## Arthur Rutherford v. State of Florida

TEST, TEST , .

THE MARSHAL: HEAR YE , HEAR YE, HEAR Y E. THE SUPREME COURT O F FLORIDA IS NOW IN SESSION. ALL WHO HAV E C AU SE T O P LE A , DRAW NEAR, GIVE ATT EN TION , A ND Y OU SHALL B E H EA RD . GOD SAVE THE UNITED STATES , THE GREAT STATE O F FLORIDA , AND THIS HON OR ABLE C OURT . LADIES AND GENTLEMEN, T HE FLORIDA SUPREME COURT. PLEASE BE SEA TE D .

CHIEF JUSTICE: GOOD MORNING , LADIES AND GENTLEMEN, AND WELCOME TO THE F LORIDA SUPREME COURT . WE HAD MORE T HAN ONE CAS E O N THIS MORNING'S D OC KET , B UT O NE OF THE CASES HAS B EE N T AKEN OFF, ONE O F THE CIT IZ EN INITIATIVE CASES. SO WE WILL STA RT W IT H A ND END WITH LOTT VERSU S S TATE O F FLORIDA. ARE T HE P ARTIES R EA DY ? YOU MAY PRO CE ED .

M ADAM CHIEF JUSTICE , MEMBERS OF THE COURT, GOOD MORNING. MY NAME IS F RA NK B AN KOWI TZ . I'M HERE R EPRE SE NT IN G K EN L OT T W ITH REGARD TO HIS A EA L OF THE DENIAL OF HIS POST-CONVICTION RELIEF M OT IO N , HIS 3.8 50 , 3 .8 51 M OTIO N B EFOR E THE C IR CUIT C OU RT O F O RANGE COUNTY.

ARE YOU R EGIS TR Y C OUNS EL O R RETAINED COUNSEL?

REGISTRY C OU NSEL , YOUR HONOR .

B ASICALLY THE F ACTS OF T HI S CASE ARE THAT MR. LOTT W AS CONVICTED IN ORANGE COUNTY OF FIRST DEGREE M URDE R , REC EIVE D THE DEATH PEN ALTY. THIS COURT HAS AFFIRMED THAT DEATH PENALTY CONVICTION AS WELL AS THE U NI TE D S TATE S SUPREME COURT DEN IE D CERTIORARI.

WE'VE GOT A VERY LIM ITED AMOUNT OF TIM E . WE ARE VER Y F AMILIAR WIT H BOTH THE P ROCEDURAL FACTS AND T HE FACTS OF THE CASE. IF YOU COULD GET RIGHT TO THE ISSUES YOU ARE GOING TO ADDRESS?

YES, S IR. FIRST OF ALL , I T I S OUR C ONTENTION AND IN OUR BRI EF AND IN OUR ARG UMENT BEFORE THE TRIAL COURT T HAT M R. L OT T DI D NOT REC EIVE EFF EC TIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE I NVES TIGA TI ON O F THIS CASE, PRIMARILY T HE INVESTIGATION OF HIS A LIBI . MR. LOTT FROM THE B EG INNING OF THIS CASE ADVISED C OUNSEL , PUBLIC DEFENDER COUNSEL AS WELL AS PRIVA TE C OU NS EL W HE N PRIVATE COUNSEL WAS RETAI NED THAT HE HAD AN A LIBI. HIS FAMILY GAVE PHO TO GR AP HS , LOCATIONS O F W HE RE AND WHE N T HIS A LI BI C OU LD B E C ONFI RM ED. BASICALLY IN THE --.

WHO WAS HE WIT H D URING T HE COURSE OF THAT ALIBI?

IT WAS A LLEGED THAT H E W AS WITH HIS WIF E , A ND -- > > SO W AS HIS W IF E Q UESTIONED?

HIS WIFE WAS QUE ST IO NE D DURING T HE PROCEEDINGS. SHE WAS LISTED AS A D EF ENSE WITNESS. SHE G AVE SEVER AL D IFFE RENT STATEMENTS A S T O T IMES , LOCATIONS A ND H ER CRE DIBI LI TY W AS I N Q UEST ION. SHE WAS NOT - -

DID SHE SUP PO RT H IS A LI BI ?

SHE DID INITI AL LY , AND ABOUT SIX WEE KS PRIOR TO TRIAL SHE ADVISED D EF EN SE C OU NSEL THAT SHE DID NOT WANT T O TESTIFY.SHE WASN'T GOING T O T ES TIFY , AND SHE D IDN' T W AN T A NY TH IN G FURTHER TO DO WITH MR. LOT T.

JUSTICE L EWIS ?

DID SHE S AY M OR E T HA N SHE JUST DIDN'T WANT TO TESTIFY?

THERE WAS A STATE ME NT SHE WASN'T GOING TO LIE F OR K EN NY ANY MORE.

DOES T HAT NOT M AKE SOM E DIFFERENCE IN OUR CALCULATI ON OF THE FACTS AND HOW T HE SE F ACTORS WORK TOGETHER?

I T W OULD I F O THER F AC TORS C AME OUT T HA T , I N F AC T , MRS . LOTT HAD SOMETHING TO D O WITH M R. W ITTM AN W HO W AS T HE K EY WITNESS AGAINST MR. LOT T AS TO HIS CON FE SS IO N I N OTHER MATTERS REGARDING P RO PERTY TAKEN IN THE ROBBERY, B UT THERE WAS A WIT NE SS I N N ORTH FLORIDA IN THE S TARK E A RE A WHO WAS G IV EN T O DEF EN SE COU NS EL EARLY ON. I THINK HE ENTERED T HE CASE I N EITHER APRIL OR M AY O F 1 99 4 , AND THIS PER SO N W AS T HE NAM E T HE WAS GIVEN T OM , THE LOCATION, A ROXIMATE LOCATIO N OF A FRUIT S TAND IN T HE S TARK E AREA. HE WAS TOLD THIS F RU IT S TA ND WAS ONLY OPEN ON THE WEEKENDS. IT WASN' T U NTIL O CT OB ER O R NOVEMBER, SOME SIX M ONTHS AFTER HE CAME INTO T HE C AS E THAT HE SENT AN I NV ES TI GATO R , WE BELIEVE HE SENT A N INVESTIGATOR. THERE ARE N O INV ESTI GATI VE NOTES, THERE ARE NO --

WHAT WAS T HE UPS HO T AS FAR AS DID THE OWNER OF THE F RU IT STAND NOW COM E FORWARD AND S AY THAT AT THE TIM E O F T HE CRI ME AND THE TIME O F D AY THA T I C AN SWEAR T HAT YOU R C LIEN T W AS A T MY F RU IT STA ND AND I WAS HANDING HIM FRUIT AT THE ALLEGED TIME THAT THE V ICTI M WAS MURDERED? IS THAT WHAT H AENED HERE?

