRES, I MEAN, IF THE FINAL -- IF THE FEDERAL HABEAS FINISHES, THE DEATH WARRANT CAN BE I SHOULD. CORRECT?

-- CAN BE ISSUED. CORRECT?

RIGHT.

SO IN SOME OF THESE CASES, YOU KNOW, WHAT MY OBSERVATION IS THAT THE REAL SUCCESSOR STARTS, YOU KNOW, ONCE THE WARRANT IS SIGNED, AND THAT IS A RELATIVELY SHORT PERIOD OF TIME.

AND YOU CERTAINLY HAVE A BETTER PERSPECTIVE. IT MAY NOT BE A BIG ISSUE, BUT WHAT WE TRIED TO DO WITH THE COMMITTEE WAS TO DEAL WITH A LOT OF LITTLE THINGS. ONE THING, OF COURSE, WAS THE STARTING TIME FROM THE MANDATE OF THIS COURT AND NOT CERTAIN. SO WE TRIED TO -- AND NOT CERT. SO WE TRIED TO TIE-UP A LOT OF LITTLE THINGS. LET'S NOT FORGET ABOUT SUCCESSORS. THIS RULE IN THE STATUTE AND THIS COURT, AS WELL, IS A LIMITATION ON WHAT THE TRIAL COURT CAN DO, NOT A LIMITATION ON WHAT THIS COURT CAN DO. THE U.S. SUPREME COURT MADE THAT CLEAR, IN THE FELTER CASE, WHEN IT RULED ON THE VALIDITY OF THE FEDERAL ACT, THAT SUPREME COURT HABEAS CORPORAL JURISDICTION STILL EXISTS, AND IF I NEEDED ANY PROOF OF IT, I COULD USE THIS VERY CASE THAT WE ARE HERE ON DACHT THIS CASE DIDN'T COME UP ON A TRIAL COURT SYSTEM. IT WAS AN EXTRAORDINARY MATTER THAT THIS COURT HEARD, SO I WOULD SUGGEST TO YOU THAT, IF WE HAVE ANOTHER HITCHCOCK CLAIM OR SOMETHING LIKE THAT, THERE ARE NOT RECOMMEND DIS. REMOVING THE TRIAL COURT JURISDICTION, TO ME, REMOVES ALL OF THOSE REMEDIES.

TO ME, THE HEART OF THE SUCCESSOR PROBLEM, FROM WHAT I HAVE SEEN AND WHAT I KIND OF THOUGHT THAT THE COMMITTEE WAS GETTING TO, IS THE FACT THAT, WHETHER YOU GET AN EVIDENTIARY HEARING, AGAIN, BECAUSE IT IS THE -- IT IS WHETHER YOU GET ANOTHER EVIDENTIARY HEARING, THAT SLOWS DOWN THE PROCESS, AND TURNS INTO A PIECE MEAL PROCESS, AND I THOUGHT WHAT THE COMMITTEE WAS TRYING TO DO WAS TO FORCE ALL OF THE EVIDENTIARY HEARING UP INTO THE FIRST ROUND, AND THEN MAKE IT VERY DIFFICULT.

WELL, THAT IS --

TO GET A SECOND.

THAT IS EXACTLY RIGHT, YOUR HONOR, AND IF THE SYSTEM THAT WE DESIGNED WORKED THE WAY WE INTENDED IT TO WORK, WHERE EVERYBODY HAD THE INFORMATION THEY NEEDED, THE RIGHT KIND OF LEGAL REPRESENTATION, THE TIME TO DO A WHAT THEY WANTED, YOU WOULDN'T HAVE THESE KINDS OF PROBLEMS.

BUT JUDGE PADOVANO, AND I THINK JUSTICE ANSTEAD WAS ASKING FOR YOU EARLIER, WE ARE NOT HERE IN WONDERLAND, AND WE ARE TALKING ABOUT WHETHER THERE IS ENOUGH COUNSEL THAT ARE COMPETENT TO HANDLE THE POSTCONVICTION AND A MUCH-SHORT END TIME FRAME. WE ARE ASSUMING THAT ALL OF THE AGENCIES AND THE STATE WILL JUST, REALLY, GIVE UP THEIR RECORDS. WE ARE ASSUMING THAT WE CAN GET TRANSCRIPTS BUT NOW TAKE YEARS TO GET WITHIN A SHORT PERIOD OF TIME. AND YET WE HAVE GOT NO SAFETY VALVE FOR THE JUDGE, WHICH HOPEFULLY IS A JUDGE THAT ISN'T A JUDGE THAT NOW HAS BEEN TRANSFERRED TO CIVIL AND JUST DOESN'T WANT TO SEE THAT CASE AGAIN BUT IS A PART OF A CADRE OF WELL-TRAINED JUDGES THAT HAVE THE RIGHT KIND OF STAFF SUPPORT. THEY HAVE GOT A FULL-TIME LAW CLERK. THEY HAVE GOT THE ABILITY TO MANAGE THEIR CASES, BECAUSE THEY HAVE GOT A COMPUTER SYSTEM THAT ALLOWS THEM TO DO THAT, AND THEY HAVE NOTHING ELSE, MUCH, TO DO BUT THIS POSTCONVICTION MOTION FOR ABOUT A SEVERAL-MONTH PERIOD OF

TIME, SO MY CONCERN WITH THAT IS THAT, IN OUR RUSH TO MAKE THE SYSTEM PERFECT, WE ARE GOING TO END UP PUTTING THESE UNYIELDING DEADLINES ON, AND THEN WE ARE NOT GOING -- YOU KNOW, WHAT IS MAN TEST -- MANIFEST INJUSTICE TO ONE JUDGE MAY BE DIFFERENT TO THE OTHER, AND WE ARE GOING TO TAKE ONE WHERE, MAYBE, THE MOTION WAS FILED FIVE DAYS LATE AND TURN THAT INTO A THREE-YEAR DELAY BECAUSE IT GETS DISMISSED, OR TAKE ANOTHER MOTION THAT EXCEEDED 50 PAGES AND SOME OTHER JUDGE WILL DISMISS THAT, AND THAT WILL COME BACK, AND MY CONCERN IS THAT THESE PROCEDURAL REQUIREMENTS WILL START TO OVERWHELM THE SYSTEM, AND WE WILL HAVE DISMISSALS FOR THAT REASON, AND WE WON'T GET TO WHAT JUSTICE WELLS SAYS. LET'S GIVE THEM ONE GOOD EVIDENTIARY HEARING, WITH ALL OF THE INFORMATION, WITHIN THE FIRST TWO YEARS AFTER THE DEATH SENTENCE IS AFFIRMED, AND MAYBE WE CAN HAVE, REALLY, A FINAL SYSTEM IN THAT WAY.

WELL, THERE IS CERTAINLY SOME MERIT TO THAT. AND AS YOU KNOW, FOUR JUSTICES OF THE COURT HAVE ALREADY PUBLICLY SAID THEY FAVOR THAT, BUT YOU STILL HAVE THE PROBLEM, I THINK, THAT PERHAPS THE TRIAL COURT WOULD GRANT AN EVIDENTIARY HEARING, AND NOT ALL OF THE ISSUES THAT YOU THOUGHT OUGHT TO HAVE BEEN HEARD. BUT LET ME JUST SAY THIS. AS FAR AS THE RESOURCES AND TIME ARE CONCERNED, THE MORRIS COMMITTEE RULE DOESN'T CHANGE THE TIME FROM THE EXISTING TIME, EXCEPT IN ONE RESPECT, AND THAT IS TO RUN IT FROM THE MANDATE OF THIS COURT, RATHER THAN CERT DENIED IN THE U.S. SUPREME COURT, SO I DON'T REALLY SEE.

COULD THAT WORK STARTING WITH WHEN THE LEGISLATURE -- COULD THE MORRIS RULES, COULD THEY WORK, STARTING WHEN THE LEGISLATURE WANTS THIS TO START, WITH THE APPOINTMENT OF POSTCONVICTION COUNSEL AND THE EARLY FILING, DUAL TRACK SOMETHING.

THE DUAL TRACKING WORK?

COULD DUAL TRACKING WORK, WITH THE TIME LIMITS SET OUT IN THE MORRIS COMMITTEE REPORT?

I THINK SO. I THINK THAT, OF COURSE, THE COURT WOULD HAVE TO REJECT THE BASIC SEQUENTIAL NATURE OF THE MORRIS COMMITTEE RULE, IN ORDER TO DO THAT, BUT, YES, I DO THINK SO.

DID YOU WANT -- EXCUSE ME. I DIDN'T -- I KNOW YOU ARE OVER IN YOUR TIME.

ONE FINAL QUESTION ABOUT AMENDMENTS. DID THE COMMISSION GIVE ANY THOUGHT TO, INSTEAD OF THE RULE THAT YOU ARE PROPOSING ABOUT NO AMENDMENTS AFTER THE STATE FILES ITS ANSWER, THAT THERE COULD POSSIBLY BE AMENDMENTS, BASED ON THE SAME KIND OF ISSUES THAT ARE DISCUSSED IN THE SUCCESSIVE MOTION PORTION OF THE RULE?

I SUPPOSE THAT -- I SUPPOSE, IN OTHER WORDS, ONE WAY AROUND THAT WOULD BE THAT, IF THE INFORMATION WAS NOT KNOWN, AND IT FIT WITHIN THE TIME FRAMES FOR A SUCCESSIVE MOTION, THAT IT COULD BE, THEN, RAISED THERE. YES. I THINK THAT WOULD BE ANOTHER WAY OF RESOLVING THE PROBLEM. BUT OUR RULE DOES HAVE THE SAFETY VALVE FOR THE MANIFEST INJUSTICE, ABOUT THE TIME PERIOD, AND YOUR EXAMPLE EARLIER ABOUT THE HURRICANE STRIKING THE -- I DON'T THINK ANY JUDGE IN FLORIDA WOULD NOT SAY THAT WOULD AND MANIFEST INJUSTICE, SO WE TRY TO MAKE STRICT DEADLINES, BUT AT THE SAME TIME CREATE A "OUT" FOR THOSE CASES WHERE THERE TRULY NEEDS TO BE AN OUT.

THANK YOU. MR. LATIMER.

MAY IT PLEASE THE COURT.

YOU AND JUDGE EATON ARE GOING TO SHARE SOME TIME. IS THAT CORRECT?

YES, SIR. MY NAME IS JERRY LATIMER, AND I AM CHAIR OF THE CRIMINAL PROCEDURAL RULES COMMITTEE. I HERE WITH JUDGE EATON, WHO IS OUR VICE CHAIR AND CHAIR OF OUR FAST TRACK SUBCOMMITTEE, AND HE WILL ADDRESS MOST OF THE CHANGES THAT WE RECOMMENDED TO THE MORRIS COMMITTEE REPORT THAT CAME OUT OF THIS COMMITTEE. BY INVITATION OF THIS COURT, WE WERE ASKED TO ADDRESS THE MORRIS COMMITTEE PROPOSAL, AND TO DETERMINE WHETHER OR NOT THERE ARE ANY CHANGES, AMENDMENTS, EVEN NEW RULES THAT MIGHT BE APPROPRIATE AND WOULD ENHANCE THE WORK PRODUCT OF THAT COMMITTEE. AND WE DID SO. WE, ALSO, WERE ASKED TO LOOK AT THE DEATH PENALTY REFORM ACT OF 2000. AND LOOK AT IT IN TERMS OF ITS IMPACT ON EXISTING POSTCONVICTION MOTION RULES, AND, ALSO, ON THE MORRIS COMMITTEE PROPOSAL. WE DID THAT, ALSO. WE OBVIOUSLY LOOKED AT SECTION 10 OF THE ACT, WHICH SPECIFIES THE REPEAL OF 3.851, 52, AND 50, TO THE EXTENT THAT IT IS INCONSISTENT WITH THE ACT, AND SO WE OBVIOUSLY WERE AWARE OF THE FACT THAT THE IMPACT WOULD BE SUBSTANTIAL, IF THAT PROVISION IS VALID. THE VALIDITY OF THAT, OBVIOUSLY, WE FELT, PROBABLY TURNED UPON WHETHER, UNDER SEPARATION OF POWERS, ARTICLE V, SECTION 2-A, THIS LEGISLATION, IS PROCEDURAL OR SUBSTANTIVE, IN OTHER RESPECTS, AND THE MOST CENTERPIECE OF THAT LEGISLATION IS THE TIME PERIOD, THE 180 DAYS FROM THE FILING OF THE INITIAL BRIEF, IN WHICH THE POSTCONVICTION MOTION MUST BE FILED. THE ARGUMENT ON ONE HAND IS THAT THAT IS SIMPLY A STATUTE OF LIMITATIONS, CITING WILLIAMS VERSUS LAW, THAT THIS IS A SUBSTANTIVE MATTER WITHIN THE LEGISLATIVE PREROGATIVE. THERE IS ANOTHER ARGUMENT THAT THIS IS SIMPLY A TIME TRIGGERING DEVICE, MUCH LIKE THE 90-DAY SPEEDY TRIAL RULE, AND LIKE UNDER RJA VERSUS FOSTER, IS PROCEDURAL INNATE. IF THIS COURT DETERMINES THAT IT IS PROCEDURAL AND INVALID, THEN, OBVIOUSLY, THAT MAY AFFECT THE REPEAL, BECAUSE THE COURT WILL, THEN, HAVE TO LOOK, TO SEE WHETHER OR NOT THE OTHER ASPECTS OF THE LEGISLATION, INCLUDING SECTION 10 ARE SO INTERTWINED AND INTERDEPENDENT UNDER THAT POINT, THAT, UNDER THE DOCTRINE OF SEVERABILITY, IT WOULD, ALSO, FALL. OUR COMMITTEE, HOWEVER, IS MADE UP OF BOTH PROSECUTORS AND DEFENDERS AND BELONG TO AGENCIES THAT ARE ON BOTH SIDES OF THIS LITIGATED ISSUE, AND FOR THAT REASON, THE COMMITTEE DOES NOT TAKE A POSITION ON THE CONSTITUTIONALITY OF THE STATUTE. HOWEVER, WE DO PUT FORTH FOUR CASES IN OUR INTRODUCTION TO OUR KMERNKTS THAT WE FEEL ARE TO OUR COMMENTS, THAT WE FEEL ARE PARTICULARLY RELEVANT IN THE COURT'S RESOLUTION OF THAT ISSUE, AND WE DID, HOWEVER, ASSUME THAT THE COURT MAY DETERMINE THAT IT HAS THE CONSTITUTIONAL AUTHORITY AND THE DESIRE TO DON'T THE MORRIS COMMITTEE PROPOSAL. AND IF THE COURT DID, WHAT CHANGES DO WE SEE WOULD IMPROVE THAT PRODUCT, AND ONE OF THEM WAS AN OMISSION. WE SAW AN OMISSION IN THE DEATH PENALTY REFORM ACT AND, ALSO, IN THE MORRIS COMMITTEE REPORT, THAT NEITHER DEALT WITH THE ISSUE OF COMPETENCY DETERMINATION, IN THE POSTCONVICTION PROCEDURE PROCESS. AND AT THE REQUEST OF THIS COURT, IN CARTER VERSUS STATE, WE WERE DIRECTED TO PROMULGATE OUR COMMITTEE, TO PROMULGATE AND DRAFT SUCH RULES. THE COURT, IN CARTER, GAVE US EXPLICIT DIRECTIONS. CONCERNS, CITE EARIA, BOTH IN THE MAJORITY OPINION AND JUSTICE WELLS' CONCURRING OPINION. AND I THINK OUR COMMITTEE FAITHFULLY INCORPORATED MOST OF THOSE CONCERNS AND CRITERIA, IN ESTABLISHING A PROCEDURE FOR THE DETERMINATION OF COMPETENCY IN THE POSTCONVICTION.

WOULDN'T YOU ENVISION THAT, REALLY, COMING SORT OF WITHIN 3.811, 812, IN THAT SECTION, AS OPPOSED TO 3.851 SECTION THAT WE ARE DEALING WITH HERE? AND I UNDERSTAND HOW THEY ARE ALL INTERRELATED, BUT IT WILL DOES SEEM TO ME THAT, IN ORDER TO FOCUS UPON THAT PROCEDURE, THAT WE NEED TO SEND IT OUT FOR PUBLICATION AND HAVE A SEPARATE DISCUSSION.

THAT IS WHY IT IS STILL WITHIN OUR FOUR-YEAR CYCLE PROVISION, AND IT WILL BE COMING UP TO THE COURT AND BE PUBLISHED IN THAT FASHION. BUT THE COURT ASKED US TO ADDRESS IT, WITH REFERENCE TO CAPITAL POSTCONVICTION, AND SO LOOKING AT THE ABSENCE OF ANY

SUCH PROCEDURE IN THE MORRIS COMMITTEE PROPOSAL, WE THOUGHT AT LEAST THE COURT SHOULD BE ADVISED THAT THAT IS -- HAS BEEN DONE AND IS IN THE FOUR-YEAR CYCLE. THE --

LET ME --

THE RULE, ITSELF, COULD BE A FREE-STANDING RULE, AND PLACED ELSEWHERE.

I KNOW YOU -- YOUR COMMITTEE RECOMMENDED A MODIFICATION OF THE AMENDMENT PART OF THE MORRIS COMMITTEE'S RECOMMENDATION, AS TO CHANGING IT SO THAT YOU WOULD DEAL WITH AMENDMENTS ON A DUE DILIGENCE BASIS. AM I REMEMBERING THAT CORRECTLY?

I DON'T THINK WE DID. BUT I WOULD LIKE TO ALLOW JUDGE EATON TO ADDRESS THOSE SPECIFIC CHANGES.

OKAY.

BUT THIS COMPETENCY DETERMINATION PROCEDURE THAT WE ARE SUGGESTING BE ADDED AS A SUBSECTION TO THE MORRIS PROPOSAL ISN'T DEPENDENT UPON ANY PARTICULAR TIME PERIOD. IT SAYS THIS APPLICATION HAS TO BE MADE, WITHIN WHATEVER TIME PERIOD IS DETERMINED BY THE COURT TO BE PROPOSED APPROPRIATE, AND COULD BE A FREE-STANDING RULE. COULD BE, PERHAPS, BE A FREE-STANDING RULE, IN CONJUNCTION WITH 3.851, CURRENTLY EXISTS OR UNDER THIS RULE, AND I WOULD LIKE, NOW, TO TURN IT OVER TO JUDGE EATON.

GOOD MORNING. MY NAME IS O.H. EATON. I AM A CIRCUIT JUDGE IN THE EIGHTEENTH CIRCUIT AND A CHAIR OF THE FAST TRACK COMMITTEE AND, ALSO, A MEMBER OF THE MORRIS COMMITTEE, AND I WOULD LIKE TO ADDRESS THE CHANGES THAT THE RULES COMMITTEE HAS PROPOSED, AND, ALSO, IF I HAVE TIME, I WOULD LIKE TO GIVE A COUPLE OF MY VIEWS ON SOME OF THE OTHER MATTERS THAT HAVE BEEN DISCUSSED THIS MORNING. THE COMMITTEE REPORT THAT HAS BEEN FILED WITH THE COURT SHOWS WHAT THE CHANGES ARE. SOME OF THEM ARE VERY COSMETIC. FOR INSTANCE, WE SUGGESTED THAT THE TITLE TO RULE 3.851 AND 3.850 BE CHANGED TO SHOW THAT ONE OF THEM IS DEALING WITH DEATH PENALTY CASES AND ONE OF THEM WITH NONDEATH PENALTY CASES. I DON'T REALLY THINK THAT THAT IS MUCH OF AN ISSUE, BUT IT WILL, PROBABLY, HELP TO SOLVE CONFUSION FORM THE FIRST MAJOR THING THAT WE FOUND WAS THAT THERE WAS A GAP. IF YOU DON'T THE MORRIS -- IF YOU ADOPT THE MORRIS COMMITTEE RULE, WHEN IT GOES INTO EFFECT, IT IS ENTIRELY POSSIBLE THAT THERE WILL BE SOME CASES WHERE THERE IS CERTIORARI PENDING IN THE UNITED STATES SUPREME COURT. THAT WAS NOT COVERED BY THE MORRIS COMMITTEE REPORT, AND THE RULES COMMITTEE SUGGESTED A MAIN OR CHANGE IN THE WORDING, TO SHOW THAT APPOINTMENT OF COUNSEL WOULD TAKE PLACE WITHIN 30 DAYS OF THE MANDATE, RATHER THAN -- I AM SORRY. IT PRESENTLY SAYS WITHIN 30 DAYS OF THE MANDATE FROM THIS COURT, AND WE SUGGESTED THAT IT BE CHANGED TO WITHIN 30 DAYS FROM THE APPOINTMENT OF COUNSEL, TO COVER BOTH SITUATIONS, AND IF YOU READ THE RULE AND THE WAY THAT WE HAVE WORDED THAT, I THINK IT IS PRETTY OBVIOUS WHAT THAT PROBLEM IS. THERE IS, ALSO, THE SAME GAP INVOLVED IN TIME LIMITATIONS, IN SECTION C OF THE MORRIS RULE. THE REPORT ALLOWS ONE YEAR TO FILE POSTCONVICTION RELIEF MOTIONS, IN CASES PENDING CERTIORARI REVIEW, WHEN THE RULE BECOMES EFFECTIVE, SO THAT WOULD ALLOW FOR THOSE CASES WHERE CERTIORARI IS PENDING, FOR WHEN IT IS DENIED FOR A YEAR TO BE FILED FROM THAT DATE. OR A YEAR FROM THAT DATE. THE OTHER THING THAT THAT --

SO THAT WOULD BE HOW IT IS NOW. WHAT YOU ARE SUGGESTING?

