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01-882

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW 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 AND WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE THIS MORNING. THAT CASE IS KOKAL VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. LINDA McDERMOTT ON BEHALF OF GREGORY KOKAL. I WANT TO FOCUS ON CLAIM TWO OF THE BRIEF, THE EVIDENCE CLAIM, AND IN THAT CLAIM, THE LOWER COURT, THE TWO PRONGS OF THE JONES, HOLMAN STANDARD, THE COURT FOUND THAT THE STANDARD HAD BEEN SATISFIED AT ISSUE, SO THE STANDARD IS WOULD THE INFORMATION PROBABLY HAVE PRODUCED AN ACQUITTAL OR LESSER SENTENCE, IF HE WAS TRIED OR RESENTENCED, AND THAT IS THE ISSUE, I THINK, BEFORE THE COURT, AND IN THE LOWER COURT'S ORDER, I THINK I WANT TO START WITH HIS FINDING THAT THE WITNESS, MR. HUTTO, IN THIS CASE AND THE DISCOVERY OF THE NEWLY-DISCOVERED EVIDENCE WAS HIGHLY IMPEACHABLE, AND HE MADE SOME FINDINGS THAT --

LET ME BE SURE IF I HAVE STRAIGHT, WHAT MR. HUTTO ACTUALLY SAYS WHAT MR. O'KELLY SAID. IS HE SAYING MR. O'KELLY ACTUALLY CONFESSED TO COMMITTING THE MURDER AND SAID KOKAL HAD NO PART WHATSOEVER, IN EITHER THE MURDER OR THE ROBBERY?

CORRECT.

DID HE SAY HE WAS THERE AT ALL?

NO. HE SAID HE WAS THERE. HE SAID THAT, WHAT HAD HAPPENED WAS, IS, WHEN O'KELLY AND KOKAL HAD PICKED UP MR. RUSSELL, THEY HAD DRIVEN TO THE BEACH, AND THEY WERE USING ALCOHOL AND DRUGS, AND THEN AT SOME POINT, IT TURNED INTO A ROBBERY. MR. O'KELLY WAS THE ONE WHO INSTIGATED THE ROBBERY. MR. KOKAL DIDN'T WANT TO HAVE ANYTHING TO DO WITH IT. HE KEPT TELLING MR. O'KELLY LET'S GET OUT OF HERE. LET'S GO. LET'S GO. AND THEN THAT CONTINUED ON INTO A SITUATION WHERE MR. O'KELLY, THEN, BEAT THE VICTIM, WALKED HIM TO THE BEACH AND SHOT HIM.

IS THIS ESSENTIALLY THE SAME KIND OF EVIDENCE THAT MR. O'KELLY GAVE AGAINST MR. HUTTO, IN THE KIGHT CASE?

YES. YES. MR. O'KELLY GAVE SIMILAR EVIDENCE ABOUT WHO, WELL, THERE WAS A DISTINCTION IN THE KIGHT CASE THAT THIS COURT FOUND, AND THAT WAS THAT, IN THE KIGHT CASE, MR.^O'KELLY SAID THAT HUTTO HAD TOLD HIM THAT HE WAS THERE, AND THAT THEY KILLED HIM, BUT HE DIDN'T EXONERATE KIGHT OF THE MURDER. AND SO THIS COURT SAID, EVEN THOUGH YOU KNOW, IT MIGHT HAVE MADE MR. HUTTO CULPABLE IN THE MURDER, IT DIDN'T EXONERATE KIGHT, AND THAT WAS ONE OF THE RULINGS IN FINDING THAT KIGHT'S EVIDENCE WOULDN'T HAVE PROBABLY PRODUCED AN ACQUITTAL ON RETRIAL.

IS YOUR POINT THAT THE TRIAL COURT DIDN'T PROPERLY ASSESS THE CREDIBILITY OF HUTTO? I MEAN, ARE YOU ASKING US TO REWEIGH HUTTO'S CREDIBILITY?

WELL, I, WHAT I AM ASKING THE COURT TO DO --

OBVIOUSLY IT IS SOMETHING THAT WE DON'T DO IS REWEIGH THE CREDIBILITY.

HE DIDN'T FIND HUTTO NOT CREDIBLE. WHAT HE SAID WAS HE WOULD BE IMPEACHABLE, AND HE GAVE REASONS WHY HUTTO WOULD BE IMPEACHABLE.

FROM THE FACE OF THIS, WHEN WAS THIS STATEMENT THAT O'KELLY SUPPOSEDLY MADE TO HUTTO, OCCURRED IN WHAT YEAR?

WELL, IT OCCURRED IN, THERE WAS SORT OF A SERIES OF COMMUNICATIONS THAT OCCURRED IN 1984, WHEN THEY WERE INCARCERATED AT THE DUVAL COUNTY JAIL AND, ALSO, THERE WAS MORE SORT OF DETAILED INFORMATION GIVEN, AGAIN, WHEN THEY WERE INCARCERATED AT POLK CORRECTIONAL INSTITUTION AFTER THEY HAD BOTH BEEN SENTENCED.

WHAT YEAR WAS THAT?

MR. HUTTO SAID HE THOUGHT IT WAS 1985 OR 1986 BUT HE COULDN'T BE SURE ON. THAT.

SO THEN HE COMES FORWARD IN 1999?

CORRECT, WHEN SOMEONE WENT AND SAW HIM AND ASKED HIM ABOUT IF HE HAD ANY INFORMATION.

IT JUST SO HAPPENS ABOUT THREE YEARS AFTER O'KELLY GIVES TESTIMONY, PUTTING, BLAMING HIM, THAT HE JUST COMES FORWARD AND SAID THEY MUST HAVE HAD THIS MUTUAL CONVERSATION, TO SAY SOMEONE ELSE GOT CONVICTED BUT I DID IT AND YOU DID IT. IS THAT SUPPOSED TO BE WHAT --

THE CIRCUMSTANCES OF WHAT HAPPENED WERE HUTTO, O'KELLY WAS SPOKEN TO --

I GUESS WHAT I AM SAYING ABOUT IT, IS YOU SAY HIGHLY IMPEACHABLE. YOU KNOW, THE JUDGE OBVIOUSLY FOUND, FROM THE CIRCUMSTANCES OF, ESPECIALLY THE INVOLVEMENT OF O'KELLY AND THE KIGHT CASE, THAT THIS WAS JUST NOT CREDIBLE, AND WHY ISN'T THAT FINDING ENTITLED TO GREAT DEFERENCE? THAT IS THAT IT IS JUST, YOU SAY, WELL, IT WOULD BE A JURY QUESTION TO GO AHEAD AND TAKE A LOOK AT THIS EVIDENCE, BUT, AND THEN HE LOOKS AT ALL OF THE OTHER EVIDENCE THAT ACTUALLY PUTS THE BLAME ON KOKAL ANYWAY, INCLUDING HIS POSSESSION OF THE DRIVERS LICENSE, THE BLOOD ON THE SNEAKERS, THE FINGERPRINTS ON THE GUN, AND HIS OWN CONFESSION TO HIS LAWYER, AND WHY ISN'T ALL THAT TOGETHER, DOES THAT NOT MEET OR FAILS TO MEET THE SECOND PRONG OF JONES, THAT IT WOULD NOT LEAD TO AN ACQUITTAL?

