Arthur Dennis Rutherford vs Michael W. Moore

NEXT CASE ON THE COURT'S CALENDAR IS ARTHUR DENNIS RUTHERFORD VERSUS MICHAEL MOORE. MS. MCDERMOTT.

MAY IT PLEASE THE COURT. MY NAME IS LINDA MCDERMOTT, AND I REPRESENT MR. RUTHERFORD IN HIS PETITION FOR HABEAS CORPUS. I WOULD LIKE TO RAISE THE DOUBLE JEOPARDY ISSUE, RAISED ON DIRECT APPEAL, AND THIS COURT FOUND THAT THERE WAS INDICATION THAT THE PROSECUTOR PROSECUTOR'S MOTIVE, IN COMMITTING THE DISCOVERY VIOLATION AT TRIAL, WAS FOR PROVOKE A MISTRIAL. HOWEVER, SINCE THE TIME OF MR. RUTHERFORD'S DIRECT APPEAL, EVIDENCE HAS SURFACED THAT WOULD SUPPORT MR. RUTHERFORD'S CONTENTION THAT THE PROSECUTION, DID, IN FACT, PROVOKE A MISTRIAL IN HIS CASE.

EVIDENCE IS THERE WAS ANOTHER MISTRIAL IN ANOTHER CASE?

THAT IS CORRECT, YOUR HONOR. BEFORE I DISCUSS THE SPECIFICS OF THAT OTHER CASE, I JUST WANT TO GENERALLY DISCUSS THAT, UNDER THE CASE LAW OREGON V KENNEDY, WHEN A DEFENDANT ASKS FOR A MISTRIAL, GENERALLY HE IS ALLOWED TO BE RETRIED. HOWEVER, IF THE COURT FINDS THAT THE PROSECUTOR INTENTIONALLY PROVOKED THAT MISTRIAL, THEN JEOPARDY IS ATTACHED AND A RETRIAL IS NOT APPROPRIATE. IN THE ANALYSIS TO DETERMINE WHETHER OR NOT A PROSECUTOR INTENDED TO PROVOKE A MISTRIAL, CONSIDER SEVERAL OBJECTIVE FACTORS, AND SOME THIS COURT HAS SET FORWARD, AND, ALSO, OREGON V KENNEDY IS INSTRUCTIVE OF THOSE FACTORS. SOME OF THOSE FACTORS INCLUDE WHAT THE PROSECUTOR'S LEGAL ARGUMENT REGARDING THE VIOLATION, THE CHARACTER AND CIRCUMSTANCES SURROUNDING THE CASE, AND THE ADVANTAGE THE PROSECUTOR GAVE BY THE MISS -- MISTRIAL. AS TO THE ADVANTAGE THE PROSECUTOR GAINED BY THE MISTRIAL, HOWEVER, THIS COURT HELD, IN STATE V JOHNSON, THAT THE FOCUS IS NOT ON WHAT THE PROSECUTOR ACTUALLY GAINED IN THE SECOND TRIAL. IT IS WHAT THE PROSECUTOR INTENDED TO GAIN BY THE SECOND TRIAL.

WHAT IS THE FOCUS, NOW, OF YOUR CLAIM HERE? IS THIS THE CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL?

THAT IS PART OF THE CLAIM, YOUR HONOR. HOWEVER --

HELP ME WITH THIS PARTICULAR CLAIM. WHAT PACKAGE IS THE CLAIM DRESSED UP IN?

OKAY, YOUR HONOR. THE SPECIFIC ALLEGATIONS OF THIS CLAIM CONCERN THE FACT THAT THREE WEEKS AFTER MR. RUTHERFORD'S MISTRIAL, THE SAME PROSECUTING AUTHORITY AND THE SAME COUNTY, BEFORE THE SAME TRIAL JUDGE, PROVOKED -- A MISTRIAL OCCURRED IN ANOTHER CASE, THE ANTHONY BRIAN CASE, WHICH WAS, ALSO, A CAPITOL CASE, AND THE SIMILARITIES BETWEEN THOSE CASES CANNOT BE DENIED, SO WHEN THIS COURT MADE ITS DETERMINATION THE FIRST PART OF THIS CLAIM, WHEN THIS COURT MADE ITS DETERMINATION BACK IN 1988, AT THE TIME OF MR. RUTHERFORD'S DIRECT APPEAL, THIS COURT DID NOT HAVE ALL OF THE INFORMATION TO OBJECTIVELY ANALYZE WHETHER OR NOT THE PROSECUTOR AND MR. RUTHERFORD'S CASE, INTENDED TO PROVOKE A MISTRIAL.

WAS THIS INFORMATION YOU ARE TALKING ABOUT A PART OF THE APPELLATE RECORD IN THE

CASE?

NO, YOUR HONOR, IT WAS NOT.

SO WHAT YOU ARE REALLY ARGUING, THEN, IT SEEMS TO ME, IS THAT APPELLATE COUNSEL WAS SUPPOSED TO GO OUT AND DO SOME KIND OF INVESTIGATION, GET THIS INFORMATION, AND THEN DO WHAT?

CORRECT, YOUR HONOR. THAT IS ONE COMB OPPONENT OF THE CLAIM. THE CLAIM IS THAT -- THAT IS ONE COMPONENT OF THE CLAIM. THE CLAIM IS THAT --

WHAT WAS THE CLIENT GOING TO DO WITH THE CLAIM, ONCE IT WAS DISCOVERED?

THE FACTS AND CIRCUMSTANCES -- EEVED NATIONAL -- EVIDENCE THAT WAS NOT BEFORE THE TRIAL COURT, THE APPELLATE COUNSEL WAS GOING TO PRESENT TO THIS COURT.

CORRECT, YOUR HONOR, BECAUSE IN THE TYPE OF SITUATION OF THIS DOUBLE JEOPARDY CLAIM, WHAT HAPPENED WAS THAT THIS INFORMATION WOULD HAVE SUPPORTED THE IDEA THAT THE TRIAL -- THAT THE PROSECUTOR DID, IN FACT, PROVOKE A MISTRIAL IN THIS CASE, BECAUSE THEY DID THIS SIMILAR THING IN A SIMILAR CASE, IN A SIMILAR TIME FRAME.