YES. NO. THE WAY IT IS WORDED, NOW, IT DOESN'T TAKE INTO CONSIDERATION CASES WHICH MAY BE PENDING CERTIORARI.

BUT YOU ARE SUGGESTING A YEAR FROM WHEN CER. IT IS DENIED, WHICH IS, WHAT, 3.851 NOW --

PRESENTLY DOES, I BELIEVE, YES. I BELIEVE THAT IS TRUE. THE OTHER THING WAS WE SUGGESTED THAT THE STATE, AS WELL AS THE DEFENSE, BE LIMITED TO 50 PAGES. QUITE FRANKLY MY EXPERIENCE HAS BEEN THAT THE ANSWERS TO THESE MOTIONS ARE NEVER ALL THAT LENGTHY, AND IT HASN'T EVER BEEN A PROBLEM, BUT IT SEEMS TO BE A CONCERN TO SOME, AND THE RULES COMMITTEE CERTAINLY DIDN'T HAVE AN OBJECTION TO MAKING THE.

-PAGE LIMIT APPLY TO BOTH SIDES.

LET ME ASK YOU. THE.

-PAGE LIMIT FOR THE FULLY -- THE.

-PAGE LIMIT FOR THE FULLY-PLED MOTION IS TO INCLUDE ALL OF THE AFFIDAVIT SUPPORTING DOCUMENTS IN THE 50 PAGES?

NO. THERE USUALLY IS AN APPENDIX FILED WITH THESE THINGS THAT DEALS WITH, THAT HAS THAT KIND OF INFORMATION IN IT.

I GUESS I DIDN'T THINK THAT WAS AS CLEAR, IN THE PROPOSED RULE.

WELL, IT MAY NOT BE, BUT, I MEAN, THAT HAS BEEN THE PRACTICE, AND MAYBE YOU ARE JUST ASSUMING THAT EVERYBODY KNOWS IT, BUT THAT IS THE WAY IT GENERALLY IS. THE NEXT ONE, THERE IS, IT DEALS WITH THE PUBLIC RECORDS PROBLEM, AND THERE ARE A LOT OF PROBLEMS WITH PUBLIC RECORDS, BUT THE MORRIS COMMITTEE REPORT HAS A SENTENCE IN IT THAT SAYS DEPENDENCY OF -- THE PENDENCY -- DEPENDENCY OF COLLATERAL LITIGATION OR OTHER LITIGATION OR OF COUNSEL TO FILE THE CASE PROPERLY SHALL NOT TOLL THE TIME FOR ANY POSTCONVICTION PLEADING. THE RULES COMMITTEE LOOKED AT THAT, AND WE THOUGHT THAT IT WAS A LITTLE NARROW, IF YOU ARE GOING TO DON'T SUCH A RULE, AND WE SUGGESTED, AND YOU CAN TELL BY THE WORDING, THAT A PROFFER DRAFTED IT, IT -- THAT APPROVEES OR DRAFTED IT, IT SAYS -- THAT APPROVEES OR -- THAT A PROVEES OR DRAFTED IT, IT SAYS WHERE A FAILURE FOR DUE DILIGENCE SHALL NOT TOLL THE TIME FOR ANY POSTCONVICTION PLEADING. IT IS A RATHER AWKWARD SENTENCE, I THINK. IT COULD BE REWARDED TO SAY FAILURE OF COLLATERAL COUNSTOLL EXERCISE DUE DILIGENCE SHALL NOT TOLL THE TIME FOR FILING A POST CONVICTION MOTION.

SO IF COLLATERAL COUNSEL IS INEFFECTIVE IN MISSING THE DEADLINE, THEN WOULD THE MANIFEST INJUSTICE --

I WANT TO TALK TO YOU ABOUT THAT, BECAUSE WHEN I GET THROUGH THESE AMENDMENTS, I WANT TO TALK ABOUT CASE MANAGEMENT, AND I THINK I CAN ADDRESS YOUR CONCERN, WHEN I GET TO THAT POINT.

WHAT I AM CONCERNED ABOUT IS, AS I VOICED EARLIER, JUDGE EATON, IS IN THIS PORTION OF THE RULE, THAT THE RULES COMMITTEE HAS RECOMMENDED, AND GOING BACK TO USING THE DETERMINATION "DUE DILIGENCE", AND, ALSO, IN THE SUCCESSIVE MOTION AREA, THAT WHAT WE -- MY ANALYSIS OF OUR EXPERIENCE IS, THAT THE PROCEDURE SET UP IN THE EXCEPTION, BECOMES THE RULE, AS TO HOW EASY IT IS OR WHAT DUE DILIGENCE MEANS. ALL OF THOSE INTERPRETATIONS BECOME A PROBLEM, AND, ALSO, ON THE SUCCESSIVE MOTION, SINCE YOU HAVE BEEN THROUGH THE SUCCESSIVE MOTION FAIRLY RECENTLY, IN A WARRANT PERIOD, I WOULD LIKE YOU TO SPEAK TO THE PROBLEM OF THE GRANTING OF AN EVIDENTIARY HEARING OR THE NEED TO, ON WHAT IS CLAIMED TO BE A SUCCESSIVE MOTION, AND WHAT THAT IMPACT HAS TO DO ON THE PROCESS.

WELL, ARE YOU ASSUMING THAT THERE IS A REQUIREMENT FOR AN EVIDENTIARY HEARING, IN

CASES ON THE INITIAL MOTION?

CORRECT.

AND THEN WHAT SHOULD BE THE DIFFERENCE, IF IT IS A SUCCESSOR MOTION?

RIGHT.

I DON'T SEE ANY DIFFERENCE. I THINK IF YOU ARE GOING TO DO ONE, YOU SHOULD DO THE OTHER. I AM SORRY. I JUST DON'T SEE THE DIFFERENCE. IN FACT, THE SECOND MOTION, IF IT IS TRULY A SUCCESSOR MOTION, PROBABLY WOULD CRY OUT FOR AN EVIDENTIARY HEARING, MORE THAN THE FIRST.

IN OTHER WORDS IF IT IS A PROPERLY PLED, STATES A CAUSE OF ACTION.

RIGHT. BUT I DON'T LIKE THAT TERM, JUDGE. YOU KNOW, WE TOUCHED ON IT, PROFFER LATIMER TOUCHED ON IT -- PROVEESER -- PROVEES OR LATIMER TOUCHED UPON IT JUST A LITTLE BIT, BUT HABEAS CORPUS IS AN EXTRAORDINARY REMEDY THAT HAS ITS BASE IN ENGLAND. IT IS ITS OWN PROCEDURE.

IT HAS TO STATE A LEGAL BASIS FOR RELIEF, SO MAYBE THAT PHRASE.

RIGHT. BUT WHEN YOU CALL IT AN ACTION, THEN YOU START TALKING ABOUT STATUTES OF LIMITATION, BECAUSE THE LEGISLATURE HAS THE AUTHORITY TO ESTABLISH STATUTES OF LIMITATION TO ACTIONS, BUT THIS, WE ARE TALKING ABOUT A PROCEDURAL DEFAULT. THAT IS A COURT-MADE THING. THIS IS NOT A LEGISLATIVE-MADE THING, AND I THINK THERE IS A BIG DIFFERENCE. YOU HAVE A CASE, AND WE CITED IT ON THE FIRST PAGE OF THE RULES COMMITTEE'S REPORT. WHAT IS IT? IT IS RJA VERSUS FOSTER. IT HAS TO DO WITH THE SPEEDY TRIAL RULE CASE, AND IF YOU LOOK AT THAT, AND THEN YOU LOOK AT THE DUAL TRACK LEGISLATION, I DON'T SEE HOW YOU CAN MAKE A DISTINCTION BETWEEN THE TWO. I THINK THAT THEY ARE VERY SIMILAR.

AS FAR AS THE PROCEDURAL ISSUE IS CONCERNED?

RIGHT.

I DON'T WANT TO INTERRUPT YOU, EITHER, BUT WHILE YOU ARE UP THERE, I DO WANT TO, AND REALIZING THIS IS PROBABLY SKIPPING AHEAD TO THE CHANGES SUGGESTED BY THE RULES COMMITTEE AND NOW INTO THE AREA WHERE YOU SAID YOU WANTED TO ADDRESS SOME OF THE OTHER, COULD YOU ADDRESS EITHER THE WAY THE COMMITTEE DID IT OR THE WAY IT WOULD BE APPROPRIATE FOR THIS COURT TO DO IT, TO ENSURE THAT THESE UNDERPINNINGS OF THESE REQUIREMENTS, IN A PROCEDURAL RULE LIKE THIS, OF COMPETENT COUNSEL, A REASONABLE TIME TO INVESTIGATE AND PREPARE A PETITION, AND THE RESOURCES TO DO SO, SHOULD BE ADDRESSED BY THIS COURT, EITHER IN THE RULE OR THE COMMENTARY, OR HOW SHOULD THOSE MATTERS BE MADE MAN FEST, SO THAT THERE IS CLEARLY SHOWN A CONNECTION THAT THE RULES AND THE PROVISIONS, HERE, ARE PREDICATED ON THE EXIST ENOF THOSE THINGS?

LET ME SEE IF -- ON THE PRESENCE OF THOSE THINGS?

LET ME SEE IF I CAN ANSWER YOUR QUESTION THIS WAY. IT HAS TO DO WITH A CASE MANAGEMENT KIND OF ISSUE. FOR THOSE WHO DO NOT LIVE IN THE CRIMINAL DIVISION DAY BY DAY, LET ME EXPLAIN,000 WORKS FORM THE CRIMINAL DIVISION SYSTEM IS DEVELOPED ON THINGS THAT ARE CALLED COURT EVENTS. THE FIRST EVENT IN A CRIMINAL CASE IS A ARREST. AT THAT POINT THERE IS A FIRST APPEARANCE. AFTER FIRST APPEARANCE, THERE IS A ARRAIGNMENT. AFTER AN ARRAIGNMENT, THERE IS A PRETRIAL CONFERENCE OR A TRIAL. THEN

THERE IS AN APPEAL. IN OTHER WORDS, AT EVERY STEP OF THE PROCESS, THERE IS ANOTHER COURT EVENT SCHEDULED. SO IF I HAVE A CASE THAT IS PENDING IN MY COURT, I KNOW WHERE IT IS. IT IS ON A TRIAL DOCKET SOMEWHERE. OR IT IS ON AN ARRAIGNMENT DOCKET SOMEWHERE, SO THESE MOTIONS, THESE POSTCONVICTION MOTIONS, NEED TO BE MANAGED BY HAVING A COURT EVENT SCHEDULED IN EVERY EVENT, FROM THE TIME IT IS FILED UNTIL THE TIME IT IS DISPOSED OF. NOW, THE MORRIS REPORT SUGGESTS THAT WE HAVE STATUS CONFERENCES EVERY 90 DAYS, AND THE WORD STATUS CONFERENCE MEANS DIFFERENT THINGS TO DIFFERENT PARTS OF THE STATE. FOR THE WAY I WILL CONDUCT STATUS CONFERENCES IS I WILL PUT THESE MOTIONS ON MY TRIAL DOCKET, AND WHEN I HAVE A DOCKET SOUNDING ONCE A MONTH, IT WILL COUP, AND I WILL SAY, ALL RIGHT, HERE IT S WHAT IS THE STATUS OF THE CASE? WE WILL DECIDE WHAT IS GOING ON. WHAT THE PROBLEMS ARE WITH PUBLIC RECORDS. WE WILL ENTERORD ONERS, HOLD HEARINGS -- HE WE WILL ENTER ORDERS AND HOLD HEARINGS AND WHATEVER WE ARE GOING TO DO AND SET THE CASE FOR STATUS CONFERENCE EVERY 90 DAYS, AND IF IT LOOKS LIKE WE ARE READY TO HAVE THAT CASE HEARD, THEN WE SET IT FOR TRIAL, AND THAT IS THE WAY THAT YOU HAVE TO MANAGE THESE CASES. NOW, THE PROBLEM THAT YOU HAVE INDICATED AND SOME OF THE OTHER HAVE, TOO, IS THAT THERE IS A GAP FROM THE TIME THAT THE APPOINTMENT OF COUNSEL IS MADE, UNTIL THE MOTION IS FILED. AND DURING THAT TIME, WE ARE ALL ASSUME WILLING THAT -- ASSUMING THAT INVESTIGATIONS ARE TAKING PLACE BY COMPETENT COUNSEL, THAT PUBLIC RECORDS ARE BEING OBTAINED, THAT AGENCIES ARE PROVIDING THE PUBLIC RECORDS, AND ALL OF THESE THINGS, BUT DURING THAT ONE-YEAR GAP, THERE IS NOT ANYTHING TO CHECK, TO FIND OUT IF ALL OF THIS IS ACTUALLY GOING ON. SO ONE OF -- AFTER HAVING READ THIS WHOLE THING AND HAVING LOOKED AT THE WHOLE PROCEDURE, I THINK THAT THERE IS, FROM THE TIME COUNSEL IS APPOINTED, WE THEAD TO START HAVING -- WE NEED TO START HAVING COURT EVENTS, TO FIND OUT WHAT IS GOING ON, BECAUSE IF I FIND OUT THAT THE DEPARTMENT OF CORRECTIONS, FOR INSTANCE, HAS NOT PRODUCED PUBLIC RECORDS AND IT IS THREE MONTHS INTO THE PROCESS, I MEAN, WHY WOULD I WANT TO WAIT FOR A YEAR INTO THE PROCESS, BEFORE I DO SOMETHING ABOUT IT, SO THAT IS A GAP OR A, SOME SLOP IN THE SYSTEM THAT I SUSPECT WE RECOVER.

IS THERE A MECHANISM, NOW, BEFORE THE ONE-YEAR PERIOD, TO BRING PUBLIC RECORDS DISPUTES, USING 3.852, BEFORE THE TRIAL COURT? DOES THAT HAPPEN?

NO. I DON'T THINK SO. THE PRESENT RULE, I BELIEVE, CONTEMPLATES THAT A MOTION BE FILED FIRST.

SO I GUESS THAT IS WHAT, UNDER YOUR SYSTEM TO WORK, THE FULLY PLED MOTION TO BE FILED, YOU NEED TO HAVE THE PUBLIC RECORDS PRODUCTION COMPLETED.

YES. I THINK SO, AND I THINK THE TRIAL COURT SHOULD BE INVOLVED IN THAT SOMETIME DURING THAT YEAR, AND IT WOULD -- I MEAN, IT WOULD JUST SEEM TO MAKE SENSE.

BECAUSE WHAT YOU WERE SAYING, I HEARD YOU SAY THAT EVERY 90 DAYS, IF YOU HAD THE STATUS CONFERENCE, YOU MIGHT BE CHECKING ON PUBLIC RECORDS PRODUCTION, IF THE ONE-YEAR PERIOD WAS USED FOR PUBLIC RECORDS PRODUCTION, ONE YEAR AFTER THE DECISION OF THIS COURT.

RIGHT.

THEN THAT WOULD BE A PRODUCTIVE TIME, WHERE THE TRIAL COURT WOULD BE ACTIVELY MAKING SURE THAT ALL OF THE PUBLIC RECORDS THAT ARE REQUESTED ARE THERE AND THEN ALLOWING A DEFENDANT WITH A COMPETENT COUNSEL APPOINTED THE YEAR BEFORE, TO, REALLY, DABBLE, TO FILE A MOTION WITH TEETH IN IT.

WELL, WITH, YOU KNOW, WE ALL HOPE THAT THE WORLD IS PERFECT, AND THAT ALL PUBLIC RECORDS ARE PRESENTED AND PRODUCED BEFORE THE ONE YEAR, BEFORE THE MOTION IS FILED,

BUT WE KNOW, FROM EXPERIENCE, THAT SOMEHOW PUBLIC RECORDS TEND TO GET FOUND LATER, TOO, AND AS A RESULT, THAT IS WHY I AM SAYING PART OF THE STATUS CONFERENCE EVERY 90 DAYS IS TO SEE HOW THINGS ARE GOING ON.

BUT UNDER THE LEGISLATIVE PROPOSAL, THERE IS NO, SINCE WE KNOW THE REALITY IS PUBLIC RECORDS DON'T ALL GET PRODUCED, THERE IS NO SAFETY VALVE TO ALLOW FOR THE AMENDMENT TO THAT PUBLIC RECORD THAT WASN'T PRODUCED.

YES, AND SINCE YOU MENTIONED SAFETY VALVES, JUSTICE, I DO HAVE THREE. NOW, I AM A MEMBER OF THE MORRIS COMMITTEE, AND WE DRAFTED THIS REPORT, AND I SUPPORT THIS REPORT, BUT I HAVE READ, NOW, COMMENTS FROM THE PUBLIC DEFENDERS' ASSOCIATION. I HAVE READ COMMENTS KPR THE CAPITAL COLLATERAL PEOPLE, AND THERE ARE SOME THINGS THAT I THINK WE NEED TO TALK ABOUT CONSIDER, AND THERE ARE THREE SAFETY VALVES IN THIS THING THAT I FEEL PROBABLY NEED TO BE ADDRESSED. ONE IS WHAT HAPPENS IF CERTIORARI IS ACTUALLY ACCEPTED BY THE UNITED STATES SUPREME COURT? SHOULD TIME FOR FILING OR PROCESSING A POST CONVICTION RELIEF MOTION BE TOLLED DURING THAT TIME? BECAUSE IT IS A WASTE OF ENERGY AND RESOURCES TO DO OTHERWISE? I THINK PROBABLY SO. I THINK, WHAT, NINE TIMES IT HAS HAPPENED IN 20 YEARS, BUT NONETHELESS, IT IS A WASTE OF TIME AND ENERGY, IF THE U.S. SUPREME COURT ACCEPTS CERTIORARI. SECONDLY, I THINK THAT WE OUGHT TO LOOK AT THE POSSIBILITY OF ALLOWING AN AMENDMENT FOR TRULY NEWLY-DISCOVERED EVIDENCE, PRIOR TO THE HEARING ON THE MOTION. NOW, I REALIZE THAT THAT CUTS INTO A LOT OF THE IDEAS THAT WE HAVE SUGGESTED, BUT NONETHELESS, IT SEEMS LIKE THERE ARE TIMES WHEN YOU HAVE GOT TRULY NEWLY-DISCOVERED EVIDENCE, WHERE IT WOULD MAKE SENSE TO GO AHEAD AND ALLOW THE AMENDMENT.

ON THAT POINT, LET ME JUST ASK YOU, BECAUSE WE ARE TALKING ABOUT DELAY, IF THE JUDGE HAS SET, LIKE YOU SAID ABOUT EVENTS, AND I THINK THAT SOUNDS LIKE A GREAT IDEA OF DOCKET CONTROL, DO YOU SET AN EVIDENTIARY HEARING AND SAY WE ARE GOING TO HAVE THIS EVIDENTIARY HEARING IN APRIL?

UM-HUM.

IT IS NOW FEBRUARY, AND THIS IS, IN CIVIL CASES, THE RULE IS AMENDMENTS ARE FREELY GRANTED, SO THAT JUSTICE IS DONE. AND THIS PUBLIC RECORDS COMES UP AND SAYS I NEED TO AMEND IT, TO MAKE SURE TAKE THIS CLAIM IS DID YOU DO CHRUDED. WHAT -- IS INCLUDED. WHAT IS THE DELAY THAT INCURS BY NOT ALLOWING THAT AMENDMENT PRIOR TO THE EVIDENTIARY HEARING?

NO DELAY, UNLESS THE STATE FEELS THERE IS IN SORT OF DELAY CAUSED.

AND IF THERE IS NO PREJUDICE DI, BECAUSE IT IS A RECORD THAT THE STATE HAD TO PRODUCE, WHY WOULDN'T WE BE ALLOWING AN EVIDENTIARY HEARING BEFORE THE PUBLIC RECORDS IS HELD?

THAT GETS INTO A PUBLIC PRIVATE RECORDS RIGHT AWAY.

BUT GETTING INTO DETAIL, DON'T WE GET INTO DETAIL, REVOLVING BACK TO THE QUESTION OF WHAT IS, QUOTE, TRULY NEWLY-DISCOVERED EVIDENCE? THAT IS THE CONUNDRUM THAT THIS WHOLE THING PRESENTS.

THAT'S RIGHT. AND IT GETS DOWN TO A JUDGMENT CALL AS TO WHETHER YOU ARE GOING TO ALLOW IT OR NOT, BUT YOU ARE EITHER GOING TO HAVE TO ALLOW IT FOR TRULY NEWLY-DISCOVERED EVIDENCE, OR THE DOOR IS SHUT. I DON'T KNOW HOW YOU CAN DEFINE IT, ONE WAY OR THE OTHER.

AND TRULY NEWLY-DISCOVERED EVIDENCE IS THE MILLS CASE?

WHAT IS THE LINE OF EVIDENCE?

DUE DILIGENCE.

THEY ARE ALL CITED IN SPAZIANO, BUT I CAN'T REMEMBER THE NAMES OF THE CASES.

YOU WERE GOING TO DO YOUR THIRD POINT, AND THEN YOU MUST CONCLUDE.

THE THIRD POINT, I AM SORRY, IS WE NEED TO HAVE, AND WE TALKED ABOUT IT SOME THIS MORNING, AN ABILTY TO EXTEND TYPES FOR TRUE EMERGENCIES. DEATH OF A LAWYER. ILLNESS OF A LAWYER. UNFORESEEABLE EVENTS THAT WE DON'T CONTEMPLATE.

BEFORE YOU SIT DOWN.

YES, SIR.

