Alphonso Cave v. State of Florida

MARSHAL: 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 THE 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. I APPRECIATE COUNSEL BEING READY ON THE FIRST CASE. THAT CASE IS CAVE VERSUS STATE. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. KATE BONNER REPRESENTING MR. CAVE. THIS IS A 3.850 MOTION. MR. CAVE WOULD REPRESENT THAT, BUT FOR HIS COUNSEL, HE WAS 30-TO-90 DAYS AWAY FROM HAVING A LIFE SENTENCE ON A REMAND FROM THE FEDERAL COURT, AT ONE POINT IN TIME, AND WHOSE CAUSES RAISED ISSUES BEFORE THIS COURT AS TO HIS PRIOR CRIMINAL HISTORY, WOULD HAVE RECEIVED A LIFE SENTENCE.

WHAT DO YOU MEAN, WHEN YOU SAY HE WAS 30-TO-90 DAYS AWAY FROM --

AT ONE POINT THE ELEVENTH CIRCUIT REMANDED THE CASE BACK TO FLORIDA AND SAID, IF YOU DO NOT RETRY HIM WITHIN, THE REASON I SAY 30 OR 90 IS I WAS UNDER THE DIRECT IMPRESSION THAT IT WAS 30 DAYS. WHEN I WAS LOOKING AT MY NOTES LAST NIGHT, I NOTICED THAT THE STATE SAID 90, SO PERHAPS THEY ARE CORRECT. IF HE WAS NOT RETRIED WITHIN THAT PERIOD OF TIME, IT WAS AN AUTOMATIC LIFE SENTENCE, AND THE ONLY SENTENCE TO BE GOT WAS TO BE GOTTEN FROM THE ELEVENTH CIRCUIT. HOWEVER, SINCE A PUBLIC DEFENDER WAS APPOINTED AND THE CASE ROLLED AROUND A LITTLE BEFORE PRIVATE COUNSEL WAS RETAINED, I AM SORRY, BEFORE PUBLIC DEFENDER WAS APPOINTED, A SECOND PUBLIC DEFENDER, PRIVATE COUNSEL.

NOT RELEVANT AT ALL HERE.

NOT RELEVANT AT ALL HERE, YOUR HONOR. HOWEVER, IT DOES SHOW THAT MR. CAVE AT ONE POINT, WAS VERY CLOSE TO A LIFE SENTENCE. THE ERRORS THAT OCCURRED HERE, WITH THIS COUNSEL IN MR. CAVE'S 1996, THE WAY THAT COUNSEL DEALT WITH THE MITIGATOR OF NO SUBSTANTIAL PRIOR CRIMINAL HISTORY. HE BROUGHT OUT THE FACT OF AN ARREST, ON DIRECT TESTIMONY FROM THE DEFENDANT. THE STATE TOOK ADVANTAGE OF THAT AND CROSS-EXAMINED. DEFENSE COUNSEL ALSO INTRODUCED THE CRIMINAL HISTORY OF THE TWO CODEFENDANTS WHO WERE STILL IN THE LIFE, WHO WERE GETTING, HAD BEEN RECEIVING THE DEATH SENTENCE.

WHAT WAS THE EXTENT OF THE INFORMATION, THEN, THAT WAS BROUGHT OUT, AFTER COUNSEL HIMSELF, BROUGHT OUT THE FACT OF A PRIOR ARREST AND CHARGE? THEN WHAT HAPPENED IN TERMS OF THE STATE'S CROSS-EXAMINATION AND WHAT HAPPENED IN TERMS OF THE REDIRECT EXAMINATION?

WELL, THERE WAS NO REDIRECT ON THIS POINT. THE CROSS-EXAMINATION, WHICH WENT UNOBJECTED TO BY STATE ATTORNEY HOLTON, ASKED WHETHER THE DEFENDANT HAD KNOWN

CODEFENDANT BUSH, WHETHER HE KNEW ANYTHING ABOUT BUSH'S RECORD, WHETHER BUSH'S RECORD INCLUDED RAPE, AND THEN ASKED HIM WHAT THE NATURE WAS, OF HIS OWN ARREST. WHICH WAS RAPE. AND THEN TALKED ABOUT HOW, IN TWO DIFFERENT INSTANCES, YOU DIDN'T SEE YOUR SELF AS DIFFERENT FROM THE OTHER MEN THAT WERE IN THE CAR.

IT WAS BROUGHT OUT THAT HE WAS EXONERATED.

YOU DIDN'T GIVE US A COMPLETE ANSWER, I DON'T BELIEVE.

I AM SORRY. I THOUGHT I DID. WHAT HAPPENED?

THE STATE ASKED HIM WHAT THE NATURE OF THE CHARGE WAS, AND HE SAID RAPE, AND THEN WHAT DID HE TESTIFY TO AS FAR AS WHAT HAD HAPPENED TO THAT RAPE CHARGE?

HE, IN HIS DIRECT TESTIMONY, HAD TESTIFIED THAT THERE, IT, HE WAS INNOCENT OF IT. HE TESTIFIED AGAIN, THAT IT WAS DISMISSED, THAT HE WAS INNOCENT OF IT. HOWEVER, THE TYING TOGETHER BY MR. COLTON OF THE RAPE ARREST OF THE CODEFENDANT AND THE RAPE ARREST AND SENTENCE OF THE CODEFENDANT, TAINTED MR. CAVE TO SUCH AN EXTENT THAT IT LOOKS LIKE THESE RAPISTS ARE GOING AROUND, KIDNAPING WOMEN WHO WORK IN 7-ELEVEN'S AND TAKING THEM TO THE NETHERLANDS, THE NETHERWOODS.

WAS THAT THE ARGUMENT MADE BY THE STATE ATTORNEY?

THE STATE ATTORNEY LEVEL, THE ONLY ARGUMENT THAT WAS MADE AT 96 CONCERNING THIS, WAS, NOW, AGAIN, THIS ONE THAT DESERVES LITTLE WEIGHT AS THE FIRST ONE BY HIS PRIOR CRIMINAL RECORD. THAT IS TRUE, BUT IT DOESN'T DESERVE MUCH WEIGHT. THE MITIGATING CIRCUMSTANCE, I SUBMIT TO YOU, DOES NOT EVEN EXIST, BASED ON THE EVIDENCE. SO THE PERSON IN THE ROOM WHO WAS THE REPRESENTATIVE OF THE STATE, IS SAYING THAT THERE WAS NO STATUTORY MITIGATOR, WHICH SHOULD APPLY.

AND WAS THAT FOUND AS A STATUTORY MITIGATOR?

IT WAS FOUND AS A STATUTORY MITIGATOR, WHICH WAS GIVEN LITTLE WEIGHT.

WHAT WAS THE REASON THAT DEFENSE COUNSEL, FROM THIS TRIAL, SINCE THERE HAD BEEN SEVERAL PENALTY PHASE PROCEEDINGS, SO I WOULD IMAGINE THAT HE HAD REVIEWED THOSE PRIOR PENALTY PHASE PROCEEDINGS, WHAT IS THE REASON HE GAVE FOR BRINGING THIS EVIDENCE OUT ON CROSS-EXAMINATION, SOMETHING THAT A NEW LAWYER KNOWS WOULD NOT NORMALLY BE ADMISSIBLE?

WELL, HE SAID THAT EVERY TIME HE SPOKE TO CAVE, THAT THE ISSUE CAME OUT, SO HE WAS, IN MANY DIFFERENT WAYS, HE TRIED TO SAY THAT HE PRECLUDED THE EVIDENCE. HE TRIED TO SHORT-CIRCUIT THE EVIDENCE. HOWEVER, HE ONLY ASKED HAVE YOU BEEN ARRESTED, AND CAVE SAID, YES, I WAS ARRESTED IN PENNSYLVANIA BUT I WASN'T GUILTY.

IT WASN'T JUST THAT CAVE WAS GOING TO BLURT IT OUT. DIDN'T HE TESTIFY THAT THIS WAS RELEVANT TO A STRATEGY THAT HE HAD, AND WAS EMPLOYING, AS FAR AS SHOWING THAT THE, THE CRIMINAL HISTORY AND THAT HE HAD NONE, AND THAT HE THOUGHT THAT THIS WAS SOMETHING THAT THE STATE WAS GOING TO BE ABLE TO BRING OUT ANYWAY?

