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Robert Arguelles v. State of Florida

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS ARGUELLES VERSUS STATE OF FLORIDA.

CHIEF JUSTICE: MR. MALONE.

THANK YOU, CHIEF JUSTICE WELLS. MAY IT PLEASE THE COURT. IN THIS CASE, THE GOVERNMENT INFORMANT WHO SUPPLIED THE COCAINE FOR THE DEAL ADMITTED THAT HE DID NOT DEAL DIRECTLY WITH MR. ARGUELLES ON THE TRANSACTION. IN FACT NEVER EVEN SPOKE WITH MR. ARGUELLES. HIS DEALINGS ON THE TRANSACTION, WERE EXCLUSIVELY WITH MR. GAHANTE. HE IS THE ALLEGED COCONSPIRATOR OF MR. ARGUELLES.

MR. MALL LOAN, AT SOME POINT -- MR. MALONE, WOULD YOU AT SOME POINT TELL US WHICH ITEMS YOU BELIEVE SHOULD HAVE BEEN EXCLUDED FROM INCLUSION IN THE EVIDENCE.

YES. I CAN GO TO THAT RIGHT NOW.

ALL RIGHT.

THE ITEMS THAT SHOULD BE EXCLUDED IS ALL OF THE COCONSPIRATOR, ALL THE COCONSPIRATOR HEARSAY TESTIMONY OF MR. ARGUELLES, OF MR. GAHATE.

WHICH WAS ACTUALLY GIVEN BY THE POLICE OFFICER?

IT WAS GIVEN BOTH -- MR. GAHATE DID NOT TESTIFY, SO IT WAS GIVEN, BOTH BY THE INFORMANT WHO WAS MR. GOMEZ, AND BY AN CEORD THE CONVERSATIONS THROUGH AN UNION TELL DEVICE. -- THROUGH A U.N. ITEL DEVICE.

SO NONE OF YOUR STATEMENTS, IN YOUR VIEW, FIT INTO THE BANKS STEPHENS, VERBAL ACTS EXCEPTION THE COURT AGREES THERE IS A LOT OF HEARSAY TESTIMONY OF MR. GA HMENT ATE - - OF MR. GAHATE, THE NONTESTIFYING COCONSPIRATOR. THAT TESTIMONY IS REALLY THE ONLY DIRECT EVIDENCE THAT CONNECTS MR. ARGUELLES TO A CONSPIRACY AND IN EFFECT SHOWS A CONSPIRACY, BECAUSE THE TESTIMONY, THE COCONSPIRATOR HEARSAY IS, APPARENTLY MR. GAHATE COULDN'T GO ON ENOUGH ABOUT HOW MR. ARGUELLES HAD A FRIEND FROM THE NORTHEAST WHO HAD THE MONEY THAT HE WAS GOING TO, HAD TO APPROVE OF THE TRANSACTION, THAT MR. ARGUELLES WAS A MIDDLEMAN.

OKAY. WELL, LET'S START, OKAY, IT SEEMS TO ME AT THE BEGINNING, WHEN MR. GAHATE MEETS WITH MR. GOMEZ, HE SAYS BASICALLY THAT THE MONEY IS COMING FROM A BUDDY OF MINE. OKAY. WE START WITH THAT. IS THAT EXCLUDEABLE?

YES. THAT WOULD BE, AS A VERBAL ACT, IT WOULD BE EXCLUDEABLE, BECAUSE THE FIRST ISSUE HERE IS, IS THERE INDEPENDENT EVIDENCE, INDEPENDENT NONHEARSAY EVIDENCE OF A CONSPIRACY AND MR. ARGUELLES'S PARTICIPATION IN IT, TO ADMIT THE HEARSAY EVIDENCE. THAT WOULD NOT BE EXCLUDEABLE AS A VERBAL ACT.

WE GET TO THE POINT WHERE MR. GAHATE IS TALKINGR. GOMEZ AND HIS BEEPER GOES OFF, RIGHT, AND HE USES MR. GOMEZ'S PHONE TO CALL SOMEONE.

HE SAYS TO CALL HIS BUDDY.

HE SAYS ALL HIS BUDDY.

AND THEY DISCUSSED THE TRANSN. WHOEVER HE WAS TALKING TO.

AND YOU ARE CONTENDING THAT IS EXCLUDEABLE, ALSO.

THAT WOULD NOT BE A VERBAL ACT, IF THERE IS SUFFICIENT EVIDENCE. THERE WOULD BE, IT COULD BE ADMISSIBLE AS COCONSPIRATOR HEARSAY, BUT THAT IS NOT WHAT THE FOURTH DISTRICT, I DON'T BELIEVE, FOUND WAS THE VERBAL ACT. THE FOURTH DISTRICT FOUND THREE AREAS OF VERBAL ACTS. THEY SAY WERE VERBAL ACTS. FIRST, THE FOURTH DISTRICT SAYS THAT THE INITIAL SET UP OF THE DEAL AT THE FIRST MEETING WITH GOMEZ, THE INITIAL SET UP OF THE DEAL --

THIS IS WHERE THE PHONE CALL TOOK PLACE AND THEN THEY ARE GOING TO SOMEONE ELSE'S HOUSE? THAT IS WHAT IS CONSIDERED SET UP?

YES. I AGREE THIS IS A LITTLE CONFUSING, HOW, TO FIGURE OUT WHAT THE FOURTH DISTRICT, EXACTLY, TALKING B I THINK IT IS PARTLY BECAUSE THE VERBAL ACTS -- TALKING B I THINK IT IS PARTLY BECAUSE THE VERBAL ACTS CONGRESS TRINH IS A LITTLE SLIPPERY.

I -- THE VERBAL ACTS DOCTRINE IS A LITTLE SLIP.

WHO TEST SNIS.

GOMEZ.

AND HE TESTIFIES AS TO WHAT GAHATE TOLD HIM?

YES.

IS ANYTHING THAT MR. GAHATE TOLD HIM, WHICH WOULD BECOME VERBAL HEARSAY, IF IT IS SIMPLE, IT BECOMES HEARSAY, IF IT IS NOT A VERBAL ACT, UNLESS AS YOU SAY, IT WOULD COME IN UNDER THE COCONSPIRATOR'S EXCEPTION, THEN IT WOULD COME IN AND BE REQUIRED AS INDEPENDENT EVIDENCE.

YES. EVERY STATEMENT THAT HE MAKES THAT IMPLICATES THE PETITIONER IS HEARSAY AND NOT ADMISSIBLE AS A VERBAL ACT. THAT IS OUR CONTENTION.

COULD YOU COME BACK TO THE FOURTH DISTRICT'S OPINION AND POINT OUT TO US WHAT MISSTATEMENTS OF LAW YOU BELIEVE WERE MADE IN THE OPINION? IN OTHERS E G O CONSIDER THIS ON ISSUES OF LAW HERE, AS OPPOSED TO DECIDING A SPECIFIC CASE.

