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Richard M. Cooper v. State of Florida

CHIEF JUSTICE: GOOD MORNING, EVERYONE, THIS BEAUTIFUL MORNING AFTER ELECTION DAY. JUSTICE QUINCE IS RECUSED ON THIS FIRST CASE, AND WE WILL BE TAKING ABOUT A FIVE-MINUTE RECESS AFTER WE HEAR THE ARGUMENT IN THIS CASE, FOR THE BENEFIT FIT OF COUNSEL OUT THERE, IN ORDER FOR JUSTICE QUINCE TO RETURN. THE FIRST CASE IS COOPER VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MR. CHIEF JUSTICE. STEVE HANLON WITH HOLLAND & KNIGHT AND AT COUNSEL TABLE WITH ME IS ROBIN ROSENBERG OF THE LAW FIRM, AND WE ARE HERE ON BEHALF OF RICHARD COOPER. I HAVE GOT TO TELL YOU THAT, GIVEN THE GRAVITY OF THAT ETHICAL COMPROMISE, I CAN'T IMAGINE NOT HAVING BROUGHT THAT TO THE COURT'S ATTENTION. THAT WAS RICHARD COOPER'S LAWYER, DEFENSE ATTORNEY KY KOCH, TESTIFYING ABOUT MR. COOPER'S CASE. MR. COOPER SHOULD PREVAIL ON HIS CONFLICT CLAIM AND IS ENTITLED TO A NEW TRIAL, SOLELY ON THE BASIS OF MR. KOCH'S ACKNOWLEDGMENT THAT HE HAD A GRAVE ETHICAL CONFLICT.

TELL US A LITTLE BIT MORE ABOUT THAT CONFLICT. EXACTLY WHAT WAS IT.

MR. KOCH HAD REPRESENTED A KEY PROSECUTION WITNESS IN THIS CASE, A VETERAN SNITCH, PAUL SCALNICK, IN PINELLAS COUNTY. HE REPRESENTED HIM IN A 1981 MATTER, WHERE MR. SKALNICK HAD BEEN IN JAIL DOWN THERE FROM MAY OF '81.

HE WAS IN THE COUNTY JAIL, AND WHEN THE DEFENDANT WAS ARRESTED, HE WAS PLACED IN THE SAME GEL CELL?

THAT IS IN -- IN THE SAME JAIL CELL?

THAT IS IN A SUBSEQUENT OPERATION, YOUR HONOR. MR. COOPER WAS PLACED IN SKALNICK'S CELL.

SKALNICK LATER TESTIFIED THAT COOPER DESCRIBED TO HIM THIS EPISODE AND HIS ROLE IN IT?

YES, AND IMPORTANTLY, YOUR HONOR, MR. SKALNICK'S TESTIMONY WOULD BE DEVASTATING IN THE PENALTY PHASE OF THIS TRIAL. MR. SKALNICK WOULD TESTIFY THAT MR. COOPER WALKED IN THAT CELL AND SAID HELLO, MR. SKALNICK. MY NAME IS RICHARD COOPER. I KILLED THREE PEOPLE, AND I AM VERY PROUD OF IT, AND HE BRAGGED ABOUT IT, AND HE SHOWED NO REMORSE.

DIDN'T SKALNICK WAIVE HIS ATTORNEY/CLIENT PRIVILEGE?

MR. SKALNICK, IN A DEPOSITION WITH MR. CRIDER, NOT MR. KOCH, WAS ASKED IF HE WOULD WAIVE. THAT WAIVER, YOUR HONOR, IS NOT WORTH THE PAPER THAT IT IS TRANSCRIBED ON.

WHY DO YOU SAY THAT?

BECAUSE A WAIVER, TO BE EFFECTIVE, NEEDS TO FULLY INFORM THAT PERSON OF THE CONSEQUENCES OF THAT WAIVER, APPLETS JUST READ IT, SO WE ARE REAL CLEAR ON THIS. "ARE YOU WILLING TO WAIVE ANY CONFIDENTIALITY OR ANY PRIVILEGE THAT MAY EXIST BETWEEN

YOU AND MR. KOCH?" "YES, SIR, I WILL WAIVE THAT." THAT IS IT.

THAT IS A WAIVER, THOUGH. ASSUMING THAT SKALNICK WAIVED IT, IS YOUR ARGUMENT THAT COOPER SHOULD HAVE BEEN APPRISED OF THIS CONFLICT THAT KOCH HAD WITH SKALNICK?

ABSOLUTELY.

BECAUSE THAT IS DIFFERENT IF SKALNICK WAIVED IT. IT DOESN'T MATTER IF IT IS A VALID WAIVER AS TO SKALNICK. CONTINUE WITH THAT, AS FAR AS HOW IS IT, THEN THAT, COOPER, WAS HE NOT APPRISED OF THE KOCH REPRESENTTITION AND -- REPRESENTATION, AND --

LET'S TAKE THEM ONE AT A TIME. ON THE SKALNICK WAIVER, IT IS AN INADEQUATE WAIVER T DOESN'T COME FROM MR. KOCH. TO MR. KOCH. AND THERE IS NO DESCRIPTION OF THE CONSEQUENCES, AND LATER IN THE TRANSCRIPT HERE, MR. SKALNICK TELLS MR. CRIEDER THAT HE IS REPRESENTED BY COUNSEL, MR. POPE, SO HIS LAWYER ISN'T EVEN THERE. NOW LET'S GO WITH THE COOPER WAIVER. MR. KOCH TESTIFIES THAT HE TOLD MR. COOPER ABOUT SKALNICK AND MR. COOPER WAS FINE WITH IT, THAT ALL OCCURRED OUTSIDE THE HEARING OF THE JUDGE. THE TRIAL JUDGE WAS NOT ADVISED OF THIS, AND MR. KOCH ACKNOWLEDGES THAT HE DID NOT TELL MR. COOPER, THEN, THAT THERE WOULD BE ANY LIMITATIONS ON HIS REPRESENTATION OF MR. COOPER, AS A RESULT OF THAT CONFLICT. THERE IS NOTHING ON THIS RECORD THAT INDICATES THAT RICHARD COOPER ENGAGED IN A KNOWING WAIVER OF THE SKALNICK CONFLICT TO MR. KOCH. AND TO THE CONTRARY MR. KOCH TESTIFIES UNEQUIVOCALLY, I DID NOT TELL HIM THAT THERE WOULD BE ANY LIMITATION ON THE REPRESENTATION, AND THERE CLEARLY WAS A LIMITATION ON THE REPRESENTATION. MR. KOCH WAS NOT GOING TO GO BACK INTO THAT MAY 1981 INCARCERATION OF MR. SKALNICK AND DELVE INTO THE TIMES AND THE CASES THAT MR. SKALNICK TESTIFIED FOR THE STATE, FROM MAY OF '81 UNTIL JUNE OF 1930. IN FACT, MR. KOCH AND MR. CROW, AFTER THE SUPPRESSION HEARING, HAD A CONVERSATION, AND THE CONVERSATION WAS ABOUT MR. KOCH'S REPRESENTATION OF SKALNICK, AND THE FACT THAT MR. KOCH HAD NOT GONE BACK INTO THAT MAY 1981 INCARCERATION THROUGH JUNE. BUT HAD ADAMANTLY LIMITED HIS QUESTIONS, IN THAT SUPPRESSION HEARING, TO NOVEMBER OF '82 FORWARD.

WHAT WAS THE EXTENT OF KOCH'S REPRESENTATION OF SKALNICK? WASN'T IT JUST HE REPRESENTED HIM DURING A MOTION HEARING?

THAT HE FILES IN OCTOBER OF 1982, AND HE IS ASKING, AND HE REPRESENTS --

I -- A MOTION TO RESENTS.

SKALNICK HAD GOTTEN A SENTENCE FOR GRAND THEFT AND HE WAS A CONTRACT INVESTIGATOR, AND HE WANTED TO GET A PRIVATE INVESTIGATOR'S LICENSE, SO THAT IS WHY HE WANTED TO GET THAT 60-MONTH PROBATION REDUCED DOWN, AND MR. KOCH FILED A PLEAD NOT GUILTY WHICH HE SAID THAT MR. SKALNICK HAD HAD NO PRIOR INVOLVEMENT WITH LAW ENFORCEMENT. AND OF COURSE MR. SKALNICK'S PRIOR INVOLVEMENT WITH LAW ENFORCEMENT IS ALL ABOUT WHAT THIS CASE IS ABOUT.

BUT THIS OCCURRED MONTHS BEFORE KOCH REPRESENTED YOUR CLIENT. IS THAT CORRECT?

HE STARTS REPRESENTING MY CLIENT IN MAR --.

HE REPRESENTED SKALNICK AT THAT TIME?

NO. MR. POPE HAD COME IN AND WAS NOW REPRESENTING MR. SKALNICK, AND I SUBMIT TO YOU, YOUR HONOR, THAT THE TRIAL JUDGE FOCUSED ON THE SHORT PERIOD OF TIME IN THAT REPRESENTATION, IN DENYING THIS CLAIM, AND I WOULD SUBMIT TO YOU THAT THE SHORT

PERIOD OF REPRESENTATION IS IRRELEVANT TO THE ANALYSIS. WHAT IS IMPORTANT TO THE ANALYSIS IS THAT MR. KOCH KNEW, AND THIS RECORD COMPELS THE CONCLUSION THAT MR. KOCH KNEW THAT WHAT HE HAD LEARNED IN THE COURSE OF THAT REPRESENTATION PROHIBITED HIM FROM GOING BACK INTO THAT SNITCHING ACTIVITY PRIOR TO THAT, THE BEGINNING OF THAT REPRESENTATION OR ACTUALLY THE END OF THAT REPRESENTATION, IN NOVEMBER OF 1982.

IS THIS A CORRECT REPRESENTATION THAT KOCH REPRESENTS SKALNICK MONTHS BEFORE HE REPRESENTED YOUR CLIENT, AND HE ONLY REPRESENTED HIM IN ONE HEARING. THAT WAS THE EXTENT OF HIS REPRESENTATION OF SKALNICK.

THERE IS NO QUESTION ABOUT THAT, YOUR HONOR.

HUH?

THERE IS NO QUESTION ABOUT THAT, BUT I WOULD SUBMIT TO YOU THAT THE TIME INVOLVED IS NOT NEARLY AS IMPORTANT AS WHAT WAS INVOLVED AND THE FACT THAT THERE IS NO QUESTION IN THIS RECORD, THAT MR. KOCH LIMITED HIS TESTIMONY FROM NOVEMBER, MR. SKALNICK'S TESTIMONY TO SNITCHING ACTIVITIES, FROM NOVEMBER 1982 FORWARD.

IS THAT YOUR CLAIM THAT YOU HAVE SHOWN ACTUAL PREJUDICE THROUGH THAT? OR IS IT YOUR CLAIM THAT YOU DON'T HAVE TO SHOW?

SURE. MY CLAIM IS THAT I DON'T HAVE TO SHOW. I HAVE TO SHOW SOME EFFECT. OKAY. THAT IS THE TEST, THE ELEVENTH CIRCUIT TEST. IT CAN'T BE JUST CONFLICT IN THE AIR. OKAY. IT HAS GOT TO HAVE SOME EFFECT, AND THE MOST DEVASTATING EFFECT IT HAD, AND I WOULD SUBMIT TO YOU THAT THIS CONCLUSION IS COMPELLED ON THIS RECORD, THAT MR. KOCH DID NOT GO BACK BEFORE NOVEMBER OF '82, BECAUSE OF HIS REPRESENTATION OF MR. SKALNICK. THOUGH IT COMPELS THAT, A, THE FACT THAT HE DIDN'T DO IT, B THAT, HE HAD A CONVERSATION WITH MR. CROW, WHO IS A PROSECUTOR, OF COURSE, OUTSIDE OF THE PRESENCE OF THE JUDGE, IN WHICH THEY ARE DISCUSSING HOW THEY ARE GOING TO HANDLE THAT. THAT IS TO HANDLE YOU REPRESENTED MR. SKALNICK IN NOVEMBER 1982, AND YOU HAVEN'T TOLD THE TRIAL JUDGE ANYTHING ABOUT ALL OF THAT TESTIMONY THAT WENT BEFORE.

YOU HAVE GOT SOME OTHER ISSUES HERE. DON'T GET TIED UP --

I DO. THAT IS MY MOST IMPORTANT ISSUE THOUGH, SO I APPRECIATE KNOWING THE COURT'S VIEWS.

NOW, IF THAT IS YOUR MOST IMPORTANT ISSUE, LET'S GO TO CRIDER'S CONFLICT.

MR. CRIDER'S CONFLICT, YOUR HONOR, WAS FORMERLY IN THE STATES ATTORNEYS OFFICE AND HE HAD A DISCUSSION WHILE HE WAS IN THE STATES ATTORNEYS OFFICE, AND HE HAD NO BUSINESS BEING ON THIS CASE, AND THAT IS OUR PROOF SFR MR. CRIDER.

WHAT IS THE TESTIMONY ABOUT THIS --

CRIDER TESTIFIES TO IT AND SAYS IT IS NOT SIGNIFICANT. IN HIS VIEW, IT WAS NOT A MATTER OF ANY GRAVE CONCERN.

I THOUGHT THE TESTIMONY WAS THAT HE HAD NO CONTACT WITH THIS CASE, NO INVOLVEMENT WITH THIS CASE.

I COULD BE MISTAKEN ON THAT BUT I DON'T THINK I AM. I THINK HE DID HAVE SOME, WHAT HE DESCRIBED AS MINIMAL.

BUT HE HAD LEFT, CRIDER HAD LEFT THE STATE ATTORNEYS OFFICE, BY THE TIME THAT COOPER BECAME A SUSPECT IN THE CASE, HAD HE NOT?

YES, SIR. I AM NOT SURE OF THAT, YOUR HONOR, BUT I WILL SAY THAT CRIDER WAS HEARD BY THE COURT, AND IT IS DISTINGUISHABLE FROM THE KOCH CONFLICT IN THAT WAY.

AND IT WAS CRIDER'S TESTIMONY THAT HE HAD NO KNOWLEDGE OF COOPER'S CASE AT ALL. IS THAT CORRECT?

NO. MY RECOLLECTION OF THE RECORD, AND I COULD BE MISTAKEN ON THIS, YOUR HONOR, BUT THAT IT WAS VERY, VERY MINIMAL. IT WAS SIMPLY A DISCUSSION, AND IT WAS NOT OF ANY CONSEQUENCE. I COULD BE WRONG ON THAT BUT I AM PRETTY SURE THAT'S RIGHT. OKAY. MR. COOPER'S EFFORTS TO GET TO THE BOTTOM OF THE SKALNICK QUESTION HAVE BEEN FRUSTRATED BY THE ACTIONS OF THE PROSECUTOR AND THE TRIAL JUDGE IN THE 119 LITIGATION IN THIS CASE. MR. COOPER SUBMITTED A CHAPTER 119 REQUEST FOR DOCUMENTS, EVIDENCING SKALNICK'S SNITCHING ACTIVITIES. THE STATE PRODUCED TWO KINDS OF DOCUMENTS. 30,000 DOCUMENTS AND THEN 8,000 DOCUMENTS TENERRED TO THE JUDGE EVEN -- DOCUMENTS ABOUT SNITCHING, WHICH THE JUDGE EVEN TENERRED AND -- EVEN TENDERED, AND THEY ARE HERE, AND I WOULD ASK YOU TO REVIEW THOSE AT HIS REQUEST, AND IN PARTICULARLYITY, THEY DISCUSS -- IN PARTICULARITY THEY DISCUSS WHY THEY WERE REQUIRED. IT IS OUR CONTENTION THAT THE STATE NEVER REQUIRED A PARTICULAR WRITTEN EXPLANATION, UNDER CHAPTER 119, WHY ANY EXEMPTION APPLIES TO ANY DOCUMENT IN THIS CASE, EITHER THOSE REDACTED OR THOSE PROVIDED COUNSEL, AND PROVIDED TO COUNSEL, OR THOSE TENDERED TO THE COURT IN CAMERA. THE STATE MANDATED THAT THE REDACTED DOCUMENTS, THAT THE STATE MUST STATE BASIS FOR THE EXEMPTION CLAIM AND THE REASON WHY THE EXEMPTION APPLIES WITH PARTICULARITY, AND WE HAVE SUGGESTED THAT, IN ORDER TO ENABLE THE COURTS OF THIS STATE TO DO THEIR JOB, THIS COURT SHOULD REQUIRE THE STATE TO PROVIDE THAT SAME KIND OF INFORMATION, WHEN IT TENDERS DOCUMENTS FOR IN CAMERA REVIEW. AND MOST IMPORTANTLY, THE STATE MUST IDENTIFY WHICH EXEMPTION APPLIES TO WHICH DOCUMENT. YOU CANNOT MAKE ANY SENSE OF WHAT THE STATE HAS GIVEN US.

BUT ISN'T THE SAME ISSUE LITIGATED IN YOUR PETITION FOR MANDAMUS AND THE VERY IDENTICAL ISSUE, AND YOU WERE DENIED RELIEF ON THAT?

YES, BUT I DON'T THINK THAT CONCLUDES OUR COMING FORWARD HERE IN THIS CASE, AND THE STATE HAS NOT ARGUED THAT, AND MY UNDERSTANDING OF THE MANDAMUS LAW, YOUR HONOR, IS THAT A SIMPLE DENIAL WILL NOT PRECLUDE ME BRINGING AFFORD LETTER LATER, BECAUSE IT IS NOT DETERMINATION ON THE MERITS. IT IS SIMPLY THAT THE COURT, IN A 4-TO-3 DECISION, FELT THAT MANDAMUS WAS NOT APPLICABLE, EITHER. IT IS EXTRAORDINARY WRIT. MAY NOT HAVE FELT IT WAS A CRITICAL DUTY, ALL OF THOSE ISSUES. I DON'T THINK I AM IN ANY WAY PRECLUDE AND THE STATE HAS NOT SUGGESTED.

THAT WAS APPLIED FOR WHILE THE PROCEEDINGS WERE PENDING BEFORE THE TRIAL COURT.