I THINK THAT IS TWO ISSUES, AND I JUST WANT TO SORT OF TALK ABOUT HUTTO'S CREDIBILITY AND WHAT I THINK CREDIBILITY AND BEING IMPEACHED ARE SORT OF SEPARATE THINGS. AT TRIAL, MOSTLY, A WITNESS AGAINST KOKAL, WAS, I THINK, PRETTY WELL IMPEACHED, BUT HE WAS, OBVIOUSLY THE JURY FOUND SOME CREDIBILITY TO WHAT HE WAS SAYING IN CONVICTING MR. KOKAL, SO I DO THINK THAT THOSE ARE SOMEWHAT DISTINCT, BUT IN MAKING THE FINDINGS THAT, LIKE, HUTTO HAD COME FORWARD AND THE TIMING WAS AN ISSUE, THIS COURT HAS NEVER HELD IN CASES LIKE IN MILLS, WHERE THAT DEFENDANT WAS ACTUALLY GIVEN A NEW RESENTENCING AND THEN WAS ACTUALLY SENTENCED TO LIFE --

THE TRIAL COURT MADE THAT DETERMINATION, AFTER LISTENING TO THE EVIDENCE.

CORRECT. BUT I AM JUST POINTING OUT THAT, IN THAT CASE YOU KNOW, THE INDIVIDUAL DIDN'T COME FORWARD FOR 20 YEARS, AND THAT DIDN'T SEEM TO BE AN ISSUE, IN TERMS OF WEIGHING HIS, YOU KNOW, WHAT HIS VALUE WOULD BE AT TRIAL, SO I THINK THAT THERE ARE CIRCUMSTANCES WHERE PEOPLE DON'T COME FORWARD N THIS CASE, HUTTO HAD NO REASON TO COME FORWARD. HE HAD --

AREN'T YOU NOW REARGUING CREDIBILITY. THAT? THE WAY THAT YOU ARE PRESENTING THIS, CLEARLY IF YOU WANT TO TAKE AWAY THAT THE TRIAL COURT DIDN'T EXPRESSLY, WHICH IS VERY DIFFICULT, WHEN HE WALKS ABOUT HOW IMPEACHABLE THIS WITNESS WOULD BE, WE HAVE GOT JUST THIS EXTRAORDINARY CIRCUMSTANCES WHERE HIS CELLMATE HAPPENS TO OUT AND BLAME HIM, AND SO THE APPEARANCE BEING THAT, WELL, NOW, HE IS GOING TO COME OUT WITH A STORY, BUT NEVERTHELESS AT LEAST IMPLIEDLY, THE TRIAL COURT, REALLY, HAS REJECTED HIS CREDIBILITY, ALMOST TOTALLY, HAS HE NOT?

I THINK THAT, WELL, HE SAID HE IS HIGHLY IMPEACHABLE. I THINK CERTAINLY HE DIDN'T THINK THAT THE WEIGHT OF HIS EVIDENCE --

HOW CAN YOU OVERCOME IF THE APPROPRIATE PERSON, i.e. THE TRIAL COURT JUDGE, HAS REJECTED HIS CREDIBILITY, THERE FOR HOW CAN YOU REALLY, THEN, OVERCOME HIS CONCLUSIONS THAT THERE WOULD NOT BE A DIFFERENT OUTCOME ON A RETRIAL? LET ME FOLLOW THAT UP WITH DIDN'T KOKAL, HIMSELF, TESTIFY UNDER OATH IN THIS CASE IN AN EARLIER TRIAL?

YES, HE DID.

WHAT WAS HIS TESTIMONY ABOUT HIS INVOLVEMENT IN THE CRIME?

HIS TESTIMONY WAS SIMILAR. IT WAS THAT THEY WERE IN THE CAR TOGETHER.

HE TESTIFIED THAT HE WAS PART OF THE ROBBERY AND ALL OF THAT IN THE EARLIER --

HE -- GO AHEAD. WHAT DID HE -- TELL ME.

WHEN THEY WERE AT THE BEACH HE STEPPED OUT OF THE CAR. HE WAS GOING ON THE BATHROOM ON THE BEACH AND HE CAME BACK TO THE CAR, AND HE SAID O'KELLY HAD A GUN STUCK IN MR. RUSSELL'S FACE, AND HE DIDN'T KNOW THIS WAS GOING TO HAPPEN.

HE DIDN'T IMPLICATE HIMSELF IN ANY WAY WITH THIS VICTIM.

NO.

WHAT DID HE SAY HIS CONTACT WITH THIS VICTIM WAS IN HIS EARLIER TESTIMONY?

STARTING FROM THE VERY BEGINNING, WHEN THEY PICKED HIM UP?

RIGHT.

HE SAID THAT MR. RUSSELL WAS HITCHHIKING. THEY PICKED HIM UP.

WHY DID THEY PICK HIM UP?

HE SAID THAT THEY ASKED HIM DO YOU, YOU KNOW, DO YOU WANT, DO YOU WANT TO DO ANY DOPE WITH US? DO YOU SMOKE MARIJUANA, AND IT WAS ABOUT SORT OF --

IN OTHER WORDS ALL OF HIS TESTIMONY IN HIS EARLIER TRIAL, WAS, WOULD EXONERATE HIM

FROM ANY BAD CONDUCT, IS THAT WHAT YOU ARE SAYING?

THAT IS MY RECOLLECTION, YES.

DO YOU NOT RECALL MR. KOKAL TESTIFYING THAT HE WALKED TO THE BEACH WITH THE OTHERS, IS THAT NOT PART OF HIS TESTIMONY?

