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## **Richard McCoy v. State of Florida**

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED. ANOTHER LAST CASE ON THE COURT'S DOCKET THIS MORNING IS McCOY VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

THANK, YOUR HONOR. MAY NAME IS LASSETER MAKOFKA AND I REPRESENT MR. RICHARD McCOY. THE CENTRAL EVIDENCE WHICH RESULTED IN MR. McCOY'S CONVICTION, WAS THE AUDIOTAPE AND THE ACCOMPANYING TRANSCRIPT WHICH THE JURY WAS ALLOWED TO VIEW. IN OUR BRIEF AND TODAY HERE, BEFORE YOUR HONORS, I WOULD RESPECTFULLY ARGUE THAT THE JURY NEVER SHOULD HAVE BEEN ALLOWED TO VIEW THE TRANSCRIPT, AND THE REASON I SAY THIS IS THAT THE TRANSCRIPT, DESPITE THE ADMONITION IN MARTINEZ AND DESPITE THE RULES OF EVIDENCE, WHICH WE CITED IN OUR BRIEF, WAS NEVER AUTHENTICATED BY ANYONE. THE TRIAL JUDGE MADE AN ANNOUNCEMENT, IN HIS CAUTIONARY INSTRUCTION, THAT THE OFFICE OF THE STATE ATTORNEY HAD PREPARED THE TRANSCRIPT, BUT NO ONE FROM THE STATE ATTORNEYS OFFICE, EITHER AT TRIAL OR AT THE PRETRIAL HEARING, EVER ATTEMPTED TO AUTHENT INDICATE THAT THE TRANSCRIPT -- EVER ATTEMPTED TO AUTHENTICATE THAT THE TRANSCRIPT --' WHAT WAS THE TESTIMONY TO THAT PERSON WITH REFERENCE TO THE TRANSCRIPT?

VERY THIN. THE QUESTION WAS ASKED OF ZSAZSA MARCELL, WHICH WAS THE DEFENDANT'S GIRLFRIEND, WHETHER SHE HAD ANY PART IN PREPARING THE TRANSCRIPT, AND IN MY BRIEF I QUOTED HER ANSWER, AND SHE SAID SHE HELPED PREPARE IT. NOBODY EVER ASKED HER WHETHER OR NOT THE TRANSCRIPT FAIRLY AND ACCURATELY REPRESENTED THE CONVERSATION AS IT TOOK PLACE. THEY NEVER ASKED HER WHO SHE HELPED PREPARE THE TRANSCRIPT. THEY NEVER ASKED HER WHAT PART SHE HAD IN PREPARING THE TRANSCRIPT.

WAS THIS OBJECTION VOICED TO THE TRIAL JUDGE AND ARGUED THAT THERE WAS INSUFFICIENT PREDICATE ESTABLISHED FOR THIS STATEMENT?

NO.

SO YOU ARE MAKING THAT FOR THE FIRST TIME THIS MORNING, THEN.

YOUR HONOR, I AM, BUT WITH THIS PROVISION, THAT THE QUESTION AS TO THE ADMISSIBILITY OF THE TRANSCRIPT WAS CHALLENGED PRETRIAL AT A SEPARATE MOTION HEARING, THAT --

BUT AT THAT TIME THE TRIAL JUDGE, DID HE NOT, WENT THROUGH THE TRANSCRIPT AND EVEN ORDERED THE STATE TO INSERT SOME IN AWED I BELIEVE SO WITHIN THE TRANSCRIPT. -- SOME INAUDIBLES WITHIN THE TRANSCRIPT.

HE DID. THE JUDGE, THE PUBLIC DEFENDER WHO WAS REPRESENTING MR. McCOY, FILED A MOTION, PRETRIAL, ASKING THAT THE TRANSCRIPT NOT BE INCLUDED AND THEN RAISED THAT AGAIN AT THE MOTION HEARING, AND THE BASIS FOR THE MOTION WAS THAT THE TRANSCRIPT WAS NOT AN ACCURATE REPRESENTATION OF THE CONVERSATION.

BUT THAT WAS BASED ON ITS AWEDIBILITY RATHER THAN ITS -- ON ITS AWEDIBILITY, RATHER THAN ITS REPRESENTATION, WAS IT NOT?

I ADMIT IT WAS MOOT AS TO AWEDIBILITY, BUT FROM AN EVIDENCE STANDPOINT, THE AWEDABILITY AND THE AUTHENTICITY REALLY GO HAND IN GLOVE, BECAUSE IF IT IS INAUDIBLE, IT CAN'T REALLY BE AUTHENTIC.

IT SEEMS TO ME THAT THE JUDGE SET FORTH MUCH OF WHAT WE SET FORTH IN MARTINEZ, WHICH WAS HOW TO HANDLE THIS, AND DID YOU, DURING THE PRETRIAL, IS THERE ANY INDICATION THAT, AS TO ANY OF THE PARTS THAT THE JURY HEARD, THAT, IF SAY, THIS COURT WERE TO LISTEN, THAT REALLY WHAT WAS IN THE TRANSCRIPT IS DIFFERENT THAN WHAT IS ON TAPE?

YES, YOUR HONOR. FIRST OF ALL, WELL, I WASN'T IN THE COURTROOM WHEN IT WAS PLAYED. THE COURT REPORTERS WERE. THERE WERE TWO DIFFERENT COURT REPORTERS THAT HAVE THEIR TRANSCRIPTS AS PART OF THE RECORD, THAT YOUR HONORS CAN REVIEW, AND VIRTUALLY, I WOULD SAY AT LEAST 50 TO 60 PERCENT OF EVERYTHING THAT WAS UTTERED ON THAT AUDIOTAPE WAS DEEMED IN AWED IBLE POOH -- WAS DEEMED INAUDIBLE BY TRAINED COURT REPORTERS. NOW, THE TRIAL JUDGE ON THE RECORD, SAID THAT HE WAS HEARING THINGS THAT WERE DIFFERENT FROM WHAT WAS ON THE STATE'S TRANSCRIPT, AND HE SAID THAT HE HOPED THAT THE LIVE WITNESS, WHICH WOULD BE MISS MARCEL, WOULD FILL IN THE BLANKS, BUT THAT NEVER HAPPENED. NO BLANKS WERE FILLED IN AT THE TRIAL.

WELL, COULD YOU GIVE US, SAY, IF YOU HAD TO TAKE ONE PART OF THE TRANSCRIPT THAT IS TOTALLY DAMNING AS AGAINST THE DEFENDANT, THAT YOU ARE ASSURE THAT, IF WE -- YOU ARE SURE THAT, IF WE LISTENS -- IF WE LISTEN, WOULD BE IN AWEDABLE, AND THAT THERE IS -- INAUDIBLE, AND THAT THERE IS SOMETHING IN THE JURY -- WHAT IS IT?

IN FACT IT WAS CITED AT THE MOTION HEARING THAT THERE WAS A STATEMENT THAT WAS IN THE TRANSCRIPT THAT SAID "I WENT INSIDE THE PLACE", MEANING THE LIQUOR STORE WHERE THE ROBBERY AND MURDER TOOK PLACE, BUT IT WAS COMPLETELY INAUDIBLE BEFORE THE STATEMENT WAS MADE, SO YOU DIDN'T HEAR WHAT MISS MARCEL WAS SAYING TO PROMPT THE RESPONSE OF THE DEFENDANT, AND IT WAS COMPLETELY INAUDIBLE AFTER THE STATEMENT WAS MADE.

IT IS REFLECTED IN THE TRANSCRIPT.

IT IS REFLECTED IN THE TRANSCRIPT. ANOTHER TRANSCRIPT OF THAT DOES REFLECT THAT. WHAT DID THE TRIAL JUDGE NOT DO THAT HE SHOULD HAVE DONE, TO FOLLOW MARTINEZ?

JUST ABOUT EVERYTHING, WITH ALL RESPECT.

OUTLINE FOR US, IF YOU WOULD, BECAUSE IT APPEARED THAT HE DID HAVE THE HEARING. HE DID GO THROUGH IT PERSONALLY. HE DID INSTRUCT THE JURY CORRECTLY.

HE DID THAT. BUT FIRST OFF, I THINK MARTINEZ SAYS THAT THE COURT SHOULD USE EXTREME INDICATION, BEFORE ADMITTING A TRANSCRIPT. SECONDLY, THAT THE COURT SHOULD ENDEAVOUR TO OBTAIN A STIPULATION OF THE PARTIES. NO EFFORT THAT AT LEAST ON RECORD, WAS, INDICATES THAT THE TRIAL JUDGE MADE AN EFFORT TO OBTAIN A STIPULATION OF THE PARTIES, AND THIRD, MARTINEZ MAKES IT VERY CLEAR THAT A TRANSCRIPT CAN BE AUTHENTICATED IN ONE OF THREE WAYS, EITHER BY AN EXPERT WHO IS QUALIFIED TO LISTEN TO AN AUDIOTAPE AND TRANSCRIBE IT, OR BY ONE OF THE PARTIES TO THE CONVERSATION, AND THIS WASN'T, OR --

I THOUGHT THE TESTIMONY WAS THAT THIS WITNESS OR THE TAPE ACTUALLY WAS

PARTICIPATING AND ACTUALLY MADE SOME CORRECTIONS DURING THAT PROCESS. IS THAT INCORRECT?