YES. EXACTLY. IT WAS. THIS IS A VERY IMPORTANT ISSUE IN THIS CASE. THOSE DOCUMENTS CANNOT BE ANALYZED BY THE TRIAL JUDGE NOR HIS DETERMINATION OF WHICH IS EXEMPT AND WHICH IS NOT BE REVIEWED BY YOU. YOU CAN GO BACK THERE AND LOOK AT THOSE DOCUMENTS FROM NOW FOR THE REST OF THE YEAR AND HAVE THE WHOLE STAFF HERE TO LOOK AT THEM, AND NOBODY IS GOING TO BE ABLE TO TELL WHICH EXEMPTION APPLIES TO WHICH DOCUMENT. YOU ARE SIMPLY TOLD THERE ARE, HERE IS A CASE, AND THERE ARE FILES IN THIS CASE HERE OR DOCUMENTS FROM THIS CASE, AND HERE IS SIX EXEMPTIONS THAT IS APPLIED TO THAT CASE.

CHIEF JUSTICE: IF YOU WANT TO SAVE YOUR REBUTTAL TIME.

THANK YOU, YOUR HONOR. GOOD MORNING.

GOOD MORNING, JUSTICES I I AM CAROL DITTMAR REPRESENTING THE RESPONDENT MICHAEL MOORE AND THE STATE OF FLORIDA. THE COURT DENIED THAT EVIDENTIARY HEARING RULING AND THAT WAS CORRECT AND SUPPORTED BY THE EVIDENCE AT THE HEARING.

WHAT WAS OUR STANDARD OF REVIEW ON THAT? IS THERE DEFERENCE TO FACTUAL FIND THATION WE ARE GOING TO BE LOOKING AT -- FINDINGS THAT WE ARE GOING TO BE LOOKING AT, OR DO WE LOOK AT IT AS A MIXED QUESTION OF FACT AND LAW, CONSTITUTIONAL ISSUES?

THE FACTUAL FINDINGS ARE ENTITLED TO DEFERENCE BY THIS COURT AND THE LEGAL CONCLUSIONS ARE REVIEWED DE NOVO.

TELL US ABOUT CRIDER FIRST OF ALL.

CRIDER, AND ACTUALLY CRIDER'S ALLEGED CONFLICT IS DISCUSSED IN THE TRIAL TESTIMONY MORE THAN IT IS DEVELOPED AT THE EVIDENTIARY HEARING. WHAT HAPPENED IS ON THE RECORD IN THE DIRECT APPEAL RECORD. THE JUDGE, AT ONE POINT, ASKED CRIDER, WEREN'T YOU WITH THE STATE ATTORNEYS OFFICE BACK WHEN THESE MURDERS OCCURRED? NOW, IT WAS MORE THAN SIX MONTHS AFTER THE MURDERS BEFORE THEY DEVELOPED COOPER AND THE OTHER DEFENDANTS AS SUSPECTS, SO THERE WAS A GREAT, THERE WAS EXTENDED TIME WHEN, AFTER THE CRIME HAD OCCURRED, THAT THEY DID NOT HAVE THE NAMES AND DIDN'T HAVE ANY INFORMATION ABOUT THE SUSPECTS. CRIDER RESPONDED THAT HE HAD LEFT OF THE STATE ATTORNEYS OFFICE AFTER THAT TIME, BUT THAT HE NEVER HAD ANYTHING TO DO WITH THE INVESTIGATION, AND NEVER WAS INVOLVED IN ANY OF THE INVESTIGATION FROM THE STATE ATTORNEYS OFFICE, SO HE DIDN'T HAVE ANY KNOWLEDGE ABOUT IT, DID NOT FEEL LIKE IT WAS A CONFLICT, AND THERE WAS NOTHING ADDITIONAL PURSUED AT THAT TIME. AT THE EVIDENTIARY HEARING, CRIDER TESTIFIED THAT HE LEFT THE STATE ATTORNEYS OFFICE IN FEBRUARY 1983, WHICH WOULD HAVE BEEN ACTUALLY A COUPLE OF MONTHS BEFORE THE MURDERS, BUT THE ALLEGATION IN THE POSTCONVICTION MOTION WAS THAT THIS WAS A CONFLICT OF INTEREST, BECAUSE CRIDER REMAINED FRIENDLY WITH HIS PRIOR ASSOCIATES IN THE STATE ATTORNEYS OFFICE AND WITH SOME OF THE LAW ENFORCEMENT OFFICIALS INVOLVED, SO THERE IS NO REAL ALLEGATION. THERE IS CERTAINLY NEVER ANY PROOF THAT CRIDER HAD ANY CORRECT INVOLVEMENT WITH THE INVESTIGATION OR ANY KNOWLEDGE OF --

WAS THERE ANY EVIDENCE OR TESTIMONY SUBMITTED THAT HE HAD ANY CONVERSATIONS WITH SOMEBODY ASSIGNED TO THE CASE OR ANYTHING LIKE THAT?

NO.

SO --

I DON'T RECALL ANYTHING LIKE THAT.

IT SEEMS TO ME THE QUESTION AS TO WHETHER CRIDER WAS ACTUALLY EMPLOYED WITH THE STATE ATTORNEYS OFFICE WHEN THIS MURDER INVESTIGATION WAS ONGOING, WOULDN'T BE SOMETHING THAT WE WOULDN'T HAVE TO BE GUESSING ABOUT. IT IS A DATE.

RIGHT.

AND THE ACTUAL DEFENSE ATTORNEY TESTIFIED UNDER OATH AT THE EVIDENTIARY HEARING THAT HE HAD, IN FACT, LEFT BEFORE THE MURDER HAD EVEN OCCURRED?

IN FEBRUARY 1983 AND THE MURDERS WERE IN -- I AM SORRY, THE MURDERS WERE IN JUNE 1982. I MISSPOKE ON THAT. SO HE WAS WORKING THERE WHILE THE MURDERS WERE ONGOING. WHILE THEY OCCURRED. BUT HE HAD LEFT BEFORE COOPER WAS ACTUALLY DEVELOPED WITH THE STATE ATTORNEYS OFFICE. IT WAS ABOUT THE TIME THAT COOPER WAS IDENTIFIED BY LAW ENFORCEMENT, AND THEY WERE TALKING TO THE OTHER DEFENDANTS IN DEVELOPING THAT INFORMATION DURING JANUARY AND FEBRUARY OF '83. SO IT WAS SIMILAR TO THE TIME BUT, AGAIN, HE WAS NOT INVOLVED IN THE INVESTIGATION.

AND IT WAS DEMONSTRATED IN THE ORIGINAL TRIAL RECORD THAT THIS WAS DISCLOSED TO THE DEFENDANT.

YES.

IS THAT CORRECT?

WELL, I DON'T RECALL THAT SPECIFICALLY, WHERE IT IS IN THE RECORD OF THE DIRECT APPEAL. I AM ASSUMING THAT THE DEFENDANT WAS PRESENT IN THE COURT, BUT I KNOW THAT IT WAS A COLLOQUY BETWEEN THE TRIAL JUDGE AND THE DEFENSE ATTORNEYS, SO I AM ASSUMING THAT THE DEFENDANT WAS PRESENT, BUT I DON'T RECALL SPECIFICALLY WHEN THAT OCCURRED, IN TERMS OF WHAT THE TRANSCRIPT REFLECTS.

IS THERE A CLAIM, JUST FROM MR., SO MR. HANLON CAN ENLIGHTEN US, THAT THE DEFENDANT DID NOT KNOWINGLY WAIVE, LET'S ASSUME THERE WAS A CONFLICT, BECAUSE I KNOW WE DO HAVE CASES ABOUT, THAT SOMEBODY IS IN THE STATE ATTORNEY OR PUBLIC DEFENDERS OFFICE. I MEAN THEY ARE PRESUMED TO KNOW WHAT IS GOING ON IN THE REST OF THE OFFICE, THAT HE DID OR DIDN'T WAIVE IT? IN OTHER WORDS WHAT WAS THE TESTIMONY AT THIS EVIDENTIARY HEARING? DID MR. CRIDER SAY THAT HE DID INFORM HIS CLIENT AND THE CLIENT KNOWINGLY WAIVED ANY POTENTIAL --

THEY DIDN'T DISCUSS IT AT THE EVIDENTIARY HEARING, PARTICULARLY AS TO A WAIVER FROM COOPER, BECAUSE, AGAIN, IT WAS DISCUSSED ON THE RECORD FROM THE DIRECT APPEAL, AND CRIDER WAS SAYING THAT HE WAS, THERE IS NO EVIDENCE THAT SHOWS EXACTLY WHEN THE STATE ATTORNEYS OFFICE REALLY UNDERTOOK ANY TYPE OF INVESTIGATION. SO WE DON'T EVEN KNOW WHEN THEY WOULD, WHEN YOU SAY HE WOULD BE FAMILIAR WITH THINGS HAPPENING IN THE OFFICE --

I AM NOT SAYING HE WOULD BE FAMILIAR. I THOUGHT YOU SAID THAT THERE WAS A GENERAL PRESUMPTION THAT SOMEBODY WAS EMPLOYED INEST PUBLIC DEFENDERS OR STATE ATTORNEYS OFFICE, EVEN IF THEY HAVEN'T WORKED ON THE CASE THAT, IT IS THE SAME KIND OF CONFLICT.

THEY HAVE THAT KNOWLEDGE. THERE JUST IS NO, I THINK TO THE EXTENT YOU HAVE THAT PRESUMPTION, IT IS REBUTTED PIE CRIDER SAYING I WAS NOT INVOLVED IN THE INVESTIGATION. I DIDN'T HAVE ANYTHING TO DO WITH THE CASE, WHEN HE IS TELLING THE TRIAL JUDGE THAT, SO TO THE EXTENT THAT THERE COULD BE SUCH A PRESUMPTION, I THINK WE HAVE THE EVIDENCE OR THE STATEMENTS FROM THE ATTORNEY THAT REFUTES THAT. BECAUSE HE WAS NOT. NOW --

SO ALL WE HAVE, AS FAR AS CRIEDER CONCERNED, IS THE EMPLOYMENT BY THE STATE ATTORNEYS OFFICE.

THAT'S CORRECT.

AT A TIME AFTER THIS MURDER WAS COMMITTED.

THAT'S CORRECT. THAT'S CORRECT.

OKAY. WHILE IT WAS UNDER INVESTIGATION.

YES.

BUT NO DEMONSTRATION OF ANY KNOWLEDGE.

LET'S GO ON TO THE OTHER --

AS TO MR. KOCH, THERE HASN'T BEEN ANY --

THERE IS A STARTING POINT HERE THAT THERE IS A CONFLICT, RIGHT? THIS IS THAT IT IS UNDISPUTE ODD THIS RECORD THAT MR. KOCH HAD PREVIOUSLY REPRESENTED A KEY, THE KEY? A KEY STATE WITNESS AGAINST THE DEFENDANT HERE, AND SO THAT IS A CONFLICT, ISN'T IT?

WELL THAT, IS A POTENTIAL CONFLICT. I DO NOT BELIEVE THAT IS AN ACTUAL CONFLICT, WHEN YOU HAVE A SUCCESSIVE REPRESENTATION SITUATION, AND THAT IS WHAT THE CASE LAW HAS DEMONSTRATED. IT IS NOT, AS A MATTER OF LAW, AN ACTUAL CONFLICT. IT IS A POTENTIAL CONFLICT, WHICH MAY GIVE RISE TO AN ACTUAL CONFLICT, IF THERE IS SOME COMPETING INTERESTS INVOLVED. IN THIS CASE, FIRST OF ALL, I CHALLENGED THE CHARACTERIZATION OF SKALNICK AS A KEY WITNESS BECAUSE HE WAS NOT. HE WAS USED ONLY IN PENALTY PHASE, BASICALLY CORROBORATED COOPER'S OWN CONFESSION TO LAW ENFORCEMENT, WHICH HAD BEEP USED AT THE GUILT PHASE.

THAT WAS PRETTY DAMAGING TESTIMONY THAT HE GAVE. DID HE NOT, I MEAN, DIDN'T HE DESCRIBE A VERY CALLOUS ATTITUDE HERE, ON THE PART --

YES, HE DID, BUT AS FAR AS BEING A WIT KNOWS WHO -- A WITNESS WHO ESTABLISHES MITIGATING OR AGGRAVATING FACTORS, HE DID NOT. HE JUST HAD CORROBORATING TESTIMONY THAT HAD ALREADY BEEN GIVEN IN THE GUILT PHASE.

GIVE US THE CHRONOLOGY OF THIS --

THE REPRESENTATION?

RIGHT. AND THE TRIAL JUDGE HAS A FOOTNOTE SAYING THAT THERE WAS EVIDENCE, A STATEMENT BY KOCH THAT THE DEFENDANT WAS ADVISED OF THIS. WHAT WAS THE STATE OF THE RECORD ON THAT?

A RECORDER -- AN ORDER AND CHARTLY THEREAFTER THAT HE DISCLOSED THE POTENTIAL CONFLICT TO THE DEFENDANT AND THE DEFENDANT CONSENTED TO IT?

RIGHT. THAT WAS AT THE EVIDENTIARY HEARING. STARTING CHRONOLOGICALLY, SKALNICK, IN OCTOBER 1982, KY KOCH FILED A MOTION FOR COMMITTEE CONSIDERATION, AS WAS DISCUSSED PREVIOUSLY IN ONE OF SKALNICK'S CASES AND CAME UP FOR CONSIDERATION. BEFORE THAT MOTION CAME TO BE HEARD, ANOTHER ATTORNEY CAME IN AND, POPE, TOOK OVER SKALNICK'S REPRESENTATION, SO KOCH, AT THE TIME OF THE EVIDENTIARY HEARING, HE HAD BEEN SHOWN THE MOTION TO RECONSIDER THAT HE HAD FILED AND SAID YES, THAT IS MY SIGNATURE. I DID THAT PLEADING, BUT HE HAD NO MEMORY OF HAVING REPRESENTED SKALNICK. AT THE TIME OF THE, SKALNICK'S DEPOSITION, WHICH WAS IN NOVEMBER 1983,, ATTORNEY CRIDER ASKED SKALNICK ABOUT KOCH'S REPRESENTATION, AND IT IS AT THAT POINT THAT SKALNICK WAIVED ANY POSSIBLE CONFLICT AND SAID HE DIDN'T HAVE A PROBLEM AT ALL WITH KOCH REPRESENTING COOPER IN THE MATTER, AND I BELIEVE THAT HE WAS ADVISED BY CRIDER THAT, OF KOCH'S INVOLVEMENT, AND HE WAIVED ANY POTENTIAL CONFLICT, AND, REALLY, THE POTENTIAL FOR PREJUDICE HERE WOULD BE PREJUDICE TO SKALNICK AND NOT TO COOPER. IT WOULD BE TO COOPER'S ADVANTAGE.

I AM HAVING DIFFICULTY WITH THAT, BECAUSE IF SKALNICK TESTIFIES AGAINST COOPER AT THE PENALTY PHASE, AND WE HAVE GOT A LAWYER THAT IS NOW REPRESENTING COOPER, BUT WHO, ALSO, REPRESENTED THIS WITNESS, WHO IS NOW TESTIFYING AGAINST COOPER, AND SO THE INFERENCE OR THE ORDINARY ARGUMENT IS, IS IT THE LAWYER IS GOING TO GO EASY ON THIS WITNESS, WHO HAS ALSO BEEN HIS CLIENT, AND SO I AM --

FIRST OF ALL, YOU HAVE GOT --

IN OTHER WORDS HELP ME WITH THAT PROPOSITION HERE, AS FAR AS IF THERE IS ANY SHOWING THAT, IN FACT, KOCH DID NOT CROSS-EXAMINATION THIS WITNESS WHO TESTIFIED AGAINST COOPER, OR WITH HELD SOMETHING THAT WAS THERE, YOU KNOW, TO BE USED AGAINST SKALNICK. -- TO BE USED AGAINST COOPER. DID HE -- HE TESTIFIED THAT THERE WAS NO CONFLICT IN DOING SO.

SO HE TESTIFIED THAT THERE WAS NO CONFLICT OF ANYTHING, NO PREJUDICE ACTUALLY ENYOURING AGAINST HIS PRESENT CLIENT.

BUT MORE IMPORTANTLY THE RECORD SHOWS THAT, WHERE THEY ARE CLAIMING THERE WAS AN ADVERSE EFFECT WAS AT THE SUPPRESSION HEARING, AND THE REASON FOR THAT TESTIMONY WAS THAT THE DEFENSE HAD FILED A MOTION TO EXCLUDE ANY TESTIMONY FROM SKALNICK ALLEGING THAT HE HAD BEEN A STATE WITNESS THAT, HE HAD BEEN PLANTED BY THE STATE TO GET THIS INFORMATION. AT THE SUPPRESSION HEARING, THE LINE OF QUESTIONING THAT IS DIRECTED TO SKALNICK IS ABOUT WHAT, HIS SNITCHING ACTIVITIES, BASICALLY, DURING HIS INCARCERATION FROM NOVEMBER 19 WILL 2 THROUGH THE PRESENT TIME -- FROM NOVEMBER, 1982, TO THE PRESENT TIME, WHICH IS 1984. SO HE HAD BEEN IN THE COUNTY JAIL FOR OVER A YEAR AND HE TALKED ABOUT HOW HE HAD PROVIDED INFORMATION ON 28 DIFFERENT INDIVIDUALS DURING THAT TIME PERIOD. HE WAS NOT ASKED AND THIS IS WHAT THE DEFENSE HAS POINTED TO, HE WAS NOT ASKED ABOUT ACTIVITIES PRIOR TO NOVEMBER OF 1982. HOWEVER, AT PENALTY PHASE IN THE TRIAL, THAT LIMITATION DID NOT OCCUR, AND WHEN KY KOCH TESTIFIED AT THE EVIDENTIARY HEARING, HE SAID THAT HE HAD REVIEWED THE SUPPRESSION TESTIMONY. HE NOTED THAT THERE WAS THE LIMITATION THAT HE WAS ONLY ASKED ABOUT NOVEMBER 1982, BUT HE SAID YOU KNOW, IT WAS NOT LIMITED AT THE PENALTY PHASE. I DIDN'T LIMIT HIM TO THAT TIME. I ASKED HIM HIS HISTORY OF EVER PROVIDING INFORMATION TO LAW ENFORCEMENT, AND IT WAS BASICALLY ABOUT THE SAME. HE SAID ABOUT 30 DEFENDANTS. AND THE SUGGESTION THAT SKALNICK HAD TESTIFIED IN CASES PRIOR TO THE NOVEMBER 1982 INCARCERATION, HAS NO SUPPORT IN THIS RECORD, BECAUSE THERE IS NO EVIDENCE OF SKALNICK EVER TESTIFYING IN ANY PRIOR CASES, SO WE REALLY DON'T HAVE THE INFORMATION THAT THERE WAS ANYTHING PRIOR TO NOVEMBER OF 1982, THAT WAS DAMAGING TO SKALNICK OR HELPFUL TO COOPER, AND IF WE DID, WE HAVE THE RECORD FROM THE PENALTY PHASE, WHERE THIS LIMITATION WAS NOT EMPLOYED BY DEFENSE COUNSEL, SO TO THE EXTENT THEY ARE SAYING THE ONLY REASON HE DIDN'T GO TO PRIOR ACTIVITIES WAS BECAUSE OF THIS ALLEGED CONFLICT WITH THE PRIOR REPRESENTATION, AND THAT IS REFUTED BY THE FACT THAT HE ASKED ABOUT IT AT PENALTY PHASE. THE --

WAS KY KOCH, DID KY KOCH REPRESENT THE DEFENDANT AT THE MOTION TO SUPPRESS HEARING?