THAT IS NOT W HAT H AENED. THE FRUIT STAND OWN ER W AS LOCATED B Y M Y I NV ESTI GATO R A FTER S OM E E FF OR T , AND H E C AME TO COU RT A T T HE EVIDE NT IARY HEARING, AND HE S AID I K NO W THAT MAN. I'VE SEEN THAT MAN. I REMEMBER THA T M AN . I CAN'T GIV E YOU A N E XACT D ATE OR TIME. THIS MAN WAS ALMOST 8 0 YEA RS OLD BY THE TIME T HE EVIDENTIARY HEARING CAME AROUND.

WAS THE ORIGI NA L A TT OR NE Y GIVEN THE NAME OF THIS PER SON AND ADDRESS AND L OC ATIO N O F THE STAND? ALL OF THIS I NF OR MA TION AND I T W AS ONLY OPE N O N T HE WEEKENDS? WAS ALL OF THAT GIVEN?

YES, SIR, IT WAS , I NCLUDI NG PHOTOGRAPHS OF THE S TA ND A ND THE ROAD WHERE THE S TAND WOULD HAVE BEEN SET UP . C OLLATERAL I NVESTIGATOR ACTUALLY WENT TO THE FLORIDA DEPARTMENT OF AGRIC UL TURE A ND LOCATED T HIS M AN EIG HT Y EARS LATER.

WHERE DID THE P HOTO GR APHS COME FROM?

THEY WERE TAKEN B Y MR. LOTT'S MOTHER AND P ROVIDE D T O COUNSEL , AND T HE Y W ERE PROVIDED TO T HE PUBLIC DEFENDER INITIALLY AND PROVIDED TO M R. SPE CTOR W HO WAS E VE NTUA L T RIAL C OUNSEL. A PHOTOGRAPH OF THE FRU IT STAND WAS GIVEN TO H IM.

HOW DO WE EVA LU AT E T HE EVIDENCE ABOUT THIS F RU IT STAND NOW? AS I U ND ER STAN D , MR. L OT T S AY S THA T HE H AD GON E T HERE O NCE T O THIS FRUIT S TAND A ND H IS MOTHER SAYS THAT HE HAD BEE N THERE NUMER OU S TIM ES , AND S O HOW ARE WE T O EVA LU AT E T HA T WHEN WE HAV E , EVE N I F H E HAD GONE TO THE FRUIT S TAND O N SOME OCCASION , H E

SAY S O NC E , HIS MOT HE R S AY S S EVER AL. IN CONFLICT.

T WE L , I F THE C OURT REC AL LS MR. LOTT'S OTHER TESTIMONY HE INDICATED THAT HE HAD VISITED ANOTHER FRUIT STAND WITH H IS MOTHER, A ND THERE WAS DISCUSSION ABOUT R ELIS H T HA T M R. , I B EL IEVE ELM ER J ON ES SOLD R EL IS H A T H IS F RUIT STA ND UP I N N OR TH F LO RIDA AND T HERE WAS A Q UE STIO N A BO UT WHETH ER HE PURCH AS E D REL IS H T HERE OR NOT. HE HAD IND ICAT ED H E H AD PURCHASED RELISH AT ANOTHER FRUIT STAND WITH HIS MOTHER ON A NUMBER OF O CC AS IO NS, S O , AGAIN , T HERE I S S OM E C ON FLICT THERE. BUT I DON'T THINK IT IS U NRESOLVE AB LE C ONFL IC T AS FAR AS Q UE STIO NI NG W IT NESSES AND BRI NGING T HI S P ER SO N B EFORE THE COURT. MRS. LOTT OR M R. L OT T' S M OT HE R DID TESTIFY AT TRIAL .

WELL , EVEN I F W E ACC EP T THAT HE HAD GON E TO T HAT F RUIT STAND THAT DAY, D OE S I T CONCLUSIVELY D EMON ST RA TE T HA T H E COULD NOT HAVE BEE N A T T HE SCENE OF THE CRIME AT THE T IME OF THE MURDER W AS COM MI TTED ?

WELL, WHAT WE H AV E T O D O THEN IS L OOK AT THE FACTS AND HOW THEY WERE NARROWED D URIN G THE TRIAL. THE MEDICAL EXAMINER GAVE A 2 7-HOUR WIN DO W O F W HEN T HE MURDER COULD HAVE O CCUR RE D FROM EARLY ON A S AT URDA Y AFTERNOON TO A RO XI MATE LY 5:00 P.M..ON A SUNDAY. THAT W IN DOW W AS NAR ROWE D B Y A NEIGHBOR OF THE VICTIM , MR. BIONES WHO TESTIFIED THAT HE ACTUALLY HEA RD SCR EAMS AT THE V IC TI M' S R ES ID ENCE MID-MORNING AROUND 10 :3 0 O N S UNDAY MORNING.

WASN'T THERE ALSO EVIDENCE THAT THOSE S CREAMS W ERE O F SOMEB ODY WHO HAD W IT NE SS ED T HE BODY WHO SAW THE BOD Y AND N OT THE S CREAMS OF THE V IC TI M O R AT LEAST IT COULD H AV E B EE N INTERPRETED THAT WAY?

IT WAS M Y REC OL LECTION OF THE FACTS THAT THE PERSON WHO FOUND THE B OD Y F OU ND I T MUCH LATER BECAUSE THE MEDICAL EXAMINER PUT TIME OF DEATH POSSIBLY UP T O 5:00 P.M.. ON THAT SUNDAY. THIS WAS SUN DA Y M ORNI NG ; THEREFORE , GIVEN THA T T IME FRAME I D ON'T B ELIEVE THAT T HE SCREAMS, THE PERSON WHO FOUND THE BODY DID S CREAM BUT I T W AS MUCH LATER IN T HE DAY, EAR LY E VENING ON T HAT SUNDAY THAT SHE FOU ND THE B OD Y . A ND --

TO HAVE A VIA BLE C LA IM O N SOMETHING LIKE THIS , WOULDN' T YOU HAVE T O H AV E V ER Y CRE DIBL E W ITNESS THAT SAYS I WAS W IT H THE DEFENDANT OR I KNOW T HE DEFENDANT WAS S OM EP LA CE E LS E AT PRECISELY T HE T IM E O F THE CRIME AND P ER HAPS EVE N MO RE THAN O NE , A ND T HE E VIDE NC E GRA NTED, YOU K NOW , A FTER T HE FACT, BUT IT IS VER Y D IFFICU LT TO -- BUT Y OU D ON'T H AV E EVIDENCE THAT E VEN COMES C LOSE TO THAT STANDARD , DO YOU?

WELL, YOUR HON OR , I F W E THEN GET I NT O WHE THER MR. LOTT'S TESTIMONY AND H IS NOT TES TIFYING OR T ES TIFY ING AT TRI AL . I THINK H IS T ES TIMO NY C OU PLED W ITH M R. JON ES ' TES TIMO NY O F HIM REMEMBE RI NG HIM , B EI NG THERE, AND M R. JONES T ES TIFIED AT THE EVIDENTIARY T HA T HIS MEMORY 1 1 Y EARS AGO .

