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## **Anthony Banks vs State of Florida**

MR. CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR THE SFLAECT. THE FIRST CASE ON THIS ORAL ARGUMENT CALENDAR FOR THIS WEEK IS BANKS VERSUS STATE. MS. ALLEN.

MAY IT PLEASE THE COURT. MY NAME IS MARCY ALLEN, AND TODAY I HAVE THE PLEASURE OF REPRESENTING ANTHONY BANKS. WE ARE HERE TODAY TO DISCUSS A CONFRONTATION CLAUSE VIOLATION THAT OCCURRED DURING THE TRIAL OF MR. BANK'S CASE. WHAT HAPPENED WAS MR. BANKS AND HIS PASSENGER, JEFF GOODMAN, DROVE INTO AN AMOCO GAS STATION, AND WHEN THEY WERE AT THE A.M. GO GAS STATION, THEY -- AT THE AMOCO GAS STATION, THEY SAW A WOMAN WHO WAS AN UNDERCOVER POLICE OFFICER, OFFICER RODIN. MR. GOODMAN CALLED OUT TO OFFICER RODIN, AND SHE WENT OVER TO THE CAR, AND HE THOUGHT THAT HE KNEW HER FROM SOME PAST ACQUAINTANCE AT A MOTEL ROOM. THEY TALKED ABOUT THAT FOR A FEW MINUTES, AND THEN SHE, MR. GOODMAN ASKED HER WHETHER SHE NEEDS, WHICH AT THAT POINT MY CLIENT HAD GOTTEN OUT AND BEGUN TO PUT AIR IN HIS TIRES. OFFICER RODIN SAYS TO MR. GOODMAN IS HE STRAIGHT UP, AND HER INTERPRETATION OF THE WORD "STRAIGHT UP", WHICH SHE TOLD THE JURY IS STREET TERMINOLOGY FOR MEANING HE IS OKAY. HE IS WITH THE PROGRAM. HE IS PART OF THE BUSINESS. GOODMAN --

YOU JUST DESCRIBED THE FACTS AS MR. BANKS WAS PUTTING AIR IN THE TIRE OR HE GOT OUT OF THE CAR TO PUT AIR IN THE TIRE, AND THEN YOU HAVE GONE ON TO THE CONVERSATION. WOULD YOU CLARIFY THAT. WAS BANKS IN THE CAR, WHEN THAT INITIAL CONVERSATION TOOK PLACE ABOUT IS HE STRAIGHT OR STRAIGHT UP OR WHATEVER, AND -- OR WAS HE OUT OF THE CAR, OR IS THAT CLEAR?

IT IS NOT TOTALLY CLEAR FROM THE RECORD. SHE TESTIFIED, ON PAGE 62 OF THE TRANSCRIPT, THAT THEY WERE TALKING ABOUT KNOWING EACH OTHER AND THAT, DURING THAT PERIOD OF TIME, MR. BANKS HAD GOTTEN OUT OF THE CAR. HE GOT BACK INTO THE CAR BEFORE THE BUSINESS DISCUSSION TOOK PLACE, AND THAT IS HER TESTIMONY AT PAGE 64. BEYOND THAT IT IS NOT PINPOINTED PRECISELY WHEN HE DID THAT. AFTER GOODMAN TELLS RODIN THAT MR. BANKS IS STRAIGHT UP, BANKS, GOODMAN ASKED RODIN WHAT IS IT YOU NEED? THERE IS TALK THAT SHE WANTS A 50 CENT PIECE. THAT IS \$50 WORTH 6 COCAINE. -- \$50 WORTH OF COCAINE. GOODMAN ASKED RODIN WHEN WILL YOU GET THE MONEY? SHE SAYS SHE HAS TO MAKE A PHONE CALL. SHE GOES TO THE PHONE. THEY DRIVE OVER TO THE AMOCO STATION. WHEN SHE GETS OFF THE PHONE, SHE SPEAKS TO GOODMAN AGAIN, AND GOODMAN SAID THERE IS A SURVEILLANCE CAR ACROSS THE STREET. RODIN SAYS, WELL, IF YOU DON'T FEEL COMFORTABLE DOING THE DEAL HERE, WE CAN DO IT BEHIND THE OCEANS 11, WHICH IS A NIGHTCLUB, AND THEY AGREED TO MEET THERE 15 MINUTES LATER. 15 MINUTES LATER RODIN IS BEHIND THE OCEANS 11 NIGHTCLUB. THEY DRIVE UP. MR. GOODMAN SAYS, TO OFFICER RODIN, I KNOW YOU ARE OKAY. I KNOW YOU ARE STRAIGHT UP, BUT WE WERE TALKING -- WE HAVE HAD THIS CONVERSATION, AND WE DECIDED THAT, IF WE SAW THE POLICE CAR AGAIN, WE WOULD KNOW THAT YOU WERE AN UNDERCOVER OFFICER. AFTER THAT PORTION OF THE CONVERSATION, THE EXCHANGE TAKES PLACE. THEY LEAVE. AND THEY ARE APPREHENDED, MY CLIENT IS FOUND IN THE YARD LATER ON. BASICALLY IT IS OUR POSITION THAT THE TWO STATEMENTS "ARE YOU STRAIGHT UP" AND HER EXPLANATION OF THAT TERMINOLOGY, AS WELL AS GOODMAN'S STATEMENTS THAT OCCURRED BEHIND THE OCEANS 11 ARE HEARSAY. MR. GOODMAN NEVER TESTIFIED AT TRIAL. HE IS THE OUT-OF-COURT DECLARANT AND HIS STATEMENTS WERE USED BY THE PROSECUTION, TO PROVE THE TRUTH OF THE MATTER ASSERTED THERE IN, TO SHOW THAT

MR. BANKS HAD AN INTENT TO PARTICIPATE IN THE TRANSACTION, THAT, IN FACT, HE WAS PART OF THE BUSINESS, AND THAT HE INTENDED TO AID AND ABET MR. GOODMAN.

NOW, THERE WERE A LOT OF OTHER STATEMENTS THAT MR. GOODMAN MADE, AS TESTIFIED TO BY THE POLICE OFFICER. CORRECT?

CORRECT.

ARE THESE THE ONLY STATEMENTS THAT YOU OR SECRETARYING TO -- THE ONLY STATEMENTS THAT YOU ARE OBJECTING TO, BECAUSE THEY WERE OFFERED AS TO THE TRUTH OF THE MATTER, OR ARE YOU AGREEING THAT THE OTHER STATEMENTS WOULD FALL WITHIN THE VERBAL ACTS EXCEPTION EXCEPTION.