I BELIEVE THAT THE STATEMENTS THAT WERE.

I BELIEVE HE HAD REASON TO MAKE THE ARGUMENT. BUT THERE WAS NO REASON ON EARTH THAT HE WOULD HAVE ASKED MR. CAVE, BECAUSE IT WAS NOT INTRODUCEABLE BY MR. CAVE, BY THE STATE IN ITS CASE-IN-CHIEF, AND ALL WE HAVE IS A DOCUMENT SAYING IT WAS NOT

DISMISSED, AND THAT WAS NOT INTRODUCED INTO EVIDENCE. THERE WAS NO WITNESS. THE STATE HAS AGREED, SO THERE WAS NO SIGNIFICANT CRIMINAL HISTORY. AT THE 3.850 HEARING, THE STATE ARGUED THAT THE MERE FACT THAT HE WAS ARRESTED WAS INTRODUCEABLE, AND IT WAS INTRODUCEABLE SOLELY FOR ITS WEIGHT, AND I SUGGEST TO YOU THAT THAT IS NOT TRUE. THERE HAS TO BE EVIDENCE. IT HAS TO COME IN THROUGH A SOURCE, SUCH AS THE CASES THAT I HAVE SEEN HAVE SOMEONE THERE WHO WAS A CODEFENDANT AVAILABLE TO GIVE DIRECT EVIDENCE ABOUT THE PRIOR CASE, AND AT THAT TIME IT IS STILL TREATED WITH A GREAT DEAL OF RESPECT, BECAUSE WE ALL KNOW IN A COMMONSENSE WAY, THAT A PRIOR ARREST, ESPECIALLY WHEN YOU HAVE AN UNEDUCATED DEFENDANT AND HE SAYS, I WAS FOUND NOT GUILTY OF IT, IT REALLY PLACES IN THE JURY'S MINDS OR I SUGGEST THAT IT PLACES IN THE JURY'S MIND THAT HE GOT AWAY WITH IT. IT RAISES SOMETHING AND THEN THEY ATTEMPT TO TAKE AWAY THE STIGMA OF THAT. HOWEVER, THEY CAN'T TAKE THAT STIGMA AWAY. THE OTHER INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE, INSTANCE THAT I WOULD LIKE TO STRESS HERE, IS THAT THERE WAS ABSOLUTELY NO ACKNOWLEDGMENT, NO ASCERTAINMENT OF WHETHER THE STATE WAS GOING TO PROCEED, IN 1996 AT THE SENTENCING, ON THE SAME THEORY IT PROCEEDED ON IN 1993. THERE HAVE BEEN SHIFTING BASIS OF PROSECUTION, SHIFTING BASIS OF WHAT MR. CAVE'S ROLE WAS. IN 1993, A JAILHOUSE INFORMANT WAS PUT ON THE STAND, TO TESTIFY TO WHAT WAS REALLY AN ADOPTIVE ADMISSION BY SILENCE, BUT AT LEAST HE WAS ABLE TO TESTIFY. THE JURY HEARD HIM. THE SENTENCING JUDGE IN 1993, DID NOT FIND THAT THAT WAS, THAT HE COULD BASE, BEYOND A REASONABLE DOUBT, THE FINDING THAT CAVE WAS THE SHOOTER ON THIS TESTIMONY.

SO IS THIS A PART OF YOUR ARGUMENT CONCERNING THE DEATHBED STATEMENT BY THE CODEFENDANT?

THEY ARE ALL INTERTWINED WITH EACH OTHER, YOUR HONOR. THE NEXT ONE ACTUALLY IS THAT, AND ALSO BECAUSE HE DID NOT, BECAUSE GARLAND DID NOT ASCERTAIN THE THEORY IN 1996 AS TO WHETHER CAVE WAS GOING TO BE THE SHOOTER OR NOT, ALL OF THE VOIR DIRE, ALL OF EVERYTHING UP UNTIL THE OPENING STATEMENT, NO ONE KNEW WHETHER MR. BRYANT, THE JAILHOUSE PERSON, WAS GOING TO TESTIFY OR NOT. THAT IS THEY DID NOT KNOW AND GARLAND ADMITTED THAT HE DID NOT KNOW THE THEORY UPON WHICH THEY WERE GOING TO PROSECUTE IN 1996.

WOULD YOU COME BACK AND TELL US WHAT THE TRIAL COURT'S ANALYSIS WAS OF THE ISSUE, WITH REFERENCE TO BRINGING OUT ON DIRECT EXAMINATION, THE PREVIOUS CHARGE OF RAPE.

THE TRIAL COURT AGREED WITH MR. GARLAND'S TESTIMONY THAT IT WAS A STRATEGY. HOWEVER, I SUGGEST TO YOU THAT SOMETHING THAT CANNOT BE INTRODUCEABLE STRATEGY, CAN BE ERROR. MR. GARLAND WAS CONFUSED WHEN HE TESTIFIED AT THE 3.850 HEARING. HE DID NOT RECOLLECT THAT HE DIDN'T OBJECT, WHEN THE STATE MADE INCORRECT STATEMENTS ABOUT THE LAW WITH REGARD TO PRIORS, AND HE DIDN'T RECOLLECT THESE THINGS AT ALL. HOWEVER, NOW, IN AN AFTER THE FACT FASHION, HE IS SAYING THAT HE INTRODUCED IT, BECAUSE OF A STRATEGY, AND THE COURT AGREED WITH HIM, THE TRIAL COURT AGREED WITH HIM. THE, SINCE GARLAND HAD NOT CLARIFIED THAT CAVE WAS NOT GOING TO BE CALLED THE TRIGGERMAN HERE, HE DID NOT PUT ON SOME EVIDENCE OR HE DID NOT STRUCTURE HIS DEFENSE IN A CERTAIN WAY. HE TOLD US, IN THE HEARING, THAT HE WAS GOING TO PUT ON DR. ALEGRIA, WHO WAS A PSYCHOLOGIST WHO HAD BEEN INTERVIEWED AFTER THE VOIR DIRE HAD BEGUN, AND HE SAID THAT DR. ALEGRIA WAS GOING TO GIVE TESTIMONY ABOUT THE LACK OF CRIMINAL HISTORY AND ITS IMPORTANCE. HE THOUGHT THAT THAT WAS ONE OF THE MOST IMPORTANT OF THE MITIGATORS. ANOTHER, AND I GO BACK TO JUSTICE QUINCE'S QUESTION. I BELIEVE THAT ONE OF THE SIGNIFICANT ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL IS THAT GARLAND DID NOT PICK UP THE PHONE AND RETURN THE PHONE CALL TO BUSH'S LAWYER, THE PERSON WHO HAD BEEN EXECUTED WHO MADE THE DEATHBED STATEMENT. HE DID NOT RETURN THE PHONE CALL TO FIND OUT THE QUANTITY AND QUALITY OF WHAT BUSH HAD SAID

ON HIS DEATHBED.

HOW WAS THAT STATEMENT ADMISSIBLE? IT --

THE STATEMENT BASICALLY, IS THAT MR. CAVE ATTEMPTED TO, SORT OF GOT AWAY FROM THE MURDER, THAT HE WALKED AWAY AND WENT TO THE CAR, AND THE OTHER CODEFENDANTS COMMITTED THE MURDER, CORRECT?

YES, MA'AM.

SO HOW WAS THAT STATEMENT ADMISSIBLE OR HOW WOULD IT HAVE BEEN ADMISSIBLE?

SINCE HEARSAY IS ADMISSIBLE WHEN IT HAS DEGREES OF RELIABILITY IN SENTENCING PROCEDURES, IT WOULD HAVE BEEN ADMISSIBLE. THE TRIAL COURT HERE, ADMITTED THE TESTIMONY OF MR. KISSINGER, WHO RELATED THE HEARSAY FROM MR. BUSH, BUT WHAT I AM SAYING IS THERE WAS ERROR BEFORE THAT, WHEN MR. GARLAND KNEW THAT MR. BUSH HAD SAID THINGS THAT WERE DIFFERENT. HE COULD HAVE INTERVIEWED HIM, HE COULD HAVE DEPOSED HIM. THE STATE SUGGESTED THAT HE COULD HAVE DEPOSED HIM.

