SC02-2044 & SC03-1123

CHIEF JUSTICE: IF COUNSEL IS READY ON DILLBECK VERSUS STATE, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS GEORGE BLOW ON BEHALF OF THE PETITIONER APPELLATE, DONALD DILLBECK IN THIS CASE. MR. DILLBECK STANDS SENTENCED OR CONVICTED AND SENTENCED FOR MURDER, AND HAS BEEN SENTENCED TO THE DEATH PENALTY. WE ARE HERE ON AN APPEAL FROM DENIAL OF HIS POST-CONVICTION RELIEF MOTION, PREDICATED PRIMARILY ON INEFFECTIVE ASSISTANCE OF COUNSEL. THE CENTRAL ISSUE FOR MR. DILLBECK'S PERSPECTIVE IS WHETHER THIS COURT'S DECISION LAST YEAR IN NIXON AND IN HARVEY, HE IS ENTITLED TO A NEW TRIAL, BIVIRTUE OF HIS PUBLIC DEFENDER CONCEDING THE ISSUE OF GUILT TO MURDER IN JURY VOIR DIRE AND IN OPENING STATEMENT AND IN CLOSING STATEMENT. DURING THE OPENING STATEMENT OF THE TRIAL, THE PUBLIC DEFENDER QUESTIONED OR TOLD EACH PROSPECTIVE JUROR THAT THERE WAS NO QUESTION BUT THAT THEY WOULD FIND THAT MR. DILLBECK HAD, IN FACT, COMMITTED THE CRIME OF, FOR WHICH HE WAS CHARGED, THAT HE KILLED THE DECEASED, AND THAT HE DID SO IN A RATHER BRUTAL MANNER, THE ONLY VARIATION IN THAT STATEMENT THAT HE MADE TO EACH JUROR WAS ON SOME JURORS HE ACTUALLY TOLD THEM THAT THE WOMAN WAS STABBED REPEATEDLY.

DIDN'T HE MAKE IT CLEAR, THOUGH, THAT HE WAS CHALLENGING THE PREMEDITATION ASPECT OF THE CASE?

I BELIEVE HE DID, YOUR HONOR.

HELP US, YOU KNOW, THIS IS A CASE THAT WAS TRIED AFTER NIXON, THE KNICKS ONE OPINION WAS OUT, -- THE NIXON OPINION WAS OUT, THAT CORRECT?

YES. NIXON TWO WAS OUT.

AND NIXON WAS DISCUSSED BY THE TRIAL LAWYER AND WITH MR. DILLBECK, ISN'T THAT CORRECT?

IT WAS DISCUSSED WITH THE LAWYER. MR. DILLBECK, AT LEAST DURING THE FIRST CONFERENCE WHICH WAS DURING JURY SELECTION, WAS PRESENT. THE SECOND CONFERENCE, WHICH WAS DURING THE OPENING STATEMENTS, WAS A BENCH CONFERENCE TARNKS IS NOT CLEAR FROM THE RECORD WHETHER HE WAS --, AND IT IS NOT CLEAR FROM THE RECORD WHETHER HE WAS PRESENT FOR THAT.

WE HAVE SOME DISCUSSION ON NIXON, DO WE THOUGHT?

WE DO.

HELP ME, THEN, DID THE LAWYER TESTIFY IN THE POSTCONVICTION HEARING THAT HE DID DISCUSS THIS WITH HIS CLIENT, AND THAT THE CLIENT DID AGREE TO THIS STRATEGY, IF YOU WILL, AND THAT THAT IS WHAT HURT HERE, THAT DISTINGUISHES IT FROM NIXON. IN OTHER WORDS, WHY ISN'T THERE PLENTY OF EVIDENCE ON THE BASIS OF LAWYER'S TESTIMONY, THAT HE ADHERED TO THE REQUIREMENTS OF NIXON? THAT THERE BE A DISCUSSION WITH THE CLIENT, YOU KNOW, BY THE LAWYER, BEFORE GOING FORWARD WITH THE STRATEGY, AND DIDN'T THE LAWYER HERE, IF IN HIS TESTIMONY, FILL IN THAT BLANK, OF AFFIRMATIVELY STATING THAT HE

DID DISCUSS THIS, AND DON'T, THEN, ON THE RECORD STATEMENTS OF THE TRIAL JUDGE AND THE LAWYER, IN THE PRESENCE OF DILLBECK, REALLY, SUBSTANTIATE THAT TESTIMONY? SO HELP ME WITH, I REALIZE THAT WHAT I AM POSITING IS EXACTLY WHAT THE STATE IS POSITING, AS FAR AS IN TRYING TO DEFEND THIS CLAIM ON APPEAL, BUT THOSE THINGS ARE IN THE RECORD HERE, AND SO WHY DOESN'T THAT DISTINGUISH THIS CASE FROM NIXON?

THE ISSUE CAME UP AND NIXON WAS DISCUSSED, AND COUNSEL ASSURED THE COURT THAT HE HAD DISCUSSED HIS STRATEGY WITH MR. DILLBECK.

HE TESTIFIED AT THE POSTCONVICTION HEARING, DID HE NOT, THAT HE WAS CERTAIN THAT HE HAD DISCUSSED IT WITH.

AS I RECALL THE POSTCONVICTION HEARING TESTIMONY WAS HIS BEST RECALL AT THE TIME, AND IT WAS A NUMBER OF YEARS LATER, THAT HE HAD, HE HAD NO AFFIRMATIVE RECOLLECTION OF IT, NO MEMAND A, NOTHING TO SAY THAT HE WOULD, BUT HE WAS SURE THAT HE WOULD HAVE DISCUSSED IT WITH HIM, AND THAT HE -- EXCUSE ME.

