William Frederick Happ vs Michael Moore etc.

THE NEXT CASE ON THE COURT'S CALENDAR THIS MORNING IS HAPP VERSUS MOORE. ARE YOU READY TO PROCEED?

MAY IT PLEASE THE COURT. MY NAME IS DWIGHT WELLS, AND I AM HERE ON BAFFLE OF WILLIAM FREDERICK HAPP, AND FILING A HABEAS CORPUS IN THE CCRC, MIDDLE DISTRICT. -- FIRST DISTRICT. FIRST OF ALL, A CLAIM ALLEGING CONFLICT OF INTEREST, AS TO THE EMPLOYMENT OF A DOCTOR, BOTH BY THE DEFENSE AND THEN, LATER ON, BY THE STATE. AT THE TIME WE WROTE THE WRIT, IT WAS -- I, OBVIOUSLY, ARGUED IN GOOD FAITH, BUT WE DISCOVERED, UPON READING THE RECORD OF THE FIRST TRIAL, WHICH WAS HELD IN JANUARY OF 1989, THAT THE APPOINTMENT OF DR. CROPP, BY, BOTH, THE DEFENSE AND THE STATE, WAS KNOWN BY EVERYONE, THE DEFENSE, TOO, AND THAT I WANT TO LET THE COURT KNOW ABOUT. THAT THE NEXT ISSUE I WANT TO TALK ABOUT, AND I, REALLY, WOULD LIKE THE COURT TO LET ME COMBINE CLAIM NUMBER ONE, WHICH ADDRESSES THE FAILURE OF THE COURT, THE TRIAL COURT, TO LET MR. LEE, WHO WAS AN ASSISTANT PUBLIC DEFENDER, TESTIFY AS A REBUTTAL WITNESS OR AS AN IMPEACHMENT WITNESS, AGAINST MR. MILLER, WITH CLAIM NUMBER FOUR, WHICH GOES TO THE ISSUE OF THE COURT, THE TRIAL COURT FINDING MR. MILLER UNAVAILABLE TO TESTIFY IN THE SECOND TRIAL, WHICH OCCURRED SOME EIGHT OR NINE MONTHS AFTER THE FIRST TRIAL OF MR. HAPP ENDED IN A MISTRIAL. THE CONE REASON FOR THAT IS THAT MR. MILLER IS, REALLY, THE LINCHPIN OF THE STATE'S CASE AGAINST MR. HAPP. WITHOUT MR. MILLER, THIS IS A WEAK, CIRCUMSTANTIAL EVIDENCE CASE. IN FACT, THE ONLY LINK BETWEEN MR. HAPP AND THE CASE AT ALL ARE SOME FINGERPRINTS FOUND ON THE OUTSIDE OF THE VICTIM'S CAR AND FOUND SOME TWO DAYS AFTER THE VICTIM WAS FOUND. CLAIM NUMBER ONE ADDRESSES AN ISSUE THAT, WE REALIZE, WAS PARTIALLY ADDRESSED BY PILL AT COUNSEL, IN ITS -- BY APPELLATE COUNSEL, IN ITS BRIEF TO THIS COURT IN INITIAL APPEAL. WHEN I SAY PARTIALLY ADDRESSED, IT WAS ADDRESSED TO THE EXTENT THAT APPELLATE COUNSEL TALKED ABOUT MR. LEE TELLING THE COURT, IN AN IN CAMERA PROCEEDING, STATING HE HAD LIED. IT IS IN HIS TESTIMONY. WHAT WELL ARE SAYING IS THAT THERE WERE MORE ISSUES TO LOOK AT BY APPELLATE COUNSEL THAN JUST FACT THAT MR. MILLER STATED THAT HE HAD LIED. WE FEEL THAT APPELLATE COUNSEL SHOULD HAVE, ALSO, BRIEFED THIS COURT ON THE ISSUE OF MR. MILLER STATING THAT HE HAD BEEN GIVEN ANSWERS BY THE STATE ATTORNEY AND ADDITIONALLY, THAT THE REASONS MR. MILLER WAS SEEKING OUT COUNSEL, THAT IS MR. LEE, AN ASSISTANT PUBLIC DEFENDER, WAS THAT HE WAS CONCERNED, THAT IS MR. MILLER WAS CONCERNED, ABOUT HOW HIS IMPACT, HIS TESTIMONY, IN THE SECOND TRIAL, WOULD AFFECT HIS OWN CASE, AND WE THINK THOSE TWO ADDITIONAL ISSUES, AS TO THAT CLAIM NUMBER ONE, SHOULD HAVE BEEN BRIEFED, BECAUSE, WHEN YOU PUT THAT IN COMBINATION WITH CLAIM NUMBER FOUR, YOU SEE THAT MR. LEE COULD HAVE BEEN A VERY POWERFUL, IT IS OUR CONTENTION, IMPEACHMENT WITNESS.

LET ME ASK YOU, AS FAR AS GETTING QUESTIONS OR ANSWERS, WHATEVER, FROM THE PROSECUTOR, WHAT, SPECIFICALLY, WERE WE TALKING ABOUT, BECAUSE I UNDERSTOOD IT TO BE IT WAS ANSWERS CONCERNING WHAT HE SHOULD SAY, IF ASKED ABOUT WHETHER HE WANTED AN ATTORNEY. WAS THERE MORE TO IT THAN THAT?

WE BELIEVE, JUSTICE QUINCE, THAT, YES, THERE WAS MORE TO IT THAN THAT, THAT, IN FACT, IT IS OUR CONTENTION THAT MR. MILLER WAS ACTUALLY GIVEN INFORMATION ABOUT THE CRIME, ITSELF, AND ABOUT THE CONFESSION.

WHAT DO YOU BASE THAT ON?

WELL, PARTIALLY WE BASE IT ON A RECENT RECANTATION BY MR. MILLER, BUT ADDITIONALLY, WE FEEL IF YOU READ, IF YOU ARE AWARE OF THE PLEA AGREEMENT MR. MILLER HAD, AND THE CONDITIONS OF THAT PLEA AGREEMENT, THAT HE TRUTHLY TESTIFIED AT TRIAL, AND -- TRUTHFULLY TESTIFIED AT TRIAL, AND THE FACT THAT, UPON SECOND TRIAL, HE IS, APPARENTLY, INDICATING THAT HE MAY HAVE BEEN GIVEN INFORMATION ABOUT AND BEYOND THIS NARROW ISSUE OF WHETHER OR NOT HE SHOULD SAY THAT HE WAS APPOINTED OR HAD HIS OWN ATTORNEY, SO IT IS --

I AM NOT SURE. DID YOU ANSWER THAT QUESTION? YOU ARE STILL SAYING YOU BELIEVE. WHAT IS THERE THAT IS OF THIS RECORD OR ANYWHERE THAT ADDRESSES THAT MATTER AS TO WHAT INFORMATION WAS GIVEN OR WAS NOT GIVEN?