BUT H E D IDN'T SAY THA T A NY TIME OVER A LONG PERIO D OF TIME BASED ON THAT KIN D O F TESTIMONY, COULD HE HAVE NOT?

HE C OULD HAVE BEEN , YOUR HONOR, YES , B UT M R. J ON ES NARROWED HIMSELF, H E I NDIC AT ED IN HIS T ESTIMO NY T HA T H E - - H IS M EMORY WOULD H AV E B EEN MUCH MORE S OLID, M UC H MOR E TIME-BASED 11 Y EARS BEF OR E H AD HE BEEN INVESTI GATED.

C ORRE CT . BUT WHERE WE ARE A T T HI S P OINT IS THAT I F H E HAD C ALLE D J ON ES AS A W IT NE SS , W HA T W OULD JON ES HAVE BEEN ABL E T O SAY A BO UT T HIS 2 7- HOUR T IM E?

IT WOU LD NOT HAV E J US T B EE N J ONES.

WHAT WOULD J ONES HAVE SAI D? JONES WOULDN'T HAVE B EEN ABLE TO SAY A NYTH IN G ?

WE BELIEVE THA T J ONES W OULD HAVE TESTIFIED OR COULD HAVE TESTIFIED AND NAR RO WE D THAT TIME. HE COULDN'T HAVE GIVEN A N EXACT HOUR, MIN UTE , TIM E S PO T IN TIME.

WELL , HE DID TES TI FY A T T HE P OST-CONVICTION, HEA RI NG , RIGHT?

YES, HE DID.

DID H E N AR RO W A T T HA T T IM E THAT YOU SAID Y OU B ELIEVE HE COULD HAVE DONE?

HE SAI D H E C OU LDN' T REMEMBER, IN FACT , BECAUSE O F I T HAD BEEN SO L ON G A GO .

I S T HERE D NA --

I THINK JUS TI CE CAN TE RO HAS --

HE COULDN'T POINT OUT THE YEAR AT THE E VIDENTIARY HEARING, CORRECT? HE COULDN'T EVEN NAR RO W I T THAT MUCH .

RIGHT.

AND S O IT I S T OT AL S PECU LATION TO SAY THA T HAD H E TESTIFIED EIGHT YEARS EARLI ER HE COULD HAVE NAR ROWE D I T D OW N TO HOURS W HE N H E C OU LD N' T NARROW IT DOW N TO YEARS A T THE EVIDENTIA RY HEARING.

THE ONLY A RGUMENT I CAN MAKE TO T HAT IS THAT H E TESTIFIED AT THE E VI DENTIARY IF HE HAD BEE N C ON TACT ED WAY B ACK THEN, WIT HI N A S HORT PERIOD OF T IM E , HIS MEM OR Y WOULD HAV E B EE N M UC H BET TER THAN IT W AS 11 Y EA RS LATER .

WELL , THAT'S T RU E O F M Y WITNESS, CORRECT, NOT JUST O F MR. JONES, OF ANY W IT NE SS , BUT IT STILL DOE SN'T M EAN T HAT IT WOULD HAVE G ON E FRO M NOT BEING ABLE TO TELL THE Y EAR BUT BEING ABLE TO TELL THE E XACT HOU R?

WHEN P RE SE NTING A N ALI BI , THE E XA CT HOU R M AY NOT B E T HA T IMPORTANT. IT IS H EL PFUL IF Y OU C AN HAV E SOMEONE TO PUT SOMEONE THERE THE EXACT MINUTE AND THE E XACT HOUR.

IT IS PRE TT Y I MPOR TANT I N THIS CASE, ISN'T IT , BECAU SE HE HAD TO EXP LA IN 2 7 H OURS WHERE THE MURDER COULD H AV E OCCURRED, SO IT I S P RETT Y IMPORTANT FOR HIM TO - - F OR JONES TO BE ABL E T O P INPO IN T BECAUSE NOT EVEN IF HE HAD JONES PINPOINTI NG A C ERTA IN HOUR HE S TILL WOULD H AVE H AD TO EXPLAIN THE OTHER HOURS T O OTHER WITNESSES, COR RE CT?

HE WOULD HAVE HAD T HE O THER WITNESSES AS WELL A S H IM SELF , L OTT HIMSELF , T O N ARRO W T HA T TIME, PLUS MR. B IONE S WHO HEARD THE S CREAMS IN THE E AR LY MORNING HOURS WHI CH I B EL IE VE NARROWS THE 2 7- HO UR T IM E F RAME VER Y SIGNIFICA NTLY .

CHIEF JUSTICE: NOW, YOU HAVE , O F C OURS E , R EB UTTA L T IM E , BUT A S J USTICE A NS TEAD WAS ASKING, WHAT O TH ER P OINT S WOULD YOU LIKE TO ADDRESS?

THE OTHER POINT I WOULD LIKE TO ADDRESS P RI MA RI LY I S MR. LOTT'S TES TI FY ING OR N OT TESTIFYING IN THI S C ASE. IT IS OUR POS IT ION AND I T W AS OUR POSITION AT THE E

VIDENTIARY HEARING T HAT H E DID NOT GIVE A KNO WI NG , VOL UNTARY AND I NTELLI GE NT WAIVER OF HIS RIGHT TO TES TI FY OR TO REMAIN SILENT.

AS TO THAT I SSUE , T HE T RI AL COURT ASKED M R. LOT T A T T HE TRIAL , C ORRE CT , A BOUT T HA T , AND HE S AID IT WAS A J OINT CHOICE BY ALL T HREE O F YOU THAT YOU WOULD NOT T ESTIFY IN THE TRIAL? YES, MA'AM. AND LATER ON , S O YOU ARE SATISFIED WITH EVERYTHING THEY HAVE DONE? YES, MA'AM.

T HAT C OL LOQU Y WIT H THE TRIAL C OURT WAS AFTER T HE JUR Y WAS CHARGED , AFT ER C LO SING ARGUMENT AND AFTER THE JURY HAD BEEN OUT SOM E HOU RS DELIBERATIN G THE CASE.

BUT THERE IS N O REQUIREMENT THAT ANY CAL QEE BE C ONDUCT ED AT ANY TIME, CORRECT ?

BOTH THIS C OURT AND FOLLOWING THE W IS CONS IN SUPREME COURT HAS R UL ED , I N FACT, THAT THERE IS NO REQUIREMENT OF AN ON T HE R ECORD COLLOQUY.

S O GIV EN T HE REQUI REME NT THAT THERE IS N O COLLOQUY AT ALL AND W E DO HAV E O NE A FTER THE EVIDENCED B EE N PRE SENTED , ISN'T THAT EVIDENCE FOR US THAT THERE WAS A V OL UN TA RY A ND KNOWING WAIVER OF THE RIGHT TO TESTIFY?