YES. REPRESENTED COOPER.

SO HE ALSO, AND HE ALSO CROSS-EXAMINED SKALNICK BOTH TIMES THAT, BOTH AT THE SUPPRESSION HEARING AS WELL AS --

AND AT THE PENALTY PHASE.

-- AT THE PENALTY PHASE?

YES.

DID HE EXPLAIN A REASON AS TO WHY THERE WAS A LIMITATION TO ONE AND NOT THE OTHER?

HE SAID THAT HE COULD NOT RECALL. YOU KNOW, THAT READING THE QUESTIONS, HE SAW THAT THEY WERE DIRECTED TO THAT TIME FRAME, BUT HE, AT THE POSTCONVICTION HEARING, DID NOT RECALL IF THERE WAS A REASON THAT HE WAS DOING THAT INTENTIONALLY OR IF THAT WAS JUST INFORMATION THAT HE HAD. HE SAID THAT HE KNEW ALL ABOUT SKALNICK, AND THAT HE AND CRIDER HAD DISCUSSED STRATEGICALLY HOW TO CROSS-EXAMINE SKALNICK AT THE TRIAL. THEY ANTICIPATED THAT SKALNICK WAS GOING TO BE USED IN THE GUILT PHASE OF THE TRIAL, AND IN FACT, THE PROSECUTOR TESTIFIED AT THE EVIDENTIARY HEARING, THAT HE HAD INTENDED ORIGINALLY, TO USE SKALNICK IN GUILT PHASE, BUT WHEN HE SAW HOW PREPARED THE DEFENSE WAS, TO CROSS-EXAMINE, AND BASICALLY THEY HAD THIS TWO-INCH-THICK STACK OF DOCUMENTS THEY WERE GOING TO USE AND THEY WERE VERY MUCH READY TO CROSS-EXAMINE SKALNICK, THAT THEY DECIDED THEY DIDN'T REALLY WANT TO PUT HIM ON IN GUILT PHASE, SO THEY USED HIM ONLY AS A PENALTY-PHASE WITNESS.

WOULD YOU ADDRESS THE PUBLIC RECORDS REQUEST. WHAT IS YOUR RESPONSE THERE?

I THINK THAT THE PROCEDURES THAT ARE USED BY THE STATE IN SUBMITTING THE DOCUMENTS FOR AN IN CAMERA INSPECTION IN THIS CASE, ARE EXACTLY THE PROCEDURES THAT THIS COURT HAS OUTLINED IN PRIOR CASES. THEY HAVE BEEN UPHOLD. THE PINELLAS COUNTY STATE ATTORNEYS OFFICE HAS, IN NUMEROUS CAPITAL CASES, DONE THESE SAME PROCEDURES. THE DIFFICULTY IN THIS CASE IS BECAUSE SKALNICK WAS INVOLVED IN SO MANY CASES, IT, THERE IS A GREAT DEAL OF RECORDS GENERATED, SO YOU HAVE MORE VOLUME THAN YOU HAVE WITH OTHER RECORDS. I THINK THAT IS ONE OF THE REASONS FOR THE DELAY IN GETTING THIS CASE WHERE IT IS NOW, THIS POSTCONVICTION MOTION FILED IN 1989, AND A SIGNIFICANT PORTION OF THE DELAY, WE DIDN'T START HAVING THE EVIDENTIARY HEARING UNTIL 1999. DURING THAT TIME, WE WERE DOING PUBLIC RECORDS LITIGATION. THERE WAS A GREAT DEAL OF DOCUMENTS THAT WERE ACTUALLY DISCLOSED, MANY OF THEM WERE REDACTED, AND WHEN THE DEFENSE IS ASKING FOR THESE INDEX THAT THEY WANT FOR ALL THE DOCUMENTS THAT WERE ADMITTED FOR AN IN CAMERA REVIEW, THEY ASKED FOR, IN THE TRIAL COURT THEY ASKED FOR THE SAME TYPE OF INVENTORY ON DOCUMENTS THAT HAD PROVIDED, BEEN PROVIDED TO THEM BUT WERE REDACTED, AND AT ONE OF THE HEARINGS, THE TRIAL JUDGE NOTED YOU CAN LOOK AT THIS DOCUMENT AND TELL ON THE FACE OF THE DOCUMENT WHAT IT IS AND WHAT HAS BEEN REDACTED OUT. IT MIGHT BE A PHONE NUMBER OR LAW ENFORCEMENT PERSONAL INFORMATION, BUT IT IS APPARENT FROM LOOKING AT THE FACE OF THE RECORD, SO THE JUDGE ACTUALLY GAVE THE DEFENSE, THEY SAID YOU KNOW, YOU ARE NOT REALLY ENTITLED TO THIS, BUT IF YOU HAVE A COPY OF A PAPER, A DOCUMENT THAT HAS BEEN REDACTED AND YOU DON'T UNDERSTAND WHAT HAS BEEN REDACTED OUT OF IT AND YOU WANT MORE INFORMATION, THEN YOU HAVE UNTIL A CERTAIN NUMBER OF DAYS TO IDENTIFY THOSE PARTICULAR DOCUMENTS TO THE COURT, AND I WILL GET MORE INFORMATION FROM THE STATE ABOUT THOSE PARTICULAR DOCUMENTS, AND THE DEFENSE NOT DO THAT. THEY DID NOT COME FORWARD WITH ANY DOCUMENTS THEY HAD IN THEIR POSSESSION THAT THEY HAD ANY FURTHER QUESTIONS ABOUT. AND I THINK, WHEN THIS COURT LOOSE AT THE DOCUMENTS, THE EIGHT BOXES THAT HAVE BEEN SUBMITTED FOR IN CAMERA REVIEW, IT IS THE SAME SITUATION. THEY WERE IDENTIFIED BY THE STATE. THE BASIS OF THE EXEMPTION WAS CITED. AND THE ONLY THING, THE TYPE OF INFORMATION THAT THE DEFENSE IS ASKING FOR IN THIS REQUEST IS THEY WANT TO KNOW WHO WROTE THE DOCUMENT, THE DATE OF THE SDOUMENT, WHO THE DOCUMENT -- THE DATE OF THE DOCUMENT, WHO THE DOCUMENT WAS DIRECTED TO, A SUMMARY OF WHAT THE DOCUMENT WAS ABOUT AND A PARTICULAR REASON THAT THE DOCUMENT IS EXEMPT. TO BE ABLE TO GO BACK AND DO THAT FOR THE THOUSANDS AND THOUSANDS, PROBABLY MILLIONS OF

DOCUMENTS THAT ARE INCLUDED, WOULD BE INCREDIBLY TIME-CONSUMING FOR THE STATE. IT WOULD BE AN EXTREME BURDEN. THE TRIAL JUDGE CERTAINLY, IF HE FELT LIKE HE NEEDED FURTHER INFORMATION TO BE ABLE TO INTELLIGENTLY REVIEW WHETHER THESE MET EXEMPTIONS, HE COULD HAVE ASKED FOR IT, IF HE HAD CONCERNS ABOUT IF I CANLAR DOUBTS. -- ABOUT PARTICULAR DOCUMENTS. HE COULD HAVE LIMITED THE DOCUMENTS TO THE DOCUMENTS THAT THE STATE WAS CONCERNED ABOUT AND HE DID NOT DO THAT.

DO YOU AGREE THAT MANDAMUS DOES NOT PRECLUDE COOPER FROM RAISING THIS ISSUE NOW, OR IS THIS A SUCCESSIVE MOTION?

I DON'T THINK HE IS BARRED FROM RAISING IT, BECAUSE I THINK THE MANDAMUS HAS A DIFFERENT STANDARD AND A HIGHER BURDEN THAT HE WOULD HAVE TO DEMONSTRATE AT THAT TIME, SO I THINK IT IS PROPERLY RAISED IN THIS APPEAL, AND I THINK IT CERTAINLY PRESERVES, THIS IS SOMETHING THEY ASKED THE TRIAL JUDGE TO REQUIRE THE STATE TO DO. THE TRIAL JUDGE DID NOT FEEL LIKE THE CASE LAW OR THE CURRENT, THE STATUTE AT ALL REQUIRED THIS, AND DECLINED TO IMPOSE THIS BURDEN ON THE STATE. SO I THINK IT IS PROPERLY BEFORE THIS COURT, BUT I, IT IS WITHOUT MERIT, BASED ON OTHER CASES WHERE THIS COURT, AND THIS COURT HAS SEEN, AGAIN, IN OTHER CASES OUT OF PINELLAS COUNTY, THE EXACT SAME PROCEDURES BEING USED AND HAS UPHELD THAT WITHOUT THEIR BEING THE SPECIFIC PARTICULAR INDEXING AND CROSS-REFERENCEING THAT THE DEFENSE IS AFTER. THE OTHER POINT I WANT TO MAKE ABOUT PUBLIC RECORDS IS, OF COURSE, ANY RULING THAT THIS COURT WOULD CHANGE AND REQUIRE SOMETHING FURTHER WOULD ONLY IMPACT THIS CASE BUT DOES NOT REQUIRE THIS TYPE OF INDEXING, SO FOR CURRENT, COMING UP, IT WOULDN'T MAKE A DIFFERENCE. [TECHNICAL DIFFICULTIES] THANK YOU.

CHIEF JUSTICE: COUNSEL.

MR. MARSHAL, HOW MUCH TIME DOES HE HAVE?

THANK YOU, YOUR HONOR. YOUR HONOR, I ASK THIS COURT TO READ THE THREE-PAGE CROSS-EXAMINATION OF PAUL SKALNICK IN THE PENALTY PHASE HEARING BY MR. KOCH, AND THE ONE QUESTION THAT WAS ASKED THAT HAD NO TIME ABOUT THIS PRIOR SNITCHING ACTIVITY, THAT HAD NO TIME FRAME OF REFERENCE ON IT WHATSOEVER. IT IS TRUE THAT HE DIDN'T LIMIT IT TO NOVEMBER OF '82, BUT IT HAD NO TIME ON IT, AND THE JURY HAD NO IDEA WHETHER THAT SNITCHING ACTIVITY OCCURRED BEFORE OR AFTER NOVEMBER, BEFORE OR AFTER JUNE OF '83, WHEN MR. SKALNICK TALKED WITH RICHARD COOPER.

WHAT IS THE EVIDENCE IN THE RECORD ABOUT IF AN ATTORNEY THAT HAD NO CONFLICT OF INTEREST HAD INQUIRED AS TO PRIOR ACTIVITY, WHAT KIND OF PRIOR ACTIVITY HAVE YOU BEEN ABLE TO ESTABLISH?

WELL, I WILL GIVE YOU THE PROSECUTOR'S VERSION. AFTER THE CONCLUSION OF THE SUPPRESSION HEARING, THE PROSECUTOR, THIS IS IN A WRITTEN PLEADING, COUNSEL FOR THE STATE SPECIFICALLY ASKED DEFENSE COUNSEL WHY HE HAD NOT BROUGHT OUT THAT SKALNICK HAD TESTIFIED DURING PRIOR INCARCERATIONS, IN THE MOREAL, ADVISED HIM OF SKALNICK HAVING PREVIOUSLY TESTIFIED FOR THE STATE, AND OFFERED TO HAVE SKALNICK RETAKE THE STAND AND RELATE THE DETAILS, IN THE PLURAL, OF THOSE INCIDENTS, IN THE PLURAL, FOR THE COURT'S CONSIDERATION, IF DEFENSE COUNSEL DESIRED TO DO SO. MR. CROW AND MR. KOCH HAD A CONVERSATION ABOUT HOW TO, QUOTE, MR. CROW'S WORDS, HANDLE THE PROBLEM, AND THEY HANDLED IT BY NOT REOPENING. THE TRIAL JUDGE HAD NO IDEA OF THOSE PREVIOUS SNITCHING ACTIVITIES BY MR. SKALNICK. ON THIS RECORD, MR. SKALNICK REFUSED, I AM SORRY, MR. CROW, SORRY AGAIN, MR. KOCH REFUSED AND DID NOT GO BACK BEFORE NOVEMBER OF 1982, FOR SKALNICK'S SNITCHING ACTIVITIES, BECAUSE HE REPRESENTED MR. SKALNICK, AND HE HAS TESTIFIED THAT HE DID NOT INTERVIEW MR. SKALNICK PRIOR TO TAKING HIS TESTIMONY, PRIOR

TO EXAMINING HIM, AND THE REASON THAT HE DID NOT INTERVIEW HIM WAS BECAUSE OF THIS WILL GRAVE,ETHICAL CONFLICT, AND HE SAYS THAT TWICE.

OTHER THAN THE FACT THAT SKALNICK WAS A NOTORIOUS JAILHOUSE SNITCH, WHAT IS YOUR PROOF THAT HE WAS AN AGENT OF THE STATE?

YES.

OR ARE YOU ADVANCING THAT?

A LOT OF IT IS BACK THERE. OKAY.

WHAT?

A LOT OF IT IS BACK THERE IN THOSE THOSE BOXES THAT WE HAVE BEEN TRYING TO GET OUR HANDS ON, AND THE BEST PROOF, WHICH IS ONLY THE BEGINNING, WE HAVE JUST BARELYLY SKACHED THE -- SCRATCHED THE SURFACE ON MR. SKALNICK IN THIS CASE, THAT THE TRIAL JUDGE WHO, DIDN'T KNOW ABOUT THE PRIOR ACTIVITY, SAID IN THE NEW TRIAL MOTION, WHEN MR. CRIDER TRIED TO ARGUE THAT THERE HAD BEEN A COURSE OF CONDUCT, THE TRIAL JUDGE SAID, WELL, WAIT A MINUTE. IF THERE HAD BEEN A COURSE OF CONDUCT, THAT WOULD HAVE BEEN A DIFFERENT THING, BUT THE EVIDENCE HERE IS COOPER WAS NUMBER ONE. COOPER WAS THE FIRST, SO YOUR MOTION FOR NEW TRIAL ON, BASED ON THE SUPPRESSION MOTION, IS DENIED. MR. CRIDER SAID I UNDERSTAND, AND I THINK HE DID UNDERSTAND. AND THAT WOULDN'T DO -- I AM SORRY, YOUR HONOR. GO AHEAD.

GO AHEAD. I AM SORRY.

THAT IS NOT CONCLUSIVE BUT THAT IS THE BEGINNING. WHAT YOU DO TO PROVE WHAT SKALNICK WAS IS YOU TAKE HIM THROUGH EVERY ONE OF THESE, EVERY SINGLE ONE, AND AFTER A WHILE, THE STATE'S NOTION THAT THIS IS JUST A BOY SCOUT AND HE IS JUST INTERESTED IN TRUTH, JUSTICE AND THE AMERICAN WAY OF LIFE, IS GOING TO FALL APART, BECAUSE HE KEEPS GOING TO DETECTIVE O'BRIEN AND HE KEEPS GOING BACK AND BACK AND BACK TO O'BRIEN, AND EVENTUALLY IF WE CAN GET OUR HANDS ON EVERYTHING AND GET A FAIR SHOT AT MR. SKALNICK, IT WILL BE VERY CLEAR.

BUT WHAT DOES SKALNICK GET OUT OF HIS SNITCHING IN THIS PARTICULAR CASE, COOPER'S CASE?

YOU KNOW WHAT? WE SEE THAT THE SENTENCING KEEPS BEING CONTINUED AND CONTINUED AND CONTINUED IN THAT 1981, IN THOSE JAIL RECORDS. SKALNICK EVENTUALLY TESTIFIES, THEY HAD PROMISED HIM, OKAY, HE FILES AN AFFIDAVIT AND SAYS THEY DID PROMISE ME THINGS, AND THEN EVENTUALLY RETRACTS THE AFFIDAVIT. WE JUST NEED TO GET EVERYTHING ABOUT MR. SKALNICK'S SNITCHING ACTIVITIES OUT HERE AND GIVE US A FAIR SHOT AT PAUL SKALNICK, AND PAUL SKALNICK WILL NOT TAKE THE STAND IN ANY HEARING IN THIS CASE.

CHIEF JUSTICE: ALL RIGHT. I AM AFRAID YOUR TIME IS UP. WE HAVE TOLL LEAVE IT WITH THAT AND ON THE BRIEFS. THANK YOU BOTH, VERY MUCH. WE ARE GOING TO HAVE A FIVE-MINUTE RECESS AT THIS TIME AND RETURN TO HEAR THE NEXT CASE.

MARSHAL: PLEASE RISE.

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. GOOD MORNING AGAIN. ALLEN VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS KEN MALNIK, AND ALONG WITH DAN HALLENBERG OF CCRC, SITS AT THIS COUNSEL TABLE. WE REPRESENT MR. ALLEN, A PRISONER OF THE SENTENCE OF DEATH, ON THIS 3.850 MOTION. I WOULD LIKE TO ARGUE WITH RESPECT TO THE HABEAS CORPUS AND PRIMARILY FOCUS TODAY ON GUILT PHASE ARGUMENTS. SPECIFICALLY THE ARGUMENT I WOULD LIKE TO ADDRESS DEALS WITH EXCULPATORY EVIDENCE, EVIDENCE IN THIS CASE THAT THERE WERE HAIRS FOUND ON THE VICTIM'S HAND, ON HER HAND OR IN HER HAND THAT DID NOT MATCH THAT OF MR. ALLEN.