BUT SHOULD THIS BE MORE OF A CLAIM IN THE TRIAL COURT, YOU KNOW, FOR POSTCONVICTION RELIEF, OR HABEAS? IN ESSENCE YOU ARE SAYING THAT THERE IS NEWLY-DISCOVERED EVIDENCE OF MISCONDUCT BY THE PROSECUTOR, AND THEREFORE, FOR INSTANCE, AN EVIDENTIARY HEARING MAY BE APPROPRIATE, TO SEE IF THERE IS A PATTERN OF MISCONDUCT OR WHATEVER. AS YOU CAN SEE BY THE INITIAL QUESTIONS, IT IS A LITTLE DIFFICULTY. ORDINARILY WE SEE CLAIMS OF INEFFECTIVENESS OF APPELLATE COUNSEL, WITH REFERENCE TO WHETHER THEY DIDN'T ARGUE EW ALL THE LAW OR THEY DIDN'T POINT SOMETHING OUT THAT WAS IN THE RECORD ABOUT THE ISSUE THEY RAISED OR MORE IMPORTANTLY, THERE WAS A SERIOUS PRESERVED ISSUE THAT WASN'T RAISED AT ALL. BUT YOU CAN SEE ALL OF THAT IS IN THE CONTEXT OF WHAT WE TRADITIONALLY EXPECT AN APPELLATE LAWYER TO DO, AND ONCE YOU GO OUTSIDE THOSE BOUNDS, IT IS VERY DIFFICULT TO GET A HANDLE, AND THAT IS WHY I ASKED YOU HOW THIS -- SO LET ME SEE IF I CAN -- THIS OTHER CASE, OKAY, HOW WOULD APPELLATE COUNSEL HAVE KNOWN ABOUT THAT, NOW?

WELL, JUDGE, HE COULD HAVE LEARNED -- HE KNEW THAT THERE WAS A PROBLEM WITH JEOPARDY, AND MR. RUTHERFORD'S CASE, HE RAISED THAT ISSUE.

THAT WAS AN ISSUE, RIGHT?

HE RAISED THAT ISSUE ON DIRECT APPEAL. NOW, UNDER THE CASE LAW, HE WOULD, ALSO, KNOW THAT THIS COURT, IT WAS A FACTUAL ISSUE, SO HE NEEDED TO PRESENT THIS COURT WITH CIRCUMSTANCES SURROUNDING MR. RUTHERFORD'S CASE THAT WOULD SUPPORT HIS ARGUMENT THAT THE PROSECUTOR DID INTEND TO PROVOKE A MISTRIAL. NOW, HE COULD HAVE -- IN THE BRIAN APPEAL, THEY DID NOT RAISE THIS ISSUE. HOWEVER, THE BRIAN APPEAL WAS GOING ON SIMULTANEOUSLY WITH THE RUTHERFORD APPEAL, AND HAD HE TALKED TO THE TRIAL ATTORNEYS, PERHAPS HE WOULD HAVE LEARNED THAT THIS HAPPENED BEFORE THE SAME JUDGE AND THE SAME COUNTY, WITH THE SAME PROSECUTOR, THREE WEEKS --

BUT YOU UNDERSTAND YOU HAVE THAT SAME DIFFICULTY THERE. THAT IS THAT OBVIOUSLY ORDINARILY WE LIMIT THE APPEAL TO THE RECORD ON APPEAL, YOU KNOW, AND THE APPELLATE RECORD, AND SO IN ORDER TO HAVE ANY OF THIS COME BEFORE A COURT, IT WOULD HAVE HAD TO HAVE HAD SOME KIND OF TRIAL COURT PROCEEDING. YOU COULDN'T JUST FILE AN AFFIDAVIT UP HERE OR SAY, WELL, WHY DON'T WE HOLD A FACTUAL EVIDENTIARY HEARING OR SOMETHING. WE ARE NOT REALLY EQUIPPED TO DO THAT, AND WE DON'T ORDINARILY REQUIRE

APPELLATE COUNSEL TO GO AND INVESTIGATE FACTS AND CIRCUMSTANCES AS WE DO WITH TRIAL COUNSEL OR POSTCONVICTION COUNSEL. WHY ISN'T THIS MORE APPROPRIATELY A CLAIM FOR POSTCONVICTION RELIEF?

YES, YOUR HONOR. WELL, WE RAISED THIS CLAIM IN OUR STATE HABEAS PETITION, BECAUSE THIS COURT MADE A FINDING, ON DIRECT APPEAL, THAT THERE WAS NO INDICATION THAT THE PROSECUTOR INTENDED TO PROVOKE A MISTRIAL.

HAVE YOU EVER SEEN AN APPELLATE OPINION ON APPELLATE HABEAS, WHERE THE COURT HAS INDICATED THAT THE APPELLATE LAWYER HAS SOME OBLIGATION TO GO OUT AND INVESTIGATE OUTSIDE OF THE RECORD, IN ORDER TO BRING EVIDENTIARY OR FACTUAL MATERIAL IN SUPPORT OF AN APPELLATE HABEAS?

NO, YOUR HONOR, BECAUSE THAT IS WHY I WANTED TO POINT OUT THAT OUR CLAIM HAS TWO COMPONENTS, AND THE FIRST COMPONENT WAS THAT WE FELT IT WAS PROPER TO BRING THE CLAIM IN THIS PETITION, BECAUSE WE ARE COLLATERALLY ATTACKING THE FINDING THAT THIS COURT MADE ON MR. RUTHERFORD'S DIRECT APPEAL AND GIVING YOU MORE INFORMATION THAT WE DIDN'T FEEL YOU HAD, AT THE TIME OF HIS APPEAL, THAT WOULD SUPPORT THIS ARGUMENT, AND THEREFORE WE FELT IT WAS PROPER TO DO THAT IN THIS MANNER. HOWEVER --

I GUESS WE ARE BACK TO ISN'T THIS ABOUT THE PERFORMANCE OF APPELLATE COUNSEL?

NO, YOUR HONOR. THAT IS ONE COMPONENT OF THE CLAIM, THAT THE DIRECT APPEAL ATTORNEY COULD HAVE SOUGHT OUT THIS INFORMATION. HE COULD HAVE RAISED IT. UNDER THE CASE LAW REGARDING DOUBLE JEOPARDY, HE MAY HAVE HAD A DUTY TO DO THAT, BECAUSE HE KNEW THAT, UNDER OREGON V KENNEDY, HE HAD TO SUPPORT HIS CLAIM WITH OBJECTIVE FACTS SURROUNDING MR. RUTHERFORD'S TRIAL THAT WOULD HAVE PROVEN THAT THE PROSECUTOR DID INTEND TO PROVOKE A MISTRIAL. HAD HE SPOKEN TO TRIAL COUNSEL, I DON'T THINK IT WOULD HAVE BEEN UNREASONABLE THAT TRIAL COUNSEL WOULD HAVE ACTUALLY INFORMED HIM THAT THIS ACTUALLY HAPPENED IN A CASE THREE WEEKS AFTER MR. RUTHERFORD'S CASE.