I AM, THE BIGGEST DIFFERENCE WITH NIXON IS NOT ONLY DIDN'T HE CLEARLY WAS CONTESTING PREMEDITATION, AND DILLBECK TESTIFIED IN THE TRIAL, EXACTLY CONSISTENT WITH WHAT THE LAWYER REPRESENTED HE WOULD TESTIFY TO. THEIR WHOLE IDEA, SINCE HE HAD ALREADY CONFESSED TO THE CRIME AND THE CONFESSION WASN'T BEING SUPPRESSED, THE ONLY WAY THAT THE STRATEGY WAS THAT THEY WERE GOING TO TRY TO SHOW THERE WAS NO PREMEDITATION, AND LOOK AT THIS AS AWAY TO SAVE THIS GUY'S LIFE, AND I AM JUST, DON'T SEE THIS AS, I MEAN, I UNDERSTAND WHY YOU ARE TRYING TO ARGUE NIXON, BUT IT IS NOT ONLY IN ADDICTION TO WHAT JUSTICE ANSTEAD SAID ABOUT THE FACT THAT THIS IS GOING ON IN THE DIRECT APPEAL, THAT IS THE CONVERSATION ABOUT THE STRATEGY, THE ASSISTANT STATE ATTORNEY IS VERY CONCERNED AND WANTS TO MAKE SURE THAT THIS WAS DONE WITH THE CLIENT'S CONSENT, THE CLIENT SITTING THERE, AND THEN THE CLIENT TESTIFIES AT TRIAL, AND YOU KNOW, NIXON DIDN'T TESTIFY AT HIS TRIAL, SO HE TESTIFIED EXACTLY CONSISTENT WITH THE STRATEGY. HOW IS THIS A NIX ONE/CROHN I GO SITUATION -- A NIXON/KROENIG SITUATION?

BECAUSE THIS IS THE STRATEGY THAT THE LAWYER WORKED OUT. THE QUESTION WAYS NOT IF HE DID THAT -- THE QUESTION WAS NOT IF HE DID THAT OR WHETHER IT HAD BEEN DISCUSSED WITH HIM. THE ISSUE WAS WHETHER HE HAD MADE AN INTELLIGENT AND KNOWING CONSENT TO THAT THAT TO DO THAT, AND THAT BECOMES THE ISSUE. DID HE UNDERSTAND WHAT HIS LAWYER WAS DOING? I MEAN, A CRITICAL FACTOR HERE IS WHAT THE ATTORNEY WAS TRYING TO DO WAS BEAT OFF PREMEDITATED MURDER BUT CONCEDE FELONY MURDER. DID MR. DILLBECK UNDERSTAND THAT, IN LIGHT OF THE FACT THAT THEY HAD AT LEAST FOUR AGGRAVATORS, THAT WERE GIVE-ME'S NO ISSUE ABOUT THEM, THAT ON FELONY MURDER, THAT HE WOULD, IN ALL PROBABILITY, STILL GET THE DEATH PENALTY!

YOU ARE NOT CONTESTING, AS I READ THE BRIEF, THAT THE COUNSEL WAS INEFFECTIVE IN THE FACT THAT DILLBECK TESTIFIED, RIGHT? I MEAN, THAT IS NOT PART OF YOUR, BECAUSE ARE SAYING. YOU ARE SAYING THAT THIS IS A CHRONIC SITUATION, CORRECT?

CORRECT.

STRIPPING NIXON OF EVERYTHING ELSE, IT IS BASED ON CHRONIC.

YES.

BUT IF YOU GET TO THE POINT AT WHICH YOU ARE SAYING THAT THEY WERE CARRYING OUT THE STRATEGY, THEN DOESN'T THAT NECESSARILY ELIMINATE CHRONIC, BECAUSE CHRONIC IS BASED UPON THE ABSOLUTE FACT THAT THIS LAWYER WAS NOT FUNCTIONING, THAT THIS PERSON

DIDN'T HAVE A LAWYER, IN ALL REGARDS. ISN'T THAT WHAT CHRONIC STANDS FOR?

WELL, CHRONIC CERTAINLY STANDS FOR THE PROPOSITION THAT, WHERE YOU HAVE SUCH A FUNDAMENTAL DENIAL OF COUNSEL, WHEN A TESTING OF THE ADVERSARIAL SYSTEM THAT, THAT IS WHERE YOU HAVE THE PER SE ERROR. FOR MR. DILLBECK, THE FACT THAT THEY MAY HAVE DISCUSSED A STRATEGY AND THERE IS SOME ISSUE IN THE TRANSCRIPT ABOUT WHETHER THEY WERE IN AGREEMENT ON THAT, THE QUESTION BECOMES DID HE MAKE A KNOWING CONSENT, AN INTELLIGENT CONSENT, THAT IS THE LANGUAGE THIS COURT HAS USED IN NIXON AND HARVEY, AND IT IS CRITICAL IN MY SUGGESTION, ANYHOW, THAT HERE HE IS, GOING WITH A STRATEGY THAT DOESN'T GET HIM A LESSER-INCLUDED OFFENSE. IT STILL SUBJECTS HIM ALMOST CERTAINLY TO THE DEATH PENALTY.

SO IS YOUR ARGUMENT, THEN, A PART OF YOUR ARGUMENT, THAT, WHILE THEY DISCUSSED THIS IN COURT, WITH THE ATTORNEY, IS THE ERROR, REALLY, THAT THE TRIAL JUDGE DID NOT TAKE THAT NEXT STEP AND QUESTION MR. DILLBECK AT COURT, WHEN THIS WAS GOING ON? IS THAT PART OF YOUR ARGUMENT IS THAT THE BASIS OF YOUR ARGUMENT?

YES, MA'AM, THAT IS THE BASIS FOR MY ARGUMENT.

BUT WE SAID, IN NIXON TWO OR THREE, THAT THAT WAS A PROSPECTIVE REQUIREMENT OR SUGGESTION, THAT THAT WOULD BE THE WAY, JUST LIKE IT WAS WITH KUKOC, THAT IT IS BETTER IF THE RECORD LOOK LIKE THIS, BUT THIS RECORD LOOSE TO ME THAT THE TRIAL COURT, THE ATTORNEY, THE STATE, AND DILLBECK, ALL SITTING THERE, WERE ALL TRYING TO MAKE SURE THAT, ALTHOUGH THIS SEEMED TO BE A LITTLE UNUSUAL, AND YOU ARE RIGHT, WHILE CONCEDING FELONY MURDER, IT STILL ALLOWED HIM TO ARGUE IN THE PENALTY PHASE, THIS WAS NOT PREMEDITATED. HE ACHIEVED A 8-TO-4 JURY RECOMMENDATION IN A CASE THAT YOU KNOW, VERY EASILY COULD HAVE BEEN A 12-0 CASE, SO YOU KNOW, YOU ARE SAYING THIS IS PRIMARILY AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, BUT YET YOU ARGUE TO OR YOU SAID TO JUSTICE WELLS, NO, IT IS A CHRONIC CLAIM, SO WHICH IS IT?