YES.

WHAT MISSTATEMENTS OF LAW DO YOU CONTEND ARE CONTAINED IN THE FOURTH DISTRICT OPINION? AND WE ARE TALKING, NOW, REALLY, ABOUT MISSTATEMENTS OF LAW ABOUT VERBAL ACTS. IS THAT CORRECT?

YES. THAT IS CORRECT.

SO WHAT MISSTATEMENTS OF LAW ARE CONTAINED IN THAT OPINION?

THE FOURTH DISTRICT SAID THERE WERE THREE VERBAL ACTS WHICH WOULD SUPPORT THE ADMISSION OF THE COCONSPIRATOR HEARSAY. THE THIRD VERBAL ACT IS THE MISSTATEMENT OF

LAW, BECAUSE IT RELIES ON ITS OPINION IN BANKS, WHICH THIS COURT HAD REVERSED SINCE THAT DECISION, SINCE THE ARGUELLES DECISION, TO PERMIT A STATEMENT AS A VERBAL ACT, WHICH DIDN'T JUST EXPLAIN A TRANSACTION BUT IMPLICATED MR. ARGUELLES IN THE TRANSACTION.

WELL, WHERE DOES IT SAY, IN THE OPINION, WHEN THEY NAME THOSE THREE THAT YOU ARE TALKING ABOUT, AND YOU SAY THE THIRD ONE WHERE DOES IT SAY, IN THE OPINION, WE ARE RELYING ON OUR OPINION IN BANKS?

IT DOES RELY ON THE OPINION.

I REALIZE THAT BANKS IS CITED AND IT IS AT THE TIME REVIEW HAD BEEN GRANTED IN THIS COURT.

RIGHT.

BUT I AM HAVING DIFFICULTY WITH THE, WHERE IS THE CONNECTION?

THE CONNECTION IS THIS.

IN OTHER WORDS OF A STATEMENT IN BANKS, AND THEN THE RELIANCE ON THAT STATEMENT IN BANKS IN THIS OPINION.

THE CONNECTION IS THIS. THE COURT, IN ITS OPINION, SAYS THAT, UNDER BANKS, THE FOURTH DISTRICT HAD SAID THAT IT COULD USE VERBAL ACT TESTIMONY FOR EVEN INCRIMINATING VERBAL ACT TESTIMONY FOR THE TRUTH OF THE MATTER, ONCE INTRODUCED.

WELL, NOW, WE ARE TALKING ABOUT A DIFFERENT ISSUE, ARE WE NOT? THAT IS THAT IS REALLY A SECOND ISSUE THAT WE DISCUSSED IN BANKS BUT IM TALKING ABOUT THE FIRST ISSUE, NOW, IN TERMS OF WHERE IS THERE A MISSTATEMENT WITH REFERENCE TO THE LAW, OF VERBAL ACTS, IN SON?

THERE IS A MISSTATEMENT OF, THERE IS A MISSTATEMENT OF THE APPLICATION OF THE LAW, AND THERE IS A MISSTATEMENT OF THE LAW, IN THAT IT RELIES ON BANKS.

I AM TRYING TO SEPARATE OUT THE APPLICATION OF THAT LAW AND WHETHER OR NOT THERE WAS AN ERRONEOUS APPLICATION HERE, WHICH IS BASICALLY WHAT WE ARE TALKING ABOUT, WHEN WE ARE TRYING TO EXAMINE EACH OF THE STATEMENTS THAT WERE MADE AND WHETHER THEY COME WITHIN THAT EXCEPTION, BUT I AM LOOKING FOR WHETHER OR NOT, CAN YOU REALLY POINT OUT A MISSTATEMENT OF LAW?

YES.

OKAY. WELL, GO AHEAD. WHAT IS THAT?

AT PAGE 502, JUST BEFORE THE COURT TALKS ABOUT THE THREE THINGS THEY DESCRIBE AS VERBAL ACTS, THE COURT SAYS EVEN IF THE STATEMENT IS ULTIMATELY USED TO PROVE THE TRUTH OF THE MATTER, IT IS STILL ADMISSIBLE AS A VERBAL ACT, AND THEY CITE BANKS AND GRANTED, AND THEN THE COURT GOES ON TO DESCRIBE THE THREE THINGS I SAY ARE VERBAL ACTS, THE THIRD ONE BEING THAT MR. GAHATE, AT THE CONCLUSION OF THE TRANSACTION, SAID HE HAD TO TAKE THE COCAINE OVER TO MR. ARGUELLES AND MR. GREEN, BECAUSE THEY HAD THE LAST WORD ON THE DEAL. THE ONLY WAY, THAT CAN'T BE ADMISSIBLE AS A VERBAL ACT, BECAUSE IT IS NOT USED TO EXPLAIN THE NATURE OF THE TRANSACTION. IT IS USED, IN EFFECT USED EXPRESSLY BY THE FOURTH DISTRICT FOR ITS TRUTH. THEY DO WHAT THEY SAY THEY CAN DO. THEY SAY THEY CAN USE IT FOR ITS TRUTH, AND THEN THEY DO IT, BECAUSE THE FOURTH

DISTRICT RELIES ON THAT THIRD VERBAL ACT TO SAY THAT THAT ACT, TOGETHER WITH THE FIRST TWO, SHOWS THERE IS A CONSPIRACY BETWEEN MR. ARGUELLES AND MR. GAHATE.

IF, INCT, THERES ENOUGH EVIDENCE TO DEMONSTRATE THE CONSPIRACY PART OF THAT, WOULD THAT BE ADMISSIBLE AS A COCONSPIRATOR'S STATEMENT?

YES.

AND SO YOUR BASIC PREMISE, THEN, IS THAT THERE IS NOT SUFFICIENT EVIDENCE HERE, OF, INDEPENDENT OF THAT.

YES.

TO SHOW A CONSPIRACY.

YES, AND THAT IT WAS ERROR FOR THE COURT TO USE THIS STATEMENT BY MR. GAHATE AS EVIDENCE TO SUPPORT THE ADMISSION OF COCONSPIRATOR HEARSAY, BECAUSE IT IS NOT A VERBAL ACT. IT IS HEARSAY, AND IN ROMANI, THIS COURT REJECTED THAT APPROACH, THE FEDERAL APPROACH, WHICH PERMITS THE USE OF THE ACTUAL HEARSAY TO SHOW THAT THERE IS A CONSPIRACY.

SO TO GET BACK TO THE STATEMENT THAT YOU JUST READ OUT OF THIS OPINION, THAT STATEMENT WOULD BE CORRECT, IF THIS WAS, IN FACT, A VERBAL ACT. IF THE EVIDENCE THAT WE ARE TALKING ABOUT WAS, IN FACT, A VERBAL ACT, THE STATEMENT THAT WAS READ THAT YOU READ FROM THIS OPINION, WOULD BE CORRECT, WOULDN'T IT?