WELL, I THINK W HA T T HE COURT SHOULD LOOK AT IS THE P ROCEEDINGS I MM ED IATELY BEF ORE DEFENSE RESTED , W HE RE D EFEN SE COUNSEL AND A NO THER PERSON , ANO THER ATTORNEY , A F RI EN D OF DEFENSE COUNSEL'S WAS IN THE JURY BOX D ISCUSS IN G A AR ENTL Y WITH MR. L OT T H IS T ES TIMONY AND WHETHER HE WAS GOING TO TESTIFY OR N OT . AND CO-COUNSEL, M R. RIC HARD SO N , DESCRIBED THA T D ISCU SS IO N A S MORE OF A C ON FRONTA TI ON T HA T THEY WERE BROWB EA TING HIM , SAYING YOU CAN'T TESTIFY. YOU SHOULDN'T TESTIFY. THERE IS NO WAY YOU C AN TESTIFY. YOU KNOW, YOU'VE G OT T HI S VOLATILE PERSONALITY. YOU'VE GOT THIS AND THAT AGAINST YOU AND YOU SHOULDN'T TESTIFY.

AND HIS ADMIS SION W AS T HAT HE ACCED E D T O T HE IR SUGGESTIONS AND DECID ED NOT T O TESTIFY?

HE FELL IN LINE WITH THEIR RECOMMENDATIONS, YES, YOUR HONOR.

CHIEF JUSTICE: DO YOU WANT TO MENTION BRIEFLY THE ARGUMENT ON THE DNA T ES TING ? > > IT IS O UR P OS ITIO N T HA T THE -- THERE WAS VIA BLE D NA . THE FIN GE RN AI LS O F THE V IC TI MS WERE SCRAPED. THERE WAS N EVER A NY D NA D ON E BY EITHER THE STATE O R T HE DEFENSE IN THIS CASE , AND I T IS OUR POSITION THAT THERE WAS E VIDENCE T HERE T HAT THA T EVIDENCE COULD H AV E EIT HER E LIMINATE D M R. LOT T O R I N THE ALTERNATIVE E ST ABLI SH ED T HA T ANOTHER PERSON OR PERSONS WERE THERE. NOW, THE STATE C ON CEDE D THAT THIS CRIME AT TRIAL COULD H AV E BEEN PERFORMED BY MORE THAN ONE PERSON AND MAY HAVE B EE N BECAUSE OF THE --

WAS THE RE A SHO WI NG A T T HE POST-CONVICTION HEARING THAT THERE WAS EVIDENCE THERE? THAT IS , THAT T HERE WAS SCRAPINGS OR THERE WAS B LO OD OR THERE WAS SKI N O R TH ER E WERE HAIRS? IN OTHER WORDS, W HA T S HOWI NG DID YOU M AKE AS T O WHA T T HING S EXISTED THAT MAY BE R EL EV AN T AND THAT DNA T ES TING COU LD B E DONE ON?

AT THE EVI DE NTIA RY H EARING ITSELF THERE WAS NO SHOWING WITH REGARD TO THE D NA , YOUR HONOR.

AND ISN'T THA T A N E SS ENTI AL PREDI CATE THAT YOU F IRST HAVE TO SHO W THE E XI STEN CE O F CERTAIN M ATERIA L THA T COULD B E T ESTED BEFORE YOU EVE N R EA LLY GET T O R ELEV ANCY A NALY SI S?

THE E VIDE NTIA RY MAT ER IA LS TAKEN BY THE S HE RI FF'S DEPARTMENT IN THIS CASE , T HE PEO PLE WHO C OLLE CTED E VI DE NC E AT THE SCENE INDICATED T HAT THERE WAS - - THERE W AS E SCAPING - - SCR AP INGS , THE RE WAS A R AP E KIT THA T W AS D ONE. THERE WAS THE MEDIC AL EXAMI NE R TOOK SAMPLES , UNK NO WN HAI R S AMPLES BECAUSE THE S HERI FF 'S DEPARTMENT WENT THROUGH AND PULLED ALL OF T HE DRAINS IN THE SHOWERS AND THE S IN KS T O PULL HAIR SAMPLES , S O TH ERE WERE THINGS TO TEST , AND THESE WERE FROM AREAS W HE RE M R. LOT T WOULD HAVE BEEN IN T HA T H OU SE. IN FACT, AREAS W HE RE H IS FINGERPRINTS WERE FOUND IN THE HOUSE.

SO IF , I N F ACT , E VE RY THING HAD BEEN TESTED A ND I T HAD DEMONSTRATED THAT IT WAS N OT M R. LOTT'S DNA BUT I T B ELON GE D TO SOME OTHER PER SO N W HAT WOULD THAT HAVE DONE IN REGARDS TO WHETHER OR N OT MR. LOTT WAS GUILTY O F T HIS OFFENSE OR HOW WOULD IT HAV E CHANGED THE S EN TENC E T HA T MR. LOTT WOULD HAVE BEE N GIVEN?

IT IS OUR B EL IE F T HA T I N PARTICULAR WITH THE P LIER S THAT WERE F OUND A T T HE SCENE , PLIERS WERE ESSENTI ALLY ARG UE D AS B EI NG A SUBSTAN TIAL A GGRAVATOR IN THIS C AS E AS THE HEINOUS, ATROCIOUS AND C RUEL AGGRAVATOR IN THAT THE V IC TI M WAS GRABBED WITH T HE SE PLI ER S AND TOR TU RED W ITH T HE M .

IF A NO TH ER P ER SO N H AD BEEN IN THE SCENE AND USE D T HOSE PLIERS BUT M R. L OT T WAS A LS O T HERE, A P ART O F T HI S AND WITNESSING ALL OF THIS WOULD THAT HAVE MADE A DIFFE RENCE?

I THINK IT WOULD H AVE M ADE A DIFFERENCE AS TO HIS POTENTIAL SENTENCE BECAUSE HE WOULD NOT HAVE B EE N T HE P ERSO N -- IT WOU LD HAV E B EEN A P ROPORTIONALITY ARGUMENT AT THAT POINT A S T O W HE TH ER H E WOULD BE RESPONSIBLE F OR T HE ACTUAL TOR TU RE W HI CH T OO K PLACE.

CHIEF JUSTICE: YOU ARE SUBSTANTIALLY INTO YOUR REBUTTAL.

THANK YOU . > > CHIEF JUSTI CE : I HAVE T HR EEAND A HAL F MINUTES FOR REBUTTAL.

GOOD MORNING. SCOTT BROWNE FOR THE STATE OF FLORIDA . YOUR HONORS , T HE P ROBLEMS FOR M R. LOTT HERE BEFORE T HE C OURT TODAY IS THE SAM E P ROBL EM T HA T TRIAL COUNSEL HAD BEL OW . IT IS T HA T TRIAL C OUNS EL INVESTIGATED LOT T' S C LAIM O F A LIBI BUT THERE WAS S IM PL Y N O EVIDENCE TO S UORT IT.