WELL, SHE MAY HAVE HELPED IN PREPARING THE TAPE, BUT THE JUDGE'S INSTRUCTION TO THE JURY, HIS TAUINGS CAUTIONARY INSTRUCTION WAS THAT THE TRANSCRIPT -- HIS CAUTIONARY INSTRUCTION WAS THAT THE TRANSCRIPT WAS PREPARED BY THE OFFICE THE STATE ATTORNEY, AND THEY WEREN'T A PARTY TO THE CONVERSATION.

WHAT WAS HER TESTIMONY?

EXCUSE ME?

HER TESTIMONY. ZSA ZSA'S TESTIMONY.

HER TESTIMONY WAS ONLY THAT SHE HELPED PREPARE IT. SHE NEVER SAID THAT IT WAS ACCURATE. SHE NEVER SAID THAT IT WAS AUTHENTIC. SHE NEVER AUTHENTICATED IT. FLORIDA RULE OF EVIDENCE 90.9, AND FORGIVE ME IF I AM GETTING IT MIXED UP, SAID THAT ANY EVIDENCE CAN BE ADMITTED, AND I REMARK THAT IT WASN'T ACTUALLY STAMPED "ADMITTED", BUT IT WAS TANTAMOUNT TO.

BUT THE JUDGE DID SAY THIS IS THE TAPE.

THE REAL EVIDENCE, HE SAID, WAS THE TAPE, BUT THE TRANSCRIPT EFFECTIVELY BECAME THE EVIDENCE, BECAUSE SO MUCH OF THE TAPE WAS INAUDIBLE THAT THE JURY, IF YOU LOOK AT WHAT THE COURT, IN OUR APPENDIX TO THE BRIEF, IF YOU LOOK AT WHAT THE COURT REPORTERS WROTE DOWN, THAT THEY ARE TRAINED TO LISTEN TOE THESE THINGS, AND IF YOU LOOK AT WHAT THE TRANSCRIPT SAID IT IS A WHOLE NEW WORLD. IT IS A COMPLETELY DIFFERENT SPIN THAT THE JURY IS GETTING ON THIS ENTIRE AUDIOTAPE.

DID THE JURY HEAR THE TAPE?

THE JURY HEARD THE TAPE.

WERE THEY READING THE TRANSCRIPT AT THE TIME, AT THE SAME TIME?

YES, YOUR HONOR.

SO THEY WERE ABLE TO DETERMINE FOR THEMSELVES, WHETHER THERE WERE ANY DISCREPANCIES BETWEEN THE TRANSCRIPT AND THE AUDIO?

THEY COULD CONCEIVABLY HAVE, BUT THE PROBLEM IS THAT EVEN IN THE TRANSCRIPT, SO MUCH IS INAUDIBLE, WELL, LET ME STRIKE THAT. IN THE COURT REPORTER'S VERSION OF THE AUDIOTAPE TRANSCRIPTION, SO MUCH IS INAUDIBLE, BUT IN THE TRANSCRIPT THAT THE JURY SAW, A LOT OF THESE INAUDIBLES WERE FILLED IN BY SOME UNKNOWN PERSON.

BUT I GUESS, LET ME GO BACK, I ASKED YOU WHAT WAS THE, IF WE WERE TO LISTEN TO THE TAPE AND HAVE THE TRANSCRIPT, IF THERE WAS SOMETHING IN THAT TRANSCRIPT THAT WAS CLEARLY INAUDIBLE ON THE TAPE, AND YOU SAID IT WAS ABOUT BEING INSIDE OF THE LIQUOR STORE, BUT IN FACT, AS JUSTICE LEWIS POINTS OUT, THERE WAS A SHOWING THAT THERE WAS INAUDIBLE BEFORE AND AFTER THAT, SO THE DEFENSE LAWYER COULD ARGUE THAT THAT DIDN'T REFER TO GOING INTO LIQUOR STORE. IS THERE ANYTHING THAT YOU CAN POINT TO, AGAIN, THAT IS INACCURATE IN THE TRANSCRIPT THAT THE JURY HEARD, AND IN AC --, AN INACCURACY?

YES. AS A MATTER OF FACT, IT IS REALLY, ALMOST, NOT COMCAL, NOTHING ABOUT THIS CASE IS

COMCAL, BUT IT IS INTERESTING WHERE THEY SAY HUGH SHOT HIM, WHEN THEY REALLY MEANT "YOU", SHOT HIM, AND THE TRANSCRIPT, AND "YOU" MEANT MISS MARCEL, BECAUSE THAT BRINGS US KIND OF NOT TO LEAVE THE QUESTION BUT THAT KIND OF BRINGS US TO THE OTHER AREA THAT I WANTED TO ARGUE BEFORE YOUR HONORS TODAY, AND THAT IS THE RESTRICTION OF THE CROSS-EXAMINATION OF MISS MARCEL, BECAUSE MY CLIENT, MR. McCOY, HAD CONTENDED THROUGH HIS COUNSEL, THAT MISS MARCEL, HERSELF, RIGHT AT THE TIME THAT THIS PARTICULAR ROBBERY ROBBERY/MURDER TOOK PLACE, COMMITTED A ROBBERY HERSELF, OF A LEE'S CHICKEN RESTRAINT, AND THAT HE WAS SAYING YOU SHOT HIM, RATHER THAN HUGH SHOT HIM.

BEFORE YOU ADDRESSED THAT, WOULD YOU PUT A CAP ON THIS OTHER ISSUE, AS FAR AS YOUR POSITION. IS IT YOUR POSITION, WITH REFERENCE TO THE USE OF THIS TRANSCRIPT, THAT THE TRANSCRIPT ACTUALLY REFLECTED DAMAGING TESTIMONY TO YOUR CLIENT THAT WAS NOT AUDIBLE, ON A LISTENING OF THE ACTUAL TAPE. IS THAT WHAT YOUR CLAIM IS?

YES, YOUR HONOR, AND THERE IS MORE. ALSO INAUDIBLE ON THE TAPE, AT LEAST AS FAR AS THE COURT REPORTERS WERE CONCERNED, BUT CLEARLY VISIBLE ON THE TRANSCRIPT, WERE REFERENCES TO THE FACT THAT MY CLIENT WAS ON PROBATION, REFERENCES TO THE FACT --' BUT THE TEST ISN'T WHETHER THE COURT REPORTER PUT IT DOWN. I MEAN THERE, IS PLENTY OF TRANSCRIPTS WHERE THERE IS SOMETHING ORITY COURT REPORTER MAY NOT BE ABLE TO HEAR. THAT DOESN'T MEAN IT WASN'T SAID. THE ISSUE IS WHETHER, WHEN WE HEAR THE TAPE, WHETHER THERE IS SOMETHING ON THE TAPE THAT IS INAUDIBLE, AND YOU ARE SAYING YES.

YEAH. I AGREE WITH YOU THAT THE TEST IS WHEN YOU LISTEN TOE THE TAPE, WHAT YOU HEAR, WHEN THE TRIAL JUDGE LISTENS TO THE TAPE, WHAT HE HEARD, NOT WHAT THE COURT REPORTER HEARD. I AM JUST SAYING THAT YOU HAVE TWO DIFFERENT COURT REPORTERS THAT GAVE A TRANSCRIPT, WITHOUT THE BENEFIT OF THE STATE ATTORNEY'S PRODUCT.

BUT YOUR BOTTOM LINE IS THAT THAT TRANSCRIPT REFLECTED TESTIMONY THAT, WHEN YOU LISTEN TO THIS TAPE, YOU CANNOT HEAR THAT TESTIMONY ON THE TAPE, THAT RIGHT?

ABSOLUTELY.

NOW, IF YOU WANT TO MOVE ON TO THE TESTIMONY.

THE SECONDARY THAT I WAS HOPING TO STRESS TODAY WAS THE RESTRICTION OF THE CROSS-EXAMINATION OF THE STATE'S STAR WITNESS.

WELL, DIDN'T THE TRIAL COURT, WITH REFERENCE TO HER ROBBERY OF THE CHICKEN RESTAURANT, OR WHATEVER, DIDN'T THE TRIAL COURT SAY "I AM NOT FORBIDDING YOU TO HAVE THAT TESTIMONY. I AM JUST GOING TO REQUIRE YOU TO HAVE HIM TESTIFY FIRST, IF THAT IS WHAT YOUR INTENTION IS." THAT SHE SAID THAT, AND THEN --

O YES.