I DON'T SEE THEM AS BEING PARTICULARLY DIFFERENT. STILL INEFFECTIVE ASSISTANCE OF COUNSEL, AND EVEN THOUGH MR. DILLBECK MAY HAVE COOPERATED WITH HIS COUNSEL, I THINK, I WOULD HOPE MOST DEFENDANTS DO, BECAUSE THEY RELY ON THEIR COUNSEL TO KNOW WHAT IS BEST IN THAT SITUATION, THE ISSUE STILL BECOMES DID HE MAKE A KNOWING AND INTELLIGENT CONSENT, AND IF I MAY CALL THE COURT'S --

IF IT IS AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, THEN HOW IS THERE PREJUDICE TO THIS? HOW HAVE YOU DEMONSTRATED IT IN YOUR EVIDENTIARY HEARING, THAT THERE WAS PREJUDICE, AGAIN, BECAUSE YOU DIDN'T MAKE AN ARC UNIT THAT IT WAS WRONG FOR MR. -- AN ARGUMENT THAT IT WAS WRONG FOR MR. DILLBECK TO TESTIFY, AND SINCE HE TESTIFIED, LIKE I SAID, EXACTLY WHAT COUNSEL REPRESENTED HE WOULD TESTIFY, I AM JUST HAVING A HARD TIME HOW YOU WOULD ESTABLISH PREJUDICE.

IF HE IS FOLLOWING A STRATEGY THAT HE HAS NOT CONSENTED TO, THAT LEADS TO THE IMPOSITION OF A DEATH PENALTY, I WOULD CERTAINLY HOPE THAT WE COULD ALL AGREE THAT HE HAS BEEN PREJUDICED, AND THERE WAS SOME QUESTION ABOUT WHETHER HE HAD CONCEPTED TO IT. IN THE VOIR DIRE, WHEN THERE IS A DECISION THAT COMES UP, THE TRIAL JUDGE ASKS THE PUBLIC DEFENDER, CAN YOU GIVE ME THE ASSURANCE THIS IS AT PAGE 329,, OF THE TRANSCRIPT, CAN YOU GIVE ME THE ASSURANCE THAT, IN FACT, YOU HAVE DISCUSSED THIS WITH HIM, NOT THAT HE HAS CONSENTED TO IT BUT THAT YOU HAVE DISCUSSED IT WITH HIM AND THAT HE HAS MADE AN INTELLIGENT DECISION. HE DIDN'T ASK HIM THAT. JUST HAVE YOU DISCUSSED IT. MR. MORELL SAID, I CAN GIVE THE COURT THAT ASSURANCE, BUT THEN GOES ON TO SAY CLIENTS AND ATTORNEYS HAVE DISAGREEMENTS ALL THE TIME, ABOUT HOW TO HANDLE ANY GIVEN MATTER. AND THE COURT SAYS SURE AND I SUGGEST TO THAT YOU A

RONABLE INFERENCE TO THAT IS THE -- A REASONABLE INFERENCE TO THAT IS THE RECOGNITION IN THAT STATEMENT THAT THERE WAS REFERENCES TO HE AND HIS CLIENT ABOUT THAT, THAT HE HAD DISCUSSED IT WITH HIM, IT DOESN'T MEAN THAT HE WAS IN AGREEMENT WITH HIM BUT SIMPLY HE FOLLOWED THE LEAD OF HIS COURT-APPOINTED LAWYER IN THE ONLY TRIAL THAT HE HAD EVER BEEN AND HIS LIFE IS AT STAKE, I DON'T NECESSARILY THAT MEANS THAT HIS STRATEGIES HAD BEEN FOLLOWED. AND I WOULD SUBMIT TO YOU THAT DURING OPENING STATEMENT, AT THAT TIME JUDGESTEIN MYRON BROUGHT UP THE ISSUE AGAIN -- JUDGESTEIN MEYER BROUGHT UP THE ISSUE -- JUDGE STEINMEYER BROUGHT UP THE ISSUE AGAIN, AND I QUOTE AT PAGE 350, SAYING IT WOULD BE CONFIDENT TO ME IF YOU HAVE DISCUSSED IT WITH HIM AND YOU HAVE EXPLAINS PLAIPD IT THOROUGHLY -- AND YOU HAVE EXPLAINED IT THOROUGHLY TO HIM AND THE CONSEQUENCES.

DIDN'T HE ALSO SAY TO MR. DILLBECK ON THE RECORD, OKAY, WE ARE SITTING HERE AND YOU HEARD OUR DISCUSSION ABOUT WHETHER OR NOT YOU HAVE AGREED TO THIS STRATEGY, AND THE COURT, REALLY, IS TAKING YOUR NOT RESPONDING, COUPLED WITH WHATEVER THE LAWYER HAS TOLD ME HERE, IN OUR OPEN DISCUSSION OF THIS, IS THAT YOU HAVE AGREED TO THIS. ISN'T THERE COLLOQUY LIKE THAT?