I AGREE THAT THE OTHER STATEMENTS WOULD FALL WITHIN THE VERBAL ACTS EXCEPTION, BUT THE VERBAL ACTS EXCEPTION, IN THIS CONTEXT, IS AS TO THE LANGUAGE. THE LANGUAGE, FOR INSTANCE, IF TWO MEN ARE DISCUSSING A BUSINESS DEAL, AND THEY SAY, YOU KNOW, I WANT TO BUY 100 BOXES OF WIGIE EITHER, AND, YES -- OF WIGEITYS, AND, YES -- OF WIGITS, AND THEY WOULD LIKE TO BUY THEM FOR 100, AND THEN THEY START TO TALK ABOUT THE GOLF GAME. IT WOULD BE NICE TO MEET YOU LATER ON AT THE COUNTRY CLUB. WELL, THAT WOULDN'T BE PART OF THE VERBAL ACTS, BECAUSE THEY WEREN'T PART OF THE OFFER AND ACCEPTANCE, SO UNDER THIS COURT'S DECISION, IN CONNALLY YOU SEPARATE OUT THE HEARSAY FROM THE NONHEARSAY, AND CONNALLY WAS WHERE THE COURT HELD THAT STATEMENTS THAT NECESSARILY GO TO THE DOCTOR'S DIAGNOSIS MIGHT BE ADMISSIBLE, BUT STATEMENTS SUCH AS "THE PERSON CARRIES A GUN" WOULDN'T FALL WITHIN THE EXCEPTION, SO JUST BECAUSE THERE ARE NUMEROUS STATEMENTS MADE DURING THE COURSE OF A CONVERSATION, NOT ALL OF THEM NECESSARILY FALL WITHIN A PRECISE DEFINITION, SO THAT YOU CAN SEPARATE THE HEARSAY FROM THE NONHEARSAY.

IF THIS, IN FACT, WAS ERROR, WHY WOULDN'T IT BE HARMLESS?

BECAUSE, IN THIS INSTANCE, IT WAS THE PRIMARY EVIDENCE THAT THE STATE RELIED UPON IN ITS CLOSING ARGUMENT, TO SHOW HIS INTENT TO PARTICIPATE. BASICALLY, UNDER THIS COURT'S DECISION IN KEEN, WHERE THE COURT DISCUSSED HARMLESS ERROR IN THAT INSTANCE, THE COURT NOTED THAT THIS WASN'T AN ISOLATED SITUATION, WHERE THE STATEMENTS ONLY CAME IN DURING THE TESTIMONY, BUT THEY WERE, IN FACT, USED BY THE STATE DURING THE CLOSING ARGUMENT, AND EMPHASIZED, AS SUBSTANTIVE EVIDENCE OF GUILT, AND IN THIS CASE THEY WERE USED TO SHOW THE ONLY EVIDENCE OF INTENT. IN AN AID AND ABET, YOU HAVE TO SHOW INTENT TO PARTICIPATE AND PARTICIPATION IN THE CRIME. PUTTING ASIDE THE STATEMENTS, ALL YOU HAVE IS MR. BANK'S PRESENCE DURING THE DISCUSSION. YOU POSSIBLY HAVE KNOWLEDGE, IF YOU ASSUME THAT HE HEARD AND UNDERSTOOD, AND THEN YOU HAVE FLIGHT, AND THOSE THREE FACTORS, IN COMBINATION, HAVE BEEN FOUND BY THIS COURT AND OTHERS, NOT TO BE SUFFICIENT, SO --

DOES IT MAKE ANY DIFFERENCE THAT THEY WERE AT THE SCENE AT ONE POINT, LEFT, AND THEN CAME BACK? DOES THAT SHOW ADDITIONAL INTENT ON THE PART OF MR. BANKS?

WELL, YOU HAVE HIS PRESENCE AT THE TWO LOCATIONS. BUT, AGAIN, AS TO HARMLESS ERROR IT WOULD BE THE QUESTION OF WHETHER OR NOT THE JURY WOULD HAVE BEEN AFFECTED BY THE ADDITIONAL TESTIMONY THAT HE WAS PART OF THE BUSINESS. THAT HE WAS CONCERNED ABOUT THE UNDERCOVER POLICE OFFICERS. CERTAINLY THOSE FACTORS MIGHT SWAY THE JURY, AND IN THIS PARTICULAR CASE, THE JURY ASKED -- IT WAS BASICALLY A ONE-WITNESS CASE. I MEAN THEY DID HAVE --

WE REALLY DON'T HAVE MR. GOODMAN ACTUALLY MAKING THOSE STATEMENTS. IS THIS JUST OFFICER'S INTERPRETATION OF WHAT MR. GOODMAN SAID?

CORRECT. MR. GOODMAN NEVER TESTIFIES AT TRIAL, SO WHETHER OR NOT MR. GOODMAN UNDERSTOOD STRAIGHT UP TO MEAN THE SAME THING THAT OFFICER RODIN UNDERSTOOD, WE DON'T KNOW THAT, AND WHAT I WAS GOING TO MENTION ON THE HARMLESS ERROR IS THAT THE JURY DID ASK FOR A READ BACK OF OFFICER RODIN'S TESTIMONY, SO FOR WHATEVER REASON, THEY WANTED TO HAEFER FROM HER -- TO HEAR FROM HER AGAIN, IN MAKING THEIR DECISION, SO I DON'T THINK WE CAN TOTALLY DISCOUNT THE FACT THAT THESE STATEMENTS PLAYED SOME ROLE IN THE JURY'S DETERMINATION.

WAS THERE A LIMITING INSTRUCTION GIVEN AS TO THE TESTIMONY?

NO. THERE WAS NOT. WHAT HAD HAPPENED WAS THERE WAS SOME PRETRIAL MOTIONS IN LIMINE, AND DURING THE COURSE OF THE PRETRIAL MOTION IN HIS LIMINE, MR. BANKS WAS GRANTED A CONTINUING OBJECTION TO THE STATEMENTS, SO IT NEVER CAME UP AGAIN DURING THE COURSE OF THE TRIAL, UNTIL THE MOTION FOR NEW TRIAL, WHEN, THEN, THE ARGUMENT WAS MADE, AGAIN.

IF WE APPROVED THE TESTIMONY THAT YOU FIND OBJECTIONABLE, WHAT DO YOU VIEW AS THE EVIDENCE AGAINST YOUR CLIENT?