AND THEN I WILL ALLOW YOU TO BRING HER BACK ON AND CONTINUE THE CROSS-EXAMINATION. IS THAT CORRECT?

YOU ARE QUITE CORRECT. OF COURSE, THERE ARE TWO ADD JUNKTS -- ADD JUNKTS TO THAT. FIRST, IT -- ADJUNCTS TO THAT. FIRST, IT PLACES THE DEFENDANT IN THE POSITION OF HAVING TO TAKE THE STAND, IN ORDER TO BRING OUT EFFECTIVE CROSS-EXAMINATION OF THE STATE'S STAR WITNESS, AND AS WE JUST HEARD IN THE LAST ARGUMENT, THE DECISION WHETHER TO TAKE THE STAND IS OFTEN A LASSO MINUTE DECISION, AND IT IS A CRITICAL DECISION.

I THOUGHT THAT HAD ALREADY BEEN REPRESENTED TO THE TRIAL COURT, AND THAT IS THAT IT

HAD ALREADY BEEN REPRESENTED TO THE TRIAL COURT THAT, INDEED, JUDGE, WE ARE GOING TO HAVE OUR CLIENT TESTIFY. WAS THAT NOT REPRESENTED TO THE TRIAL COURT?

YOU ARE CORRECT AGAIN. IT WAS REPRESENTED BY TRIAL COUNSEL BUT THESE THINGS CHANGE. ALMOST BY THE SECOND. AND THEY CAN THANK CHANGE BY THE SECOND. THE -- AND THEY CAN CHANGE BY THE SECOND. THE OTHER ASPECT TO THIS IS THAT THE STATE FILED A MOTION IN LIMINE, WHERE THE STATE ASKED THE TRIAL JUDGE, PRETRIAL, TO PRECLUDE THE DEFENSE FROM ASKING ABOUT SOME \$800 WORTH OF PHONE CHARGES THAT MISS MARCEL HAD PUT ON THE DEFENDANT'S FATHER'S PHONE. NOW, THE DEFENDANT WAS LIVING WITH HIS FATHER, AND THE DEFENSE WANTED TO BRING THAT OUT AS A TYPE OF AND MUST, THAT -- A TYPE OF ANIMOUS, THAT MISS MARCEL HAD TOWARD THE DEFENDANT, AS A MOTIVE FOR HER TO SPEAK FALSELY ABOUT HIM AT TRIAL, AND THE TRIAL JUDGE GRANTED THAT MOTION IN LIMINE, AND, AGAIN, THE DEFENSE WAS RESTRICTED. THE STATE'S CASE REALLY CENTERED AROUND THE TESTIMONY OF MISS MARCEL, BECAUSE WHEN YOU LOOK AT THE TRIAL TRANSCRIPT IN THE RECORD, THEY HAD A VIDEOTAPE, A VIDEO SURVEILLANCE TAPE, WHERE THE FACE OF THE PERPETRATOR COULD NOT BE DISTINGUISHED, AND THE BODY HABITOUS, HIS SIZE, WAS A MATTER OF DEBATE, BECAUSE BOTH LAWYERS, ON CLOSING, SAID OH, THE STATE SAID OH, IT LOOKS LIKE THE DEFENDANT, AND THEN THE DEFENSE COUNSEL GOT UP AND SHOWED ANOTHER PORTION OF THE VIDEOTAPE AND SAID OH, IT DOESN'T LOOK LIKE THE DEFENDANT AT ALL, SO THEY HAD THE SURVEILLANCE TAPE. THEY HAD THE AUDIOTAPE, WHICH IN AND OF ITSELF, WE ARE SAYING WOULD HAVE MEANT VERY LITTLE, WITHOUT THE TRANSCRIPT. WE HAVE AN UNAUTHENTICATED TRANSCRIPT BY ANY OF THE PARTIES TO IT, AND THEN WE HAVE THE FINGERPRINT EVIDENCE, WHICH WAS PROBABLY THE MOST COMPELLING, BUT --' YOU HAD THE VIDEOTAPE, DO YOU NOT, ALSO, THAT SHOWS A PERSON THAT GENERALLY MEETS THE PHYSICAL CHARACTERISTICS OF YOUR CLIENT?

WELL, ACCORDING TO THE CLOSING ARGUMENT OF THE PUBLIC DEFENDER, THAT PERSON DIDN'T MEET THE PHYSICAL CRITERIA. THEY SAID THAT THE PERSON ON THE TAPE WAS CONSIDERABLY MORE MUSCULAR, STOCKY, CERTAINLY A DEBATABLE POINT.

WELL, COME BACK TO THE, I AM HAVING A LITTLE INITIAL DIFFICULTY WITH THIS AND I MUST TOWARD THE DEFENDANT -- WITH THIS ANIMOUS TOWARD THE DEFENDANT, BY SOMEBODY THAT HAD CHARGED CALLS TO THE DEFENDANT'S FATHER. WOULDN'T IT WORK THE OTHER WAY AROUND, THAT THE DEFENDANT SON WOULD HAVE ANIMOUS TOWARD THE PERSON THAT MADE THE CHARGES? I AM TRYING TO ASK HOW DOES THAT REALLY SERVE AS IMPEACHMENT EVIDENCE AGAINST THIS WITNESS, IN TERMS OF SHOWING HER DISLIKE OR, AS YOU SAY, SOME ANIMOUS AGAINST THIS DEFENDANT. HELP ARTICULATE THAT, SINCE WE GENERALLY GIVE TRIAL JUDGES PRETTY GOOD RANGE ABOUT CONTROLLING CROSS-EXAMINATION HERE. HELP US.

YES, YOUR HONOR. THE PUBLIC DEFENDER HAD REPRESENTED TO THE COURT THAT SOME \$800' WORTH OF UNAUTHORIZED CHARGES WERE PUT ON THE DEFENDANT'S FATHER'S PHONE, WHICH IS AN EXTRAORDINARY AMOUNT ON A RESIDENTIAL SERVICE, AND IT WAS DONE IN THE TIME FRAME WHEN THE DEFENDANT AND MISS MARCEL WERE HAVING DIFFICULTIES. MISS MARCEL WAS SOOING THE DEFENDANT ON THE SLY. SHE WAS A MARRIED WOMAN. THE DEFENDANT WANTED MISS MARCEL TO LEAVE HER HUSBAND. SHE KEPT TELLING HIM SHE WAS, AND THEN SHE DIDN'T, AND IT WAS DRAGGING ON. THE DEFENSE COUNSEL WANTED TO EXPLORE THAT WITH HER, WANTED TO KNOW YES SHE WOULD RUN UP \$800 WORTH OF CHARGES ON, EFFECTIVELY THE DEFENDANT'S PHONE. I REALIZE WHAT YOU ARE SAYING, CHIEF JUSTICE, THAT THE DEFENDANT SHOULD FEEL ANIMOUS TOWARD HER AS WELL, BUT IT IS MUTUAL.

I AM TRYING TO IMAGINE THE SCENARIO OF WHEN COUNSEL GETS TO THIS PART OF THE ARGUMENT TO THE JURY AND SAYS, YOU KNOW, ONCE MORE, LET ME POINT OUT THAT SHE RAN UP ALL THESE CHARGES ON MY CLIENT'S FATHER'S PHONE BILL, THERE FOR SHE HA MOTIVE, NOW, FOR -- SHE HAD HE A MOTIVE, NOW, FOR MAKING UP -- SHE HAD A MOTIVE, NOW, FOR

MAKING UP THIS CONFESSION AND ALL AND COMING IN HERE. THERE IS A LITTLE DISCONNECT IN THERE SOMEPLACE THAT I AM HAVING DIFFICULTY SEEING A NATURAL BRIDGE IN MAKING SOME KIND OF A CONNECTION THERE. HELP ME WE THAT.

I AM SAYING THAT A DEFENSE -- HELP ME WITH THAT.

I AM SAYING THAT A DEFENSE COUNSEL SHOULD BE ALLOWED TO BRING OUT ANIMOUS OR HOSTILITY OF THE STATE'S STAR WITNESS ON CROSS-EXAMINATION.

HOW DOES THAT DEMONSTRATE HOSTILITY?

WELL, BY, IT IS EFFECTIVELY THEFT, BY PUTTING \$800 OR SO ON SOMEONE'S PHONE THAT HAD NO RIGHT TO PUT. I MEAN, PUTS THEM, PUTS THAT PERSON \$800 IN DEBT, WHEN MONEY IS TIGHT FOR POOR PEOPLE, AND THAT COULD MAKE A BIG DIFFERENCE.