CAN YOU EXPLAIN HOW THAT EVIDENCE WAS EXCULPATORY.

YES. THE TRIAL COURT IN THIS CASE MADE A, WHAT WE CONTEND IS AN ERRONEOUS DECISION THAT IT WAS NOT EXCULPATORY. EXCULPATORY IS DEFINED IN KYLES AND STRICKLAND V GREEN, IS THAT EVIDENCE THAT IS FAVORABLE OR HAVE IMPEACHING VALUE. I WOULD SUBMIT, YOUR HONOR, THAT THIS IS VERY FAVORABLE EVIDENCE TO NEGATE GUILT. IT DOES NOT, IN THIS CASE, AND, AGAIN, I WOULD TURN TO HOFFMAN, WHICH WAS A CASE DECIDED APPROXIMATELY A YEAR AGO BY THIS COURT, WHERE THE SUPREME COURT FOUND THAT HAIRS, ALMOST THE IDENTICAL SAME EVIDENCE, WERE FAVORABLE, BECAUSE THERE WAS AN ARGUMENT THAT COULD BE MADE THAT SHOWED THAT THE ATTACKER IN HOFFMAN COULD NOT HAVE BEEN THE DEFENDANT.

AREN'T THERE A COUPLE OF SDIPTIONS THOUGH? IN HOFFMAN -- DISTINCTIONS THOUGH? IN HOFFMAN, WASN'T IT THE CASE THAT THE ANALYSIS SHOWED THAT THE HAIR WAS NEITHER THE DEFENDANT'S NOR THE VICTIMS, AND ALSO IN HOFFMAN THE DEFENDANT CONTESTED THAT HE WAS NEVER IN THE MOTEL ROOM, WHEREAS HERE THE DEFENDANT WAS, HERE FIRST OF ALL, WE DON'T KNOW WHETHER THE HAIR COULD HAVE BEEN THE VICTIM'S, FROM WHAT THE ANALYSIS SHOWED, AND THE DEFENDANT ADMITTED THAT HE WAS IN THE HOUSE. HE ONLY CONTESTED HE DIDN'T MURDER THE VICTIM.

JUDGE, ESSENTIALLY IT IS A TWO-PART QUESTION, AND THE WAY THAT I WOULD LIKE TO RESPOND TO IT IS CERTAINLY, UNDER THE DEFINITION OF EXCULPATORY, IT IS FAVORABLE, IF EVIDENCE NEGATES GUILT, AND IN THIS CASE, AT LEAST MR. ALLEN WOULD HAVE HAD THE ARGUMENT THAT HE DIDN'T HAVE AT TRIAL, THAT IN THE CLOSEST PROXIMITY TO THE DECEASED, IT WASN'T HIM. SECOND, AND WHAT, MORE IMPORTANT, THERE IS A DISTINCTION BETWEEN HOFFMAN. IN HOFFMAN, MR. HOFFMAN ACTUALLY CONFESSED TO THE HOMICIDE. I WOULD SUBMIT THAT THE EVIDENCE IN HOFFMAN IS STRONGER THAN IN THE INSTANT CASE, AND THE SIGNIFICANCE OF THAT WOULD BE THAT IT UNDERMINES THE CONFIDENCE IN THIS CASE, BECAUSE WHEN WE USE, WHEN WE DO, PERFORM THE ANALYSIS, YOUR HONOR, WE SAY HOW WOULD THE NONDISCLOSURE HAVE AN IMPACT ON THE EVIDENCE THAT WAS PRESENTED? ONE OF THE STATE'S VERY COMPELLING ARGUMENTS, AND IN THEIR CLOSING ARGUMENT, THEY ARGUED THAT THERE WAS BLOOD THAT ALLEGEDLY BELONGED TO THE VICTIM ON MR. ALLEN'S CLOTHES, AND IN ADDITION THERE WAS A TOWEL FOUND WITHIN PROXIMITY OF THE VICTIM THAT HAD SEMEN. THAT IS A VERY COMPELLING ARGUMENT, TO SAY IN TERMS OF THE PROXIMITY TO MR. ALLEN, LOOK AT ALL THESE THINGS THAT POINT TO GUILT. HOWEVER, THE CLOSEST THING TO MR., TO THE VICTIM, WHICH WAS ACTUALLY ON HER, WAS THESE HAIRS THAT DON'T MATCH HIM.

BUT IT COULD HAVE BEEN HER HAIR.

CERTAINLY IT COULD HAVE BEEN, BUT I DON'T BELIEVE THE RULING, I DON'T BELIEVE THAT THE COURT'S RULING IN HOFFMAN SAID THAT WE EXPLICITLY HAVE TO RULE OUT, IN HOFFMAN, THEY WERE ABLE TO RULE OUT THAT IT WAS THE MALE VICTIM, BUT I BELIEVE THE ANALYSIS IN HOFFMAN SHOWED THAT, IF THE EVIDENCE WAS FAVORABLE, AND CERTAINLY I WOULD SUBMIT, YOUR HONOR, THAT THIS COULD BE CONSTRUED AS BEING FAVORABLE EVIDENCE THAT WOULD PUT THIS CASE IN A DIFFERENT LIGHT.

WHAT IF ANYTHING, DID YOU KNOW ABOUT HAIRS AT THE TIME OF THE TRIAL? DID YOU KNOW, DID THE DEFENSE KNOW THAT THERE WERE, IN FACT, HAIRS FOUND IN THE VICTIM'S HAND OR ON HER HAND? ON OR ABOUT HER BODY?

YOUR HONOR, THERE WAS A MOTION TO COMPEL, AND THE, THERE WAS A MOTION TO COMPEL FILED. THE MOTION WAS GRANTED. A HAIR SAMPLE WAS TAKEN FROM MR. ALLEN. THE REPORT IS, THE REPORT WAS NEVER FURNISHED, AND THE TRIAL COURT, IN ITS SUMMARY DENIAL, SAID THAT THERE WAS NO EVIDENCE THAT THIS REPORT WAS EVER FURNISHED. NOW, IN TERMS OF RECENT CASES, STRICKLAND, WHICH DEALS WITH THE CRITERIA OF BRADY, DUE DILIGENCE IS, I WON'T SAY IT, THERE IS A DEBATE AS TO WHETHER DUE DILIGENCE STANDARD STILL APPLIES, BUT IN THIS CASE, TO ANSWER YOUR QUESTION, I THINK WHERE THE COURT IS GOING, THIS INFORMATION, THE REPORT, NOT THE HAIRS, BUT THE REPORT WAS NOT EQUALLY AVAILABLE TO BOTH PARTIES. THIS WAS A REPORT THAT WAS, A TESTING THAT WAS FORWARDED TO FDLE.

NOW, ASSUMING THAT THERE IS NO DUE DILIGENCE REQUIREMENT UNDER BRADY, YOU STILL HAVE TO PROVE A PROBABILITY OF A DIFFERENT RESULT. HOW DO YOU PROVE THAT, WITH THIS HAIR THAT MAY BE THE VICTIM'S BUT WASN'T THE DEFENDANT'S.

YOUR HONOR, I THINK WHAT MAKES IT DIFFICULT IN THIS -- DIFFICULT IN THIS CASE, IS THAT THERE WAS A SUMMARY DENIAL.

WHAT WOULD YOU SHOW AT AN EVIDENTIARY HEARING THEN?

WELL, JUDGE, THERE ARE A NUMBER OF CLAIMS, AND IN THE STATE OF THE STATE V GUNSBY, THERE IS A ANALYSIS THAT SAYS IF THE BRADY VIOLATIONS, COUPLED WITH INEFFECTIVE ASSISTANCE OF COUNSEL, USING A KEY POINT OF ANALYSIS, YOU CAN SHOW A REASONABLE PROBABILITY AFTER DIFFERENT OUTCOME. THIS PIECE OF EVIDENCE, I SUBMIT, IS VERY, IS VERY IMPORTANT. WOULD IT ALONE HAVE, WOULD IT ALONE NECESSARILY PRODUCE A DIFFERENT RESULT? I AM NOT CERTAIN THAT IT WOULD. HOWEVER, IN ANALYSIS OF BRADY, A LOT OF TIMES THE CASES DON'T SAY THAT YOU HAVE TO SHOW MORE LIKELY THAN NOT. IT IS WHETHER IT UNDERMINES THE CONFIDENCE, AND I SUBMIT THAT IT IS SHOCKING IN OFFENSIVE THAT THIS PIECE OF EVIDENCE WAS NOT TURNED OVER. AND I DON'T WANT TO CAST ASPERSIONS ON THE STATE, BUT I THINK THERE IS A NECESSITY FOR AN EVIDENTIARY HEARING, TO KNOW WHETHER THIS WAS WILLFUL OR INADVERTENT, AND, AGAIN, THIS CASE --

THAT ISN'T GO TO THE POINT OF WHETHER IT MEETS THE PREJUDICE STANDARD UNDER STRICKLAND.

I AGREE, YOUR HONOR.

SO LET'S GET SPECIFICALLY ON THAT. WHAT WOULD BE ABLE TO -- WHAT IS NEEDED TO BE SHOWN AT THAT, COULD BE DEMONSTRATED AT THE, AT AN EVIDENTIARY HEARING, THAT WAS NOT BEFORE THE JUDGE IN THIS CASE? IF YOU HAVE TAKEN INTO CONSIDERATION THE ENTIRE RECORD THAT THE JUDGE HAD.

YOUR HONOR, IN ORDER TO UNDERMINE, TO DO THE PREJUDICE ANALYSIS, I THINK WE HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE. THIS IS A CASE WHERE MR. ALLEN MADE NO INCULPATORY STATEMENTS PRETRIAL, EXCULPATORY STATEMENTS DURING PRETRIAL. THIS IS NOT A CASE WHERE THERE WAS EVIDENCE LINKING HIM TO A MURDER WEAPON. IT IS IMPORTANT TO DO THE ANALYSIS THAT JUSTICE CANTERO AND JUSTICE WELLS ARE ASKING, YOU HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE. THE STATE'S ARGUMENT, GIVEN THE FACT THAT THERE IS SOME INHERENT WEAKNESSES IN THE CASE THAT WE DON'T HAVE, ALL WE HAVE IS THE PRESENCE THAT NOW YOU HAVE GOT A PIECE OF EVIDENCE THAT IS IN A VICTIM, AND THIS IS REAL IMPORTANT, THAT THIS VICTIM WASN'T SHOT. THIS VICTIM, IF WE GO BY THE STATE'S

THEORY IN THIS CASE, THIS VICTIM WAS TIED AND THEN STABBED, WHICH MEANS THERE IS A HIGH PROBABILITY THAT THERE IS A HIGH PROBATIVE VALUE OF THESE HAIRS. YOUR HONOR, SO WHEN YOU SAY IN TERMS OF DOING THE PREJUDICE ANALYSIS, I THINK WE HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE AND THE SIGNIFICANCE OF THIS EVIDENCE. THIS EVIDENCE COULD HAVE REBUTTED A VERY CONVINCING ARGUMENT THAT THE STATE MADE, WHICH IS LOOK AT ALL THIS EVIDENCE THAT POINTS TO MR. ALLEN, BUT THE EVIDENCE OF THE HAIR WOULD SUGGEST THAT THE PERSON THAT WAS ATTACKING HIM WASN'T HIM, AND --

BUT CAN WE GO BACK TO THE BASIC PREMISE THAT, IF YOU CAN'T RULE OUT THAT IT COULD BE THE VICTIM'S, THEN THE PROBATIVE VALUE JUST GOES DOWN TO WHAT? I MEAN --

WELL, YOUR HONOR, I THINK THE PROBATIVE VALUE, AS PART OF WITHHELD EVIDENCE.

IN OTHER WORDS, YOU HAVE A PICTURE OF YOU HAVE GOT HIS BLOOD OR HER BLOOD ON HIS CLOTHES, GOT HIS SEMEN, YOU HAVE GOT THE FACT THAT HE WAS WITH HER, AND WAS SEEN GOING IN AND OUT OF HER HOUSE IN CLOSE PROXIMITY TO THE TIME OF THE MURDER. I THINK THERE IS SOME OTHER CIRCUMSTANCES THAT I AM NOT, SO IF THE JURY WERE TO HEAR THAT SOME HAIR WAS UNIDENTIFIED BUT CONSISTENT WITH THE VICTIM'S, HOW DID DOES THAT CHANGE, AND I REALIZE MY VIEW BRADY IS AN OUTCOME DETERMINATIVE, BUT IT IS AKIN TO STRICKLAND, UNDERMINING CONFIDENCE IN THE RESULT, AND CERTAINLY THE STATE OUGHT TO BE PRODUCING THINGS THAT COULD BE HELPFUL, BUT I JUST, COULD YOU --

YOUR HONOR, MAYBE I MISHEARD THE COURT IN THE QUESTION. THE HAIR WAS NEVER IDENTIFIED, JUST SO WE KNOW. IT IS POSSIBLE THAT IT COULD HAVE BEEN THE VICTIM. HOWEVER, ONE OF THE OTHER PIECES --

HAS IT NOW BEEN -- OKAY. SO WHAT TESTING WAS DONE ON THE HAIR?

WELL, YOUR HONOR, THIS IS THE PROBLEM, AND THE PROBLEM IS THAT THE EVIDENCE, THE HAIR EVIDENCE WAS MISLABELED. ONE OF THE OTHER CLAIMS THAT WE ARE ASSERTING IS CONTAMINATION, THAT THE STATE DIDN'T PROPERLY HANDLE EVIDENCE. SO THE POINT IS PUTTING MYSELF IN THE SHOES OF TRIAL COUNSEL, TRIAL COUNSEL WOULD HAVE THE ARGUMENT, NOT ONLY DOES IT SAY IT IS NOT MY CLIENT BUT MORE IMPORTANTLY, WE CAN'T BE BLAMED FOR THE FACT THAT IT CAN'T BE TESTED, BECAUSE IT WAS MISHANDLED BY THE STATE. WHEN THEY DREW THE HAIRS, THEY MISLABELED THEM, SO THEY WERE NEVER ABLE TO TEST HER HAIR IN COMPARISON TO THE HAIR THAT WAS FOUND IN HER HANDS.

TELL ME HOW THE MISLABELING WOULD PRECLUDE EXAMINING IT. THEY COULDN'T FIND IT OR --

THAT IS IT, JUDGE. THAT IS WHAT THE FDLE REPORT BASICALLY SAYS. WE CAN'T TEST THIS HAIR AGAINST HER HAIR, BECAUSE WE DON'T KNOW WHETHER THE HAIRS WE HAVE WERE HEAD HAIRS OR PUBIC HAIRS, AND I APOLOGIZE, YOUR HONOR, NOT REALLY HAVING THE EXPERTISE, IN TERMS OF HAIR ANALYSIS, BUT BHAFKLY THEY SAID IT IS NOT TEST -- BASICALLY THEY SAID IT IS NOT TESTABLE.

SO WHAT ARE YOU CLAIMING THE STATE, WITH EITHER, EITHER WITHHELD OR DIDN'T DISCLOSE, WHETHER INTENTIONALLY OR NOT, BECAUSE BRADY DOESN'T MAKE A DISTINCTION IN TERMS OF THE INTENT, WHAT IS THE, IT, IF THE HAIR, IF THEY COULDN'T GIVE YOU THE RIGHT HAIR, WHAT IS THE BRADY PART? WHAT IS THE -- WHAT IS IT THAT THEY DIDN'T DISCLOSE?

WELL, WHAT THEY DIDN'T DISCLOSE IS THEY DIDN'T DISCLOSE THE RESULT, SO THAT WHEN MR. -- THE REPORT.

RIGHT. SO AGAIN, IN DOING A BRADY ANALYSIS, A LOT OF TIMES YOU ASK YOURSELF WHAT IS

THE IMPACT ON THE WAY THE DEFENSE HANDLED THE CASE?

BUT IF THE REPORT WOULD BE INCONCLUSIVE BECAUSE THE EVIDENCE WAS IMPROPERLY PRESERVED, THEN DOESN'T, I DON'T KNOW, HOW DOES THAT --

YOUR HONOR, IT IS NOT NECESSARILY INCONCLUSIVE. THE POSITIVE CONCLUSION THAT THE DEFENSE COULD DRAW, IS IT IS NOT MY CLIENT. THE STATE COULD THEN, THEIR FALL BACK ARGUMENT COULD BE, WELL, IT COULD HAVE BEEN THE VICTIM. HOWEVER, USING BRADY, IT CERTAINLY IS FAVORABLE FOR THIS, FOR TRIAL COUNSEL TO HAVE BEEN ABLE TO ARGUE IT IS NOT --

DID THE DEFENSE KNOW THERE WAS HAIR IN HER HAND AT THE TRIAL? I MEAN, PRETRIAL? WAS THAT KNOWN TO THE --

THERE WAS A MOTION TO COMPEL. ANOTHER REASON FOR AN EVIDENTIARY HEARING, YOUR HONOR, IN THIS CASE IS TO KNOW WHAT TRIAL COUNSEL ACTUALLY KNEW. THE TRIAL COURT JUDGE, IN MAKING HIS FINDINGS, SAID THIS WAS WITHIN THE STATE'S POSSESSION. IT SHOULD HAVE BEEN TURNED OVER. THAT WAS ONE OF THE FINDINGS OF THE LOWER COURT MADE, THAT IT WAS SUPPRESSED.

SO THE ONLY ISSUE IS, AS A MATTER OF LAW, WHETHER IT MEETS THE THIRD PRONG. IS THAT --

YES. BUT IN ORDER TO MEET THE THIRD PRONG, WE HAVE TO SAY HOW DID IT AFFECT THE DEFENSE ATTORNEY'S ABILITY TO PREPARE, AND I GUESS AT THIS POINT I AM GOING TO LEAP INTO ANOTHER ARGUMENT, BECAUSE I THINK IT DOVETAILS, WHICH IS THE DEFENSE IN THIS CASE CLAIMS CERTAIN, A COUPLE ARGUMENTS. ONE ARGUMENT WAS THAT THE THIRD PARTY DID IT. CERTAINLY HAVING THE ABILITY TO SAY THIS HAIR DOESN'T MATCH MY CLIENT WOULD HAVE BEEN CONSISTENT WITH THE THIRD PARTY POSSIBLY DOING IT. NOW, THE STATE COULD CONSIDER AND SAY IT COULD HAVE BEEN THE VICTIM, BUT AT LEAST IT GIVES SUPPORT, BUT THE OTHER PROBLEM IS THE DEFENSE IN THIS CASE MADE AN ARGUMENT THAT THE VICTIM KILLED HERSELF.