THERE IS A COLLOQUY SIMILAR TO THAT, AND THAT IS IN THE FIRST ONE IN THE OPENING, IN THE VOIR DIRE, AND THE JUDGE COMMENTS ABOUT THE FACT THAT HE HAS BEEN SITING THERE AND SEEMS TO KNOW WHAT IS GOING ON IN VOIR DIRE AND SO FORTH AND HE SEEMS TO BE PAYING ATTENTION, AND SUMS IT UP AT THE END AND SAYS IF HE WANTS TO MAKE AN OPPORTUNITY OR WANTS TO MAKE SOME OBJECTION TO THIS STRATEGY, I WILL GIVE HIM AN OPPORTUNITY TO DO THAT IF HE CHOOSES TO. NOW, HE DOESN'T TELL HIM HOW HE IS GOING TO DO THAT OR WHEN HE IS GOING TO DO IT OR DOES HE DO IT THROUGH HIMSELF OR DOES HE DO IT THROUGH THE LAWYER OR DOES HE GETS ANOTHER LAWYER. HE DOESN'T GIVE HIM ANY GUIDANCE ON. THAT HE JUST MAKES THE STATEMENT.

WHAT DOES THE LAWYER, THEN, TESTIFY TO AT THE EVIDENTIARY HEARING ON THIS ISSUE? WHAT IS THE --

MR. MORELL, HIS RECOLLECTION WAS THAT THEY HAD DISCUSSED IT AND THAT MR. DILLBECK DIDN'T HAVE A PROBLEM WITH IT. MR. DILLBECK TESTIFIED THAT IT HADN'T BEEN AGREED TO BY HIM, THAT HE WAS BASICALLY FOLLOWING HIS LAWYER'S LEAD.

SO THERE WAS A CONFLICT.

THERE WAS A CONFLICT, YES, SIR.

AND DON'T WE, THEN, DEFER TO THE FACT FINDER, THE TRIAL JUDGE, WHEN THERE IS A CONFLICT?

WELL, YOU HAVE A --

I HIM SAYING THAT, ESPECIALLY IN THE CONTEXT HERE, WHERE WE HAVE THIS VERY OPEN DISCUSSION OF NIXON IN THE PRESENCE OF MR. DILLBECK, AND ALL OF THESE CAUTIONARY STATEMENTS ARE MADE, SO THAT WOULDN'T YOU AGREE THAT THAT COULD BE TAKEN AS CORROBORATION OF THE LAWYER'S TESTIMONY THAT HE HAD DISCUSSED IT WITH HIM AND HE HAD AGREED?

I WOULD TAKE IT AS CORROBORATION THAT HE HAD DISCUSSED IT WITH HIM, THAT HE HAD DISCUSSED IT WITH HIM, IS NOT REALLY THE POINT OF MY ARGUMENT. THE POINT IS, AS I READ YOUR DECISION IN NIXON AND HARVEY, THERE NEEDS TO BE A WAIVER. THERE NEEDS TO BE SOMETHING ON THE RECORD, HERE, SHOWING HIS CONSENT TO THIS STRATEGY, ONE THAT IS VERY LIKELY TO PUT HIM IN THE DEATH HOUSE. AND THAT WAS NEVER DONE.

WE HAVE DISCUSSED THAT, AND OUR RULING WITH REFERENCE TO SUGGESTING THAT YOU PUT THAT WAIVER ON THE RECORD, IS, REALLY, FIRST OF ALL, A SUGGESTION, AS THE BEST EVIDENCE, AND, ALSO, WAS A PROSPECTIVE HOLDING, WAS IT NOT?

WELL, NO, SIR.

ARE YOU SAYING THAT WE HAVE ESTABLISHED RETROACTIVELY, IN NIXON, THAT THERE HAS TO ABSOLUTELY BE AN ON-THE-RECORD, NOW, AGREEMENT, BY THE CLIENT, THAT APPLIED TO THIS TRIAL, AND THAT THAT SIMPLY IS A MATTER OF LAW NOW?

I BELIEVE THAT NIXON TWO, WHICH WAS ALREADY IN EXISTENCE AT THE TIME OF THE TRIAL, SET THAT STANDARD, AND IN FACT, MR. KERWIN, THE PROSECUTOR, READ IT TO THE JUDGE, AND THAT IS WHY HE WAS ASKING HIM TO PUT IT ON THE RECORD, SO THAT THERE WAS AN AFFIRMATIVE, EXPLICIT ACCEPTANCE OF THIS STRATEGY. IF HE HAD, WE WOULDN'T BE HERE ON THIS ISSUE NOW. AND THAT IT IS NOT A QUESTION OF DID HE CONSENT, DID HE CONSENT KNOWINGLY, TO NOT A LESSER OFFENSE BUT ONE THAT IS STILL JUST AS LIKELY TO GET HIM THE DEATH PENALTY.

CHIEF JUSTICE: THANK YOU VERY I HAVE MUCH. -- THANK YOU VERY MUCH. GOOD MORNING.

GOOD MORNING, CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE.

IS IT PRETTY STRAIGHTFORWARD? IN OTHER WORDS IT IS JUST A MATTER THAT WE HAVE ABSOLUTELY REQUIRED THERE BE A STATEMENT ON THE RECORD BY THE DEFENDANT, AND IN A CIRCUMSTANCE LIKE THIS, AND THIS TRIAL OCCURRED AT A TIME THAT THAT WAS THE PREVAILING LAW. IS THAT ALL THERE IS TO IT?

NO, YOUR HONOR. NIXON TWO WAS NOT OUT. NIXON TWO WAS DECIDED IN 2000. THIS TRIAL WAS HELD IN FEBRUARY OF 1991. NINE YEARS BEFORE THAT NIXON DECISION.

COUNSEL WAS IN ERROR, WHEN HE SAYS THAT NIXON TWO WAS ALREADY OUT AND MAKE REQUIREMENT WAS --

YES. WHAT THE PROSECUTOR IS READING TO THE TRIAL JUDGE, THE REMAND ORDER FROM THIS COURT, THE OCTOBER 1987 REMAND ORDER, IN NIXON ONE. AND HE IS READING TO THE COURT, WHAT THE EVIDENTIARY HEARING THAT YOU REQUIRED AS PART OF NIXON ONE, THAT IS WHAT HE IS READING TO THE TRIAL JUDGE.

NOTHING TO DO WITH NIXON TWO.

NO, NIXON TWO --

OBVIOUSLY, BECAUSE WE ARE TALKING ABOUT THAT SUBSTANTIAL GAP IN TIME.