THAT HE WAS PRESENT WHEN MR. GOOD MAN AND OFFICER RODIN NEGOTIATED THE NARCOTICS TRANSACTION. THAT HE LEFT THE AMOCO STATION. THAT HE DROVE TO THE OCEANS 11. THAT HE WAS PRESENT DURING THE EXCHANGE, AND THAT HE DROVE AWAY AND ENGAGED IN A CHASE WITH THE POLICE OFFICERS. THAT HE FLED THE VEHICLE, AND HE WAS APPREHENDED IN THE YARD.

IS IT YOUR POSITION THAT A JURY COULD NOT INFER, FROM THAT, THAT HE HAD KNOWLEDGE AND, IN FACT, PARTICIPATED?

CERTAINLY THAT IS A POSSIBILITY, BUT, THEN, AGAIN, ON THE OTHER HAND, THE JURY MAY HAVE CONCLUDED THAT HE WENT TO THE AMOCO STATION TO PUT GAS IN HIS TIRE. THAT HE WASN'T CONCERNED WITH WHAT WAS GOING ON. THAT HE THEN GAVE HIS FRIEND A RIDE TO THE OTHER LOCATION. AND LEFT BECAUSE HE WAS FINISHED FINISHED.

BUT ISN'T THE OPERATOR OF A MOTOR VEHICLE CIRCUMSTANCE SUBSTANTIALLY DIFFERENT THAN ONE JUST BEING PRESENT, SEATED IN THE BACKSEAT WHEN SOMETHING HAPPENED? CAN WE -- OR SHOULD WE EQUATE THE TWO?

WELL, I DON'T THINK THAT THE TEST IS THE SUFFICIENCY OF THE EVIDENCE TEST, AND CERTAINLY THE EVIDENCE, WE ARE NOT HERE TO ARGUE SUFFICIENCY. CERTAINLY THAT WOULD HAVE BEEN A JURY QUESTION, WHETHER OR NOT HIS DRIVING THE VEHICLE WAS SUFFICIENT TO SHOW ACTIVE PARTICIPATION. BUT BECAUSE THERE ARE OTHER EXPLANATIONS FOR HIS PRESENCE, I THINK THAT THE CASE SHOULD HAVE GONE TO THE JURY, WITHOUT THE INADMISSIBLE TESTIMONY.

DO YOU HAVE A SUCCINCT DEFINITION OF "VERBAL ACTS"? WHAT DOES THAT REALLY MEAN?

IN CHICONE, THIS COURT'S DECISION, THE COURT -- ACTUALLY I HAVE McCORMACK, HERE, WHICH I DIDN'T CITE, BUT THEY GIVE A PRETTY GOOD DEFINITION OF IT AS WELL, BUT BASICALLY THE STATEMENTS ARE COMING IN, TO PROVE THE NATURE OF THE ACT, AS OPPOSED TO PROVING THE TRUTH OF THE MATTER THERE IN.

COULD YOU GIVE ME A GOOD EXAMPLE OF THAT? I HAVE A HARD TIME WITH VERBAL ACTS.

TAKE SLANDER, BECAUSE I THINK SLANDER MIGHT BE THE EASIER WAYS TO VISUALIZE IT. IN THE

SLANDER ACTION, THE WORDS THAT ARE THE SUBJECT OF THE SLANDER, THOSE COME INTO EVIDENCE, EVEN THOUGH THEY WERE MADE OUT OF COURT. THEY ARE NOT COMING IN TO PROVE THE TRUTH OF THE MATTER ASSERTED THERE IN, TO PROVE THE SLANDER STATEMENT. -- THE SLANDEROUS STATEMENT. THEY ARE COMING IN BECAUSE OF THE SUBJECT OF THE LAWSUIT, AND THE LAW ATTACHES LEGAL SIGNIFICANCE TO IT, SO NOW IN THE CONTACT SCENARIO, THE WORDS OF "OFFER AND ACCEPTANCE". I AM SELLING 100 WIDGETS. HOW MUCH WILL YOU PAY ME FOR THEM? I WILL PAY YOU \$100. WHERE WILL WE MAKE THE TRANSFER? AT THE OCEANS 11. THOSE ARE PART OF THE CONTRACT. THEY GO TO ESTABLISH THE NATURE OF THE TRANSACTION. IN CHICONE, THIS COURT CONSIDERED WHETHER OR NOT TELEPHONE CALLS COMING IN -- POLICE WERE DOING THE RAID, AND THEY WANTED TO ESTABLISH THAT THE HOUSE WAS A GAMBLING ESTABLISHMENT, SO THESE PHONE CALLS COME IN, PEOPLE PLACING BETS. THAT IS ALLOWED INTO EVIDENCE, NOT TO PROVE THAT THESE PEOPLE WANTED TO PLACE BETS BUT TO SHOW THE CHARACTER OF THE ESTABLISHMENT. TO ME IT WAS KIND OF A TRICKY LEGAL DOCTRINE, BUT THAT IS BASICALLY WHAT IT MEANS.

BUT YOUR CONFLICT HERE IS NOT ON THE BASIS OF CHICONE.

NO.

YOUR CONFLICT SOUGHT BASIS OF CONSALVO?

NO. MY CONFLICT IS ON THE BASIS OF BREED, KEEN, AND CONNALLY, AND THE REASON FOR IT IS, IN EACH OF THOSE CASES, AS IN MAY CASE, STATEMENTS WERE INTRODUCED FOR ONE PURPOSE, AND USED FOR ANOTHER, SO, FOR INSTANCE, IN KEEN, THE STATEMENTS COME --

YOUR CONFLICT IS REALLY ON A FACTS FACT-SPECIFIC -- ON A FACT-SPECIFIC BASIS.

MINE IS ON THE FACTS IN THE LEGAL DOCTRINE. LET'S SAY, FOR INSTANCE, YOU PUT IN THE STATEMENT TO PROVE LOGICAL SEQUENCE OF EVENTS, AND THEN YOU RELY UPON IT TO PROVE THE TRUTH OF THE MATTER ASSERTED THERE IN, REGARDLESS OF THE PURPOSE THAT YOU OFFERED IT FOR. IT IS HEARSAY, BECAUSE YOU ARE USING IT TO PROVE THE TRUTH, AND THAT IS EXACTLY WHAT HAPPENED HERE. IT COMES IN AS VERBAL ACT, BUT THEN IT IS USED TO PROVE THE TRUTH OF THE MATTER ASSERTED THERE IN, WHICH IS INTENT TO PARTICIPATE, AND WE KNOW THAT, BECAUSE AS IN KEEN, HERE THE PROSECUTOR RELIED UPON IT IN CLOSING, AND IF I COULD JUST TURN TO THE DECISION.