BUT HOW IS HE GOING TO GET THAT BEFORE AN APPELLATE COURT, EVEN IF HE FINDS IT OUT FROM TRIAL COUNSEL. WAS HE GOING TO FILE AN AFFIDAVIT?

I THINK, JUDGE, THAT HE COULD HAVE FILED THE CLAIM BEFORE YOU, JUST AS I DID, AND THEN JUST AS I DID IN MY BRIEF, ASKED FOR THIS COURT, IF YOU FEEL THAT THERE ARE CIRCUMSTANCES THAT NEED TO BE MORE FULLY FLERBD OUT, TO EITHER RELINQUISH JURISDICTION, WHICH THIS COURT HAS NOT HESITATED TO DO ON DIRECT APPEAL, WHEN YOU FEEL THAT THERE IS A FACTUAL ISSUE THAT NEEDS FURTHER DEVELOPMENT, OR HE COULD HAVE, YOU KNOW, TRIED TO SUPPLEMENT THE RECORD WITH THE BRYAN RECORD ON APPEAL, TO SHOW THAT THERE WAS THIS PATTERN.

IF THERE IS AN ORDINARY WAY THAT THIS CLAIM IS PRESENTED, YOU KNEE, IN A TRIAL COURT GRANTS -- YOU SEE, IF A TRIAL COURT GRANTS A MISTRIAL AND THEN LATER THE DEFENDANT IS GRANTED A RETRIAL AND IT IS FOUND DOUBLE JEOPARDY, BASED ON PROSECUTORIAL MISCONDUCT, THEN THE COURT HAS A HEARING, AND IF THERE IS COLLATERAL INFORMATION OR ADDITIONAL INFORMATION, FOR INSTANCE, IN THE BEST CASE SCENARIO, THEY COULD HAVE SOMEBODY OVER HEARING SOMEBODY ADMIT THEY DID SOMETHING LIKE THAT AND SAY, WELL, I HAVE GOT A WITNESS, NOW, THAT OVERHEARD THE PARTICULAR PROSECUTOR SAYING AH-HA! I DID THAT BECAUSE THE CASE WASN'T GOING WELL, AND I WANTED TO PROVOKE A MISTRIAL, SO I DID IT INTENTIONALLY, AND THEY PRESENT THAT TESTIMONY TO A TRIAL COURT JUDGE WHO, INDEED, THEN, MAY TAKE THAT INTO CONSIDERATION IN DETERMINING WHETHER THERE IS A DOUBLE JEOPARDY VIOLATION. I GUESS WHAT YOU ARE FINDING IS THAT IT IS HIGHLY UNUSUAL FOR AN APPELLATE COURT TO TREAT THIS, AND WE ARE JUST NOT EQUIPPED TO --

FOLLOWING UP ON THAT, IF THAT WAS KNOWN, BY THE TIME OF THE SECOND TRIAL, BEFORE THIS COURT RULED ON THE DOUBLE JEOPARDY ISSUE, THEN WHY WASN'T THIS ASPECT OF THE CLAIM BROUGHT AS AN INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, BASED ON WHAT JUSTICE ANSTEAD SAID, THAT THEY SHOULD HAVE BROUGHT THAT TO LIGHT AT THE TIME THAT THE DETERMINATION WAS MADE, WHETHER IT WAS APPROPRIATE TO RETRY MR. RUTHERFORD? I ASSUME IT WAS NOT BROUGHT TO LIGHT, BECAUSE IT WOULD HAVE BEEN PART OF THE RECORD, CORRECT?

CORRECT.

AND WAS IT INCLUDED AS A CLAIM IN THE INEFFECTIVE ASSISTANCE IN TRIAL COUNSEL CLAIM IN THIS CASE?

MR. RUTHERFORD'S 3.850 DID INCLUDE A CLAIM REGARDING THE DOUBLE JEOPARDY ISSUE, AND IN THAT CLAIM HE DID STATE THAT HE FELT HIS TRIAL COUNSEL HAD BEEN INEFFECTIVE FOR NOT RAISING THAT ISSUE AT THE TIME OF THE SECOND TRIAL.

WHAT WAS THE DECISION THEN? ANOTHER LOWER COURT DETERMINED THAT THAT WAS PROCEDURALLY BARRED, BECAUSE IT HAD BEEN RAISED ON DIRECT APPEAL, AND THIS COURT AFFIRMED THAT DETERMINATION.

WAS THE ARGUMENT, AT THAT TIME, THAT THERE WAS -- HE WAS INEFFECTIVE IN FAILING TO DISCOVER THIS INFORMATION? WAS IT POSED IN THAT LIGHT?

WELL, IF I COULD JUST STEP BACK A MOMENT AND, PERHAPS, THIS WILL HELP. WHAT HAPPENED AT MR. RUTHERFORD'S TRIAL WAS, DURING THE FIRST TRIAL HE WAS REPRESENTED BY PRIVATE COUNSEL. HE HAD BEEN ABLE TO HIRE AN ATTORNEY, AND DURING HIS FIRST TRIAL, THE PROSECUTOR PUT ON THESE WITNESSES, HE LISTED TESTIMONY THAT MR. RUTHERFORD HAD MADE AND CULPATORY STATEMENTS TO THEM AND VIOLATED JUDGE LOWERY'S PRETRIAL DISCOVERY ORDER. AT THAT TIME, MR. RUTHERFORD'S PRIVATE ATTORNEY MADE A MOTION FOR A MISTRIAL. THE JUDGE WITHHELD ANY DETERMINATION UNTIL AFTER THE TRIAL. AFTER THE TRIAL, HE DID DETERMINE THAT THERE WAS A WILLFUL AND KNOWING VIOLATION OF THE DISCOVERY ORDER, THAT THERE WAS SUBSTANTIAL PREJUDICE TO MR. RUTHERFORD, AND THAT THE ONLY WAY TO, YOU KNOW, PUT MR. RUTHERFORD BACK IN THE POSITION THAT HE SHOULD HAVE BEEN IN WAS TO DECLARE A MISTRIAL. MR. RUTHERFORD DIDN'T HAVE THE MONEY TO CONTINUE WITH A PRIVATE ATTORNEY. SO HE WAS APPOINTED THE PUBLIC DEFENDER. NOW, AT THAT POINT, WHEN THE PUBLIC DEFENDER STEPPED IN, THEY SHOULD HAVE MADE A MOTION THAT MR. RUTHERFORD COULD NOT BE TRIED, BUT THEY DIDN'T, AND SO THEREFORE, AND I DON'T DENY I THAT THE DIRECT APPEAL ATTORNEY WAS DISADVANTAGED, BECAUSE HE DIDN'T HAVE WHAT MOST DEFENDANTS HAVE WHEN THEY ARE LITIGATING DOUBLE JEOPARDY ISSUES, AND THAT IS A HEARING REGARDING WHETHER OR NOT THERE WAS AN INTENTIONAL PROVOCATION AFTER MISTRIAL BY THE PROSECUTOR, SO THERE WAS NO HEARING. THE DEFENSE ATTORNEY, THE PUBLIC DEFENDERS DID NOT RAISE THE ISSUE. MR. RUTHERFORD WAS TRIED AND RECONVICTED, AND THEN THE ISSUE BECAME BEFORE THIS COURT, ON DIRECT APPEAL, AND THEN IT WAS RAISED IN HIS 3.850 MOTION, AS WELL AS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, AND IT WAS NOT -- IT WAS NOT -- THE JUDGE -- I BELIEVE THE JUDGE SUMMARILY DENIED MR. RUTHERFORD'S GUILT-PHASE CLAIMS, ALTHOUGH I AM NOT QUITE SURE ON THAT, BUT HE DID DENY THE DOUBLE JEOPARDY ISSUE AND DID NOT ALLOW COUNSEL TO EXPLORE THAT ISSUE, WHEN MR. RUTHERFORD HAD HIS 3.850 HEARING ON HIS APPELLATE CLAIM.