THAT WOULD BE OUR CONTENTION -- TIME GETTING BACK TO THE SAME QUESTION THAT JUSTICE ANSTEAD ASKED ABOUT WHAT WAS IN THE OPINION. IF, IN FACT, IT WAS A VERBAL ACT THEN THE STATEMENT READ WOULD BE CORRECT, TRUE?

IF IT WAS VERBAL ACT, THEN I WOULD BE WRONG, BUT OUR CONTENTION IS THAT THIS CAN'T QUALIFY AS A VERBAL ACT. IN BANKS, THIS COURT SAID THAT THE STATEMENTS THAT THE, NOT THE CODEFENDANT BUT THE THIRD PARTY HAD MADE TO THE POLICE OFFICER THAT MR. BANKS WAS COOL AND STRAIGHT UP, EVEN THOUGH THEY WERE MADE DURING THE COURSE OF THIS COCAINE TRANSACTION, COULD NOT, WERE NOT VERBAL ACTS BUT THEY WERE USED TO INCRIMINATE MR MR. BANKS.

BUT DO WE HAVE A LITTLE MORE, I MEAN, IN BANKS, IF I RECALL CORRECTLY, WE SAID THAT BASICALLY THAT MR. BANKS REALLY SAT THERE AND NEVER SAID ANYTHING AND NEVER DID ANYTHING.

RIGHT.

WHEREAS IN THIS CASE, WE DO HAVE A LITTLE MORE THAN JUST MERE SILENCE BY THIS DEFENDANT, DON'T WE?

YES.

WE ACTUALLY HAVE AN ACTUAL TELEPHONE CALL THAT WAS MADE TO HIS HOME, THAT WE, THAT WAS DEMONSTRATED TO BE TO HIS HOME.

PHONE RECORDS.

THEY GO THERE. HE COMES OUT. AT SOME POINT, HE ACTUALLY GIVES GAHATE, I GUESS, A BAG THAT CONTAINS THE MONEY THAT HE USED TO PURCHASE THE DRUGS, CORRECT?

YES.

SO WE DO HAVE A LITTLE MORE ACTIVITY ON THE PART OF THIS DEFENDANT THAN WE HAD IN THE BANKS CASE, DON'T WE?

YES. I DON'T KNOW HOW THAT LEGALITIES RELATES TO WHETHER THERE IS SUFFICIENT EVIDENCE THAT THERE IS A CONSPIRACY. I DON'T KNOW HOW IT WOULD DISTINGUISH BANKS ON WHETHER THIS IS A VERBAL ACTOR NOT.

BUT IF WE TAKE THAT EVIDENCE AND SAY THAT THERE WAS INDEPENDENT EVIDENCE OF A CONSPIRACY, THEN SHOULD WE SEND IT BACK TO DETERMINE WHETHER OR NOT THIS WAS A COCONSPIRATOR'S STATEMENT, OR CAN WE MAKE THAT DETERMINATION?

WELL, I THINK, SINCE THE FOURTH DISTRICT'S OPINION IS A LITTLE UNCLEAR EXACTLY ON WHAT IS RELIED ON, IT WOULD BE BEST TO VACATE IT AND REMAND IN LIGHT OF BANKS, BECAUSE THE COURT PLAINLY RELIES ON BANKS AND USES IT FOR WHAT THE COURT THOUGHT IT COULD DO AT THE TIME, BEFORE THIS COURT REVERSED IT.

ARE THE TWO MUTUALLY EXCLUSIVE, THE VERBAL ACT AND THE HEARSAY STATEMENT?

YES. THE TWO OTHER VERBAL ACTS, I AGREE, ARE VERBAL ACTS. THE FIRST ONE IS THE INITIAL SET UP OF THE DEAL AT THE FIRST MEETING WITH GOMEZ, AT THE BAKERY OR RESTAURANT, AS IT IS DESCRIBED IN THE O. THAT IS A VERBAL ACT, TO THE EXTENT THAT THE INITIAL SET UP OF THE DEAL WAS THE TWO DISCUSSED THE AMOUNT, QUANTITY, AND LOCATION OF THE DEAL. THE AMOUNT IS ONE KILO. I MEAN THE AMOUNT IS 14,000. THE AMOUNT IS ONE LOCATION AND LOCATION OF THE RESTAURANT. THE REMAINING DISCUSSION THERE CAN'T BE A VERBAL ACT THAT IS ALL HEARSAY, WHEN HE GETS THE CELL PHONE BEEP.

BUT IF THE VERBAL ACT CRIMINALIZES THE DEFENDANT, DOES THAT NECESSARILY MAKE IT HEARSAY?

WELL, NO. IN STEPHENS, WHICH THIS COURT CITES IN BANKS, WHERE MR. STEPHENS IS STANDING AWAY AND THE THIRD PARTY YELLS TO HIM, HEY, I NEED A DIME, TO SHOW WHAT MR. STEPHENS IS DOING WHEN HE IS IN REACTION TO THAT STATEMENT, IN THAT SENSE, IT INCRIMINATES HIM, BUT IT DOESN'T EXPLAIN --

SO IT CAN IMPLICATE THE DEFENDANT AND BE ADMISSIBLE AS A VERBAL ACT.

IT CAN IMPLICATE THE DEFENDANT. YES. AND BE ADMISSIBLE AS A VERBAL ACT.

BECAUSE THIS WHOLE DISTINCTION REVOLVES AROUND WHETHER THE EVIDENCE IS OFFERED FOR THE PROOF OF WHAT IS CONTAINED WITHIN THE STATEMENT.

YES.

OR IT IS OFFERED AS A DESCRIPTIVE MATTER, HAVING TO DO WITH WHAT IS GOING ON IN THE OVERALL EPISODE?

WELL, IT HAS, TO I THINK THE WAY THIS COURT SAID IN BANKS, INCITING WEINSTEIN AND WIGMORE IS IT HAS TO MERELY EXPLAIN THE TRANSACTION AND DO KNOW MORE, AND DOES IT MERELY EXPLAIN THE TRANSACTION AND DO KNOW MORE?

BUT REALLY, WHAT WE ARE DEALING WITH IS THIS HAS TO BE DONE AS A MATTER OF WHAT WOULD EXCLUDE THIS EVIDENCE.

YES.

BECAUSE WE START WITH THE PREMISE THAT ALL RELEVANT EVIDENCE IS ADMISSIBLE. CORRECT?

SURE.

AND SO ONLY IF IT IS INTENDED TO PROVE THE MATTER ASSERTED WITHIN THE STATEMENT, IS IT EXCLUDED, BECAUSE THAT WOULD BE HEARSAY. ISN'T THAT RIGHT?