WELL, MR. KOKAL, I THINK THE DIFFERENCE BETWEEN WHAT HUTTO, THERE IS A SLIGHT DIFFERENCE WHAT HUTTO SAID AND THAT, WHAT O'KELLY HAD TOLD HUTTO AND WHAT KOKAL SAID ACTUALLY HAPPENED. KOKAL SAID THE BEATING STARTED AT THE CAR, AND HUTTO SAID THAT THE BEATING, WELL, HE WAS SORT OF UNCLEAR. HE SAID THAT THERE WAS THIS EXCHANGE THAT HE, AND THEN HE SAID THAT GREG WANTED TO LEAVE, GREG KOKAL SAID LET'S GO, LET'S GO, AND THEN THEY WENT DOWN TO THE BEACH. GREG DIDN'T GO DOWN TO THE BEACH AND THERE WAS A BEATING, SO GREG KOKAL AND BOTH HUTTO AND GREG KOKAL WERE CONSISTENT IN THE FACT THAT HE DIDN'T GO TO THE BEACH, BUT I THINK SORT OF THE DISTINCTION THAT YOU MIGHT HAVE THINKING OF IS WHERE THIS BEATING STARTED, AND THAT IS SORT OF A CONTRADICTION THERE, IN WHAT O'KELLY ALLEGEDLY TOLD HUTTO AND WHAT KOKAL TESTIFIED TO AT TRIAL.

LET'S ASSUME THAT WE ACCEPT YOUR ARGUMENT WITH REGARD TO THOSE POINTS. HOW DO WE, AND YOU PLEASE GIVE US YOUR BEST ARGUMENT WITH REGARD TO THE ADMISSIONS MADE TO THE ATTORNEY, AND THE TRIAL COURT'S VISION ON THAT, ONCE THE ATTORNEY/CLIENT PRIVILEGE HAD BEEN INITIALLY WAIVED.

OKAY.

YOU SEEM TO BE ARGUING THAT, SOMEHOW EVEN THOUGH THAT EVIDENCE AND INFORMATION HAS BEEN DISCLOSED, THAT SOMEHOW IT DISAPPEARS THROUGH THIS PROCESS. CAN YOU HELP US WITH THAT, PLEASE.

I THINK THIS COURT STATED THAT, WHEN YOU DO AN ANALYSIS TO THE STANDARD, PROBABLY WHETHER SOMETHING WOULD PRODUCE ACQUITTAL OR A LESSER SENTENCE, YOU LOOK AT ALL OF THE ADMISSIBLE EVIDENCE, AND IT IS OUR CONTENTION THAT THAT CONFESSION IS NOT ADMISSIBLE. ASSUMING THAT IT IS TRUE.

I UNDERSTAND THAT.

I THINK THE ADMISSIBILITY ISSUE COMES DOWN TO WHAT IS, WHAT HAPPENS AT POSTCONVICTION, THAT ALLOWS THAT INFORMATION, A WAIVER OF AN ATTORNEY CLIENT PRIVILEGE, TO THEM, BE ADMITED IN A RETRIAL. I MEAN, CERTAINLY WE DON'T LET PLEA NEGOTIATIONINGS, ONCE THEY FALL APART, WE DON'T ALLOW THAT INTO TRIAL, AND IF YOU LOOK AT REED AND LECROY, THIS COURT HAS SAID THAT EFFECTIVE ASSISTANCE OF COUNSEL IS IN LIMITED MATTERS.

IN THE PROCEEDINGS IT WAS HIS TESTIMONY AS TO WHAT MR. KOKAL SAID TO HIM. THAT WAS PRECISELY THE ONLY REASON FOR THAT TESTIMONY.

THE REASON FOR THE TESTIMONY WAS FOR THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

I THINK IT WAS STILL AN ADMISSION BY MR. KOKAL, WAS IT NOT? IT IS THE IDENTICAL SUBJECT MATTER OF THE SUBSTANCE OF THE TESTIMONY. WHAT YOU ARE TALKING ABOUT IS PURPOSE.

CORRECT. CORRECT. AND, BUT, I DO THINK THAT, THEN, WHAT THE STATE RELIED HEAVILY ON AND THE CIRCUIT COURT ADOPTED, THE SUAREZ OPINION, WHICH IS THE ELEVENTH CIRCUIT OPINION, BUT I THINK SUAREZ MAKES VERY CLEAR THAT THERE ARE TWO PROBLEMS WITH THE

IDEA THAT ATTORNEY/CLIENT PRIVILEGE IS WAIVED IN A POSTCONVICTION PROCEEDING OR IN SOME SORT OF PROCEEDING THAT PRECEDES A NEW TRIAL OR NEW RESENTENCING, THAN IS FIRST OF ALL, THERE IS A SIMMONS PROBLEM WHICH THE ELEVENTH CIRCUIT DID NOT GET TO IN SUAREZ BECAUSE THEY FOUND THAT IT WAS PROCEDURALLY DEFAULTED. THAT ISSUE IS NOT PRESENT HERE. THERE IS NO DEFAULT AS TO SIMMONS IN THIS CASE, SO THAT CERTAINLY IS AN ARGUMENT THAT MR. KOKAL WOULD NOT BE, IT WOULDN'T BE FUNDAMENTALLY FAIR TO FORCE HIM TO GIVE UP ONE RIGHT, TO ASSERT ANOTHER RIGHT, AND THE SECOND POINT THAT THE LEFT CIRCUIT MADE CLEAR, WAS THAT THEY DIDN'T ADDRESS WHETHER OR NOT, INSERT TYPES OF PROCEEDINGS THERE, IS A LIMITED WAIVER, AND I THINK THAT IS WHERE REED AND LECROY COME IN IN THIS SCENARIO, BECAUSE IN THOSE CASES, IT THIS COURT HAS STATED THAT THE WAIVER IS AS TO WHAT ISSUES ARE PRESENTED AT THAT, AT THE INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE, SO I THINK THAT THAT IS WHERE WE ARE DRAWING FROM AN AND MAKING THE ARGUMENT THAT THAT IS A NARROW WAIVER T THAT IS LIMITED, AND IT CERTAINLY WOULDN'T BE ADMISSIBLE DOWN THE ROAD, IN TERMS OF IF HE WERE TO GET A RESENTENCING OR A RETRIAL.

ARE YOU SAYING THAT THAT TESTIMONY COULD ONLY COME IN AS TO WHETHER COUNSEL WAS INEFFECTIVE AND NOT COME IN AS TO THE NEWLY-DISCOVERED EVIDENCE CLAIM?