MR. GARLAND HAD, MR. CAVE'S ATTORNEY, CORRECT?

YES.

WHAT HE UNDERSTOOD THAT BUSH HAD SAID WAS THAT CAVE WAS NOT THE SHOOTER.

YES. THAT WAS UNDERSTOOD.

AT THAT POINT, WITH WHAT MORE DID HE KNOW?

HE KNEW NO MORE BECAUSE HE DID NOT ANSWER THE PHONE CALL. HE TRAVELED UPON HIS OWN PRESUMPTION THAT THAT WAS GOING TO BE ALL THAT MR. BUSH WAS GOING TO SAY, BUT WHEN MR. KISSINGER GOT ON THE STAND, MR. KISSINGER SAID THAT BUSH SAID MORE. BUSH SAID THAT, WHEN MR. CAVE GOT OUT OF THE CAR AND RECOGNIZED WHAT WAS GOING TO HAPPEN, HE TOLD PARKER THAT IT DIDN'T NEED TO HAPPEN LIKE THIS, AND WHEN PARKER CONTINUED, HE GOT BACK IN THE CAR AND SAT DOWN WITH JOHNSON. THE MAN WHO INITIALLY GOT A LIFE SENTENCE AND HAS ACTUALLY TESTIFIED RECENTLY IN THE PARKER 3.850 HEARING AND TESTIFIED CONSISTENTLY WITH WHAT WE ARE TALKING ABOUT NOW THAT, MR. CAVE WAS NOT THE SHOOTER AND WASN'T EVEN OUTSIDE THE CAR, AT THE TIME THAT THE SHOOTING TOOK PLACE AND THE STABBING TOOK PLACE.

YOU SAY KISSINGER TESTIFIED AT THE EVIDENTIARY HEARING.

YES.

HE DID NOT TESTIFY AT THE PENALTY PHASE.

THAT IS WHAT WE ARE CALLING AN INEFFECTIVE ASSISTANCE OF COUNSEL. HE WAS NOT CALLED AS A WITNESS. MR. GARLAND WENT THROUGH AN ENCANTATION OF WHY HE DID NOT CALL HIM. FIRST HE SAID HE WAS GOING TO CALL BUSH, AND HE CAME TO THIS COURT AND TO THE SUPREME COURT OF THE UNITED STATES, ASKING TO HAVE MR. BUSH'S DEATH WARRANT VACATED SO THAT MR. BUSH COULD BE A WITNESS FOR HIM, AND WHEN WE GET BACK TO THE TRIAL COURT AND HE HAS LOST AT THIS COURT AND AT THE SUPREME COURT OF THE UNITED STATES AND THE TRIAL COURT HAS SUGGESTED TO HIM THAT ONE OF THE THINGS YOU OUGHT TO DO IS PRESERVE THE TESTIMONY BY TAKING A DEPOSITION, HE DOES NOTHING. HE DOES NOT SPEAK TO BUSH INFORMALLY. HE DOES NOT SPEAK TO BUSH IN A DEPOSITION.

BUT HE DID ASK KISSINGER TO TALK TO HIM? SO HE DID DO SOMETHING.

AT ONE POINT, MR., I BELIEVE MR. GARLAND, I BELIEVE YOU ARE CORRECT THAT MR. GARLAND ASKED MR. KISSINGER TO SPEAK WITH HIM, BUT WHEN MR. KISSINGER CALLED BACK AND SAID, I HAVE SPOKEN WITH HIM AND IT IS MORE THAN YOU KNOW, HE DID NOT FOLLOW UP ON THAT, AND BY THE TIME THE 1996 SENTENCING CAME AROUND, HE DID NOT CALL MR. KISSINGER. HE COULD OBVIOUSLY NOT CALL MR. BUSH. HE COULD NOT INTRODUCE A DEPOSITION BECAUSE HE DIDN'T TAKE IT OF MR. BUSH, SO THERE WAS NO EVIDENCE, WHICH I THINK WOULD HAVE BEEN IMPORTANT TO THE JURY, EVER EVEN THOUGH I BELIEVE THAT THIS ENTIRE SENTENCING WAS STRUCTURED ON THE FACT THAT THEY WERE TRYING TO AVOID BAD THINGS FROM COMING IN. THERE ARE BAD THINGS THERE. SOME THINGS THAT ARE BAD HAVE TO COME IN, BUT YOU CAN'T STRUCTURE AN ENTIRE SENTENCING IN A DEATH CASE, TO AVOID EVERYTHING. AND THAT IS EXACTLY WHAT MR. GARLAND DID, AND IF YOU LOOK THROUGH THE BRIEFS AND YOU LOOK THROUGH HIS TESTIMONY, YOU WILL SEE.

BUT IN RESPECT TO THAT TESTIMONY, WHAT WOULD HAVE COME IN?

WHAT WOULD HAVE COME IN?

RIGHT.

WHEN, I AM SORRY?

IF KISSINGER HAD TESTIFIED.

I THINK MR. BUSH'S CONTRARY STATEMENTS WOULD HAVE COME IN AND HE MADE MULTIPLE CONTRARY STATEMENTS. HOWEVER, I THINK IN A COMMON SENSE WAY, MOST PEOPLE WOULD RECOGNIZE THAT A STATEMENT MADE --

BUT WE CAN'T SAY THAT THAT WAS NOT, THAT IT WAS A TOTALLY UNREASONABLE VIEW THAT MR. GARLAND HAD THAT I DON'T WANT THESE OTHER THINGS COMING IN.

IT WOULD BE TOTALLY UNREASONABLE, IF HE HAD KNOWN WHAT GARLAND HAD TO SAY AND THEN DISCARDED IT. WITH WIGGINS AND THE SUPREME COURT, WE TALK ABOUT YOU HAVE TO KNOW WHAT IT IS, BEFORE YOU CAN MAKE AN INFORMED DECISION NOT TO USE IT. HE HAD TO KNOW WHAT GARLAND WAS GOING TO SAY, BEFORE HE MADE IT.

AS I RECALL WHEN GARLAND SPOKE TO KISSINGER, KISSINGER TOLD HIM BUSH IS GOING TO SAY WHAT HE HAD SAID BEFORE.

NO, THAT IS NOT WHAT HAPPENED. AT LEAST THAT IS NOT WHAT THE EVIDENCE SHOWS IN THE HEARING. BUSH SAID HE CALLED GARLAND AND LEFT A MESSAGE THAT THERE WAS MORE THAN THERE HAD BEEN. EVERYBODY KNEW, APPARENTLY DURING THE LITIGATION BEFORE THIS COURT AND THE SUPREME COURT OF THE UNITED STATES, THAT BUSH WOULD SAY THAT CAVE WAS NOT THE SHOOTER, BUT KISSINGER WOULD TESTIFY HERE THAT HE TOLD GARLAND, HE LEFT A MESSAGE FOR GARLAND THAT THERE WAS MORE AND HE NEEDED TO TALK TO HIM ABOUT IT AND THAT WAS NEVER FOLLOWED UP ON, SO HE DID NOT KNOW WHAT IT WAS THAT HE WAS WAIVING.

WHERE DOES THAT FIT IN THE CHRONOLOGY OF THE DEVELOPMENT, BECAUSE ALL OF THE FACTS WERE FAIRLY CONSISTENT, WITH REGARD TO WHAT OCCURRED AT THE SCENE, AND THEN THIS DEATHBED CONFESSION, DID IT NOT, WAS A LITTLE MORE EXTREME, AS FAR AS CAVE WITHDRAWING FROM THE CIRCUMSTANCES. IS THAT A FAIR ANALYSIS, OR DID HE MAKE THAT STATEMENT EARLIER THAN THE DEATHBED CONFESSION, ADMISSION OR STATEMENT, AND WHERE DID THAT OCCUR IN THIS CHRONOLOGY? WAS THIS WEEKS BEFORE OR A YEAR BEFORE?

WHEN DID THIS OCCUR?