YES, YOUR HONOR. SO NIXON TWO HAD NOT COME OUT YET. IT IS THE REMANDORD PER FROM NIXON ONE THAT THE PROSECUTOR IS READING, AND HE DOES READ IT AT LENGTH, AND HE SAYS THAT THIS MUST BE VOLUNTARILY CONSENTED TO BY THE DEFENDANT, BUT IT DOES NOT HAVE, OBVIOUSLY, THE FOOTNOTE OF NIXON TWO.

WHAT IS THE STRONGEST EVIDENCE IN THIS RECORD, WHEN WE EXAMINE THE EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING WAS HELD HERE, AND THE RECORD OF THE TRIAL? WHAT WOULD THE STATE CLAIM TO BE THE STRONGEST EVIDENCE THAT THE DEFENDANT WAS MADE AWARE OF AND CONSENTED TO THIS STRATEGY BY THE LAWYER?

DURING THE VOIR DIRE, THIS IS DISCUSSED AT LENGTH. IT IS 20 PAGES OF THE RECORD, AND WHAT HAPPENS IS THAT IS READ INTO THE RECORD DURING VOIR DIRE, AS THE DEFENDANT STANDING THERE WITH THE DEFENSE COUNSEL, RANDY MORELL. THEY GIVE HIM THE OPPORTUNITY, THEY EXPLAIN HIS RICE, THAT HE HAS THE RIGHT TO -- HIS RIGHTS, THAT HE HAS THE RIGHT TO STOP THIS CONFESSION THAT, THIS MUST BE KNOWING AND VOLUNTARY, PERSONALLY, ON HIS PART. ALL OF THIS IS EXPLAINED TO THE DEFENDANT WHILE IS HE STANDING THERE, BY A COMBINATION OF THE PROSECUTOR, DEFENSE COUNSEL AND THE TRIAL JUDGE. THE TRIAL JUDGE TURNS --

SO THE CONTENTS OF THE KNICKS ONE ONE REMAND ORDER -- THE CONTENTS OF THE NIXON ONE REMAND ORDER IS EXPLICITLY LAID OUT.

YES, YOUR HONOR, IT IS. I CAN READ IT TO YOU FROM THE TRIAL TRANSCRIPT. FROM 329-TO-330, IN AN ORDER DATED OCTOBER 20, 1987, THE SUPREME COURT RELINQUISHED JURISDICTION IN NIXON'S DIRECT APPEAL AND REMANDED TO THE CIRCUIT COURT FOR AN EVIDENTIARY HEARING, TO DETERMINE WHETHER NIXON WAS INFORMED OF AND KNOWINGLY, VOLUNTARILY CONSENTED TO THE TRIAL STRATEGY OF CONCEDING GUILT AND SEEKING LENIENCY. THEN HE READS SOME MORE FROM THE ORDER. ON REMAND, THE TRIAL COURT SHALL INQUIRE OF BOTH NIXON AND TRIAL COUNSEL, MR. COIN, AS TO WHETHER NIXON WAS INFORMED OF AND KNOWINGLY AND VOLUNTARILY CONSENTED TO THE STRATEGY OF CONCEDING. THEN THE TRIAL JUDGE GIVES THE DEFENDANT, IS HE UNCOMFORTABLE WITH INTERFERING WITH THE ATTORNEY/CLIENT PRIVILEGE RELATIONSHIP, AND REMEMBER HE DOES NOT HAVE THE GUIDANCE FROM THIS COURT ABOUT NIXON TWO, ABOUT GETTING IT ON THE RECORD, THE INQUIRY, SO HE IS UNCOMFORTABLE, AND DEFENSE COUNSEL RANDY MORELL, IS SPECIFICALLY ASSERTING THAT THIS IS INTERFERING WITH HIS ATTORNEY/CLIENT PRIVILEGE, SO WHAT THE JUDGE DOES IS HE TURNS TO THE DEFENDANT AND SAYS, ALL RIGHT, YOU HAVE HEARD ALL THIS, NOW, AND THIS IS YOUR OPPORTUNITY TO OBJECT, SO DO YOU WANT TO OBJECT? AND THE TRIAL COURT'S SPECIFICALLY PUT ON THE RECORD THAT NOT ONLY DOES NOT RESPOND. ALL HE DOES IS STAND THERE AND SMILE. UNDERSTAND HE HAD THE OPPORTUNITY TO OBJECT. MOREOVER, YOUR HONOR, WHILE YOU HAVE MADE IT A SUGGESTION TO, IN THE FUTURE, GET AN ON-THE-RECORD WAIVER, THE TRUTH IS THAT IF THE DEFENDANT DOES NOT WANT TO RESPOND TO THAT INQUIRY, HE DOES NOT HAVE TO. OF COURSE WE ARE DOING IT TO MAKE THE POSTCONVICTION LITIGATION CLEANER, AND I UNDERSTAND THAT. IT IS A VERY PRAGMATIC SUGGESTION, BUT THE TRUTH IS YOU CANNOT MAKE THAT A REQUIREMENT.

ISN'T IT THE THERE I HAVE THE HAGE OR THE IN THE -- OF THE MAJORITY IN THE KNICKS ONE LINE OF -- IN THE NIXON LINE OF CASES, IS THAT THIS IS TANTAMOUNT TO ENTERING A GUILTY PLEA, AND THE FACTS AS I READ THEM IN NIXON IS THAT THE MAN TOOK OFF HIS CLOTHES AND WENT AND SAT IN THE CELL AND THEY TALKED TO HIM VERY SIMILARLY TO WHAT IS SAID HERE. WHAT DISTINGUISHES BETWEEN THE CONVERSATIONS HAD WITH NIXON, WHEN HE WAS IN THE CELL AND CAME BACK AND REFUSED TO WAIVE THE ATTORNEY/CLIENT PRIVILEGE AND WHAT OCCURRED IN THIS CASE?