I GUESS, I SUPPOSE YOU WOULD SAY, WELL, IF SHE HAD STOLEN \$100,000 FROM THEM AND DIDN'T WANT TO PAY IT BACK, THAT SHE WOULD HAVE A MOTIVE TO SET McCOY UP SO THEY COULD PUT HIM IN JAIL. IS THAT THE WAY YOU WOULD TRY TO ARGUE THE POINT?

I AM JUST SAYING THAT IT IS A MEAN-SPIRITED THING TO DO, AND THAT THAT CERTAINLY SHOWS HER LACK OF, WELL, LACK OF COMPASSION FOR McCOY OR HER DISREGARD FOR THE TRUTH. IT SHOWS HER PROPENSITY TO BE DISHONEST. IT SHOWS HER ANIMOUS TOWARD THE DEFENDANT, AND, REALLY, UNDER THE DICTATES THAT THIS COURT HAD RECENTLY DECIDED IN GARCIA, VERY RECENT OPINION, WHERE, WHEN A STATE BASIS ITS CASE ON A STAR WITNESS, AND IN THIS CASE THIS IS A STAR WITNESS, THE DEFENSE SHOULD BE GIVEN LIBERAL OPPORTUNITY TO EXPLORE ALL OF THE ASPECTS OF THE CHARACTER OF THE STAR WITNESS.

CHIEF JUSTICE: ALL RIGHT. THE MARSHAL REMINDED US THAT YOU ARE IN YOUR REBUTTAL TIME, SO IF YOU WANT TO PAUSE, THIS WOULD BE A GOOD TIME.

YES, THANK YOU.

CHIEF JUSTICE: GET MORNING.

YES. GOOD MORNING. CHARMAINE MILLSAPS REPRESENTING THE STATE. IF IT PLEASE THE COURT, I AM GOING TO TALK ABOUT THE EXACT SAME TWO ISSUES. MARCEL DID TESTIFY, DURING THE TRIAL, THAT SHE HELPED PREPARE THIS TRANSCRIPT. THE OBJECTION TO THE TRANSCRIPT WAS BASED ON IN AWEDIBILITY. IT WAS NOT THAT THE PROPER PREDICATE HAD NOT BEEN LAID. THAT ISSUE IS NOT PRESERVED, THAN ISSUE IS NOT BEFORE THE COURT. THAT WAS NOT THE OBJECTION AT TRIAL. THE OBJECTION TO THE TRANSCRIPT WAS THAT, BECAUSE THE TAPE WAS INAUDIBLE, THE TRANSCRIPT WAS, TOO.

CAN'T WE PRETTY, IS THE RECORD, IN THE WAY THAT IT REFLECTS, IS IT EITHER, IS THERE EITHER DIRECT EVIDENCE OR A CLEAR IMPLICATION THAT SHE HAD THE TRANSCRIPT THERE AND WAS LOOKING AT IT OR EXAMINING IT OR HAD BEEN GIVEN IT, AT THE TIME SHE WAS GIVING THIS TESTIMONY? IN OTHER WORDS THERE WAS SOMETHING SPECIFIC THAT SHE WAS REFERRING TO, WHEN SHE SAID, IS THAT CORRECT?

YES, YOUR HONOR, AND SHE SITS THERE WHILE THIS IS ALL GOING ON, TOO. THE TRANSCRIPT AND THE PLAYING OF THE TAPE OCCURS WHILE SHE IS ON THE STAND. MOREOVER --

I WANT TO MAKE SURE WHAT AUTHENTICITY REALLY MEANS FOR A TRANSCRIPT THAT IS PREPARED. REALLY, IT IS WHETHER IT IS A FAIR AND ACCURATE RECORDING, TRANSCRIPT, TRANSCRIPTION OF THE TAPE, SO AWEDIBILITY AND AUTHENTICITY, REALLY, ARE THE SAME, AND IT WOULDN'T HAVE MATTERED, WHAT I AM GATHERING, I AM SORT OF A FRIENDLY QUESTION,

WHETHER EVEN IF SHE SAID IT WAS FAIR AND ACCURATE, THE ARGUMENT IS STILL IT WASN'T AN ACCURATE TRANSCRIPTION. THAT IS WHAT THE ARGUMENT IS BEING MADE TODAY.

OBVIOUSLY WE DISPUTE THAT, BUT REMEMBER, YOU CAN SAY IN CLOSINGIAL WORDS, THE -- IN COLLOQUIAL WORDS. IT IS A FAIR AND ACCURATE DESCRIPTION TO WHAT OCCURRED. YOU DON'T HAVE TO USE THE WORDS. I THINK IT IS COMING FROM A WITNESS THAT I NOT JUST READ OVER IT BUT HELPED PREPARE IT IS THE EQUIVALENT OF SAYING IT IS FAIR AND ACCURATE, IN HER VIEW. NOW, GOING BEYOND THAT, SAYING IN FACT IT WAS FAIR AND ACCURATE --

I KNOW THERE WERE TWO THINGS, AND MARTINEZ WAS SORT OF AN EXAMPLE WHERE YOU COULD HAVE A WITNESS, WHERE THE TAPE ITSELF MIGHT HAVE BEEN INAUDIBLE, BUT YOU HAVE A WITNESS WHO HAD ACTUALLY BEEN A PARTY TO THE CONVERSATION, AND NOW WHAT THEY ARE SAYING IS THAT THAT TRANSCRIPT, NOT THAT IT IS A FAIR AND ACCURATE REPRESENTATION OF THE TAPE, BECAUSE REALLY, ANYBODY WHO IS LISTENING TO IT IS EITHER, LIKE THE JUDGE IS IN AS GOOD A POSITION, BUT IF THE TRANSCRIPT CONTAINS THING THAT IS MIGHT BE INAUDIBLE, YOU COULD HAVE A WITNESS THAT SAYS, LISTEN, I LISTENED TOE IT AS IT WAS GOING ON. THAT IS WHAT THE DEFENDANT SAID TO ME.

FOR INSTANCE, LET'S --' IS THAT WHAT IS BEING -- WAS THAT WHAT IT WAS USED FOR, TO SAY THAT EVEN THOUGH THE TAPE IS NOT INAUDIBLE, MISS MARCEL, YOU KNOW, HEARD THINGS, AND THAT IS WHAT THIS TRANSCRIPT IS, OR ARE YOU SAYING THAT IF WE LISTEN TO THIS TRANSCRIPT, TO THE TRAIN -- TO THE TAPE, WE WOULD BE ABLE TO HEAR WHATEVER IS SHOWN ON THE TAPE.

YES. FOR THE MAJORITY OF, YES, I AM SAYING THE LATTER. I AM NOT SAYING THE FORMER CAN'T OCCUR. FOR INSTANCE, THE TAPE MISS ES A WORD, BUT THE PARTICIPANT IN THE CONVERSATION SAYS I REMEMBER THAT WORD, AND THE WORD WAS "X", RIGHT, SO THEY FILL IT IN. THAT IS NOT WHAT REALLY HAPPENED HERE. THAT CAN HAPPEN BUT THAT IS NOT WHAT HAPPENED HERE.

THAT WOULD BE MORE CRITICAL THAN FOR THE WITNESS --

THEY DIDN'T EVEN DISPUTE THAT, LOOK, THE MOST CRITICAL PART, THE STATEMENT ON THIS THAT THE STATE REALLY WANTS IS THAT HE AIDE MITTS HE IS HE INSIDE THE LIQUOR STORE. THAT IS OUR MOST CRITICAL THING. THEY DIDN'T EVEN DISPUTE THAT THAT WASN'T ACCURATE. WHAT THEY SAID WAS THE STATEMENT BEFORE IT WAS INACCURATE, I MEAN WAS INAUDIBLE AND THE STATEMENT AFTER IT. THEY ARE NOT EVEN DISPUTING THAT THAT IS CLEARLY AUDIBLE ON THE TAPE, THAT STATEMENT. THEY ARE NOT DISPUTING THAT. THAT IS NOT WHAT THEY DISPUTED AT TRIAL. THEIR ARGUMENT WAS BECAUSE WHAT CAME BEFORE AND WHAT CAME AFTER WAS INAUDIBLE, IT DEPRIVED THAT STATEMENT THAT WAS CLEAR, OF CONTEXT. THAT IS WHAT DEFENSE COUNSEL ARGUED TO THE TRIAL COURT.

IS IT, ALSO, CORRECT THAT THE TRIAL COURT ACTUALLY REFERRED TO OUR CASE LAW ON THIS ISSUE?