YOU MENTIONED, BEFORE, YOUR VIEW THAT THERE IS A NEED TO MONITOR OR TO HAVE EVENTS, AS YOU PUT IT, WITH REFERENCE TO THE APPOINTMENT OF COUNSEL AND INVESTIGATION AND THE RESOURCES OR WHATEVER ARE THERE. WE HAVE HAD TIME-CONSUMING BATTLES GOING ON, UP TO THIS POINT, ON THE ISSUE OF, WELL, YOU CAN'T COME INTO COURT AND HAVE A MOTION TO COMPEL PRODUCTION, FOR INSTANCE, OR TO RAISE ISSUES LIKE THAT, BECAUSE YOU HAVEN'T, FIRST, FILED YOUR PETITION, AND IT IS NOT PENDING IN THE COURT. HOW WOULD YOU ADDRESS THAT? IN OTHER WORDS LIKE ONE OF THE POSSIBILITIES IS THAT WE SPECIFICALLY PROVIDE THAT JURISDICTION REMAINS IN THE TRIAL COURT THAT IMPOSED THE JUDGMENT AND SENTENCE FOR ISSUES LIKE THAT, EVEN BEFORE THE FORMAL FILING OF A PETITION, BUT HAVE YOU GIVEN ANY THOUGHT TO THAT?

THAT IS THE WAY TO DO IT. I THINK THAT APPOINTMENT OF COLLATERAL COUNSEL OUGHT TO TRIGGER THE ABILITY TO COME TO COURT AND GET THE PUBLIC RECORDS THAT ARE NEEDED.

EVEN BEFORE THE FILING OF THE PETITION?

YES, SIR.

AND WE SHOULD MAKE THAT EXPLICIT?

YES, SIR.

DOESN'T THERE HAVE TO BE SOME RELEVANT BASIS? ONE OF THE PROBLEMS I HAVE SEEN, SINCE I HAVE BEEN HERE, IS PUBLIC RECORDS, IS THE FACT THAT YOU HAVE THESE BREADTH OF SYSTEM-WIDE DISCOVERY FOR THE PERSONNEL RECORDS OF ARRIVE PERSON THAT HAS EVER BEEN INCARCERATED WITH THIS PERSON, AND YOU HAVE GOT TO HAVE SOMETHING TO TIE IT TO BEING DISCOVERABLE.

YES. AND THAT IS A PROBLEM. BUT I THINK YOU CAN AT LEAST REQUIRE DISCOVERY OF THE RECORDS THAT EVERYBODY IN THE CASE KNOWS ARE A PERTINENT TO THE CASE. -- ARE AND EARTHNENT TO THE CASE. THE -- APERTINENT, THE RECORDS INVOLVING THIS CASE, THE RECORDS INVOLVING THE ARREST. THE WITNESSES THAT TESTIFIED. YOU CAN DO THAT SORT OF THING. I AGREE WITH. THAT I HAVE RECEIVED THESE MOTIONS, WHERE THE DEMAND FOR DISCOVERY, FROM EVERYTHING TO THE STATE ATTORNEY'S OFFICE IN MIAMI TO EVERYTHING THAT DIDN'T HAVE ANYTHING TO DO WITH IT, AND I GUESS STATE TRIAL JUDGES HAVE TO WADE THROUGH THAT AND MAKE A DECISION. I DON'T KNOW,000 DO IT OTHERWISE. THANK YOU.

THANK YOU. MR. MARTELL.

THANK YOU, YOUR HONOR. JUST VERY BRIEFLY, IT IS OUR INTENTION THAT WE RECOGNIZE THE GOOD INTENT ON THE COMMITTEE WHICH WORKED ON THE MORRIS COMMITTEE REPORT, ITSELF, IN OTHER WORDS THE BAR REVISION, BUT WE SUGGEST THAT THE RECOMMENDATIONS MADE TO THE MORRIS COMMISSION DO, IN FACT, NOT AGREE WITH ITS WORK PRODUCT, AND WITH REGARD TO JUSTICE WELLS AND THE, WHAT IS CALLED THE CARTER COMPETENCY, SHOULD BE A BAR PROCEEDING THAT IS LIKELY IN ADDITION TO THESE PROCEEDINGS. THAT, PRETTY MUCH, OTHERWISE I WOULD RELY ON OUR PLEADINGS TO THIS AND INTRODUCE MR. FEENEY, WHO WOULD LIKE TO SPEAK BEFORE THIS COURT.

THANK YOU. MR. FEENEY?

THANK YOU AND MAY IT PLEASE THE COURT. MY NAME IS TOM FEENEY, AND I AM JOINED HERE, TODAY, BY JOHNNY BYRD AND DUDLEY GOODLETTE, ON BEHALF OF THE SPEAKER OF THE HOUSE, REPRESENTATIVE THRASHER, AND THE HOUSE OF REPRESENTATIVES. WE APPRECIATE THE COURT'S SERIOUS EFFORTS TO RESOLVE THE PROBLEMS THAT HAVE BEEN RECOGNIZED BY THE EXECUTIVE BRANCH AND JUDICIARY AND LEGISLATIVE BRANCH, WITH RESPECT TO THE POSTCONVICTION COLLATERAL PROCESS, AND WE ARE GRATEFUL FOR THE OPPORTUNITY, AS THIS COURT SAID, IN CALLOWAY, TO WORK HAND-IN-HAND TO TRY TO RESOLVE THE ISSUES THAT AFFECT THE PEOPLE OF THE STATE OF FLORIDA. I AM PARTICULARLY EXCITED ABOUT BEING IN FRONT OF YOU TODAY. I HAVE TO TELL THAT YOU NEITHER MR. BYRD OR MR. GOODE LET MORE NOR MYSELF ARE SCHOLARS, WITH REGARD TO CONSTITUTIONAL LAW, AND WE WILL DEFER TO YOU ON THOSE MATTERS. HAVING SAID THAT, TO ENACT THE STATUTE THAT WE DID, PARTICULARLY SIX AND SEVEN, INVOLVING STATUTE OF LIMITATIONS, WE DO THINK IT IS IMPORTANT THAT WE PLAY A ROLE HERE, TODAY, AND WE ARE VERY GRATEFUL FOR THE OPPORTUNITY. I WOULD SUGGEST TO YOU THAT THERE ARE SEVERAL POINTS THAT HAVE BEEN MADE, AND BY THE WAY, REPRESENTATIVE BYRD IS HERE. IF THERE ARE ANY QUESTIONS ABOUT OUR DETAILED RULE MAKING, JOINT POWERS, IN THAT TWILIGHT ZONE, ARTICLE V, 2-A, REPRESENTATIVE GOODLETTE WITH REGARD TO THE MORRIS COMMITTEE'S FINDINGS AND THE STATUTE AND TECHNICALLY I REALIZE WE ARE PART OF THE RULE-MAKING PROCESS, BUT IF THE COURT WOULD ALLOW, I WOULD ADDRESS THE FEATURES THAT WE CAN BE KEY IN SPEAKING TO, WITH REGARD TO THE DUAL ROLE. FIRST I WOULD TALK ABOUT THE DUAL TRACKING SYSTEM, AND THE COURT PETITIONEDERLY YEAR THAT THE -- PETITIONED EARLIER THAT THE TEXAS MODEL, WHICH I THINK THEY SAID HAD THE EQUATION OF A PROFESSIONAL WRESTLING MATCH. I AM NOT SURE WHAT CONSTITUTIONAL MATTER THAT HOLDS FOR US, BUT HAVING SAID THAT, I THINK THAT THE LEGISLATURE CAN BASICALLY LOOK AT POLICIES AROUND THE COUNTRY, INCLUDING DUAL TRACKING AND PARALLEL TRACKING, LIKE VIRGINIA AND OKLAHOMA AND TAKE NOTE OF THE SUCCESSFUL DROP IN CRIME RATE AND VIOLENT ASSAULT AND MURDER, PARTICULARLY IN THE STATE OF TEXAS, RELATIVE TO THE COUNTRY, AND THAT IS A QUESTION OF POLITICAL QUIZ DOM AND JUDGMENT, WE FEEL. IF THERE ARE PARTICULARLY CONSTITUTIONAL ATTACKS ON THE TEXAS DUAL-TRACK SYSTEM THAT WOULD APPLY HERE, WE THINK THAT WOULD AND VERY DIFFERENT MATTER. WITH RESPECT TO RULE MAKING IN THE TWILIGHT ZONE IN GENERAL, WE WOULD NOTE THAT WE HAVE ASKED OUR STAFF, IN THE LAST WEEK OR TWO, TO GO THROUGH ALL OF THE DIFFERENT, QUOTE, RULES OR PROCEDURAL ASPECTS OF WHAT WE TELL PEOPLE THAT THEY HAVE THE RIGHT TO DO OR TIME LIMITS IN COURT PROCEEDINGS, BOTH CIVIL AND CRIMINAL, THROUGHOUT OUR STATUTES, AND WE NOTED, JUST IN A CURSORY REVIEW, SOME 500 EXAMPLES OF WHERE WE HAVE ENGAGED IN THE RULE-MAKING PROCESS. WE ARE NOT HERE ARGUING THAT YOU DO NOT HAVE CONCLUSIVE JURISDICTION TO DO PROCEDURAL THING IN HIS THE COURT SYSTEM. WE ARE HERE, ARGUING THAT THERE ARE NUMEROUS CASES, DOMESTIC BATTERY, FOR EXAMPLE, CHILDREN, CHILD ABUSE, WHERE THE LEGISLATURE CONSTANTLY FEELS THAT IT IS IMPORTANT AND INTERTWINED IN THE SUBSTANTIVE POLICY OF THE LAW TO MAKE SURE THAT WE AT LEAST MAKE SUGGESTIONS, WHICH IS WHAT WE DID IN SECTION 8 AND SECTION 9 HERE, AND IN SOME CASES

OUR RULES, WE FEEL, ARE INTRICATELY INTERTWINED WITH THE POLICY THAT WE HAVE THE AUTHORITY TO ENACT. THERE IS SOME QUESTION ABOUT FUNDING HERE, TODAY, ALTHOUGH I AM NOT HERE TO TELL YOU WHAT WILL HAPPEN IN THE NEXT A 5 DAYS, I AM HERE TO TAKE NOTICE OF THE JUDICIAL FACT THAT, WHEN WE PASSED THE BILL DURING SESSION, WE HAD A FISCAL ANALYSIS IN THE HOUSE SIDE. EVERY MEMBER THAT VOTED ON THE BILL THAT READ THAT FISCAL ANALYSIS, WOULD KNOW AND SUGGEST THAT, IN ORDER TO ENACT THIS LEGISLATION, IT WOULD PROBABLY COST IN EXCESS OF $4 MILLION THIS YEAR, BECAUSE OF THE BUBBLE, THE BACK LOAD OF CASES THE PETITIONERS TALK ABOUT. WE BELIEVE THAT, IN THE NEXT FISCAL YEAR, THERE WILL PROBABLY AND IMPACT OF AROUND $9 MILLION AND THEN $10 MOIN 5 OR $11 MILLION AFTER. THAT HOWEVER, IN THE NEXT A 5 DAYS, WE DON'T HAVE A STATUTE OF LIMITATIONS EXCEPT THE FINAL PASSAGE OF THE APPROPRIATIONS PROCESS, AND WE ARE CERTAINLY EXPECTING TO HEAR FROM THE ATTORNEY GENERAL'S OFFICE, THE CCR AND THE --

MR. FEENEY, DID YOU CONSIDER THE MATTER OR WILL YOU CONSIDER THE MATTER OF THE NECESSITY, IN ORDER TO DUE PROCESS THESE CASES AND THE IMPORTANCE IN PROCESSING THESE CASES, OF REALTIME COURT REPORTING, SO THAT THE RECORDS AND THE TRANSCRIPTS CAN BE TIMELY PROVIDED TO THE DEFENSE COUNSEL AND THE COURT?

YOUR HONOR, THIS COURT UPHOLDS THE SUBSTANTIVE PORTIONS OF THE ACT AND EITHER ADOPTS OUR RULES OR OTHER RULES CONSISTENT WITH THE ACT, WE WILL CONSIDER EVERYTHING THAT THIS COURT HAS DONE AND THAT HAPPENED DURING SPECIAL SESSION, AND WE WILL TAKE A GUIDANCE FROM THIS COURT, THE PD'S OFFICE, THE CCR AND THE ATTORNEY GENERAL'S OFFICE, WITH RESPECT TO MAKING THE IMPORTANCE OF THESE RECORDS OPEN AS QUICKLY AS POSSIBLE, IN ORDER FOR THE PROCESS TO MOVE FORWARD. AGAIN, I AM SPEAKING PROSPECTIVELY, BUT RETROSPECT I FEEL, I CAN SURE YOU WE DID TAKE A -- I CAN ASSURE YOU WE DID TAKE A LOOK AT THE FISCAL IMPACT. WE CONSIDERED IT DURING SPECIAL SESSION.

IN WHAT AREAS DID YOUR REPORT INDICATE THIS $4 MILLION WOULD BE NEEDED IN?

YOUR HONOR, I AM NOT INTRICATELY FAMILIAR WITH WHERE THAT $4 MILLION WAS ARRIVED AT NOR THE $9 MILLION IN FISCAL YEAR TWO AND THE $10.5 OR $11 MILLION IN FISCAL YEAR THREE. WE HAVE APPROPRIATIONS COMMITTEE IN THE HOUSE AND THE SENATE IS DOING THE SAME. I ADVISED, WITHOUT GIVING YOU TESTIMONY, THAT THE SENATE HAS PUT IN SOMETHING LIKE A TOTAL OF $6 MILLION FOR THIS YEAR, SO WE ARE WORKING ON THESE ISSUES AS WE SPEAK. WHAT YOU DO HERE, WITH RESPECT TO RULE MAKING, WOULD BE PART OF WHAT WE ANALYZE, I WOULD HOPE. IF I CAN ADDRESS A VERY IMPORTANT ISSUE, WITH RESPECT TO THE SUCCESSIVE CLAIMS ISSUE, BECAUSE JUDGE EATON JUST ADDRESSED THE FACT THAT IT A REAL DILEMMA, HOW DO YOU PRESERVE THE RIGHTS, AND I WOULD SUGGEST THAT MAYBE IT HASN'T BEEN MADE PRECISELY CLEAR TO THIS COURT WHAT THE STANDARD THAT WE INTENDED TO DON'T WAS. IT WAS ESSENTIALLY THE FEDERAL STANDARD. WE VIEW IT AS A HYPOTHETICAL STANDARD, A BUT-FOR TEST, AND WE WOULD SUGGEST THAT THIS COURT PUT ITSELF IN THE POSITION OF A JURY, FOUR, FIVE, SIX YEARS AGO, WITH NEWLY-DISCOVERED EVIDENCE UNDER BRADY, WHETHER INTENTIONALLY OR UNINTENTIONALLY HELD, WHETHER DNA EVIDENCE OR SOME NEW TECHNOLOGY THAT WOULD COME DOWN IN THE FUTURE, AND WE SUGGEST THAT, HAD A JURY IGNORED THAT EVIDENCE OR DESPITE THAT EVIDENCE, CONVICTED SOME INDIVIDUAL DEFENDANT, THAT THAT WOULD HAVE BEEN A CONSTITUTIONAL INFIRMITY. WE BELIEVE YOU ARE THERE. WE BELIEVE THAT YOU HAVE TOLLED THE STATUTE OF LIMITATIONS, AND THAT LEADS ME TO MY FINAL POINT, IF I MAY, AND THAT IS THAT JUDGE EATON SUGGESTED THAT STATUTE OF LIMITATIONS ARE APPROPRIATE IN TYPICAL STATUTORY MATTERS AND CAUSES OF ACTIONS, AND HE DWIBD DISTINGUISHED DISTINGUISHED BETWEEN A CAUSE OF ACTION AND A WRIT OF SHAPE YAS CORPUS FORM I WOULD SUGGEST TO -- OF HABEAS CORPUS, AND I WOULD SUGGEST TO YOU THAT BACK IN 1929 HAD, IN THE PALMER CASE, WE BELIEVE THAT, IN HABEAS CORPUS, THAT IF YOU LOOK AT THIS COURT IN CALLOWAY, WHERE THIS COURT SPECIFICALLY REJECTED THE NOTION THAT IT COULD NOT ENACT A STATUTE OF LIMITATIONS, YOU WOULD

FIND THAT WE DO HAVE AT POWER TO DO THAT, NN AND IN THE CASE OF CALLOWAY, WE BELIEVE THAT, UNDER RULE C, WE SPECIFICALLY FIND THAT YOU WILL FIND THE LEGISLATURE'S ACTION, WITH REGARD TO LAWS, WAS SPECIFICALLY ADDRESSED BY THIS WRIT.

AREN'T YOU HAVING SOME PROBLEMS ARE, HERE, WITH, I RECOGNIZE THAT YOUR THROUGHS IS FINALITY. BUT FINALITY SEEMS TO BE RUNNING UP AGAINST SOME CONSTITUTIONAL PROBLEMS OF DUE PROCESS, EQUAL PROTECTION, AND ALL OF THESE THINGS WE HAVE BEEN DISCUSSING, AND BASIC JUSTICE AND FAIRNESS. DOES -- DO YOU RECOLLECTING ON NAIS THAT?

YOUR HONOR, WE CERTAINLY DO. WE BELIEVE THAT STATUTE OF LIMITATIONS AND HABEAS AXS ENACTED -- ACTIONS ENACTED BY LEGISLATURES, BOTH AT THE FEDERAL LEVEL AND AT THE STATE LEVEL, ARE SUPPORTABLE AND DEFENSIBLE, IF THE TIME LINE IS REASONABLE, AND PART OF THE REASONABLENESS REQUIREMENT, WE SUGGEST WOULD, AND AS WE INVITE IN OUR ACTION, THE COURT WOULD UPHOLD THE CONSTITUTIONALITY OF THE STATUTE, SO WE WOULD SUGGEST THIS BASICALLY IS GOING TO HAVE TO BE LOOKED AT AS A WHOLE. WHEN YOU COMPLETED WITH YOUR RULE MAKING PROCESS, WE SUGGEST THAT YOU WILL MAKE THE FULL INTENT OF GIVING THE FULL CONSTITUTIONALITY AND INTENT OF THE SUBSTANTIVE LAW THAT WE ENACTED, BACK AT THE TIME OF THE ACTION.

I AM ASKING YOU THIS, IN ACTUAL FREE STANDING, WHAT IS YOUR POSITION ON THAT?

I THINK, YOUR HONOR, OUR POSITION IS THE SAME AS THE FEDERAL TEST, AND THAT IS, AGAIN, THAT ANY NEWLY-DISCOVERED EVIDENCE, THAT ANY DN A OR TECHNICAL EVIDENCE THAT WOULD HAVE BEEN, HAD THE JURY IGNORED IT, IF A HYPOTHETICAL TRIAL OCCURRING AT THE ACTUAL TIME THE TRIAL OCCURRED, WITH THAT ADDITIONAL EVIDENCE, IF THE JURY IGNORED IT, IF IT WOULD HAVE BEEN A CONSTITUTIONAL INFIRMITY, WE BELIEVE IT SHOULD TAKE DOWN THE CONVICTION.

BUT THAT EVIDENCE IS NOT AVAILABLE IN THE TECHNOLOGY WAS NOT AVAILABLE AT THE TIME OF TRIAL, AND I THINK THAT THE CONCERN THAT WE HAVE IS YOU HAVE COUPLED THAT INNOCENCE WITH A CONSTITUTIONAL ERROR. AND WHAT I HEAR YOU SAYING IS, NOW, HAD THAT EVIDENCE BEEN PRESENTED, IT WOULD BE UNCONSTITUTIONAL TO HAVE CONVICTED THAT DEFENDANT.

YES, SIR. WE ARE ASKING YOU TO CONDUCT A HYPOTHETICAL TRIAL WITH THAT EVIDENCE, HAVING BEEN AVAILABLE AT THE TIME THE FIRST TRIAL TOOK PLACE. WE BELIEVE THAT IS THE FEDERAL TEST, YOUR HONOR.

AND SO YOU AGREE WITH MR. MARTELL THAT THE REAL THRESHOLD IS NOT A COMBINATION OF THE TWO BUT THAT THERE IS A TEST OF INNOCENCE, AND HAD THAT BEEN AVAILABLE AT THE TIME OF TRIAL, THERE WOULD HAVE BEEN A CLAIM OR THERE WOULD HAVE BEEN A FEIGNEDING OF NOT GUILTY?

YOUR HONOR, I AM NOT SURE WHICH THRESHOLD TEST COMES FIRST. WE WILL ALLOW THIS COURT TO DECIDE. IT IS A CON JUNKTIVE TEST. YOU NEED BOTH OF THEM, ACCORDING TO THE WAY WE HAVE WRITTEN THE BILL. I WANT TO THANK THE COURT. I WANT TO THANK THE EXECUTIVE BRANCH. WE ARE GAITFUL -- GRATEFUL TO PARTICIPATE IN THE PROCESS, AND WE LOOK FORWARD TO A VERY GOOD RESULT.

THANK YOU. IS ANYONE ELSE SPEAKING? MR. BYRD.