WELL, LET ME ASK YOU THIS. LET'S GO BACK TO THE REPORT THAT YOU, THAT WAS NOT TURNED OVER DOES NOT SAY THAT THIS HAIR DOES NOT BELONG TO YOUR CLIENT.

AND I APOLOGYIZE IF I AM NOT BEING CLEAR. IT CONCLUSIVELY SAYS IT IS NOT MY CLIENT'S HAIR. IT JUST CAN'T RULE OUT THE VICTIM.

AND SO ON ANY SUBSEQUENT USE OF THIS, YOU WOULD BE USING THIS TO SAY, THEN, THAT, LOOK, THERE WAS THIS WILL HAIR FOUND ON THE VICTIM THAT IS NOT MY CLIENT, SO THAT SUPPORTS AND DOVETAILS INTO YOUR ARGUMENT THAT YOU WERE JUST SAYING THAT THIS WAS SOMEONE ELSE WHO WAS THERE, ALSO, AT OR ABOUT THE TIME OF THIS LADY'S MURDER. IS THAT THE USE THAT YOU ARE NOW --

THAT IS THE USE, AND MAYBE IT WOULD HAVE PREVENTED THE DEFENSE ATTORNEY FROM MAKING AN ARGUMENT THAT I SUBMIT JUST DOESN'T SQUARE WITH THE FACTS, BECAUSE GIVEN THE, GIVEN NONDISCLOSED INFORMATION, I IS UP MIGHT -- I SUBMIT IT HAS AN IMPACT. THE PROBLEM IS I AM PUTTING THE CART BEFORE THE HORSE, BECAUSE WE DIDN'T HAVE AN EVIDENTIARY HEARING, AND I THINK THIS COURT, ON NUMEROUS OCCASIONS, SAYS THAT IT IS SO IMPORTANT TO COME UP WITH REASONS FOR STRATEGY, AND IN THIS CASE THE LOWER COURT IS MAKING A LOT OF PRESUMPTIONS. I APPRECIATE AND I WOULD RESERVE MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. THE DEFENSE DID, IN FACT, KNOW THERE WAS A HAIR, BECAUSE WE MOVED TO HAVE

HIS HAIR SAMPLE TAKEN TO COMPARE TO THE HAIR AND TOLD HIM AT THAT TIME WE HAVE GOT A HAIR. WE NEED YOUR HAIR TO COMPARE TO IT. HE KNOWS THERE IS A HAIR. HE KNOWS WE ARE COMPARING IT.

EVERYONE KNEW THIS. THE TESTING WAS DONE, SO WHY DIDN'T THE STATE GIVE -- THERE WAS THE REQUEST FOR DISCOVERY, CORRECT?

FIRST OF ALL, YES, THERE WAS. FIRST OF ALL, WE DON'T KNOW THAT THE STATE DIDN'T TURN IT OVER AT THIS TIME POINT THIS. IS A SUMMARY DENIAL, SO WE ARE SIMPLY ASSUMING THEY DIDN'T BECAUSE THEY HAVE MADE THAT ALLEGATION. IF THERE WERE AN EVIDENTIARY HEARING, THE STATE WOULD, IN FACT, CONTEST THAT IT WASN'T TURNED OVER, BUT THE POINT IS THE DEFENSE KNEW WE WERE DOING THIS TESTING. THE DEFENSE KNOWS THAT WE ARE TESTING IT AGAINST HIS HAIR. THE DEFENSE KNOWS WE NEVER PRESENT THIS PERSON TO SAY IT WAS HIS HAIR. THEREFORE THE DEFENSE KNOWS THAT THE RESULT IS IT IS NOT HIS HAIR.

IS IT YOUR POSITION THAT THE DEFENDANT WAS REQUIRED TO REQUEST THE RESULTS OF THE TEST?

IS IT MY POSITION THAT, IF THE STATE HAD NOT TURNED THEM OVER, YES. HE KNEW THE TESTING WAS GOING ON AND HE SHOULD HAVE REQUESTED THEM. YES.

SO YOUR POSITION, THEN, THAT THERE IS A DUE DILIGENCE REQUIREMENT?

ABSOLUTELY.

AND THAT THAT DUE DILIGENCE REQUIREMENT INCLUDES FOLLOWING UP WITH THE STATE, ONCE THE STATE COMPELS PRODUCTION OF PHYSICAL EVIDENCE TO DETERMINE --

YES. IF YOU WANT TO KNOW WHAT THAT TEST SAYS, AND KEEP IN MIND HE KNOWS WHAT THAT TEST SAYS, BECAUSE WE NEVER PRESENT THE WITNESS WHO SAYS IT DOES MATCH HIM, AND THAT IS ALL THAT REPORT SAYS IS IT DOESN'T MATCH HIM, AND WHEN WE DON'T PRESENT IT DOES, THAT MEANS IT DIDN'T.

IS IT THE STATE'S POSITION THAT THIS IS NOT EX-CONSUMETORY EVIDENCE?

IT IS THE STATE'S POSITION THAT THIS IS NOT MATERIAL EVIDENCE, BECAUSE ALL THEY GET OUT OF THIS IS TO BE ABLE SAY THAT THE EVIDENCE SHOWS THIS WAS NOT MY CLIENT. THIS WOMAN WAS TIED UP WITHOUT A STRUGGLE. WHERE IS SHE PULLING THIS HAIR FROM? SHE IS NOT STRUGGLING WITH WHOM EVER SHE IS HAVING THIS FIGHT WITH.

LET'S GO BACK, BECAUSE SOMETIMES IN TRYING TO MAKE SURE THAT BRADY AND REALLY WHAT IS THE INTENT OF BRADY IS FULFILLED. YOU KNOW, WE WANT TO MAKE SURE FOR THE FUTURE CASES, THAT THE STATE IS ON THE RIGHT TRACK. WHEN A HAIR SAMPLE IS TAKEN FROM A DEFENDANT AND THE STATE TESTS IT AND FINDS OUT THAT THAT HAIR IS NOT THE DEFENDANT'S, YOU WOULDN'T WANT US TO WRITE AN OPINION THAT SAYS THAT, UNLESS THE DEFENDANT THEN SUBSEQUENTLY ASKS FOR THE REPORT, THE STATE DOESN'T HAVE TO TURN OVER A REPORT THAT SAYS THE HAIR IS NOT THE DEFENDANT'S.

WELL, FIRST OF ALL, KEEP IN MIND SUMMARY DENIAL. WE ARE SIMPLY IS ASSUMING THEY DIDN'T TURN IT OVER.

THAT IS WHAT WE HAVE TO ASSUME.

YES. WE ABSOLUTELY HAVE TO ASSUME THAT, BUT I AM NOT CONCEDING THAT IT WASN'T TURNED OVER, AND THERE WERE SOME COMMENTS MADE.

IF IT WAS TURNED OVER, WE --

I UNDERSTAND. MY POINT, THOUGH, IS ASSUMING IT WASN'T TURNED OVER, THIS DEFENDANT KNEW THERE WAS THIS HAIR. THIS DEFENDANT KNEW WHAT THAT RESULT WAS, WHEN WE DON'T PRESENT IT AS HIS HAIR, AND THAT IS ALL THAT REPORT IS GOING TO SAY, AND IT IS NOT THE REPORT HE NEEDS. IT IS THE INFORMATION HE NEEDS, SO HE HAS THE INFORMATION.

SO LET'S ASSUME THAT A DEFENDANT, YOU ARE SAYING THE DEFENDANT HAS TO ASSUME, BECAUSE THE STATE IS NOT GOING TO USE IT, THAT THIS SHOWED THAT IT WAS NOT HIS HAIR, SO HE WOULD, THEN, GET TO COURT AND TRY TO PRESENT THIS, WITHOUT KNOWING WHETHER OR NOT IT IS, IN FACT, HIS HAIR.

AT THAT POINT GO AHEAD AND SAY, OKAY, WHO TESTED IT? STATE. ASK THEM. IT IS JUST THAT SIMPLE. GET THE WITNESS. DEPOSE THEM.

WHAT GOES BACK TO PUTTING THE BURDEN ON THE DEFENDANT, WHEN IT IS THE STATE WHO HAS THE BURDEN OF TURNING OVER THIS KIND OF EVIDENCE, ISN'T IT?

BUT THE DEFENDANT HAS A DUE DILIGENCE REQUIREMENT UNDER BRADY TO SEEK THE EVIDENCE.

IF WE LOOK AT STRICKLER, AS YOU KNOW, THERE IS NO DUE DILIGENCE REQUIREMENT IN THERE.

WELL, I DISAGREE.

YOU DISAGREE THAT STRICKLER SAYS THERE IS A DUE DILIGENCE REQUIREMENT?

I DISAGREE THAT STRICKLER WROTE OUT THE DUE DILIGENCE REQUIREMENT. THERE IS A FOOTNOTE IN STRICKLER THAT SAYS THEY ARE NOT MENTIONING IT IN THIS CASE FOR THESE SPECIFIC REASONS.

IF THE DEFENSE LAWYER KNEW THAT HIS CLIENT'S HAIR WAS BEING TESTED AND DOESN'T, AND DOESN'T FIND OUT THAT THE HAIR SAMPLE IS OR IS NOT THE CLIENT'S HAIR, AND DOESN'T USE THAT FACT IN THE TRIAL, WHY ISN'T THAT SOMETHING THAT, THEN, YOU HAVE GOT INEFFECTIVE ASSISTANCE OF COUNSEL, SINCE IF THE WHOLE DEFENSE WAS IT WASN'T MY CLIENT, AND YOU HAVE GOT HAIR BEING GRIPPED IN A HAND, IT SEEMS TO ME THAT ANY REASONABLY-COMPETENT DEFENSE LAWYER WOULD WANT TO USE THAT TO AT LEAST SAY, LOOK, THE MOST DAMNING PIECE OF EVIDENCE, WHICH IS HAIR IN THE HAND, IS NOT MY CLIENT'S. I MEAN, IN OTHER WORDS IN TERMS OF TRYING TO UNDERSTAND THIS FROM WHY THERE WAS NO EVIDENTIARY HEARING IN THIS CASE, DON'T THOSE TWO ARGUMENTS DOVETAIL TOGETHER? YOU EITHER HAVE INEFFECTIVE ASSISTANCE OR YOU HAVE GOT A BRADY PROBLEM.

WELL, THE INEFFECTIVE ASSISTANCE CLAIM WOULD NEED TO BE PLED. IT HAS NEVER BEEN PLED. BUT BEYOND WHICH, YOU END UP WITH MATERIALALITY UNDER BRADY IS THE SAME AS PREJUDICE UNDER STRICKLAND, AND WHAT YOU END UP WITH IN THIS CASE IS THE DEFENSE GETS AN ARGUMENT THAT THIS WOMAN HAD A HAIR ON HER HAND. IT IS NOT CLEAR SHE IS HE GRIPPING IT IN HER HAND. IT IS JUST ON HER HAND. THAT DOESN'T MATCH MY CLIENT. THAT WE DON'T KNOW, AND THE STATE RESPONDS, WELL, THE EVIDENCE HERE IS THERE WAS NO STRUGGLE, SO WHERE IS SHE PULLING THIS HAIR OUT OF THIS DEFENDANT'S HEAD? SHE IS TIED UP. THERE WAS NO STRUGGLE. THERE ARE NO DEFENSIVE WOUNDS. THAT SHE ENDS UP WITH THIS HAIR ON HER HAND THAT MAY BE HERS. IT MAY BE OFF THE FLOOR FROM SOMEBODY WHO BELONGS IN THAT HOUSE, SO WHAT YOU HAVE HERE IS YOU HAVE A PIECE OF EVIDENCE THAT IS COMPLETELY AND TOTALLY AMBIGUOUS, AND YOU END UP WITH THE ARGUMENT THAT COUNSEL MADE, WHICH IS, AND HAD AMPLE EVIDENCE TO SUPPORT, WHICH IS THAT THE STATE SCREWED UP PROCESSING THIS CRIME SCENE, AND THAT IS ALL YOU END UP WITH OUT OF IT.

I WAS UNDER THE IMPRESSION THAT THERE WAS AN IN EFFECTIVE CLAIM, WITH REGARD TO EXAMINATION OF WITNESSES, WITH REGARD TO OTHER PERSONS BEING IN AND ABOUT THE PROPERTY AND THOSE KINDS OF THINGS AND WOULD NOT AN EVIDENTIARY HEARING KIND OF PULL ALL OF THIS TOGETHER OR WHY WOULD IT NOT? I GUESS, WHY WOULD IT NOT PULL ALL OF THIS TOGETHER, IF YOU HAD AN EVIDENTIARY HEARING WITH REGARD TO WHAT HAPPENED WITH REGARD TO THE TESTING OF THE HAIR AND THEN, ALSO, WHY THE ATTORNEYS DID OR DID NOT DO CERTAIN THINGS WITH THIS THEIR PERSON POSSIBILITY.

WELL, IT WASN'T REALLY A THIRD PERSON POSSIBILITY. IT IS A REASONABLE DOUBT DEFENSE. THE STATE DIDN'T EXCLUDE THE POSSIBILITY THAT IT WAS SUICIDE, THAT IT WAS A THIRD PERSON THAT, IT WAS THIS, THAT IT WAS THAT. ALL THE STATE HAS PROVEN TO YOU IS HE WAS AT THE CRIME SCENE AND WE HAVE CONCEDED THAT. WAS THE DEFENSE. WITH REGARD TO --

THE QUESTION IS AS TO OTHER PEOPLE BEINGS ON THE SCENE. AM I -- TO OTHER PEOPLE BEING ON THE SCENE.

WITH REGARD TO OTHER PEOPLE BEING ON THE SCENE, THE FIRST WITNESS THEY ARE TALKING ABOUT HAVING FAILED TO IMPEACH IS A WITNESS WHO, THE THE DAY OF THE CRIME WAS WORKING ACROSS THE STREET AND THE DEFENSE ADMITS WAS THE PERSON WHO WENT UP TO THIS PERSON, SO WE ARE TALKING ABOUT CROSS-EXAMINING SOMEBODY BASICALLY IN BAD FAITH, BECAUSE THE CLIENT ADMITS THAT IS HIM. THIS PERSON WAS ABLE TO DRAW A COMPOSITE PHOTOGRAPH OF THE DEFENDANT. THIS PERSON WAS ABLE, ONE OF THE THINGS LEFT AT THE CRIME SCENE WAS A CAMERA WITH UNDEVELOPED FILM. THEY DEVELOPED THE FILM. WE DON'T HAVE THE DEFENDANT. THEY TAKE THE PICTURE TO HIM AND SAID IS THIS THE PERSON YOU ARE TRYING TO DESCRIBE TO US? YES. THEY BRING HIM UP AT TRIAL. THEY DO AN I.D. WHEN THEY CATCH THE DEFENDANT. YES. THIS IS HIM. THEY DO HIM IN COURT. YES, THIS IS HIM. AND WHAT THEY ARE TALKING ABOUT DOING IS HIS WEIGHT AT THE TIME OF THE TRIAL COMPARED TO HIS WEIGHT NOW.

I THOUGHT THERE WAS ANOTHER WITNESS THAT PLACED ADDITIONAL PEOPLE ON THE PROPERTY EARLIER THAT DAY.

THERE WAS ANOTHER WITNESS WHO GAVE AN INITIAL STATEMENT TO THAT EFFECT, AND IS DEPOSED BY DEFENSE COUNSEL AND DOESN'T SAY. THAT SHE SAYS THERE WAS ONE CAR. I COULD HAVE BEEN MISTAKEN ABOUT TWO CARS. I COULD HAVE THOUGHT THAT IT WAS A NEIGHBOR'S CAR. SO YOU ARE TALKING ABOUT BRINGING THIS OUT AS IMPEACHMENT. IMPEACHMENT IS NOT SUBSTANTIVE EVIDENCE. YOU CAN'T ARGUE THERE WAS A SECOND CAR THERE, BASED ON IMPEACHING THIS WOMAN. SHE SAYS I LOOKED ACROSS A CANAL WITHOUT MY GLASSES ON, IN HER DEPOSITION, AND I SAW A STOUT WOMAN WITH A YOUNG-LOOKING THIN MAN. THE EVIDENCE AT TRIAL IS THIS DEFENDANT HAS GAINED A LOT OF WEIGHT BEFORE WE EVEN GET TO TRIAL, THAT HE WAS THIN AT THE TIME OF THE CRIME. SHE ADMITS THAT, WHEN SHE LOOSE ACROSS IN THE DEPOT, SHE SAYS -- WHEN SHE LOOKS ACROSS IN THE DEPO, SHE SAYS I LOOK ACROSS AT PEOPLE BUT I REALLY DON'T SEE THEM, SO YOU ARE GOING TO HAVE SOMEBODY UP THERE TO PRESENT THIS THAT IS GOING TO END UP BEING IMPEACHED BY THE STATE, AND TO PRESENT EVIDENCE, THE FIRST OF WHICH YOU ARE NOT GOING TO BE ABLE TO PRESENT AS SUBSTANTIVE EVIDENCE, BECAUSE THAT IS NOT GOING TO BE HER TESTIMONY, BASED ON WHAT SHE TOLD COUNSEL AT DEPO. IT WAS ONE CAR, AND THEN YOU ARE GOING TO PUT HER UP TO SAYING IT WAS A YOUNG-LOOKING PERSON AND MY CLIENT ISN'T YOUNG-LOOKING, AND SHE IS GOING TO BE IMPEACHED WITH, BUT I REALLY DIDN'T SEE HIM, WHICH IS WHAT SHE SAID IN DEPO.

GETTING BACK TO THE BRADY VIOLATION, WHICH I AM SORRY TO SKIP AROUND, BUT YOU SAID EARLIER THAT THE DEFENDANT DIDN'T HAVE THE INFORMATION, HAD THE -- HAD THE REPORT

BUT DIDN'T HAVE THE INFORMATION. WHAT DO YOU MEAN BY THE INFORMATION?