THAT WAS PART OF THE RECORD?

CORRECT, YOUR HONOR.

WAS THAT PART OF THE EVIDENCE AT THE 3.850?

NO. THE BRYAN EVIDENCE, WHAT WE LEARNED, WHEN WE WERE INVESTIGATING THE ANTHONY BRYAN CASE DURING THE SAME WARRANT, THE SAME ATTORNEY WAS THE PROSECUTOR IN BOTH CASES, AND THIS PATTERN OCCURRED WITHIN THE SAME TIME PERIOD, AND A PRELIMINARY INVESTIGATION WAS CONDUCTED WHICH SEEMED THAT THERE WAS A PATTERN TO MOVE CASES FROM JUDGE LOWERY TO JUDGE WELLS, AND AT THAT POINT MR. RUTHERFORD'S STATE HABEAS WAS DUE AND WE FELT THAT, SINCE THIS COURT HAD MADE A DETERMINATION ON DIRECT APPEAL REGARDING THIS ISSUE, IT WOULD BE APPROPRIATE TO BRINGING THE EVIDENCE TO THIS COURT, AND WE CERTAINLY WOULD NOT OBJECT TO BEING SENT BACK TO FURTHER FLUSH OUT THIS ISSUE, IF THE COURT DEEMS WE NEED TO, AND WE WOULD NOT OBTO FILING A 3.850, IF THIS COURT FEELS THAT THIS WOULD BE MORE APPROPRIATE. WE ARE IN TIME LIMITS OF THE 3.850, IF THIS COURT FEELS THAT THIS WOULD BE MORE APPROPRIATE.

HOW ARE YOU IN THE TIME LIMITS? THIS WOULD BE WHEN?

THE BRYAN TRIAL WAS IN THE SAME PATTERN AND IT DID NOT COME TO LIGHT, YOU MEAN WE WERE INVESTIGATING THE WARRANT JUST LAST YEAR.

YOU ARE ALLEGING HERE THAT, IF THIS GUY SHOULD HAVE FOUND OUT AT THE TIME OF THE DIRECT APPEAL, THEN ISN'T THAT, LAKE, MORE THAN TWO YEARS?

YOUR HONOR, I DON'T DENY THAT THERE IS NOT ATTENTION THERE, BUT BECAUSE THE DIRECT APPEAL ATTORNEY KNEW WHAT THE CASE LAW STOOD FOR AND KNEW THAT HE HAD TO OBJECTIVELY SHOW THIS COURT AND HE DIDN'T HAVE THE BENEFIT OF ANY TYPE OF HEARING, HE SHOULD HAVE SOUGHT OUT OTHER INFORMATION AND AT A MINIMUM ASK THIS COURT TO RELINQUISH JURISDICTION, SO THAT HE COULD DEVELOP THAT CLAIM FURTHER, SO THAT IT WASN'T JUST BASED ON A RECOMMENDATION ON WHETHER OR NOT THE PROSECUTOR'S INTENT WAS TO PROVOKE A MISTRIAL.

IF YOU WANT TO SAVE SOME OF YOUR REBUTTAL TIME, YOU MAY, IF YOU WISH. MS. YATES.

MAY IT PLEASE THE COURT. I AM BARBARA YATES, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA.

BEFORE YOU GET INTO YOUR ARGUMENT, I JUST WANT TO MAKE SURE THAT I AM CLEAR ABOUT WHAT HAPPENED OR WHAT COULD HAPPEN IN A NORMAL CASE. YOU HAVE THE FIRST MISTRIAL DECLARED, AND THEN YOU ARE, DOING A RETRY, IS IT CORRECT THAT IT WOULD BE APPROPRIATE FOR THE DEFENSE COUNSEL TO, THEN, ASK THAT, BEFORE THE REPROSECUTION BEGINS, TO SAY THAT IT WOULD BE DOUBLE JEOPARDY AND TO ASK THE JUDGE TO FIND THAT IT WAS INTENTIONALLY PROVOKED? THAT WOULD AND PROCEDURE THAT WOULD BE FOLLOWED?

IT COULD BE FOLLOWED.

NOW, IF IT WERE FOLLOWED, IS IT APPROPRIATE, OR IS THERE CASE LAW THAT SAYS IT IS APPROPRIATE TO LOOK AT WHAT THE PROSECUTOR HAS DONE IN OTHER CASES? I MEAN, IS THERE ANY CASE LAW THAT SUGGESTS THAT THAT PATTERN IS INAPPROPRIATE WAY TO LOOK AT, WHETHER THERE HAS BEEN INTENTIONAL PROVOKEING, UNDER OREGON VERSUS KENNEDY?

NOT THAT I SEE. YOUR HONOR, THERE MIGHT BE IF THERE WAS EVIDENTIARY ON IT. HOWEVER, THAT DID NOT HAPPEN IN THIS CASE. ON DIRECT APPEAL, HE WAS TRIED FIRST -- THE MURDER OCCURRED IN AUGUST OF '85. RUTHERFORD WAS TRIED, FIRST, IN 1986. THERE WAS A MISTRIAL DECLARED AFTER THE TRIAL, BECAUSE THE COURT SAID THIS WAS A DISCOVERY VIOLATION. RUTHERFORD MADE A STATEMENT THAT YOU DIDN'T TELL THE DEFENSE ABOUT, AND HE NEEDS A NEW TRIAL. HE WAS RETRIED IN SEPTEMBER, OCTOBER OF '86. HE WAS SENTENCED IN

DECEMBER OF '86.