MAY IT PLEASE THE COURT. I AM JOHNNY BYRD, ALSO REPRESENTING SPEAKER THRASHER. AGAIN, IN THE CALLOWAY CASE, JUSTICE SHAW, IN 1998, SAID THAT THE SEPARATION OF POWERS IS A POTENT DOCTRINE, CENTRAL TO OUR CONSTITUTIONAL FORM OF STATE GOVERNMENT, AND WENT ON TO SAY THAT THIS DOES NOT MEAN THAT THE TWO BRANCHES OF GOVERNMENT

CANNOT WORK HAND-IN-HAND IN PROMOTING THE PUBLIC GOOD, AS WELL AS IMPLEMENTING THE PUBLIC WILL. SO I WOULD REITERATE WHAT REPRESENTATIVE ATTORNEY FEENEY HAS SAID ON WHAT HAVE THE SPEAKER -- ON BEHALF OF THE SPEAKERER, THAT THE SPEAKER AND THE HOUSE IS COMMITED TO WORKING HAND-IN-HAND WITH THE COURT TO IMPLEMENT THE PUBLIC WILL. THE --

DO YOU THINK IT IS THE PUBLIC WILL THAT AN INNOCENT PERSON SHOULD BE EXECUTED?

I WOULD NEVER THINK IT WOULD BE THE PUBLIC WILL IN THE STATE OF FLORIDA THAT AN INNOCENT PERSON BE EXECUTED.

AN I BEG YOUR PARDON?

I WOULD NEVER THINK THAT IT WOULD BE THE PUBLIC WILL, IN THE GREAT STATE OF FLORIDA, THAT AN INNOCENT PERSON BE EXECUTED.

THAT IS A CONCERN WE ARE HAVING, THE WAY THE ACT IS WORDED. THAT COULD HAPPEN. DO YOU RECOGNIZE THAT?

WE RECOGNIZE. THAT THE INTERPLAY BETWEEN ARTICLE II SECTION A AND STATUTORY ENACTMENTS BY THE LEGISLATURE, I THINK, PLACES THE EMPHASIS ON THE LAST SENTENCE OF ARTICLE FIVE SECTION 2-A, WHAT IS THE SIGNIFICANCE OF THE PEOPLE'S WILL, WHEN A TWO-THIRDS VOTE OF THE LEGISLATURE OVERRIDES A COURT RULE? I THINK THAT IS WHERE WE ARE TODAY. THAT AT SOME POINT, THERE MUST BE DEFERENCE TO THE LEGISLATIVE WILL, THE WILL OF THE PEOPLE, IN ADDRESSING THE TEMP RAL AND OTHER LIMITS -- TEMPORAL AND OTHER LIMITS TO THE RIGHTS OF HABEAS CORPUS, SO THAT IS WHY WE ARE HERE. THANK BEGS THE QUESTION THAT IS WHY WE ARE HERE TODAY. THE LEGISLATURE HAS IMPLEMENTED THE PEOPLE'S WILL THAT PUTS A FINITE TIME LIMIT ON THE HABEAS CORPUS RIGHT, AND THE QUESTION IS, IS THAT REASONABLE, AND HOW DOES THAT INTERPLAY WITH THE COURT'S ABILITY TO IMPLEMENT RULES OF PROCEDURE.

WELL, IT IS NOT ONLY IF IT IS REASONABLE, BUT IT IS, ALSO, WHETHER IT MEASURES UP TO CONSTITUTIONAL RESTRAINTS. YOU WOULD AGREE, I ASSUME.

I AGREE.

EVEN THE POPULAR WILL OF THE PEOPLE HAS TO GIVE WAY TO CONSTITUTIONAL RESTRAINTS.

WE AGREE TOTALLY WITH THAT.

LET ME ASK YOU SOMETHING. OBVIOUSLY THIS IS SOMETHING THAT WE ARE STRUGGLING WITH, AND WE HAVE STRUGGLED, YOU KNOW, FOR A LONG TIME IN OR WORK, ON THE ISSUE. -- IN OR WORK, ON THE ISSUE. I WAS IMPRESSED THAT YOUR COLLEAGUE SAID THAT THE LEGISLATURE WOULD FULLY BACK UP, IN TERMS OF FUNDING EFFORTS TO MAKE THIS PROCESS MORE EFFICIENT, WHILE BALANCING THE OTHERS, BUT HE SEEMED TO HAVE A CAVEAT IN THERE, AND THE CAVEAT WAS ASSUMING THAT WE UPHOLD THE SUBSTANTIVE PROVISIONS OF THE LEGISLATION, THAT WE COULD BE ASSURED THAT THE LEGISLATURE WOULD -- WE OBVIOUSLY HAVEN'T DECIDED THIS. IT IS A TOUGH JOB, BELIEVE ME, IN DOING THIS. ASSUMING THAT WE DECIDE THAT THERE ARE SOME CONSTITUTIONAL PROBLEMS HERE, BUT NEVERTHELESS AS WE HAVE BEEN IN THE COURSE OF TRYING TO DO, AS IS EVIDENCED BY THE WORK OF THE MORRIS COMMITTEE, THAT WE ARE GOING TO FOLLOW THE SPIRIT OF THE LEGISLATIVE MESSAGE HERE, IN SOME FORM, CAN WE BE ASSURED THAT THE LEGISLATURE WILL FUND THESE EFFORTS TO MAKE THIS PROCESS, FOR LACK OF A BETTER WORD, MORE EFFICIENT?

THEREIN LIES THE THRUST AND THE SEPARATION OF POWERS. AND I CAN TELL YOU THIS, THAT

WE ARE COMMITTED TO BE PUT IN A POSITION TO BE EMBARRASSED. IT WOULD BE THE BEST RESULT FOR THE BALL TO BE IN THE LEGISLATURE'S COURT, TO SEE IF WE -- I FORGET THE EXACT WORDS OF THE CHIEF -- WILL FAIL IN OUR CARING OUT THE PUBLIC'S WILL, BUT THAT IS THE ONLY WAY THAT WE WILL FIND OUT WHETHER THE LEGISLATURE HAS THE POLITICAL WILL TO CARRY OUT THE PUBLIC'S WILL IN IMPLEMENTING THESE SHORTENED TIME TEMPORAL LIMITS ON THE HABEAS CORPUS RIGHTS, SO I THINK THE ONLY WAY TO FIND THE ANSWER TO THAT IS TO SEE WHAT HAPPENS, AND AS AN ATTORNEY, I CAN SAY TRUST ME. [LAUGHTER]

I HAVE ONE QUESTION ON THIS. YOU WOULD, IN ORDER FOR THIS, WHATEVER THE TIME LIMIT IS, WHETHER IT IS SIX MONTHS, A YEAR, FOR THE MOTION, ITSELF, TO BE MEANINGFUL, AS FAR AS BEING ABLE TO HAVE CONTAINED THE INFORMATION NECESSARY FOR THE JUDGE TO DECIDE TO GRANT AN EVIDENTIARY HEARING, CERTAIN THINGS NEED TO BE IN PLACE, AND WE TALKED ABOUT THAT, LIKE THE FACT OF THE TRANSCRIPT, EVEN IF TIME LIMIT IS 180 DAYS AFTER, IF THE EVIDENCE IS THAT UNIFORMLY, YOU KNOW, TRANSCRIPTS AREN'T PREPARED FOR A YEAR AFTER THE APPEAL, HOW DO -- THE LEGISLATURE, IN TERMS OF DOING THINGS FOR THE FUTURE, BUT WE HAVE GOT INFLECTIONIBLE GUIDELINES FOR THE PAST. I, ALSO -- INFLECTIONIBLE GUIDELINES FOR THE PAST. I ALSO WANT TO ASK DO YOU AGREE, FROM THE LEGISLATURE'S POINT OF VIEW, THAT THE PUBLIC RECORDS HAVE TO BE OPENLY PRODUCED, BEFORE THE POST CON SPRINGS -- POSTCONVICTION MOTION CAN BE FILED?

I DO AGREE, AND ALL OF THIS CAN BE TIED TOGETHER IN A SEAMLESS WEB, IN THAT WE ARE COMMITTED, IN THE 21st CENTURY, FOR UNIFIED TECHNOLOGY AND AN UNIFIED SYSTEM, THE GOVERNOR, AND HIS COMMITMENT TO TECHNOLOGY AND MAKING THE GOVERNMENT MORE ACCESSIBLE, IN THE INFORMATION, IT IS GOING TO TAKE ON A REAL MEANING IN THE COURT AND JUDICIAL SYSTEM, BECAUSE THE PUBLIC WILL HAVE MORE ACCESS TO INFORMATION, MORE ACCESS TO WHAT IS HAPPENING IN THE COURT SYSTEM, AND SO THE LEGISLATURE, I CAN SPEAK FOR SPEAKER THRASHER, SPEAKER DESIGNATE FEENEY AND MYSELF, THAT WE ARE COMMITTED TO MAKING SURE THAT WE HAVE A HIGH QUALITY JUDICIAL SYSTEM IN THE STATE OF FLORIDA. AND WE WILL BE WORKING ON THAT OVER THE NEXT FOUR YEARS, AS WE IMPLEMENT THE REVISION SEVEN TO ARTICLE FIVE. I AM SORRY I MADE LIGHT OF THAT, BUT WE ARE COMMITTED TO HAVING A HIGH QUALITY JUDICIAL SYSTEM, AND I THINK THIS IS ALL A SEAMLESS PART OF THAT WEB.

THANK YOU. THANK YOU. WE WILL TAKE A SHORT RECESS. MR. DUDLEY. BAILIFF: PLEASE RISE.

WAIT JUST A MINUTE. MR. GOODE LET, DID YOU WISH TO SPEAK? YOU ARE NOT ON MY LIST. REST INDTHAT ORDER FOR RECESS. -- RESCIND THATORDER FOR RECESS.

THANK YOU, MR. CHIEF JUSTICE. GOOD MORNING. I AM DUDLEY GOODLETTE, AND IT IS A HONOR FOR ME TO BE HERE THIS AFTERNOON. I AM HERE PRIMARILY TO ANSWER ANY QUESTIONS THAT YOU HAVE SPECIFICALLY REGARDING THE MORRIS COMMISSION REPORT. I WANT TO TELL YOU VERY BRIEFLY, THAT, DURING THE TIME FRAME THAT THE SPECIAL SESSION AROSE, WE WERE MONITORING THE VERY CLOSELY THE MORRIS COMMISSION REPORT. WE, ALSO, WERE SENSITIVE TO THE ISSUES RAISED BY JUDGE PADOVANO'S LETTER TO YOU ON DECEMBER 3. WE ATTEMPTED TO INCORPORATE THAT, TOGETHER WITH THE COMMISSION ON CAPITOL CASES, OVERSIGHT INTO THE BILL THAT IS IN FRONT OF YOU OR THE ACT THAT WAS PASSED AND SIGNED BY THE GOVERNOR, AND I JUST MERELY WANTED THE COURT TO BE AWARE THAT WE WERE TRYING TO SHOW, IN SECTIONS 8 AND NINE OF THE ACT, GREAT DEFERENCE TO YOUR RULE-MAKING POWER OF THIS COURT, AND I THINK THAT IS EVIDENT IN THE ACT THAT IS BEFORE YOU. AGAIN, I WOULD BE HAPPY TO ANSWER ANY SPECIFIC QUESTIONS. I JUST MIGHT COMMENT, IN RESPONSE TO JUSTICE PARIENTE'S LAST QUESTION, THAT THE, UNDER OUR -- UNDER THE ACT, THE 180 DAYS BEGINS TO RUN AFTER THE FILING OF THE DIRECT APPEAL BRIEF AND NOT AFTER SENTENCING. AND I THINK THAT THAT MAY CLARIFY, IF I UNDERSTOOD YOUR QUESTION CORRECTLY, THE BRIEF, THE REALTIME REPORTING --

THE RECORD WILL HAVE ALREADY BEEN MADE. YES. I JUST WANTED TO MAKE THAT POINT. IF THERE ARE ANY OTHER SPECIFIC QUESTIONS.

I JUST WHAT WONDER IF WE WOULD -- I JUST WONDERED IF WE WOULD GET ANOTHER VOTE ON FULL FUNDING. THANK YOU VERY MUCH. WE APPRECIATE IT. WE WILL TAKE A SHORT RECESS. BAILIFF. PLEASE RISE. BAILIFF: PLEASE RISE. PLEASE BE SEATED.

ALL RIGHT. MR. MINERVA, MR. SCHER, MR. CHARTL AND MR. PURR SELL.

THANK YOU, YOUR HONORS. I WOULD LIKE TO RETURN TO THE THEME THAT I MENTIONED EARLIER, WHICH WAS THE BALANCE, AND WHO STRIKES THE BALANCE. I WOULD LIKE TO GO BACK, THOUGH, TO ONE ISSUE THAT I WOULD HOPE THE COURT IS CLEAR ON. AND THAT IS, UNDER THE STATUTE, UNDER THE DPRA, THERE MUST BE A, AND ITS SUCCESSOR, THERE MUST BE A CONSTITUTIONAL CLAIM, IN ADDITION TO THE INNOCENCE ALLEGATION, THAT A FREE-STANDING CLAIM OF INNOCENCE DOES NOT EXIST, AND WHAT JUSTICE PARIENTE ASKED MR. MARTELL WHEN BRADY AND GIGLY-CLAIMS, HE -- AND GIGLIO CLAIMS, HE PROPERLY SAID THAT THAT COULD BE BROUGHT IN SUCCESSOR, AND THE REASON IS BECAUSE BRADY AND GIGLIO ARE CONSTITUTIONAL CLAIMS. HOWEVER, SUCH AS A SITUATION, IN THE SPAZIANO CASE, IN WHICH THERE WAS NO CONSTITUTIONAL VIOLATION, WOULD BE BARRED, IN SUCCESSOR, BY THIS STATUTE.

IS IT, ALSO, WOULD THAT, ALSO, PERTAIN TO THE FEDERAL HABEAS THAT A SPAZIANO-TYPE CLAIM WOULD, ALSO, BE BARRED, BY THE FEDERAL HABEAS?

IT WOULD BE BARRED BY THE FEDERAL HABEAS. WELL, NOW, THEY LEFT THAT -- THEY SORT OF LEFT THAT OPEN IN HERRERA, BECAUSE THEY SAID IF YOU ARE REALLY, REALLY INNOCENT, WE ARE NOT SURE THAT WE WOULD UPHOLD AN EXECUTION, BUT THE HABEAS STATUTE IS WRITTEN IN SUCH AWAY THAT IT MUST BE LINKED WITH A CONSTITUTIONAL CLAIM.

DO YOU AGREE WITH JUDGE PADOVANO THAT, ALTHOUGH, EITHER, PERHAPS THE LEGISLATURE CAN FIND WHAT THE TRIAL COURT CAN DO THAT THIS COURT STILL HAS THE AUTHORITY, UNDER ITS POWER, TO ISSUE WRITS OF HABEAS TO CORRECT WHAT WOULD BE A CLAIM OF INNOCENCE?

WE HATE TO TAKE SUCH A CHANCE. THERE IS NO NEED FOR THAT. IT SHOULD BE PART OF THE RULE, BECAUSE IF YOU GET IT, THEN IT IS A FACTUAL MATTER, AND YOU ARE GOING TO HAVE TO SEND IT BACK TO A TRIAL COURT, ANYWAY. I WOULD ASSUME THAT IT WOULD SURVIVE IN HABEAS, BUT WHY WOULD YOU WANT TO DO THAT, AND IF THE LEGISLATURE ACTUALLY CUTS OFF A VALID CONSTITUTIONAL CLAIM, AND YOU CAN'T RAISE IT IN THE 3.851, THEN, YES, YOU SHOULD BE ABLE TO TO GET IT.

IF WE INTERPRETED THE STATUTE ALONG THE LINES THAT I THINK I WAS HEARING, WHEREAS IF SOMEONE ACTUALLY INNOCENT, THAT THEY WOULD HAVE BEEN CONVICTED IN VIOLATION OF THE CONSTITUTION. WOULD THAT CURE THE PROBLEM?

SPAZIANO WAS NOT CONVICTED IN VIOLATION OF THE CONSTITUTION, ACCORDING TO THE WAY THAT CASE WENT, SO THE FACT, AND THAT GETS TO THE FACT OF WHETHER INNOCENCE, ALONE, IS A CLAIM, ETCH EVEN IF THE TRIAL WAS FAIR. THAT IS -- EVEN IF THE TRIAL WAS FAIR. THAT IS WHAT THE SUPREME COURT DEALT WITH IN HERRERA, AND THEY SAID THAT, TRADITIONALLY, BECAUSE OF THE COMEDY CONCERNS THAT EXISTS IN FEDERAL COURTS VERSUS STATE COURTS, IN REVIEWING THE JUDGMENTS OF STATE COURTS, THAT WE HAVE ALWAYS SAID THAT WE COULD NOT GRANT RELIEF IN STATE COURT FROM A PREVIOUS CONVICTION, IF THERE WAS NO CONSTITUTIONAL ERROR IN THE TRIAL. THE ONLY CLAIM WAS THAT LATER DISCOVERED EVIDENCE SHOWED THAT THE PERSON MIGHT BE INNOCENT.

EXPLAIN WHAT THE FLAW IS, THEN, IN SAYING, WELL, IT IS GOOD ENOUGH FOR FEDERAL HABEAS CORPUS. WHY ISN'T IT GOOD ENOUGH FOR STATE HABEAS CORPS US?

BECAUSE THAT IS NOT THE LAW OF THIS COURT. THIS COURT HAS ALREADY SAID, UNDER DUE PROCESS, AND IN FACT, IN INTERPRETING ITS CONSTITUTION, THAT INNOCENCE, NEWLY-DISCOVERED EVIDENCE OF PURE INNOCENCE, NOT LINKED TO ANY CONSTITUTIONAL CLAIM, IS A VALID CLAIM, PROVIDED IT WAS -- COULD NOT HAVE PREVIOUSLY BEEN DISCOVERED IN THE EXERCISE OF DUE DILIGENCE. THAT IS BASIC FAIRNESS, AND WHAT I HEARD OTHER SPEAKERS SAY HERE, TODAY, WAS I THOUGHT THEY SAID THAT WE WOULDN'T WANT TO EXECUTE ANYONE WHO WAS INNOCENT, BUT THEN, AT THE SAME TIME, THEY SAID IF THE WILL OF THE PEOPLE IS SUCH THAT WE HAVE THIS STATUTE THAT SAYS YOU MUST HAVE A CONSTITUTIONAL CLAIM, THAT, MAYBE, IT IS OKAY. I DIDN'T REALLY UNDERSTAND THE ANSWER TO THAT.

WELL, IF WE FOUND THAT PART OF THE STATUTE UNCONSTITUTIONAL, WHY ISN'T THAT SEVERABLE FROM THE TIME LIMITATIONS THAT HAVE BEEN SET, WHICH SEEMS TO BE ONE OF THE ASPECTS OF THIS STATUTE IS THAT IT IS DESIGNED TO EXPEDITE, IT MAY NOT BUT THAT IS ITS INTENT?

WELL, BECAUSE IT IS, ALSO, TIED IN WITH MANY OTHER PARTS OF THE STATUTE THAT TRY TO GOVERN THE RULE-MAKING OF THIS -- THE RULE 6 MAKING OF THIS POWER.

YOU FOUND THAT, ON ITS FACE, THAT WOULD PRESENT A FLORIDA CONSTITUTIONAL PROBLEM, AND IT WOULD QUIET THAT WAY, TO CONSTITUTE SUCCESSOR MOTIONS, HOW WOULD THAT AFFECT THE BASIC RULE-TRACKING SYSTEM THAT HAS BEEN SET UP BY THE LEGISLATURE? WHAT IS THE -- GIVE ME THE BEST CONSTITUTIONAL ARGUMENT ON THATACYPECT OF THE STATUTE.

WELL, -- ON THAT ASPECT OF THE STATUTE.

AS TO DUAL TRACKING, I AM NOT SURE THAT THAT WOULD AFFECT DUAL TRACKING. IF YOU WERE LOOKING AT JUST THAT ONE PROVISION, BUT, OF COURSE, THAT IS NOT THE CASE HERE. WE ARE SAYING THAT THERE ARE MANY OTHER INTERTWINED PARTS, AND THE STATUTE, AS A WHOLE, IS SO INTERMEASURED THAT YOU CAN'T PULL ONE PART OUT -- INTERMESHED, THAT YOU CAN'T PULL ONE PART OUT, BUT IF YOU DID PULL THAT PART OUT --

AS A SUCCESSOR MOTION YOU CAN PULL THAT ONE PART OUT.

I HADN'T REALLY THOUGHT ABOUT THAT, BUT JUST STANDING HERE AND TRYING TO RESPOND TO YOUR QUESTION, I AM NOT SURE. MAYBE ONE OF MY OTHER COUNSEL, WHEN THEY GET UP HERE, WOULD GIVE A BETTER ANSWER TO THAT. THERE ARE -- BUT IT IS NOT JUST THAT PART. IT IS, ALSOINGS THE EQUAL PROTECTION PART -- ALSO, THE EQUAL PROTECTION PART, IN WHICH YOU COMPARE THE RELIEF AVAILABLE TO PEOPLE WHO, IN POSTCONVICTION, WHO ARE NOT SENTENCED TO DEATH, BECAUSE THIS, ALSO, TAKES AWAY RIGHTS THAT -- IT ONLY TAKES AWAY, FROM DEATH SENTENCE PEOPLE, THE RIGHT TO RAISE THE WHITT CLAIMS, THE FUNDAMENTAL CHANGES IN THE LAW THAT OCCUR IN SUCCESSOR, AND THE INNOCENCE, THE -- AND THE INNOCENCE CLAIM, AND THOSE -- THERE IS NO -- THAT IS NOT CURED BY GIVING A PERSON A LAWYER, BECAUSE IF YOU GIVE A PERSON A LAWYER, AND THEY DON'T HAVE -- THEY CAN'T RAISE A CLAIM, THEN THE -- GIVING PEOPLE LAWYERS DOESN'T AFFECT THAT. IF I COULD, LET ME TALK, A LITTLE BIT, ABOUT THE MORRIS REPORT, AND THE PROPOSED RULES.