THE ONLY INFORMATION WE HAVE, YOUR HONOR, IS IN THE RECORD, AND SO ONE COULD READ THE RECORD TO STATE THAT THE ONLY QUESTION OR THE ONLY QUOTE/UNQUOTE LIE THAT MR. MILLER WAS TALKING ABOUT WAS OR INFORMATION, I AM SORRY, THAT MR. MILLER IS TALKING ABOUT, IS THE INFORMATION ABOUT THE ATTORNEY.

SO IT DOESN'T GO BEYOND THAT, IN WHAT WE ARE DEALING WITH.

YES. THAT IS TRUE.

YOU NEED TO CIRCLE BACK TO THAT A LITTLE BIT, BECAUSE WHAT YOU ARE DOING, HERE, IS TRYING TO EVALUATE THE PERFORMANCE OF APPELLANT COUNSEL. AND NOW YOU HAVE GIVEN US, REALLY, IF YOU HAVE SAID, WELL, IT IS BASED PARTLY ON RECENT RECANTATIONS. OBVIOUSLY THAT IS NOT WESTBOUND THE KNOWLEDGE OF APPELLATE COUNSEL. AND THEN YOU SEEM TO HAVE RETREATED HERE, ALSO, ON THE ISSUE YOU OF WHAT THE RECORD MIGHT SHOW ABOUT THAT. WOULDN'T YOU AGREE THAT THIS IS AWFUL THIN STUFF FOR APPELLATE COUNSEL NOW. TO HAVE THIS CONDUCT REWEIGHED, ON THE FACE OF THAT.

JUSTICE ANSTEAD, THE REASON THAT I AM ASKING THAT, AND I AM GOING, NOW, TO CLAIM FOUR, IN LOOKING AT THE TOTALITY TO LEE AND MR. MILLER, WE MAY NOT OBTAIN THAT THE RECORD IS VERY CLEAR, AS TO CLAIM FOUR, FIRST OF ALL THAT THE COURT DID FIND MR. MILLER UNAVAILABLE TO TESTIFY, AND --

WHY DON'T YOU GO AHEAD AND ADDRESS THAT.

ALL RIGHT. THANK YOU. AS TO THE UNAVAILABILITY OF, FIRST OF ALL, WE WERE LOOKING AT BOTH CRIMINAL RULES OF PROCEDURE, WHICH WE SAY APPLY TO THIS CASE, WHEN JUDGING ONE'S UNAVAILABILITY TO TESTIFY. AND THERE ARE THREE STANDARDS, IF YOU WILL, IN THE RULE. ONE IS THAT HE IS OUT-OF-STATE. WELL, WE KNOW MR. MILLER WAS IN THE STATE. WE KNOW MR. MILLER, IN FACT, TESTIFIED IN THE TRIAL, AS TO WHY --

WHAT HAPPENED IN THE TRIAL COURT BELOW, THOUGH, INSOFAR AS ANY OBJECTION TO MILLER TESTIFYING AND ABOUT THIS UNAVAILABILITY AND ALL THAT? IN OTHER WORDS SET THE STAGE FOR US, IN TERMS OF WHAT APPELLATE COUNSEL WOULD HAVE KNOWN, BY AN EXAMINATION OF THE RECORD, AS TO WHAT OCCURRED.

WELL, THE RECORD SHOWS THAT MR. FISTTER, WHO WAS TRIAL COUNSEL, DID OBJECT. HE OBJECTED ON TWO GROUNDS AND HE WENT ON TO SAY THAT ONE OF THE GROUNDS WAS A PROPOSAL TO MR. KICKLITER, WHO WAS AN INVESTIGATOR, READ MR. MILLER'S TESTIMONY INTO THE RECORD FOR THE JURY. MR. FISTTER OBJECTED TO THAT AND, IN FACT, GOT THE COURT TO RULE THAT MR. KICKLITER WOULD NOT BE READING THAT INFORMATION IN. HE HAD ANOTHER OBJECTION TO THE PROCESS, ITSELF, AND THAT IS IN THE RECORD, SO WE FEEL, NUMBER ONE,

THAT MR. --

WHAT DID THAT OBJECTION SAY? I MEAN, IN OTHER WORDS YOU SAY THAT YOU FEEL IT WAS TO -- AN OBJECTION TO THE PROCESS, ITSELF. WHAT WAS THE OBJECTION NOW?

HE OBJECTED TO THE PROPOSAL, BY MR. -- BY THE PROSECUTOR, THAT MR. MILLER'S TESTIMONY BE ALLOWED TO BE READ INTO THE RECORD, BASED UPON HIS FORMER TESTIMONY, BACK IN JULY OR JANUARY OF 1989.

WHAT WAS THE BASIS OF THE OBJECTION, I GUESS, IS WHAT I AM TRYING TO GET AT?

WELL, THE DIFFICULTY, YOUR HONOR, IS THAT HE NEVER FULLY RETURNED TO WHAT THE BASIS OF HIS OBJECTION WAS. AND -- BUT YOU KNOW, IT WOULD SEEM TO ME, AND IT IS A FUNDAMENTAL ERROR, HERE, WE ARE, ALSO, ALLEGING, IN THE SENSE THAT MR. MILLER'S TESTIMONY WAS SO CRUCIAL TO THE STATE'S CASE, THAT APPELLATE COUNSEL SHOULD HAVE BRIEFED THIS ISSUE BEFORE THE COURT, IN ITS INITIAL APPEAL. WE, ALSO, FEEL THAT, AGAIN, GIVEN THE ISSUE OF UNAVAILABILITY, THAT MR. MILLER SIMPLY DID NOT, IN ANY WAY, BREACH THAT -- REACH THAT STANDARD OF HIM BEING UNAVAILABLE TO TESTIFY. FIRST OF ALL, THE COURT NEVER ORDERED MR. MILLER TO TESTIFY, AND WE WOULD SAY THAT IS A THRESHOLD ISSUE, WITH WHETHER OR NOT ONE IS UNAVAILABLE.