OKAY. FIRSTLY, TO ANSWER THE FIRST PART OF YOUR QUESTION, THERE WAS NO INCONSISTENT, THERE WAS NO CONSISTENCY AT ALL BETWEEN THE VARIOUS STATEMENTS OF THE VARIETIES DEFENDANTS, EVEN ON THE EVE, ON THE ARREST, ONE OF THEM, THE PERSON, JOHNSON WHO GOT THE LIFE SENTENCE, SAID THAT CAVE WASN'T THE SHOOTER.

WAS NOT.

WAS NOT.

CORRECT.

HOWEVER, WHAT HAPPENED IN THE CHRONOLOGY SPECIFICALLY TO ANSWER YOUR QUESTION, IS THAT CAVE'S DEATH WARRANT WAS NOT VACATED. HE WAS EXECUTED, AND IT WAS WITHIN DAYS OF HIS EXECUTION THAT KISSINGER CALLED.

YOU SAID CAVE AND YOU MEAN BUSH.

YES. YES, I DO, SIR. I AM SO SORRY.

WITHIN DAYS OF HIS EXECUTION.

WITHIN DAYS OF BUSH'S EXECUTION.

YOU ARE ASSERTING THERE WAS TIME TO PRESERVE THE TESTIMONY FROM THAT TELEPHONE CALL TO THE EXECUTION.

THERE WAS TIME. THEY WERE IN THE PROCESS OF VOIR DIRE WITHIN A FEW DAYS OF THAT, AND ABOUT TEN DAYS LATER IS WHEN THEY ACTUALLY PRESENTED THE NEXT WITNESS IN THE 1996 SENTENCING. I AM GOING TO RESERVE A COUPLE OF MINUTES FOR REBUTTAL.

GOOD MORNING. MAY IT PLEASE IT IS COURT. DEBRA RESCIGNO ON BEHALF OF THE STATE. I AM GOING TO START WITH THE DEATHBED CONFESSION OF BUSH AND THE ALLEGATION. TO START OFF, IN THE BRIEF COUNSEL IS ALSO SEEKING A NEW TRIAL ON THAT INEFFECTIVENESS CLAIM BUT THAT IS NOT PROPER IN THE 3.850. SHE JUST ALLEGED THAT GARLAND WAS INEFFECTIVE FOR --

THERE WAS NO CLAIM MADE IN THE 3.850, THE POSTCONVICTION.

THAT WOULD BE A PROPER LINGERING DOUBT CLAIM, ANYWAY, BUT REGARDING BUSH, GARLAND TESTIFIED AND THE COURT FOUND THAT, AFTER REVIEWING GARLAND AFTERNOONS TESTIMONY AT THE EVIDENTIARY HEARING, THAT THIS WAS SOUND TRIAL STRATEGY. HE TESTIFIED THAT ALL KISSINGER TOLD HIM, WAS THAT BUSH WOULD SAY THAT CAVE WAS NOT THE TRIGGERMAN. THAT WAS ALL THAT WAS PRESENTED. THERE WAS NOTHING ABOUT THE ADDITIONAL PHONE CALL FROM KISSINGER. WE BASICALLY HAD A CONFLICT. GARLAND SAID THAT A FEW WEEKS BEFORE BUSH WAS TO BE EXECUTED, HE GOT A TELEPHONE CALL FROM KISSINGER, SAYING THAT WE HAVE MUTUAL INTERESTS THAT WE COULD PROBABLY PURSUE TOGETHER TO KEEP BUSH ALIVE, SO THAT HE COULD COME AND TESTIFY THAT CAVE WAS NOT THE TRIGGERMAN. AT THE TIME, THIS WAS RELEVANT TO GARLAND, BECAUSE HE DIDN'T KNOW WHETHER THE STATE WAS STILL GOING TO PROCEED ON THE THEORY AT THE THIRD RESENTENCING THAT CAVE WAS THE TRIGGERMAN, SO IT WAS SOMETHING THAT HE HAD TO FACTOR INTO HIS DECISION-MAKING, BUT GARLAND SAID SPECIFICALLY THAT HE DID NOT WANT TO PRESENT BUSH AS A WITNESS IF HE HAD ANY CHOICE ABOUT IT, BECAUSE BUSH WASN'T A BOY SCOUT. HE HAD MADE NUMEROUS PRIOR INCONSISTENT STATEMENTS WHERE HE HAD

IMPLICATED CAVE, SO HE WAS ONLY GOING TO PRESENT THIS TESTIMONY AT ALL, IF HE NEEDED IT. THAT IS IF THE STATE PURSUED THE CAVE-AS-A-TRIGGERMAN THEORY, AT THE THIRD RESENTENCING.

DIDN'T HE HAVE AN OBLIGATION, THOUGH, AT THAT TIME, TO WHATEVER EXTENT OF WHATEVER BUSH WOULD SAY, SO THAT HE COULD EVALUATE, REEVALUATE HIS DECISION AS TO WHETHER OR NOT TO --

AND HE DID. HE WAS TOLD, WHAT HE SAYS IS THAT HE WAS TOLD, DURING WEEKS OF THIS LITIGATION TOGETHER, IS THAT WHAT BUSH WOULD SAY IS THAT CAVE WAS NOT THE TRIGGERMAN. IT IS KISSINGER WHO SAID AT THE EVIDENTIARY HEARING, OH, NO I TOLD HIM THIS ADDITIONAL INFORMATION ABOUT ALLEGEDLY TRYING TO PURSE WADE THE CODEFENDANTS NOT TO MURDER THE VICTIM AND --

TRYING TO TALK TO THE LAWYER.

HE CALLED SEVERAL TIMES AND THEY DISCUSSED THIS TOGETHER.

AND FIRM THAT UP, THAT VERY LIMITED EXTENT OF THE TESTIMONY THAT BUSH WOULD GIVE.

RIGHT. THAT, THE TESTIMONY THAT BUSH WAS THE TRIGGERMAN.

DID THE STATE PROCEED ON THAT THEREY?

THE STATE DID NOT PROCEED ON THAT THEORY AT THE THIRD SENTENCING, THE 1996.

AND GARLAND KNEW THAT THE STATE WAS NOT GOING TO PURSUE ON THAT THEORY?

HE DID KNOW THAT PRERESENTENCING, SO HIS THOUGHTS, PRERESENTENCING, HE WAS PREPARING FOR THE POSSIBILITY THAT THEY WOULD. BUT HE SAID THAT --

WHEN DID HE DETERMINE, WHEN DID HE KNOW THAT THE STATE WAS NOT GOING TO PROCEED ON THAT THEORY?

DURING VOIR DIRE IS WHEN IT CAME OUT THAT THE STATE WAS NOT GOING TO PROCEED ON THAT THEORY.

WAS HE PLANNING TO CALL GARLAND, I MEAN CALL KISSINGER?

WHAT HE SAID WAS THAT HE DIDN'T WANT TO DEPOSE BUSH, BECAUSE THERE WERE THINGS THAT CAME OUT, AND BUSH HAD MADE THESE PRIOR INCONSISTENT STATEMENTS, SO HE THOUGHT IT WOULD BE MORE REASONABLE THAT HE WOULD GET A DYING DECLARATION TO PRESENT TO THE ATTORNEY AND THAT THE ATTORNEY WOULD BE MORE CREDIBLE TO PRESENT THIS ALLEGED DEATHBED STATEMENT IF HE NEEDED IT, TO REBUT THE STATE'S THEORY OF CAVE BEING THE TRIGGERMAN.

WHEN DID IT COME OUT THAT IN FACT, KISSINGER HAD LEARNED MUCH MORE FROM BUSH THAN JUST THAT CAVE WAS NOT THE TRIGGERMAN?

WHEN DID IT COME OUT? THE APPELLANT ALLEGES IT CUTE FOR THE FIRST TIME AT THE EVIDENTIARY HEARING.

DID IT?

THAT IS WHEN CAVE TESTIFIED, YES, THAT HE TOLD GARLAND THE ADDITIONAL INFORMATION.

AND HE SAID HE NEVER HEARD THAT INFORMATION.

WELL, THAT EXACT QUESTION WASN'T PRESENTED TO HIM, BUT WHAT WAS PRESENTED TO HIM WAS IF HE HAD BEEN TOLD WHAT THE SUBSTANCE WAS THAT BUSH WOULD TESTIFY, AND HE SAID THAT THE SUBSTANCE WAS THAT CAVE WAS NOT THE TRIGGERMAN.