NOW , C OU NS EL ARG UE S H E H AS GIV EN D EF ENSE ATTORNEY PHOTOGRAPHS , NAMES , ADD RESS ES , D AYS OF O PERATION, I MEA N , EVERYTHING EXCEPT BRI NGIN G T HE WITNESS TO THE D EF EN SE C OUNSEL'S OFFICE. IS THAT THE STATUS OF T HE RECORD?

NOT EXACTLY , YO UR H ON OR. THE EVIDENCE WAS THA T MR. SPECTOR DID , I ND EE D , INV ESTIGATE THE C LA IMED A LI BI. HE SENT HIS I NV ES TI GA TO R , BARTLES, OUT.

I UNDERSTAND THAT. I'M TALKING ABOUT COU NSEL .

YES , H E I S I NC ORRE CT I N THAT AN ADDRESS W AS G IV EN FOR THE FRUIT STAND. MAYBE PHOTOS W ERE S HOWN T O H IM BUT THERE WAS N O A DDRE SS . THEY KNEW IT WAS S OMEW HE RE I N STARKE. HE SENT HIS INV ES TIGATOR OUT TO FIND THE F RU IT S TA ND B UT I T WAS NOT F OUND. THE INV ESTIGATOR WENT T O S T. AUGUSTINE TO LOOK FOR R ECORDS FROM S ON NY'S B ARBE CU E. NO RECORDS WERE F OUND. NOW, WHAT HAP PENS D URIN G POST-CONVICTION IS THAT THEY DO FIND ELMER JONES A ND H E I S BROUGHT IN TO TESTI FY, BUT AS J USTICE C AN TE RO POI NT ED O UT H E COULDN'T EVEN NARROW D OWN A YEAR IN W HICH HE MIGHT H AV E SCENE M R. LOT T , MUC H L ES S NARROW IT DOWN TO E VE N T HE TIME FRAME O F THI S M UR DER OCCURRED. IN FACT, M R. J ON ES C OU LDN' T EVEN NARROW IT D OWN T O A DECADE IN W

HI CH HE M IGHT HAV E SEEN OR T ALKED TO MR. L OT T. HE SAID I T WAS ANY WH ER E FROM THE EARLY ' 80 s T O 1 99 6.

WERE THE P IC TURES THA T WER E G IVEN TO T RI AL C OUNSEL , T HE ACTUAL PICTURES OF MR. JON ES' STAND? I MEAN, D O W E - - ARE W E A BL E TO SAY THAT?

I'M TRYING T O R EC ALL , YOUR HONOR, FROM I F M R. B ANKO WI TZ HAS A RECOLLECTION. I C ANNO T D ISPUTE THAT. I DON'T RECALL THAT FROM THE EVIDENTIARY H EARING THAT I KNOW THAT PICTURES WER E G IV EN TO C OLLA TERA L C OU NSEL 'S I NVESTIGATOR A ND PERHAPS A P HOTO WAS S HOWN F RO M LOT T' S MOTHER REGARDING A FRUIT STAND , BUT EVEN IF WE ASS UME THA T COUNSEL WAS S OM EHOW D EF ICIENT AND T HE S TATE I SN'T CON CE DI NG THAT, THE B UR DE N U PON M R. L OT T IS TO SHO W P REJU DI CE AND I F MR. JONES CAN'T NARROW I T D OW N TO A Y EA R O R E VE N A D EC AD E HOW CAN W E FIN D COU NS EL INE FFECTIVE?

T HE S IMPL E ANS WE R I S T HA T WE CANNOT , AND O N T HE I SSUE OF LOTT TESTIFYING, THE TRIAL COURT MADE A SPECI FI C F ACTU AL FINDING.

BEFORE YOU MOVE ON TO H IM TESTIFYING, IN THIS CASE T HE FRUIT STAND WAS ONLY OPE N A T CERTAIN HOURS OF THE DAY, CORRECT?

CORRECT.

AND I F W E A SSUM E T HA T H E , IN FACT , VIS ITED T HA T FRU IT STAND ON THA T PARTI CU LA R D AY , HOW D OE S THA T , D UR IN G - - SOMETIME DURING THO SE H OU RS , HOW DOE S THAT SQU AR E W IT H T HE T IME O F D EA TH I N TH IS CAS E?

YOUR HONOR, HE V IS ITED T HE FRUIT STA ND A LL EGEDLY O N T HA T SUNDAY, W HI CH WAS WIT HI N PERHAPS THE 2 7-HO UR P ERIO D. THE MURDER COULD HAV E OCC URRED BETWEEN SAT URDAY A ND M ARCH 2 6TH AT 2 :00 A ND SUNDAY , M AR CH 27TH AT 5:00. SO EVEN IF W E ASS UM E T HA T ELMER JON ES WAS AVAIL ABLE AND COULD HAVE PLACED L OTT A T T HAT FRUIT STAND, IT S TI LL LEF T MR. LOTT AMPLE TIM E T O C OM MIT THE MURDER. SO EVEN IF W E A SS UM E M R. J ONES AND THA T' S G RO SS SPECU LATI ON , COULD H AVE P LA CE D MR. L OT T A T THE FRUIT S TA ND , I T I S A T B ES T A P AR TIAL B UY .

CHIEF JUSTICE: HOW F AR IS THE FRUIT STAND FROM THE P LA CE OF THE MURDE R ? > > STARKE FROM O RA NG E COU NT Y , A COUPLE OF H OURS , YO UR HON OR, A FEW HOURS . MAYBE THREE AT THE MOST. I THINK IT IS P ROBA BL Y M OR E LIKE TWO. NOW, LET'S GO B AC K T O W HA T WAS PRE SENTED BY T RIAL COUNS EL.

COULD YOU ALS O B EFORE Y OU GO THERE, C OU NS EL M AD E JUS T A VERY IN P ASSI NG S TA TE MENT ABOUT A CONNECTION BET WE EN MR. LOTT AND M R. L OT T' S W IF E . A ND T HE PER SO N T HA T , AND W E KNOW THIS IS, Y OU KNOW , H E I S LIE - - W HA T WAS THE M OT IV E FOR THIS PERSON T O A LL O F T HE SUDDEN TURN ON HER H USBAND ? WOULD YOU ELABORATE?