THE HAIR TEST REPORT. WHAT THE REPORT SAYS IS THAT IT DIDN'T MATCH THE DEFENDANT. WHAT THE STATE SAYS IN SAYING WE LIST THE WITNESS AND SAY WE ARE GOING TO PRESENT THEM AS THEY DO MATCH. THAT MEANS IT DIDN'T MATCH.

THAT MEANS THEY HAD THE INFORMATION THAT THERE WAS A REPORT THERE THAT CAME BACK AND SAID THAT IT WASN' CLAIMS, AND LET ME JUST -- BEFORE YOU MOVE ON TO THE SECOND CLAIM, HAVEN'T YOU SAID THAT THESE REMARKS WER

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, EVERYONE, THIS BEAUTIFUL MORNING AFTER ELECTION DAY. JUSTICE QUINCE IS RECUSED ON THIS FIRST CASE, AND WE WILL BE TAKING ABOUT A FIVE-MINUTE RECESS AFTER WE HEAR THE ARGUMENT IN THIS CASE, FOR THE BENEFIT FIT OF COUNSEL OUT THERE, IN ORDER FOR JUSTICE QUINCE TO RETURN. THE FIRST CASE IS COOPER VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MR. CHIEF JUSTICE. STEVE HANLON WITH HOLLAND & KNIGHT AND AT COUNSEL TABLE WITH ME IS ROBIN ROSENBERG OF THE LAW FIRM, AND WE ARE HERE ON BEHALF OF RICHARD COOPER. I HAVE GOT TO TELL YOU THAT, GIVEN THE GRAVITY OF THAT ETHICAL COMPROMISE, I CAN'T IMAGINE NOT HAVING BROUGHT THAT TO THE COURT'S ATTENTION. THAT WAS RICHARD COOPER'S LAWYER, DEFENSE ATTORNEY KY KOCH, TESTIFYING ABOUT MR. COOPER'S CASE. MR. COOPER SHOULD PREVAIL ON HIS CONFLICT CLAIM AND IS ENTITLED TO A NEW TRIAL, SOLELY ON THE BASIS OF MR. KOCH'S ACKNOWLEDGMENT THAT HE HAD A GRAVE ETHICAL CONFLICT.

TELL US A LITTLE BIT MORE ABOUT THAT CONFLICT. EXACTLY WHAT WAS IT.

MR. KOCH HAD REPRESENTED A KEY PROSECUTION WITNESS IN THIS CASE, A VETERAN SNITCH, PAUL SCALNICK, IN PINELLAS COUNTY. HE REPRESENTED HIM IN A 1981 MATTER, WHERE MR. SKALNICK HAD BEEN IN JAIL DOWN THERE FROM MAY OF '81.

HE WAS IN THE COUNTY JAIL, AND WHEN THE DEFENDANT WAS ARRESTED, HE WAS PLACED IN THE SAME GEL CELL?

THAT IS IN -- IN THE SAME JAIL CELL?

THAT IS IN A SUBSEQUENT OPERATION, YOUR HONOR. MR. COOPER WAS PLACED IN SKALNICK'S CELL.

SKALNICK LATER TESTIFIED THAT COOPER DESCRIBED TO HIM THIS EPISODE AND HIS ROLE IN IT?

YES, AND IMPORTANTLY, YOUR HONOR, MR. SKALNICK'S TESTIMONY WOULD BE DEVASTATING IN THE PENALTY PHASE OF THIS TRIAL. MR. SKALNICK WOULD TESTIFY THAT MR. COOPER WALKED IN THAT CELL AND SAID HELLO, MR. SKALNICK. MY NAME IS RICHARD COOPER. I KILLED THREE PEOPLE, AND I AM VERY PROUD OF IT, AND HE BRAGGED ABOUT IT, AND HE SHOWED NO REMORSE.

DIDN'T SKALNICK WAIVE HIS ATTORNEY/CLIENT PRIVILEGE?

MR. SKALNICK, IN A DEPOSITION WITH MR. CRIDER, NOT MR. KOCH, WAS ASKED IF HE WOULD WAIVE. THAT WAIVER, YOUR HONOR, IS NOT WORTH THE PAPER THAT IT IS TRANSCRIBED ON.

WHY DO YOU SAY THAT?

BECAUSE A WAIVER, TO BE EFFECTIVE, NEEDS TO FULLY INFORM THAT PERSON OF THE CONSEQUENCES OF THAT WAIVER, APPLETS JUST READ IT, SO WE ARE REAL CLEAR ON THIS. "ARE YOU WILLING TO WAIVE ANY CONFIDENTIALITY OR ANY PRIVILEGE THAT MAY EXIST BETWEEN YOU AND MR. KOCH?" "YES, SIR, I WILL WAIVE THAT." THAT IS IT.

THAT IS A WAIVER, THOUGH. ASSUMING THAT SKALNICK WAIVED IT, IS YOUR ARGUMENT THAT COOPER SHOULD HAVE BEEN APPRISED OF THIS CONFLICT THAT KOCH HAD WITH SKALNICK?

ABSOLUTELY.

BECAUSE THAT IS DIFFERENT IF SKALNICK WAIVED IT. IT DOESN'T MATTER IF IT IS A VALID WAIVER AS TO SKALNICK. CONTINUE WITH THAT, AS FAR AS HOW IS IT, THEN THAT, COOPER, WAS HE NOT APPRISED OF THE KOCH REPRESENTTITION AND -- REPRESENTATION, AND --

LET'S TAKE THEM ONE AT A TIME. ON THE SKALNICK WAIVER, IT IS AN INADEQUATE WAIVER T DOESN'T COME FROM MR. KOCH. TO MR. KOCH. AND THERE IS NO DESCRIPTION OF THE CONSEQUENCES, AND LATER IN THE TRANSCRIPT HERE, MR. SKALNICK TELLS MR. CRIEDER THAT HE IS REPRESENTED BY COUNSEL, MR. POPE, SO HIS LAWYER ISN'T EVEN THERE. NOW LET'S GO WITH THE COOPER WAIVER. MR. KOCH TESTIFIES THAT HE TOLD MR. COOPER ABOUT SKALNICK AND MR. COOPER WAS FINE WITH IT, THAT ALL OCCURRED OUTSIDE THE HEARING OF THE JUDGE. THE TRIAL JUDGE WAS NOT ADVISED OF THIS, AND MR. KOCH ACKNOWLEDGES THAT HE DID NOT TELL MR. COOPER, THEN, THAT THERE WOULD BE ANY LIMITATIONS ON HIS REPRESENTATION OF MR. COOPER, AS A RESULT OF THAT CONFLICT. THERE IS NOTHING ON THIS RECORD THAT INDICATES THAT RICHARD COOPER ENGAGED IN A KNOWING WAIVER OF THE SKALNICK CONFLICT TO MR. KOCH. AND TO THE CONTRARY MR. KOCH TESTIFIES UNEQUIVOCALLY, I DID NOT TELL HIM THAT THERE WOULD BE ANY LIMITATION ON THE REPRESENTATION, AND THERE CLEARLY WAS A LIMITATION ON THE REPRESENTATION. MR. KOCH WAS NOT GOING TO GO BACK INTO THAT MAY 1981 INCARCERATION OF MR. SKALNICK AND DELVE INTO THE TIMES AND THE CASES THAT MR. SKALNICK TESTIFIED FOR THE STATE, FROM MAY OF '81 UNTIL JUNE OF 1930. IN FACT, MR. KOCH AND MR. CROW, AFTER THE SUPPRESSION HEARING, HAD A CONVERSATION, AND THE CONVERSATION WAS ABOUT MR. KOCH'S REPRESENTATION OF SKALNICK, AND THE FACT THAT MR. KOCH HAD NOT GONE BACK INTO THAT MAY 1981 INCARCERATION THROUGH JUNE. BUT HAD ADAMANTLY LIMITED HIS QUESTIONS, IN THAT SUPPRESSION HEARING, TO NOVEMBER OF '82 FORWARD.

WHAT WAS THE EXTENT OF KOCH'S REPRESENTATION OF SKALNICK? WASN'T IT JUST HE REPRESENTED HIM DURING A MOTION HEARING?

THAT HE FILES IN OCTOBER OF 1982, AND HE IS ASKING, AND HE REPRESENTS --

I -- A MOTION TO RESENTS.

SKALNICK HAD GOTTEN A SENTENCE FOR GRAND THEFT AND HE WAS A CONTRACT INVESTIGATOR, AND HE WANTED TO GET A PRIVATE INVESTIGATOR'S LICENSE, SO THAT IS WHY HE WANTED TO GET THAT 60-MONTH PROBATION REDUCED DOWN, AND MR. KOCH FILED A PLEAD NOT GUILTY WHICH HE SAID THAT MR. SKALNICK HAD HAD NO PRIOR INVOLVEMENT WITH LAW ENFORCEMENT. AND OF COURSE MR. SKALNICK'S PRIOR INVOLVEMENT WITH LAW ENFORCEMENT IS ALL ABOUT WHAT THIS CASE IS ABOUT.

BUT THIS OCCURRED MONTHS BEFORE KOCH REPRESENTED YOUR CLIENT. IS THAT CORRECT?

HE STARTS REPRESENTING MY CLIENT IN MAR --.

HE REPRESENTED SKALNICK AT THAT TIME?

NO. MR. POPE HAD COME IN AND WAS NOW REPRESENTING MR. SKALNICK, AND I SUBMIT TO YOU, YOUR HONOR, THAT THE TRIAL JUDGE FOCUSED ON THE SHORT PERIOD OF TIME IN THAT REPRESENTATION, IN DENYING THIS CLAIM, AND I WOULD SUBMIT TO YOU THAT THE SHORT PERIOD OF REPRESENTATION IS IRRELEVANT TO THE ANALYSIS. WHAT IS IMPORTANT TO THE ANALYSIS IS THAT MR. KOCH KNEW, AND THIS RECORD COMPELS THE CONCLUSION THAT MR. KOCH KNEW THAT WHAT HE HAD LEARNED IN THE COURSE OF THAT REPRESENTATION PROHIBITED HIM FROM GOING BACK INTO THAT SNITCHING ACTIVITY PRIOR TO THAT, THE BEGINNING OF THAT REPRESENTATION OR ACTUALLY THE END OF THAT REPRESENTATION, IN NOVEMBER OF 1982.

IS THIS A CORRECT REPRESENTATION THAT KOCH REPRESENTS SKALNICK MONTHS BEFORE HE REPRESENTED YOUR CLIENT, AND HE ONLY REPRESENTED HIM IN ONE HEARING. THAT WAS THE EXTENT OF HIS REPRESENTATION OF SKALNICK.

THERE IS NO QUESTION ABOUT THAT, YOUR HONOR.

HUH?

THERE IS NO QUESTION ABOUT THAT, BUT I WOULD SUBMIT TO YOU THAT THE TIME INVOLVED IS NOT NEARLY AS IMPORTANT AS WHAT WAS INVOLVED AND THE FACT THAT THERE IS NO QUESTION IN THIS RECORD, THAT MR. KOCH LIMITED HIS TESTIMONY FROM NOVEMBER, MR. SKALNICK'S TESTIMONY TO SNITCHING ACTIVITIES, FROM NOVEMBER 1982 FORWARD.

IS THAT YOUR CLAIM THAT YOU HAVE SHOWN ACTUAL PREJUDICE THROUGH THAT? OR IS IT YOUR CLAIM THAT YOU DON'T HAVE TO SHOW?

SURE. MY CLAIM IS THAT I DON'T HAVE TO SHOW. I HAVE TO SHOW SOME EFFECT. OKAY. THAT IS THE TEST, THE ELEVENTH CIRCUIT TEST. IT CAN'T BE JUST CONFLICT IN THE AIR. OKAY. IT HAS GOT TO HAVE SOME EFFECT, AND THE MOST DEVASTATING EFFECT IT HAD, AND I WOULD SUBMIT TO YOU THAT THIS CONCLUSION IS COMPELLED ON THIS RECORD, THAT MR. KOCH DID NOT GO BACK BEFORE NOVEMBER OF '82, BECAUSE OF HIS REPRESENTATION OF MR. SKALNICK. THOUGH IT COMPELS THAT, A, THE FACT THAT HE DIDN'T DO IT, B THAT, HE HAD A CONVERSATION WITH MR. CROW, WHO IS A PROSECUTOR, OF COURSE, OUTSIDE OF THE PRESENCE OF THE JUDGE, IN WHICH THEY ARE DISCUSSING HOW THEY ARE GOING TO HANDLE THAT. THAT IS TO HANDLE YOU REPRESENTED MR. SKALNICK IN NOVEMBER 1982, AND YOU HAVEN'T TOLD THE TRIAL JUDGE ANYTHING ABOUT ALL OF THAT TESTIMONY THAT WENT BEFORE.

YOU HAVE GOT SOME OTHER ISSUES HERE. DON'T GET TIED UP --

I DO. THAT IS MY MOST IMPORTANT ISSUE THOUGH, SO I APPRECIATE KNOWING THE COURT'S VIEWS.

NOW, IF THAT IS YOUR MOST IMPORTANT ISSUE, LET'S GO TO CRIDER'S CONFLICT.

MR. CRIDER'S CONFLICT, YOUR HONOR, WAS FORMERLY IN THE STATES ATTORNEYS OFFICE AND HE HAD A DISCUSSION WHILE HE WAS IN THE STATES ATTORNEYS OFFICE, AND HE HAD NO BUSINESS BEING ON THIS CASE, AND THAT IS OUR PROOF SFR MR. CRIDER.

WHAT IS THE TESTIMONY ABOUT THIS --

CRIDER TESTIFIES TO IT AND SAYS IT IS NOT SIGNIFICANT. IN HIS VIEW, IT WAS NOT A MATTER OF

ANY GRAVE CONCERN.

I THOUGHT THE TESTIMONY WAS THAT HE HAD NO CONTACT WITH THIS CASE, NO INVOLVEMENT WITH THIS CASE.

I COULD BE MISTAKEN ON THAT BUT I DON'T THINK I AM. I THINK HE DID HAVE SOME, WHAT HE DESCRIBED AS MINIMAL.

BUT HE HAD LEFT, CRIDER HAD LEFT THE STATE ATTORNEYS OFFICE, BY THE TIME THAT COOPER BECAME A SUSPECT IN THE CASE, HAD HE NOT?

YES, SIR. I AM NOT SURE OF THAT, YOUR HONOR, BUT I WILL SAY THAT CRIDER WAS HEARD BY THE COURT, AND IT IS DISTINGUISHABLE FROM THE KOCH CONFLICT IN THAT WAY.

AND IT WAS CRIDER'S TESTIMONY THAT HE HAD NO KNOWLEDGE OF COOPER'S CASE AT ALL. IS THAT CORRECT?

NO. MY RECOLLECTION OF THE RECORD, AND I COULD BE MISTAKEN ON THIS, YOUR HONOR, BUT THAT IT WAS VERY, VERY MINIMAL. IT WAS SIMPLY A DISCUSSION, AND IT WAS NOT OF ANY CONSEQUENCE. I COULD BE WRONG ON THAT BUT I AM PRETTY SURE THAT'S RIGHT. OKAY. MR. COOPER'S EFFORTS TO GET TO THE BOTTOM OF THE SKALNICK QUESTION HAVE BEEN FRUSTRATED BY THE ACTIONS OF THE PROSECUTOR AND THE TRIAL JUDGE IN THE 119 LITIGATION IN THIS CASE. MR. COOPER SUBMITTED A CHAPTER 119 REQUEST FOR DOCUMENTS, EVIDENCING SKALNICK'S SNITCHING ACTIVITIES. THE STATE PRODUCED TWO KINDS OF DOCUMENTS. 30,000 DOCUMENTS AND THEN 8,000 DOCUMENTS TENERRED TO THE JUDGE EVEN -- DOCUMENTS ABOUT SNITCHING, WHICH THE JUDGE EVEN TENERRED AND -- EVEN TENDERED, AND THEY ARE HERE, AND I WOULD ASK YOU TO REVIEW THOSE AT HIS REQUEST, AND IN PARTICULARLYITY, THEY DISCUSS -- IN PARTICULARITY THEY DISCUSS WHY THEY WERE REQUIRED. IT IS OUR CONTENTION THAT THE STATE NEVER REQUIRED A PARTICULAR WRITTEN EXPLANATION, UNDER CHAPTER 119, WHY ANY EXEMPTION APPLIES TO ANY DOCUMENT IN THIS CASE, EITHER THOSE REDACTED OR THOSE PROVIDED COUNSEL, AND PROVIDED TO COUNSEL, OR THOSE TENDERED TO THE COURT IN CAMERA. THE STATE MANDATED THAT THE REDACTED DOCUMENTS, THAT THE STATE MUST STATE BASIS FOR THE EXEMPTION CLAIM AND THE REASON WHY THE EXEMPTION APPLIES WITH PARTICULARITY, AND WE HAVE SUGGESTED THAT, IN ORDER TO ENABLE THE COURTS OF THIS STATE TO DO THEIR JOB, THIS COURT SHOULD REQUIRE THE STATE TO PROVIDE THAT SAME KIND OF INFORMATION, WHEN IT TENDERS DOCUMENTS FOR IN CAMERA REVIEW. AND MOST IMPORTANTLY, THE STATE MUST IDENTIFY WHICH EXEMPTION APPLIES TO WHICH DOCUMENT. YOU CANNOT MAKE ANY SENSE OF WHAT THE STATE HAS GIVEN US.

BUT ISN'T THE SAME ISSUE LITIGATED IN YOUR PETITION FOR MANDAMUS AND THE VERY IDENTICAL ISSUE, AND YOU WERE DENIED RELIEF ON THAT?

YES, BUT I DON'T THINK THAT CONCLUDES OUR COMING FORWARD HERE IN THIS CASE, AND THE STATE HAS NOT ARGUED THAT, AND MY UNDERSTANDING OF THE MANDAMUS LAW, YOUR HONOR, IS THAT A SIMPLE DENIAL WILL NOT PRECLUDE ME BRINGING AFFORD LETTER LATER, BECAUSE IT IS NOT DETERMINATION ON THE MERITS. IT IS SIMPLY THAT THE COURT, IN A 4-TO-3 DECISION, FELT THAT MANDAMUS WAS NOT APPLICABLE, EITHER. IT IS EXTRAORDINARY WRIT. MAY NOT HAVE FELT IT WAS A CRITICAL DUTY, ALL OF THOSE ISSUES. I DON'T THINK I AM IN ANY WAY PRECLUDE AND THE STATE HAS NOT SUGGESTED.