MR. MINERVA, I DON'T HAVE ANY TIME ASSIST PRESIDENTS FOR EACH OF THE SPEAKERS -- ASSESSMENTS FOR EACH OF THE SPEAKERS IN RESPONSE. DID YOU ASK FOR? SO YOU HAVE AN HOUR, AND YOU CAN BREAK IT UP ANY WAY YOU WISH.

THEY WAIVED AT -- THEY WAVED AT ME TO KEEP GOING TO A WHILE. THANK YOU, YOUR HONOR.

THEY HAVE THE PERMISSION TO COME UP AND STAND HINDU, WHEN THEY ARE READY --

-- BEHIND YOU, WHEN THEY ARE READY -- WHEN THEY STAND UP, I WILL SIT DOWN. ONE OF THE PROBLEMS WITH THE MORRIS REPORT IS BOTH JUDGE MORRIS AND JUDGE POD-VAN-, IF I HEARD THEM CORRECTLY -- PADOVANO, IF I HEARD THEM CORRECTLY, SAID THAT, IF THIS RULE MUCH IMPLEMENTED, THE RESOURCES ARE NOT THERE TO CARRY IT OUT, AND I ASSUME THAT THEY WERE SPEAKING OF FUNDING, OF JUDICIAL RESOURCES, OF COURT REPORTER RESOURCES, OF ALL OF THE MYRIAD THINGS TO THAT GO INTO MAKING SUCH A RULE WORK, YET IF YOU HAVE THE RIGIDITY OF THESE RULES IS PREDICATED, I ASSUME, ON HAVING ALL THOSE RESOURCES, SO JUST AS A MATTER, AS A PRACTICAL MATTER, HOW COULD YOU IMPOSE ALL OF THESE RIGID TIME LIMITS, WHEN THE AUTHORS OF THE RULE ADMIT THAT THEY DON'T HAVE THE WHEREWITHAL OR THE SYSTEM DOES NOT HAVE THE WHEREWITHAL TO CARRY IT OUT? ONE OTHER PART OF THIS IS THAT I THINK, FROM, WHEN I READ THE MORRIS COMMITTEE LETTER, WHEN I READ THE RULE, IT SEEMED TO DEMONIZE THE DEFENSE. IT SEEMED TO SAY THAT DILATORY TACTICS ON THE PART OF CCR'S AND DEFENSE LAWYERS WAS WHAT IS BOGGING THIS PROCESS DOWN. I DON'T THINK THAT THAT WAS THE MAJOR INTENT OF IT, BUT IT SEEMED TO SAY THAT WE WERE AT FAULT. I THINK WHAT THIS COURT HAS HEARD, TODAY, IS THAT THERE IS PLENTY OF FAULT. IT IS A SYSTEMIC PROBLEM. IT HAS BEEN A SYSTEMIC PROBLEM, AND WHERE I TAKE ISSUE WITH ALL OF THESE RULES IS THAT THEY ARE SO INFLECTION I BELIEVE THAT THEY DO NOT -- INFLECTION I BELIEVE THAT THEY DO -- THEY ARE SO INFLEXIBLE THAT THEY DO NOT ACCOUNT FOR THE REALITIES THAT GOES ON.

ON THE OTHER HAND, WE ARE TRYING TO STRIKE A BALANCE, BUT THE IN FLEXIBILITY HAS DRIVEN THE SYSTEM, IN LARGE PART RESPECT AND HOW CAN -- WHERE WOULD WE GO, IF YOU DON'T AGREE WITH THE RULE, AS PROPOSED, HOW WOULD YOU CHANGE IT TO PROVIDE THE FLEXIBILITY? BUT, ALSO, TO DEAL WITH THE ISSUE OF SPEEDING THE PROCESS ALONG OR INSURING THAT, WITH THE SPEEDING OF THE PROCESS ALONG, THAT THE DEFENDANT IS ASSURED A FAIR PROCESS?

YOUR HONOR, I THINK THAT ONE OF THE THINGS THAT HAPPENED IN THE DEVELOPMENT OF THE MORRIS RULE WAS THAT THE PROCESS BECAME TRUNCATED. ON THE DECEMBER 3, DATE, WHEN THIS COURT HELD A -- DECEMBER 3, DECEMBER 9 DATE, WHEN THIS COURT HELD A ROUNDTABLE, IT SHOULD HAVE BEEN TO HEAR ALL THE COMMENTS THAT CAME OUT IN RESPONSE TO THE ROUNDTABLE AND THEN, I ASSUME, WOULD HAVE LED TO MODIFICATIONS, BECAUSE AS I UNDERSTAND, FROM WHAT JUDGE MORRIS SAID AND OTHER COMMITTEE MEMBERS, THERE WERE SOME GOOD SUGGESTIONS IN THERE, AND THAT COULD HAVE TEMPERED SOME OF THE STRICTNESS, BUT AS I RECALL, AT THAT TIME, THE PADOVANO RULE WAS, THEN, PROPOSED, AND NO ONE HAD COMMENTED ON THAT, AND AT THE SAME TIME, THAT VERY SAME DAY, THE GOVERNOR ANNOUNCED THE CALL FOR A SPECIAL SESSION, WHICH RESULTED, THEN, IN THE DPRA, SO I THINK WHAT HAPPENED WAS THE PROCESS THAT HAD STARTED THAT VERY WELL COULD HAVE LED TO THAT --

BUT WE ARE NOW BACK TO THE MORRIS RULES, AND WE HAVE ASKED FOR COMMENT.

WELL, WE HAVE SUBMITTED OUR COMMENCE, YOUR HONOR.

AND SO THAT IS WHY WE ARE HEAR, TODAY, TO RECEIVE THOSE COMMENTS, AND IF IT IS NOT A GOOD RULE, TELL US HOW IT CAN BE MADE BETTER. OR WHAT YOU WOULD DO IN THE ALTERNATIVE.

I WOULD, FIRST OF ALL, RELAX THE RIGID PROHIBITIONS. I THINK THAT THE RECOMMENDATIONS THAT CAME FROM THE RULES COMMITTEE HAVE -- GO SOME DISTANCE IN DOING THAT, BECAUSE THEY TAKE AWAY THOSE PROHIBITIONS AGAINST GRANTING AN EXTENSION OF TIME FOR A LACK OF PUBLIC RECORDS AND THE LACK OF PREPAREDNESS ON THE PART OF DEFENSE COUNSEL,

WHICH COVERS A MYRIAD OF THINGS. I WOULD DO AWAY WITH THE REQUIREMENT, THE PROHIBITION AGAINST ANY INTERLOCUTORY APPEAL. THIS COURT HAS ALREADY SAID, JUST LAST WEEK, IN TREPALL, THAT THERE IS A RIGHT TO AN INTERLOCUTORY APPEAL. A YOU DO AGREE WITH THE IDEA THAT, IN TERMS OF THE INTERLOCUTORY APPEAL, WE NARROWED IT CONSIDERABLY, IN TRIPLE, AND THERE MAY BE ANOTHER EXCEPTION, WITH THE WRIT OF PROHIBITION, WHERE YOU HAVE GOT A RECUSAL, BUT OTHERWISE, JUST INTERLOCUTORY APPEALS DELAY THE PROCESS.

YES. BUT THE RULE COULD BE INTERPRETED TO SAY THAT YOU COULDN'T EVEN QUESTION, ON PLENARY APPEAL, WHETHER THE JUDGE ABUSED THE DISCRETION IN NOT GRANTING AN EXTENSION.

HOW CAN THAT BE?

BECAUSE THE RULE SAYS THAT YOU CAN'T APPEAL THAT, BUT IT, ALSO, BARS INTERLOCUTORY APPEAL, SO SINCE INTERLOCUTORY APPEAL IS ALREADY BARRED, THEN WHAT DOES THAT OTHER PROVISION MEAN? THIS IS A TRICK. WHENEVER YOU HAVE A RULE, A NEW RULE, YOU HAVE UNINTENDED CONSEQUENCES THAT HAVE TO BE FERRETED OUT AND ASSORTED OUT, AND THAT WAS ANOTHER PART OF SORT OF WHAT I WAS SAYING AT THE BEGINNING, THAT ALL OF THE CASE LAW, ALL OF THE LAW AND THE RULES AND THE INTERPRETATION OF HIS WHAT WE HAVE, ALL GOES OUT THE WINDOW WITH THESE RADICAL CHANGES, AND YOU START FROM SCRATCH WITH EVERY LITTLE PART OF THE RECALL. AS JUSTICE PARIENTE WAS SAYING BEFORE, WHEN A JUDGE DISMISSES A PETITION BECAUSE IT IS NOT FULLY PLED, IN THAT JUDGE'S MIND, THAT ONLY LEADS TO MORE APPEALS. I THINK THAT THERE NEEDS TO BE CONSIDERATION OF THE FEDERAL HABEAS CORPUS DEADLINE. THAT IS NOW SEEMINGLY GOING TO BE IMPAIRED BY THE FULLY-PLED REQUIREMENT, BECAUSE IF YOU CAN'T GET SOMETHING INTO THE COURT BEFORE THAT ONE-YEAR FEDERAL GUIDELINE OR LIMITATION, YOU LOSE YOUR RIGHT TO GO TO FEDERAL HABEAS. THAT IS WHY WE HAVE SHELLS, AND WE HAVE EXPLAINED THAT IN THE PLEADINGS, BUT I THINK IT IS SOMETHING THAT REALLY, REALLY NEEDS TO BE CONSIDERED BY THIS COURT, IS IF YOU KICK OUT A PLEADING BECAUSE IT SNOT FULLY PLED, YOU ENDANGER THE PERSON'S RIGHTS.

WHAT WE ARE TRYING TO FOR, ALSO -- TRYING TO DO, ALSO, IS TO ENSURE THAT POSTCONVICTION COUNSEL HAS ADEQUATE RESOURCES, ADEQUATE TIME WITHIN AND FROM THE TIME OF APPOINTMENT, TO GET THAT MOTION FILED. WE ARE DEALING WITH TRYING TO GET THE RECORDS IN, AND WHY CAN WE NOT PLACE THE EMPHASIS ON GETTING THAT MATERIAL AND THOSE RESOURCES TOGETHER, SO THAT WE CAN HAVE A FULLY-PLED MOTION, IN A REASONABLE PERIOD OF TIME?

WELL, YOUR HONOR, FOR THREE, ALMOST FOUR YEARS, I WAS AT CCR. AND IF -- WE NEVER HAD WHAT WE NEEDED TO DO WHAT WAS NECESSARY. WE HAD A CHEVIN COMMISSION COME IN AND STUDY AND WRITE A REPORT AND RECOMMENDED THAT WE RECEIVE ADDITIONAL FUNDING, AND FROM THEN ON, WE HAD TO GET EXTENSIONS OF TIME, BECAUSE THIS COURT WOULDN'T HAVE GRANTED THEM, IF WE HAD NOT BEEN MAKING A SHOWING OF NECESSITY, THAT WE NEEDED THOSE EXTENSIONS, BECAUSE WE HAD FINITE RESOURCES AND MORE CASES THAN WE COULD FILE, UNDER --

DOESN'T THAT INDICATE, THEN, MR. MIGHT NOT EFERB, A THAT THIS SYSTEM WORKS? -- MR. MINERVA, THAT THIS SYSTEM WORKS?

YES, IT WORKS, YOUR HONOR, BUT IN ORDER TO, THEN, WHEN THE FEDERAL COURT, FEDERAL CONGRESS ENACTED THE DEATH PENALTY ACT AND AN ONE-YEAR LIMITATION, THAT IS WHEN WE HAD TO START FILING THOSE SHE WAS, BECAUSE THE COURT WAS GIVING US TWO YEARS TO FILE, AND THE FEDS WERE SAYING YOU HAVE TO FILE SOMETHING WITHIN A YEAR. IT WAS A COMPROMISE ..

WAS THERE -- I DON'T KNOW WHAT IS IN THE BRIEFS OR WHAT, BUT IT WAS REPRESENTED, I THINK, BY THE STATE, THAT THERE WAS NEVER AN OBJECTION TO THE FILING OF THESE SHELL MOTIONS, BECAUSE OF THE INABILITY TO GET THE INFORMATION TO PUT IN THE MOTION. IS THAT CORRECT?

I WOULD NOT DISPUTE WHAT THEY SAID. I THINK THAT THERE WERE SOME MOTIONS FILED, AND THEY WERE TO DISMISS THOSE PLEADINGS. I DON'T THINK ANY OF THEM EVER MADE IT UP TO THIS COURT FOR A DEFINITIVE RULING, BUT WHAT I AM SAYING, NOW, IS THE PROPOSED RULES ALL REQUIRE FULLY PLED, AND IF YOU ARE NOT FULLY PLED, YOU ARE OUT OF COURT, AND THEN IF YOU ARE OUT-OF-STATE COURT, YOU ARE, ALSO, OUT OF FEDERAL COURT, AND THAT NEEDS TO BE CONSIDERED. THAT IS ALL I AM SAYING.

HOW CAN WE ADDRESS THE FEDERAL ISSUE?

WELL, BY NOT HAVING SUCH A RIGID REQUIREMENT THAT THE FULLY-PLED OR NOTHING -- THERE IS NO IN BETWEEN THAT WOULD STOP IT.

ISN'T THERE -- ISN'T THERE A PROCESS, AS I READ THE MORRIS COMMISSION'S PROPOSAL, IF IT HAS NOT BEEN FULLY PLED, THEN THERE IS A 30-DAY COMPLIANCE PERIOD. IS THERE NOT? AM I MISREADING THEIR PROPOSAL? SO IT SEEMS TO ME THAT IT CONTEMPLATES A PROCESS WHERE IT IS PLED, AND THEN IF THERE IS DEFECTS IN THAT PLEADING, THOSE ARE CALLED TO THE ATTENTION. THE COURT MAKES ITS RULING, AND THERE IS A 30-DAY PERIOD TO CORRECT THOSE. IS THAT NOT HOW IT IS, AND IF THAT IS NOT HOW IT IS, WHY ISN'T THAT SUFFICIENT, SO THAT WE MAY UNDERSTAND?

WELL, YOUR HONOR, YOU ARE CORRECT, IN THAT THAT IS WHAT THE RULE SAYS, AND THEN THE QUESTION BECOMES WHETHER OR NOT 30 DAYS WOULD BE SUFFICIENT TO SATISFY THE RULE?

IS IT NOT? YOU ARE SUITING THAT IT IS NOT? -- YOU ARE SUITING THAT IT IS NOT?

I AM SUGGESTING THAT IT IS NOT, AND IN SOME CASES IT COULD BE. THIS, AGAIN, IS A BRAND NEW RULE. AND SO HOW IS THAT FULLY PLED REQUIREMENT GOING TO BE INTERPRETED BY JUDGES IN 67 COUNTIES IN THIS STATE, WITHOUT AND UNTIL WE KNOW THAT, WE DON'T REALLY KNOW WHETHER PEOPLE'S RIGHTS TO GO TO FEDERAL COURT ARE GOING TO BE PRESERVED.

BUT IT SEEMS TO ME AT THE HEART OF WHAT THE MORRIS COMMITTEE RECOMMENDED AND WHAT TRULY BOTHERS ME ABOUT WHAT I HAVE SEEN, MR. MINERVA, IS THIS ASPECT THAT WE ARE IN A POSTURE IN WHICH WE ARE POST TRIAL. WE HAVE HAD DISCOVERY IN THE TRIAL. AND NOW, IN POSTCONVICTION, WHAT REALLY, EVERYBODY, OUGHT TO DO, IS IDENTIFY WHO THEY HAVE GOT AS WITNESSES AND EVIDENCE, AT THE EARLIEST POSSIBLE TIME, AND THAT IT OUGHT TO HONE IN TO WHAT COULD BE A PROBLEM WITH THE CONVICTION OR THE SENTENCE. AND THAT IS WHAT I SEE THAT THIS PLEADING REQUIREMENT, THAT THE MORRIS COMMITTEE RECOMMENDED, TRYING TO GET TO, IS SO THAT WE DON'T HAVE VALLEA AGAIN, SO THAT WE DON'T HAVE THESE SITUATIONS WHERE SOMEBODY SHOWS UP AND WON'T TELL THE TRIAL JUDGE WHAT THEIR EVIDENCE IS.

WELL, YOUR HONOR, I UNDERSTAND THAT. BUT, OF COURSE, VALLEA SAID THAT YOU DON'T HAVE TO PLEAD THESE THINGS. NOW, IF THE RULE CHANGES, AND THEY CERTAINLY DO, THEN WE WILL HAVE TO LIVE WITH THAT, AND THAT IS OKAY. WHAT BOTHERS US AND WHAT IS UNFAIR IS TO, FROM ON HIGH, SAY YOU MUST DO THIS, WITH NO EXCEPTIONS WITHIN THIS PERIOD OF TIME, BECAUSE THE WAY THAT RULE IS WRITTEN, IT SAYS THAT THE LACK OF PUBLIC RECORDS IS NOT A GROUND FOR AN EXTENSION. WELL, IF THE STATE DOESN'T GIVE YOU THE RECORDS, FOR WHATEVER REASON, THEN YOU ARE PENALIZED AS A RESULT OF WHAT THE STATE DIDN'T DO. THAT IS THE FLAW IN THAT, AND THE RULES COMMITTEE RECOGNIZES THAT. THAT THAT IS A FLAW.

BUT WE HAVE BEEN TRYING, EVER SINCE I HAVE BEEN ON THIS COURT, A GREAT DEAL WITH YOUR HELP, WITH THE HELP OF THE STATE, BUT WE HAVE NOT BEEN ABLE TO GET OVER THIS HURDLE OF THE PUBLIC RECORDS ACT, BECAUSE WE STILL HAVE A TREMENDOUS AMOUNT OF TIME SPENT IN THIS, WITHOUT ANY TYPE OF AN AGREEMENT, BY COUNSEL, AS TO WHAT CAN BE AND SHOULD BE PRODUCED AS PUBLIC RECORDS. NOW, I UNDERSTAND THAT THIS REGISTRY SYSTEM HAS WORKED, BUT, I MEAN, WE HAVE GOT TO GET OUT OF THE PUZZLE OF THE PUBLIC RECORDS SYSTEM FOR ANY OF THIS TO WORK, AND I HAVEN'T SEEN ANYTHING THAT HAS BEEN OFFERED, TO GET US OUT OF THAT.

WELL, YOUR HONOR, I THINK SOME OF THE COMMENTS THAT JUDGE EATON MADE, ABOUT CONTROL, ON THE LOCAL LEVEL, AND OF A DOCKET AND EVENTS, IF, FOR EXAMPLE, YOU HAD THE START OF THE PUBLIC RECORDS PROCESS WHILE, IF YOU WANTED TO COMBINE THAT WITH THE TIME THAT THE CASE WAS ON APPEAL, TO BEGIN THE PUBLIC RECORDS' PORTION EARLIER, AS I, I BELIEVE, JUSTICE PARIENTE SUGGESTED, THAT YOU WOULD BE GATHERING THE PUBLIC RECORDS DURING A PERIOD OF TIME THAT THE APPEAL IS GOING ON, BUT YOU WOULD NOT -- YOU WOULDN'T PIGGYBACK THE ONE SYSTEM ON TOP OF THE OTHER, WHERE YOU WOULD HAVE THE COLLATERAL PROCEEDING GOING AT THE SAME TIME AS THE DIRECT APPEAL, BUT YOU WOULD HAVE THE RECORDS GATHERING PROCESS TAKING PLACE THEN. THAT SEEMED TO ME LIKE A VERY SENSIBLE SOLUTION, PARTIALLY, AND, I THINK, WOULD ACCOMMODATE WHAT YOUR CONCERN IS.

WELL, REALLY, WE TRIED, TLEER THREE YEARS AGO -- WE TRIED, THREE YEARS AGO, TO GET YOUR OFFICE AND THE STATE TO GET TOGETHER, TO COUP WITH AN AGREEMENT AS TO WHAT WORDS SHOULD COME WITHIN A PROPER PUBLIC RECORDS REQUEST. NOW, SINCE THAT TIME, WE HAVE HAD A STATUTE, BUT I AM STILL SEEING, OUT THERE IN THE FIELD, IN THIS SUBSTANCES IN WHICH, LITERALLY, IN ONE CASE, 8 ON MOTION IT IS TO -- MOTIONS TO COMPEL WERE TAKEN, BECAUSE -- AT LEAST 80 MOTIONS TO COMPEL WERE TAKEN, BECAUSE YOU ARE GOING AFTER A BROAD RANGE OF RECORDS THAT REALLY HAVEN'T HONED DOWN TO AN ISSUE IN THE CASE. NOW, ISN'T THAT A SFLOB.

IT CAN BE. -- ISN'T THAT A PROBLEM?

IT CAN BE. WHEN YOU ARE CHARGED WITH THE RESPONSIBILITY OF HAVING SOMEONE WHO IS IN THE FINAL SAGES OF LITIGATION, IN WHICH IF YOU MISS -- STAGES OF LITIGATION, IN WHICH, IF YOU MISS SOMETHING, THEY ARE DEAD, THEY TEND TO BE, AND I THINK RIGHTLY SO, VERY CAUTIOUS AND VERY THOROUGH ABOUT WHAT YOU ARE DOING, AND I THINK THIS COURT EX-PECTS US TO DO THAT.

BUT SHOULDN'T YOU AT LEAST HAVE TO MAKE A THRESHOLD SHOWING THAT, WHEN YOU ARE REQUESTING ALL OF THESE PERSONNEL RECORDS, TO EXPLAIN TO THE ROURT COURT WHAT IT RELATES TO -- TO THE COURT WHAT IT RELATES TO?