YES , YOUR HONOR, WHA T M R. SPECTOR TESTIFIED TO BELOW WAS THA T H E HAS A LW AY S PLA NN ED AND PREPARED TO PRESENT THIS ALIBI AND THE WIFE , TAM MY , W AS THE CRI TI CA L P IECE OF E VIDENCE , BECAUSE MR. LOTT WAS PLACI NG HIMSELF WITH HIS WIFE DURING THE RELEV ANT T IM E FRAME O R MOST OF T HEM. JUST PRIOR TO TRI AL, T AMMY CALLED UP AND SAID I'M NOT GOING TO LIE FOR KEN NY A NY MORE AND M R. S PECT OR T ES TI FI ED , WELL, THE ALIBI FEL L A PART BECAUSE HE HAD NO ONE E LS E T O SUORT IT AT T HAT TIME. NOW, DURING THE E VIDE NTIARY HEARING THE ONLY A TT AC K U PO N THE CRE DI BI LI TY O F T AMMY , L OTT'S WIFE , W AS FRO M L OT T HIMSELF WHO M ADE A C LAIM T HA T TAMMY WAS SOMEHOW CON NE CT ED T O W HITMAN OR SHE W AS UPS ET A BOUT HIM S IGNING O VE R INS URANCE PAPERS ON A TRUCK BUT T HA T , A GAIN, THE ONLY ATTAC K U PO N TAMMY SHE WAS NOT CAL LE D BEL OW BY C OLLATERA L C OU NS EL O R HER CREDIBILITY WAS MR. LOTT AND HIS UNS

UORT ED S TA TEMENT AND M R. SPECTOR TESTIFIED ONCE A WITNESS GOES SOUTH ON Y OU LIK E THAT, THA T'S IT. YOU KNOW, YOU WOU LDN'T WANT TO CALL HER AND RIS K H ER A LT ERIN G CONSI STENT STATEMENTS A ND SAYING I AM NOT GOING TO L IE FOR HIM. THAT'S A VERY CLE AR S TATE MENT THAT SHE WAS NOT G OING T O SUORT MR. L OT T' S C LAIM O F A LIBI . IF I CAN GET T O T HE S EC ON D ISSUE ON LOTT T ES TI FYIN G , T HE TRIAL COURT MADE A S PE CIFI C FACTUAL FINDING BELOW THA T LOT T WAS ADVISED B Y COU NS EL NOT TO TESTIFY , A ND T HA T MR. LOTT MADE THE D EC ISIO N V OLUNTARILY NOT TO TESTIFY , AND THAT D ECISION WAS SUORTED BY M R. S PE CTOR'S TESTIMONY, M R. RIC HA RD SON 'S TESTIMONY B ELOW, BEC AU SE MR. RICHARDSON TESTIFIED THA T ALTHOUGH INITIALLY HE A GR EE D THAT LOTT S HOULD TESTIFY A ND HE W AN TE D L OTT T O T ES TIFY , H E AGREED THAT L OT T U LTIM AT EL Y , HEEDED THE ADVICE OF C OU NSEL IN THIS CASE , NOT T O TES TI FY . AND HE HAD VER Y S PE CI FI C REASONS F OR ADVISING LOT T N OT TO TESTIFY. LOTT HAD A S IG NIFICA NT CRIMINAL HISTORY. LOTT HAD A T EM PE R , A ND T HA T W AS BORNE OUT B Y T HE CROSS -EXAMINATION THAT M R. LOTT U ND ER WE NT D URING T HE SPENCER HEARING. HE LOST HIS T EM PER W IT H THE PRO SECUTOR . HE SAID YOU DON E G AV E M E A N ATTITUDE. SO THERE WER E V ER Y CLE AR REASONS , F OR M R. LOT T' S T RI AL COUNSEL TO ADVISE HIM NOT T O TESTIFY . FURTHERMORE, LOTT'S TESTIMONY WOULD HAVE BEEN COMPLETELY UNSUORTED AT THE TIME OF TRIAL AS IT WAS AT THE POST-CONVICTION HEARING B ELOW . AND INT ERES TI NG LY ENOUGH , LOTT'S TESTIMONY DURING THE POS T-CONVICTION HEARING W AS C ONTRADICTED B Y H IS M OT HE R A S THIS COURT HAS R EC OG NI ZED. HE TESTIFIED SPECIFICALLY THAT HE HAD ONL Y G ONE TO THE F RUIT STAND ONCE. HIS MOTHER TESTIFIED THAT HE HAD GONE THERE A NUMBE R O F TIMES AS SHE H AD . WHI LE LOTT T ES TIFIED THAT H E WOULD NEVER B UY T HE REL IS H BECAUSE HE W ASN' T S UR E ABO UT THE H YGIENE PART O F T HING S H IS MOTHER DIDN'T GET THAT PART OF THE STORY. SHE T ES TI FIED T HAT LOT T RAV ED ABOUT THIS R ELIS H S HE G OT F RO M THE FRU IT STAND AND T HAT H E USED IT AND SHE USED IT ON H ER GRE AT NORTHERN BEA NS.

WHY WOULD V ER Y H AV E G ON E SEVERAL TIMES TO A FRU IT S TAND I N STARKE FROM ORA NG E C OU NTY? WHAT WAS THE REASON TO D RI VE TWO HOURS?

EXACTLY, I D ON'T KNO W, YOUR HONOR. IT D IDN' T M AK E S EN SE T HEN.

CHIEF JUSTICE: IT IS PROBABLY CLEAR THAT HE MUST HAVE FREQUENTED I T AT SOM E POINT.

IT IS NEAR T HE P RI SO N WHERE HE WAS HOUSED , U NFOR TU NATE LY N OT LON G E NOUGH , F OR 2 0 YEA RS . YOUR HONOR , S IM PL Y C OM IN G I N A ND CAS TI NG ASP ERSION S O N TRIAL COUNSEL SAYING THERE WAS THIS ALIBI IS O NE T HI NG , BUT WHEN YOU ARE GIVEN AN EVIDENTIARY HEARING YOU N EED TO PROVE IT UP , AND T HE RE I S A C OMPLETE F AILURE OF P ROOF I N THIS CASE, AND O N M R. L OT T NOT TESTIFYING, THAT WAS A C HO IC E THAT HE MAD E BELOW , A ND I T W AS ON THE B EST R EC OMMEND AT IO N O F C OUNSEL, A ND YOU HAV E T HE COLLOQUY ON THE R ECORD , YOUR HONOR, IT DOESN'T MAT TE R WHE N THA T C OL LOQUY T OOK PLACE. INDEED THIS COURT HAS STATE D THAT A C OLLOQU Y I S N OT E VE N REQUIRED ON THE RECORD , BUT YOU HAVE ONE HERE. AND M R. L OT T C LE AR LY S AYS, Y ES , IT WAS A JOINT D EC IS ION B Y MYSELF AND COUNSEL NOT TO TESTIFY. HE WANTS A S EC ON D B ITE AT THE ALE HERE, A ND BRIEFLY O N T HE DNA ISSUE, IT I S THE S TATE 'S POSITION THAT T HIS ISS UE I S PRO PERLY BEFORE T HE C OU RT HERE. THAT WAS A S EP AR AT E M OTIO N UNDER R ULE 385 3. IT WAS AN ORD ER , A S EPAR AT E ORDER DENYING IT FAR A PA RT FROM THE MOTION FOR POST-CONVICTION RELIEF . INDEED WE DON'T E VEN H AVE A TRANSCRIPT OF T HE H EARI NG O N THIS M OT IO N B EF OR E THE COU RT . IT IS SEPARAT EL Y A EALA BLE. HE WATTS GIV EN 3 0 D AYS T O AEAL. HE CHOSE NOT TO A EA L .