> YOU ARE NOT RELYING ON CONSALVO, CORRECT?

I CITED CONSALVO BECAUSE THIS COURT HAS RELIED ON IT IN THE DOCTRINE OF ADMISSIBILITY. IF SOMETHING COMES IN FOR ONE PURPOSE, IT SHOULD BE RESTRICTED OR LIMITED TO ONE PURPOSE, AND THAT IS ANALOGOUS IN KEEPING WITH THE FLOW OF THIS COURT'S DECISION IN KEEN. YOU HAVE TO LOOK AT WHAT THE TESTIMONY IS ACTUALLY USED FOR, TO DETERMINE ITS CHARACTER.

I AM HAVING DIFFICULTY UNDERSTANDING YOUR ARGUMENT ABOUT THIS THEN, BECAUSE I THOUGHT YOUR ARGUMENT WAS THAT THIS -- THAT PARTICULARLY, THESE TWO PARTICULAR EXCHANGES, THE STATES BY THE WITNESS THAT WASN'T THERE WERE NOT ADMISSIBLE TO BEGIN WITH.

CORRECT.

AND SO NOW YOU ARE SAYING THAT THE ISSUE OF CONFLICT AND THAT YOUR REAL POINT IS THAT THE STATE, AFTER HAVING THIS PROPERLY ADMITTED, OKAY, AS VERBAL ACT, THAT THE STATE, THEN ERRED IN USING IT FOR ANOTHER PURPOSE, AND THAT THAT IS WHERE THE ERROR OCCURRED. NOW, YOU NEED TO -- ARE YOU CONTENDING THAT THE TRIAL COURT ERRED IN THE

BEGINNING, IN ADMITTING IT, OR ARE YOU CONTENDING THAT IT WAS PROPERLY ADMITTED BUT THEN IT WAS USED FOR A WRONGFUL PURPOSE? WHICH?

I AM CONTENDING, NUMBER ONE, IT WAS NOT PROPERLY ADMITTED, BECAUSE IT WAS NOT VERBAL ACT, AND EVEN ASSUMING THAT IT SOMEHOW COULD HAVE COME IN IN VERBAL ACT, WE KNOW IT WASN'T REALLY INTENDED TO BE VERBAL-ACT TESTIMONY, BECAUSE IT WAS USED TO PROVE THE TRUTH OF THE MATTER ASSERTED. SEE, WHERE I HAVE A PROBLEM WITH THE COURT'S DECISION IS WHERE IT IS WRITTEN WE RECOGNIZE THAT GOODMAN'S STATEMENTS TO THE EFFECT THAT BANKS WAS PART OF THE DEAL MAY BE VIEWED AS OFFER TO THE TRUTH OF THE MATTER ASSERTED, PARTICULARLY IN VIEW OF THE STATE'S CLOSING ARGUMENT. HOWEVER, STATEMENTS AND ADMISSIBILITY FOR ONE PURPOSE DOES NOT PRECLUDE ITS ADMISSIBLE FOR -- DOES NOT PRECLUDE ITS ADMISSIBILITY FOR ANOTHER. SO WHAT I AM SAYING IS THIS VERBAL ACT SHOULD NOT HAVE COME IN, IN THE FIRST PLACE, AND THEN THIS COURT WROTE "BANKS ATTEMPTS AT ASSISTANCE IS OFFERED IN EVIDENCE, AND WITH BANKS DRIVING ON TO THE LOCATION FOR THE TRANSACTION TO TAKE PLACE." AS THE STATEMENT WAS PROPERLY ADMITTED AS A VERBAL ACT, THE STATE'S CREATED USE OF ADMISSIBLE TESTIMONY IN ITS ARGUMENT, DOES NOT IMPACT UPON THE ISSUE OF ADMISSIBILITY, AND THAT STATEMENT, THAT LAST STATEMENT THAT I READ, CONFLICTS WITH THIS COURT'S DECISIONS IN KEENAN CONNALLY, BECAUSE THIS COURT -- IN KEEN AND CONNALLY, BECAUSE THIS COURT SAYS IN CONNALLY, AT PAGE 182 TO 183, THIS COURT SAID REGARDLESS OF THE PURPOSE FOR WHICH THE STATE CLAIMS TO HAVE OFFERED THE EVIDENCE, THE STATE USED THE EVIDENCE TO PROVE THE TRUTH OF THE MATTER ASSERTED AND IN SO DOING IT CONSTITUTED HEARSAY AND FOUND NO RECOGNITION TO THE RULE OF EXCLUSION AND ALSO, IN KEEN, THIS COURT SAID, AT PAGE 274, WHEN THE ONLY POSSIBLE RELEVANCE OF AN OUT-OF-COURT STATEMENT IS DIRECTED TO THE TRUTH OF THE MATTER BY THE DECLARANT, THE TRUTH OF THE MATTER IS HEARSAY, EVEN THOUGH THE PROPONENT OF SUCH EVIDENCE SEEKS TO CLOSE SUCH HEARSAY UNDER A NONHEARSAY LABEL, AND THAT IS WHERE THE CONFLICT IN THIS CASE ARISES. NUMBER ONE, THIS TESTIMONY SHOULD NOT HAVE COME IN AS VERBAL ACT. THE COURT ERRED IN THAT REGARD, AND NUMBER TWO, THE ERROR WAS COMPOUNDED BY THE FACT THAT THE STATE CLEARLY, HERE, RELIED UPON THE TESTIMONY IN CLOSING ARGUMENT, TO PROVE THE TRUTH OF THE MATTER ASSERTED THERE IN. IT WAS CLASSIC HEARSAY. MY CLIENT WAS ENTITLED TO CONFRONT MR. GOODMAN. THE JURY SHOULD HAVE GRANTED THE STATE COULD HAVE GOTTEN THIS EVIDENCE IN, BY CALLING MR. GOODMAN AS A WITNESS, AND IN THAT INSTANCE, MR. GOODMAN WOULD HAVE BEEN PLACED UNDER OATH. HE WOULD HAVE BEEN SUBJECT TO THE PENALTY OF PERJURY. HE WOULD HAVE BEEN SUBJECT TO CROSS-EXAMINE. AND THE JURY WOULD HAVE BEEN ABLE TO OBSERVE HIS Demeanor, TO DETERMINE HIS TRUTH WORTHINESS AND HIS CREDIBILITY. BECAUSE MR. GOODMAN WAS NEVER CALLED AS A WITNESS AND HIS TESTIMONY DID COME IN AND WAS USED AS SUBSTANTIVE EVIDENCE OF GUILT, MY CLIENT WAS DEPRIVED OF HIS RIGHT OF CONFRONTATION.