DID COUNSEL MAKE ANY CONCESSIONS ON THIS, AS FAR AS WHETHER OR NOT THE -- MEETING THE REQUIREMENTS OF UNAVAILABILITY, UNDER THE STATUTE, WERE CONCERNED?

TO BE PERFECTLY HONEST WITH YOU, THE RECORD IS FAIRLY LIGHT, WHETHER OR NOT HE OBJECTED TO THAT PARTICULAR ISSUE, AND THAT IS WHY WE ARE SAYING, TO THE COURT, THAT A CONTEMPORANEOUS OBJECTION, GIVEN THE FUNDAMENTAL NATURE OF THE ERROR, PERHAPS, WAS NOT NEEDED, BUT IT IS LIGHT, IN TERMS OF THAT ISSUE. SO I THINK WHAT WE END UP WITH, HERE, A SITUATION WHERE, IF I CAN USE AN ANALOGY, WHERE MR. MILLER IS SORT OF PUT INSIDE A FENCE BY THE COURT. MR. LEE IS RULED THAT HE CANNOT TESTIFY, IN IMPEACHMENT OF MR. MILLER. MR. MILLER IS FOUND TO BE UNAVAILABLE, SO, AGAIN, THAT UNAVAILABILITY IS ONE OF OUR MAJOR POINTS IN THE WRIT. SO THAT HIS TESTIMONY IS NOT LIVE. THE JURY DOES NOT HAVE THE BENEFIT OF SEEING HIM, SEEING CROSS-EXAMINATION. MR. FISTTER IS LIMITED IN HIS CONFRONTATION OF MR. MILLER, AND THEN THIRDLY, AND, I THINK, IMPORTANTLY, THE ONE READ BACK THAT THE JURY REQUESTS, OUT OF THIS WHOLE CASE, WHILE THEY WILL ARE DELIBERATING, IS A READ BACK RELATED TO MR. MILLER. AND WHETHER OR NOT MR. MILLER READ INFORMATION, IN THE PAPER, ABOUT THIS CASE, THAT -- AND WE DON'T KNOW WHY THE JURY WAS ASKING FOR THAT READ BACK, BUT THE COURT, ALSO, DENIED THAT READ BACK. SO THAT IS OUR ARGUMENT. LIKE I SAY, IT IS THE TOTALITY OF CIRCUMSTANCES ARGUMENT, AS TO MR. MILLER. THE RELATIONSHIP OF MR. MILLER TO SEEKING OUT COUNSEL AND, ALSO, THE FACT THAT THE TRIAL COURT DENIED THE READ BACK, AND IT IS OUR CONTENTION THAT THAT WAS IN THE RECORD, THAT APPELLATE COUNSEL COULD HAVE PICKED UP ON THOSE ISSUES, AND, IN FACT, DID PICK UP ON ONE ISSUE, AS RELATED TO MR. LEE, AND, IN FACT, BRIEFED THAT ISSUE BEFORE THIS COURT. THE SECOND ISSUE I WOULD LIKE TO ADDRESS IS THE -- WHAT WE, WHAT WE ARE CLAIMING IS A GROSS MAN VIOLATION. NOW, THERE ARE TWO POINTS I WOULD LIKE TO MAKE, BEFORE I START THIS ARGUMENT. ONE IS THAT I HAVE DONE OVER TWENTY CAPITAL CASES AT TRIAL, MYSELF. I HAVE NEVER SEEN A SITUATION, BEFORE, WHERE A TRIAL JUDGE GETS THE RECOMMENDATION OF A JURY, AS THE TRIAL JUDGE DID IN THIS CASE, AND IMMEDIATELY SENTENCES SOMEONE TO DEATH, AND THAT IS WHAT HAPPENED IN THIS CASE. THE SECOND POINT IS THAT, BY HIS OWN WORDS, THE JUDGE DID NOT FILE, CONTEMPORANEOUSLY, WITH THE ORAL PRONOUNCEMENT OF SENTENCE, A WRITTEN ORDER. NOW, GIVEN THOSE TWO ISSUES, IT SEEMS TO ME THAT, WHEN THIS COURT ADOPTED GROSSMAN, THIS COURT LAID OUT A PROCEDURE WHICH THEY FELT THIS COURT FELT, WAS VERY, VERY IMPORTANT, WHEN THE TRIAL COURT IS GOING TO IMPOSE THE ULTIMATE SENTENCE, THE DEATH SENTENCE. MOST APPEALS

THAT DEAL WITH GROSSMAN FOCUS ON THE END OF THAT PROCEDURE, WHICH IS WHERE THE "MUST" LANGUAGE SAYS THE TRIAL COURT SHALL ENTER AN ORDER, CONTEMPORANEOUS WITH THE ORAL PRONOUNCEMENT OF THE SENTENCE. WHAT I WOULD SAY TO THE COURT THAT, THE COURT, ALSO, FELT THAT THE TRIAL COURT SHOULD GO THROUGH A CONTEMPLATE I HAVE, DELIBERATIVE PROCESS, THAT THEY SHOULD RECEIVE THE JURY'S RECOMMENDATION THAT, IN SOME CASES, AND I AM NOT SAYING IN THIS CASE, BECAUSE SPENCER, OBVIOUSLY, WAS AFTER THIS CASE, BUT THAT THERE WOULD BE SOME DELAY OR SOME THOUGHT PROCESS, BEFORE IMPOSEING THE DEATH PENALTY, SO THAT IN THIS CASE, THAT PROCESS NEVER TOOK PLACE. AND THE -- IF YOU READ THE DIFFERENT -- THE DIFFERENCE BETWEEN THE ORAL PRONOUNCEMENT, WHICH TALKS, ALMOST ENTIRELY, ABOUT THE AGGRAVATORS, THEY DON'T -- THE JUDGE DOES NOT TALK ABOUT MITIGATION. HE DOESN'T TALK ABOUT WEIGHING MITIGATION. HE SIMPLY LISTS THE AGGRAVATORS, AND THEN HE SENTENCES MR. HAPP TO DEATH. LATER ON, IN HIS ORDER, HE DOES TALK ABOUT THE MITIGATORS AND I WOULD ADMIT TO YOU HE FILES THAT SAME ORDER IN THE DAY, BUT HE IS IN VIOLATION. AS THIS COURT POINTED OUT, HE DID NOT FILE THE ORDER CONTEMPORANEOUSLY, AND LASTLY, THE FACT THAT HE FILED OR SENTENCED MR. HAPP TO DEATH SHOWED A PREDISPOSITION OF THE COURT TO SENTENCE MR. HAPP TO DEATH. HE OBVIOUSLY IN WRITTEN, AT LEAST HIS ORAL PRONOUNCEMENTS, WHILE THE JURY WAS OUT. THANK YOU VERY MUCH.