THAT WOULD BE FINE. IT IS NOT REQUIRED NOW, BUT THOSE ARE THE KINDS EVER THINGS, I THINK, THAT COULD BE MODIFIED HAD, IN THE PRESENT PROCEDURE, BUT GOING, I THINK, THAT THE RULES THAT JUST SET ABSOLUTE DEADLINES AND DON'T FIX THE PROCESS ARE THE WRONG WAY TO GO ABOUT IT. I THINK I HAVE PROBABLY STEPPED ON MY COCOUNSEL'S TIME, AND UNLESS THERE ARE ANY QUESTIONS, I WILL SIT DOWN.

THANK YOU, MR. MINERVA. MR. SCHER.

MAY IT PLEASE THE COURT. I DON'T WANT TO BE REPRESENTATIVE OF SOME OF THE THINGS THAT WE HAVE ALREADY TALKED ABOUT, BUT I WANTED TO HONE IN ON A COUPLE OF ISSUES THAT HAVE BEEN TALKED ABOUT. NUMBER ONE IS FUNDING. JUST TO MAKE IT CLEAR, IN TERMS OF JUSTICE WELLS' QUESTION EARLIER, THE CCR OFFICES THAT REQUESTED ADDITIONAL FUNDING

AND ADDITIONAL POSITIONS FROM THE LEGISLATURE FOR OUR CURRENT BUDGET, WE REQUESTED DOUBLE THE AMOUNT OF MONEY AND DOUBLE THE AMOUNT OF POSITIONS, TO BE ABLE TO ABSORB THE POSSIBILITY OF A DUAL TRACK SYSTEM. WE WERE TOLD THAT OUR BUDGET WOULD REMAIN REVENUE NEUTRAL, AND THAT ALL MONEY AND ALL POSITIONS WOULD BE GOING TO THE REGISTRY. NONE TO CCR, AND THAT IS THE END OF THE PROCESS, IN TERMS OF WHAT WE CAN DO, SO ANY REPRESENTATIONS THAT HAVE BEEN MADE THAT THE LEGISLATURE IS WAITING FOR OUR REQUEST, SIMPLY ARE NOT ACCURATE. THE REQUEST HAS ALREADY BEEN MADE, PURSUANT TO WHENEVER THEY NEED TO BE MADE, UNDER THE RULES REGARDING BUDGETS. I AM NOT AN EXPERT ON. THAT HAVE ALREADY BEEN MADE, AND THEY HAVE ALREADY BEEN REJECTED. THE MONEY CLEARLY HAS ALREADY BEEN EARMARKED FOR THE REGISTRY, NOT FOR THE CCR.

HAVE YOU BEEN TOLD WHY THAT SELECTION?

BECAUSE THE INTENTION OF THIS DPRA WAS TO GIVE ALL THESE CASES TO THE REGISTRY NOT TO CCR. WHY THAT IS, I DON'T KNOW, BUT THAT WAS THE CLEAR INTENT.

OTHER -- THERE HAS BEEN SOME ASSERTIONS, TODAY, THAT THE REGISTRY COUNSEL HAVE BEEN INEFFECTIVE IN NUMEROUS WAYS. IS THERE -- WE HAVE NOT SEEN ANY RECORD EVIDENCE OF THAT, BUT THAT IS A CONCERN, CERTAINLY, TO ME.

YES.

BECAUSE THE WHOLE SYSTEM STARTS TO FALL APART, IF YOU KNOW, WE DON'T HAVE EFFECTIVE REPRESENTATION. I THINK THAT JUST FACT OF ALL OF THE CCR'S GETTING TOGETHER TO FILE THIS ONE CONSOLIDATED MOTION SHOWS THERE IS SOME BENEFIT TO HAVING OFFICES THAT ARE PROFESSIONAL AND ABLE TO HANDLE IT, BUT WHAT, HOW, JUST THROWING THAT OUT, WITHOUT ANY BACKUP, PUTS EVERYONE IN A DIFFICULT POSITION.

NO. I UNDERSTAND THAT. AND ALL WE CAN DO IS GIVE YOU ANECDOTAL INFORMATION THAT WE HAVE RECEIVED FROM VARIOUS SOURCES. I MEAN, I KNOW, FOR EXAMPLE, THIS COURT CLERK KEEPS A LOG, AND IN THAT LOG IT IS INDICATED, YOU KNOW, CERTAIN CASES ARE, I MEAN, THERE ARE TWO CASES I KNOW OF IN DADE COUNTY, WHERE CER. IT WAS DENIED OVER TWO YEARS AGO AND NOTHING HAS BEEN FILED. THE REGISTRY LAWYER WAS RECENTLY REMOVED FROM THE CASE. THERE WAS ANOTHER CASE, DOWN IN MIAMI, WHERE THE REGISTRY LAWYER WAS REMOVED AFTER AN EVIDENTIARY HEARING HAD ALREADY BEEN SET, BECAUSE OF PROBLEMS.

AS AN OFFICER OF THE COURT, DON'T YOU HAVE AN OBLIGATION AT LEAST TO THE BRING THIS TO THE ATTENTION OF THE REGISTRY, SO THAT, AND TO THE CAPITAL COLLATERAL --

I FIND OUT ABOUT IT BECAUSE I WILL GET A CALL ON A FRIDAY AFTERNOON FROM THE REGISTRY LAWYER, SAYING YOU GUYS KNOW SOMETHING ABOUT THIS POSTCONVICTION STUFF. I HAVE GOT THIS MOTION DUE ON MONDAY, AND SOMEBODY SENT ME A DRAFT OF ONE YOU HAD FILED. IT IS 130 PAGES, AND I HAVE GOT ABOUT FOUR OR FIVE PAGES WRITTEN HERE. SHOULD I GET AN EXPERT? SHOULD I GET AN INVESTIGATOR? AND THE MOTION IS DUE ON MONDAY. MY ADVICE IS YOU FILE A MOTION TO WITHDRAW. I MEAN, WHAT ELSE CAN I DID -- CAN I TELL HIM. AND THERE ARE OTHER PROBLEMS. THE OTHER PART OF THAT IS NOT ONLY QUALIFICATIONS BUT THE FUNDING. THERE ARE REGISTRY LAWYERS WHO, FROM MY UNDERSTANDING, ARE USING TYPEWRITERS STILL, YET THE REGISTRY, EXCUSE ME, THE REPOSITORY, SINCE IT WAS CHANGED UNDER THE DPRA, FROM THE COMMISSION TO THE SECRETARY OF STATE, IS NOW SENDING THESE FILES NOT HARD COPIES, BUT THEY ARE SENDING A CD ROM. WHICH MY OFFICE, AT THIS POINT, REALLY DOESN'T HAVE THE ABILITY TO READ, LET ALONE SOME LAWYER WHO IS ONLY WORKING ON A TYPEWRITER, AND SO YOU KNOW, WE HAVE GOT THIS REPOSITORY, WHICH --

YOU MEAN WHEN WE SET THE STANDARDS FOR COMPETENT COUNSEL, YOU OUGHT TO SAY YOU

CAN'T HAVE A TYPEWRITER?

NO. I AM NOT SAYING THAT, BUT WHAT I AM SAYING, THIS IS GENERAL AS UMING THAT CCR IS DOING -- THERE IS A GENERAL ASSUMPTION THAT CCR IS DOING ALL THE CASES AND THAT CCR IS ON TOP OF EVERYTHING AND KNOWS EVERYTHING, WHEN, IN FACT, WE HAVE OUR CASES AND THE REGISTRY HAS THEIR CASES, AND WE HAVE NO CONTROL WITH THAT, WHAT HAPPENS WITH THE REGISTRY CASES. THERE ARE SOME VERY FINE REGISTRY LAWYERS WHO ARE DOING THEIR JOB. OF COURSE THAT IS NOT THE PROBLEM. THE PROBLEM IS THE ONES THAT AREN'T.

JUST GETTING BACK TO THE ALL-OR-NOTHING APPROACH, CERTAINLY, AND MAYBE IT IS NOT FROM YOUR OFFICE, BUT I AM SURE YOU HAVE SEEN MOTIONS THAT ARE 130 PAGES, AND IF YOU READ ALL 130, YOU WOULDN'T REALLY KNOW WHAT WAS BEING CLAIMED. THERE IS 25 CLAIMS BEING RAISED AND THEY SOUND REPRESENTATIVE OF WHAT HAD JUST BEEN DECIDED ON APPEAL. AND SOME OF THAT MAY HAVE BEEN FILED FOR PRESERVATION, BUT CAN'T, WHERE IS THE HAPPY MEDIUM TO HAVE, WE ARE JUST FILING THIS. DON'T WORRY ABOUT THESE, BECAUSE THIS IS JUST A PRESERVATION TYPE THING, IN CASE THE LAW CHANGES, SO DON'T HE HAVE EASTBOUND BOTHER YOURSELF, TRIAL JUDGE -- DON'T EVEN BOTHER YOURSELF, TRIAL JUDGE, WITH THIS. BUT THE SPECIFICITY OF WHAT YOU ARE RELYING ON THE TO BE PLED, AND AFTER, A SHORT PERIOD OF TIME AFTER, THAT WITNESSES BE LISTED, THAT THERE ARE EXPERTS, THAT REPORTS BE EXCHANGED. THAT IS THE WAY MOST, THE ONLY WAY THAT PROCESSES CAN WORK WITHIN INTELLIGENT PROCESS. WHY SHOULDN'T THAT BE PLACED ON TO THE CCR, ASSUMING THAT THE PUBLIC RECORDS PORTION IS COMPLETED PRIOR TO THAT TIME THAT YOU HAVE GOT TO FILE YOUR MOTION?

AND, YOU KNOW, OBVIOUSLY, IF THE COURT WANTS TO MAKE THAT A REQUIREMENT, IT CAN DO SO.

DO YOU THINK THAT IS AN UNREASONABLE -- I GUESS FROM HEARING ABOUT ALL OF THESE THINGS ABOUT WHAT CAN HAPPEN. OBVIOUSLY IF A LAWYER DIES OR HURRICANE ANDREW STRIKES, WE ARE NOT TALKING ABOUT THAT. WE ARE TALKING ABOUT YOU HAVE BEEN APPOINTED. YOU HAVE GOT YOUR RESOURCES, AND INSTEAD OF FILING SOMETHING THAT SOMEONE COULD READ CLEARLY AND UNDERSTAND IT, IT IS -- JUST GOES ON FOR, YOU KNOW, 100 PAGES OF JUST CONCLUSIONARY ALLEGATIONS.

I CERTAINLY UNDERSTAND YOUR POINT. MY TAKE ON THAT, HOWEVER, IS WHENEVER, AND THERE IS CLEARLY, FROM MY OFFICE PERSPECTIVE, BEEN A MORE CONCERTED EFFORT TO TIGHTEN UP THE MOTIONS, BUT NO MATTER WHAT WE PLEAD, NO MATTER HOW MORE SPECIFIC WE GET, IT IS NOT GOING TO BE GOOD ENOUGH FOR THE STATE. THEY ARE GOING TO CONTINUALLY COME IN, AND THEY ARE GOING TO CONTINUALLY SAY IT IS NOT SPECIFIC ENOUGH.

WHAT IS THE PROPOSAL, THEN, IF THE STATE IS CAUSING PART OF THE PROBLEM, THE STATE ISN'T FULLY GIVING UP THE RECORDS. IF THE STATE IS FILING MOTIONS THAT, REALLY, ARE NOT ADVANCING THE CASE BUT FURTHER DELAYING IT. WHAT DOES THE TRIAL JUDGE, THEN, WHAT IS THE SOLUTION? WHAT SHOULD THE TRIAL JUDGE HAVE, AND WHAT SHOULD THIS RULE HAVE, TO PROVIDE A DISINCENTIVE TO THE STATE TO DO THOSE KINDS OF THINGS?

DISAGREE WITH THEM. SAY, YOU KNOW, STATE, YOU ARE WRONG. MR. SCHER IS BEFORE ME SAYING THAT THIS IS NOT REQUIRED, AND SO I AM GOING TO REJECT YOUR ARGUMENT, AND I AM GOING TO GO IN ON A HE HAVE YEAR HEARING.

YOU -- ON AN EVIDENCIARY HEARING.

YOU ARE SAYING THE KEY IS TO HAVE TRIAL JUDGES THAT ARE SUFFICIENTLY FAMILIAR WITH THE PROCESS AND TO HAVE SUFFICIENT TIME TO BE ABLE TO MANAGE THAT CASE, AS JUDGE

EATON SAID, WHERE YOU HAVE GOT NOT ONLY STATUS CONFERENCES AFTER THE MOTION IS FILED, BUT YOU HAVE THEM DURING THE PUBLIC RECORDS TIME PERIOD, AS WELL.

SURE.

THAT IS A CRITICAL PART, ISN'T IT?

YEAH. AND TO A CERTAIN EXTENT, A LOT OF THIS IS LITIGATION. IT IS GOING TO HAPPEN. PEOPLE DISAGREE ON THINGS, BUT AS SURE AS I AM STANDING HERE, I HAVE FILED MOTIONS THAT AREN'T 1.

PAGES. THEY ARE 70 PAGES. THE STATE'S RESPONSE IS THEY FILED A 150-PAGE MOTION IN THE OTHER CASE, WITH 40 PAGES OF FAMILY HISTORY. THIS MOTION ONLY HAS TEN PAGES OF FAMILY HISTORY. THIS IS CONCLUSIONARY. WHATEVER WE DO, THERE HIS REACTION TO OPPOSE THAT. THAT IS LITIGATION. A LOT OF THAT CAN'T BE FIXED BY A RULE. THAT IS JUST NATURE OF LITIGATION.

NORMALLY SANCTIONS, WHEN IT IS DONE IN THE CIVIL PART, THERE ARE SANCTIONS THAT ARE IMPOSED.

RIGHT. YOU KNOW, AND CHIEF JUSTICE HARDING HAD MENTIONED EARLIER, IN TERMS OF, WITH MR. MINERVA, ABOUT THE SYSTEM WORKING, AND I THINK, I MEAN, PART OF WHAT I WANT TO IMPRESS ON THE COURT IS THAT, WHETHER YOU ADOPT THE RULE OR WHETHER YOU ADOPT THE DPRA, IN PART, OR WHATEVER, THIS COURT HAS SPENT A LOT OF TIME DEVELOPING A BODY OF LAW, ANALYZING ALL OF THESE DUE PROCESS ISSUES, ADDRESSING ALL OF THESE EQUAL PROTECTION PROBLEMS. THAT IS GOODING'S TO BE THROWN OUT -- THAT IS GOING TO BE THROWN OUT, AND NOW WE ARE GOING TO BE HAVING LITIGATION ON WHAT IS FULLY PLED. WHAT IS MANIFEST INJUSTICE. WHAT IS THIS. WHAT IS THAT. CERTAINLY THERE ARE THINGS THAT CAN BE DONE, IN TERMS OF POSSIBLY TIGHTENING THINGS UP, BUT THE RULE, SINCE 3.851 WAS ENACTED, WAS NEVER FULL ANY PLACE, BECAUSE OF FUNDING PROBLEMS, BECAUSE OF A HOST OF PROBLEMS. THE SYSTEM THAT HAS BEEN HERE HAS NOT HAD TIME TO WORK.

WHAT ABOUT IF YOU HAD A SYSTEM THAT, LIKE, YOU FILED YOUR MOTION AND IT HAD TO BE FACTUALLY SPECIFIC, AND THEN THE JUDGE HAD THE STATUS CONFERENCE AND SET AN EVIDENTIARY HEARING, SAY, 1 8 ON DAYS HENCE, AND THEN YOU HAD TO FILE YOUR WITNESS AND EXHIBIT LIST, YOU KNOW, WITHIN A REASONABLE TIME BEFORE THAT, AND THE POLICY WAS BASICALLY NO CONTINUEANCES OF THE EVIDENTIARY HEARING, EXCEPT IF THERE WAS A MANIFEST INJUSTICE, AND ALLOWED AMENDMENTS, BASED ON GOOD CAUSE SHOWN, UP UNTIL THE TIME THAT PENNEDED FOR THE EVIDENTIARY HEARING. WOULD -- THAT PENDED FOR THE EVIDENTIARY HEARING. WOULD THAT ALLOW ENOUGH FLEXIBILITY FOR THE MAJORITY OF THE CASES AND ALLOWED THE CASE TO RESOLVE, NOT AFTER FIVE YEARS OR TEN YEARS OR, EVEN, FOUR YEARS, BUT MAYBE WITHIN A YEAR OR A YEAR AND-A-HALF AFTER THE CONVICTION?

I THINK SO AND I THINK MR. MARTELL EVEN AGREED, THAT THE WAY THESE CASES PROGRESS, LET'S SAY FROM THE TIME OF THE HUFF HEARING UNTIL THIS POSITION, PARTICULARLY IF THERE IS GOING TO BE AN EVIDENTIARY HEARING THAT, IS REALLY NOT A PROBLEM. THAT IS SOMETHING THAT I DON'T THINK CAN BE LEGISLATED, BECAUSE THE COURTS CAN HAVE A SIX-MONTH TRIAL COMING UP AND CAN'T SCHEDULE A HEARING, BUT, YOU KNOW, ONCE A HEARING IS ORDERED, YOU KNOW, I HAD A HEARING THAT WAS SCHEDULED BACK, I THINK, IN DECEMBER OR JANUARY, FOR THIS COMING MAY, AND WE HAVE BEEN PREPARING FOR IT, COMING UP IN MAY, WE HAVE GOT WITNESS LISTS TO EXCHANGE BY NEXT MONTH.

THOSE KINDS OF THINGS, WITNESS LIST EXCHANGES, ARE NOT IN THE RULE.

THEY ARE ALREADY HAPPENING. THEY ARE NOT IN THE RULE, BUT IT IS COMMON PRACTICE. IF

THE STATE WANTS A WITNESS LIST, I JUST WANT A RECIPROCAL WITNESS LIST. THAT IS ALL. UNDER LEWIS HAD, THERE IS SOME SORT OF LIMITED DISCOVERY -- UNDER LEWIS, THERE IS SOME SORT OF LIMITED DISCOVERY ALLOWED, SO ALL OF THAT IS REALLY NOT THAT MUCH OF A PROBLEM.

WHAT IS THE PROBLEM? IS IT THE PUBLIC RECORDS AGAIN?

A LOT OF IT IS THE PUBLIC RECORDS, AND, AGAIN, THE BIGGEST PROBLEM WITH PUBLIC RECORDS IS THAT IT IS CHANGED EVERY SIX MONTHS. AND IT IS NEVER BEEN ALLOWED TO WORK ITSELF OUT. I MEAN, I CONTINUE TO THINK THAT THE REPOSITORY IS A MAJOR CONTRIBUTOR TO PART OF THE DELAY, BECAUSE FROM MY PERSPECTIVE, BROWARD SHERIFF'S OFFICE IS TWO BLOCKS AWAY FROM MY OFFICE. I CAN'T GO THERE AND GET THESE RECORDS.

BUT HAS BEEN --

NO. I UNDERSTAND, BUT THAT IS AN INHERENT PART OF THE DELAY. RECORDS DON'T GET SENT. THEY GET SENT. THEY ARE ILLEGIBLE. WE GET THEM BACK. WE GET A COPY OF A TAPE, WHEN IS THERE ACTUALLY 40 CASSETTE TAPES.

BUT HASN'T THAT BEEN ADDRESSED, AND ISN'T THERE SOME LEGISLATION OR SOMETHING TO ADDRESS THOSE CONCERNS SOME.

WELL, I MEAN, THE PROBLEM IS THERE IS LEGISLATION, AND THEN IT GETS REPEALED, AND THEN THERE IS A NEW RULE, AND THAT GETS STAYED OR REPEALED, SO WE ARE TALKING ABOUT A PROBLEM THAT ISN'T SUSCEPTIBLE TO SOLUTION, UNLESS IT, THE STATUTE, ACTUALLY, OR THE RULE OPERATE, AND, YOU KNOW, IT IS NOT A PERFECT WORLD. AGENCIES OBJECT TO THINGS FORM STATE ATTORNEYS -- OBJECT TO THINGS. STATE ATTORNEYS' OFFICES OBJECT TO THINGS. THEY HAVE A RIGHT TO OBJECT TO CERTAIN THINGS, AND THAT IS FINE. IT JUST TAKES SOME TIME TO WORK ALL OF THIS OUT. 32 CASES, MOST OF THEM ARE STILL PENDING IN THE COURTS, WITH THE EXCEPTION OF WARRANTS, THERE HAS BEEN NO BODY OF LAW TO GUIDE LOWER COURTS ABOUT RELEVANCY AND CERTAIN OTHER ISSUES THAT ARE INHERENT IN 3.852, AND SO THAT REMAINS TO BE SEEN, BUT IT IS A PROCESS THAT IS CUMBERSOME. THERE IS NO QUESTION ABOUT IT, AND IT IS JUST NOT A PROCESS BECAUSE OF THE NATURE OF THE PENALTY AND THE NUMBER OF CASES AND THE SYSTEMIC PROBLEMS THAT ARE SUSCEPTIBLE TO BEING MADE PERFECT. CAN IT BE MADE BETTER? PROBABLY. BUT CAN IT BE MADE PERFECT? NO T CAN'T BE. IT IS JUST IMPOSSIBLE.