YOU ARE INTO YOUR REBUTTAL TIME.

THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS AUGUST BONAVIDA, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA. JUSTICE QUINCE, I WANTED TO RESPOND, BECAUSE YOU ASKED THE QUESTION ABOUT A GOOD WORKING DEFINITION OF VERBAL ACTS, AND I AM CITING FROM PROFESSOR -- I CAN'T RECALL HIS NAME.

EARHART?

EARHART. THANK YOU.

ON SEX 8 ON 1.6, VERBAL ACTS, WHEN WORDS HAVE INDEPENDENT LEGAL SIGNIFICANCE,

EVIDENCE THAT THEY WERE SAID IS NOT HEARSAY.

BUT WHAT IS THE INDEPENDENT LEGAL SIGNIFICANCE OF THIS CONVERSATION THAT WAS -- THAT THE OFFICER RELATED?

THE INDEPENDENT LEGAL SIGNIFICANCE IS THE STATE WAS TRAVELING UNDER A PRINCIPLE THEORY, IN ESTABLISHING THEIR CASE AGAINST MR. BANKS. BUT THE RECORD IS CLEAR BANKS SAID NOTHING. NO WORDS WERE EVER SPOKEN. THE ONLY THING BANKS DID WAS HE WAS IN THE CAR. HE WAS DRIVING. AND LISTENING IN. SO THE WORDS, THE CONVERSATION --

HOW DO WE EVEN KNOW HE WAS LISTENING IN?

I WOULD SUBMIT THAT THE RECORD SUPPORTS THAT HE WAS. OFFICER RODIN TESTIFIED THAT, WHEN THEY FIRST PULLED UP, HE GOT OUT OF THE CAR, BUT HE WENT OVER TO THE FRONT RIGHT TIRE AND WAS PUTTING AIR IN THE TIRE, SO HE WAS AT A POSITION WHERE HE WAS VERY CLOSE TO HER, SO THAT A JURY CERTAINLY CAN FIND FROM THAT, THAT HE WAS IN EARSHOT. HE WAS ABLE TO HEAR WHAT SHE WAS SAYING. HE THEN GETS BACK INTO HIS CAR, INTO THE DRIVER'S SEAT, AND HE IS SITTING THERE, AND HE REMAINED THERE FOR THE DURATION OF THE REMAINDER OF THE CONVERSATION, SO THERE IS COMPETENT SUBSTANTIAL EVIDENCE FROM WHICH THE JURY CAN FIND THAT HE WAS ABLE TO HEAR THESE STATEMENTS, AND THAT, I WOULD SUBMIT TO THIS COURT THAT, IS WHAT THE STATE'S CASE WAS. IN ORDER TO PROVE THAT BANKS AID AND ASSISTED, THEY NEEDED TO GET IN THE CONVERSATION, THE WORDS THAT WERE OUT THERE, SO THAT, TO PROVE THAT BANKS WAS ABLE TO HEAR THAT, TO PROVE THAT BANKS, WHEN HE LEFT THAT CONVENIENCE STORE THAT, WHEN HE RETURNED ON THE SECOND TRIP, HE CAME BACK WITH FULL KNOWLEDGE AND A CONSCIOUS INTENT TO GIVE ASSISTANCE IN THE DRUG TRANSACTION.

BUT IT SEEMS TO ME THAT YOU REALLY ARE USING IT TO SHOW HIS COMPLICIT, AND THAT THIS ISN'T REALLY JUST A VERBAL ACT, BUT IT IS ACTUALLY SUBSTANTIVE EVIDENCE OF HIS INVOLVEMENT IN THIS DRUG TRANSACTION.

WELL, WITH ALL DUE RESPECT, I WOULD DISAGREE WITH. THAT WHEN YOU LOOK AT THE STATEMENTS THEMSELVES, AT NO TIME DURING THE TRIAL, WAS THE TRUTH OF ANY OF THOSE STATES AN ISSUE. IN OTHER WORDS, WE DIDN'T CARE, THE STATE DID NOT CARE WHETHER BANKS WAS, CONTRARY TO MY ADVERSARY'S POSITION, THE ISSUE WAS NEVER NOT WHETHER OR NOT BANKS WAS STRAIGHT UP, HE WAS COOL. AS A MATTER OF FACT, WHEN YOU LOOK --

IF "STRAIGHT UP" MEANS THAT HE IS A PART OF THIS DEAL, THEN ISN'T THAT WHAT THE STATE WAS TRYING TO PROVE? THAT HE WAS, IN FACT, A PART OF THIS DEAL AND THE CO-PERPETRATOR OF THE SALE OF DRUGS?

I WOULD SUBMIT THAT THAT IS NOT THE PURPOSE, AND CERTAINLY NOT THE PURPOSE THAT WAS ARGUED, EITHER. WHAT THE PURPOSE OF THAT STATEMENT WAS, JUST SIMPLY TO SHOW, FIRST OF ALL, OFFICER RODIN WAS ASKED WHAT GOODMAN SAID ABOUT BANKS, THAT HE IS COOL AND HE IS STRAIGHT UP. IMMEDIATELY AFTER THAT TESTIMONY SHE, THEN, GIVES HER INTERPRETATION OF WHAT SHE UNDERSTANDS THAT TERMINOLOGY TO BE. AT NO TIME DID SHE EVER TESTIFIED OR WAS THERE ANY EVIDENCE ENTERED INTO THE RECORD TO ESTABLISH THAT BANKS, HIMSELF WAS COOL. HE WAS STRAIGHT UP. THAT IS THE ARGUMENT THAT I THINK THEY ARE TRYING TO MAKE. THEY ARE TRYING TO MAKE THE ARGUMENT, WELL, THE INFERENCE FROM THAT IS THAT, WELL, BANKS WAS COOL AND STRAIGHT UP, BUT IF YOU LOOK AT RODIN'S TESTIMONY, SHE NEVER TESTIFIED THAT BANKS, HIMSELFS, WAS COOL. SHE WAS ASKED, WELL, WHAT DOES THAT MEAN? THAT JUST MEANS THAT SOMEONE, AN INDIVIDUAL, IS IN THE GAMEPLAN, AND THAT IS ALL THAT MEANS, AND THAT IS AT 63 ON THE TRANSCRIPT.