THAT WAS APPLIED FOR WHILE THE PROCEEDINGS WERE PENDING BEFORE THE TRIAL COURT.

YES. EXACTLY. IT WAS. THIS IS A VERY IMPORTANT ISSUE IN THIS CASE. THOSE DOCUMENTS CANNOT BE ANALYZED BY THE TRIAL JUDGE NOR HIS DETERMINATION OF WHICH IS EXEMPT AND

WHICH IS NOT BE REVIEWED BY YOU. YOU CAN GO BACK THERE AND LOOK AT THOSE DOCUMENTS FROM NOW FOR THE REST OF THE YEAR AND HAVE THE WHOLE STAFF HERE TO LOOK AT THEM, AND NOBODY IS GOING TO BE ABLE TO TELL WHICH EXEMPTION APPLIES TO WHICH DOCUMENT. YOU ARE SIMPLY TOLD THERE ARE, HERE IS A CASE, AND THERE ARE FILES IN THIS CASE HERE OR DOCUMENTS FROM THIS CASE, AND HERE IS SIX EXEMPTIONS THAT IS APPLIED TO THAT CASE.

CHIEF JUSTICE: IF YOU WANT TO SAVE YOUR REBUTTAL TIME.

THANK YOU, YOUR HONOR. GOOD MORNING.

GOOD MORNING, JUSTICES I I AM CAROL DITTMAR REPRESENTING THE RESPONDENT MICHAEL MOORE AND THE STATE OF FLORIDA. THE COURT DENIED THAT EVIDENTIARY HEARING RULING AND THAT WAS CORRECT AND SUPPORTED BY THE EVIDENCE AT THE HEARING.

WHAT WAS OUR STANDARD OF REVIEW ON THAT? IS THERE DEFERENCE TO FACTUAL FIND THATION WE ARE GOING TO BE LOOKING AT -- FINDINGS THAT WE ARE GOING TO BE LOOKING AT, OR DO WE LOOK AT IT AS A MIXED QUESTION OF FACT AND LAW, CONSTITUTIONAL ISSUES?

THE FACTUAL FINDINGS ARE ENTITLED TO DEFERENCE BY THIS COURT AND THE LEGAL CONCLUSIONS ARE REVIEWED DE NOVO.

TELL US ABOUT CRIDER FIRST OF ALL.

CRIDER, AND ACTUALLY CRIDER'S ALLEGED CONFLICT IS DISCUSSED IN THE TRIAL TESTIMONY MORE THAN IT IS DEVELOPED AT THE EVIDENTIARY HEARING. WHAT HAPPENED IS ON THE RECORD IN THE DIRECT APPEAL RECORD. THE JUDGE, AT ONE POINT, ASKED CRIDER, WEREN'T YOU WITH THE STATE ATTORNEYS OFFICE BACK WHEN THESE MURDERS OCCURRED? NOW, IT WAS MORE THAN SIX MONTHS AFTER THE MURDERS BEFORE THEY DEVELOPED COOPER AND THE OTHER DEFENDANTS AS SUSPECTS, SO THERE WAS A GREAT, THERE WAS EXTENDED TIME WHEN, AFTER THE CRIME HAD OCCURRED, THAT THEY DID NOT HAVE THE NAMES AND DIDN'T HAVE ANY INFORMATION ABOUT THE SUSPECTS. CRIDER RESPONDED THAT HE HAD LEFT OF THE STATE ATTORNEYS OFFICE AFTER THAT TIME, BUT THAT HE NEVER HAD ANYTHING TO DO WITH THE INVESTIGATION, AND NEVER WAS INVOLVED IN ANY OF THE INVESTIGATION FROM THE STATE ATTORNEYS OFFICE, SO HE DIDN'T HAVE ANY KNOWLEDGE ABOUT IT, DID NOT FEEL LIKE IT WAS A CONFLICT, AND THERE WAS NOTHING ADDITIONAL PURSUED AT THAT TIME. AT THE EVIDENTIARY HEARING, CRIDER TESTIFIED THAT HE LEFT THE STATE ATTORNEYS OFFICE IN FEBRUARY 1983, WHICH WOULD HAVE BEEN ACTUALLY A COUPLE OF MONTHS BEFORE THE MURDERS, BUT THE ALLEGATION IN THE POSTCONVICTION MOTION WAS THAT THIS WAS A CONFLICT OF INTEREST, BECAUSE CRIDER REMAINED FRIENDLY WITH HIS PRIOR ASSOCIATES IN THE STATE ATTORNEYS OFFICE AND WITH SOME OF THE LAW ENFORCEMENT OFFICIALS INVOLVED, SO THERE IS NO REAL ALLEGATION. THERE IS CERTAINLY NEVER ANY PROOF THAT CRIDER HAD ANY CORRECT INVOLVEMENT WITH THE INVESTIGATION OR ANY KNOWLEDGE OF --

WAS THERE ANY EVIDENCE OR TESTIMONY SUBMITTED THAT HE HAD ANY CONVERSATIONS WITH SOMEBODY ASSIGNED TO THE CASE OR ANYTHING LIKE THAT?

NO.

SO --

I DON'T RECALL ANYTHING LIKE THAT.

IT SEEMS TO ME THE QUESTION AS TO WHETHER CRIDER WAS ACTUALLY EMPLOYED WITH THE STATE ATTORNEYS OFFICE WHEN THIS MURDER INVESTIGATION WAS ONGOING, WOULDN'T BE

SOMETHING THAT WE WOULDN'T HAVE TO BE GUESSING ABOUT. IT IS A DATE.

RIGHT.

AND THE ACTUAL DEFENSE ATTORNEY TESTIFIED UNDER OATH AT THE EVIDENTIARY HEARING THAT HE HAD, IN FACT, LEFT BEFORE THE MURDER HAD EVEN OCCURRED?

IN FEBRUARY 1983 AND THE MURDERS WERE IN -- I AM SORRY, THE MURDERS WERE IN JUNE 1982. I MISSPOKE ON THAT. SO HE WAS WORKING THERE WHILE THE MURDERS WERE ONGOING. WHILE THEY OCCURRED. BUT HE HAD LEFT BEFORE COOPER WAS ACTUALLY DEVELOPED WITH THE STATE ATTORNEYS OFFICE. IT WAS ABOUT THE TIME THAT COOPER WAS IDENTIFIED BY LAW ENFORCEMENT, AND THEY WERE TALKING TO THE OTHER DEFENDANTS IN DEVELOPING THAT INFORMATION DURING JANUARY AND FEBRUARY OF '83. SO IT WAS SIMILAR TO THE TIME BUT, AGAIN, HE WAS NOT INVOLVED IN THE INVESTIGATION.

AND IT WAS DEMONSTRATED IN THE ORIGINAL TRIAL RECORD THAT THIS WAS DISCLOSED TO THE DEFENDANT.

YES.

IS THAT CORRECT?

WELL, I DON'T RECALL THAT SPECIFICALLY, WHERE IT IS IN THE RECORD OF THE DIRECT APPEAL. I AM ASSUMING THAT THE DEFENDANT WAS PRESENT IN THE COURT, BUT I KNOW THAT IT WAS A COLLOQUY BETWEEN THE TRIAL JUDGE AND THE DEFENSE ATTORNEYS, SO I AM ASSUMING THAT THE DEFENDANT WAS PRESENT, BUT I DON'T RECALL SPECIFICALLY WHEN THAT OCCURRED, IN TERMS OF WHAT THE TRANSCRIPT REFLECTS.

IS THERE A CLAIM, JUST FROM MR., SO MR. HANLON CAN ENLIGHTEN US, THAT THE DEFENDANT DID NOT KNOWINGLY WAIVE, LET'S ASSUME THERE WAS A CONFLICT, BECAUSE I KNOW WE DO HAVE CASES ABOUT, THAT SOMEBODY IS IN THE STATE ATTORNEY OR PUBLIC DEFENDERS OFFICE. I MEAN THEY ARE PRESUMED TO KNOW WHAT IS GOING ON IN THE REST OF THE OFFICE, THAT HE DID OR DIDN'T WAIVE IT? IN OTHER WORDS WHAT WAS THE TESTIMONY AT THIS EVIDENTIARY HEARING? DID MR. CRIDER SAY THAT HE DID INFORM HIS CLIENT AND THE CLIENT KNOWINGLY WAIVED ANY POTENTIAL --

THEY DIDN'T DISCUSS IT AT THE EVIDENTIARY HEARING, PARTICULARLY AS TO A WAIVER FROM COOPER, BECAUSE, AGAIN, IT WAS DISCUSSED ON THE RECORD FROM THE DIRECT APPEAL, AND CRIDER WAS SAYING THAT HE WAS, THERE IS NO EVIDENCE THAT SHOWS EXACTLY WHEN THE STATE ATTORNEYS OFFICE REALLY UNDERTOOK ANY TYPE OF INVESTIGATION. SO WE DON'T EVEN KNOW WHEN THEY WOULD, WHEN YOU SAY HE WOULD BE FAMILIAR WITH THINGS HAPPENING IN THE OFFICE --

I AM NOT SAYING HE WOULD BE FAMILIAR. I THOUGHT YOU SAID THAT THERE WAS A GENERAL PRESUMPTION THAT SOMEBODY WAS EMPLOYED INEST PUBLIC DEFENDERS OR STATE ATTORNEYS OFFICE, EVEN IF THEY HAVEN'T WORKED ON THE CASE THAT, IT IS THE SAME KIND OF CONFLICT.

THEY HAVE THAT KNOWLEDGE. THERE JUST IS NO, I THINK TO THE EXTENT YOU HAVE THAT PRESUMPTION, IT IS REBUTTED PIE CRIDER SAYING I WAS NOT INVOLVED IN THE INVESTIGATION. I DIDN'T HAVE ANYTHING TO DO WITH THE CASE, WHEN HE IS TELLING THE TRIAL JUDGE THAT, SO TO THE EXTENT THAT THERE COULD BE SUCH A PRESUMPTION, I THINK WE HAVE THE EVIDENCE OR THE STATEMENTS FROM THE ATTORNEY THAT REFUTES THAT. BECAUSE HE WAS NOT. NOW --

SO ALL WE HAVE, AS FAR AS CRIEDER CONCERNED, IS THE EMPLOYMENT BY THE STATE

ATTORNEYS OFFICE.

THAT'S CORRECT.

AT A TIME AFTER THIS MURDER WAS COMMITTED.

THAT'S CORRECT. THAT'S CORRECT.

OKAY. WHILE IT WAS UNDER INVESTIGATION.

YES.

BUT NO DEMONSTRATION OF ANY KNOWLEDGE.

LET'S GO ON TO THE OTHER --

AS TO MR. KOCH, THERE HASN'T BEEN ANY --

THERE IS A STARTING POINT HERE THAT THERE IS A CONFLICT, RIGHT? THIS IS THAT IT IS UNDISPUTE ODD THIS RECORD THAT MR. KOCH HAD PREVIOUSLY REPRESENTED A KEY, THE KEY? A KEY STATE WITNESS AGAINST THE DEFENDANT HERE, AND SO THAT IS A CONFLICT, ISN'T IT?

WELL THAT, IS A POTENTIAL CONFLICT. I DO NOT BELIEVE THAT IS AN ACTUAL CONFLICT, WHEN YOU HAVE A SUCCESSIVE REPRESENTATION SITUATION, AND THAT IS WHAT THE CASE LAW HAS DEMONSTRATED. IT IS NOT, AS A MATTER OF LAW, AN ACTUAL CONFLICT. IT IS A POTENTIAL CONFLICT, WHICH MAY GIVE RISE TO AN ACTUAL CONFLICT, IF THERE IS SOME COMPETING INTERESTS INVOLVED. IN THIS CASE, FIRST OF ALL, I CHALLENGED THE CHARACTERIZATION OF SKALNICK AS A KEY WITNESS BECAUSE HE WAS NOT. HE WAS USED ONLY IN PENALTY PHASE, BASICALLY CORROBORATED COOPER'S OWN CONFESSION TO LAW ENFORCEMENT, WHICH HAD BEEP USED AT THE GUILT PHASE.

THAT WAS PRETTY DAMAGING TESTIMONY THAT HE GAVE. DID HE NOT, I MEAN, DIDN'T HE DESCRIBE A VERY CALLOUS ATTITUDE HERE, ON THE PART --

YES, HE DID, BUT AS FAR AS BEING A WIT KNOWS WHO -- A WITNESS WHO ESTABLISHES MITIGATING OR AGGRAVATING FACTORS, HE DID NOT. HE JUST HAD CORROBORATING TESTIMONY THAT HAD ALREADY BEEN GIVEN IN THE GUILT PHASE.

GIVE US THE CHRONOLOGY OF THIS --

THE REPRESENTATION?

RIGHT. AND THE TRIAL JUDGE HAS A FOOTNOTE SAYING THAT THERE WAS EVIDENCE, A STATEMENT BY KOCH THAT THE DEFENDANT WAS ADVISED OF THIS. WHAT WAS THE STATE OF THE RECORD ON THAT?

A RECORDER -- AN ORDER AND CHARTLY THEREAFTER THAT HE DISCLOSED THE POTENTIAL CONFLICT TO THE DEFENDANT AND THE DEFENDANT CONSENTED TO IT?

RIGHT. THAT WAS AT THE EVIDENTIARY HEARING. STARTING CHRONOLOGICALLY, SKALNICK, IN OCTOBER 1982, KY KOCH FILED A MOTION FOR COMMITTEE CONSIDERATION, AS WAS DISCUSSED PREVIOUSLY IN ONE OF SKALNICK'S CASES AND CAME UP FOR CONSIDERATION. BEFORE THAT MOTION CAME TO BE HEARD, ANOTHER ATTORNEY CAME IN AND, POPE, TOOK OVER SKALNICK'S REPRESENTATION, SO KOCH, AT THE TIME OF THE EVIDENTIARY HEARING, HE HAD BEEN SHOWN THE MOTION TO RECONSIDER THAT HE HAD FILED AND SAID YES, THAT IS MY SIGNATURE. I DID THAT PLEADING, BUT HE HAD NO MEMORY OF HAVING REPRESENTED SKALNICK. AT THE TIME OF

THE, SKALNICK'S DEPOSITION, WHICH WAS IN NOVEMBER 1983,, ATTORNEY CRIDER ASKED SKALNICK ABOUT KOCH'S REPRESENTATION, AND IT IS AT THAT POINT THAT SKALNICK WAIVED ANY POSSIBLE CONFLICT AND SAID HE DIDN'T HAVE A PROBLEM AT ALL WITH KOCH REPRESENTING COOPER IN THE MATTER, AND I BELIEVE THAT HE WAS ADVISED BY CRIDER THAT, OF KOCH'S INVOLVEMENT, AND HE WAIVED ANY POTENTIAL CONFLICT, AND, REALLY, THE POTENTIAL FOR PREJUDICE HERE WOULD BE PREJUDICE TO SKALNICK AND NOT TO COOPER. IT WOULD BE TO COOPER'S ADVANTAGE.

I AM HAVING DIFFICULTY WITH THAT, BECAUSE IF SKALNICK TESTIFIES AGAINST COOPER AT THE PENALTY PHASE, AND WE HAVE GOT A LAWYER THAT IS NOW REPRESENTING COOPER, BUT WHO, ALSO, REPRESENTED THIS WITNESS, WHO IS NOW TESTIFYING AGAINST COOPER, AND SO THE INFERENCE OR THE ORDINARY ARGUMENT IS, IS IT THE LAWYER IS GOING TO GO EASY ON THIS WITNESS, WHO HAS ALSO BEEN HIS CLIENT, AND SO I AM --

FIRST OF ALL, YOU HAVE GOT --

IN OTHER WORDS HELP ME WITH THAT PROPOSITION HERE, AS FAR AS IF THERE IS ANY SHOWING THAT, IN FACT, KOCH DID NOT CROSS-EXAMINATION THIS WITNESS WHO TESTIFIED AGAINST COOPER, OR WITH HELD SOMETHING THAT WAS THERE, YOU KNOW, TO BE USED AGAINST SKALNICK. -- TO BE USED AGAINST COOPER. DID HE -- HE TESTIFIED THAT THERE WAS NO CONFLICT IN DOING SO.

SO HE TESTIFIED THAT THERE WAS NO CONFLICT OF ANYTHING, NO PREJUDICE ACTUALLY ENYOURING AGAINST HIS PRESENT CLIENT.