WELL, SOME OF THE DISTINCTIONS FOR NIXON DON'T HAVE TO DO WITH THE CONVERSATION. HERE WE DO HAVE THE DEFENDANT, HIMSELF, TESTIFYING IN THE GUILT PHASE AND ADMITTING THE FACTS UNDER LYING THE FELONY. MOREOVER, THIS IS NOT A TRUE NIXON CHRONIC WHATEVER YOU WOULD WANT TO CALL IT SITUATION, BECAUSE COUNSEL DID NOT CONCEDE TO PREMEDITATED MURDER. HE SPECIFICALLY, IN OPENING, STATED THAT THIS CASE IS ABOUT TWO THINGS, WHETHER PREMEDITATION EXISTS AND WHETHER THE DEFENDANT SHOULD LIVE OR DIE, SO UNDERSTAND HE DID, HE CONCEDED TO ONE FORM OF FIRST-DEGREE MURDER, AND HE DISPUTED PREMEDITATION, SO THIS IS NOT A NIX ONE --

WHY DOES THAT MAKE A DIFFERENCE? YOU CAN BE SENTENCED TO DEATH FOR PREMEDITATED FIRST-DEGREE MURDER AND FOR FIRST-DEGREE FELONY MURDER, ISN'T THAT CORRECT?

YES, YOUR HONOR.

SO WHY WOULD IT MAKE A DIFFERENCE, IF YOU CONCEDE TO PREMEDITATED, I MEAN, IF YOU CONTEST PREMEDITATED, YET YOU CONCEDE TO FIRST-DEGREE FELONY?

WELL, IT DOESN'T MATTER, IN TERMS OF WHAT THE DEATH PENALTY COULD BE IMPOSED BASED ON THAT, BUT IT DOES MATTER THIS WAY. WE HAD A SPECIAL JURY VERDICT. THIS VERDICT IS A RESULT OF ADVERSE EARL TESTING. THE DEFENSE COUNSEL DISPUTED PREMEDITATION. THE PROSECUTOR ARGUED FOR IT ANYWAY AND JURY FOUND IT. UNDERSTAND THE JURY VERDICT HERE, IS BEYOND THE CONCESSION, AND THAT, ALSO, GOES TO WHY THERE IS NO PREJUDICE. THIS JURY WOULD HAVE CONVICTED OF FIRST-DEGREE MURDER, COMPLETELY REGARDLESS OF THIS CONCESSION, BECAUSE THEY FOUND PREMEDITATION. THE PROSECUTOR, IN CLOSING, SPECIFICALLY SAYS TO THE JURY, DON'T TAKE THE EASY WAY OUT. DON'T JUST CHECK FELONY MURDER. CHECK PREMEDITATION AS WELL. THERE WAS THE WHOLE GUILT PHASE. THAT WAS THE WHOLE DISPUTE IN THE GUILT PHASE, WAS ABOUT PREMEDITATION. THE MINUTE YOU HAVE A JURY VERDICT THAT GOES BEYOND THE CONCESSION, YOU HAVE NOT GOT A NIX ONE CHRONIC PROBLEM, AND YOU HAVE ALSO -- YOU HAVE NOT GOT A NIXON CHRONIC PROBLEM AND YOU HAVE ALSO GOT NO CONFESSION.

BEFORE YOU SIT DOWN, COULD YOU DISCUSS FINDINGS OF FACT AND CONCLUSIONS OF LAW?

YES, IN HIS ORDER ON THE POSTCONVICTION HEARING, HE DID NOT, HE SAID THERE WOULD BE NO FURTHER BENEFIT FOR ME TO MAKE FINDINGS AND CONCLUSIONS OF LAW. AS TO THE NIXON CLAIM, IT DOES NOT MATTER A BIT. THE TRIAL JUDGE WHO WAS SAYING THAT JUDGE STEINMEYER WAS BOTH TRYING THE CASE AND AT THE EVIDENTIARY HEARING. HE MADE A SPECIFIC FINDING ON THE RECORD THAT THIS WAS A KNOWING PROCEDURE BY THE DEFENDANT. THOSE FINDINGS WERE ALREADY MADE, BEFORE WE HELD THE EVIDENTIARY HEARING. HE FOUND THAT DURING THE TRIAL, DURING THE VOIR DIRE, BEFORE THE TRIAL EVEN STARTED, HE MADE A FINDING THAT THIS WAS A KNOWING AND INTELLIGENT AND VOLUNTARY WAIVER ON THE PART OF THE DEFENDANT.

HOW DO YOU SQUARE THAT BE, THOUGH, WITH NIXON AND THE KNICKS ONE CASE -- AND THE NIXON CASE, AS I SEEM TO RECALL, THE JURY OVERTURNED A TRIAL COURT'S FINDING THAT THE DEFENDANT KNEW EXACTLY WHAT WAS GOING ON, AND THIS COURT OVERTURNED THAT. ISN'T THAT THE FACTUAL SCENARIO IN NIXON?

YES. THE TRIAL JUDGE -- EVEN AFTER SENDING IT BACK AND MAKING THOSE INSTRUCTIONS, THE TRIAL JUDGE FOUND THAT THE DEFENDANT, MR. NIXON, WAS AWARE OF WHAT WAS GOING ON AND I GUESS,ESS ESSENTIALLY HELD THAT HE -- AND I GUESS, ESSENTIALLY HELD THAT HE AGREED TO IT BY SILENCE AND THAT IS WHAT THIS COURT OVERRULED IN THE FINAL ANALYSIS.

YES, THAT IS AN ACCURATE DESCRIPTION OF THE KNICKS ONE THREE HOLD -- OF THE NIXON THREE HOLDING.

WHERE DOES THAT LEAVE US WITH THAT MAJORITY?

THIS IS DIFFERENT THIS. IS NOT MERE SILENT ACQUIESCENCE. REMEMBER, THE DEFENDANT DOES TESTIFY AT THIS TRIAL. HE GUESS UPS --

WOULD -- HE GETS UP --

WOULD THAT MAKE THE DIFFERENCE IS IT IS TANTAMOUNT TO A GUILTY PLEA, IF YOU HAVE A GUILTY PLEA AND THEN SOMEONE TESTIFIES LATER IN TRIAL, DOES THAT CURE THE FUNDAMENTAL ERROR IN THAT CASE?