CORRECT. THAT IS, YEAH, ABSOLUTELY, BECAUSE OF THOSE REASONS, BECAUSE --

WHERE IS THE POLICY ON THAT? I MEAN, IN OTHER WORDS, I AM, THAT WOULD CONCERN ME VERY MUCH, THAT WE KNOW, NOW, THROUGH TESTIMONY, THAT KOKAL HAS CONFESSED TO THIS CRIME TO HIS ATTORNEY. THERE WAS A, HE TOOK, HE DIDN'T HAVE TO ASSERT A CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL BUT HE DID, AND BY DOING THAT, HE OPENED UP THE COMMUNICATIONS. NOW, WHY WOULD THAT ONLY BE? WHY WOULD THAT, AS OPPOSED TO A PLEA NEGOTIATION, BE SOMETHING THAT WAS ENTITLED TO A LIMITED WAIVER AND NOT COME IN ON A RETRIAL? I JUST HAVE A REAL PROBLEM WITH THAT.

WE HAVE BENEFITS. WE HAVE A BENEFIT THAT WE HAVE EXTENDED TO POSTCONVICTION DEFENDANTS, CAPITAL DEFENDANTS. YOU ARE ALLOWED TO BRING A SIXTH AMENDMENT CLAIM THAT YOUR ATTORNEY WAS NOT COMPETENT, SO YOU HAVE A CONSTITUTIONAL RIGHT TO BRING THIS CLAIM TO THE COURT. YOU, ALSO, HAVE A RIGHT, WHICH THIS COURT IN MILES STATED RISES TO THE LEVEL OF A CONSTITUTIONAL RIGHT, IN HAVING YOUR ATTORNEY/CLIENT PRIVILEGE. IF YOU, NOW, SAY THAT YOU WOULD HAVE TO GIVE UP A BENEFIT OF YOUR ATTORNEY/CLIENT PRIVILEGE FOR ANY FUTURE MATTER, IN ORDER TO ASSERT ANOTHER RIGHT THAT, IS A SIMMONS PROBLEM, AND I THINK THAT THAT IS THE CRUX OF THE ISSUE, IS IF YOU HAVE GOT A BENEFIT AND YOU ARE FORCED TO GIVE IT UP AND YOU ARE FORCED TO CHOOSE, WHICH IS THE HOBSON'S CHOICE, THEN THERE IS REALLY NO CHOICE AT ALL AND HE SHOULDN'T BE FORCED TO MAKE THAT ISSUE, BUT I DO WANT TO GET INTO BRIEFLY, YOU KNOW, THE TESTIMONY OF MR. WESTLING AT THE EVIDENTIARY HEARING BACK IN 1997, IS HIGHLY SUSPECT. IT IS ABSOLUTELY NOT CORROBORATED BY THE RECORD.

DON'T WE HAVE TWO OTHER CONFESSIONS THAT HE MADE? DIDN'T HE MAKE A STATEMENT TO THE POLICE AND TO ANOTHER PERSON WHO IS NOT A CODEFENDANT OR ANYTHING ELSE IN THIS CASE, WHERE HE ESSENTIALLY CONFESSES TO THE MURDER, ALSO, SO EVEN IF WE DON'T HAVE WHAT HIS TRIAL ATTORNEY SAYS, WE HAVE THESE OTHER TWO STATEMENTS BY MR. KOKAL, DON'T WE?

WE HAVE MOSLEY'S STATEMENT THAT HE SAYS KOKAL TOLD ME THESE THINGS, WHICH YOU KNOW, IN HIS STATEMENT INITIALLY, THE POLICE WAS THEY, HE SAID THAT THEY DID THIS, THAT THEY DID THAT, AND THEN AT TRIAL HE SWITCHES AND SAID, NO, KOKAL SAID HE DID THIS, HE DID THAT, SO THAT WAS IMPEACHED AT TRIAL AND THEN THERE IS ALSO O'KELLY'S TESTIMONY, AND O'KELLY LIKEWISE, WROTE A LETTER TO GREG KOKAL PRIOR TO TRIAL, SAYING WHAT DO

YOU WANT ME TO SAY, AND THEN HE WROTE THE LETTER SAYING, MAKING UP THIS STORY ABOUT HOW THEY WERE TARGET PRACTICE ON THE BEACH AND HE JUST HAPPENED TO SHOOT YOU KNOW, THIS OBJECT AND THEN THEY REALIZED IT WAS A PERSON, AND SO I MEAN, I THINK O'KELLY'S TESTIMONY IS SOMEWHAT SUSPECT, SO IT IS REALLY A CREDIBILITY CONTEST OF ALL OF THESE PEOPLE THAT HAVE PROBLEMS WITH CREDIBILITY.

CHIEF JUSTICE: AS YOU ARE AWARE FROM THE LIGHT, THE MARSHAL REMINDED YOU YOU ARE IN YOUR REBUTTAL TIME.

THANK YOU. I WOULD LIKE TO RESERVE MY TIME FOR REBUTTAL. THANK YOU.

MAY IT PLEASE THE COURT. MY NAME IS CURTIS FRENCH REPRESENTING THE STATE OF FLORIDA. IN THIS CASE, THERE ARE A NUMBER OF REASONS WHY KOKAL IS NOT ENTITLED TO A NEW TRIAL, AND IN FACT, WE DON'T REALLY HAVE TO DECIDE IN THIS CASE, WHETHER OR NOT HIS CONFESSION TO HIS ATTORNEY WAS ADMISSIBLE OR WOULD BE ADMISSIBLE AT RETRIAL OR NOT, BECAUSE THERE IS PLENTY OF OTHER EVIDENCE WHICH HUTTO'S TESTIMONY FAILS TO REBUT, AND HUTTO'S TESTIMONY IS NOT CREDIBLE ANYWAY. AT THE SAME TIME, IT IS OUR POSITION THAT THE CONFESSION TO WESTLING WOULD BE ADMISSIBLE ON A RETRIAL, AND I WOULD JUST LIKE TO ADDRESS THE HOLDING IN SUAREZ, WHICH I THINK OPPOSING COUNSEL HAS MISINTERPRETED. IN SUAREZ, THE DEFENDANT HAD PLED GUILTY. HE MOVED TO WITHDRAW THAT PLEA ON THE GROUNDS THAT HIS ATTORNEY HAD MADE MISREPRESENTATIONS TO HIM. THERE WAS A HEARING ON THAT MOTION. AT THE HEARING, EVERYBODY AGREED THAT IT WAS NECESSARY FOR THE ATTORNEY TO TESTIFY ABOUT WHETHER OR NOT HE HAD MADE THESE MISREPRESENTATIONS OR NOT. THE ULTIMATE OUTCOME OF THAT WAS THAT THE DEFENDANT WAS ALLOWED TO WITHDRAW HIS PLEA. WENT TO TRIAL WITH A NEW ATTORNEY. AND AT THAT TRIAL, THE GOVERNMENT CALLED THE ORIGINAL ATTORNEY AND ASKED HIM TO BASICALLY REPEAT THE TESTIMONY HE HAD GIVEN AT THE HEARING TO WITHDRAW THE PLEA. THE ELEVENTH CIRCUIT SAID THAT IT WAS NO LONGER PRIVILEGED, THAT ONCE A DEFENDANT HAD WAIVED THE FROM PRIVILEGE AND HIS TESTIMONY CAME IN, THE PRIVILEGE WAS WAIVED FOR ALL PURPOSES.