DO YOU AGREE THAT THE TESTIMONY OF KISSINGER, WHO WAS HIS LAWYER, ACTUALLY GAVE AT THE EVIDENTIARY HEARING, WAS CERTAINLY MORE COMPELLING AND WOULD REQUIRE A LAWYER, IF THAT LAWYER KNEW ABOUT IT, TO REALLY THINK SERIOUSLY ABOUT WHETHER THAT WOULD HAVE AN IMPACT BEFORE A JURY, NO MATTER WHAT ELSE BUSH HAD SAID PREVIOUSLY, THAT NOT ONLY WASN'T HE THE TRIGGERMAN BUT THAT HE HAD REALLY, HAD, DID NOT WANT TO GO AHEAD WITH IT, AND IT REALLY WOULD HAVE FIT IN WITH GARLAND'S DEFENSE THAT THE OTHER TWO HAD EXTENSIVE PRIOR CRIMINAL HISTORY, AND HIS CLIENT'S CRIMINAL HISTORY WAS --

GARLAND THOUGHT THAT, TOO, BECAUSE THAT WAS THE OTHER ALLEGATION ABOUT NOT PRESENTING KISSINGER AS A WITNESS, BUT AFTER EXAMINING WITH KISSINGER, THERE WERE PROBLEMS THAT HE WOULD RUN INTO THERE. NUMBER ONE, THE PRIOR INCONSISTENT STATEMENTS WOULD COME IN, AND ALSO KISSINGER WAS SUBJECT TO IMPEACHMENT, BECAUSE HE HAD FILED A PLEADING AFTER BEING TOLD, LIKE, WITHIN HOURS OF BEFORE THE EXECUTION, AFTER HAVING BEEN TOLD THESE ALLEGED STATEMENTS, HE FILED A PLEADING, STILL ALLEGING THAT CAVE WAS THE MORE CULPABLE OF THE TWO, SO THAT HE WOULD HAVE BEEN SUBJECT AT LEAST TO THE IMPEACHMENT, HIS CREDIBILITY ON WHAT HE WAS SAYING.

BUT I GUESS I AM SITTING HERE,, THINKING YOU ARE GOING TO BRING OUT THAT YOUR CLIENT WAS ARRESTED, WHICH THEN OPENS THE DOOR, BUT YOU ARE NOT GOING TO BRING OUT THIS FAR MORE, IF YOU KNEW ABOUT IT, FAVORABLE EVIDENCE THAT YOUR CLIENT MAY HAVE HAD VERY LITTLE TO DO WITH THIS SHOOTING. I MEAN, IF I AM SITING THERE AND I AM A JURY, AND --

THEY HAVE ALWAYS ARGUED, I MEAN, CAVE'S POSITION HAS BEEN THE SAME THROUGHOUT. I MEAN, HE SAID ONE TRIAL AND TWO RESENTENCING. HIS POSITION HAS ALWAYS BEEN THAT HE WAS NEITHER THE SHOOTER NOR THE STABBER, AND HIS CONTENTION WAS THAT HE WAS A MINOR PARTICIPANT. OF COURSE HE HAS BEEN FOUND AS MAJOR PARTICIPANT, BECAUSE IT WAS HE WHO WENT INTO THE LIL' GENERAL STORE WITH THE GUN AND HELD THE GUN.

I AM TRYING TO ESTABLISH HERE WHETHER THERE WAS ENOUGH ABOUT WHAT BUSH HAD TOLD KISSINGER ON HIS SO-CALLED DEATHBED AND THEN, AGAIN, IF HE DIDN'T, WAS HE INEFFECTIVE OR DEFICIENT, FOR NOT FINDING IT OUT? THAT IS THE FIRST PRONG. THEN, BECAUSE ASSUMING YOU FOUND IT OUT, I AM HAVING A HARD TIME FIGURING OUT WHY YOU WOULDN'T WANT TO PUT THAT EVIDENCE IN, AS PART OF THE OVERALL DEFENSE STRATEGY.

ONCE THE STATE, ONCE THE STATE DECIDED NOT TO PROCEED WITH CAVE AS THE TRIGGERMAN, HE DIDN'T NEED THIS TESTIMONY ANYMORE.

BUT IT IS A DIFFERENT POINT. IT APPEARS THAT THIS DEATHBED TYPE STATEMENT, WAS ONE THAT EXCULPATED MR. CAVE FROM PARTICIPATION, ALMOST A WITHDRAWAL FROM THE CIRCUMSTANCES. IT SEEMS TO BE HIGHLY RELEVANT TO WHAT HAPPENED ON THE EVENING, THAT HE ALMOST TRIED TO TALK THEM OUT OF THIS EVENT, AND THAT IS WHY I WAS WONDERING ABOUT THE CHRONOLOGY. IS THERE A TIME THAT YOUR OPPOSITION SEEMS TO SUGGEST THAT THERE IS PLENTY OF TIME TO GO GET THIS STATEMENT AND THAT THE LAWYER WAS AWARE THAT THIS IS WHAT THAT, THE EXECUTED INDIVIDUAL WOULD HAVE TOLD THEM, HAD HE JUST GONE ON TO GET THIS STATEMENT. IS THAT INCORRECT? IT IS THE QUALITY OF IT.

THE RECORD ISN'T REALLY CLEAR ABOUT HOW MUCH TIME WAS INVOLVED IN ALL OF THIS. THERE WAS A FLURRY OF LITIGATION. I THINK WHAT THE RECORD SHOWS, FROM THE

EVIDENTIARY HEARING, IS THAT GARLAND WAS FIRST APPROACHED BY BUSH'S ATTORNEY, APPROXIMATELY TWO WEEKS BEFORE HIS SCHEDULED EXECUTION DATE, AND THEN, WITHIN THAT TWO WEEKS, THEY TRIED TO PERPETUATE HIS LIE, WHAT THEY TRIED TO DO, TO HAVE HIM BE THE ONE TO COME TESTIFY, SO ALL OF THIS TOOK PLACE WITHIN A VERY SHORT TIME SPAN, BUT THE STATE WOULD ALSO SUBMIT THAT, AS THE APPELLANT HAS ADMITTED, THIS ALLEGED DEFENSE OF WITHDRAWAL WOULD NOT HAVE EVEN BEEN AVAILABLE TO CAVE, BECAUSE ACCORDING TO THE STATUTORY DEFENSE, YOU HAVE TO ACTUALLY PERSUADE YOUR CO-CONSPIRATORS TO NOT COMMIT THE --

YOU DON'T THINK THIS WOULD HAVE IMPACTED UPON INDIVIDUALS FROM THE COMMUNITY THAT, HERE YOU HAVE AN INDIVIDUAL TRYING TO GET THE OTHER PEOPLE NOT TO DO THIS. IT IS THE QUALITY OF IT. NOT THAT HE IS OR IS NOT THE SHOOTER, BUT NOT WANTING TO HAVE ANYTHING TO DO WITH THIS BUT PULLING BACK AND TELLING THEM NOT TO DO THIS, IT SEEMS TO HAVE A DIFFERENT SUBSTANTIVE QUALITY.

WELL, THERE IS TWO OTHER THINGS THAT EACH OF YOU REMEMBER AS TO WHY THERE WOULD BE NO PREJUDICE ON THIS POINT, NUMBER ONE THAT CAVE HAD AN ADMISSION THAT CAME IN AT THIS 1996 RESENTENCING. IN THAT ADMISSION, HE NEVER ONE TIME CLAIMS THIS DEFENSE OF WITHDRAWAL. OKAY. HE SAYS IN HIS STATEMENT, THEN HE TESTIFIED AT THE 1996 SENTENCING, AND HIS VERSION OF WHAT HAPPENED, WAS THAT HE DID GET OUT OF THE CAR, AND HE WALKED THE VICTIM INTO THE WOODS, AND THEN AS THEY GOT HALFWAY, HE LET HER CONTINUE GOING AND HE CAME BACK INTO THE CAR. HE DOESN'T SAY ANYTHING ABOUT ANY STATEMENTS THAT HE MADE TO THE OTHER CODEFENDANTS.