WHAT WAS THE PURPOSE IN THE STATE PUTTING THAT STATEMENT IN? WHAT DOES THE STATE

HOPE TO GAIN BY THAT? WHAT ELEMENTS DID THE STATE HOPE TO PROVE, BY PUTTING THAT IN?

WELL, I THINK, JUSTICE SHAW, AS I INDICATED, THE FIRST PART IS PART OF THE STATE'S CASE. IT IS CERTAINLY THE EVIDENCE THAT WAS AVAILABLE AT THE TIME. CERTAINLY THE STATE SHOULDN'T BE RESTRICTED IN PUTTING FORT EVIDENCE TO ESTABLISH ITS CASE. SO THAT WOULD BE THE FIRST PURPOSE, BUT ALSO I THINK YOU NEED TO GIVE THE JURY AN UNDERSTANDING, BECAUSE YOU ARE DEALING WITH A SITUATION WHERE THERE IS A LOT OF STREET LINGO BEING USED, SO WHEN YOU HEAR SOMETHING IS "COOL, STRAIGHT UP" IT IS NOT REALLY CLEAR WHAT THAT MEANS.

IT IS MORE THAN THE RES GESTAE. ISN'T THAT WHAT YOU ARE TRYING TO IMPLY THAT, THAT IS A THROW AWAY STATEMENT?

IT IS PART AND PARCEL TO THE WHOLE TRANSACTION. I THINK TO SEGUE AND TO SEPARATE IT OUT AND TO LOOK AT IT IN ISOLATION, BY ITSELF, IS, I THINK, CLEARLY NOT THE PROPER WAY TO GO HERE.

THE STATE DIDN'T HOPE TO PROVE, BY PUTTING IT IN, THAT HE WAS KNOWLEDGEABLE AND PART OF THE OPERATION? THAT WAS NOT THE PURPOSE OF THE STATE?

I WOULD SUBMIT TO YOU, JUSTICE SHAW, AND TO THE COURT THAT THAT WAS NOT THE PURPOSE, AND I WOULD DIRECT THE COURT'S ATTENTION TO THE PROSECUTOR'S CLOSING ARGUMENT. VERY BRIEF. IF YOU GO TO PAGE 143 IN THE TRANSCRIPT, HERE IS THE PARAGRAPH, I THINK, THAT IS CREATING THE PROBLEM. AND THIS IS THE PROSECUTOR, NOW, MAKING HIS ARGUMENT. MR. GOODMAN, THIS OTHER MAN, STARTS TALKING ABOUT WHAT IS RODIN THEREFORE, AND RODIN SAYS TO GOODMAN IS HE OKAY? GOODMAN SAYS, YEAH, HE IS COOL. HE IS STRAIGHT UP. DO YOU KNOW WHAT THAT MEANS? THEN THE PROSECUTOR SAYS, IMMEDIATELY AFTER THAT, HE WAS SITTING THERE IN THE CAR, LISTENING TO WHAT WAS GOING ON. RODIN TELLS THEM, IN CLEAR EARSHOT OF THE DEFENDANT, I GOT TO CALL MY FRIEND, TO SEE IF I CAN GET SOME MONEY. THE DEFENDANT HEARS THAT. I WOULD SUBMIT TO THIS COURT THAT, AT NO TIME DURING THE CLOSING ARGUMENT, IN THE CONTEXT OF THAT STATEMENT, WAS THE STATE ATTEMPTING TO USE THOSE STATEMENTS TO PROVE THE TRUTH OF THE MATTER ASSERTED. IT WAS SIMPLY ARGUING TO THE FACT THAT BANKS WAS THERE AND HE HEARD EVERYTHING THAT WAS GOING ON, AND HEARING THAT, HE LEAVES THE AMOCO STATION AND COMES BACK 15 MINUTES LATER, KNOWING THAT THERE IS GOING TO BE A DRUG TRANSACTION OCCURRING, AND IN FACT, ENCOURAGES AND AIDS AND ASSISTS MR. GOODMAN IN THE TRANSACTION.

SO THEN IT IS BEING OFFERED FOR THE TRUTH OF THE MATTER, BECAUSE IF IT IS BEING OFFERED FOR HIS KNOWLEDGE THAT A DRUG TRANSACTION IS GOING ON, HOW IS THAT NOT THE TRUTH OF THE MATTER MATTER?

IT IS NOT ACTUALLY, JUSTICE PARIENTE, I THINK THAT THE PROBLEM HERE IS YOU HAVE TO PUT THE STATEMENTS ASIDE, AS FAR AS WHAT THE TRUTH OF THOSE STATEMENTS ARE. AGAIN, WE DON'T CARE WHETHER BANKS IS COOL. WE DON'T CARE WHETHER HE IS STRAIGHT UP. WE ONLY CARE THAT HE HEARD THIS ENTIRE TRANSACTION.

THEN WHAT ABOUT THE STATEMENT WHICH IS THE SEPARATE STATEMENT, WHERE, AFTER THEY COME BACK AGAIN AND YOU HAVE THE OFFICER TESTIFYING THAT GOODMAN SAID THAT HE KNEW, MEANING GOODMAN, THAT HE WAS STRAIGHT UP, I WAS OKAY IN THIS ONE, THAT HIM AND MR. BANKS HAD HAD A DISCUSSION WHILE THEY WERE GONE, ABOUT THE UNDERCOVER VEHICLE BEING ACROSS THE STREET AT THE AMOCO, AND IF THEY SAW THAT VEHICLE AGAIN, THEN THEY WOULD KNOW THAT I WAS EITHER THE COPS OR A SNITCH TRYING TO SET THEM UP. THAT -- WHAT WAS THAT OFFERED FOR?

AGAIN, PART OF THE VERBAL ACT TO ESTABLISH THE INTENT, TO ESTABLISH, RATHER, THE

EFFECT OF THAT THAT STATEMENT HAD ON BAKES'S ACTION, BECAUSE AS GOODMAN IS SAYING THAT --

WAS IT BEING OFFERED, THOUGH, TO SAY THAT I HIM READING THAT, AND I AM THINKING THAT, IF I HEARD THAT, I WOULD THINK THAT THEY HAD A CONVERSATION, AND THEY ACTUALLY DISCUSSED THAT THIS GUY OR THIS WOMAN MIGHT BE A COP, AND THAT -- WHAT THEY WERE GOING TO DO, ALMOST LIKE A CONSPIRACY THING, BUT AS I AM UNDERSTANDING THIS, THIS WAS NEVER OFFERED UNDER A, YOU KNOW, COCONSPIRATOR'S EXCEPTION TO THE HEARSAY RULE OR ADOPTIVE ADMISSION OR SOMETHING. HOW IS THAT NOT -- HOW WOULD THE JURY UNDERSTAND THAT THAT IS NOT BEING OFFERED FOR THE TRUTH OF THE MATTER?