LET ME GO THROUGH THE FOLLOWING SCENARIO WITH YOU. LET'S ASSUME IN A HYPOTHETICAL, THAT A DEFENDANT CONVICTED OF A MURDER, GETS A DEATH PENALTY, AND HE FILES A POSTCONVICTION MOTION, AND HE TESTIFIES THAT HE TOLD HIS ATTORNEY, UNDER NO CIRCUMSTANCES DO I WANT TO IMPLY TO THE JURY THAT I COMMITTED THIS CRIME. I WASN'T THERE. IT WASN'T ME. I DIDN'T COMMIT THE CRIME. AND THE ATTORNEY SAYS, IN CLOSING, HE WAS THERE. WE ARE PLEADING FOR SECOND-DEGREE MURDER NOT FIRST-DEGREE. FILES, SO THE TRIAL COURT, AND AS PART OF THE TESTIMONY, THE DEFENDANT SAYS, YEAH, BY THE WAY I DID CONFESS TO THE ATTORNEY THAT I DID IT, BUT I TOLD AM NOT TO SAY THAT TO THE JURY. SO THE TRIAL COURT SAYS, WELL, CLEARLY THIS WAS INEFFECTIVE ASSISTANCE OF COUNSEL. COUNSEL DIDN'T FOLLOW THE DEFENDANT'S DIRECTIONS HERE, BUT NOW ON RETRIAL, CLEARLY WE HAD AN EFFECTIVE ASSIST -- INEFFECTIVE ASSISTANCE OF COUNSEL, BUT IN ORDER TO PROVE THE INEFFECTIVE ASSISTANCE, THE DEFENDANT HAD TO PROVE THAT AT HEARING, SO NOW THAT TESTIMONY IS GOING TO COME BACK TO HAUNT HIM BECAUSE THE JURY IS GOING TO HEAR THAT HE CONFESSED TO THE CRIME TO HIS ATTORNEY. IS THAT WHAT WE ARE DEALING WITH HERE?

WE ARE NOT DEALING WITH THAT IN THIS CASE, BECAUSE THE ATTORNEY WAS NOT FOUND INEFFECTIVE.

I UNDERSTAND THAT, BUT IF WE HOLD AS YOU WOULD WANT US TO HOLD, THAT BY WAIVING THE ATTORNEY/CLIENT PRIVILEGE AT EVIDENTIARY HEARING, HE NOW WAIVES IT FOR ALL PURPOSES AT A SUBSEQUENT RETRIAL.

THAT'S RIGHT.

WOULDN'T THAT SCENARIO COME TO PASS?

YES, AND I WOULD ALSO POINT OUT THAT ALTHOUGH THE ELEVENTH CIRCUIT DID NOT ADDRESS THE SIMMONS CASE IN SUAREZ, IT DID ADDRESS IT IN FEDERAL GRAND JURY PROCEEDINGS IN RE COHEN, AND REJECTED THAT ARGUMENT, BECAUSE FOR SEVERAL REASONS, IT SET OUT IN THAT CASE, BUT THE ATTORNEY/CLIENT PRIVILEGE IS A PRIVILEGE NOT A CONSTITUTIONAL RIGHT, SO YOU ARE NOT FORCING A DEFENDANT TO GIVE UP ONE CONSTITUTIONAL RIGHT TO ASSERT ANOTHER, AND SIMMONS HAS NEVER BEEN EXPANDED TO COVER A SITUATION LIKE THIS, AND LET ME SAY, TOO --

YOU STARTED OUT BY SAYING WE DIDN'T NEED TO ADDRESS THAT ISSUE BECAUSE OF THE OTHER EVIDENCE IN THE CASE. COULD YOU GO BACK TO --

THAT'S CORRECT. IN ADDITION TO THAT, I KNOW THAT THE STANDARD IN JONES READ STRICTLY, REFERS TO ADMISSIBLE EVIDENCE. AT THE SAME TIME, WE HAVE A CASE HERE, IN WHICH THERE WAS A TRIAL. THERE WAS NO CONSTITUTIONAL ERROR AT THAT TRIAL. THE EVIDENCE WAS SUFFICIENT AT THAT TRIAL. THE DEFENDANT HAS COME IN HERE TODAY AND SAYING, WELL, GIVE ME A NEW TRIAL, BASED UPON THE TESTIMONY OF MR. HUTTO, AND BY THE WAY, WHEN YOU ARE CONSIDERING THAT TESTIMONY, TOTALLY DISREGARD THE FACT THAT I HAVE CONFESSED TO MY OWN ATTORNEY, AND IN FACT THAT EVIDENCE, WE WOULD SUGGEST, SHOWS THAT HE IS NOT IN ANY WAY, SHAPE, FORM OR FASHION, INNOCENT OF THESE CHARGES, AND THE WHOLE POINT, THE REASON WE ALLOW THE DEFENDANT, A DEFENDANT TO COME ON POSTCONVICTION AND RAISE A CLAIM OF NEWLY-DISCOVERED EVIDENCE OF INNOCENCE, IS THAT OTHERWISE, IN THIS COURT, IT WAS SET OUT IN JONES, WHERE NO ERROR OCCURRED AT TRIAL BUT THINGS WE LEARNED SINCE TRIAL, INDICATE THAT AN INJUSTICE OCCURRED. CLEARLY THAT DID --

LET'S SET THAT ASIDE AND TALK ABOUT MS.^McDERMOTT'S DISTINCTION. IS THE DISTINCTION, THE JUDGE MADE A CREDIBILITY DETERMINATION THAT O'KELLY WAS NOT, IS IT.

KEL -- IS IT O'KELLY OR --

HUTTO.