I THINK THAT IS ABOUT, THAT IS ABOUT AS GOOD AN ANALYSIS OF VERBAL ACTS AS I HAVE SEEN. YES. BUT LET ME JUST SAY IT WAS EXACTLY FOR THE TRUTH OF THE MATTER ASSERTED. THE FOURTH DISTRICT USED THIS STATEMENT. THE FOURTH DISTRICT SAID THIS STATEMENT SHOWS THE STATEMENT THAT GAHATE MADE, I HAVE GOT TO GO OVER TO THE CAR TO SHOW THE COCAINE TO MR. ARGUELLES AND MR. GREEN, BECAUSE THEY HAVE GOT THE FINAL WORD, THIS STATEMENT SHOWS HIS CONSPIRACY AND PARTICIPATION IN IT, SO THAT IS JUST WHAT THE FOURTH DISTRICT DID THEY USE IT FOR ITS TRUTH.

CHIEF JUSTICE: YOU ARE IN -- FOURTH DISTRICT DID. THEY USED IT FOR ITS TRUTH.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL.

I THINK JUSTICE QUINCE SAID IF IT WAS PROPERLY A VERBAL ACT, THEN IT COULD BE USED TO SHOW THE CONSPIRACY.

BUT IT IS NOT A VERBAL ACT.

BECAUSE YOU ARE SAYING, ONCE IT IS BEING USED TO SHOW THE TRUTH OF IT, IT IS NO LONGER A VERBAL ACT?

THAT'S CORRECT. IT WAS USED BY THE FOURTH DISTRICT TO SHOW THE TRUTH OF IT. THIS IS THE STATEMENT THEY SAY, TOGETHER ABOUT GAHATE'S OTHER TWO, THAT SHOWS MR. ARGUELLES'S PARTICIPATION IN THE CONSPIRACY AND THE FACT THAT THERE IS A CONSPIRACY BETWEEN THE TWO. THAT HAS TO BE THE TRUTH OF IT.

BECAUSE HE IS NOT REALLY DESCRIBING AN ACTION.

BECAUSE, WELL, THE FOURTH DISTRICT IS SAYING THAT WHAT GAHATE SAYS SHOWS MR. ARGUELLES ARGUELLES'S PARTICIPATION, SO THAT IS THE TRUTH OF WHAT MR. GAHATE IS SAYING. I HAVE GOT TO SHOW THIS COCAINE TO HIM, BECAUSE HE HAS GOT THE FINAL SAY.

CHIEF JUSTICE: THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. CHIEF JUSTICE WELLS. I AM HEIDI BETTENDORF, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE OF FLORIDA. THIS ISSUE IS LIKE A ONE I DON'T KNOW. IT HAS SO MANY LAYERS, AND YOU PEEL ONE AWAY AND IT BECOMES ANOTHER SUBISSUE AND YOU PEEL THAT ONE AWAY AND IT BECOMES ANOTHER SUBISSUE, BUT FIRST I WOULD LIKE TO ADDRESS YOUR QUESTION, JUSTICE ANSTEAD THAT, YOU SAID WHAT IS IT ABOUT THE FOURTH DISTRICT'S OPINION THAT IS AN INCORRECT STATEMENT OF LAW. IN YOUR OPINION IN BANKS, WITH WHAT THEY CITED IS EVEN IF THE STATEMENT IS ULTIMATELY USED TO PROVE THE MATTER ASSERTED, IT IS STILL ADMISSIBLE ASA VERBAL ACT. BASED UPON THE PETITIONER'S CONTENTION HERE TODAY, IF IT IS USED AS A VERB BALL ACT, IT CANNOT SUBSEQUENTLY BE USED AS COCONSPIRATOR HEARSAY, AND HE SAYS THAT THEY ARE, THE TWO ARE MUTUALLY EXCLUSIVE. HOWEVER, I DON'T THINK THERE IS ANY CASE LAW THAT SUPPORTS THAT. IF THE CASE LAW IS USED PROPERLY AS A VERBAL ACT TO PROVE WHETHER THE STATE

HAS PROVEN A CONSPIRACY BY THE PREPONDERANCE OF EVIDENCE, THAT OPENS THE DOOR TO THE ADMISSION OF STATEMENTS AS COCONSPIRATOR HEARSAY, UNDER THE EXCEPTION TO THE HEARSAY RULE. NOW, HE HAS SOME PROBLEMS WITH ISSUE NUMBER THREE, AND I WILL ADDRESS ISSUE NUMBER THREE.

IS IT YOUR POSITION, LET'S TRY TO GET TO THE BOTTOM -- LET'S TRY TO GET TO THE BOTTOM OF THE VERBAL ACT MATTER. IS IT YOUR POSITION OR THE STATE'S POSITION THAT IS A VERBAL ACT IS AN EXCEPTION TO THE HEARSAY RULE?

NO, SIR, NOT AT ALL. THE VERBAL ACT IS NOT HEARSAY, AND THERE ARE NUMEROUS CASES THAT SAY THAT A VERBAL ACT IS NONHEARSAY.

IT IS NOT HEARSAY, BECAUSE WHAT THE EVIDENCE IS INTRODUCED FOR THE PURPOSE OF IS NOT TO WHAT THE TRUTH OFTS CONTAINED WITHIN THE STATEMENT.

THAT IS . WHEN THE STATEMENT IS BEING USED AS A VERBAL ACT, THE SAME THAT, DOES NOT PRECLUDE THE SAME STATEMENT FWR SUBSEQUENTLY BEING USED TO PROVE THE TRUTH OF THE MATTER ASSERTED. THAT IS PRECISELY WHAT THIS COURT SAID WAS IMPROPER IN BANKS WHERE THE STATE INITIALLY USED THE VERBAL ACT STATEMENT AS A VERBAL ACT AND THEN SUBSEQUENTLY ARGUED THE TRUTH OF THE MATTER IN ITS CLOSING ARGUMENTS, BUT IN THIS CASE, WE HAVE A VERY IMPORTANT DISTINCTION. IN THIS CASE, THE HEARSAY STATEMENTS COULD PROPERLY BE ADMITTED AS AN EXCEPTION TO THE HEARSAY RULE, AS COCONSPIRATOR HEARSAY. IN BANKS, THERE WAS NO EXCEPTION.

WHAT IS THE EVIDENCE THAT YOU ARE SAYING WOULD BE THE PREDICATE FOR THIS BEING ADMITTED AS WITHIN THAT CONSPIRACY EXCEPTION?

WELL, FIRST OF ALL --

DO YOU HAVE TO PROVE, IN ORDER TO LAY THE PREDICATE, TO GET IT TO BE A CONSPIRACY?