REFRESH OUR MEMORY, AGAIN, IN TERMS OF THE FOUR PARTICIPANTS IN THIS EVENT. BUSH HAS BEEN EXECUTED. HAS PARKER BEEN EXECUTED?

CORRECT. NO.

PARKER REMAINS ON DEATH ROW.

RIGHT.

OKAY. AND BUSH AND PARKER ARE THE TWO THAT DID THE STABBING AND THE SHOOTING.

CORRECT. BUSH DID THE STABBING AND PARKER DID THE SHOOTING.

AND THEN THE FOURTH DRIVER OF THE AUTOMOBILE, WHAT WAS HIS SENTENCE?

JOHNSON. HE RECEIVED LIFE.

LIFE SENTENCE. AND THEN --

JOHNSON REMAINED IN THE CAR, BOTH FOR THE ROBBERY AND THE MURDER. HE WAS THE ONLY ONE OF THE FOUR WHO DID. THAT HE NEVER GOT OUT OF THE CAR, EVEN FOR THE ROBBERY. HE WAS NOT A PARTICIPANT.

LET'S GO BACK, HERE, FOR A MINUTE, TO, STILL I AM HAVING A LITTLE PROBLEM WITH THE CHRONOLOGY OF EVENTS. BUSH'S ATTORNEY AND GARLAND, WENT BEFORE THIS COURT AND TRIED TO GET A STAY OF EXECUTION FOR BUSH, BASED ON THE STATEMENT THAT BUSH HAD MADE THAT GARLAND, I MEAN, CAVE WAS NOT THE SHOOTER.

RIGHT.

AND IS THAT ALL THAT MR. GARLAND KNEW AT THAT POINT?

RIGHT. AND THAT'S RIGHT. THAT IS ALL THAT WAS STATED.

SO AT WHAT POINT DID MR. BUSH ACTUALLY MAKE THE STATEMENT THAT CAVE HAD ACTUALLY WITHDRAWN OR AMENDMENTED TO WITHDRAW, FROM THIS?

ACCORDING TO HIS ATTORNEY, HE MADE THAT THE NIGHT BEFORE HIS EXECUTION, WE KNEW HIS EXECUTION WAS IMMINENT.

HE MADE THIS STATEMENT THE NIGHT BEFORE THE EXECUTION, AND MR. GARLAND CALLED BUSH'S ATTORNEY OR HOW DID, THEN, THAT INFORMATION GET TO CAVE'S ATTORNEY?

ACCORDING TO THE RECORD, THAT ADDITIONAL INFORMATION DID NOT GET TO GARLAND. GARLAND SAYS THAT ALL HE WAS TRAVELING UNDER WAS THE KNOWLEDGE THAT BUSH --

THE RECORD IS CLEAR AT THAT POINT, HE ONLY KNEW HE WAS GOING TO SAY THAT HE WAS NOT THE SHOOTER.

EXACTLY.

IT SOUNDS LIKE WHAT HAPPENED WAS, ONCE GARLAND HAD THIS INFORMATION AND WEIGHT, AND IF THEY WEREN'T GOING TO SAY CAVE WAS THE SHOOTER, HE DIDN'T REALLY THINK BEYOND, AS TO WHAT ELSE BUSH'S TESTIMONY TO HIS ATTORNEY COULD HAVE ADVANTAGED HIS CLIENT IN THE PENALTY PHASE. IN OTHER WORDS, HE DIDN'T, IT SOUNDS LIKE, ONCE HE KNEW THAT HE WAS GOING TO SAY HE WASN'T THE SHOOTER, HE SORT OF HAD THAT IN HIS BACK POCKET, JUST IN CASE THE STATE WAS TO ASSERT IT.

RIGHT. WAS TO ASSERT THAT.

AND THEN THE ONLY QUESTION GETS BACK TO WHETHER THIS TESTIMONY OF KISSINGER THAT HE TOLD MR. GARLAND THAT IT WAS, THERE WAS MORE TO IT OR THAT IS CREDIBLE, AND WHETHER, YOU KNOW, AND IN THAT, DID THE TRIAL JUDGE MAKE A FIND SOMETHING.

THE TRIAL JUDGE MADE A FINDING, HE DIDN'T MAKE A FINDING THAT HE DIDN'T BELIEVE KISSINGER, BUT HE MADE A FINDING THAT HE RELIED ON GARLAND'S REASONABLE TRIAL STRATEGY AND THAT GARLAND HAD PURSUED A REASONABLE TRIAL STRATEGY AND THAT, HE NEVER PURSUED MR. GARLAND.

AND WE DON'T HAVE TESTIMONY AS TO WHETHER THIS INFORMATION WAS ACTUALLY CONVEYED TO MR. GARLAND, THAT THERE WAS MORE TO THE SHOOTING THAN --

ALSO IN THE 1996 RESENTENCING, MR. CAVE'S MOTHER TESTIFIED AND TESTIFIED THAT, WHEN CAVE RECOUNTED THAT HE HAD BEEN INVOLVED IN THIS, THAT HE TOLD HIS MOTHER THAT HE BEGGED THEM NOT TO KILL HER, AND SHE TESTIFIED TO THIS AT THE 1996 HEARING.

THAT WAS THE MOTHER. THE REASON I AM HAVING TROUBLE WITH IT, IS IT SORT OF IMPRESSED ME, SO, AGAIN, NOW, YOU SAID, THOUGH, THAT CAVE'S MOTHER TESTIFIED THAT HE BEGGED HER, BEGGED THEM NOT TO SHOOT THIS VICTIM.

UM-HUM. HE TOLD HER THAT.

THAT CONTRADICTS WHAT CAVE SAYS, ALSO, SO ONE OF THE REASONS YOU SAID YOU WOULDN'T HAVE WANTED TO HAVE BUSH, IS IT CONTRADICTS WHAT CAVE PUT IN BUT NOT WHAT GARLAND PUT IT IN.

GARLAND, ONCE HE REALIZED THAT WAS NOT THE STATE'S THEORY, HE DIDN'T NEED THEM TO

COME IN AND IMPEACH.

ONCE THE --

FOR A LACK OF PREJUDICE ON THIS ISSUE, EXCULPATING HIM, BECAUSE IT IS HE HIMSELF, WHO WOULD HAVE KNOWN NEVER SAID --

HIS MOTHER TESTIFIED TO THE VERY SAME THING THAT BUSH TOLD HIS ATTORNEY.

SHE MADE THAT STATEMENT. RIGHT. STATEMENT FOR THE JURY.

I THOUGHT, WAIT A MINUTE --

THE OTHER ISSUE --

WHAT WAS THE MOTHER'S STATEMENT? BECAUSE I THOUGHT THE MOTHER'S STATEMENT WAS THAT BUSH, THAT CAVE SAID THE VICTIM WAS BEGGING FOR HER LIFE AND NOT THAT HE WAS BEGGING THEM NOT TO DO IT.

IT WAS BOTH. CAVE TOLD HER, AND THAT WAS THE ALLEGED DAMAGING PART OF HER TESTIMONY, BUT IT WAS BOTH, THAT CAVE TOLD HER THAT THE VICTIM WAS BEGGING FOR HIS LIFE, FOR HER LIFE, AND ALSO THAT HE HAD BEGGED THEM NOT TO KILL HER.

THERE WAS A CONFESSION, ALSO, IN THIS CASE, RIGHT?

YES.

AND WHAT DID CAVE SAY IN HIS CONFESSION ABOUT THESE CIRCUMSTANCES?

IN THE CONFESSION, HE SAYS THAT HE HAD NO INTENT TO KILL HER. HE ADMITS TO HIS INVOLVEMENT, THAT HE WAS THE RINGLEADER IN THE WHOLE ROBBERY, THAT HE LED HER OUT TO THE CAR BY GUNPOINT, AND IN HIS CONFESSION, HE SAYS THAT HE STAYED IN THE CAR AND THEY TOOK HER OUT OF THE CAR AND THAT YOU KNOW, HE DIDN'T KNOW, BASICALLY, WHAT THEY DID AFTER THAT. AT TRIAL, WHEN HE TESTIFIED IN 1996, HE ADMITTED THAT HE LED HER OUT OF THE CAR. HE WAS THE ONE WHO LED HER OUT OF THE CAR AND WAS WALKING HER INTO A DESOLATE AREA. HE, THEN, TURNED BACK AND WENT BACK TO THE CAR. HE SAYS THAT, THEN, BUSH AND PARKER KIND OF RUSHED HER, WHICH HE DIDN'T KNOW WHAT THEY WERE DOING, AND THEN THE ONE STABBED HER AND THE OTHER SHOT HER.