O'KELLY WAS NOT CREDIBLE, OR THAT HE WAS HE WOULD BE IMPEACHED AT TRIAL, AND IS THAT A SIGNIFICANT DIFFERENCE IN THE FINDING, AND HOW WOULD YOU ADDRESS JUST CREDIBILITY OF THAT TESTIMONY, AND HOW THIS COURT SHOULD LOOK AT WHAT WAS STATED AT THE --

MS.^McDERMOTT HAS ATTEMPTED TO PARSE THE ORDER OF THE COURT. WHAT THE COURT SAID, AFTER ADDRESSING THE ADMISSIBLE OF THE CONFESSION TO WESTLING, WAS THERE IS THE FACT THAT THE NEW TESTIMONY FROM HUTTO WOULD BE HIGHLY IMPEACHABLE AND THEN IT MAKES NO SENSE, IN LIGHT OF THE PHYSICAL EVIDENCE INTRODUCED AT TRIAL, AND THEN HE WENT ON TO POINT OUT THAT BASICALLY HUTTO CAN CAME FORWARD FOR THE FIRST TIME, 15 YEARS AFTER TRIAL. HE HAS NEVER EXPLAINED WHY HE WAITED 15 YEARS TO COME FORWARD. HIS ONLY TESTIMONY ABOUT THAT, WAS, ABOUT WHY HE DIDN'T COME FORWARD AT THE TIME, WAS THAT NOBODY ASKED HIM OF IT. HE ALSO SAID THAT HE MIGHT NOT HAVE COME FORWARD, EVEN IF HE HAD BEEN ASKED. THAT IS REALLY NOT AN EXPLANATION WHY HE DID NOT COME FORWARD THEN, BUT REALLY IT WAS NOT PROFFERED WHY HE CAME FORWARD FOR THE FIRST TIME, 15 YEARS LATER, AND THE REAL REASON FROM THE RECORD IS THAT HE CAME FORWARD, ONLY BECAUSE O'KELLY HAD TESTIFIED AGAINST HIM, THREE MONTHS --

THERE SEEMS TO BE SOME DISPUTE IN THE RECORD, AS TO WHEN HE ACTUALLY FOUND OUT ABOUT THIS, AND DID HE REALLY KNOW ABOUT MR. O'KELLY HAVING TESTIFIED ABOUT HIS INVOLVEMENT IN THE KIGHT MURDER, PRIOR TO THE CCRC INVESTIGATORS COMING TO HIM ABOUT THIS CASE.

WELL, HUTTO CLAIMED THAT HE DIDN'T KNOW. AT THE SAME TIME, THE HEARING IN THE KIGHT CASE WAS JANUARY 21, 1999. ON AUGUST 16, 1999, SOMETHING LIKE 15 YEARS AFTER THE ORIGINAL TRIAL IN THIS CASE, HUTTO FINALLY COMES FORWARD WITH THIS INFORMATION. SO BASICALLY, 15 YEARS GO BY. THEN O'KELLY TESTIFIES, THEN ALL OF A SUDDEN A FEW MINUTES LATER, HUTTO COMES FORWARD.

SO THE AFFIDAVIT IS ACTUALLY EXECUTED AFTER, WITHIN A FEW MONTHS AFTER THE TESTIMONY.

AFTER O'KELLY TESTIFIES.

AND HOW, HUTTO SAYS THAT HE DIDN'T KNOW O'KELLY HAD TESTIFIED AGAINST HIM?

THAT IS WHAT HE SAID.

SO THAT IS ANOTHER CREDIBILITY ISSUE.

THAT'S CORRECT. AND BASICALLY WHAT THE COURT SAID IS IT IS HARD TO UNDERSTAND WHY HE WOULD HAVE COME FORWARD WITH THE EVIDENCE NOW, RATHER THAN WHEN IT COULD HAVE HELPED HIM IN HIS OWN SENTENCING, AND BY THE WAY, ACCORDING TO HUTTO'S TESTIMONY NOW, HE LEARNED ABOUT THESE STATEMENTS BEFORE HE, HIMSELF WAS SENTENCED, SO THE COURT SAYS THE IMPLICATION IS CLEAR, NOTWITHSTANDING MR. HUTTO'S UNDERSTANDING TO THE CONTRARY THAT HE ONLY CAME FORWARD WITH EVIDENCE AGAINST MR. O'KELLY BECAUSE MR. O'KELLY HAD COME FORWARD WITH EVIDENCE ABOUT KIGHT.

THIS ISN'T JUST AN ISSUE ABOUT SOMEBODY COMING FORTH 15 YEARS LATER, AS MS.^McDERMOTT STATED. MILLS IS REALLY A CASE WHERE THE PERSON CAME FORWARD LATER.

THAT IS SOMETHING THAT THE FINDER OF FACT HAS GOT TO DETERMINE IS THE CREDIBILITY OF THAT WITNESS. IN THIS CASE, THE COURT FOUND THAT THE CIRCUMSTANCES SUGGESTED THAT HE CAME FORWARD FOR NO REASON, OTHER THAN TO SEEK REVENGE ON MR. O'KELLY, BUT I WOULD, ALSO, POINT OUT THAT HUTTO'S TESTIMONY IS INCONSISTENT WITH A NUMBER OF THINGS. FIRST OF ALL, KOKAL'S TESTIMONY AT TRIAL, WAS, AND HE DID BLAME O'KELLY FOR EVERYTHING, AND AT THE SAME TIME WHAT HE SAID WAS THAT O'KELLY, WHEN THEY GOT OUT OF THE PICKUP TRUCK THAT, O'KELLY HIT THE VICTIM OVER THE HEAD WHAT COULD YOU STICK THEN FORCED HIM TO WALK DOWN TO THE BEACH AND THAT KOKAL WALKED WITH HIM AND WAS THERE WHEN O'KELLY CONTINUED TO STRIKE HIM ON THE HEAD A NUMBER OF TIMES WITH A CUE STICK. NOW, THE TESTMONY OF THE MEDICAL EXAMINER AT THE ORIGINAL TRIAL WAS THAT THE VICTIM WAS BEATEN SO SEVERELY WITH A CUE STICK THAT THOSE INJURIES COULD HAVE KILLED HIM EVEN WITHOUT THE GUN SHOT WOUND. AS A MATTER OF FACT HE WAS BEATEN SO SEVERELY THAT THEY DIDN'T REALIZE HE WAS SHOT UNTIL THE AUTOPSY. AT ANY RATE --

DID KOKAL CONFESS TO HAVING BEEN A PART OF THE BEATING?

HE ADMITTED HE WAS THERE AT THE BEACH WHEN THE BEATING OCCURRED, CONTRARY TO HUTTO'S TESTIMONY, WHICH IS THAT HE STAYED IN THE CAR THE ENTIRE TIME. IN ADDITION --

WHOSE FINGERPRINTS WERE ON THE CUE STICK? DID THEY EVER --

I DON'T RECALL THERE WAS, KOKAL'S FINGERPRINT WAS ON THE GUN, THE MURDER WEAPON, AND I DON'T RECALL ABOUT THE CUE STICK.

WAS WHO, AND HIS WAS THE, HIS WERE THE ONLY FINGERPRINTS ON THE GUN?