MR. WHITE. THANK YOU, YOUR HONOR. STEVE WHITE, APPEARING ON BEHALF OF ROBERT BUTTERWORTH, FILLING IN FOR KEN NUNNELLEY, WHO HAS A PENDING DEATH WARRANT. I WILL ADDRESS, FIRST -- OF COURSE, SUBJECT TO THE COURT'S QUESTIONS, THE ARGUMENTS OF THE PETITIONER. REGARDING DR. CROPP, ISSUE TWO, THE STATE, RESPONDENT ASSERTS THAT IT WASN'T PRESERVED, AND THAT POINT IS, FURTHER, REINFORCED BY THE CANDID CONCESSION OF PETITIONER'S COUNSEL TODAY. REGARDING HUGH LEE, ISSUES ONE AND FOUR, COUNSEL ARGUES THAT RICHARD MILLER'S TESTIMONY WAS THE LINCHPIN OF THE STATE'S CASE. IF I COULD, VERY BRIEFLY, SUMMARIZE THE OTHER EXTREMELY COMPELLING EVIDENCE IN THE STATE'S CASE, EXCLUDING RICHARD MILLER'S TESTIMONY. THE DEFENDANT'S FINGERPRINTS, COUNSEL ARGUES THAT THEY WERE ON THE EXTERIOR OF THE VEHICLE, THE VICTIM'S VEHICLE. THEY WERE ON THE DOOR HANDLE, THE DRIVER'S SIDE DOOR HANDLE, AS WELL AS ON THE WINDOW POST ON THE OTHER SIDE OF THE CAR. THE DEFENDANT --

THESE PEOPLE, DID THEY KNOW EACH OTHER? WAS THERE ANY REASON HIS PRINTS WOULD HAVE BEEN THERE, OTHER THAN AT THAT TIME OF THE MURDER?

NO, YOUR HONOR. IN FACT THAT SUGGESTS MY NEXT POINT THAT, THE DEFENDANT DENIED, TO LAW ENFORCEMENT, ANY KNOWLEDGE OF HOW HIS PRINTS COULD HAVE GOTTEN THERE, SO HE WAS NOT -- THIS WAS NOT ONLY A STRANGER CRIME BUT HE DENIED THAT AFFIRMATIVE EVIDENCE AS TO HOW HIS PRINTS COULD GET THERE. THE DEFENDANT WAS SEEN WALKING TOWARDS THE BARGE CANAL AT ONE POINT, THE EVENING BEFORE THE MURDER. THE BARGE CANAL IS WHERE THE VICTIM'S BODY WAS RECOVERED. THERE WAS A SHOE PRINT NEAR THE DRIVER'S SIDE OF THE VICTIM'S VEHICLE, WHICH WAS, ALSO, RECOVERED IN THE SAME GENERAL AREA. THAT SHOE PRINT WAS CONSISTENT WITH THE DEFENDANT'S SHOE. IT WAS A PONY 6030, I BELIEVE, TYPE SHOE. THE DRIVER'S SIDE OF THE VICTIM'S CAR WAS BROKEN AND THE WIN-WAS BROKEN. THE DEFENDANT HAD TOLD -- AND THE WINDOW WAS BROKEN. THE DEFENDANT HAD TOLD HIS EX-GIRLFRIEND THAT HE HAS, IN THE PAST, BROKEN OUT A CAR WINDOW WITH HIS FIST. HE WAS SEEN, THE NEXT MORNING, AFTER THE MURDER, WITH A SWOLLEN AND RED HAND, INDICATING OR SUPPORTING A REASONABLE INFERENCE THAT, IN FACT, HE HAD BROKEN OUT A CAR WINDOW, ESPECIALLY WHEN YOU JUXTAPOSE THAT WITH THE EXTREMELY UNUSUAL BEHAVIOR OF BREAKING OUT A CAR WINDOW WITH HIS FIST, SO THIS IS ALL EXCLUDING RICHARD MILLER'S TESTIMONY, REGARDING THE DEFENDANT'S ADMISSIONS TO HIM, SO RICHARD MILLER WAS SIGNIFICANT, NO DOUBT, BUT THERE WAS OTHER COMPELLING EVIDENCE, INDICATING THE DEFENDANT'S GUILT. AS THE COURT HAS SUGGESTED, IN ITS QUESTIONS REGARDING HUGH LEE, THE TESTIMONY AT TRIAL WAS, WHEN ASKED, WHAT DO YOU MEAN, MR. LEE, WHAT DO YOU

MEAN BY THE DEFENDANT -- EXCUSE ME -- THAT RICHARD MILLER INDICATED THAT HE WAS TOLD TO LIE, IN GIVING ANSWERS? WHEN ASKED TO EXPLAIN THAT, HE ONLY INDICATED THE STATEMENT OF RICHARD MILLER, ABOUT COUNSEL. I WAS TOLD TO INDICATE THAT I HAD NOT ASKED FOR COUNSEL, AND I WOULD, ALSO, POINT OUT, THE STATE WOULD POINT OUT THAT, IN FACT, DURING RICHARD MILLER'S TESTIMONY IN THE FIRST TRIAL, HE DID SAY, HE DID TESTIFY THAT I WANTED COUNSEL BEFORE I FIRMED UP ANY DEAL, THAT IS TO FIRM UP ANY DEAL, BEFORE I TESTIFY FURTHER. HE, IN FACT, AT A DEPOSITION, INDICATED THAT HE WANTED COUNSEL. HE INVOKED COUNSEL. SO IN TERMS OF BEING TOLD TO, QUOTE, LIE OR BEING GIVEN ANSWERS, IT IS NARROWED ONLY TO THE INVOKEATION OF COUNSEL, AND IN FACT HE DID INVOKE COUNSEL AND TESTIFIED TO THAT IN FRONT OF THE FIRST JURY, AND, OF COURSE, THAT TESTIMONY WAS READ TO THE SECOND JURY.