THERE WAS NO MOTION TO DISMISS THE CHARGES, BASED ON DOUBLE JEOPARDY GROUNDS?

NOT AT THE TRIAL COURT. THAT WAS RAISED, HOWEVER, IN THIS COURT, BASED ON THE FACT THAT -- BASED ON THE ALLEGATION THAT THE PROSECUTOR COMMITTED A WILLFUL, KNOWING VIOLATION OF THE DISCOVERY RULES, FOR THE PURPOSE OF SEEKING A RETRIAL. I WONDER ABOUT THAT, BECAUSE THE PROSECUTOR GOT A CONVICTION THE FIRST TIME AROUND, AND HE GOT A JURY RECOMMENDATION OF DEATH THE FIRST TIME AROUND. BUT ANYWAY, THAT WAS THE CLAIM THAT WAS RAISED ON DIRECT APPEAL.

IT WASN'T, BUT IT HADN'T BRIENZED, IN THAT, BEFORE THAT SECOND TRIAL TOOK PLACE. AM I CORRECT?

NO, YOUR HONOR. IT IS JUST THAT RETRYING HIM WAS A DOUBLE JEOPARDY VIOLATION, BECAUSE THE PROSECUTOR WILLFULLY AND INTENTIONALLY MADE A DISCOVERY VIOLATION HAPPEN. ON DIRECT APPEAL, THIS COURT HELD, QUOTE, THERE IS NO INDICATION THAT HIS, THE PROSECUTOR'S MOTIVE, WAS TO OBTAIN A MISTRIAL. QUOTE OUR REVIEW OF THE RECORD IN THE FIRST CASE CONVINCES US THE PROSECUTOR'S MOTIVE WAS TO INTRODUCE EVIDENCE THAT TENDED TO CONVICT RUTHERFORD, NOT TO CREATE ERROR THAT WOULD FORCE A NEW TRIAL. ON THE POSTCONVICTION MOTION, WHICH YOU ALL DISPOSED OF IN 1998 AND WHICH WAS FILED IN 1991 AND AMENDED LATER ON, IN THE MIDDLE EIGHTIES, MIDDLE '90s, THE SAME CLAIM THAT WAS RAISE ODD DIRECT APPEAL WAS HERE, I.E. THAT THE PROSECUTOR, THAT -- WAS RAISED ON DIRECT APPEAL, I.E. THAT THE PROSECUTOR WAS INEFFECTIVE FOR NOT CHALLENGING THE GRANTING OF A MISTRIAL, BECAUSE THE PROSECUTOR WILLFULLY AND KNOWINGLY MADE A DISCOVERY VIOLATION THAT CAUSED A RETRIAL.

WAS THIS OTHER CASE EXISTENCE ALLEGED OR ANY EVIDENCE TO THAT?

WE HEAR NOTHING ABOUT ANTHONY BRADY BRYAN'S CASE, UNTIL AS COUNSEL ADMITS, THAT THEY FOUND, WHEN THEY WERE WORKING ON BRYAN'S DEATH WARRANT LAST YEAR. THIS SHOWS UP --

IT CERTAINLY CAN'T BE A BASIS FOR AN APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL, UNLESS WE ARE GOING TO START TO SAY APPELLATE LAWYERS NEED TO GO OUT AND START INVESTIGATING FACTS.

EXACTLY.

BUT AS FAR AS THE ARGUMENT THAT, IF IT WERE NEWLY-DISCOVERED EVIDENCE, COULD IT POTENTIALLY BE THE BASIS FOR A SUGGESTION SUCCESSIVE 3.851 MOTION? BE ON THE BASIS -- THAT IS WHY I WANT TO SEE IF WE CAN JUST FERRET OUT THE MERITS HERE.

I DON'T BELIEVE SO, YOUR HONOR.

ON THE BASIS THAT GOOD COUNSEL WOULD LOOK TO SEE OTHER EVIDENCE OF WHETHER THE SAME PROSECUTOR DID THIS AS A PATTERN. WHAT YOU SHOULD KNOW.

YOUR HONOR, THEY ARE TRYING TO ELEVATE MERE COINCIDENCE, WHICH IS ALL THAT THEY HAVE DEMONSTRATED, TO SOMETHING SERIOUS. IF, IN FACT, YOU ARE RIGHT. THEY ARE ASKING FOR RELINQUISH RELINQUISHMENT FOR AN EVIDENCIARY DEVELOPMENT OF THIS CLAIM, BECAUSE THEY ARE CLAIMING THAT APPELLATE COUNSEL WAS WRONG. IF APPELLATE COUNSEL TRULY SHOULD HAVE FOUND THIS BACK IN THE MIDDLE '80s, IT SHOOTS ANY 3.850 MOTION IN THE HEAD ON NEWLY-DISCOVERED EVIDENCE, BECAUSE THEY ARE CLAIMING THAT IT WAS DISCOVERABLE BACK THEN, EVEN THOUGH THEY DIDN'T FIND OUT ABOUT IT UNTIL NOW.

BUT ISN'T THAT SOMETHING WE REALLY -- ISN'T THE TRIAL JUDGE, IN THE BEST POSITION, TO TRY TO DETERMINE WHETHER OR NOT THIS IS NEWLY-DISCOVERED EVIDENCE? YOU KNOW, IF THEY FILE THEIR 3.850 OR 51 MOTION, ALLEGING NEWLY-DISCOVERED EVIDENCE, THE TRIAL JUDGE HAS THE OPPORTUNITY TO --

THEY HAVE A DUE DILIGENCE PROBLEM WITH A NEWLY-DISCOVERED EVIDENCE CLAIM, YOUR HONOR. YOU HAVE TO BRING IT WITHIN ONE YEAR OF KNOWLEDGE, AND THEY ARE SAYING THAT COUNSEL SHOULD HAVE KNOWN IT A LONG TIME AGO. PLUS --

WE DON'T NEED TO DECIDE THAT, DO WE? LET THEM FIGHT IT OUT IN THE TRIAL COURT.

THIS CASE IS THE DEFINITION OF WHY THIS COURT SAYS YOU GET ONE SHOT AT AN ISSUE. YOU TAKE YOUR BEST SHOT AT IT. YOU DON'T COME BACK, YEARS LATER, WITH ANOTHER THEORY, TO SUPPORT THE EXACT SAME CLAIM YOU HAVE RAISED BEFORE. THERE ACTUALLY IS NO BASIS TO THIS. THEY HAVE DEMONSTRATED NOTHING, AND AS I AM SURE YOU ALL ARE VERY AWARE, MR. BRYAN WAS EXECUTED THIS YEAR. YOU KNOW, HE HAS GOT THE SAME CLAIM THAT MR. RUTHERFORD DOES. NOTHING HERE.