THAT IS MY RECOLLECTION, THAT HIS WERE THE ONLY FINGERPRINTS ON THE GUN.

THERE WERE ALSO BLOODSTAINS ON HIS SHOES, IS THAT CORRECT?

THE BLOODSTAIN ON HIS SHOE WAS THE SAME TYPE AS THE VICTIM, AND OF COURSE THERE WAS AN ISSUE ABOUT DNA, THAT I DON'T KNOW WE GET INTO TODAY BUT AT THE SAME TIME, YOU KNOW, IF IT WAS THE VICTIM'S BLOOD, HE ADMITTED BY HIS OWN ADMISSION, HE WAS DOWN THERE WHEN THE BEATING OCCURRED, AND IF IT WASN'T, HE WAS STILL DOWN THERE WHEN THE BEATING OCCURRED.

AGAIN, THAT IS DIRECTLY CONTRARY TO THIS TESTIMONY WHICH PUTS HIM IN THE CAR, WHICH CAN'T BE.

CORRECT. IT IS ALSO CONTRARY TO EUGENE MOSELY'S CONFESSION IN THE TRIAL. ACCORDING TO MOSLEY, HE BEAT HIM WITH A CUE STICK AND SHOT HIM IN THE HEAD, BECAUSE BODIES DON'T LIE. HE THOUGHT IT WOULD GO IN THE SAND AND THERE WOULDN'T BE ANY PROBLEM WITH THE GUN, BUT THEY DIDN'T FIND IT IN THE SAND. THEY FOUND IT IN THE CLOTHING, AND THEY MATCHED IT TO THE GUN. ALSO STATEMENTS MADE BY THE PSYCHIATRIST WHO WAS APPOINTED TO EVALUATE THE DEFENDANT BEFORE THE TRIAL, AND WHAT HE TOLD DR. VERSEY THAT O'KELLY WAS THE ACTUAL KILLER, BUT KOKAL ADMITTED TO DR. VERSEY THAT HE HELPED BEAT THE VICTIM WITH A CUE STICK AND ALSO THAT HE HAD DONE SO PURSUANT TO PLAN TO ROB THE VICTIM, SO HUTTO'S TESTIMONY IS INCONSISTENT WITH THAT AND, OF COURSE, IT IS INCONSISTENT WITH THE TESTIMONY OF WESLING, WHO BY THE WAY, TESTIFIED ABOUT ALL OF THIS AT THE MOTION, AT THE FIRST HEARING ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, BECAUSE ONE OF THE CLAIMS WAS THAT HE WAS INEFFECTIVE BECAUSE HE FAILED TO PRESENT A DEFENSE OF VOLUNTARY INTOXICATION, AND WESLING TESTIFIED THAT HE TOLD ME ABOUT ALL OF THIS IN GREAT DETAIL AND BECAUSE OF THE DETAIL AND CLEAR MEMORY THAT HE HAD, I KNEW THAT HE WASN'T INTOXICATED AT THE TIME OF THE CRIME, SO HUTTO'S TESTIMONY FIRST OF ALL, HAS BEEN FOUND NOT TO BE CREDIBLE BY THE TRIAL COURT. IT CLEARLY ISN'T CREDIBLE AND CONTRARY TO A NUMBER OF THINGS, NOT THE LEAST OF WHICH IS KOKAL'S OWN CONFESSION TO HIS TRIAL COUNSEL, AND OUR POSITION IS SIMPLY THAT, IF HE WANTS TO COME IN HERE TODAY, AND GET A NEW TRIAL BASED UPON SOME CLAIM THAT HE IS PROBABLY INNOCENT, THEN HE HAS TO PRESENT EVIDENCE THAT HE IS PROBABLY INNOCENT. WHAT HE HAS DONE HASN'T DONE. THAT HE HAS TO SHOW SOME, HAS TO GIVE US SOME REASON WHY WE SHOULD JUST IGNORE THE DETAILED CONFESSION THAT HE GAVE TO HIS OWN ATTORNEY AND HE HASN'T DONE THAT, EITHER. AND FOR ALL THESE REASONS, THE JUDGE'S DENIAL OF THAT CLAIM SHOULD BE AFFIRMED. THE COURT HAS NO OTHER QUESTIONS?

ARE YOU SUGGESTING ON THE CONCEPT OF THE ATTORNEY/CLIENT PRIVILEGE, THAT IT WOULD BE ADMISSIBLE FOR PURPOSES OF CONSIDERING THESE COLLATERAL MATTERS BUT MAY NOT BE ADMISSIBLE, SHOULD HE BE SUCCESSFUL AND TESTIFY AT TRIAL.

THAT'S CORRECT. EVEN IF IT IS NOT ADMISSIBLE AT TRIAL, IT IS DEFINITELY ADMISSIBLE AND SHOULD BE CONSIDERED, INSOFAR AS THIS HEARING IS CONCERNED IN ADDRESSING WHETHER OR NOT HE SHOULD GET A NEW TRIAL.

CHIEF JUSTICE: THANK YOU.

THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME LEFT ON REBUTTAL? THANK YOU.

I JUST WANT TO START BY REVISITING THIS HUTTO ISSUE ONE MORE TIME AND WHEN HUTTO ACTUALLY LEARNED OF O'KELLY'S INVOLVEMENT IN THE KIGHT CASE, BECAUSE THE JUDGE

DIDN'T DISCUSS, IN HIS ORDER, THE LETTER THAT WAS WRITTEN TO THE INVESTIGATOR IN THE CASE ON OCTOBER 21, 1999, WHERE HE SAYS, DEAR JEFF, WELL, YOU WERE RIGHT, I HAD A VISIT FROM --

WHO WAS THIS LETTER FROM?

THIS LETTER IS FROM HUTTO TO THE INVESTIGATOR WHO HAD COME TO HIM AND ACTUALLY OBTAINED THE AFFIDAVIT FROM HIM ABOUT THE INFORMATION.

THIS IS SUBSEQUENT TO THE AFFIDAVIT.