WHEN WAS TESTIMONY TAKEN FROM MR. LEE?

IT WAS IN THE FIRST JURY TRIAL, YOUR HONOR, WHICH RESULTED IN A MISTRIAL. I AM SORRY. I AM SORRY. MR. LEE. IT WAS DURING THE SECOND TRIAL. HUGH LEE'S TESTIMONY WAS DURING THE SECOND TRIAL.

WAS THAT A PROFFER, BECAUSE I THOUGHT IT WAS PROFFER AND HE WASN'T ALLOWED TO TESTIFY.

YES, YOUR HONOR. THAT WAS OUTSIDE THE PRESENCE OF THE JURY, BUT MR. MILLER'S TESTIMONY WAS IN FRONT OF THE FIRST JURY THAT WAS READ TO THE SECOND JURY, AND IN THAT TESTIMONY, HE ADMITTED INVOKING THE RIGHT TO COUNSEL. HE WANTED TO FIRM UP HIS DEAL BEFORE HE TESTIFIED AT ANY DEPOSITION. HE TOLD THAT TO THE JURY IN THE FIRST TRIAL, AND IN TURN THAT WAS TOLD TO THE JURY IN THE SECOND TRIAL. COUNSEL ARGUES THAT RICHARD MILLER WAS, IN FACT, AVAILABLE, OR THAT THE STATE DIDN'T PROVE UNAVAILABILITY, AND THAT THAT SHOULD HAVE BEEN ARGUED IN THE DIRECT APPEAL. THE TRANSCRIPT -- THIS IS A TRANSCRIPT, PAGE 297, OF THE SECOND TRIAL, DEFENSE COUNSEL SAYS, AND I QUOTE, I CONCEDE, YOUR HONOR, THAT 90.804 SUB-1 SUB-B, ALLOWS THE COURT TO MAKE A RULING ALONG THOSE LINES, AND THEY HAD PREVIOUSLY BEEN TALKING ABOUT RICHARD MILLER'S AVAILABILITY, UNAVAILABILITY. HE GOES ON TO ASK, IN AN ABUNDANCE OF CAUTION, FOR THE COURT TO INQUIRE OF RICHARD MILLER. HE DOESN'T SAY THAT THAT IS REQUIRED, AS A MATTER OF LAW, BUT IN ABUNDANCE OF CAUTION. SO NOT ONLY WAS THERE NO OBJECTION TO RICHARD MILLER'S TESTIMONY IN THE SECOND TRIAL BEING READ, THERE WAS ACTUALLY AN AFFIRMATIVE STATEMENT, AGREEING TO ITS ADMISSIBILITY.

WAS THERE AN ISSUE, AT ALL, DISCUSSED ABOUT -- IN THE INITIAL APPELLATE BRIEF, CONCERNING THE READING OF THIS TESTIMONY? WAS IT NOT APPROACHED AT ALL?

YES, YOUR HONOR. ACTUALLY IT WAS, AND THE STATE'S CONTENTION IS THAT APPELLATE COUNSEL REPRESENTING MR. HAPP USED, AT EVERY OPPORTUNITY, ATTACKS ON RICHARD MILLER'S TESTIMONY, AS WELL AS LEE'S PROFFER. HUGH LEE'S PROFFER. HE ARGUED, ON THE DIRECT APPEAL THAT, THE PREAMBLE TO TO RICHARD MILLER'S TESTIMONY WAS INADMISSIBLE, AND, OF COURSE, THAT WAS A MAJOR CONTENTION BY DEFENSE COUNSEL BELOW AND, THEREFORE, ARGUABLY PRESERVED.

I AM SORRY. I DIDN'T QUITE UNDERSTAND. THE WHAT TO MR. MILLER?

CHARACTERIZED AS THE PREAMBLE, YOUR HONOR, MEANING THAT DEFENSE COUNSEL BELOW CONTENDED THAT RICHARD MILLER'S REASON FOR NOT TESTIFYING IN THE SECOND TRIAL SHOULD NOT HAVE BEEN ADMITTED TO THE SECOND JURY. THIS GETS EXTREMELY --

SO I ASSUME YOU ARE SAYING THEY WERE INSTRUCTED AS TO WHY HE WASN'T THERE PERSONALLY?

THE TESTIMONY OF RICHARD MILLER IMMEDIATELY BEFORE THE SECOND TRIAL, AS TO WHY HE WOULD NOT TESTIFY, WAS READ TO THE JURY, BEFORE RICHARD MILLER'S TESTIMONY OF THE SECOND TRIAL -- EXCUSE ME -- OF THE FIRST TRIAL WAS READ TO THE JURY IN THE SECOND TRIAL. AND BASICALLY THAT TESTIMONY OF RICHARD MILLER WAS, IN FACT, THAT, HEY, I HAVE BEEN GANG RAPED IN PRISON. I HAVE BEEN STABBED, REQUIRING 250 STITCHES. OBJECTIVE-TYPE FACTS. THIS IS NOT STUFF THAT HE COULD EASILY MAKE UP. AND BASICALLY THE DEAL WAS I WAS SUPPOSED TO GET PROTECTION FOR TESTIFYING. I AM NOT TESTIFYING. AND SO HE TESTIFIED I AM IN NO SHAPE TO TESTIFY ANY FURTHER, AND IN FACT, ON CROSS-EXAMINATION, RIGHT BEFORE THE SECOND TRIAL, ON CROSS-EXAMINATION, REFUSED TO ANSWER ANYMORE QUESTIONS BY DEFENSE COUNSEL. HE SAID I AM NOT GOING TO ANSWER ANYMORE QUESTIONS.

WAS THIS STABBING AND WHATEVER WENT ON IN PRISON, AGAINST HIM, VERIFIED BY THE TRIAL COURT?

HE RECEIVED 250 STITCHES. I AM INFERRING THIS. I WOULD IMAGINE THOSE WERE --

AND THE TRIAL JUDGE KNEW THAT.

YES, YOUR HONOR. THAT WAS TESTIFIED BY RICHARD MILLER TO THE TRIAL JUDGE, IMMEDIATELY BEFORE THE SECOND TRIAL.