WHAT IF IT WERE THAT THIS PROSECUTOR TOLD POSTCONVICTION COUNSEL, SIX MONTHS AGO, I, WHENEVER MY PATTERN WAS THAT, WHENEVER I THOUGHT THINGS WEREN'T GOING THE WAY I WANTED, I CREATED A SITUATION FOR A MISTRIAL. AND THAT -- I MEAN, IN OTHER WORDS, GOING BACK TO, REALLY, WHAT JUSTICE QUINCE IS ASKING ABOUT, OUR ABILITY TO DECIDE WHETHER THIS IS NEWLY-DISCOVERED EVIDENCE OR NOT, ISN'T THAT VERY CLAIM, THAT IS THAT THERE IS SOMETHING THAT WOULD HAVE AFFECTED WHAT THE TRIAL COURT WOULD HAVE DONE, A -- SOMETHING THAT HAS TO BE LOOKED AT, NOT BY THIS COURT?

YOUR HONOR, IF THEY HAD ATTACHED AN AFFIDAVIT TO THAT EFFECT, LOOK, THE PROSECUTOR HAS CONFESSED HE HAS DONE ALL OF THIS. THEY HAVE DONE ABSOLUTELY NOTHING OF THAT. ALL THEY ARE DOING IS ELEVATE AGO COINCIDENCE INTO A -- IS ELEVATING A COINCIDENCE INTO A PSEUDO-CLAIM THAT THEY HAVE, ALREADY, RAISED BEFORE. THEY ARE SAYING THAT THE PROSECUTOR CREATED MISCONDUCT. THEY DID NOT RAISE IT THE FIRST TIME, SO NOW, MAYBE HE DID IT THIS WAY. IF THEY HAD SUBMITTED EVIDENCE, ATTACHED AFFIDAVITS FROM WHOMEVER THEY COULD FIND, ATTACHED TO, WHATEVER, THEY HAVE DONE ABSOLUTELY NOTHING. THIS IS MERE SPECULATION. IT SHOULD BE RECOGNIZED AND IT SHOULD BE DENIED. THEY HAVE PRESENTED NOTHING HERE THAT WOULD WARRANT ANY KIND OF RELIEF ON THIS. I WOULD LIKE TO DISCUSS A COUPLE OF THE OTHER ISSUES. THEY ARE COMPLAINING ABOUT FOUR PHOTOGRAPHS OF THE VICTIM BEING INTRODUCED AT THE TRIAL. THERE WERE TWO PHOTOGRAPHS OF THE VICTIM'S BODY IN THE BATHTUB INTRODUCED AT THE GUILT PHASE. THERE WERE TWO MORE PHOTOGRAPHS OF HER HEAD INTRODUCED AT THE PENALTY PHASE, SHOWING THE INJURES. DURING THE TRIAL, SHERMAN PITTMAN TESTIFIED THAT, TWO WEEKS BEFORE THE MURDER, RUTHER FORD TOLD HIM THAT HE WAS GOING TO MAKE AN OLD LADY WRITE A CHECK TO HER AND THEN HE WAS GOING TO PUT HER IN THE BATHTUB. KENNETH COOK, RUTHERFORD'S UNCLE, TESTIFIED THAT ONE WEEK BEFORE THE MURDER, RUTHERFORD SAID THAT HE WAS GOING TO KNOCK A WOMAN IN THE HEAD AND MAKE SOME EASY MONEY. THE SAME DAY, POSSIBLY EARLY THE NEXT DAY AFTER THE MURDER, JOHNNY CECIL PARROT JR. TESTIFIED THAT RUTHERFORD HAD COME TO HIM AND CONFESSED THAT HE HAD HIT A WOMAN IN THE HEAD AND DROWNED HER IN THE BATHTUB. HE HAD $1500 IN $100 BILLS. HE WANTED PARROT TO HIDE THAT FOR HIM. RUTHERFORD TOOK THE STAND AT HIS GUILT PHASE AND SAID I NEVER CONFESSED TO ANYBODY THAT I WAS PLANNING ON KILLING THIS WOMAN. I NEVER CONFESSED TO ANYBODY THAT I KILLED THIS WOMAN AND, IN FACT, I DID NOT DO IT. IN FACT I THOUGHT OF THIS WOMAN, SHE WAS JUST LIKE MY MOTHER TO ME, AND I HAVE ALWAYS BEEN KIND AND GENEROUS TO THE ELDERLY. THESE FRACHES WERE INTRODUCED TO -- THESE PHOTOGRAPHS WERE INTRODUCED AT TRIAL TO SHOW THAT, YES, HE DID PUT HER IN THE BATHTUB, JUST LIKE HE PLANNED ON DOING. THE PHOTOGRAPHS GO TO SHOW CCP. THE ONES THAT WERE

INTRODUCED AT THE PENALTY PHASE GO TO SHOW CCP AND HAC. THEY SHOWED THAT SHE HAD THREE SKULL FRACTURES. TWO WERE CAUSED BY HER HEAD HITTING A FLAT SURFACE. WE DON'T KNOW IF THE FLAT SURFACE HIT HER OR THE -- HER HEAD HIT THE FLAT SURFACE. THERE IS, ALSO, A PICTURE OF WHERE THE HOLE WAS MADE BY A HAMMER. THERE ARE, ALSO, THE BRUISES ON HER FACE THAT ARE DEMONSTRATED. BESIDES ALL OF THIS, SHE HAD A BROKEN ARM. HE BROKE HER ARM, WHEN HE WAS TRYING TO GET HER TO WRITE A CHECK TO HIM AND SHE REFUSED TO DO SO. THERE IS -- THIS CASE HAS BEEN LOOKED AT, UPSIDE AND DOWN, BOTH AT POSTCONVICTION AND DIRECT APPEAL. I WOULD RELY ON THE RESPONSE FOR THE REST OF THIS. IF YOU HAVE NO FURTHER QUESTIONS. THEY HAVE DEMONSTRATED ABSOLUTELY NOTHING SHOWING ANY INEFFECTIVENESS BY APPELLATE COUNSEL HERE. IT SHOULD BE DENIED.

WAS THERE AN EVIDENTIARY HEARING, ON BOTH THE GUILT AND PENALTY PHASE IN THIS CASE?

THERE WAS AN EVIDENTIARY HEARING.