BUT MORE IMPORTANTLY THE RECORD SHOWS THAT, WHERE THEY ARE CLAIMING THERE WAS AN ADVERSE EFFECT WAS AT THE SUPPRESSION HEARING, AND THE REASON FOR THAT TESTIMONY WAS THAT THE DEFENSE HAD FILED A MOTION TO EXCLUDE ANY TESTIMONY FROM SKALNICK ALLEGING THAT HE HAD BEEN A STATE WITNESS THAT, HE HAD BEEN PLANTED BY THE STATE TO GET THIS INFORMATION. AT THE SUPPRESSION HEARING, THE LINE OF QUESTIONING THAT IS DIRECTED TO SKALNICK IS ABOUT WHAT, HIS SNITCHING ACTIVITIES, BASICALLY, DURING HIS INCARCERATION FROM NOVEMBER 19 WILL 2 THROUGH THE PRESENT TIME -- FROM NOVEMBER, 1982, TO THE PRESENT TIME, WHICH IS 1984. SO HE HAD BEEN IN THE COUNTY JAIL FOR OVER A YEAR AND HE TALKED ABOUT HOW HE HAD PROVIDED INFORMATION ON 28 DIFFERENT INDIVIDUALS DURING THAT TIME PERIOD. HE WAS NOT ASKED AND THIS IS WHAT THE DEFENSE HAS POINTED TO, HE WAS NOT ASKED ABOUT ACTIVITIES PRIOR TO NOVEMBER OF 1982. HOWEVER, AT PENALTY PHASE IN THE TRIAL, THAT LIMITATION DID NOT OCCUR, AND WHEN KY KOCH TESTIFIED AT THE EVIDENTIARY HEARING, HE SAID THAT HE HAD REVIEWED THE SUPPRESSION TESTIMONY. HE NOTED THAT THERE WAS THE LIMITATION THAT HE WAS ONLY ASKED ABOUT NOVEMBER 1982, BUT HE SAID YOU KNOW, IT WAS NOT LIMITED AT THE PENALTY PHASE. I DIDN'T LIMIT HIM TO THAT TIME. I ASKED HIM HIS HISTORY OF EVER PROVIDING INFORMATION TO LAW ENFORCEMENT, AND IT WAS BASICALLY ABOUT THE SAME. HE SAID ABOUT 30 DEFENDANTS. AND THE SUGGESTION THAT SKALNICK HAD TESTIFIED IN CASES PRIOR TO THE NOVEMBER 1982 INCARCERATION, HAS NO SUPPORT IN THIS RECORD, BECAUSE THERE IS NO EVIDENCE OF SKALNICK EVER TESTIFYING IN ANY PRIOR CASES, SO WE REALLY DON'T HAVE THE INFORMATION THAT THERE WAS ANYTHING PRIOR TO NOVEMBER OF 1982, THAT WAS DAMAGING TO SKALNICK OR HELPFUL TO COOPER, AND IF WE DID, WE HAVE THE RECORD FROM THE PENALTY PHASE, WHERE THIS LIMITATION WAS NOT EMPLOYED BY DEFENSE COUNSEL, SO TO THE EXTENT THEY ARE SAYING THE ONLY REASON HE DIDN'T GO TO PRIOR ACTIVITIES WAS BECAUSE OF THIS ALLEGED CONFLICT WITH THE PRIOR REPRESENTATION, AND THAT IS REFUTED BY THE FACT THAT HE ASKED ABOUT IT AT PENALTY PHASE. THE --

WAS KY KOCH, DID KY KOCH REPRESENT THE DEFENDANT AT THE MOTION TO SUPPRESS HEARING?

YES. REPRESENTED COOPER.

SO HE ALSO, AND HE ALSO CROSS-EXAMINED SKALNICK BOTH TIMES THAT, BOTH AT THE SUPPRESSION HEARING AS WELL AS --

AND AT THE PENALTY PHASE.

-- AT THE PENALTY PHASE?

YES.

DID HE EXPLAIN A REASON AS TO WHY THERE WAS A LIMITATION TO ONE AND NOT THE OTHER?

HE SAID THAT HE COULD NOT RECALL. YOU KNOW, THAT READING THE QUESTIONS, HE SAW THAT THEY WERE DIRECTED TO THAT TIME FRAME, BUT HE, AT THE POSTCONVICTION HEARING, DID NOT RECALL IF THERE WAS A REASON THAT HE WAS DOING THAT INTENTIONALLY OR IF THAT WAS JUST INFORMATION THAT HE HAD. HE SAID THAT HE KNEW ALL ABOUT SKALNICK, AND THAT HE AND CRIDER HAD DISCUSSED STRATEGICALLY HOW TO CROSS-EXAMINE SKALNICK AT THE TRIAL. THEY ANTICIPATED THAT SKALNICK WAS GOING TO BE USED IN THE GUILT PHASE OF THE TRIAL, AND IN FACT, THE PROSECUTOR TESTIFIED AT THE EVIDENTIARY HEARING, THAT HE HAD INTENDED ORIGINALLY, TO USE SKALNICK IN GUILT PHASE, BUT WHEN HE SAW HOW PREPARED THE DEFENSE WAS, TO CROSS-EXAMINE, AND BASICALLY THEY HAD THIS TWO-INCH-THICK STACK OF DOCUMENTS THEY WERE GOING TO USE AND THEY WERE VERY MUCH READY TO CROSS-EXAMINE SKALNICK, THAT THEY DECIDED THEY DIDN'T REALLY WANT TO PUT HIM ON IN GUILT PHASE, SO THEY USED HIM ONLY AS A PENALTY-PHASE WITNESS.

WOULD YOU ADDRESS THE PUBLIC RECORDS REQUEST. WHAT IS YOUR RESPONSE THERE?

I THINK THAT THE PROCEDURES THAT ARE USED BY THE STATE IN SUBMITTING THE DOCUMENTS FOR AN IN COMRA INSPECTION IN THIS CASE, ARE EXACTLY THE PROCEDURES THAT THIS COURT HAS OUTLINED IN PRIOR CASES. THEY HAVE BEEN UPHELD. THE PINELLAS COUNTY STATE ATTORNEYS OFFICE HAS, IN NUMEROUS CAPITAL CASES, DONE THESE SAME PROCEDURES. THE DIFFICULTY IN THIS CASE IS BECAUSE SKALNICK WAS INVOLVED IN SO MANY CASES, IT, THERE IS A GREAT DEAL OF RECORDS GENERATED, SO YOU HAVE MORE VOLUME THAN YOU HAVE WITH OTHER RECORDS. I THINK THAT IS ONE OF THE REASONS FOR THE DELAY IN GETTING THIS CASE WHERE IT IS NOW, THIS POSTCONVICTION MOTION FILED IN 1989, AND A SIGNIFICANT PORTION OF THE DELAY, WE DIDN'T START HAVING THE EVIDENTIARY HEARING UNTIL 1999. DURING THAT TIME, WE WERE DOING PUBLIC RECORDS LITIGATION. THERE WAS A GREAT DEAL OF DOCUMENTS THAT WERE ACTUALLY DISCLOSED, MANY OF THEM WERE REDACTED, AND WHEN THE DEFENSE IS ASKING FOR THESE INDEX THAT THEY WANT FOR ALL THE DOCUMENTS THAT WERE ADMITED FOR AN IN CAMERA REVIEW, THEY ASKED FOR, IN THE TRIAL COURT THEY ASKED FOR THE SAME TYPE OF INVENTORY ON DOCUMENTS THAT HAD PROVIDED, BEEN PROVIDED TO THEM BUT WERE REDACTED, AND AT ONE OF THE HEARINGS, THE TRIAL JUDGE NOTED YOU CAN LOOK AT THIS DOCUMENT AND TELL ON THE FACE OF THE DOCUMENT WHAT IT IS AND WHAT HAS BEEN REDACTED OUT. IT MIGHT BE A PHONE NUMBER OR LAW ENFORCEMENT PERSONAL INFORMATION, BUT IT IS APPARENT FROM LOOKING AT THE FACE OF THE RECORD, SO THE JUDGE ACTUALLY GAVE THE DEFENSE, THEY SAID YOU KNOW, YOU ARE NOT REALLY ENTITLED TO THIS, BUT IF YOU HAVE A COPY OF A PAPER, A DOCUMENT THAT HAS BEEN REDACTED AND YOU DON'T UNDERSTAND WHAT HAS BEEN REDACTED OUT OF IT AND YOU WANT MORE INFORMATION, THEN YOU HAVE UNTIL A CERTAIN NUMBER OF DAYS TO IDENTIFY THOSE PARTICULAR DOCUMENTS TO THE COURT, AND I WILL GET MORE INFORMATION FROM THE STATE ABOUT THOSE PARTICULAR DOCUMENTS, AND THE DEFENSE NOT DO THAT. THEY DID NOT COME FORWARD WITH ANY DOCUMENTS THEY HAD IN THEIR POSSESSION THAT THEY HAD ANY FURTHER QUESTIONS ABOUT. AND I THINK, WHEN THIS COURT LOOSE AT THE DOCUMENTS, THE EIGHT BOXES THAT HAVE BEEN

SUBMITTED FOR IN CAMERA REVIEW, IT IS THE SAME SITUATION. THEY WERE IDENTIFIED BY THE STATE. THE BASIS OF THE EXEMPTION WAS CITED. AND THE ONLY THING, THE TYPE OF INFORMATION THAT THE DEFENSE IS ASKING FOR IN THIS REQUEST IS THEY WANT TO KNOW WHO WROTE THE DOCUMENT, THE DATE OF THE SDOUMENT, WHO THE DOCUMENT -- THE DATE OF THE DOCUMENT, WHO THE DOCUMENT WAS DIRECTED TO, A SUMMARY OF WHAT THE DOCUMENT WAS ABOUT AND A PARTICULAR REASON THAT THE DOCUMENT IS EXEMPT. TO BE ABLE TO GO BACK AND DO THAT FOR THE THOUSANDS AND THOUSANDS, PROBABLY MILLIONS OF DOCUMENTS THAT ARE INCLUDED, WOULD BE INCREDIBLY TIME-CONSUMING FOR THE STATE. IT WOULD BE AN EXTREME BURDEN. THE TRIAL JUDGE CERTAINLY, IF HE FELT LIKE HE NEEDED FURTHER INFORMATION TO BE ABLE TO INTELLIGENTLY REVIEW WHETHER THESE MET EXEMPTIONS, HE COULD HAVE ASKED FOR IT, IF HE HAD CONCERNS ABOUT IF I CANLAR DOUBTS. -- ABOUT PARTICULAR DOCUMENTS. HE COULD HAVE LIMITED THE DOCUMENTS TO THE DOCUMENTS THAT THE STATE WAS CONCERNED ABOUT AND HE DID NOT DO THAT.

DO YOU AGREE THAT MANDAMUS DOES NOT PRECLUDE COOPER FROM RAISING THIS ISSUE NOW, OR IS THIS A SUCCESSIVE MOTION?

I DON'T THINK HE IS BARRED FROM RAISING IT, BECAUSE I THINK THE MANDAMUS HAS A DIFFERENT STANDARD AND A HIGHER BURDEN THAT HE WOULD HAVE TO DEMONSTRATE AT THAT TIME, SO I THINK IT IS PROPERLY RAISED IN THIS APPEAL, AND I THINK IT CERTAINLY PRESERVES, THIS IS SOMETHING THEY ASKED THE TRIAL JUDGE TO REQUIRE THE STATE TO DO. THE TRIAL JUDGE DID NOT FEEL LIKE THE CASE LAW OR THE CURRENT, THE STATUTE AT ALL REQUIRED THIS, AND DECLINED TO IMPOSE THIS BURDEN ON THE STATE. SO I THINK IT IS PROPERLY BEFORE THIS COURT, BUT I, IT IS WITHOUT MERIT, BASED ON OTHER CASES WHERE THIS COURT, AND THIS COURT HAS SEEN, AGAIN, IN OTHER CASES OUT OF PINELLAS COUNTY, THE EXACT SAME PROCEDURES BEING USED AND HAS UPHELD THAT WITHOUT THEIR BEING THE SPECIFIC PARTICULAR INDEXING AND CROSS-REFERENCEING THAT THE DEFENSE IS AFTER. THE OTHER POINT I WANT TO MAKE ABOUT PUBLIC RECORDS IS, OF COURSE, ANY RULING THAT THIS COURT WOULD CHANGE AND REQUIRE SOMETHING FURTHER WOULD ONLY IMPACT THIS CASE BUT DOES NOT REQUIRE THIS TYPE OF INDEXING, SO FOR CURRENT, COMING UP, IT WOULDN'T MAKE A DIFFERENCE. [TECHNICAL DIFFICULTIES] THANK YOU.

CHIEF JUSTICE: COUNSEL.

MR. MARSHAL, HOW MUCH TIME DOES HE HAVE?

THANK YOU, YOUR HONOR. YOUR HONOR, I ASK THIS COURT TO READ THE THREE-PAGE CROSS-EXAMINATION OF PAUL SKALNICK IN THE PENALTY PHASE HEARING BY MR. KOCH, AND THE ONE QUESTION THAT WAS ASKED THAT HAD NO TIME ABOUT THIS PRIOR SNITCHING ACTIVITY, THAT HAD NO TIME FRAME OF REFERENCE ON IT WHATSOEVER. IT IS TRUE THAT HE DIDN'T LIMIT IT TO NOVEMBER OF '82, BUT IT HAD NO TIME ON IT, AND THE JURY HAD NO IDEA WHETHER THAT SNITCHING ACTIVITY OCCURRED BEFORE OR AFTER NOVEMBER, BEFORE OR AFTER JUNE OF '83, WHEN MR. SKALNICK TALKED WITH RICHARD COOPER.

WHAT IS THE EVIDENCE IN THE RECORD ABOUT IF AN ATTORNEY THAT HAD NO CONFLICT OF INTEREST HAD INQUIRED AS TO PRIOR ACTIVITY, WHAT KIND OF PRIOR ACTIVITY HAVE YOU BEEN ABLE TO ESTABLISH?

WELL, I WILL GIVE YOU THE PROSECUTOR'S VERSION. AFTER THE CONCLUSION OF THE SUPPRESSION HEARING, THE PROSECUTOR, THIS IS IN A WRITTEN PLEADING, COUNSEL FOR THE STATE SPECIFICALLY ASKED DEFENSE COUNSEL WHY HE HAD NOT BROUGHT OUT THAT SKALNICK HAD TESTIFIED DURING PRIOR INCARCERATIONS, IN THE MOREAL, ADVISED HIM OF SKALNICK HAVING PREVIOUSLY TESTIFIED FOR THE STATE, AND OFFERED TO HAVE SKALNICK RETAKE THE STAND AND RELATE THE DETAILS, IN THE PLURAL, OF THOSE INCIDENTS, IN THE PLURAL, FOR THE

COURT'S CONSIDERATION, IF DEFENSE COUNSEL DESIRED TO DO SO. MR. CROW AND MR. KOCH HAD A CONVERSATION ABOUT HOW TO, QUOTE, MR. CROW'S WORDS, HANDLE THE PROBLEM, AND THEY HANDLED IT BY NOT REOPENING. THE TRIAL JUDGE HAD NO IDEA OF THOSE PREVIOUS SNITCHING ACTIVITIES BY MR. SKALNICK. ON THIS RECORD, MR. SKALNICK REFUSED, I AM SORRY, MR. CROW, SORRY AGAIN, MR. KOCH REFUSED AND DID NOT GO BACK BEFORE NOVEMBER OF 1982, FOR SKALNICK'S SNITCHING ACTIVITIES, BECAUSE HE REPRESENTED MR. SKALNICK, AND HE HAS TESTIFIED THAT HE DID NOT INTERVIEW MR. SKALNICK PRIOR TO TAKING HIS TESTIMONY, PRIOR TO EXAMINING HIM, AND THE REASON THAT HE DID NOT INTERVIEW HIM WAS BECAUSE OF THIS WILL GRAVE, ETHICAL CONFLICT, AND HE SAYS THAT TWICE.

OTHER THAN THE FACT THAT SKALNICK WAS A NOTORIOUS JAILHOUSE SNITCH, WHAT IS YOUR PROOF THAT HE WAS AN AGENT OF THE STATE?

YES.

OR ARE YOU ADVANCING THAT?

A LOT OF IT IS BACK THERE. OKAY.

WHAT?

A LOT OF IT IS BACK THERE IN THOSE THOSE BOXES THAT WE HAVE BEEN TRYING TO GET OUR HANDS ON, AND THE BEST PROOF, WHICH IS ONLY THE BEGINNING, WE HAVE JUST BARELYLY SKACHED THE -- SCRATCHED THE SURFACE ON MR. SKALNICK IN THIS CASE, THAT THE TRIAL JUDGE WHO, DIDN'T KNOW ABOUT THE PRIOR ACTIVITY, SAID IN THE NEW TRIAL MOTION, WHEN MR. CRIDER TRIED TO ARGUE THAT THERE HAD BEEN A COURSE OF CONDUCT, THE TRIAL JUDGE SAID, WELL, WAIT A MINUTE. IF THERE HAD BEEN A COURSE OF CONDUCT, THAT WOULD HAVE BEEN A DIFFERENT THING, BUT THE EVIDENCE HERE IS COOPER WAS NUMBER ONE. COOPER WAS THE FIRST, SO YOUR MOTION FOR NEW TRIAL ON, BASED ON THE SUPPRESSION MOTION, IS DENIED. MR. CRIDER SAID I UNDERSTAND, AND I THINK HE DID UNDERSTAND. AND THAT WOULDN'T DO -- I AM SORRY, YOUR HONOR. GO AHEAD.

GO AHEAD. I AM SORRY.

THAT IS NOT CONCLUSIVE BUT THAT IS THE BEGINNING. WHAT YOU DO TO PROVE WHAT SKALNICK WAS IS YOU TAKE HIM THROUGH EVERY ONE OF THESE, EVERY SINGLE ONE, AND AFTER A WHILE, THE STATE'S NOTION THAT THIS IS JUST A BOY SCOUT AND HE IS JUST INTERESTED IN TRUTH, JUSTICE AND THE AMERICAN WAY OF LIFE, IS GOING TO FALL APART, BECAUSE HE KEEPS GOING TO DETECTIVE O'BRIEN AND HE KEEPS GOING BACK AND BACK AND BACK TO O'BRIEN, AND EVENTUALLY IF WE CAN GET OUR HANDS ON EVERYTHING AND GET A FAIR SHOT AT MR. SKALNICK, IT WILL BE VERY CLEAR.

BUT WHAT DOES SKALNICK GET OUT OF HIS SNITCHING IN THIS PARTICULAR CASE, COOPER'S CASE?

YOU KNOW WHAT? WE SEE THAT THE SENTENCING KEEPS BEING CONTINUED AND CONTINUED AND CONTINUED IN THAT 1981, IN THOSE JAIL RECORDS. SKALNICK EVENTUALLY TESTIFIES, THEY HAD PROMISED HIM, OKAY, HE FILES AN AFFIDAVIT AND SAYS THEY DID PROMISE ME THINGS, AND THEN EVENTUALLY RETRACTS THE AFFIDAVIT. WE JUST NEED TO GET EVERYTHING ABOUT MR. SKALNICK'S SNITCHING ACTIVITIES OUT HERE AND GIVE US A FAIR SHOT AT PAUL SKALNICK, AND PAUL SKALNICK WILL NOT TAKE THE STAND IN ANY HEARING IN THIS CASE.

CHIEF JUSTICE: ALL RIGHT. I AM AFRAID YOUR TIME IS UP. WE HAVE TOLL LEAVE IT WITH THAT AND ON THE BRIEFS. THANK YOU BOTH, VERY MUCH. WE ARE GOING TO HAVE A FIVE-MINUTE RECESS AT THIS TIME AND RETURN TO HEAR THE NEXT CASE.

MARSHAL: PLEASE RISE.