YES, BECAUSE WHO IS PLEADING IS THE DEFENDANT, HIMSELF. REMEMBER, YOU HAVE NEVER SAID IT IS PER SE INEFFECTIVE FOR A DEFENSE LAWYER TO PLEAD HIS CLIENT GUILTY. YOU SAID THAT, WHEN YOU THINK IT IS THE LAWYER DOING IT, HIMSELF. THE DEFENDANT CAN PLEAD GUILTY, AND WHO PLEAD PLED GUILTY IN THIS -- AND WHO PLED GUILTY IN THIS CASE WAS DILLBECK, HIMSELF. HE IS THE ONE THAT GOT UP ON THE STAND AND ADMITTED THE UNDERLYING FACTS. THAT MAKES IT VERY DIFFERENT. THAT MAKES IT LIKE PLEAS THAT OCCUR EVERYDAY ACROSS THIS STATE AND ACROSS THIS NATION.

IN THE EVIDENTIARY HEARING, HE NEVER, HE SAID HE DIDN'T AGREE TO THE STRATEGY, BUT HE NEVER SAID THAT HE WAS FORCED TO TESTIFY OR ANYTHING OF THAT NATURE.

NO.

PLUS THERE WAS A CONFESSION THAT ACTUALLY WAS NOT SUPPRESSED, AND BOTH DEFENDANT AND THE ATTORNEY KNEW THAT IN THIS CASE.

YES. AND, BUT, WHEN, DURING THE EVIDENTIARY HEARING, WHEN DILLBECK WAS CROSSED, HE WAS SPECIFICALLY SHOWED THIS PART OF THE TRIAL TRANSCRIPT DURING VOIR DIRE, AND HE HAD NO EXPLANATION FOR IT. HE JUST SAID "MY LAWYER". SO AFTER BEING SILENCED DURING VOIR DIRE AND HAVING ALL OF THIS EXPLAINED TO YOU BY A COMBINATION OF DEFENSE COUNSEL AND THE JUDGE AND YOUR OWN LAWYER.

I WANT TO GO BACK TO JUSTICE CANTERO'S QUESTION FOR A SECOND. YOU SAID THAT THE REASON THAT THE NIXON CLAIM DOESN'T NEED TO BE FINEDINGS IS BECAUSE IT IS THE SAME TRIAL JUDGE, BUT SEVERAL OF THE CLAIMS ABOUT INTRODUCING THE INDIANA STABBING, THE CHANGE OF VENUE, THE INDIVIDUAL, THE FOR-CAUSE CHALLENGE ISSUE, ARE NOT NIXON CLAIMS. HOW DO WE, WITH AN ORDER THAT DOESN'T HAVE ANY FINDINGS OF FACT IN IT, STRATEGICAL BASIS FOR EACH OF THOSE, HOW DO WE JUST AFFIRM, BASED ON THIS SORT OF MIXED FINDINGS OF FACT, CHROOINGS CONCLUSIONS OF LAW, WITH -- CONCLUSIONS OF LAW, WITH THE ORDER THAT WE HAVE IN THIS CASE?

BECAUSE MOST OF THOSE CAN BE DISPOSED OF AS A MATTER OF LAW. FOR INSTANCE, YOU COULD JUST READ THE RECORD AND SEE THAT HE DIDN'T CONCEDE TO HAC. HE DID NOT --

HAS YOUR OPPONENT CHALLENGED THE LACK OF FINDINGS OF FACT?

NO. HE DID NOT. HE DID, IN HIS INITIAL BRIEF, AS PART OF THE STATEMENT OF THE CASE IN FACT, POINT OUT THAT THIS WAS NOT VALID UNDER THE NEW RULE. WELL, WE WERE UNDER THE OLD RULE, AND THAT WAS NOT RAISED AS AN INDEPENDENT ISSUE. THAT IS NOT RAISING SOMETHING AS AN ASIDE IN THE STATEMENT OF FACTS. IT IS NOT RAISING THAT AS AN ISSUE IN THE APPELLATE COURT. SO, NO, HE DID NOT. HE REFERRED TO IT IN THE STATEMENT OF THE CASE IN FACT. BUT BASICALLY, I AM SAYING EVERYTHING CAN BE DISPOSED OF WITHOUT A CREDIBILITY FINDING. ALL OF THESE ISSUES CAN BE DISPOSED OF, EITHER AS A MATTER OF LAW OR ON THE RECORD AS IT STANDS, THE KNICKS H -- THE KNICKS -- THE NIXON CLAIM IS REBUTTED ON THE RECORD AS IT STANDS. THE TRIAL COURT REBUTS THE NIXON CLAIM. THANK. I ASK THAT YOU AFFIRM THE TRIAL COURT'S DENIAL OF THE 3.850. THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME IS LEFT FOR REBUTTAL?

FOUR MINUTES.

IF I MAY ADDRESS BRIEFLY THE ISSUES THAT JUSTICE LEWIS ASKED ABOUT THE DISTINCTION BETWEEN NIXON AND THE QUESTIONING THERE. IN NIXON, THERE IS A POINT WHERE HE GIVES UP ONE OF HIS RIGHTS, THE RIGHT TO BE PRESENT IN THE COURTROOM, AND JUDGE HALL GOES BACK TO THE HOLDING CELL BECAUSE HE WON'T COME OUT OF THE HOLDING CELL AND HE ADDRESSES

NIXON DIRECTLY. HE TELLS HIM WHAT THE CONSEQUENCES ARE IF HE INSISTS ON THIS BEHAVIOR. NIXON TURNS HIS BACK AND TAKES HIS CLOTHES OFF AND WON'T KOUST THE CELL, AND HE TELLS AM I HIM GOING TO GO OUT AND WE ARE GOING TO TAKE A RECESS, IF YOU WON'T COME IN THEN, THEN WE WILL TAKE IT AS VOLUNTARY WAIVER. THE DEFENDANT WAS ADDRESSED AND KNEW WHAT THE CONSEQUENCES WERE. THE JUDGE TOLD HIM. NONE OF THAT WAS DONE HERE. THERE IS A DISCUSSION OF NIXON AND I MAKE A CORRECTION AS TO THE REMAND ORDER AS OPPOSED TO BEING NIXON TWO, AND NONETHELESS THE TRIAL COURT WAS ADVISED TO TURN TO WHETHER HE KNOWINGLY AND VOLUNTARILY CONSENT TO DO THAT STRATEGY, NOT WHETHER HE HAD DISCUSSED WITH HIM OR THAT HE KNEW ABOUT IT BUT THAT HE KNOWINGLY AND VOLUNTARILY, AND THAT ENTAILS KNOWING WHAT THE CONSEQUENCES ARE.