I KNOW THERE WAS AN EVIDENTIARY HEARING. LET'S SEE. IT WAS --

IT WAS ALLOWED ON FOUR ISSUES OF INEFFECTIVENESS, AND I BELIEVE THE HOLDING WAS THAT HE PRESENTED NO EVIDENCE GOING TO SUPPORT THE ALLEGED INEFFECTIVENESS AT THE GUILT PHASE. ALL OF THE EVIDENCE THAT WAS PRESENTED WENT TO THE PENALTY PHASE. THE TRIAL COURT DENIED ALL RELIEF, AND THIS COURT AFFIRMED THAT.

IT LOOKS LIKE THERE WAS AN EVIDENTIARY HEARING, AND THE TRIAL COURT -- THAT THE TRIAL COUNSEL WAS INEFFECTIVE DURING THE GUILT FACE, FOR FAILURE TO INVESTIGATE, PREPARE AND PERFORM, BUT THERE WAS NOTHING FOCUSING ON THE TRIAL COURT'S PERFORMANCE IN THE DOUBLE JEOPARDY AREA, FOR NOT RAISING DOUBLE JEOPARDY.

THE CLAIM WAS MADE THE SAME CLAIM THAT WAS MADE, ON DIRECT APPEAL, I.E. THE PROSECUTOR CAUSED A MISTRIAL, AND THAT WAS RESHAPED INTO A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

AS OPPOSED TO A CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO DEVELOP EVIDENCE THAT THE PROSECUTOR HAD GOADED THE --

WE BELIEVE THE CLAIM WAS THAT THE PROSECUTOR WILLFULLY AND INTENTIONALLY CAUSED A MISTRIAL. THAT IS EXACTLY THE SAME CLAIM THEY ARE MAKING NOW. NOW, HOWEVER, THEY ARE SAYING THAT THE PROSECUTOR WILLFULLY AND INTENTIONALLY CAUSED A MISTRIAL, SO THAT HE COULD GO JUDGE AND JURY SHOPPING. THAT CLAIM WAS NEVER MENTIONED, UNTIL THIS HABEAS PROCEEDING. IT IS A VARIATION ON THE CLAIM, HOWEVER, THAT THE PROSECUTOR INTENTIONALLY AND WILLFULLY CAUSED THE MISTRIAL.

I SEE IT AS DIFFERENT, IF THE CLAIM, BECAUSE IT CAN'T RAISE ON INEFFECTIVENESS. THE SAME DOUBLE JEOPARDY ISSUE. THE FOCUS HAS TO BE SOMETHING THAT TRIAL COUNSEL DID THAT CAUSED A DIFFERENT RESULT, SO THAT THE FOCUS WOULD HAVE TO BE ON TRIAL COUNSEL DIDN'T PRESENT APPROPRIATE EVIDENCE TO THE JUDGE OR ARGUMENT, IN ORDER FOR THE JUDGE TO MAKE A PROPER DETERMINATION OF THE DOUBLE JEOPARDY CLAIM, AND THAT WAS --

THEY HAVEN'T MADE THAT CLAIM, EVEN NOW, YOUR HONOR. ALL THEY ARE COMPLAINING IS THAT THIS IS A DOUBLE JEOPARDY PROBLEM RESPECT AND THEY ARE BLAMING APPELLATE COUNSEL. THEY ARE STILL NOT BLAMING TRIAL COUNSEL FOR IT, AND YOU KNOW, BESIDES BEING -- THE PROCEDURAL BARS THAT ARE INVOLVED HERE, THERE IS NO MERIT TO IT. THEY HAVE DONE ABSOLUTELY NOTHING TO SHOW ANY KIND OF MERIT. ALL THEY ARE SAYING IS IT IS SO BECAUSE I SAY IT IS SO.

YOU ARE SAYING THAT, EVEN IF THAT EVIDENCE WAS BEFORE THE TRIAL COURT, THAT IS THAT

IN ANOTHER CASE A MISTRIAL OCCURRED, THERE WOULD NOT BE SUFFICIENT EVIDENCE, UNDER OREGON VERSUS KENNEDY, TO FIND THAT THERE WAS --

THE MERE FACT THAT ANOTHER MISTRIAL OCCURRED, NO. THAT RISES -- DOES NOT RISE ABOVE COINCIDENCE. THERE HAS TO BE OTHER THINGS TO SUPPORT THAT. THEY HAVE SHOWED NO INDICATION OF THEIR WILLINGNESS OR ABILITY TO PRODUCE ANYTHING TO BACK UP THIS CLAIM. THEY COULD HAVE ATTACHED THINGS TO THIS PETITION TO SHOW IT, IF THEY ARE SERIOUS ABOUT, YES, WE NEED EVIDENTIARY DEVELOPMENT. WE WANT PERMISSION, AS THEY HAVE ASKED, NOW, TO FILE AN OUT OF TIME 3.850, BASED ON NEWLY-DISCOVERED EVIDENCE, BUT, AGAIN, THERE ARE SO MANY PROBLEMS WITH THAT, IN THE PROCEDURAL BAR, AND BY THEIR CLAIM HERE, SAYING THAT COUNSEL COULD AND SHOULD HAVE DISCOVERED IT BACK THEN. THEY ARE DEMONSTRATE AGO LACK OF DUE DILIGENCE, WHICH UNDERCUTS ANY CLAIM OF NEWLY-DISCOVERED EVIDENCE. THERE IS SIMPLY NO BASIS PRESENTED IN THIS PETITION FOR RELIEF, AND THE STATE ASKS YOU TO DENY IT. THANK YOU.

THANK YOU. MS. McDERMOTT.

I THINK THE STATE'S RECITATION OF FACTS HIGHLIGHTS MR. RUTHERFORD'S DOUBLE JEOPARDY CLAIM. THE STATE MENTIONED THATER MAN PITTMAN AND KENNETH COOK TESTIFIED THAT MR. RUTHERFORD HAD MADE STATEMENTS TO THEM PRIOR TO THE CRIME, IN WHICH HE CONFESSED THAT HE WAS GOING TO COMMIT THIS CRIME, AND THOSE WERE THE TWO WITNESSES THAT THE STATE PUT ON THE STAND AND HAD NOT REVEALED THOSE STATES TO TRIAL COUNSEL, IN ACCORDANCE WITH THE DISCOVERY ORDER. THEY WERE THE RICHARDSON VIOLATION, BOTH OF THOSE WITNESSES, AND THEY WERE THE ONLY WITNESSES THAT SUPPORTED THE PREMEDITATION FOR THE FIRST-DEGREE MURDER AND, ALSO, FOR THE CCP AGGRAVATOR, SO ALSO I WANTED TO POINT OUT THAT THIS COURT DIDN'T HAVE ALL OF THE CIRCUMSTANCES THAT WE NOW KNOW JUST RECENTLY, WHEN IT MADE ITS DECISION IN 1988, THAT MR. RUTHERFORD HAD FOUND NO INDICATION OR HAD PROVED NO INDICATION THAT THE PROSECUTOR INTENTIONALLY PROVOKED A MISTRIAL. THIS IS NEW EVIDENCE, CERTAINLY, AND IT MAY, PERHAPS, BE MORE APPROPRIATE IN THE LOWER COURT.