FIRST OF ALL, THE STATE HAS TO PROVE, BY A PREPONDERANCE OF THE EVIDENCE, THE EXISTENCE OF THE CONSPIRACY AND THE PETITIONER'S PARTICIPATION IN THE EXISTENCE, IN THE CONSPIRACY CONSPIRACY. IN THE REPLY BRIEF, IT APPEARS THAT PETITIONER CONCEDES THAT VERBAL ACT STATEMENTS ONE AND TWO AS IDENTIFIED BY THE FOURTH DCA, ARE VERBAL ACTS WHICH GO TO PROVE THE CONSPIRACY. SO IT APPEARS THAT THEIR ONLY CONTENTION IS THAT VERBAL ACT NUMBER THREE, WHICH THE FOURTH APPARENTLY USED TO SHOW THE PETITIONER'S PARTICIPATION IN THE CONSPIRACY, IS THE ONE THAT IS IN CONTENTION HERE, IN FRONT OF THIS COURT. HOWEVER, IT IS THE STATE'S CONTENTION THAT THE INDEPENDENT PROOF, IN AND OF ITSELF, ESTABLISHES BOTH THE EXISTENCE OF THE CONSPIRACY AND THE PETITIONER'S PARTICIPATION THERE IN, BUT, ALSO, WERE WE ALLOWED TO BRING IN STATEMENTS ONE AND TWO AS VERBAL ACTS AND EVEN STATEMENT THREE, THAT ALL OF THOSE STATEMENTS ESTABLISH THE EXISTENCE OF THE CONSPIRACY, BUT IF YOU WOULD LIKE, I WILL TALK ABOUT THE INDEPENDENT PROOF THAT IS CLEARLY NOT UDD UR ANY OF THE VERBAL ACTS. THE MOST IMPORTANT PIECE OF INDEPENDENT PROOF THAT I THINK WE HAVE IN THIS CASE IS THAT, WHEN PETITIONER WAS ARRESTED AND THE POLICE OFFICERS CONVERGE ON THE SCENE, THE FIRST STATEMENT OUT OF HIS MOUTH, BEFORE ANY POLICE OFFICERS MENTION THE CHARGES, IS THAT HE HAD NOTHING TO DO WITH DRUGS. THERE IS NO STATEMENT AT ALL ABOUT ANY DRUGS AT THAT TIME. AS A MATTER OF FACT, A BIG BONE OF CONTENTION IN THE TRIAL COURT AND WHAT WAS HAMMERED ON DURING CROSS-EXAMINATION WAS THAT, WHERE A PETITIONER WAS SITTING IN THE CAR, HE COULD NEVER OBSERVE COCAINE AT ALL, SO IF PETITIONER'S STATEMENTS AND DEFENSE BELOW WERE TO BE BELIEVED, HE WOULD HAVE NO WAY OF KNOWING ABOUT DRUGS. HE WAS ONLY SITTING IN THE CAR WITH A BAG CONTAINING A BOX CONTAINING MONEY BETWEEN HIS LEGS.

I AM HAVING DIFFICULTY UNDERSTANDING WHERE YOU ARE GOING WITH THIS. THAT IS ARE YOU ATTEMPTING, NOW, TO ESTABLISH THAT THERE WAS PROOF OF A CONSPIRACY, SUFFICIENT TO GET IN GAHATE, OR WHAT IS THE NAME OF THE CI, THE INFORMANT?

MR. GOMEZ.

PARDON?

MR. GOMEZ WAS THE CONFIDENTIAL INFORMANT, SIR.

WHO WAS THE, I CAN'T PRONOUNCE THE NAME.

IT WAS GAHATE.

ARE YOU CONTENDING, NOW, THAT THIS LATER STATEMENT THAT YOU HAVE REFERRED TO, THE ADMISSION OR, IS PROOF OF THE CONSPIRACY, IS THE INDEPENDENT PROOF OF THE CONSPIRACY?

IT IS NOT THE SOLE PIECE OF INDEPENDENT PROOF.

WHAT, MY CONCERN ABOUT THAT IS THIS IS AFTER, REALLY, OBVIOUSLY, THE ARREST OF EVERYBODY, AND SO IF WE ARE GOING TO GET THESE EARLIER STATEMENTS OF GAHATE IN, THROUGH THE CI OR THROUGH THE POLICE OFFICER THAT OVERHEARD THEM, YOU HAVE TO HAVE THE ESTABLISHMENT OF THE CONSPIRACY PRIOR TO THAT AND CERTAINLY PRIOR TO THE TIME THAT THIS DEFENDANT MADE ANY ADMISSIONS. RIGHT?

YES, JUSTICE ANSTEAD. BUT THE PETITIONER HAS CONCEDED THAT THERE WASN'T STAB -- THAT THERE WAS AN ESTABLISHMENT OF THE CONSPIRACY. 9 ONLY ISSUE BEFORE THIS COURT IS -- THE ONLY ISSUE BEFORE THIS COURT IS THE PARTICIPATION IN THE CONSPIRACY. BUT WE HAVE WHAT GOMEZ TESTIFIES TO AT TRIAL, ABOUT THE SET-UP OF THE DEAL BETWEEN GAHATE AND GOMEZ AND THE PRICE AND LOCATION AND ALL OF THOSE THINGS, JUST TO ESTABLISH THE CONSPIRACY.

DON'T YOU HAVE TO HAVE THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY, BEFORE YOU CAN GET THESE OUT-OF-COURT STATEMENTS IN IN?

YES, SIR.

AND THAT HAD TO PREEXIST, DID IT NOT, THE STATEMENTS THAT WERE MADE THAT, YOU ARE TRYING TO GET IN UNDER THE COCONSPIRATOR EXCEPTION?

I AM SORRY. I DON'T UNDERSTAND YOUR QUESTION.

YOU HAVE TO ESTABLISH THE EXISTENCE OF THE CONSPIRACY.

YES.

AND THE DEFENDANT'S PARTICIPATION IN IT.

YES, SIR.

BEFORE YOU CAN GET THE COCONSPIRATOR STATEMENTS IN, RIGHT?

YES, SIR, BUT THE STATEMENT THAT I AM REFERRING TO IS THE PETITIONER'S STATEMENT, MADE UPON HIS BEING TAKEN DOWN BY THE POLICE OFFICERS, THAT HE HAD NOTHING TO DO WITH DRUGS. HIS ADMISSION AT THAT POINT --

BUT THAT STATEMENT DIDN'T COME, UNTIL AFTER THE WHOLE TRANSACTION WAS OVER WITH.