YOUR HONOR, THEY TRIED VERY MUCH TO FOLLOW MARTINEZ. THEY WERE USING MARTINEZ AS A BLUEPRINT, AND THEY WERE TRYING, USING MARTINEZ, THEY WERE TRYING, WITHIN THE ACTUAL FACTS OF THIS CASE, TO DO THAT. NOW, FOR INSTANCE, MARTINEZ SUGGESTSED -- SUGGESTED TO THE JURY INSTRUCTION COMMITTEE, TO MAKE A JURY INSTRUCTION, STANDARD JURY INSTRUCTION THAT THIS IS A DEMONSTRATIVE AID, FAN THERE IS ANY DISPUTE BETWEEN WHAT YOU JURORS THINK YOU HEAR AND WHAT SOUGHT TRANSCRIPT, YOU ARE TO GO WITH THE TAPE. THE JUDGE DID NOT USE THAT STANDARD, BECAUSE IT HADN'T COME OUT, BUT YOUR HONOR, WHAT HE THEY INSTRUCTED THIS JURY, IS -- WHAT HE INSTRUCTED THIS JURY IS THE FUNCTIONAL EQUIVALENT OF THAT, SO, OKAY, THEY EVEN MADE THEIR OWN, WHAT END ED UP BEING VERY CLOSE TO THE STANDARD -- WHAT ENDED UP BEING IS VERY CLOSE TO THE STANDARD JURY INSTRUCTION, TELLING THIS JURY THAT IF YOU HEAR SOMETHING DIFFERENT

ON THAT TAPE FROM WHAT YOU ARE READING IN THIS TRANSCRIPT, YOU ARE IT IT TO TAKE THE TAPE -- YOU ARE TO TAKE THE TAPE AS THE EVIDENCE, NOT THE TRANSCRIPT.

AND THE TRANSCRIPT DID NOT GO BACK TO THE JURY ROOM.

NEW YORK CITY YOUR HONOR. IT WAS NOT ADMITTED INTO EVIDENCE. AS I UNDERSTAND IT, THE STATE HAD PRODUCTION COMPANY PLAY THIS TAPE FOR THE JURY.

IT WAS USED AS AN AID, WHILE THE AUDIOTAPE WAS BEING PLAYED, IS THAT CORRECT? AND WHILE THE WITNESS WAS TESTIFYING.

WHILE THE WITNESS WAS TESTIFYING. OKAY. SO THAT IS WHAT HAPPENED.

COUNSEL --

AND THEY FOLLOWED MARTINEZ, AND REALLY WHAT HE IS RELYING ON, HE SAYS NOT, BUT REALLY WHAT HE IS RELYING ON IS THE COURT REPORTERS, WHILE THEY ARE SITING THERE TRYING TO DO IT, OFTEN DO MISS THINGS.

ONE OF THE JUDGES HAS A QUESTION.

COUNSEL, UNDER MARTINEZ, MARTINEZ SAYS THAT, RECORDINGS THAT CONTAIN PARTIAL IN AWEDIBILITY ARE NEVERTHELESS ADMISSIBLE, UNLESS THE INADMISSIBLE PORTIONS ARE SO SUBSTANTIAL AS TO RENDER, REALLY, MOST OF IT INAUDIBLE. YOUR OPPONENT SAYS THAT 60 PERCENT OF THE TAPE WAS INAUDIBLE. DO YOU AGREE WITH THAT, A AND IF YOU DO, IS 60 PERCENT SUBSTANTIAL ENOUGH TO RENDER, REALLY, THE ENTIRE TAPE INAUDIBLE?

LARGE PORTIONS OF THIS TAPE ARE INAUDIBLE, AND WE EXPLAINED WHY. THE WAY THE TAPE RECORDING WAS MADE, IT WAS PUT IN HER PURSE, AND AT THE BEGINNING OF IT, THE CAR IS GOING, SO LARGE PORTIONS OF THE TAPE ARE INAUDIBLE. I, AND THAT IS THE LANGUAGE FROM MARTINEZ. I DID NOT SIT DOWN AND CALCULATE THE PERCENTAGE, SO I CANNOT GIVE YOU A PERCENTAGE. I DIDN'T TRY TO DO IT THAT WAY. YOUR HONOR, I AM NOT SURE I AGREE WITH THAT STATEMENT FROM MARTINEZ, EITHER. IF YOU THINK ABOUT THIS, WHAT IF YOU HAD A TAPE 590 PERCENT OF WHICH WAS INAUDIBLE BUT THE OTHER 10 PERCENT IS A DIRECT ADMISSION TO THE CRIME? ARE WE REALLY SAYING THAT, BECAUSE THE BEGINNING 90 PERCENT COULDN'T BE HEARD, THAT A DETAILED CONFESSION TO THE CRIME WOULD NOT BE ADMISSIBLE? YOUR HONOR, I THINK WHAT THE LAW NEEDS TO BE IS ONLY WHEN IT, WHEN THE INAUDIBLE PART HAS THE POSSIBILITY OF TRULY MISLEADING THE JURY, NOT JUST A PERCENTAGE, THAT, THE STATE IS THE ONE LITIGANT BEFORE YOU THAT HAS A "BEYOND A REASONABLE DOUBT" STEAD OF PROOF. WE HAVE TO MEET THAT. EXCLUDING OUR EVIDENCE, WHEN THERE IS NO REAL POSSIBILITY OF MISLEADING THE JURY, REMEMBER IF IT IS INAUDIBLE, IT IS INAUDIBLE. THE JURY IS GOING TO KNOW IT IS INAUDIBLE, AND IF OUR TRANSCRIPT SAYS IT IS INAUDIBLE, THAT SHOULD NOT BE EXCLUDED, YOUR HONOR. EVEN IF IT IS 90 PERCENT, WITH 10 PERCENT REMAINING BEING A CONFESSION TO THE CRIME, THAT SHOULD STILL BE ADMISSIBLE. BECAUSE THAT IS AS RELY VAENT AS IT GETS, A CONFESSION TO THE CRIME -- RELEVANT AS IT GETS, A CONFESSION TO THE CRIME.

WHAT DO YOU THINK "SUBSTANTIAL" MEANS?

I THINK, YOUR HONOR, I THINK IT OUGHT TO HAVE TO DO WITH THE POSSIBILITY OF TRULY MISLEADING THE JURY. THAT IS WHERE YOU NEED TO GO, NOT --

IF YOU HAD A TAPE, FOR INSTANCE, THAT THERE WAS A SERIES OF THE DEFENDANT SAYING "YES", AND THEN INAUDIBLE AND INAUDIBLE AND THEN YES, AND THEN INAUDIBLE AND THEN INAUDIBLE AND THEN YES, AND IF THE WITNESS TESTIFIED THAT, IN THAT CONVERSATION THAT

SHE HAD SAID TO HIM, AND YOU WENT INTO THE LIQUOR STORE, AND YOU SHOT, YOU KNOW, THE BARTENDER, AND YOU, AND THEN ALL OF THESE YESES, SO THAT YOU WOULD AGREE THAT EVEN THOUGH THE YES, SIRENS WERE LOUD AND -- THE YESES WERE LOUD AND CLEAR ON THAT, THAT THE TRANSCRIPT OF THAT, THE AUDIOTAPE --' THAT IS A PERFECT EXAMPLE, THANK YOU VERY MUCH, IT IS A PERFECT EXAMPLE --' YOU ARE SAYING IT IS NOT A MATHEMATICAL.

IT IS NOT MATHEMATICAL. IT IS LEAVING THE JURY A SENSE, IF THE JURY IS TRULY LEFT WITH A MISAPPREHENSION ABOUT WHAT THAT CONVERSATION ACTUALLY IS.

TO SAY IT THE OTHER WAY, THAT THE AUDIBLE PORTION, REALLY, HAS BEEN DEMONSTRATED TO BE RELEVANT AND MATERIAL TO THE ISSUE THAT IT IS BEING OFFERED ON, IS THAT --' YES, AND --

ISN'T THAT WHAT MARTINAEZ SAYS? IT SAYS SUCH RECORDINGS ARE INADMISSIBLE, UNLESS THE INAUDIBLE PORTIONS ARE SO SUBSTANTIAL AND RELEVANT AS TO PROVIDE THE AUDIBLE PORTIONS WITH RELEVANCE.

YES, AND THE RELEVANCE IS MISLEADING, YES.

IT SEEMS TO BE GOING FOR A NUMBER.

IT SEEMS TO BE GOING WITH A NUMBER, AND I AM UNCOMFORTABLE WITH 60, 70, 80 PERCENT, UNLESS THE INAUDIBLE PORTION HAS THE POSSIBILITY OF MISLEADING, SUCH AS YOUR HONOR'S EXAMPLE. EYE ASKED YOUR OPPONENT, JUST --

I ASKED YOUR OPPONENT, JUST BEFORE HE SAT DOWN, THAT IF INDEED THERE WERE STATEMENTS OF CLAIM THAT, IF YOU SAT DOWN AND LISTENED TO THE TRANSCRIPT, THAT YOU WOULD FIND THAT THOSE STATEMENTS CLEARLY APPEARED IN THE TRANSCRIPT AND ARE VERY DAMAGING TO THE DEFENDANT, BUT THAT IF YOU LISTENED TO THE TAPE WOULD COME OUT INAUDIBLE.