IT IS SUBSEQUENT TO THE AFFIDAVIT, AND THE STATE ATTORNEY GOES TO VISIT MR. HUTTO, AFTER MR. KOKAL FILED THE AFFIDAVIT WITH THE COURT IN HIS AMENDED 3.850, AND HE SAYS, DEAR JEFF, YOU WERE RIGHT. I HAD A VISIT FROM THE STATE ATTORNEY TODAY. LAURA COME WITH A DUDE WITH A BADGE, AND I DON'T KNOW HE WAS. THEY TOLD ME O'KELLY HAD DONE THE SAME THING I DID, HE GAVE A STATEMENT TO THE EFFECT THAT I WAS THE BAD GUY IN KIGHT'S CASE. DID YOU KNOW ABOUT THIS? AND AT THE EVIDENTIARY HEARING, HUTTO SAYS I WROTE THAT LETTER, BECAUSE I FELT LIKE AN IDIOT. THEY WERE TELLING ME THAT YOU MUST BE DOING THIS BECAUSE OF WHAT O'KELLY DID, AND I DIDN'T KNOW WHAT THEY WERE TALKING ABOUT. DID YOU KNOW WHAT WAS GOING ON? AND WHY DIDN'T YOU TELL ME ABOUT THAT. AND SO THIS LETTER WASN'T CONSIDERED BY THE TRIAL COURT. IT IS IN EVIDENCE AS DEFENSE EXHIBIT 2, AND I THINK THAT THAT, REALLY, SHOWS THAT THE TIMING OF WHEN HUTTO LEARNED ABOUT THE O'KELLY INFORMATION IN KIGHT, CAME AFTER HE SWORE THE AFFIDAVIT ABOUT THE INFORMATION HE HAD ON KELLY SO I THINK THAT THE JUDGE REALLY DIDN'T CONSIDER THAT. IT IS NOWHERE IN THE ORDER AND ALSO MR. WALSH'S TESTIMONY WAS NEVER CONSIDERED, NEVER MENTIONED IN THE ORDER, WHERE HE SAID I ABSOLUTELY DID NOT TELL HIM ANYTHING ABOUT THE O'KELLY SITUATION.

DID O'KELLY TESTIFY AT THE KIGHT HEARING?

HE DID BUT THAT WAS IN JANUARY, AND THIS COURT'S OPINION DIDN'T COME OUT UNTIL, I THINK, DECEMBER, FOLLOWING THE HUTTO AFFIDAVIT.

ISN'T THE DEFENDANT WHO HAS FILED THE 3.850, AND THERE IS A HEARING, ISN'T THE DEFENDANT TYPICALLY PRESENT, EITHER IN PERSON OR BY TELEPHONE?

WELL, THAT WOULD HAVE BEEN MR. KIGHT. THAT WOULDN'T HAVE BEEN MR. HUTTO.

RIGHT.

HUTTO IS THE CODEFENDANT OF THE INDIVIDUAL MR. KIGHT, WHO --

RIGHT.

-- THE NEWLY-DISCOVERED EVIDENCE WAS ABOUT AND THAT IS ANOTHER ISSUE, TOO. I MEAN, HUTTO HAD NOTHING TO GAIN. THERE IS THIS WHOLE ISSUE ABOUT THIS IS ALL PAY BACK. HE HAD NOTHING TO GAIN. HE SAID IT DOESN'T MATTER WHAT O'KELLY SAID ABOUT ME TODAY. I WAS A SENTENCE. I HAVE TO SERVE IT. IT DOESN'T DO ME ANY GOOD TO TESTIFY ABOUT KOKAL AND IT DOESN'T DO ANY GOOD FOR O'KELLY TO TEST MY ABOUT ME AND KIGHT. I DIDN'T NEED THIS REASON FOR COMING FORWARD --

WHAT WAS HIS REASON FOR COMING FORWARD?

HE SAID NOBODY ASKED ABOUT IT. I DIDN'T NEED TO TELL MY TRIAL ATTORNEY ABOUT THIS INFORMATION BECAUSE I GOT A DEAL AT TRIAL AND ACTUALLY PROVIDED INFORMATION ABOUT

KIGHT AND GAVE NAMES OF WITNESSES AGAINST KIGHT SO I HAD CUT A DEAL. THERE WAS NO USE IN USING WHAT HE KNEW ABOUT O'KELLY TO MY ADVANTAGE. I ALREADY KNEW ABOUT THIS WHOLE SITUATION, SO THIS WHOLE IDEA THAT HE WAS TRYING TO GET BACK AT O'KELLY, WHEN YOU LOOK AT THE CIRCUMSTANCES ABOUT HOW IT PLAYED OUT AND THE LETTER, IT DOESN'T MAKE ANY SENSE.

HE TESTIFIED THAT HE GOT A DEAL, BUT IF HE KNEW THAT THIS STATEMENT HAD BEEN MADE, WOULDN'T THAT BE FURTHER EVIDENCE THAT HE WOULD WANT TO SHARE TO IMPROVE HIS DEAL?

HE HAD ALREADY PLED GUILTY. HE HADN'T BEEN SENTENCED, BUT HE HAD ALREADY COME TO THE CONCLUSION THAT THIS IS THE SENTENCE I WAS GOING TO GET. HE SAW NO NEED, HE SAID AT THE EVIDENTIARY HEARING, THIS IS THE FIRST TIME THAT I WAS EVER IN JAIL. I WORKED OUT --

HE KNEW SOMEBODY CONFESSED TO A MURDER. HE IS TRYING TO GET THE BEST POSSIBLE SENTENCE AND KOKAL HASN'T BEEN TRIED YET AND WHATEVER AND HE IS NOT GOING TO OFFER THAT EVIDENCE TO THE STATE, WHEN HE IS TRYING TO GET HIS BEST POSSIBLE DEAL? I MEAN, I THINK WHEN I ASKED THAT RHETORICALLY, I JUST FIND THAT TO BE HIGHLY SUSPECT, AND THAT IS WHERE, I THINK, THE JUDGE WAS ON THIS.

THE ONLY OTHER THING I WILL SAY THOUGH, SOME OF THIS INFORMATION DIDN'T COME OUT UNTIL THEY WERE ACTUALLY INCARCERATED ON THEIR SENTENCES AND O'KELLY WAS BRAGGING ABOUT THE SWEET DEAL HE GOT AND LAUGHING ABOUT HOW HE WAS ONLY GOING TO DO FIVE AND-A-HALF TO SIX YEARS WHICH IS WHAT HE DID, AND THAT WAS ALSO PART OF THE STORY. NOT ALL OF THE STORY CAME OUT PRETRIAL. I WOULD JUST POINT OUT THAT THE JUDGE NEVER DID ANY ANALYSIS AS TO THE PENALTY PHASE ISSUES IN THIS REGARD, WITH ALL THIS INFORMATION, SO I THINK THAT THAT IS A ERROR IN THE LOWER COURT'S ORDER AND I WOULD ASK THAT THIS COURT REMAND THE MATTER FOR EITHER FURTHER FACT FINDINGS ON THAT ISSUE OR ALLOW MR. KOKAL A NEW SENTENCING AND NEW TRIAL. THANK YOU.

CHIEF JUSTICE: THANK YOU.