DID HE H AV E C OUNSEL AT T HE TIME?

DID HE H AVE C OUNS EL ?

YES . DOE SN'T THE R UL E R EQ UIRE THAT THE RIGHT TO AEAL WIT HI N 30 DAYS HAS TO BE S TATE D W IT HIN THE ORDER?

YES, YOUR HONOR.

AND WAS IT STA TE D I N T HI S ORDER?

I BELIE VE SO , B UT I 'D H AV E TO CHECK THAT.

MY RECOLLECTION WAS THAT I T WASN'T SO MY FOLLOW- UP QUESTION WAS W HAT' S T HE REMED Y FOR THAT I F T RI AL COU RT F AI LS T O STATE THAT IN THE ORD ER ? > > I'M N OT S URE , YOUR HONOR , BECAUSE IT IS CLEAR FRO M T HE RULE ITSELF A ND COUNSEL WAS AWARE OF THE RULE THAT YOU HAVE TO A EAL T HA T .

CHIEF JUSTICE: L ET 'S J US T , YOU KNOW, BECAUSE FROM T HIS COURT'S POINT OF VIEW IT IS NOT BAD TO HAVE IT I N O NE AEAL RATHER THAN TWO SEPARATE AEALS WHEN YOU KIND OF HAVE T HE WHOLE PICTURE OF THE CASE. SO LET'S GO TO THE M ERIT S J US T LET'S ASSUME WE GET PAST THE PROCEDURAL ISSUE ABOUT W HETHER THE TRIAL COURT PRO PERLY DENIED THE M OTIO N F OR D NA TESTING.

YES, B RI EFLY ON THE M ERITS , IT IS THE STATE'S POS IT IO N THAT THERE WAS N O REA SONA BL E P ROBABILITY AS F OUND B Y THE TRIAL COURT OF A D IF FE RE NT RESULTED SUCH TES TI NG BEE N C ONDUCTED IN T HIS C ASE. IT MUST BE REMEMBERED THAT THREE OF LOT T' S F INGE RP RI NT S WERE FOUND IN AREAS OF THE HOME OR ONE OUT SIDE T HE H OM E WHICH WERE A SSOCIA TE D WIT H ACTS WHICH OCC UR RE D DUR ING T HE MURDER. ONE OF WHICH WAS O N THE MAS TE R BATHROOM SINK , AND L OT T W AS I N POSSESSION OF THE VIC TIM' S S TOLEN PROPERTY IMMED IA TELY AFTER THE MURDER. HE WAS, INDEED , FOU ND USI NG THE VICTIM'S A TM C AR D WIT HI N HOURS OF THE TIM E T HA T T HE MEDICAL E XAMINER PLACED H ER TIME OF D EATH. YOU HAVE HIM USING THE VICTIM'S ATM C ARD WIT H HER PIN NUMBER S UN DA Y E VE NING. THAT E VI DE NC E , C OM BI NED W ITH WITNESS TES TI MO NY , M AD E A BUNDANT LY C LE AR T HA T LOT T W AS INDEED GUILTY AND THIS T ES TING OF HAIRS, T HE RE W AS N O C LAIM THAT THE HAI RS W ER E R EM OTEL Y A SSOCIATED WITH THE CRIME L IKE HAIRS FROM THE TRAP OF THE SINK, AND SHE DID H AV E INVESTIGATOR - - VIS IT OR S I N HER HOME. THERE WASN'T HAIR IN HER HAN D OR HAIRS ASSOCIA TE D WITH THE MURDER. AS TO THE FINGERNAI LS T HE TRIAL TES TI MONY I ND ICAT ED THERE WAS A N I N S IS WOU ND AND H AIR CLIED OFF BUT T HE RE W AS NO TES TIMONY THAT THERE WAS ANY VIABLE MATERIAL UNDER THE FINGERNAILS.I'M A WARE THAT THE M ED ICAL EXAMINER SAID IN A PRO FORM A MATTER THAT T HERE WER E F INGERNAIL SCRAP IN GS D ON E B UT THERE WAS NO SHOWING B Y MR. LOTT THAT THERE WAS A NY MATERIAL TO HAEN I N T HIS CASE.

CHIEF JUSTICE: HOW DOES THAT HAEN IN A PRACTICAL MATTER? DO WE KNOW WHETHER T HE RE ARE STILL FINGE RNAIL S KRAP TI ON AVAILABLE FOR - - SCR APIN GS A VAILABLE FOR T ESTI NG ?

I DON'T RECALL. WE DON'T HAVE THE ERROR OF THAT HEARING AND I DID NOT ATTEND IT. I T HI NK I T W AS E VE N COM E BAN T -- ENC UMBE NT U PO N COU NSEL T O A EAL THAT, A ND I T I S M Y UNDERSTANDING THERE WAS NO MATERIAL. THERE WERE V AG IN AL S WABS T AK EN AND COUNS EL H AS N' T SHOWN THE RE WAS ANY G ENETIC MATER IA L THA T WAS TESTED IN THI S CAS E .

CHIEF JUSTICE: THAT SEEMS LIKE THE F IR ST HUR DL E.

THE TRIAL C OU RT F OU ND S O W HAT, EVEN I F H E C OMMITT ED A CRIME WITH ANOTHER PERSON I T IS NOT G OI NG T O MAK E A D IFFERENCE IN THE SEN TE NCE IN THIS CASE. I DON'T THINK THAT LOT T H AS MADE A PRE LI MINARY S HO WING THERE WAS MATERIAL TO BE TESTED

IN THIS CASE. IT IS NOT L IKE YOU HAVE EVIDENCE OF A RAP E H ER E T HA T YOU CAN GET SEM EN F RO M T HE RAPE KIT A ND THE O NL Y E VI DE NC E BELOW ON THE FIN GE RNAI LS WAS THAT ONE W AS S HORN O FF B Y A KNIFE WOUND A ND Y OU A RE NOT GOING TO FIND A G ENETIC MATERIAL UNDER A F INGERNAI L UNDER THE CIRCUMSTANCES. IF THERE ARE NO F URTHER QUESTIONS, THE STATE HAS NOTHING FURTHER. THANK YOU.

CHIEF JUSTICE: THANK YOU. REBUTTAL ? > > J US TICE Q UINCE , I DID N' T MEAN TO EAR LIER M IS LEAD THE COURT.THERE WAS NOT A S PE CI FI C ADDRESS GIVEN FOR THIS FRU IT STAND. WHAT WAS GIVEN WAS T HAT TH E FRUIT S TAND WAS LOCAT ED O N STATE ROAD 1 6 B ETWEEN S TARK E AND LAKE BUTLER. SO IT WAS A N AREA T HAT W AS GIVEN , N OT 2 10 0 , N OT A S PECIFIC ADDRESS THAT WAS GIVEN, AND T HERE W ERE PHOTOGRAPHS OF THE S TAND . THEY WERE PLACED IN EVIDENCE AT THE EVIDENT IARY HEA RI NG A ND THE S AME P HOTOGRAPHS WERE T HE PHOTOGRAPHS THAT WERE G IV EN T O DEFENSE COUNSEL.