WELL, I UNDERSTAND THAT YOU ARE SAYING RICHARD MILLER SAID THAT.

AND RICHARD MILLER WAS THERE.

BUT I AM ASKING WAS THERE ANY VERIFICATION OF THAT, SUCH AS QUESTIONING OF THE MEDICS OR WHOMEVER --

NOT TO MY KNOWLEDGE, NOR WAS IT CONTESTED TO BY DEFENSE COUNSEL IN ANY WAY WHATSOEVER, AND IT GETS BACK TO MY MAIN POINT THAT DEFENSE COUNSEL DIDN'T CONTEST, AT THE TRIAL, THE UNAVAILABILITY OF RICHARD MILLER. HE JUST WANTED AN INQUIRY MADE OF RICHARD MILLER, ON THE STAND, TO BASICALLY PROVE UP THE STANO BRONCS THAT HE -- THE THE STANO PRONGS THAT HE REFUSED TO TESTIFY, AND HE DID DO IT.

YOU ARE TELLING US WHAT APPELLATE COUNSEL DID DO.

YES, YOUR HONOR.

WOULD YOU TELL US.

SO APPELLATE COUNSEL ARGUED THE IN ADMISSIBILITY OF THE PREAMBLE. ARGUED THE --

IN OTHER WORDS APPELLATE COUNSEL RAISED THE ISSUE, THE FACT THIS TESTIMONY ABOUT WHAT HAD HAPPENED TO HIM IN PRISON AND WHY HE WASN'T GOING TO TESTIFY?

YES, YOUR HONOR. THE APPELLATE COUNSEL ARGUED FOR THE ADMISSIBILITY OF HUGH LEE'S TESTIMONY, AND THAT WAS ADDRESSED ON APPEAL. APPELLATE COUNSEL ARGUED THAT, IN TERMS OF HIS DOUBLE JEOPARDY ARGUMENT, WHICH WAS HIS, PROBABLY, HIS PRIMARY POINT ON APPEAL. IN READING HIS BRIEF, THAT THE PROSECUTOR OBTAINED UNFAIR ADVANTAGE, THROUGH THE FIRST TRIAL, BY OBTAINING RICHARD MILLER'S TESTIMONY IN THAT TRIAL AND BEING ALLOWED TO READ IT OR HAVE IT READ IN THE SECOND TRIAL. SO HE, APPELLATE COUNSEL, USED IT TO ATTACK IN THE DIRECT APPEAL IN THAT MANNER. AND, ALSO, APPELLATE COUNSEL ARGUED THAT, IN A CUMULATIVE ERROR POINT, THAT RICHARD MILLER'S UNAVAILABILITY FOR CROSS-EXAMINATION, IN THE SECOND TRIAL, THERE BY DEPRIVING THE

JURY OF THE THEABILITY, THIS JURY OF THE ABILITY TO SEE HIS DEMEANOR AND SO ON, SHOULD BE CONSIDERED, IN TERMS OF WEIGHING THE OTHER ERRORS IN THE CASE, SO THE STATE CONTENDS THAT APPELLATE COUNSEL USED THESE POINTS THAT ARE NOW BEING RAISED, EVERY WHICH WAY HE COULD POSSIBLY DO IT, GIVEN THE FACT THAT DEFENSE COUNSEL BELOW HAD CONCEDED THE ADMISSIBILITY OF RICHARD MILLER'S TESTIMONY, FROM THE FIRST TRIAL, AND AT THE SECOND TRIAL. REGARDING THE GROSSMAN ISSUE, NUMBER ONE IS THERE WAS NO OBJECTION. IN FACT, MORE THAN THAT, THE TRIAL COURT ASKED IS THERE ANY LEGAL CAUSE WHY SENTENCE SHOULD NOT BE, NOW, PRONOUNCED, AND DEFENSE COUNSEL EXPLICITLY SAID, NO, YOUR HONOR. AND THEN, AGAIN, A SECOND TIME, THE TRIAL COURT ANNOUNCED I INTEND TO SENTENCE THE DEFENDANT NOW. IS THERE ANY OBJECTION? NO, YOUR HONOR. TWO EXPLICIT WAIVERS OF ANY SUPPOSED GROSSMAN ISSUE. GROSSMAN CLAIM. IN FACT THE TRIAL COURT, ALSO, ASKED THE DEFENDANT, PERSONALLY, DO YOU OBJECT TO ME SENTENCING YOU NOW, AND THE DEFENDANT SAID, NO, YOUR HONOR. THE STATE CONTENDS IT IS NOT A MATTER OF FUNDAMENTAL ERROR. SPENCER WAS BROUGHT UP BY OPPOSING COUNSEL. OF COURSE SPENCER, AGAIN, AS COUNSEL POINTS OUT, WAS POST THIS SENTENCING PROCEDURE, SO IT DOESN'T APPLY, BUT NEVERTHELESS SPENCER IS SOMEWHAT INSTRUCTIVE, BECAUSE THIS COURT HAS REQUIRED AN OBJECTION TO PRESERVE A SPENCER CLAIM.

ARE YOU SUGGESTING THAT COUNSEL CAN WAIVE THE DELIBERATIVE PROCESS THAT THE JUDGE --

YOUR HONOR, THERE IS, AS A THRESHOLD QUESTION, NO QUESTION THAT THE TRIAL COURT PROPERLY DELIBERATED IN THE CASE. THIS OCCURRED ON A MONDAY. SENTENCING WAS ON A MONDAY, AND THE GUILT PHASE WAS A WEEK BEFORE, SO THE COURT HAD ALL WEEKEND TO THINK ABOUT THE GUILT-PHASE EVIDENCE, AND THAT IS WHAT THE AGGRAVATORS WAS PRIMARILY BUILT UPON. THERE WAS SOME MITIGATION EVIDENCE INTRODUCED EARLIER IN THE SAME DAY, AND THE TRIAL COURT DID ADDRESS THOSE MITIGATION FACTORS, IN HIS ORAL PRONOUNCEMENT AS WELL AS IN HIS WRITTEN ORDER, SO THE RECORD INDICATES THAT THE TRIAL COURT DID DELIBERATE PROPERLY. APPARENTLY, WHILE THE JURY WAS DELIBERATING, SO WAS THE TRIAL COURT, AND THEN THE TRIAL COURT FACTORED IN THE JURY'S RECOMMENDATION. AND IN SENTENCING THE DEFENDANT. SO SPENCER, ALTHOUGH NOT APPLICABLE, IS INSTRUCTIVE. IT REQUIRES AN OBJECTION. THERE WAS NO OBJECTION. IN FACT, THERE WAS AN AFFIRMATIVE WAIVER HERE. DEFENSE COUNSEL HAD NO PROBLEM WITH THE SENTENCING AT THIS PARTICULAR JUNCTURE. IF THERE ARE NO OTHER QUESTIONS, THANK YOU, YOUR HONOR.