HERE HE TESTIFIED ABOUT THE PRECISE FACTS THAT WERE CONCEDED IN THE OPENING AND CLOSING ARGUMENT, SO IF YOU ARE CLAIMING THAT THE ATTORNEY SHOULD NOT HAVE CONCEDED THAT, WHAT WAS THE ATTORNEY SUPPOSED TO DO IN THE OPENING STATEMENT, KNOWING THAT THE TESTIMONY OF HIS CLIENT WAS GOING TO COME OUT LATER ON? HOW WAS HE SUPPOSED TO ADDRESS THAT TESTIMONY?

WELL, IF I RECALL CORRECTLY IN HARVEY, THE TESTIMONY WAS GOING TO COME OUT BY FORM 6 A CONFESSION AND THE -- BY FORM OF A CONFESSION AND THE SAME THING APPLIES HERE. THIS CAME OUT, BECAUSE THE CLIENT PLEADED GUILTY. HE PLED GUILTY --

THERE IS A DIFFERENCE TO THE DEFENDANT TESTIFYING ON THE STAND. HERE HE ACTUALLY TESTIFIED, IS THAT CORRECT?

HE DID. BUT THE CONCESSION OF GUILT BY DEFENSE COUNSEL TOOK PLACE IN VOIR DIRE. ALL RIGHT. WHETHER OR NOT THE DEFENSE HAD MADE A DECISION AT THAT POINT TO TESTIFY, WE DON'T KNOW. IT WASN'T MENTIONED TO THE JURY UNTIL THEY GOT INTO OPENING STATEMENTS. AT THAT POINT THE CONCESSION HAS BEEN DONE. THE DAMAGE HAS BEEN DONE.

DID THE STATE NOT IMMEDIATELY OBJECT DURING VOIR DIRE AND THAT IS WHEN THE FIRST CONVERSATION TOOK PLACE WHEN THEY HAD THE DISCUSSION WITH COUNSEL IN THE DEFENDANT'S PRESENCE, AND THAT IS WHEN THE TRIAL COURT FIRST GAVE THE DEFENDANT AN OPPORTUNITY TO OBJECT, IF HE DIDN'T CONSENT TO THE STRATEGY?

THAT IS CORRECT. IT CAME UP AT THE, IN THE VOIR DIRE. THERE IS THE DISCUSSION ABOUT NIXON. THE DEFENDANT IS PRESENT. THERE IS NO QUESTION ABOUT THAT, AND THE JUDGE, AND THAT IS ALSO THE POINT WHERE MR. MORELL GIVES THE ASSURANCE TO THE COURT THAT HE HAS DISCUSSED IT WITH HIM BUT THEN GOES ON TO SAY, BUT, JUDGE, YOU KNOW, LAWYERS AND CLIENTS DON'T ALWAYS AGREE. NOW,ION WHY HE MADE THAT STATEMENT, BUT I SUGGEST THE REASONABLE INFERENCE IS THEY HAD SOME DISAGREEMENT, AND THE JUDGE THEN DOESN'T ADDRESS MR. DILLBECK AND SAY MR. DILLBECK, ARE YOU IN AGREEMENT? HE SAYS I WILL GIVE YOU AN OPPORTUNITY TO DISCUSS THIS WITH ME, IF YOU SO CHOOSE BUT DOESN'T TELL HIM WHEN, WHERE OR HOW. HE DOESN'T ADVISE HIM OF ANY CONSEQUENCES. THERE IS NO WAY TO DETERMINE THAT THIS DECISION HAS BEEN MADE KNOWINGLY AND INTELLIGENTLY

WHAT HE SAYS, I DO BELIEVE THAT IF HE IN ANY WAY DISAGREED WITH THE STRATEGY OF HIS LAWYER IN THE HANDLING OF THIS MATTER, THAT HE COULD MAKE THAT KNOWN TO ME, IF HE CHOOSES TO DO SO, AND HE SAT SILENT. AND HE SAT SILENT. RIGHT?

YES. YES.

AND SO THAT WAS AN OPPORTUNITY FOR HIM TO SAY SOMETHING. I MEAN, IS THERE ANYTHING IN THE RECORD, WHEN THIS CAME UP, THAT EITHER THE DEFENDANT OR THE DEFENSE COUNSEL SAID WAIT A MINUTE, YOUR HONOR, WE NEED TO GO DISCUSS THIS?

IS THERE A DISCUSSION AT ONE POINT BETWEEN THE DEFENSE ATTORNEY AND MR. DILLBECK. WHAT IT IS ABOUT IS NOT IN THE RECORD. NOW, LET ME, I TAKE ISSUE WITH YOU A LITTLE BIT HERE, THAT HE IS SAYING THIS IS YOUR TIME TO TELL THAT TO ME. HE SAYS YOU CAN MAKE IT KNOWN TO DO SO AND HE DOESN'T SAY HOW HE CAN CHOOSE TO DO. THAT HE SAID I GAVE MR. DILLBECK AN OPPORTUNITY TO BE HEARD IF HE SO CHOSE, IF HE CHOSE TO DO SO, BUT HE WAS ALREADY MAKING AN INQUIRY. HE HAD THIS REMAND ORDER OUT OF NIXON AND KNEW IT NEEDED TO BE A REMAND INQUIRY AND IT WASN'T DONE.

CHIEF JUSTICE: THANK YOU VERY MUCH. THAT WILL CONCLUDE THE ARGUMENTS PRESENTED TODAY. THE COURT WILL STAND IN RECESS