YES. THAT IS JUST A PIECE OF THE EVIDENCE THAT WE HAVE. ANOTHER PIECE OF EVIDENCE IS THE FACT THAT, WHEN THE PETITIONER WAS SITTING IN THE BACKSEAT OF THE CAR, THE BAGIOUS IN BETWEEN THE PETITIONER'S LEGS, AND WE HAVE TESTIMONY FROM TWO DIFFERENT INDIVIDUALS, ONE OF THEM BEING GOMEZ, THE CONFIDENTIAL INFORMANT, WHO WAS ONLY STANDING APPROXIMATELY FOUR FEET BEHIND GAHATE, WHEN HE REACHED INTO THE CAR TO GET THE BAG FROM THE PETITIONER, AND THE OTHER BEING FROM ONE OF THE DETECTIVES, AND I BELIEVE IT WAS HARRIS, WHO WAS APPROXIMATELY FIVE PARKING SPACES AWAY, THAT THE TOP OF THE BOX WAS OPEN. ACCORDING TO DOMEZ, THE MONEY WAS VISIBLE INSIDE THE BOX, WHEN THE PETITIONER WAS HANDING IT TO GAHA TECHLT, SO HE HAVE EVIDENCE THAT -- GAHATE, SO WE HAVE NCE THAT THE PETITIONER KNEW IT WAS MONEY. NVERY BEGINNING, BETWEEN GAHATE AND GOMEZ, GAHATE ES A PAGE THAT HE NEEDS TO RETURN AND HE RETURNS THE CALL ON THE CONFIDENTIAL INFORMANT'S CELL PHONE. THE NUMBER THAT HE CALLS IS TRACED BACK TO AN INDIVIDUAL WITH PETITIONER'S SAME LAST NAME THROUGH BellSouth RECORDS. HER NAME IS OLGA ARGUELLES. HER ADDRESS IS 1021 NORTHWEST AVENUE IN MIAMI. THAT THE ADDRESS THE PETITIONER GIVES WHEN HE IS BEING BOOKED. THAT IS THE ALSO THE SAME ADDRESS THAT GAHATE GOES TO, IMMEDIATELY AFTER LEAVING HIS FIRST MEETING WITH GOMEZ, TO CONTINUE THE DRUG CONSPIRACY, AND HE GOES TO THAT ADDRESS BECAUSE HE IS TAILED BY THE AGENTS, AND HE PICKS UP THE PETITIONER AT THAT ADDRESS. IT IS ALSO IMPORTANT TO NOTE THAT THE ORDER OF PICK UP IN THIS CASE. IN THIS CASE, THE, GAHATE PICKS UP PETITIONER FIRST AND THEN HE GOES AND PICKS UP CODEFENDANT GREEN THERE. IS NO MONEY IN THE CAR AT THE TIME HE PICKS UP PETITIONER. SUBSEQUENTLY, AFTER HE PICKS UP CODEFENDANT GREEN, THERE IS MONEY THE CAR. THIS IS IMPORTANT, I THINK, BECAUSE, IN A CONSPIRACY, THE PERSON, THE PERSON WITH THE MONEY IS NOT GOING TO BE INTRODUCED TO GAHATE, OSTENSIBLY A STRANGER, WITHOUT THE MIDDLEMAN BEING THERE. THAT ORDER OF PICK UP AND THE ORDER THAT THE PLAYERS START TO BECOME MORE INVOLVED IN THE CONSPIRACY, IS IMPORTANT, AND, ALSO, POINTS TO THE PETITIONER'S PARTICIPATION IN THE CONSPIRACY.

AND SENT THE CHALLENGE STATEMENT -- ABSENT THE CHALLENGE STATEMENT, IS THERE ENOUGH TO HOLD THE DEFENDANT AS A COCONSPIRATOR?

WITHOUT STATEMENT NUMBER THREE?

RIGHT.

YES. WE CONTEND THAT, BASED ON THE INDEPENDENT PROOF WHICH I HAVE OUTLINED SUMMARILY BEFORE THIS COURT AND MORE PARTICULARLY IN MY BRIEF AND EVEN INCLUDING THE FIRST TWOAL ATMENTS, THAT THERE IS SUFFICIENT EVIDENCE OF THE PETITIONER'S CIPATION IN THE CONSPIRACY.

AND THAT IS, THAT EVIDENCE IS HE WAS IN THE CAR?

WELL, THE EVIDENCE ABOUT THE ADDRESS AND THE TELEPHONE NUMBER NUMBER.

HE MENTIONED DRUGS BEFORE THEY, THE POLICE SAID ANYTHING ABOUT DRUGS.

THAT HE WAS IN THE SOLE CONTROL OF THE MONEY. AS A MATTER OF FACT, HE WAS IN CONTROL OF THAT MONEY, EVEN AFTER GAHATE GOT OUT OF THE CAR FOR HIS INITIAL MEETING AT THE THREE O'CLOCK MEETING, HIS INITIAL ENCOUNTER WITH GOMEZ, ONCE THEY WERE GETTING TOGETHER TO DO THE DEAL, AND HE LEAVES \$14,000 IN CASH IN THE BACKSEAT BETWEEN PETITIONER'S LEGS IN AN OPEN CEREAL BOX, SO IN THIS CASE THE PETITIONER CLEARLY HAD CONTROL OVER THE MONEY, EVEN THOUGH MR. GAHATE WHO THE PETITIONER CONTENDS IS THE SOLE PERSON RESPONSIBLE FOR THIS DEAL ABANDONS THE \$14,000 AS HE IS FOUR FEET AWAY, DISCUSSING THE TRANSACTION WITH THE CONFIDENTIAL INFORMANT. WE ALSO HAVE THE

PETITIONNER THE CAR WITH CODEFENDANT GREEN AND THAT BOTH OF THEM ARE OBSERVED LOOKING AROUND AND CONDUCTING COUNTERSURVEILLANCE WHILE THE ACTUAL COCAINE PURCHASE IS TAKING PLACE AT AN APARTMENT ACROSS THE STREET. THEY DO THAT FOR SEVEN MINUTES, DRIVING UP AND DOWN THE MALL PARKING LOT.

WHY WOULDN'T THE SAFEST THING TO DO IN THIS CASE, SINCE WE WERE REVIEWING BANKS AT THE TIME THE FOURTH DISTRICT CITED THIS CASE AND SINCE THEY CITED BANKS AS ONE OF THE PRIME AUTHORITIES FOR THEIR CONSIDERATION OF THIS VERBAL ACT ISSUE, TO SEND THIS BACK TO THE FOURTH DISTRICT, IN LIGHT OF OUR OPINION IN BANKS, AND LET THEM SORT THIS OUT, BECAUSE OBVIOUSLY IT INVOLVES, REALLY, A DETAILED ANALYSIS OF EACH OF THE STATEMENTS, AND THEN AN ANALYSIS OF WHETHER OR NOT THE COCONSPIRATOR EXCEPTION APPLIES OR WHETHER THE VERBAL ACT EVIDENCE ISSUE APPLIES. WHY WOULDN'T THAT BE THE, SO THAT THE FOURTH DISTRICT, INSTEAD OF ACTING ON THE ASSUMPTION THAT THE WAY A PREVIOUS PANEL HAD LAID OUT THE LAW OF VERBAL ACTS IN BANKS, WAS THE LAW, THAT THEY WOULD SEE, NOW, OUR EXPLANATION IN BANKS, AND BE ABLE TO, WHY WOULDN'T THAT BE THE SAFEST COURSE FOR THIS COURT TO TAKE?