I THINK THAT IS THE PURPOSE OF THE LIMITING INSTRUCTION, WHICH, UNDER BREED LOVE, MR. BANKS NEVER OFFERED FOR THE LIMITING INSTRUCTION AND WAS NEVER GIVEN IT, BUT APART FROM THAT, I DON'T THINK HE WOULD NEED A LIMITING INSTRUCTION, BECAUSE I THINK IT CLEARLY DESIGNATES WHAT THOSE STATEMENTS ARE BEING USED FOR. I DON'T THINK THAT THAT STATEMENT, AGAIN, ANY OF THE FACTUAL ISSUES OR ASSERTIONS THAT GOODMAN SAYS IN THERE WERE NOT AN ISSUE. WE DIDN'T CARE WHETHER OR NOT RODIN, HERSELF, WAS STRAIGHT UP. WE DIDN'T CARE WHETHER OR NOT --

INSTEAD OF USING THE WORDS "STRAIGHT UP", IN THE LATER CONVERSATION IN WHICH THEY TALKED, SUPPOSE THE WORDS WERE "IS HE IN ON THE DEAL"? WOULD THAT HAVE BEEN PROPER, THEN TO ADMIT THAT, AND THEN THE OTHER PERSON WHO DID THE TRANSACTION TO SAY, YES, HE IS IN ON THE DEAL, INSTEAD OF ASKING AND THEN HAVING IN LENGTHY EXPLANATION BY THE POLICE OFFICER ABOUT IS HE STRAIGHT UP, WOULD IT HAVE BEEN APPROPRIATE TO ADMIT THAT EVIDENCE, IS HE IN ON THE DEAL?

WELL, I THINK, JUSTICE ANSTEAD, NOW YOU ARE GETTING MORE, CLOSER TO A DIRECT INCULPATORY STATEMENT. IT IS LIKE THE DEFENDANT, CULPATORY, STATING TO THE WITNESS, YES, HE IS PART OF --

ISN'T THAT WHAT OCCURRED HERE ESPECIALLY GIVEN THE FACT THAT THE POLICE OFFICER THEN GOES INTO A LENGTHY EXPLANATION OF WHAT SHE BELIEVES "STRAIGHT UP" MEANS, WHICH MEANS HE IS IN ON THE DEAL?

I RESPECTFULLY DISAGREE, JUSTICE ANSTEAD. I DON'T BELIEVE THAT THAT IS WHAT OFFICER RODIN DID.

WHAT DOES SHE SAY "STRAIGHT UP" MEANS?

SHE SAYS "STRAIGHT UP", AND IF I AM READING HER TESTIMONY, SHE DEFINES THAT AS STREET TERMINOLOGY, TO INDICATE THAT THE INDIVIDUALS THAT ARE PART OF THE GAMEPLAN ARE PART OF THE BUSINESS.

GAMEPLAN OR PART OF THE BUSINESS?

CORRECT.

AND WHAT IS THE GAMEPLAN OR PART OF THE BUSINESS THAT WE ARE FOCUSING ON HERE?

THAT IS PART OF THE PROBLEM.

ISN'T THAT THE DRUG TRANSACTION?

CORRECT, BUT I DON'T BELIEVE THAT THAT STATEMENT, IN AND OF ITSELF, IS IMPLICATING, IS ENOUGH TO SAY THAT IT IS IMPLICATING BANKS AS BEING --.



IF HE IS PART OF THE GAMEPLAN PART OF THE DEAL?

AGAIN GOODMAN NEVER DIRECTLY TESTIFIED THAT BANKS WAS PART OF THE DEAL. GOODMAN JUST TESTIFIED THAT BANKS WAS PART OF THE GAMEPLAN, AND THEN RODIN WAS PUTTING HER TWIST ON WHAT SHE UNDERSTANDS THAT TO MEAN, BUT IT IS NEVER REALLY A DIRECT TIE IN, AND I WOULD SUBMIT TO YOU THAT THAT IS WHY THAT STATEMENT DOES NOT --

HOW MORE DIRECTLY COULD YOU HAVE THAN FOR THE POLICE OFFICER TO EXPLAIN TO THE JURY THAT WHAT THAT MEANS IS THAT HE IS PART OF IT, AND THAT IS WHAT SHE DID, DID SHE NOT?

I DON'T BELIEVE SHE DID. I THINK ALL SHE WAS DOING WAS JUST SIMPLY GIVING THE JURY AN UNDERSTANDING, SO THAT THEY CAN UNDERSTAND WHAT THAT STATEMENT MEANS, SO THAT THEY CAN ASSESS THE DEGREE OF THE EFFECT THAT THAT STATEMENT HAD ON BANKS. I THINK THAT WAS THE PURPOSE THAT WAS BROUGHT IN. JUST, IF I MAY, IT IS THE SAME THING AS ASKING WHAT DOES A.

PIECE MEAN? THE JURY IS NOT GOING TO UNDERSTAND WHAT A.

PIECE MEANS. THEN YOU EXPLAIN TO THEM THAT A 50 PIECE IS STREET PARLANCE FOR \$.

' WORTH OF CRACK COCAINE.

BUT THE 50 PIECE IS BETWEEN THE ACTUAL PERSON DOING THE TRANSACTION, THE PASSENGER, AND THE UNDERCOVER POLICE OFFICER, BUT NOW WE ARE TALKING ABOUT THE INVOLVEMENT OF THE PERSON THAT IS TRIAL NOW. YOU USE THE WORD THAT SHE EXPLAINED THAT IT MEANT THAT HE WAS PART OF THE GAMEPLAN. AND YOU AGREE THAT THE GAMEPLAN, OF COURSE, IS THE DRUG DEAL GOING DOWN RIGHT THEN. I AM JUST HAVING DIFFICULTY IN SAYING THAT, OF COURSE THIS IS THE REASON THAT YOU WANTED TO ADMIT THAT WAS TO IMPLICATE HIM IN THE TRANSACTION.