OKAY, BUT REMEMBER THE MOST CRITICAL PART OF WHAT WE RELIED ON WAS THIS STATEMENT THAT HE WAS INSIDE THE ABC. THEY HAVE NEVER DISPUTED THAT TALK HEAR THAT. THEY DIDN'T DISPUTE THAT DOWN IN THE TRIAL COURT. THEY DISPUTED, THEIR ARGUMENT WAS BECAUSE YOU COULDN'T HEAR WHAT CAME BEFORE AND WHAT CAME AFTER, IT DEPRIVED IT OF CONTEXT.

I AM TRYING TO GET, IF I UNDERSTAND YOUR POSITION AS REPRESENTED IN THE BRIEFYm, FOR INSTANCE, AND I ASSUME HERE, TOO, IS THAT THAT REALLY DIDN'T HAPPEN. THAT IS THERE NO -- THAT IS THAT THERE ARE NO STATEMENTS IN THE TRANSCRIPT, THAT IF YOU LISTEN TO THE TAPE, A YOU WILL NOT FIND THAT, YES, THAT YOU CAN HEAR THAT ON THE TAPE, IF IT WAS PLACED IN THE TRANSCRIPT. IS THAT THE STATE'S POSITION? IN OTHER WORDS THERE IS NOTHING IN THAT TRANSCRIPT THAT, IN LISTENING TO THE TAPE, IS INAUDIBLE. THAT IS WOULD BE THE --

NO, YOUR HONOR, I DON'T THINK THERE IS. NO -- NOW, LOTS OF THE TAPE IS INAUDIBLE, BUT OUR TRANSCRIPT ACCURATELY REFLECTS THAT IT IS INAUDIBLE.

IT REFLECTS THAT IT IS INAUDIBLE WHEN IT IS INAUDIBLE. IT DOESN'T SAY AT THIS POINT HE COMPLETELY CONFESSED TO THE CRIME, AND THEN THE TRANSCRIPT, AND THEN WE LISTEN TO THE TAPE, WE HEAR ABUZZ ---.

-- WE HEAR A BUZZ --

THAT IS NOT GOING TO HAPPEN. THERE IS SOME OBJECTION TO HUGH AND YOU, BUT WE ARE NOT TALKING ABOUT THIS CRIME. WE ARE RELYING ON TWO STATEMENTS, WHERE HE ADMITS THAT HE WAS INSIDE THE ABC, AND THE STATUTE OF LIMITATIONS FOR MURDER. ALL RIGHT. IS SO

THOSE PARTS, THEY ARE NOT EVEN DISPUTING THAT THAT THAT IS NOT INACCURATE, AS I UNDERSTAND IT, OR THEY DIDN'T DOWN IN THE TRIAL COURT THAT, THAT STATEMENT THAT HE WAS INSIDE WAS NOT ACCURATE.

AGAIN, THE TAPE WAS ADMITTED. WAS THE TAPE ADMITTED INTO EVIDENCE?

PLAYED FOR THE JURY AND THE TAPE WAS ADMITTED.

AND THE JURY TOOK THE TAPE BACK WITH THEM?

YES. THEY DID NOT TAKE THE TRANSCRIPT.

THE ARGUMENT HERE TODAY, IS THE ARGUMENT, I JUST WANT TO MAKE SURE THAT THE TAPE, ITSELF, SHOULD HAVE BEEN --' EXCLUDED AS WELL. THAT IS ISSUE NUMBER ONE. THEY WANTED THE TAPE EXCLUDED, BASED ON --

-- ON THE TRANSCRIPT.

BUT WE ARE TALKING MAINLY ABOUT THE TRANSCRIPT ISSUE, TWO. -- ISSUE, TOO.

BUT THE JUDGE FOUND THAT MOST OF THE TAPE WAS AUDIBLE, AND WHAT IS THE STANDARD FOR OUR REVIEW? I MEAN, IF WE LISTEN TO THE TAPE AND WE ALL FIND THAT MOST OF IT IS INAUDIBLE, DO WE, BECAUSE IT, DO WE DEFER TO THE TRIAL COURT, SAYING IT IS FOR THE MOST PART AUDIBLE, OR IS THAT SOMETHING THAT WE LOOK AT, WE HAVE THE EVIDENCE OURSELVES, AND SEVEN OF US HEAR IT IT AND WE GO 80 PERCENT OF IT IS INAUDIBLE. HOW DOES THAT, HOW WOULD YOU SUGGEST THAT SHOULD WORK?

WELL, THE STANDARD IS ABUSE OF DISCRETION. IT IS NOT COMPETENT, SUBSTANTIAL. IT IS ABUSE OF DISCRETION. BUT, YOUR HONOR, QUITE FRANKLY, EVERY APPELLATE COURT, I WAS CURIOUS ABOUT WHICH WAY YOU DO THIS. DO YOU LISTEN TOE IT YOURSELF, SUCH THAT YOU ARE ALMOST SITTING AS A FACT FINDER? THAT IS VERY UNUSUAL FOR AN APPELLATE COURT, BUT IN FACT MOST OF THE APPELLATE CASES THAT I READ, YOUR HONOR, THEr APPELLATE COURT IS, ITSELF, LISTENING TO THE TAPE. SO THAT DOESN'T SEEM TO STRIKE ME AS MEETING THE ABUSE OF DISCRETION STANDARD.

THERE SO NO FACT FINDING. I MEAN THERE IS FACT FINDING, NOT LOOKING AT THE WITNESS, YOU ARE NOT, THERE IS NOTHING WHERE THE TRIAL COURT HAS A SUPERIOR ADVANTAGE. I THINK AT TRIAL, THAT APPELLATE COURTS WANT TO MAKE, THIS IS SUCH POWERFUL EVIDENCE, IF IT COMES IN, A TRANSCRIPT SAYING "I DID IT", THAT IF AN APPELLATE COURT LISTENS AND SAYS I DON'T KNOW WHERE, IT IS JUST NOT THERE ON THE TAPE --

I SUSPECT THAT IS WHY THEY DO IT, YOUR HONOR O.

DID MARCEL TESTIFY AT TRIAL AS TO THE SAME THINGS THAT WERE ON THE AUDIOTAPE?

YES, SHE DID. WHAT HAPPENS IS SHE STARTS, THE CRIME OCCURS THE NEXT DAY HE CONFESSES TO HER, SO SHE TESTIFIES THAT HE CONFESSED TO HER THE DAY AFTER THE CRIME, OF HAVING COMMITTED THE CRIME, AND MUCH MORE DETAILS THAT ARE EVEN OAT TAPE OR ON THE TRANSCRIPT. THE AMOUNT OF MONEY THEY GOT. NUMEROUS DETAILS. AND SHE TESTIFIES TO THAT, BEFORE WE EVEN GET TO THIS TRANSCRIPT. OKAY. SO REMEMBER IN EFFECT, HE CONFESSED TO HER. THERE WAS NO TAPE THERE. THEN SHE CALLS THE ABC, AND THEN WE SET UP THIS UNDERCOVER WITH THE RECORDING IN HER PURSE. ALL RIGHT. SO WE ALREADY HAVE THAT INITIAL TESTIMONY FROM MARCEL THAT SHE, THAT HE CONFESSED TO HER, TELLING HER DETAILS OF THE CRIME. AND THAT, HOW HE HAD GOTTEN IN BY PUSHING THE WOMAN IN, THE MANAGER, THE VICTIM IN THIS CASE, AND OTHER DETAILS, SO THAT CAME OUT EVEN BEFORE

THAT. MOREOVER, YOUR HONOR, THE DEFENDANT HIMSELF TAKES THE STAND, AND ADMITS THAT HE MADE THIS IS STATEMENT ON THE TAPE. HE AIDE MITTS THAT HE TOLD HER THIS. HIS EXPLANATION WAS HE WAS TRYING TO IMPRESS HER. SO REALLY, THIS IS HARMLESS TWO-WAYS, ALMOST THREE.

ALL RIGHT. WOULD YOU GO TO THE IMPEACHMENT OF HER TESTIMONY.