BECAUSE THE FOURTH DCA DID NOT MISS APPLY THE LAW OF VERBAL ACTS IN THIS CASE. THE ONLY QUESTION WOULD BE WHETHER THEY WERE INCORRECT IN THEIR ULTIMATE RESULT, BUT, WHICH IS WHETHER VERBAL ACT NUMBER THREE WAS, IN ESSENCE, A VERBAL ACT, BUT THEY DIDN'T, THERE ARE, THEIR CHARACTERIZATION OF THE TEST OF WHAT IS A VERBAL ACT WAS NOT KENZENT AND WAS CONTRARY TO THIS DISTRICT COURT OR ANY OTHER COURT OF APPEAL.

WHAT ABOUT THE OPINION SAID ONCE THE EVIDENCE IS ADMITED FOR ONE PURPOSE IS ABLE TO BE USED FOR ANY PURPOSE. I AM PARAPHRASING. IS THAT IN THE OPINION?

YES. SUBSEQUENTLY IN BANKS THIS COURT STATED, AND I QUOTE, EVEN WHEN STATEMENTS ARE PROPERLY ADMITTED AS VERBAL ACTS, IT WOULD BE IMPROPER FOR THE STATE TO USE THE STATEMENTS THEREAFTER FOR THE TRUTH OF THE MATTER ASSERTED THERE IN. THAT IS A VERY, VERY BROAD STATEMENT AND IT WOULD CERTAINLY NEVER ALLOW THE STATE TO USE AN ACT FOR, TO USE A VERBAL ACT AS A VERBAL ACT AND THEN SUBSEQUENTLY USE THE ACT AS A COCONSPIRATOR STATEMENT, AS WE HAVE IN THIS CASE.

SO MAYBE, OKAY, NOW -- YOUR POSITION IS THAT, EVEN AFTER BANKS, THAT THE STATEMENT THAT NUMBER THREE, IF IT WERE PROPERLY ADMITTED AS VERBAL ACT, IT COULD BE USED TO, ALSO, JUSTIFY THE ADMISSION OF OTHER STATEMENTS, BECAUSE IT ESTABLISHES --

IT ESTABLISHES -- YES, MA'AM.

WELL, ISN'T THAT, THEN, ALLOWING THAT STATEMENT IN FOR THE TRUTH OF THE MATTER? F YOU ARE GOING TO U IT N, IN ORDER TO PROVE -- IF YOU ARE GOING TO ALLOW IT IN, IN ORDER TO PROVE THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY.

IT COMES IN UNDER THE HEARSAY RULE THOUGH.

WHICH EXCEPTION?

COCONSPIRATOR HEARSAY.

YES, BUT THE FOURTH DISTRICT SAID THAT IT CAME IN TO ESTABLISH THE CONSPIRACY.

YES, AND WE ONLY NEED TO ESTABLISH THE CONSPIRACY BY A PREPONDERANCE OF THE EVIDENCE.

SO YOU AGREE --

BY 51 PERCENT.

SO YOU WOULD AGREE THAT WAS A MISSTATEMENT BY THE FOURTH DISTRICT.

NOT AT ALL. I THINK THAT, WHEN THE STATE, IF THE STATE USES THE VERBAL ACT TO SHOW THE EXISTENCE OF THE CONSPIRACY, IT IS AT A LOWER LEVEL, AND IT IS BEING USED FOR A NONHEARSAY PURPOSE. OKAY. THAT IS A BRICK IN THE WALL, ALONG WITH THE OTHER TWO VERBAL ACT STATEMENTS AND THE OTHER INDEPENDENT --

WHAT ABOUT PARTICIPATION? ARE YOU SAYING THAT A STATEMENT THAT WOULD HAVE OTHERWISE COME IN AS A VERBAL ACT, COULD BE USED TO IMPLICATE THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY?

SUBSEQUENTLY, YES. BECAUSE IT IS PROPERLY ADMITTED, THEN, AS COCONSPIRATOR HEARSAY. IN BANKS, WITH ALL DUE RESPECT --

I THINK THAT, MAYBE, OKAY. LET'S ASSUME THAT THERE ISN'T ENOUGH EVIDENCE OF PREPONDERANCE OF THE EVIDENCE, TO ESTABLISH THE DEFENDANT'S PARTICIPATION IN THE CONSPIRACY, INDEPENDENT OF THE VERBAL ACT. ALL RIGHT.

OKAY.

ARE YOU SAYING THAT, IF THE VERBAL ACT HAD COME IN, THAT THAT COULD, ALSO, BE USED, THEN, FOR THE TRUTH OF THE MATTER, WHICH IS THE DEFENDANT'S PARTICIPATION IN THE CENTERS.

YES, MA'AM.

ISN'T THAT DIRECTLY IN CONFLICT WITH WHAT WE SATISFIED SAID IN BANKS?

WELL, IT -- ISN'T THAT DIRECTLY IN CONFLICT WITH WHAT WE SAID IN BANKS?

YES. BUT THAT NEEDS TO BE CLARIFIED, BECAUSE IT IS NOT IN CONFLICT WITH WHAT THE LAW SAYS. BANKS RELIES ON CONSALVO AND CONNALLY AND KEAN, AND THIS COURT HAS NEVER SAID THAT, E A STATEMENT IS USED FOR A PURPOSE IT CANNOT BE USED FOR AN ANOTHER PROPER PURPOSE. IN THIS CASE, IF THEY WERE USED FOR COCONSPIRATOR HEARSAY, WE USED IT FOR EXACTLY THAT PROPER PURPOSE, BUT EVEN IF YOU WERE TO DECIDE IN THIS CASE THAT NONE OF THE VERBAL ACTS SHOULD HAVE BEEN ADMITTED, THE INDEPENDENT PROOF, ITSELF, ESTABLISHES THE EXISTENCE AND PARTICIPATION IN THE CONSPIRACY. YOUR HONOR, THAT IS WHY I SAID THIS ISSUE IS LIKE A ONE I DON'T KNOW, AND YOU PEEL AWAY A LAYER AND THERE IS ANOTHER AND YOU PEEL AWAY A LAYER AND THERE IS ANOTHER. THE KEY DISTINCTION IN THIS CASE FROM BANKS, IS THAT IN BANKS, IT WAS WHAT WAS BRIEFED TO THIS COURT, THERE WAS NO OTHER PROPER REASON FOR ADMISSION OF THE STATEMENTS, OTHER THAN AS A VERBAL ACT. THAT THE STATEMENTS COULD NOT HAVE BEEN, IN THAT CASE THE PROSECUTOR ARGUED THE TRUTH OF THE MATTER ASSERTED IN THOSE STATEMENTS, IN HIS CLOSING ARGUMENT, BUT THERE WAS NO PROPER REASON TO RELY ON THE TRUTH OF THE MATTER ASSERTED IN THEIR STATEMENTS, WHEREAS IN THIS CASE DOWN BELOW THE PROSECUTOR VERY CLEARLY ASKED THE TRIAL COURT AND THE STATEMENTS WERE VERY CLEARLY ADMITTED AS COCONSPIRATOR STATEMENTS, AND SO THEREFORE THEY WERE SUBSEQUENTLY PROPERLY ADMITTED AS THAT. NOW, THIS IS NOT A CASE WHERE THE STATE HAS DISGUISED ITS INTENT TO BRING THEM IN AS VERBAL ACTS AND THEN SUBSEQUENTLY USE THEM FOR AN IMPROPER PURPOSE. THEY CAME IMPROPERLY, AS A VERBAL ACT, AS NONHEARSAY, AND THEN SUBSEQUENTLY WERE ALSO USED FOR ANOTHER PROPER PURPOSE. IF THERE ARE NO FURTHER QUESTIONS.