WOULD YOU ADDRESS THE ISSUE ABOUT THE PRIOR RECORD?

THE PRIOR RAPE?

THE PRIOR ARREST.

YES. THE TRIAL COURT HAD REJECTED THIS ARGUMENT. JUST TO START OFF, THERE IS A LITTLE BACKGROUND. GARLAND TESTIFIED THAT HE HAD BEEN THE COUNSEL IN THE 1993 RESENTENCING, AND HE SAID THAT, WHEN HE APPROACHED 1996 AND PREPARING FOR IT, ONE OF THE BIGGEST THINGS HE CONCENTRATED ON WAS TRYING TO DO SOMETHING DIFFERENT, BECAUSE WHAT HAD BEEN DONE BEFORE HADN'T WORKED, SO WHAT HE HAD DONE IN 1993, HE WENT FOR THE LOW IQ. HE HAD AN EXPERT TESTIFY ABOUT THAT AND THAT DIDN'T WORK.

DID HE, IN THE '93 AT ALL, TALK ABOUT NO SIGNIFICANT HISTORY?

NO. HE WAIVES THE STATUTORY MITIGATORS, SO THAT IS WHY THE THEORY THIS TIME --

HELP US USE THE PHRASE THAT IT DIDN'T WORK.

IT DIDN'T WORK IN --

ONE OF THE PREVIOUS JURY RECOMMENDATIONS FOR DEATH WAS 7-TO-5, AS I RECALL IT.

THAT WAS THE FIRST ONE. AND AT THAT ONE --

GARLAND WAS INVOLVED IN THE SECOND ONE?

RIGHT.

AND THAT WAS 11-TO-1 OR WHAT WAS THAT?

THAT WAS 10-TO-2. THE FINAL ONE WAS 11-TO-1. SO HE KEPT GETTING WORSE IN THE RECOMMENDATION. THE 7-TO-5 THERE HAD BEEN ACTUALLY NO MITIGATION PRESENTED AND THAT WAS FOUND TO BE INEFFECTIVE, AND THEN THEY CAME BACK FOR THE RESENTENCING AND THAT IS WHEN GARLAND WAS APPOINTED.

OKAY. WELL, YOU GO AHEAD.

OKAY. SO ANYWAY, HE, HIS THEORY, THEN, FOR THIS, WAS HE WAS, THE ONLY STATUTORY MITIGATOR THAT ANY OF THE EXPERTS COULD HAVE GIVEN HIM AT ALL WAS NO SIGNIFICANT PRIOR CRIMINAL HISTORY, BUT HE FELT THAT THAT COULD BEST COME OUT THROUGH CAVE, BECAUSE HE WAS ALSO GOING TO TRY TO HUMANIZE HIM, PRESENT HIM, SO HE SAID THAT EVERY TIME THEY HAD CONVERSATIONS, THAT THIS RAPE ALLEGATION CALM, AND THAT IS WHY HE DID, YOU KNOW, ANALOGIZE TO ANTICIPATORY REHABILITATION. THAT IS WHY THEY DECIDED TO BRING IT OUT. THE TRIAL COURT --

COULD YOU TELL ME WHETHER, IF YOU ARE SAYING THAT GARLAND THOUGHT THAT HE COULDN'T TELL HIS CLIENT NOT TO MENTION THAT HE HAD BEEN ARRESTED AND WHAT IT WAS FOR?

NO. HE JUST SAID THAT, EVERY TIME THEY WOULD HAVE CONVERSATIONS ABOUT HIS TESTIMONY, THAT THE RAPE KEPT COMING UP.

WELL, COULD YOU TELL ME, THE LAW IN THIS AREA, IF THERE IS NO CONVICTION, AND THERE IS AN ARREST BUT NO EVIDENCE THAT THIS WAS ACTUALLY A CHARGE THAT ANYBODY ACTED UPON, COULD THAT COME OUT TO, WHEN YOU TRY TO PUT ON NO SIGNIFICANT HISTORY?

YES. UNDER WALTON, THE STATE IS NOT LIMITED TO REBUTTING NO SIGNIFICANT PRIOR CRIMINAL HISTORY WITH JUST CONVICTIONS. THEY CAN BRING OUT ANY DIRECT EVIDENCE OF CRIMINAL ACTIVITY.

OF CRIMINAL ACTIVITY. BUT WHAT EVIDENCE, IS BEING ARRESTED ALONE, IS EVIDENCE OF CRIMINAL ACTIVITY, IF THE CHARGES ARE FOUND TO BE COMPLETELY FALSE?

THERE ARE CASES THERE, THERE IS THE STEIN CASE, WHERE THE PERSON IS CARRYING THE CONCEALED WEAPON, AND THAT WAS ALLOWED TO COME OUT, AND THE FACT THAT HE HAD BEEN ARRESTED, WAS ALLOWED TO COME OUT IN CRIMINAL HISTORY AND THE STATE WOULD HAVE BEEN ALLOWED TO ELICIT THAT.

HOW IS THAT PROOF OF CRIMINAL ACTIVITY?

PROOF OF CRIMINAL ACTIVITY?

RIGHT.

WELL, BECAUSE THE PERSON HAS BEEN ARRESTED. THAT WOULD BE THE SAME AS, THAT WOULD BE THE SAME AS, YOU KNOW, THERE IS THE STEIN CASE, WHERE THE PERSON WAS JUST CARRYING A CONCEALED WEAPON WHEN HE WAS ARRESTED, AND THAT WASN'T A CONVICTION, AND IT WAS ALLOWED TO COME IN.

HOW WAS IT HELD THAT AN ARREST IS NOT PROOF OF CRIMINAL ACTIVITY? NOW, THAT DOESN'T MEAN THAT THE ALLEGED VICTIM, SO IS THERE ANY PROOF HERE, THAT THE STATE WAS PREPARED TO REBUT THIS WITH TESTIMONY OF THE ALLEGED VICTIM IN THE PENNSYLVANIA INCIDENT?

NOT THAT YOU I AM AWARE OF, YOUR HONOR. I AM NOT AWARE OF, BECAUSE IT DIDN'T HAPPEN, SO I AM NOT AWARE OF WHAT THEY WOULD HAVE HAD AS AN ALTERNATIVE.

THE STATE DID NOT OFFER ANY FURTHER PROOF OF THIS, IS THAT CORRECT? AND THE STATE, THEN, DID NOT ARGUE THAT HE HAD ANY SIGNIFICANT PRIOR CRIMINAL HISTORY. IS THAT NOT CORRECT? IN OTHER WORDS, THE STATE CONCEDED THAT THIS MITIGATOR HAD BEEN PROVEN.

WELL, THE STATE, ON CROSS-EXAMINATION OF HIM, BROUGHT OUT --

I AM TALKING ABOUT THE ARGUMENT OF THE STATE. THE WAY I READ IT IS THAT THE PROSECUTOR SAID, YES, HE HAD NO PRIOR CRIMINAL HISTORY, BUT I SUBMIT TO YOU THAT THAT MITIGATING FACTOR DOES NOT MEASURE UP AGAINST ANY ONE OF THE AGGRAVATING CIRCUMSTANCES THAT HAVE BEEN ESTABLISHED, SO I REALIZE I AM READING PART OF --

PART OF HIS CLOSING.

YOU MEAN THE STATE'S APPROACH TO THIS WAS TO, THEN, CONCEDE THAT THIS MITIGATOR EXISTED, SO --

BUT THAT WAS AFTER THE FACT OF THE TESTIMONY.