ALL RIGHT. NOW, UNDERSTAND WHAT HAPPENED DOWN IN THE TRIAL COURT. THE TRIAL COURT NEVER RULED THAT HE COULD NOT DO THIS. WHAT HAPPENED WAS THE WITNESSES WERE THE WITNESSES TO THE CHICKEN LEE ROBBERY. SHE HAD HE A FEW DAYS, SHE IS A SUSPECT IN A ROBBERY THAT THIS HAD HAPPENED A FEW DAYS BEFORE THIS KOOIM CRIME. NOW, SHE WAS -- BEFORE THIS CRIME. NOW, SHE WAS A SUSPECT. THE STATE ATTORNEYS OFFICE DID, THE MOTION HERE WAS A MOTION TO COMPEL THE STATE ATTORNEYS OFFICE TO INVESTIGATE THIS CHICKEN LEE ROBERY. THAT WAS THE MOTION FILED DOWN BELOW, AND THAT IS WHAT THE TRIAL COURT HELD A HEARING ON. WHEN THEY GOT TO TRIAL, THEY, THE DEFENSE COUNSEL HAD BROUGHT THE VICTIMS, TWO OF THE VICTIMS FROM THAT ROBBERY INTO THE COURTROOM, AND BY IN THE COURTROOM, I MEAN IN THE HALL. THEY DIDN'T SOUND LIKE THEY WERE ACTUALLY IN THE COURTROOM. THEY WERE IN THE HALL. SHE WAS WEARING A TURTLENECK. DEFENSE COUNSEL WANTED TO HAVE THE TRIAL COURT FORCE MARCEL TO SHOW HER NECK TO THESE VICTIMS. THESE VICTIMS COULD NOT IDENTIFY THIS WOMAN FROM THE PHOTO LINEUP THAT THEY HAD BEEN SHOWED BY THE SHERIFFS OFFICE, BUT HE WANTED TO FORCE HER TO SHOW THE NECK, MARCEL'S NECK TO THESE VICTIMS. THE TRIAL COURT NEVER SAID I WON'T LET YOU IMPEACH ON THIS OR I WON'T LET YOU CALL THESE WITNESSES OR ANYTHING LIKE. THAT HE JUST SAID I AM NOT GOING TO FORCE HER. I CAN COMPEL HER TO TESTIFY. I CANNOT FORCE HER TO SHOW HER NECK TO THESE VICTIMS. ALL RIGHT. THEN SHE COMES BACK NOT WEARING A TURTLENECK. THE VICTIMS OF THE CHICKEN LEE ROBBERY ARE STILL OUT THERE. THEY GET UNCOMFORTABLE. THEY LEAVE. THESE VICTIMS, AT THE END RESULT, WERE NEVER AVAILABLE TO TESTIFY. THEY WERE UNCOMFORTABLE WITH THIS, AND THEY LEFT. THERE WAS NEVER A RULING FROM THE TRIAL COURT THAT YOU COULD NOT HAVE THOSE TWO VICTIMS TESTIFY. HE JUST SAID HE WASN'T GOING TO COMPEL MARCEL TO SHOW HER NECK, SO I DON'T THINK THERE IS EVEN A RULING FROM THE TRIAL COURT ABOUT WHAT THEY ARE TRYING TO RAISE HERE.

HOW DOES THE RECORD DEMONSTRATE TO US THAT THESE WITNESSES LEFT? IN OTHER WORDS HOW --' THE DEFENSE COUNSEL, ALLEN SHIPPER FIELD, SAYS THAT ON THE RECORD. NONE OF THIS IS REALLY, THIS IS JUST PROSECUTOR AND DEFENSE COUNSEL TALKING TO THE JUDGE. THE ONLY REAL PROFFER WAS DEFENSE COUNSEL ASKED MARCEL IF SHE COMMIT ON -- IF SHE COMMITTED THE ROBBERY AND SHE SAID NO. THAT WAS THE ONLY PROFFER. THERE WAS NOT PROFFER OF THE VICTIMS OF THE CHICKEN LEE ROBBERY AND COULDN'T HAVE BEEN, BECAUSE THEY LEFT.

DURING THIS PROCESS, THE ATTORNEY SAID THAT THE WITNESSES THAT I HAVE OUT THERE HAVE LEFT.

HE IS EXPLAINING WHAT HE WANTS, YOU KNOW, TO SHOW THE NECK, THAT MAYBE THEY COULD IDENTIFY THEY, AND YOUR HONOR, THE FIRST PROBLEM WITH THIS IS THERE ARE NO PENDING CHARGES SO THIS IS NOT PROPER IMPEACHMENT. THE SECOND THING IS THE TRIAL COURT IS GOING TO END UP HAVING A TRIAL OF THE CHICKEN LEE ROBBERY WITH MARCEL AS THE DEFENDANT, INSIDE THIS ABC ROBBERY. THIS IS GOING TO BE THE PROVERBIAL TRIAL WITHIN A TRIAL, WITH ALL SORTS OF IMPERMISSIBLE LINEUP ISSUES IN IT. IT IS NOT JUST A MATTER OF THESE TWO WITNESSES GET UP THERE. WE WOULD HAVE LITERALLY HAD A TRIAL WITHIN A TRIAL.

DID THE DEFENDANT END UP TESTIFYING THAT SHE CONFESSED TO THE CHICKEN PLACE ROBBERY TO HIM?

YES, YOUR HONOR, AND NOT ONLY WAS HE ALLOWED TO TESTIFY, BUT DEFENSE COUNSEL USED THIS AND PRESENTED THIS THEORY OF BIAS TO THE JURY IN CLOSING. THEY DID, THEY DID PRESENT THIS THEORY OF BIAS, AND THEY WERE NOT STOPPED BY, THE PROSECUTOR DIDN'T OBJECT AND THE TRIAL COURT NEVER SAID DON'T ARGUE EW THAT, SO HE WAS ALLOWED TO PRESENT THIS THEORY OF BIAS, VIA HIS OWN TESTIMONY, AND DEFENSE COUNSEL WAS ALLOWED TO ARGUE THAT THEORY OF BIAS IN CLOSING. IF THAT IS ALL, I WILL ASK YOU TO AFFIRM THE JUDGMENT AND SENTENCE. THANK YOU.

CHIEF JUSTICE: COUNSEL, REBUTTAL.

THANK YOU. I RESPECTFULLY DISAGREE WITH THE LAST STATEMENT THAT WAS MADE. I WOULD CITE THE COURT TO VOLUME 10, PAGES 816-TO-830. MISS MARCEL WAS ON THE STAND, AND MR. McCOY'S LAWYER STARTED TO ASK HER ABOUT THE LEE'S CHICKEN ROBBERY, AND THE TRIAL JUDGE, THE STATE ATTORNEY OBJECTED, AND THE TRIAL JUDGE EXCUSED THE JURY AND THEN REQUIRED A PROFFER. AND AFTER THAT, AND DURING THAT PROFFER, HE, OF COURSE, BROUGHT UP ABOUT THE LEE'S CHICKEN ROBBERY, BUT THE JUDGE RULED THAT HE WAS NOT TO CROSS-EXAMINATION HER GOOD THE LEE'S CHICKEN ROBBERY, IN THE PRESENCE OF THE JURY, AND SO THAT LINE OF INQUIRY CEASED. NOW, THAT IS A DEVASTATE AGO BLOW TO A DEFENSE LAWYER WHO, IS TRYING TO IMPEACH THE STATE'S STAR WITNESS.

BUT, NOW, LET'S GO A LITTLE FURTHER, AND THE TRIAL JUDGE, MY READING OF THIS IS THAT THE TRIAL JUDGE INDICATED I AM NOT GOING TO DO IT NOW, BUT ONCE THERE IS SOME EVIDENCE IN THIS RECORD, FROM WHATEVER SOURCE, THEN HE IS GOING TO ORDER THAT THAT WITNESS COME BACK FOR FURTHER CROSS-EXAMINATION, AND THE DEFENSE JUST NEVER DID THAT. ISN'T THAT REALLY WHAT HAPPENED?

YEAH. HE DESAY THAT.

YEAH. -- HE DID SAY THAT. HE DID SAY IT. YEAH.

WAS THERE ANY OTHER PROFFER MADE? IN OTHER WORDS DID THE LAWYER ASK AT THAT TIME, WELL, JUDGE, OUTSIDE OF THE PRESENCE OF THE JURY, I WANT TO QUESTION HER, SO I WILL HAVE THAT IN THE RECORD?

HE DID MAKE A PROFFER. THERE WAS A PROFFER. ' ASKED HER AND SHE DENIED ANY INVOLVEMENT IN THE --

YES, YOUR HONOR. YES, YOUR HONOR. THE THE OTHER ASPECT OF THE TAPE IS THAT THE TRIAL JUDGE NEVER LISTENED TO THE AUDIOTAPE, WITHOUT A TRANSCRIPT. HE ALWAYS HAD A TRANSCRIPT. THE JURY NEVER LISTENED TO THE AUDIOTAPE WITHOUT A TRANSCRIPT.