I THINK WE ARE GOING BACK AND FORTH. I UNDERSTAND THE COURT'S CONCERN AND CERTAINLY THE FOURTH DISTRICT MADE SOME PASSING ON IT BUT I THINK WHAT IS IMPORTANT TO NOTE HERE IS THAT HOW THE STATEMENT WAS USED. CLEARLY, AND I WOULD SUBMIT THAT ALL THESE STATES CAME IN PROPER, TO ESTABLISH VERBAL ACT, AND THEY COME IN AS PART OF THE ENTIRE CASE, BUT IT IS HOW THEY WERE USED IN THE CLOSING ARGUMENT THAT I WOULD ADDRESS THIS COURT TO TAKE A LOOK AT. THE -- MR. BANKS IS ARGUING SIMPLY THAT THEY WERE ARGUED FOR THE TRUTH OF THE MATTER, AND I WOULD SUBMIT THAT, WHEN YOU READ THE CLOSING ARGUMENT, AT NO TIME WERE THEY. I MEAN, IT IS NOTEWORTHY THAT THE DEFENSE DIDN'T EVEN OBJECT, IN CLOSING, TO THE FACT THAT THEY WERE BEING USED FOR HEARSAY PURPOSES, AND I WOULD SUBMIT TO THE COURT THAT THAT IS IT WAS IN CLOSING ARGUMENT AND WAS NEVER INTRODUCED FOR THAT PURPOSE.

WHAT IS THE EXPLANATION AND SO FORTH? YOU CAN UNDERSTAND, I THINK, HOW SUCH A STATEMENT COULD, IN THE EARS AND THE UNDERSTANDING OF THE JURY, BE EXTREMELY PREJUDICIAL, IF THEY TAKE IT TO MEAN THAT, YES, HE IS INVOLVED IN IT, IF THAT IS THE WAY THEY PERCEIVE IT. NOW, LET'S SAY IT IS INADMISSIBLE. IS IT SUBJECT TO A HARMLESS ERROR? OR IS IT SO DAMAGING THAT YOU CAN NEVER KNOW WHAT IMPACT IT HAD ON THE JURY, OR ISN'T IT THAT DAMAGING?

I WOULD SUBMIT, JUSTICE SAW, THAT EVEN ASSUMING IT WAS IMPROPERLY ADMITTED AND THEN JUST TAKING THE ADDITIONAL STEP IN MAKING THE ASSUMPTION THAT IT WAS IMPROPERLY ARGUED THAT WAY, THAT, YEAH, WHEN IT IS PUT INTO ITS CONTEXT, YOU CAN'T FORGET THE OTHER FACTS. I MEAN, I THINK THE FOURTH SET IT OUT IN ITS OPINION, BUT I WANT TO REMIND

THE COURT THAT YOU HAVE ALL THESE OTHER STATEMENTS. YOU HAVE THE TRANSACTION ABOUT A 50 PIECE. ABOUT MAKING ARRANGEMENTS FOR GETTING THE MONEY, AND THEN THE SECOND CONTACT ABOUT MR. GOODMAN SAYING THAT HE IS UNCOMFORTABLE BECAUSE HE THINKS THAT THE POLICE ARE ACROSS THE STREET. AND THEN THE, WHEN THEY RETURN 15 MINUTES LATER --

I THINK YOU ARE MISS HAD GONE MY POINT. MY POINT IS THAT, IF WE DETERMINE THAT IT IS INADMISSIBLE, THEN HOW CAN WE TAKE THAT SECOND STEP AND EVER DETERMINE WHAT IMPACT IT HAD ON THE JURY'S DETERMINATION?

BECAUSE I THINK, ASIDE FROM THAT STATEMENT ALONE, AS I WAS SAYING, I THINK YOU HAVE ALL OF THE OTHER STATEMENTS AND ALL OF BANKS'S ACTIONS DRIVING THE CAR AND LET'S NOT FORGET IT, AT THE VERY END, THE HIGH-SPEED CHASE AND THE FLEEING TO ALLUDE. YOU HAVE ALL OF THESE BITS AND PIECES OF EVIDENCE ALL PUT TOGETHER. I WOULD THINK THAT THIS STATEMENT, BY ITSELF, WAS RATHER INNOCUOUS, IN THE SENSE THAT AT NO TIME EVER DID ANYONE EVER TESTIFY THAT MR. BANKS WAS PART OF THIS TRANSACTION. THERE WASN'T ANY EVIDENCE TO THAT EFFECT, AND I THINK IT WOULD BE A STRETCH TO SAY OTHERWISE. I WOULD JUST SUBMIT TO THE COURT THAT I THINK THERE IS A REAL JURISDICTIONAL PROBLEM WITH THIS CASE. THE STATE WOULD SUBMIT THAT IT IS REALLY ON ALL FOURS WITH BREED LOVE. JUST LIKE IN BREED LOVE, THE STATEMENTS ALL CAME IN, SIMPLY TO SHOW THE EFFECT THAT THEY HAD. I WOULD SUBMIT THAT ANY ISSUE REGARDING THE CLOSING ARGUMENT WAS NOT PROPERLY PRESERVED. THERE WAS NEVER ANY OBJECTION MADE TO THE STATEMENT IN CLOSING CLOSING. UNLESS THE COURT HAS ANY OTHER QUESTIONS OR CONCERNS, I WOULD REST ON MY BRIEF.

THANK YOU.

I WOULD ADDRESS JUSTTIS SHAW'S -- JUSTICE SHAW'S CONCERN AS TO THE HARMLESS ERROR DOCTRINE. IN 1922, THIS COURT APPROVED THE FOLLOWING LANGUAGE FROM THE FOLLOWING CASE IN COLLINS. "MERE KNOWLEDGE THAT THE OFFENSE IS BEING COMMITTED IS NOT PARTICIPATION WITH CRIMINAL INTENT, AND MERE PRESENCE AT THE SCENE, INCLUDING DRIVING THE PERPETRATOR TO AND FROM THE SCENE OR A DISPLAY OF QUESTIONABLE BEHAVIOR AFTER THE FACT, IS NOT SUFFICIENT TO ESTABLISH PARTICIPATION." SO IN LIGHT OF THAT STATEMENT, ON AIDING AND ABETTING, THE SIGNIFICANCE OF THE TESTIMONY THAT WE HAVE BEEN DISCUSSING HERE IS INCREDIBLY IMPORTANT. I WOULD ALSO LIKE TO MENTION --

MISS ALLEN, I THINK YOUR TIME IS UP. THANK YOU VERY MUCH.

THANK YOU.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.