THANK YOU,. MR. RIGHTER?

WE ARE SAYING THE DELIBERATIVE PROCESS, THE JUDGE CREATED A DRAFT BEFORE HE EVEN HEARD THE JURY'S VERDICT, AND HE PRONOUNCED THAT SENTENCE WITHOUT IT BEING TYPED AND PREPARED TO CONTEMPORANEOUSLY FILE WITH THE ORAL ANNOUNCEMENT. THAT IS A MANDATE BY GROSSMAN THAT WASN'T FOLLOWED. THE OBJECTION ISN'T REQUIRED, BY THE WAY. IT IS AN OBLIGATION BY STATUTE.

PRIOR TO SPENCER, WHAT KIND OF TIME FRAME USUALLY ELAPSED, BETWEEN THE TIME THAT YOU HAVE YOUR TRIAL, YOU HAVE YOUR PENALTY PHASE EVIDENCE AND THE JUDGE PRONOUNCING SENTENCE?

THERE WASN'T ANY SPECIFIC REQUIREMENT, OTHER THAN THE IMPLICATION BY GROSSMAN, IN THE PROCESS THE COURT WAS TAKING DELIBERATION. I WOULD SUGGEST TO YOU, HAD HE MADE THE OBJECTION ON APPEAL, IT WOULD BE CALLED A HAPP HEARING INSTEAD OF A SPENCER HEARING, BECAUSE AT THE TIME YOU HAD BOTH OF THE CASES, SPENCER AND HAPP. THE CRIMES WERE COMMITTED AT THE SAME TIME. THE TRIALS WERE COMMITTED AT THE SAME TIME. SPENCER CAME UP AFTER.

DOES THE JURY, AT THE SAME TIME THAT THE JURY IS DLIB DLIB RATING, CONSIDER -- THE JURY IS DELIBERATING, CONSIDER WHAT EVIDENCE AND THE FACT THAT THE MITIGATING OR AGGRAVATING CIRCUMSTANCES HAD BEEN DEMONSTRATEED?

I SUPPOSE THAT THE COURT WOULD CONSIDER THAT, AT THE TIME THAT THE JURY IS DELIBERATING. BUT HE HAS GOT A DRAFT ALREADY PREPARED, AT THE TIME THE JURY HEARD WHAT WAS SAID. WHAT HAPPENED IF HE GOT LIFE? AN OVERALL DELIBERATION?

WHAT HAPPENED?

THE JUDGE SAID I HAVE GOT A DRAFT, HERE, I AM WORKING FROM. IT WOULD BE REDUCED TO WRITING LATER. THAT IS THE WORDS OF THE COURT ON THE RECORD.

BUT THAT WAS AFTER THE EVIDENCE. THE ONLY THING THAT THE JUDGE DID NOT HAVE WAS THE JURY'S VOTE.

THAT IS CORRECT. BACK TO JUSTICE ANSTEAD'S QUESTION EARLIER ON THE THINNESS OF MR. MILLER AND MR. LEE'S TESTIMONY COMBINED. THE APPELLATE -- THE APPELLANT DIDN'T DO SOMETHING. REMEMBER MR. MILLER IS GOING TO TESTIFY, AND THE SURPRISE IS THAT DEFENSE COUNSEL IS AWARE THAT MR. MILLER DOES NOT WANT TO TESTIFY, AND HE ANNOUNCES THAT HE DOES NOT WANT TO TESTIFY. HE REFUSES. THE JUDGE, IN STANO, PROVIDES FOR THE COURT TO BE ABLE TO MAKE THAT RULING. HE DID NOT ASK FOR A CONTINUANCE. MAYBE HE SHOULD HAVE, IN ORDER TO CHECK OUT WHAT THE LAW WAS, BUT THE BOTTOM LINE IS THE STATE SAID I HAVE GOT TWO ISSUES. ONE, I WANT TO HAVE HIS TESTIMONY READ INTO THE EVIDENCE, AND NUMBER TWO, I WANT HIM TO TESTIFY TO IT. THE DEFENSE COUNSEL SAYS I WILL DEAL WITH BOTH ISSUES. LET ME DEAL WITH THE SECOND ONE FIRST. SO HE HAS TO COME BACK TO THE SECOND ONE. HE ARGUES THE FIRST, WHICH HE ARGUES IF MR. MILLER'S TESTIMONY IS ALLOWED. IT APPLIES TO IT. AND HE TELLS THE COURT LET ME TELL YOU WHAT MR. LEE'S TESTIMONY WOULD HAVE BEEN. THE STATE SAYS -- PUTS HIM ON, AND HE SAYS I DON'T WANT TO TESTIFY, BECAUSE I HAVE BEEN STABBED AND I HAVE BEEN HURT. THAT WAS ON A TUESDAY. THAT WAS THE DAY BEFORE MR. MILLER SPOKE TO MR. LEE AND SAID I DON'T WANT TO TESTIFY, BECAUSE THEY ARE GOING TO STAB ME. THE STATE WENT INTO A PROFFER OF SIX QUESTIONS CONCERNING MR. LEE'S TESTIMONY, AND EVERY PART OF IT HAD TO DEAL WITH HIMSELF. NOT ONE QUESTION DID HE SAY I AM SICK OR I HAVE BEEN STABBED. THE NEXT DAY HE TAKES THE STAND AND SAYS I DON'T WANT TO TESTIFY. I AM SICK. THE COUNSEL NEVER RAISED THAT QUESTION, WHEN IT CALLED A PROFFER, TO IMPEACH WHY MR. MILLER DIDN'T WANT TO TESTIFY, WHICH REPEATS THE FACT THAT WHY MR. MILLER IS NOT HERE IS NOT BECAUSE HE IS SICK. HE DOESN'T WANT TO FACE THE JURY. YOU DON'T GET TO SEE HIM, WITH REGARD TO HIS DEMEANOR. THE REASON WHY IT IS NOT FAIR, WITH RESPECT TO THE OTHER QUESTIONS, IS, IF YOU LOOK AT THE WAY THE QUESTIONING WENT, WITH REGARD TO MR. LEE, IF MR. MILLER WAS FORCED TO TAKE THE STAND, THEN WHAT WOULD HAPPEN WOULD BE, IT WOULD BE THE STATE'S REBUTTAL TO SHOW, WELL, MR. MILLER TOLD ME THAT HE WAS GIVEN THE ANSWERS TO THE QUESTION. NOW, OBVIOUSLY I DON'T KNOW WHAT THAT MEANT. THE JURY WOULDN'T KNOW WHAT THAT MEANT, BUT THEY COULD CONSIDER THE FACT THAT HE WAS GIVEN THE ANSWERS AND HE LIED. NOW IT BECOMES THE OBLIGATION OF THE STATE TO REBUT THAT STATEMENT, SO IT BECOME AS QUESTION FOR THE JURY TO DECIDE, AND IT WAS NOT RAISED UP ON DIRECT APPEAL. WITH REGARD TO MR. MILLER NOT BEING A LINCHPIN, THE PROSECUTOR BRAD KING, WHICH IS PART OF THE RECORD, TESTIFIED, HIMSELF, I WASN'T SURE WE WOULD GET BY A DIRECTED VERDICT WITHOUT MR. MILLER, BUT THE COURT HAD TO TAKE MR. MILLER'S TESTIMONY AS BEING TRUE, TO GET BY IT, SO HE KNEW, VERY WELL, BY HIS OWN TESTIMONY, THAT HE WAS A LINCHPIN. WHEN YOU ARE DEALING WITH A SIXTH AMENDMENT CONFRONTATION OF THAT NATURE AND YOU ARE PUT AGO FENCE AROUND THE WITNESS WHO COULD GIVE THE ONLY TESTIMONY, YOU HAVE EFFECTIVELY TAKEN THAT RIGHT AWAY. THERE WAS NO MENTION IN THE BRIEF, WHATSOEVER, BY APPELLATE COUNSEL, WITH REGARD TO THE SIXTH AMENDMENT RIGHT. IT