D ID T HE W IT NE SS , M R. JON ES , W AS HE S HO WN T HOSE P HO TOGRAPHS AND SAID, YES, T HIS I S M Y FRUIT STAND AS IT E XIST ED WHENEVER?

YES, HE WAS , A ND H E A LS O NARROWED IT D OWN W HE N THE STATE - - ASSISTANT S TA TE ATTORNEY ASKED HIM QUESTIONS ABOUT A T RAILER THAT WAS THE RE WHEN THEY WERE TALKING ABOUT THE TIME FRAMES AND HE SAI D , YES, I HAD T HIS TRA IL ER A ND I HAD P URCHASED THE TRA ILER WITHIN I BELIEVE IT WAS A YEA R BEFORE THE PIC TU RE W AS T AKEN OR SOMETHING TO THAT EFFECT BUT HE DID N ARRO W T HAT T IME FRAME DOWN SOM EWHAT.

CHIEF JUSTICE: JUST ON THIS ISSUE OF T HE S TRIC KL AN D STANDARD OF UNDER MI NING O UR CONFIDENCE. NOW THAT WE K NO W THA T T HE WIF E WOULD NOT TES TI FY B EC AUSE S HE SAID THAT SHE WAS N'T GOING T O BE A PART OF K ENNY 'S L IE S A NY MORE, WHAT D O W E D O WIT H T HA T TESTIMONY? IN OTHER WORDS, HIS W IF E BASICALLY SAYS THIS IS A L IE . THAT T HI S A LI BI . DO WE TAKE THAT I NT O CONSIDERATION AS T O W HE TH ER OUR CON FIDENCE IN THE OUT CO ME IS UND ERMI NE D?

WELL , SHE NEV ER SAI D THAT THE ALI BI WAS A LIE. SHE SAID SHE WASN'T G OING T O LIE FOR H IM ANY MORE. THERE W AS N O OTH ER TES TI MONY EITHER AT THE EVIDENTIARY O R DURING DEPOSITIONS OR A NYTHIN G TAKEN DURING P REPARATION FOR THE EVIDE NTIARY T O I ND IC AT E THAT THE LIE W AS S PE CI FICA LL Y REGARDING THE ALIBI.

WELL, WHAT ELSE W AS SHE GOING T O T ES TIFY CON CE RNING? I MEAN , I F SHE WAS GOING T O B E CALLED AS A WITNESS, I T W AS T O SUO RT HIS ALI BI . SO WHAT ELSE W OU LD S HE NOT B E LYING ABOUT? > > WELL , A GA IN AT THA T POI NT I WASN'T THERE. I NEVER HAD A NY CON VERS ATION WITH HER. WE ATTEMPTED T O L OCAT E H ER , TRACKED HER TO DIF FERENT EMPLOYERS AND ADDRESSES , AND COULD NOT GET HER U ND ER SUBPOENA TO COME T O C OU RT T O TESTIFY. I DON'T K NOW WHAT E XA CTLY S HE WAS GOING T O TES TI FY T O.

CHIEF JUSTICE: JUSTICE BELL?

WAS HER D EPOS ITIO N TAK EN B EFORE TRIAL BY THE S TA TE ?

SHE GAVE ONE D EPOSITION , I BELIEVE, AND THA T D EP OSIT IO N DID NOT - - T HA T DEPOS ITIO N GAVE LOTT THE ALIBI , B UT T HE N SHE STA RT ED TO G IV E OTH ER S TATEMENTS AND OTHER VAR IA BL ES A ND IT I S MY C ONTENT IO N A T THAT POINT IS WHEN M R. S PE CT OR SHOULD HAVE R EALLY STARTED THIS ALIBI INV ES TIGA TION WHEN SHE IS STARTING TO W AF FL E O N HIM LON G B EF OR E S IX WEEKS PRIOR T O TRIAL.

ON THAT POINT, I G UESS WHA T I C AN'T TELL F ROM THE R ECOR D HERE, IS AT S OM E POINT W AS THERE A C ONCERN THAT SHE W OULD BECOME A WITNESS FOR THE S TATE ? > > NOT R EALLY. THE STATE NEVER CALLED H ER , NEV ER SUB POENAED H ER O R ATTEMPTED TO CONTACT HER

THAT I RECALL FROM T HE T RIAL R ECOR D OR ANY OF THE D EPOS IT IONS , SUBPOENAS , ANYTHING LIKE THAT.

ANY I NVES TI GATO R' S N OTES O R W HATEVER DIS CU SS ED WITH H ER PRIOR TO HER OR SUBSEQUEN T TO HER TELLING THIS TO MR. SPECTOR THAT SHE NOW W AS NOT GOING TO SUORT MR. LOT T? > > NO, SIR.

CHIEF JUSTICE: WHY D IDN'T YOU AEAL THE DNA O RD ER ?

I FEL T A T THA T POI NT I N TIME THAT T HE R EQ UIRE MENT O F 30 DAYS WAS NOT I N T HE O RDER . THAT IT WAS BETTE R A T THAT POINT THAT IT COULD B E CONSIDERED A N ONFI NA L O RDER AND T HAT O NE A EA L WAS SUFFICIENT.

WHAT ABOUT T HE R ECOR D AT THA T H EA RI NG? IS THAT NOT - -

WHA T H AE NED T HA T --.

CHIEF JUSTIC E: YOU MAY ANSWER JUSTICE QUINC E' S QUESTION AND THEN WE ARE O UT OF TIME.

THERE WAS NO FOR MA L HEARING. THE COURT , B OT H COU NS EL , S TATE AND MYSELF, A DV IS ED T HE C OU RT THAT THE COURT H AD G IV EN US LIKE TEN MINUTES AND W E FEL T IT WAS BETTE R T HAT THE COURT D ECIDE THE ISS UE O N T HE MOTIONS THAT WERE FILED.

BUT IT WAS A RG UMEN T ON THE RECORD, WAS A COU RT R EP OR TER THERE?

YOUR HONOR , W E H AV E N O OBJ ECTION TO THE COURT DETERMINING T HE V IA BILI TY O F THIS MOTION ON THE B ASIS O F T HE MOTIONS THAT WERE F ILED B Y THE STATE. THE STA TE'S RESPONSE AND THE DEFENDANT'S MOTION.

CHIEF JUSTICE: THANK Y OUVERY MUCH. THE COURT WILL T AK E T HI S MATTER UNDER ADVISEMENT A ND THE COURT WILL BE I N RECESS UNTIL 9:00 TOMORROW MOR NI NG .

THE MARSHAL: PLEASE RISE .