WELL, I KNOW, AND ACTUALLY THE STATE WAS IN A BETTER POSITION THEN, TO ARGUE, IF YOU ARE RIGHT, THAT IF YOU CAN PUT ON TESTIMONY OF AN ARREST, TO ESTABLISH EVIDENCE OF SIGNIFICANT PRIOR CRIMINAL HISTORY, THEN I WOULD HAVE THOUGHT THE STATE WOULD BE ARGUING THAT THE DEFENDANT HAD DONE HIMSELF IN, IN A WAY, BUT THAT IS AN ISSUE AS TO THE SIGNIFICANCE OF THE ARREST. LET'S APPROACH THIS, IF YOU WILL. LET'S ASSUME THAT YOU COULD NOT USE THE ARREST. ALL RIGHT. AND THAT THE STATE DID NOT HAVE AVAILABLE TO IT, THE TESTIMONY OF THE ALLEGED VICTIM, WHATEVER. ISN'T THIS A VERY, VERY DAMAGING TESTIMONY TO GO BEFORE A JURY, IN THE KIDNAPING AND EXECUTION DEATH OF A YOUNG WOMAN IN THE PARTICULAR CASE THAT IS BEING TRIED, AND THEN TO HAVE TESTIMONY BROUGHT OUT THAT THIS DEFENDANT WAS INVOLVED IN A PRIOR RAPE? WOULDN'T THAT BE JUST VERY, VERY DAMAGING TESTIMONY TO PRESENT TO A JURY AND VERY VOLATILE TESTIMONY, SO I AM ASKING YOU TO HELP ME, WHERE IS THE SUPPORT FOR THIS STRATEGY OF THE LAWYER BRINGING THIS OUT TO THE JURY THAT IS CONSIDERING THIS HORRIFIC CRIME, WITH A YOUNG GIRL VICTIM HERE?

WELL, I JUST, I HAVE THE QUESTIONS AND THE PORTIONS OF THE TRANSCRIPT HERE, THAT I COULD JUST GO OVER QUICKLY WITH THE COURT. WHAT GARLAND ASKED HIM WAS, YOU WERE ARRESTED ONE TIME, WHICH IS THE ONLY PRIOR ARREST THAT HE HAD, AND HE SAID, YES. YOU WERE RELEASED ON YOUR OWN RECOGNIZANCE. YES, I WAS. WERE CHARGES DROPPED? THEY ARE. AND THEN WHEN IT CAME TO THE STATE'S CROSS-EXAMINATION, OF COURSE THEY GOT INTO THE FACT, WELL, THEY FIRST STARTED TO ASK WHETHER CAVE WAS AWARE OF HIS CODEFENDANT'S PRIOR CRIMINAL HISTORY, WHICH HE TESTIFIED THAT HE WASN'T, AND THAT

WAS ANOTHER POINT THAT GARLAND WANTED TO BRING OUT, TO SHOW THE JURY THAT CAVE REALLY DIDN'T KNOW THE CRIMINAL HISTORYS OF THESE GUYS THAT HE HAD ENDED UP WITH THAT NIGHT, SO HE BROUGHT OUT, THE STATE ATTORNEY BROUGHT OUT THE RAPE CONVICTIONS, AND THAT IS THE DIFFERENCE, YOU KNOW, THAT THERE WAS A RAPE CONVICTION THAT BUSH HAD, AND HE BROUGHT THAT OUT, AND THEN ASKED ABOUT THE CHARGE, THAT IS WHEN IT CAME OUT THAT THE CHARGE WAS RAPE, AND HE SAID THAT WAS DROPPED, AND CAVE WAS ABLE TO SAY TO THE JURY NOT ONLY WAS IT DROPPED, IT WAS PROVEN TO BE FALSE. THAT WAS WHAT CAME OUT. HE WAS ABLE TO GET THAT BEFORE --

TO A CITIZEN JURY, HEARING POTENTIALLY ALL OF THE DEFENDANTS IN THIS CASE HAD BEEN INVOLVED IN A PRIOR RAPE. WELL, I THINK --

THE VICTIM WAS NOT RAPED IN THIS CASE. THAT IS IMPORTANT TO KNOW, AND THE OTHER THING IS THAT THERE WAS REALLY NO PREJUDICE, BECAUSE HE DID GET THIS MITIGATOR, NO SIGNIFICANT PRIOR CRIMINAL HISTORY. I SEE THAT MY TIME IS UP. THANK YOU.

WITH REGARD TO THE STATE ON THE MITIGATOR, THEY ARGUED TO THE JURY THAT MR. COLTON, THE EVIDENCE DOES NOT EVEN EXIST, BASED ON THE EVIDENCE IN THIS CASE, SO THEY HAD ONLY THE ARREST. THEY BASICALLY SAID HE HAD A CRIMINAL HISTORY. THEY BASICALLY SAID HE HAD A SIGNIFICANT PRIOR CRIMINAL HISTORY. WITH REGARD TO THE TIMING WHICH I KNOW THE COURT IS CONCERNED WITH, IF THE COURT WILL LOOK, AND I APOLOGIZE FOR NOT HAVING THE DATE, ON PAGES 888 AND 889 OF THE 1996 SENTENCING, WHICH I BELIEVE TOOK PLACE ON NOVEMBER 12 OF 1996, THE COURT THERE IS UNAWARE OF WHETHER BRYANT IS GOING TO BE TAKING THE STAND OR NOT, UNTIL IT ASKS THE STATE TO ANNOUNCE ITS WITNESS LIST, AND IT DOES NOT ANNOUNCE BRYANT, SO THAT IS THE FIRST TIME THAT MR. GARLAND KNEW. HE SAID THAT THE FIRST TIME HE KNEW WAS DURING VOIR DIRE. IT WAS SLIGHTLY AFTER VOIR DIRE, AT THE BEGINNING OF OPENING STATEMENTS. NOW, TO GO BACK TO THE DATES AGAIN, ON 10-21 OF '96, MR. BUSH WAS EXECUTED. HE TESTIFIED THAT HE SAW MR. BUSH ON THE NIGHT BEFORE THAT, AND THAT IS WHEN HE BEGAN CALLING MR., WHEN HE PLACED HIS CALL TO MR. GARLAND, AFTER HE GOT BACK FROM LEARNING THIS NEW EVIDENCE. IT WAS NOT CORRECT THAT KISSINGER WAS FOUND INCREDIBLE. IT WAS NOT COMMENTED ON BY THE COURT IN ITS ORDER, AND THE DISTINCTION IS THAT GARLAND AND KISSINGER DID SPEAK, CERTAINLY. THEY SPOKE BECAUSE THEY WERE LITIGATING SHOULDER TO SHOULDER, TO KEEP BUSH FROM DYING.

WHY IS THE IMPLICATION HERE THAT THE TRIAL JUDGE ACCEPTED GARLAND'S VERSION OF THESE COMMUNICATIONS BACK AND FORTH BETWEEN HIM AND --

I DON'T BELIEVE THE IMPLICATION IS HERE. WE HAVE KISSINGER SAYING, I PLACED A CALL AND IT WASN'T RETURNED TO ME. WE ONLY HAVE GARLAND SAYING I SPOKE TO HIM, BASICALLY DURING THE COURSE OF THE LITIGATION THAT WE HAD, TRYING TO SAVE HIS LIFE, BEFORE BUSH'S EXECUTION ON 10-21 OF 1996.

WAS IT GARLAND THAT ADMITS THAT HE DIDN'T SPEAK TO KISSINGER, AFTER BUSH WAS EXECUTEED?

YES, I BELIEVE HE DID. THERE WAS NO TESTIMONY THAT I CAN RECALL. I AM POSITIVE THAT HE DID NOT SPEAK WITH KISSINGER UNTIL AFTERWARD, AND I AM AM NOT SURE WHETHER THAT COMES OUT IN GARLAND'S TESTIMONY OR IN KISSINGER'S TESTIMONY.

DID HE DENY THAT ANY MESSAGE HAD BEEN LEFT FOR HIM OR THAT KISSINGER HAD ATTEMPTED TO CONTACT HIM?

HE DID NOT. HE DID NOT. AND THE STATE DIDN'T ASK HIM. RED LIGHT IS ON. I SUGGEST THAT, BECAUSE OF THE INEFFECTIVENESS OF COUNSEL AT THE 1996 RESENTENCING, THAT MR. CAVE BE GRANTED A NEW SENTENCING. THANK YOU.

CHIEF JUSTICE: THANK YOU BOTH, VERY MUCH.