DEALT WITH THE PREAMENDMENT ONLY.

THE CONFRONTATION ASPECT, IS THAT NOT SATISFIED BY THE CROSS-EXAMINATION OF THAT ORIGINAL TESTIMONY?

IT DEPENDS. IT WOULD BE, IF THERE WASN'T A SITUATION WHERE THERE WAS ADDITIONAL CIRCUMSTANCES INTERJECTED. FOR INSTANCE, WITH REGARD TO MR. LEE, BY THE WAY, MR. LEE ONLY BECAME AVAILABILITY TO DEFENSE COUNSEL ON A NURSE. MR. LEE -- ON A THURSDAY. MR. LEE SPOKE TO HIM ON A MONDAY. MR. MILLER SPATE STATED HE DIDN'T WANT TO TESTIFY ON A MONDAY, AND IT BECAME TO MR. FISTTER ON A THURSDAY.

WHO BECAME AVAILABLE NOW? MR. MILLER OR MR. LEE?

MR. LEE BECAME AVAILABLE TO DEFENSE COUNSEL ON THURSDAY, ABOUT THE CONVERSATIONS HE HAD WITH MILL OTHER WEDNESDAY, AND MR. MILLER WAS THE WITNESS, WHO TESTIFIED ON TUESDAY, SO WITHOUT HAVING THAT ABILITY, EVEN THOUGH THERE WAS CROSS-EXAMINATION IN THE FIRST TRIAL, NEW INFORMATION CAME TO LIGHT FROM MR. LEE. NOT ONLY WAS HE NOT PERMITED TO CALL MR. MILLER BACK AND ASK HIM, WELL, DID YOU SAY THESE THINGS TO MR. LEE? HE WAS UNABLE TO CALL MR. LEE, TO REFUTE THE TESTIMONY OF THE PRIOR TESTIMONY, SO HE WAS NOT HAVING ANY ACCESS OF IMPEACHMENT WHATSOEVER, AND THAT IS AVAILABLE IN THE RECORD, SO WHEN YOU LOOK AT THIS, HE HAVE THEN HINDSIGHT, IT IS PREDICTABLE. WHEN THE JURY COMES BACK WITH A QUESTION, WELL, DID HE SAY HE READ THAT IN A PAPER? THE JURY WAS CONCERNED ABOUT MR. MR. MILLER'S TESTIMONY AND THE QUESTION WHETHER OR NOT HE LIED. MR. LEE WOULD HAVE BEEN A SUBSTANTIAL WITNESS TO IMPEACH THAT TESTIMONY, AS WELL AS MR. MILLER BEING ABLE TO BE CALLED BACK TO INQUIRE AS TO WHETHER HE TOLD MR. LEE THAT. DON'T FORGET, NOW, THE STATE SAYS, WELL, JUDGE, IT IS ON THE RECORD, MR. MILLER, I WOULD LIKE TO KEEP HIM AROUND FOR A WHILE. HE SAYS DON'T WORRY. MR. MILLER IS NOT GOING ANYWHERE. HE WASN'T SENT BACK FOR ANY MEDAL TREATMENT.

WITH THE INDULGES OF THE CHIEF, BECAUSE OF THE QUESTION THAT JUSTICE LEWIS ASKED.

SURE.

WHAT DID TRIAL COUNSEL SAY ABOUT CONFRONTATION RIGHTS AND THE DENIAL OF CONSTITUTIONAL CONFRONTATION RIGHTS, IN THIS EXCHANGE ABOUT THIS TESTIMONY BEING ADMITTED?

SPECIFICALLY NONE, BUT I AM UNAWARE OF A CIRCUMSTANCE, WHERE AN ATTORNEY PROFFERS TESTIMONY.

LET'S JUST BE CLEAR. IN OTHER WORDS TRIAL COUNSEL DIDN'T SAY ANYTHING ABOUT A VIOLATION OF CONFRONTATION RIGHTS OR CITING TO THE CONSTITUTION.

NO. NO.

OKAY.

THANK, MR. REITER. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.