WAS THE AUDIOTAPE GIVEN TO THE JURY, ALONG WITH THE TAPE PLAYER, TO TAKE BACK TO THE JURY ROOM?

NO, I DON'T BELIEVE SO.

I MEAN, THE AUDIOTAPE WAS SENT BACK TO THE JURY ROOM BUT WITHOUT THE CAPACITY TO PLAY IT?

I BELIEVE THAT'S CORRECT, BECAUSE I WASN'T THERE, OBVIOUSLY, BUT I BELIEVE THAT THE JURY BOX WAS EQUIPPED WITH HEAD PHONES. I KNOW THAT IS IN THE RECORD, AND THERE WAS PRETTY EXTENSIVE AUDIO EQUIPMENT IN THE JURY, IN THE COURTROOM. I DID NOT GET THE SENSE THAT THEY WERE GIVEN THOSE SAME HEAD PHONES AND AT AUDIO EQUIPMENT WAS RESET UP BACK IN THE JURY ROOM. I KAENT SAY WITH CERTAINTY.

IT WOULDN'T ORDINARILY MAKE A LOT OF SENSE, TO SEND A TAPE BACK WITH THE JURY, WITHOUT THE CAPACITY TO PLAY IT, OR WITHOUT AN INSTRUCTION.

WITHOUT AN INSTRUCTION.

IF YOU WANT TO LISTEN TO THE TAPE AGAIN, WE WILL PROVIDE YOU WITH THE EQUIPMENT, BUT YOU SAY THAT YOUR RECOLLECTION IS FROM EXAMINING THE RECORD, THAT THE TAPE WENT BACK, BUT NO MEANS TO LISTEN TO IT.

I DON'T BELIEVE SO.

WAS THERE ANY OBJECTION BY THE DEFENSE AS TO HOW THE EVIDENCE WAS HANDLED? WHATEVER HAPPENED. WHETHER EQUIPMENT WAS OR WAS NOT AFFORDED TO THE JURY AS THE EVIDENCE WENT BACK WITH THE JURY? THERE IS NOTHING, NO OBJECTION AS TO WHAT WAS GOING ON OR ANYTHING?

I DON'T RECALL ANYTHING IN THE RECORD.

THERE IS NO --

THE RECORD IS SILENT ON THAT.

I AM SORRY.

THE RECORD IS SILENT ON WHETHER --

SILENT. I WOULD SAY SO.

AND THERE IS NO REQUEST BY THE JURY, ANYWHERE ON THE RECORD, TO LISTEN TOE THE TAPE.

NO. I THINK THIS COULD SPEAK VOLUMES ON SOME LEVELS, BECAUSE THE -- LISTEN TO THE TAPE.

NO. I THINK THIS COULD SPEAK VOLUMES ON SOME LEVELS, BECAUSE THE TRANSCRIPT EFFECTIVELY BECAME THE EVIDENCE, WHICH IS THE ADMONITION THAT MARTINEZ SAYS SHOULD NOT OCCUR O.

BUT THE TRANSCRIPT DID NOT GO BACK WITH THE JURY.

DID NOT GO BACK BUT THE JURY SAW IT, AND THEY READ IT AND THEY HEARD IT, AND THE QUESTION COMES UP SINCE THE TRIAL JUDGE NEVER HEARD THE AUDIOTAPE WITHOUT THE TRANSCRIPT, AND SINCE THE JURY --' WHEN THE TRIAL JUDGE WAS LISTENING TO THE AUDIOTAPE AND HAD THE TRANSCRIPT, DIDN'T HE, IN FACT, TELL THE STATE THAT, LOOK, THERE ARE SOME PLACES HERE THAT YOU HAVE GOT TO GO BACK AND DO SOME THINGS TO THIS TRANSCRIPT, BECAUSE IT DOESN'T REFLECT CERTAIN AUDIBLE, INAUDIBLE PORTIONS AND THINGS LIKE THAT? SO THE TRIAL JUDGE WAS LISTENING AND --

HE DID.

-- MAKING SORT OF INDICATIONS OF WHERE CORRECTIONS NEEDED TO BE MADE.

HE, ALSO, SAID THAT HE WAS HEARING THINGS THAT WERE DIFFERENT THAN WERE ON THE TRANSCRIPT, AND THAT IS IN THE RECORD. WHEN THIS HONORABLE COURT HEARS THE AUDIOTAPE, I AM WONDERING, AS JUSTICE PARIENTE ASKED, WILL YOU, WHAT IS THE PROCEDURE? WILL YOU RELY ON THE TRANSCRIPT? OR WILL YOU JUST HEAR THE AUDIOTAPE TO DETERMINE IF SO MUCH OF IT IS INAUDIBLE, TO RENDER IT IMPROPER, AS FAR AS AN EVIDENTIARY AID.

CAN YOU ADDRESS THE HARMLESS ERROR ISSUE? I MEAN, MARCEL TESTIFIED INDEPENDENTLY OF THIS TAPE, THAT THE DEFENDANT HAD CONFESSED TO HER THAT HE HAD COMMITTED THE CRIME, SO WHY ISN'T ANY INTRODUCTION OF THIS TAPE OR THE TRANSCRIPT HARMLESS ERROR?

BECAUSE MISS MARCEL'S CREDIBILITY AS A WITNESS WAS SHAKE TONE ITS VERY FOUNDATIONS. SHE HAD A LONG CRIMINAL HISTORY. SHE HAD ILLEGITIMATE CHILDREN. SHE HAD OUTSTANDING ARREST WARRANTS, AND SHE HAD BEEN PREVIOUSLY CONVICTED OF LYING UNDER OATH. THEY ALSO BROUGHT IN TESTIMONY FROM HER HOME STATE THAT HER REPUTATION FOR TRUTH AND VERACITY IN THE COMMUNITY WAS VERY SUSPECT, SO SHE WAS NOT THE IDEAL WITNESS FOR THE STATE, AND TO BOLSTER HER TESTIMONY, THE AUDIOTAPE WAS ESSENTIAL, BUT THE AUDIOTAPE STANDING ALONE, MEANT VIRTUALLY ZERO WHEN YOU LISTEN TO IT. IT WAS ONLY WITH THIS SCRIPT -- WITH THIS TRANSCRIPT THAT MS. MARCEL, HERSELF, DIDN'T PREPARE, THAT THE PROSECUTOR PREPARED THAT, THIS WHOLE THING IS STID TOGETHER, AND THAT IS WHY WE FEEL THE USE OF THE TRANSCRIPT -- IS TIED TOGETHER, AND THAT IS WHY THE USE OF THE TRANSCRIPT, WHICH IS UNAUTHENTICATED, AND I KNOW I AM RUNNING CLOSE TO OUT OF MY TIME, BUT THE HUNT CASE, WHICH THE STATE HAD CITED OF AN AUTHENTICATION, PROPER AUTHENTICATION, ITS BRIEF BUT IT IS SHORT N THAT CASE, THEY SAID, AND HAVE YOU PREVIOUSLY REVIEWED THIS VIDEO WITH THAT TRANSCRIPT? YES, MA'AM. HOW MANY TIMES? ABOUT FOUR OR FIVE TIMES AT LEAST. AND DID YOU LOOK AT THE PHRASES THAT ARE ON THE TRANSCRIPT AND COMPARE THEM TO WHAT'S ON THIS TAPE? THEYER ACCURATE, MA'AM. WERE THEY A FAIR AND ACCURATE DEPICTION OF WHAT WAS SPOKEN ON SEPTEMBER 22? YES, MA'AM.

ADDITIONALLY YOU TESTIFIED THAT YOU KNOW THE OTHER EMPLOYEES' VOICES? DID YOU PLACE -- YES, MA'AM. ADDITIONALLY YOU TESTIFIED THAT YOU KNOW THE OTHER EMPLOYEES' VOICES IN YES, MA'AM. AND DID QUESTION, DID YOU LATER HELP PREPARE A TRANSCRIPT OF THE TAPE? YES, I DID.

AND WHAT OBJECTION, THOUGH, WAS MADE ALONG THESE GROUNDS?

WELL, NO CONTEMPORANEOUS OBJECTION TO THAT. BUT PRETRIAL, AN OBJECTION WAS MADE, AND THERE WAS A HEARING, A MOTION, A HEARING, AND THEN THE OBJECTION AS TO THE USE OF THE TRANSCRIPT WAS, THEN, RENEWED, BUT NOT AS TO THE SPECIFIC GROUND THAT IT WASN'T AUTHENTICATED, THAT IT JUST WASN'T A FAIR AND ACCURATE DEPICTION, WHICH I AM ARGUING IS TANTAMOUNT TO THE SAME THING UNDER THESE CIRCUMSTANCES.

OKAY.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU BOTH VERY MUCH. THE COURT WILL NOW STAND IN RECESS FOR THIS MORNING AND WILL BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.