BUT THE PROPERTYES -- BUT THE PROCESS WOULD BE GREATLY ENHANCED, FROM WHAT I HEAR YOU SAYING, IF THIS COURT CAME OUT WITH, LIKE THIS COURT DID IN CIVIL MEDICAL MALPRACTICE CASES, AND SAID THESE, THIS IS THE DISCOVERY YOU GET. THIS IS THE PARAMETERS OF IT, AND YOU ONLY GET ANYTHING ELSE FOR SOME TYPE OF EXTRAORDINARY SHOWING. SO THAT EVERYBODY IS WORKING FROM THE SAME PAGE, SO WE CAN STOP THIS BUSINESS OF HAVING 80 OR 100 MOTIONS.

DISCOVERY, IN TERMS OF NAMES OF WITNESSES AND EVERYTHING, HAD NOT BEEN A PROBLEM, UNTIL THE STATE KEPT LOSING CASES THAT KEPT GETTING REVERSED BY THIS COURT BECAUSE OF THEIR REPEATED INSISTENCE THAT THE MOTIONS NEEDED TO BE FULLY PLED WITH ALL OF THE ADDITIONAL REQUIREMENTS, SO IT HAS NEVER BEEN A PROBLEM, IN TERMS OF WHEN WE GET TO A PUBLIC RECORDS HEARING.

THE PUBLIC RECORDS IS A PROBLEM, BECAUSE ANY TIME YOU GET INTO WHAT RECORDS YOU ARE GOING TO DISCOVERY, ANY LITIGATE OR CAN DEAL WITH THAT -- ANY LITIGATOR CAN DEAL WITH THAT ISSUE UNTIL THE COWS COME HOME, BECAUSE THERE IS ALWAYS SOME OTHER NUANCE, UNTIL SOMEBODY SAYS THIS IS WHAT YOU GET AND THAT IS IT.

THERE ARE, I MEAN, THERE ARE THINGS IN THE RULE ALREADY, OR AT LEAST THE RULE THAT WAS JUST REPEALED, IN TERMS OF CERTAIN AGENCIES GO, RECORDS GET REQUESTED AT THIS TIER, AND OTHER AGENCIES AT THIS TIER, AND THERE ARE OTHER REQUIREMENTS, AND I HAVE HAD JUDGES SAY, I AM SORRY, MR. SCHER, YOU ARE NOT GETTING THAT. I SAY, OKAY. I WILL WAIT UNTIL MY APPEAL AND DO IT ON APPEAL, BUT THERE ARE CASES WHERE JUDGES SAY, NO, THAT IS NOT RELEVANT OR, YES THAT, IS RELEVANT, AND SO IT DOES GET DEALT WITH IN A CIRCUIT COURT. IT TAKES TIME, BUT OTHER AGENCIES CAN CLAIM THAT THIS IS UNDULY BROAD OR OVERLY BURDENSOME. WHY CAN'T THE RULE SAY THAT TURN THE RECORDS OVER TO THE REPOSITORY? BUT THERE IS BUILT IN THESE DELAYS IN TURNING OVER RECORDS AND OBTAINING RECORDS.

BUT JUSTICE WELLS, AND I WOULD LIKE TO SEE IF THERE IS A HAPPY MEDIUM, AGAIN, ON THIS, IS THAT THERE IS RECORDS THAT YOU SEEM TO SAY ROUTE IBLE GET LITIGATED ABOUT -- ROUTINELY GET LITIGATED ABOUT, EVEN THOSE THESE WOULD BE RECORDS THAT EVERY REASONABLE POSTCONVICTION COUNSEL WOULD WANT TO GET, AND WHY CAN'T THERE BE AGREED-UPON LISTING OF WHAT THOSE RECORDS ARE THAT EVERYONE COMES TO AN AGREEMENT ON AND THEN ANY ADDITIONAL RECORDS, SUCH AS WHEN YOU DO THE 50 PERSONNEL RECORDS OF THE DADE COUNTY JAIL, THERE -- THE 500 PERSONNEL RECORDS OF THE DADE COUNTY JAIL, THERE HAS GOT TO BE SOME SHOWING AS TO WHY, IN THIS CASE, YOU ARE ASKING FOR THAT TYPE OF OVERBROAD PRODUCTION.

THAT IS THE WAY IT IS NOW. THE FIGHTS OVER PUBLIC RECORDS ARE NOT RELATED TO WHETHER THE STATE ATTORNEY'S OFFICE HAS THE OBLIGATION TO TURN OVER RECORDS. IT IS WHETHER THE REQUEST FOR STATE ATTORNEY FILES ON PARTICULAR WITNESSES IS OVERBROAD. WHETHER PERSONNEL RECORDS ON POLICE OFFICERS OR SBERBL AFFAIRS ON -- OR INTERNAL AFFAIRS RECORDS ON POLICE OFFICERS IS OVERLY BROAD. IT IS NOT AS TO THE CENTRAL, AT LEAST IN MY EXPERIENCE, IT HAS NOT BEEN AS TO THE CENTRAL LAW ENFORCEMENT FILES, STATE ATTORNEY FILES --

PERSONNEL RECORDS OF EVERY PRISON GUARD THAT EVER --.

THAT WAS A REQUEST THAT WAS MADE ONE TIME, WHEN THE RULE FIRST STARTED. THAT REQUEST HAS NEVER BEEN HONOREDORD. IT HAS NEVER BEEN FOLLOWED UP UPON, AND IT IS A REQUEST THAT IS SIX OR IS HE NOT YEARS OLD.

AND SO YOU WOULD, JUST AS A MATTER OF LAW, RULE THAT ONE OUT.

THAT WAS MADE AND NO COURT EVER ORDERED ANYBODY TO TURN ANYTHING OVER, AND YOU KNOW, BUT THAT IS JUST NOT THE REALITY OF THE WAY THINGS WORK NOW.

WHAT IS THE PERIOD OF TIME THAT YOU SEE APPROPRIATE TO LITIGATE THESE ISSUES, IF WE ARE LOOKING AT THE TIMETABLES. YOU ARE SUGGESTING THESE PROBLEMS ARE GOING TO OCCUR? WE HAVE HEARD DIFFERENT VIEWS TODAY. WHAT DO YOU SAY IS THE REASONABLE PERIOD OF TIME TO COLLECT THIS, TO LITIGATE OUR DISPUTES ON THIS ISSUE, AND TO HAVE THE RECORDS READY TO AT LEAST GO THROUGH TO, THEN, FORMULATE WHATEVER IT IS WE ARE GOING TO FILE. WHAT IS THE REASONABLE TIME?

BECAUSE OF THE TRIGGERING MECHANISM, WITH AGENCIES OBVIOUSLY NEEDING SUFFICIENT TIME TO GET RECORDS, I MEAN, CERTAINLY THERE IS GOING TO BE AT LEAST AT YEAR, JUST TO MAKE SURE THAT THE -- AT LEAST A YEAR, JUST TO MAKE SURE THAT THE RECORDS REQUESTS ARE MADE AND THAT GETS OUT. I AM BAFFLED. I GO TO RECORD REQUESTS ALL THE TIME IN MIAMI. I HAVE GOT RELEVANCY HEARINGS. I HAVE GOT RECORDS REQUEST HEARINGS. SOME JUDGES ARE MOVING THIS ALONG. IT IT IS A SYSTEMIC -- IT IS A SYSTEMIC PROBLEM, BUT PRIMARILY --

IS THE HEARING TAKING PLACE AFTER THE POSTCONVICTION MOTION IS FILED?

MOST OF THEM. I AM TRYING, EVEN, TO REMEMBER, YEAH, BECAUSE ALL OF THEM HAVE SOMETHING FILED INITIALLY. RIGHT FORM RIGHT.

BUT HERE, IF WE WERE TO DON'T -- RIGHT. RIGHT.

BUT HERE, IF WE WERE TO DON'T THE MORRIS COMMISSION OR THE DEATH PENALTY REFORM ACT, THOSE HAVE PRESUPPOSED THAT YOU HAVE ALREADY GOT YOUR PUBLIC RECORDS.

RIGHT. BUT YOU KNOW, IT IS SORT OF PUTTING THE CART BEFORE THE HORSE, IN TERMS OF DOING THE PUBLIC RECORDS BEFORE YOU REALLY HAVE ANY INKLING OF WHAT THE CASE IS ABOUT. IT MAKES IT VERY DIFFICULT TO SHOW HOW A PARTICULAR REQUEST IS RELEVANT TO YOUR CASE, WHEN YOU MAY NOT EVEN HAVE THE RECORD ON APPEAL YET. YOU KNOW, SO THERE IS LOTS OF VARIATIONS OF THINGS THAT I CAN --

BUT YOU GET A LOT, IF YOU GET ALL THE RECORDS IN THE STATE ATTORNEY'S OFFICE AND THE --

YOU GET SOME IDEA, YEAH, SURE. YOU GET SOME IDEA.

YOU GET A LOT, AND FROM THAT YOU BEGIN TO MAKE YOUR OTHER KNOWLEDGE OF OTHER REQUESTS THAT CAN BE MADE.

RIGHT. I MEAN, FROM MY, YOU KNOW, EXPERIENCE, AGAIN, THE BIGGEST PROBLEM HAS BEEN THE CONSTANT CHANGING IN ALL OF THE RULES AND THE DIFFERENT NUANCES IN ALL OF THE RULES, NOT SO MUCH THE ACTUAL SETTING UP THE REQUESTS. I MEAN, SOMETIMES ARE THEY LATE? SOMETIMES THEY ARE LATE. THE STATE RESPONDS LATE SOMETIMES. I MEAN, THAT HAPPENS. BUT THERE IS A PROCESS THAT IS FOLLOWED. IT IS JUST CONTINUED SHIFTING OF SAND. DOES THE NEW RULE APPLY TO OLD CASES, AND THEN THERE IS PIPELINE CASES, AND WHAT HAPPENS WITH THESE RECORDS, AND IT GETS INTO THE REPOSITORY, AND NOW THE EXEMPT RECORDS, INSTEAD OF GOING TO THE REPOSITORY, ARE GOING DIRECTLY TO THE TRIAL COURTS, UNDER DPRA, AND WHAT IS GOING TO HAPPEN TO ALL OF THE RECORDS THAT ARE SITTING UP HERE NOW? THE AGENCY IS GOING TO COMPLAIN THAT THEY SHOULDN'T PAY FOR IT. I MEAN, YOU JUST GET THESE CONSTANT KINDS OF ISSUES THAT YOU JUST CAN'T PREDICT IN A RULE. CERTAIN THINGS ARE GOING TO HAPPEN AND CERTAIN DELAYS ARE GOING TO HAPPEN. IT IS A COMPLICATED PROCESS, WHEN, PARTICULARLY, YOU ARE TRYING TO MANAGE AN ENTIRE STATE'S WORTH OF DISCOVERY IN ONE BUILDING IN TALLAHASSEE. IT IS JUST NOT CENTRALLY LOCATED.

IN STRIVING FOR SPECIFICITY IN THE MOTIONS, DO YOU HAVE ANY COMMENTS WITH REGARD TO THE SIX ELEMENTS THAT HAVE BEEN PROPOSED BY THE MORRIS COMMISSION? ANOTHER SIX ELEMENTS, MEANING? ANOTHER ELEMENTS FOR A -- WHAT THEY LIST AS FULLY-PLED MOTION?

ONLY TO THE EXTENT THAT, YOU KNOW, OBVIOUSLY, LIKE I SAID, IF THE COURT WANTS TO ADOPT THAT, MY, AS SURE AS I AM STANDING HERE, I CAN TELL YOU THAT, NO MATTER WHAT IS PLED IN ACCORDANCE WITH THAT, IT IS NOT GOING TO BE SUFFICIENT ENOUGH, AND THERE IS GOING TO BE LITIGATION OVER THAT, AND SO --

BUT THERE IS NOT A PARTICULAR ELEMENT THAT IS UNACCEPTABLE OR INAPPROPRIATE, UNDER THESE CIRCUMSTANCES, WAS VIEW THEM?

YOU ARE TALKING ABOUT NAMES AND ADDRESSES AND THAT SORT OF THING?

THEY ARE TALKING ABOUT SIX ELEMENTS, AS THEY GO THROUGH, AND PROFFERS OF STATEMENTS. THAT IS WHAT THEY ANTICIPATE FOR A FULLY-PLED MOTION, AND WHETHER THERE ARE ANY OF THOSE THAT WE SHOULD SAY THAT IS JUST NOT APPROPRIATE.

FOR EXAMPLE ADDRESSES. I MEAN, I DON'T UNDERSTAND THE NEED FOR ADDRESSES. IF THEY WANT THE NAMES TO BE SUFFICIENT ENOUGH, I MEAN, WE HAVE HAD EXPERIENCES WHERE WE HAVE HAD, PARTICULARLY UNDER WARRANT, WHERE YOU DO HAVE, YOU KNOW, YOU PUT AFFIDAVITS IN OR SOMETHING LIKE THAT, WHERE I HAD IN A CASE RECENTLY, WHERE THE POLICE GO AND START INTIMIDATING YOUR WITNESSES.

WHAT YOU DON'T WANT IS, ALSO, SOMETHING WHERE YOU HAVE NOW, THAT YOU END UP LISTING AN ADDITIONAL WITNESS, AND THE STATE, SOMEONE COMES BACK AND SAID, WELL, YOU DIDN'T FULLY PLEAD YOUR ORIGINAL MOTION, BECAUSE THE WITNESS WASN'T IN YOUR ORCK MEELINGS.

-- YOUR ORIGINAL MOTION.

RIGHT. I LEFT ONE OFF BY MISTAKE OR I PUT ONE MORE THAN I SHOULD HAVE. THAT IS THE PROBLEM, BECAUSE WHATEVER I DO OR DON'T DO, THERE IS GOING TO BE A HA! WE CAUGHT YOU. YOU FELL INTO THE TRAP. YOU ARE NOT FULLY PLED.

YOU ARE SAYING THAT THAT MENTALITY EXISTS UNIFORMLY, IN THE STATE'S APPROACH TO THESE CASES?

IT VARIES, DEPENDING ON THE STATE ATTORNEY INVOLVED, THE ATTORNEY GENERAL'S OFFICE INVOLVED. I AM CERTAINLY NOT IMPUGNING THE ENTIRE --

IF THAT IS SOMETHING THAT OCCURS WITH ANY FREQUENCY, HOW THIS COURT, THROUGH RULE, COULD TAKE STEPS TO CURB THAT ABUSE?

I DON'T KNOW. LITIGANTS --

YOU ARE SAYING PART OF LITIGATION, BUT IT IS NOT -- EVERYONE HAS AGREED THAT DELAY DOESN'T WORK TO THE -- TO ADVANCE THE CAUSE OF JUSTICE. SO THE STATE WOULD SAY, NO, WE ARE NOT DOING THAT. THE QUESTION IS IF IT IS BEING DONE, WHAT MECHANISM SHOULD EXIST TO PROVIDE A DISINCENTIVE FOR THAT HAPPENING?

WELL, YOU KNOW, I GUESS IT JUST COMES FROM YOUR PERSPECTIVE, BECAUSE I AM SURE THAT THEIR POSITION IS THAT THEY ARE ENTITLED TO SAY THAT THIS ISN'T FULLY PLED, JUST LIKE, FOR EXAMPLE, THE DPRA THREATENS SANCTIONS AND RAISING BEFORE THE HOUSE AND SENATE THAT THE COURT FOUND IT PROCEDURALLY BARRED. THE FACT THAT THE COURT FOUND IT BARRED DOESN'T MEAN I THOUGHT IT WAS BARRED WHEN I PLED IT. I MEAN, I FOUND REASONS THAT IT WASN'T BARRED. I DON'T KNOW WHAT YOU CAN DO, AND YOUR JOB ISN'T EASY. FAR FROM IT.

YOU -- THERE ARE TWO OTHER PEOPLE THAT WANTED TO SPEAK.

YES. I JUST, BEFORE I SIT DOWN, WANTED TO TOUCH BRIEFLY ON ONE MATTER THAT HAS KIND OF BEEN TOUCHED ON BUT NOT REALLY IN DEPARTMENT, AND THAT IS THE CARTER INCOMPETENCY PROBLEM. I KNOW THE STATE, THE ATTORNEY GENERAL'S OFFICE, SAID THAT THIS SHOULDN'T BE SOMETHING THAT IS INCORPORATED IN THE RULE. I WAS VERY PLEASED THAT THE FLORIDA BAR DID DECIDE TO PUT A PROPOSED RULE IN ITS SUBMISSION, BECAUSE CARTER CAME OUT IN '97. IT HAS BEEN THREE YEARS. THERE STILL ISN'T A RULE, AND I KNOW THE COURTS ARE STILL STRUGGLING WITH THAT, AND I DON'T SEE WHY IT SHOULDN'T BE INCORPORATED INTO ANY PROPOSED RULE THAT THE COURT WOULD DON'T. -- WOULD ADOPT.

THANK YOU, MR. SCHER. MR. CHARTL?

THANK YOU. MAY IT PLEASE THE COURT. I WILL BE VERY BRIEF. I KNOW IT IS LATE. A FEW OF THE

THINGS, I THINK, JUSTICE LEWIS, ABOUT THE THINGS THAT ARE REQUIRED IN THE MOTION, HAVING A PAGE LIMIT AT THE SAME TIME THAT YOU ARE INCREASING ALL OF THE THINGS YOU HAVE TO FILE, I THINK THAT, HAVE TO PLEAD, IN THE SPECIFICITY WITHIN WHICH YOU HAVE TO DO THAT, I THINK THAT IS ANOTHER TRAP THAT MR. SCHER POINTED OUT RESPECT AND, AGAIN, IF YOU LATER CAME FORWARD WITH OTHER WITNESSES, IT WASN'T PLED, SO THE WHOLE THING SHOULD BE DISMISSED. THE STATEMENT OF EACH ISSUE RAISED ON APPEAL AND DISPOSITION THEREAFTER, IT IS -- THEREOF, IT IS BASICALLY UP TO THE STATE TO PLEAD THEIR DEFENSES. I DON'T THINK THAT IS NECESSARY. IN TERMS OF RESPOND RESPONDING TO HOW CAN WE -- IN TERMS OF RESPONDING TO HOW CAN WE CURB THE PRACTICE OF RELITIGATING VILLEA AND GASKIN AND THESE OTHER CASES OVER AND OVER AGAIN, YOU WOULD O'CLOCK THAT -- YOU WOULD THINK THAT FINALITY AND SPEED ARE THE PRIMARY CONCERNS OF THE STATE, THAT CASES LIKE PD AND VILLEA AND GASKIN THAT GO BACK, AFTER EVIDENTIARY HEARINGS AND THE STATE HAS SAID THAT THEY SHOULD HAVE BEEN SUMMARILY DENIED BECAUSE THERE WEREN'T WITNESSES PLED, IF THAT DOESN'T DO, IT FRANKLY, I DON'T KNOW WHAT WILL. ON THE -- JUSTICE PARIENTE, I THINK THAT WE HAVE GIVEN YOU SOME EVIDENCE OF WHAT THE REGISTRY SYSTEM PRODUCES. WE PROVIDED YOU WITH THE HAMILTON 3.850 THAT WAS FILED IN OUR REGION, IN THE NORTHERN REGION. IT IS ABOUT THREE AND-A-HALF PAGES LONG. I DON'T THINK IT CITES TO ANY CASES, RULES OR STATUTES. AND IT DOESN'T STATE A BASIS FOR AMENDING THE PETITION. THEN IT WAS FILED ABOUT SIX MONTHS LATE. THE OTHER THING ABOUT THIS SYSTEM IS, IF -- I WOULD LIKE TO JUST TALK ABOUT THE CONDITIONS THAT YOU SAID NEEDED TO BE IN PLACE, THAT THIS COURT FELT NEEDED TO BE IN PLACE, IN 1994. THE -- HAVING AN OFFICE, WHETHER IT IS A RESOURCE CENTER OR CCR IN PLACE, SO THAT WE CAN ANSWER QUESTIONS LIKE YOU ASKED, JUSTICE WELLS: DID YOU GO TO THE LEGISLATURE AND SEEK MORE FUNDING FOR YOUR OFFICE? WE HAVE COME HERE, YEAR AFTER YEAR, TO ANSWER THOSE KINDS OF QUESTIONS. THE REGISTRY CAN'T COME HERE AND ANSWER THOSE QUESTIONS. IT IS A DECENTRALIZED SYSTEM. AND ONE OF THE DISADVANTAGES OF IT --

BUT THE COMMISSION, FOR CAPITAL CASES, IS THERE NOT?

THEY OWE NO OBLIGATION TO THE CLIENTS OF THOSE INDIVIDUAL LAWYERS. THERE IS NOTHING THAT WOULD REQUIRE THEM TO GO AND INCREASE MORE FUNDING. THEY ARE LEGISLATIVE BONDING. THEIR GOAL IS TO DECREASE SPENDING, AND THAT IS WHY I HAVE, HERE, THE LEG I HAVE STAFF ANALYSIS FOR THE -- THE LEGISLATIVE STAFF ANALYSIS FOR THE ECONOMIC IMPACT STATEMENT ON THE DPRA. IT IS A MONEY-CUTTING THING. THERE IS NO FUNDS FOR CCR. NO RESOURCES. NO LAWYERS TO HANDLE THESE CASES. IT STATES THAT THE MONEY WILL GO TO THESE REGISTRY LAWYERS, AND, AGAIN, WITH ALL DUE RESPECT, JUSTICE PAR YEPT, I THINK WE HAVE GIVEN YOU MORE -- PARIENTE, I THINK WE HAVE GIVEN YOU MORE TO GO ON, WITH RESPECT TO THAT. EACH AND EVERY REGISTRY LAWYER WILL SIGN A CONTRACT THAT WILL SAY I WILL ONLY WORK THIS MANY COMPREHENSIBLE HOURS, AND THOSE ARE FAR -- COMPENSIBLE HOURS, AND THOSE ARE FAR, FAR BELOW THE NUMBER OF REASONABLE HOURS THAT THEY NEED TO WORK ON A CLAIM. THEY WILL SIGN A CONTRACT SAYING I WILL NOT INVESTIGATE A CLAIM WITH REGARD TO JOHNSON VERSUS MISSISSIPPI. I WILL NOT INVESTIGATE A CLIENT'S JUVENILE RECORDS. THEY HAVE SIGNED A CONTRACT THAT SAYS THEY WILL NOT DO THAT. I WILL NOT FILE ON CLEMENCY PROCEEDINGS. EVERY REGISTRY LAWYER SIGNS A CONTRACT SAYING I WILL NOT DO IT, UNDER NO CIRCUMSTANCES. THAT IS IN DIRECT CONFLICT WITH THE RULES BY THE FLORIDA BAR. ZOO THERE A CONTACT BY THE REGISTRY?