CHIEF JUSTICE: THANK YOU. REBUTTAL, MR. MALONE?

COUNSEL, WOULD YOU RESPOND TO THAT LAST POINT THAT YOUR OPPONENT MAKES, AND THAT IS THAT IF WE, AS YOU CONCEDE, AT LEAST AS I UNDERSTOOD YOU, THAT THE FIRST TWO STATEMENTS WERE CATEGORIES, THAT IS THE SET UP OF THE TRANSACTION, THAT THE COMBINATION OF THE SET-UP OF THE TRANSACTION AND THEN YOUR CLIENT CLIENT'S VISIBILITY, INCLUDING GIVING THE BAG OF MONEY TO THE OTHER PARTICIPANT, THAT THAT WAS ENOUGH TO ESTABLISH YOUR CLIENT'S -- A CONSPIRACY AND YOUR CLIENT'S PARTICIPATION IN A CONSPIRACY, AND THEREFORE THE STATEMENTS OF GAHATE, IF I AM PRONOUNCING THAT CORRECT.

GAHATE.

WOULD BE ADMISSIBLE FOR THE TRUTH OF THE MATTER, IN OTHER WORDS.

ON THAT ISSUE, FIRST, THE FIRST TWO VERBAL ACT, FIRST TWO STATEMENTS, I AGREED, WERE VERBAL ACTS, BUT THEY DID NOT SHOW A CONSPIRACY, AND WE DON'T ADMIT THERE IS A CONSPIRACY SHOWN AT ALL.

WELL, THEY SET UP A TRANSACTION, IS THAT CORRECT?

YOU HAVE A TRANSACTION AND YOU HAVE GAHATE SAYING I HAVE THE MON. THAT IS TRAFFICKING BUT IS IT IS NOT A CONSPIRACY. TO HAVE CONSPIRACY --

BUT TO HAVE THAT, THEN YOU HAVE YOUR CARRIVING IN A CAR AND NOT JUST BEING PRESENT BUT GIVING THE MONEY TO GAHATE.

WELL, FOR A CONSPIRACY --

WHEN YOU HAVE THE SET-UP OF A TRANSACTION, YOUR CLIENT PROVIDING THE MONEY, THEN HOW MUCH MORE DO YOU NEED TO SHOW A CONSPIRACY?

YOU NEED KNOWLEDGE OF THERE IS GOING TO BE A COCAINE DEAL, AND YOU NEED HIS AGREEMENT TO PARTICIPATE IN IT. THERE IS NOTHING IN THESE INDEPENDENT NON-HEARSAY THINGS, THAT SHOW THAT HIS KNOWLEDGE OF THE COCAINE DEAL AND THAT HE AGREED TO PARTICIPATE.

WELL, THE AGREEMENT CAN BE PROVED BY CIRCUMSTANTIAL EVIDENCE.

IT CAN BE AND OUR CONTENTION IS THAT IT IS NOT SUFFICIENT --

SO, BUT, YOU HAVE GOT THE CIRCUMSTANCES, HERE, OF THE FACT THAT THERE WAS A DRUG DEAL GOING DOWN, BY JUST EVIDENCE OF --

THERE WAS A DRUG DEAL.

-- THE TRANSACTION. AND YOU HAVE GOT THE FACT THAT THE MONEY, FOR, THAT IS PART OF THE DEAL, IS IN THE CONTROL OF YOUR CLIENT. ISN'T THAT RIGHT? AT SOME POINT IN THIS EPISODE.

YES.

AND THAT YOUR CLIENT IS DRIVING AROUND IN A CAR WITH THE MONEY, AND THEN HANDS THE MONEY TO THE PERSON THAT IS GOING TO MAKE THE PURCHASE. ISN'T THAT --

YES.

I MEAN, ALL OF THAT, AND SO ISN'T THAT ENOUGH PREPONDERANCE OF THE EVIDENCE, TO GET US TO A CONSPIRACY? WHY NOT?

IT DOESN'T SHOW. BECAUSE IT IS CIRCUMSTANTIAL, AND IT DOESN'T SHOW THAT MR. ARGUELLES, THE TIME TO HAND OVER THE MONEY, IS AGREEING, THAT HE HAS KNOWLEDGE OF A COCAINE TRANSACTION, BY THE PREPONDERANCE OF THE EVIDENCE, OR THAT HE HAS AGREED TO PARTICIPATE IN IT. IT IS CIRCUMSTANTIAL.

CAN IT BE INFERRED FROM THAT? IN OTHER WORDS THIS LEVEL OF PROVE WOULD ESTABLISH A CONSPIRACY, FOR PURPOSES OF ADMITTING COCONSPIRATOR STATEMENTS, IS REALLY JUST A PREPONDERANCE OF THE EVIDENCE. IS THAT NOT CORRECT?

RIGHT.

WHY COULDN'T A FACT FINDER CONCLUDE THAT THAT PREPONDERANCE HAS BEEN ESTABLISHED, BY ALL THOSE CIRCUMSTANCES, INCLUDING YOU SAY THAT THE SET-UP OF THE DRUG DEAL HAS BEEN ESTABLISHED, AND NOW YOUR CLIENT PROVIDING THE MONEY.

OUR ARGUMENT IS THAT IS NOT SUFFICIENT, WHICH CITED CARLOS GOETZ CASE, AND I BELIEVE MY TIME IS UP.

CHIEF JUSTICE: THANK YOU, MR. MALL LOAN. THANK YOU -- MR. MALONE. THANK YOU, COUNSEL, FOR YR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS FOR 15 MINUTES.