NOW, HOW WOULD YOU -- LET'S JUST ASSUME THERE IS AN EVIDENTIARY HEARING. YOU WOULD SAY THIS HAPPENED IN THE ANTHONY BRYAN CASE. I REALIZE YOU DON'T HAVE TO ATTACH EVERYTHING. WHAT ELSE COULD YOU SHOW?

WHAT OCCURRED IN THE ANTHONY BRYAN INVESTIGATION WAS WE SPOKE TO HIS TRIAL ATTORNEY AND WE SPOKE TO ATTORNEYS IN THE OTHER AREA, AND WHAT WE LEARNED, FROM ANTHONY BRYAN'S TRIAL ATTORNEY, THAT IN FACT, THE PROSECUTOR, THE DIFFERENCE BETWEEN THE TRIAL JUDGES AND THE EXPECTATION THAT THE PROSECUTOR WOULD RECEIVE MORE FAVORABLE RULINGS, IF THE CASE WAS MOVED BEFORE JUDGE WELLS, BECAUSE JUDGE WELLS --

HOW DOES THE PROSECUTOR CONTROL WHO THE CASE IS ASSIGNED TO, IF YOU GET A NEW JUDGE?

I DON'T KNOW, YOUR HONOR. THAT WOULD BE SOMETHING ELSE WE WOULD NEED TO SPEND MORE TIME INVESTIGATING, CERTAINLY. I CAN TELL YOU WHAT HAPPENED IN MR. RUTHERFORD'S CASE WAS JUDGE LOWERY ACTUALLY HAD RESET MR. RUTHERFORD'S CASE BEFORE HIM. HE HAD IT ON HIS DOCKET. THERE IS A ORDER APPEARING IN THE FILE THAT SHOWS THAT THE CHIEF JUSTICE MOVED THE CASE TO JUDGE WELLS. I HAVE NO IDEA HOW THAT OCCURRED. BUT WE KNOW THAT IT DID OCCUR, AND WE KNOW THAT IT OCCURRED IN BRYAN, ALSO. AND THE SIMILARITIES BETWEEN THE TWO CASES, BASICALLY WHAT THE PROSECUTOR ACHIEVED, IN BOTH OF THOSE MISTRIALS, WAS HE WASABLE TO GET EVIDENCE WHICH JUDGE LOWERY HAD NOT ALLOWED IN, TO BECOME ADMISSIBLE IN THE SECOND TRIAL. AND IN MR. BRYAN'S CASE IT WAS

WILLIAMS RULE EVIDENCE AND IN MR. RUTHERFORD'S CASE IT WAS WITNESSES WHO SUPPORTED THE THEORY OF PREMEDITATION AND, ALSO, SUPPORTED AGGRAVATING CIRCUMSTANCES.

EVEN BEFORE JUDGE LOWERY, WHAT WE HAVE WAS A DISCOVERY VIOLATION, RIGHT?

CORRECT, YOUR HONOR.

SO ONCE HE HAS DECLARED THE MISTRIAL AND YOU HAVE CURED THE DISCOVERY VIOLATION, THEY PROBABLY WOULD HAVE BEEN ALLOWED AS WITNESSES IN A SECOND TRIAL OF MR. RUTHERFORD, EVEN BEFORE JUDGE LOWERY.

CORRECT, YOUR HONOR. WE DON'T REALLY KNOW, AND THAT IS WHY I THINK IN THE ANALYSIS THEY SAY THAT YOU CAN'T ACTUALLY LOOK AT THE SECOND TRIAL, TO DETERMINE WHAT ADVANTAGE THEY ACTUALLY GAINED. IT WAS JUST WHAT THEY MAY HAVE GAINED, WHEN THEY PROVOKED THE MISTRIAL, THAT YOU NEED TO LOOK AT, AND SO --

I WANTED TO ASK YOU IS THERE ANY OTHER ISSUE IN THIS HABEAS PETITION, THAT YOU PARTICULARLY WANT TO DRAW TO THE COURT'S ATTENTION?

NO, YOUR HONOR. WE WOULD REST ON OUR PETITION. I WOULD JUST CONCLUDE BY SAYING THAT THIS NEW EVIDENCE DOES REVEAL THAT THERE IS A INDICATION THAT THE PROSECUTOR INTENDED TO PROVOKE A MISTRIAL, AND THE CLOSELY-CONNECTED CHAIN OF EVENTS IN EVIDENCE INDICATES THAT THE STATE FORM SHOPPED IN THESE CAPITAL CASES. IN LIGHT OF THE SCHOLARS BETWEEN THESE TWO CASES, WE ASK THAT THIS COURT FIND IN FAVOR OF MR. RUTHERFORD, AND IN THOMAS V STATE, THIS COURT SAID THAT WHEN THERE IS ANY DOUBT ABOUT THE DEFENDANT AND A DOUBLE JEOPARDY ISSUE, IT MUST BE RESOLVED IN FAVOR OF THE DEFENDANT. THIS EVIDENCE CERTAINLY PROVIDES THE DOUBT. IT PROVIDES THE EVIDENCE THAT WOULD UNDERMINE THIS COURT'S FINDING IN 1988, THAT THERE WAS NO INDICATION THE PROSECUTOR INTENDED TO PROVOKE A MISTRIAL.

SO YOU ARE ASKING US TO FIND APPELLATE COUNSEL INEFFECTIVE AND DO WHAT?

YOUR HONOR, I AM ASKING YOU, INITIALLY, TO -- I SEE MY TIME HAS EXPIRED. MAY I FINISH MY ANSWER?

CONCLUDE YOUR ANSWER, YES.

YOUR HONOR, WE ARE ASKING YOU TO REVISIT YOUR FINDING, BECAUSE IT IS THIS COURT'S FINDING A THAT WE ARE ATTACKING, AND SECONDLY THAT THERE WAS, PERHAPS THERE WAS A PROBLEM WITH APPELLATE COUNSEL'S PERFORMANCE, YES, AND FINALLY I JUST RESPECTFULLY REQUEST THAT THIS COURT ORDER THE APPROPRIATE RELIEF, AND IF THIS COURT FINDS THAT IT IS NECESSARY TO SEND US BACK TO THE CIRCUIT COURT FOR FURTHER FACTUAL DEVELOPMENT THAT YOU DO SO. THANK YOU.

THANK YOU. THANK YOU, MS. YATES.