THERE HAS BEEN, AND IT IS ACTUALLY BEFORE YOU NOW. I RAISE IT BECAUSE MY CLIENT, THE REGIONAL COUNSEL, IF EITHER OF THESE PROVISIONS IS ADOPTED, EITHER THE DPR A OR THE MORRIS COMMITTEE'S PROPOSAL, THE BURDENS WILL BE PUT ON OUR OFFICE THAT SOMEBODY WILL HAVE TO GO, AND THE QUESTION IS HOW CAN WE MAKE THAT DECISION? HOW CAN THE REGIONAL COUNSEL SAY, WELL, I CAN PROVIDE TWO LAWYERS FULL TIME IN EVERY CASE. A FULL-TIME INVESTIGATOR IN EVERY CASE. I CAN LITIGATE THESE OTHER ISSUES, BUT SORRY. YOU ARE JUST UNLUCKY PERSON WHO HAS TO GO, BECAUSE I CAN ONLY HANDLE 100 CASES, AND YOU

ARE THE 101 PERSON, SO YOU HAVE TO GO, AND THAT POSITION --

LET ME ASK A COMPARISON OF WHAT ARE THE HOURS THAT YOU REPRESENT IS AN AVERAGE NUMBER OF HOURS TO BE ABLE TO FILE A FULLY-PLED POSTCONVICTION?

IT IF I AM NOT MISTAKEN, I THINK IT IS ABOUT 2000 HOURS, AND THE REGISTRY, IF I AM NOT MISTAKEN, IS ABOUT 200 OR SOMETHING LIKE THAT. BUT I DON'T HAVE THOSE FIGURES IN FRONT OF ME. THEY ARE IN THE REPORT.

THE LIMIT IS $20,000 FOR THE POSTCONVICTION? >> TO BE HONEST WITH YOU, I DON'T RECALL WHAT THE STATUTORY CAP IS ON THAT STAGE OF THE PROCEEDINGS. BUT THERE AGAIN, IT IS, YOU KNOW, RATHER THAN HAVE AN ORGANIZATION THAT CAN COME BEFORE YOU AND TALK ABOUT THINGS LIKE THAT, IT IS DONE ON A CASE BY CASE BASIS, MOSTLY BY SOLE PRACTITIONERS. LASTLY, JUST TO SAY, ON THAT POINT, THAT I, HAVING HANDLED CASES THAT WE HAVE PRESENTED YOU INFORMATION ON, IN STEPHEN WRIGHT'S ARTICLE FROM TAXES, AND WE HANDLED, FROM MY OFFICE, A COUPLE OF CASES WHERE LAWYERS DIDN'T FILE TIMELY PETITIONS ON MATTERS IN STATE COURT, I JUST DON'T FEEL THAT THIS COURT WANTS TO BE IN THE POSITION THAT THOSE COURTS WERE IN, PARTICULARLY IN THE CANTU CASE. ANDREW CANTU WAS EXECUTED FEBRUARY 16, 1999, AFTER RECEIVING NO COLLATERAL REVIEW AT ALL. AND THE ONLY REASON IS BECAUSE HIS STATE HABEAS LAWYER APPOINTED UNDER A SYSTEM UPON WHICH THE REGISTRY ACT IS MODELED, DIDN'T DO ANY WORK ON HIS CASE. THAT IS IT. AND THAT IS GOING TO BE WHAT WE HAVE IN THE STATE OF FLORIDA, IF THIS GOES FORWARD, AND I MENTION IT HERE, AGAIN, BECAUSE IN THE RULE 3.8 A 1 MAKING, HAVING EQUAL -- IN THE RULE 3.851 MAKING, HAVING EQUAL REPRESENTATION TO EVERYONE IS SIMPLY LIMITING THE TIME, AND WE DON'T HAVE THAT HERE.

YOU HAVE MADE A NUMBER OF STATEMENTS ABOUT REGISTRY COUNSEL. WHAT DO YOU PROPOSE IS AN ALTERNATIVE TO REGISTRY COUNSEL? AS I UNDERSTAND IT, A LOT OF THE CCR OFFICES HAVE SAID THAT WE HAVE ALL OF THE CASES WE CAN HANDLE, SO WHAT SHOULD WE DO? IF REGISTRY COUNSEL ISN'T PERFORMING ACCORDING TO STANDARDS, WHERE DO WE GET OTHER ATTORNEYS?

I DON'T THINK THE ATTORNEYS ARE NECESSARILY AVAILABLE. THEY MAY BE. I THINK THE COURT IS BASICALLY IN THE SITUATION IT WAS IN THIS 1995 AND 1996, WHEN, AFTER RULE 3.8 A 1 WENT INTO EFFECT -- RULE 3.851 WENT INTO EFFECT, IT COULDN'T BE IMPLEMENTED, AND THE CASES HAD TO BE STAGGERED, AND ADMINISTRATIVE ORDERS WERE ENTERED, TOLLING TIME UNTIL COUNSEL WERE ONBOARD TO HANDLE THE CASES. I WOULD SUGGEST THAT YOU LOOK AT THE CALIFORNIA SUPREME COURT STANDARDS FOR THE APPOINTMENT OF COUNSEL IN CAPITAL HABEAS PROCEEDINGS. THOSE ARE VERY DEMANDING STANDARDS BUT THEY ARE VERY GOOD STANDARDS. AND UNLESS WE CAN MEET SOMETHING LIKE THAT, WE JUST SIMPLY AREN'T ABLE TO PROVIDE COUNSEL, AT LEAST NOT ON AN EQUAL BASIS, AND I DON'T THINK THERE IS ANY DISPUTE, REALLY, THAT IS AN UNEQUAL SYSTEM.

SO YOU ARE, ALSO, SAYING THAT INCREASING THE NUMBER OF RETURNEES OR THE FUNDING FOR CCR'S WOULD NOT HELP THE SITUATION, EITHER, OR SOLVE THE PROBLEM?

NO. I AM SORRY. INCREASING POSITIONS AT CCR COULD HELP TO ABSORB SOME OF THE CASES. IT COULD.

AND WHERE WOULD CCR DRAW ATTORNEYS, NEW ATTORNEYS? I MEAN, IT SOUNDS LIKE YOU ARE SAYING THERE ARE NOT ATTORNEYS OUT THERE WHO WOULD BE QUALIFIED TO HANDLE THESE CASES, SO WHERE WOULD CCR FIND THEM?

I AM NOT SAYING THAT AT ALL. IT HAS BEEN DIFFICULT, OVER THE YEARS, FOR THE CCR'S AND THE REGIONAL COUNSELS TO FIND QUALIFIED ATTORNEYS, BUT THEY HAVE DONE SO. I MEAN, IT

IS A VERY DIFFICULT PROBLEM. IT IS A DIFFICULT PROBLEM NATIONALLY. BUT IT IS A SOLVABLE PROBLEM.

THANK YOU, MR. PURCELL.

MY NAME IS STEVE PROECHEL, AND I AM REPRESENTING NO ONE BUT MYSELF. HOWEVER, I AM A MEMBER OF THE APPELLATE RULES COMMITTEE, AND I SAW THE RULE THAT WAS PUBLISHED IN THE FLORIDA BAR NEWS, AND I DECIDED TO THROW IN A FEW COMMENTS. WHAT INITIALLY ATTRACTED MY ATTENTION IS THAT THE MORRIS COMMITTEE HAS A NUMBER OF APPELLATE RULES IN IT, AND IT WOULD SEEM A LOT MORE LOGICAL TO PUT THOSE RULES IN THE APPELLATE RULES, AS OPPOSED TO THE CRIMINAL RULES, AND WHEN YOU HAVE RULES IN MORE THAN ONE PLACE, SOME OF THE APPELLATE RULES ARE IN THE APPELLATE RULES AND SOME OF THEM ARE IN THE RULES OF JUDICIAL ADMINISTRATION, AND SOME OF THEM ARE IN THE CRIMINAL RULES, AND CONFUSION RESULTS. THE PRIME EXAMPLE OF THAT IS THAT THE LEGISLATURE ATTEMPTED TO OR DID REPEAL 3.8 A 1 BUT FAILED TO REHE WILL -- 3.851 BUT FAILED TO REPEAL THE CORRESPONDENCING APPELLATE RULE, SO THE QUESTION IS WHAT DOES THAT MEAN? DOES THE APPELLATE RULE STILL RULE OR DID THEY REPEAL THAT? SO IT IS BETTER IF YOU HAVE GOT OF THE RULES IN THE SAME PLACE. IN, GENERALLY SPEAKING, THE CRIMINAL SECTION, YOU HAVE GOT THE TRIAL RULES IN THE CRIMINAL RULES AND THE APPEAL RULES IN THE APPELLATE RULES, AND THAT IS THE WAY IT SHOULD BE DONE, TOO. I GAVE YOU A PROPOSAL WITH HOW IT SHOULD BE DONE. IT WAS NOT A FINAL PROPOSAL BUT AT LEAST SOME IDEA OF HOW IT WOULD BE DONE, AND CERTAINLY IF YOU WANTED TO REFER THIS MATTER TO US, OUR SUBCOMMITTEE THAT DEALS WITH CRIMINAL MATTERS IS PRETTY GOOD. WE HAVE GOT THREE APPELLATE JUDGES ON THAT, AND WE WOULD BE HAPPY TO LOOK AT THAT. TO THE EXTENT THAT YOU COULD TELL US, GENERALLY, WHAT YOU WANTED, AS FAR AS TIME FRAMES GO, THAT WOULD HELP US. IT WOULD, ALSO, PROBABLY HELP US, IF YOU COULD DESIGNATE SOME STAFFERS FROM THIS COURT TO SIT IN ON OUR MEETINGS, BUT WE WOULD BE HAPPY TO DO THAT. LIKE I SAY, I HAVE NO THE RUN THIS BY THE APPELLATE RULES COMMITTEE, BUT I BELIEVE THEY WOULD AGREE WITH ME, SHOULD THAT OCCASION EVER ARISE. NOW, THE OTHER POINT I WANTED TO MAKE IS I CAME, LET ME THROW IN ONE MORE THING. I WAS SURPRISED TO HEAR THAT THERE IS NO EXPOSE FACT-ARGUMENT BEING DMAD. -- EXPOS FACTO ARGUMENT BEING MADE TODAY. EITHER IT IS SUBSTANTIVE OR PROCEDURAL. IF IT IS SUBSTANTIVE, IT CAN'T BE APPLIED RETRO ACTIVELY. IF IT IS PROCEDURAL, IT HAS TO DO WITH THE DOCTRINE OF POWER. I THOUGHT I WOULD MENTION THAT PROCEDURALLY, NO ONE HAS. WITH REGARD TO THE TECHNICAL ARGUMENT, I THINK THAT THE DPRA VIOLATES THE FOLKS' EQUAL PROTECTION RIGHTS AND I THINK THE MORRIS COMMITTEE DOES, ALSO, ALTHOUGH NOT TO THE SAME DEGREE. CERTAINLY THE PRIME EXAMPLE OF THAT IS THE DUAL TRACK. IT IS EASY TO THINK OF IT. FOR 2 ON 0 YEARS, YOU HAVE BEEN -- FOR 200 YEARS, YOU HAVE BEEN ALLOWED TO SEE HOW THE APPEAL WILL TURN OUT BEFORE YOU FILE YOUR HABEAS CORPUS, AND NOW ALL OF A SUDDEN YOU HAVE GOT TO FILE YOUR HABEAS CORPUS RIGHT AWAY, AND IT IS EASY TO THINK OF EXAMPLES HOW, SOMETIMES, YOU MIGHT WANT TO WAIT. FOR EXAMPLE, YOU MIGHT WANT TO ACCUSE YOUR TRIAL COUNSEL OF NOT BEING EFFECTIVE FOR NOT RAISING AN ENTRAPMENT DEFENSE, AND HE, INSTEAD, USED A MISTAKEN IDENTITY DEFENSE. I MEAN, IF YOU HAVE TO FILE YOUR INEFFECTIVE ASSISTANCE CLAIM, YOU BASICALLY HAVE TO SAY THAT YOU DID IT, IF YOU WANT TO USE ENTRAPMENT DEFENSE, AND SAY THAT THE LAWYER WAS INEFFECTIVE FOR NOT DOING. THAT MEANWHILE, WHAT IMPACT WOULD THAT HAVE ON YOUR APPEAL? WOULD THEY GET A TRANSCRIPT OF YOUR STATEMENT AND FILE IT WITH THIS COURT AND SAY, HEY, LOOK AT THIS, THEY ARE SAYING, NOW, THAT HE IS ADMITTING THAT HE DID IT, AND WHAT IMPACT WOULD THAT HAVE?

WE DO THAT SAME THING, NOW, BUT AFTER THE APPEAL, AND WHEN -- IF WE HAVE SEND IT BACK FOR A NEW TRIAL, THAT EVIDENCE IS NOT ADMITTED.

THE POINT I AM TRYING TO MAKE IS THAT THE NORMAL -- I SHOULDN'T SAY NORMAL BUT A

PERSON WHO IS NOT ON DEATH ROW DOESN'T HAVE TO MAKE THAT CHOICE. HE CAN WAIT TO SEE HOW THE APPEAL IS GOING. AND AS I SEE IT, THAT IS A VIOLATION OF EQUAL PROTECTION, BECAUSE A PERSON WHO IS CONVICTED OF MURDER IN THE FIRST DEGREE AND GETS LIFE IN PRISON, CAN WAIT TO SEE HOW THE APPEAL GOES. THE PERSON WHO IS CONVICTED OF MURDER IN THE FIRST DEGREE AND GETS DEATH HAS TO APPEAL IT RIGHT AWAY, HAS TO MAKE THIS CHOICE WHICH THE OTHER PERSON DOESN'T HAVE TO MAKE.

THANK YOU.

NOW, THERE IS A NUMBER OF OTHER POINTS. I MEAN ONE THING THAT CAUGHT MY EYE ABOUT THE MORRIS COMMITTEE PROPOSAL IS THAT YOU ARE NOT ALLOWED TO DO A MOTION FOR REHEARING. WHY WOULD THAT BE? I MEAN, PEOPLE WHO ARE NOT ON DEATH ROW CAN FILE MOTIONS FOR REHEARING. PEOPLE WHO ARE ON DEATH ROW CAN'T. WHAT IS THE LOGIC OF THAT? NOW, AS I UNDERSTAND IT, THE WHOLE JUSTIFICATION FOR THIS WAS DONE IN 1993, WHEN THIS COURT PROMULGATED THE CHANGE FROM TWO YEARS TO ONE YEAR, IN THE 3.850, AND YOU SAID, WELL, SINCE THEY ARE GETTING A LAWYER, THERE FOR WE CAN REDUCE THE AMOUNT OF TIME FROM TWO TO ONE, AND I THINK WHERE JUSTICE KOGAN SAID THAT WAS A VIOLATION OF EQUAL PROTECTION, I THINK HE WAS RIGHT. I DON'T THINK THAT YOU CAN TRADE CONSTITUTIONAL RIGHTS LIKE STOCKS ON AN EXCHANGE. I MEAN, YOU CAN'T SAY, WELL, WE HAVE GOT THREE VALUABLE SHARES OF RIGHT TO COUNSEL INCORPORATED, AND WE WILL TAKE YOUR HABEAS SHARE INSTEAD. WHAT IF THE GUY DOESN'T WANT TO GIVE IT UP? HE IS ENTITLED TO KEEP IT. OR SUPPOSE HE ALREADY HAS A LAWYER. HOW CAN YOU GIVE HIM, AS A GOOD TRADE, HOW CAN YOU GIVE HIM SOMETHING HE ALREADY HAS, THAT HE DOESN'T EVEN WANT? SO THE RICH PERSON ON DEATH ROW WHO ALREADY HAS A LAWYER DOESN'T REALLY WANT THIS FREE LAWYER. NEVERTHELESS HIS RIGHTS HAVE BEEN REDUCED. MEAN WHILE THE RICH PERSON WHO HAS A GUILTY OF MURDER AND GETS A LIFE SENTENCE GETS TO DO ALL OF THE OTHER THINGS THAT THE PERSON ON DEATH ROW CAN'T DO. SUPPOSE THE LAWYER THAT YOU GET IS NO GOOD. SUPPOSE HE BLOWS THE FILING DEADLINE. SUPPOSE HE FILES A THREE-PAGE MOTION? UNDER THE MORRIS COMMITTEE PROPOSAL, YOU CAN'T CHALLENGE THE INEFFECTIVE ASSISTANCE, AND I THINK THE DPRA SAYS THE SAME THING. HOW IS IT A FAIR TRADE, IF THE LAWYER YOU GET IS NO GOOD? YOU SAY WE ARE GIVEN A FREE LAWYER, BUT I DIDN'T WANT THAT LAWYER, AND HE BLEW MY FILING DEADLINE. THE RICH PERSON ON, THE RICH PERSON WHO RECEIVES A LIFE SENTENCE DOESN'T HAVE TO MAKE THAT KIND OF CHOICE. NOW, THE OTHER POINT I WANT TO MAKE, HERE, IS THAT THE EQUAL PROTECTION, AND I THINK THAT THIS HAS BEEN OVERLOOKED FOR 200 YEARS, ARTICLE I SECTION 2 PROVIDES THAT ALL NATURAL PERSONS, FEMALE AND MALE ALIKE, ARE EQUAL BEFORE THE LAW AND HAVE INALIENABLE RIGHTS, AMONG WHICH ARE THE RIGHT TO ENJOY AND DEFEND LIFE AND LIBERTY. NOW, THAT LANGUAGE COMES FROM THE DECLARATION OF INDEPENDENCE, BUT EVEN THE DECLARATION OF INDEPENDENCE DOESN'T HAVE THE WORD "DEFEND LIFE", AND TO MY KNOWLEDGE NO ONE HAS EVER POINTED OUT TO THIS COURT THE IMPLICATION OF THAT TO THE DEATH PENALTY JURISPRUDENCE, THAT EVERYBODY HAS AN EQUAL RIGHT TO DEFEND THEIR LIFE. NOW, WHEN YOU LOOK AT OTHER PROVISIONS OF SEX TWO, THERE -- OF SECTION TWO, THERE IS ONE THAT SAYS YOU HAVE AN EQUAL RIGHT TO BE REWARDED FOR INDUSTRY. THIS COURT SAID, IN THE DIALLO CASE THAT I CITED THAT, IS A FUNDAMENTAL RIGHT, AND THEREFORE ANY ATTEMPT TO RESTRICT THAT IS SUBJECT TO STRICT SCRUTINY. WHAT LOGIC IS THERE TO SAY HAD GONE THAT THE RIGHT TO BE REWARDED FOR INDUSTRY IS SUBJECT TO SKRIT SCRUTINY, EVEN THOUGH -- TO STRICT SCRUTINY, HE HAVE THEN -- BUT EVEN THOUGH THAT INVOLVES MERE MONEY, BUT THE RIGHT TO DEFEND YOUR LIFE IS NOT SUBJECT TO STRICT SCRUTINY? AND SO I AM SAYING, TO ANY EXTENT THAT THESE PROPOSALS, THE DPR A OR THE MORRIS COMMITTEE PROPOSAL DISCRIMINATES AGAINST PEOPLE DEATH ROW AND DISCRIMINATES AGAINST THE RIGHT TO DEFEND THEIR LIFE, ANY SUCH A BRIDGEMENT IS SUBJECT TO STRICT SCRUTINY. NOW, WE ALL KNOW THAT STRICT STRUT ANY IS INVARIABLY FATAL. INSTEAD OF SAYING THAT PEOPLE DEATH ROW ARE SUBJECT TO THESE RESTRICTIONS, LET'S SAY THAT AFRICAN-AMERICANS ARE SUBJECT TO THESE PROVISIONS. WE WOULDN'T SAY THAT THE PROVISION OF A FAIR LAWYER IS A FAIR --

OF A FREE LAWYER IS A FAIR FRAYED UNDER THOSE STRICT CIRCUMSTANCES AND THAT, UNDER STRICT SCRUTINY, YOU COULDN'T DO THAT. WHY IS IT A PROVISION FOR A PERSON ON DEATH ROW, IF THE PROVISION OF AN ATTORNEY WOULD NOT BE SUFFICIENT FOR AN AFRICAN AMERICAN, WHY IS IT ANY DIFFERENT FOR SOMEONE ON DEATH ROW? IT IS THE SAME STRICT SCRUTINY ANALYSIS THAT APPLIES.

WE WOULD APPRECIATE YOUR BRINGING YOUR REMARKS TO A CONCLUSION. WE GAVE YOU EXTRA TIME, BECAUSE WE GAVE PETITIONERS EXTRA TIME AS WELL.

OKAY. THANKS.

THANK YOU. AND I BELIEVE YOU HAVE USED ALL OF YOUR TIME, AND WE WILL