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Robin Lee Archer v. State of Florida

THE MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: THE NEXT CASE ON THIS MORNING'S CALENDAR IS ARCHER VERSUS THE STATE OF FLORIDA. MISS DYEHOUSE?

THANK YOU VERY MUCH. MAY IT PLEASE THE COURT, SARA DYEHOUSE ON BEHALF OF THE APPELLANT, ROBIN ARCHER. MR.^ARCHER COMES BEFORE THE COURT TODAY WITH A CLAIM AMONG OTHERS OF FACTUAL INNOCENCE, BASED ON THE RECANTATION OF THE PRINCIPLE PARTICIPATEOR, PATRICK BONIFAY. BECAUSE MR.^ARCHER WAS NOT AT THE SCENE OF THE CRIME, WAS NOT AN ACTIVE PARTICIPANT IN THE -- AT THE SCENE OF THE CRIME THE STATE WAS REQUIRED TO PROSECUTE HIM UNDER THE PRINCIPALS THEORY IN WHICH CASE THEY WERE REQUIRED TO SHOW THAT MR.^ARCHER KNEW WHAT WAS GOING TO HAPPEN BUT HE INTENDED TO PARTICIPATE ACTIVELY OR SHARE IN AN INTENDED BENEFIT. AND THAT HE ACTUALLY DID SOMETHING WHICH HE -- BY WHICH HE INTENDED TO HELP COMMIT THE CRIMES. IT IS THE APPELLANT'S POSITION THAT GIVEN THE RECANTATION OF MR.^BONIFAY THE STATE WOULD NO LONGER BE ABLE TO PROVE THESE ELEMENTS, AND SO THE JURY'S VERDICT IN THIS CASE --

THE RECANTATION TESTIMONY, THE TRIAL COURT FOUND THAT MR.^BONIFAY IN THE RECANTATION TESTIMONY WAS NOT CREDIBLE, CORRECT?

THAT'S CORRECT.

HAS THERE BEEN ANY CASE THAT YOU HAVE CITED TO US OR THAT YOU HAVE LOCATED IN WHICH THIS COURT HAS REVERSED A TRIAL COURT ON A DENIAL OF POST-CONVICTION RELIEF FOR RECANTATION WHERE THE TRIAL COURT FOUND THAT THE RECANTATION WAS NOT CREDIBLE?

NO, SIR, I WAS NOT ABLE TO FIND THAT.

ALL OF THE CASES THAT WE HAVE DEALT WITH, SPAZIANO IN WHICH RELIEF HAS BEEN GRANTED ARE CASES IN WHICH THE TRIAL JUDGE MADE THE DETERMINATION THAT THE RECANTATION WAS CREDIBLE, CORRECT?

YES, SIR, THAT IS CORRECT.

SO WE WOULD ESSENTIALLY HERE HAVE TO PLOW NEW GROUND IN ORDER TO REVERSE THIS TRIAL JUDGE?

WELL, PLOW NEW GROUND,, THE RECORD HAS TO SUPPORT THE FINDING OF LACK OF CREDIBILITY.

RIGHT.

SO WHILE APPELLANT UNDERSTANDS HE HAS AN INCREDIBLY UPHILL BURDEN TO SHOW THAT THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF CREDIBILITY, THERE ARE MULTIPLE FACTORS IN THE RECORD THAT WOULD SUPPORT THE FINDING OF CREDIBILITY.

CHIEF JUSTICE: JUST ASIDE FROM CREDIBILITY, I MEAN AND THIS IS I HAVE SOME QUESTIONS FROM MR.^FRENCH WHO SEEMS LIKE VERY DIFFERENT FROM A LOT OF OUR CASES, ONE BECAUSE, AGAIN, HE WASN'T AT THE SCENE OF THE CRIME AS YOU SAID SO BONIFAY BECOMES CRITICAL, BUT AND THERE IS ANOTHER RECANTATION BY I GUESS MR.^BARTH, BUT WYNN'S TESTIMONY THAT BONIFAY TOLD HIM ABOUT THE MURDER-FOR-HIRE BY ARCHER BEFORE THE MURDER WAS NOT RECANTED, CORRECT?

WYNN'S TESTIMONY WAS NOT RECANTED, THAT'S CORRECT.

CHIEF JUSTICE: AND THAT IT WAS IF BONIFAY, I DON'T KNOW HOW THAT CAME INTO EVIDENCE BUT BONIFAY TOLD HIM IT WAS A MURDER FOR HIRE BY ARCHER WAS GOING TO OCCUR?

YES, MA'AM.

CHIEF JUSTICE: SO IS THAT A -- WHAT DOES THAT GO TO AS FAR AS WYNN'S TESTIMONY IS OUT THERE? WAS THAT OFFERED -- WAS WYNN'S TESTIMONY OFFERED IN THE TRIAL ITSELF?

YES, MA'AM.

I'M TRYING TO THINK OF HOW, WOULDN'T THAT HAVE BEEN HEARSAY TESTIMONY?

WELL, YES, IN ARCHER'S TRIAL BASED ON CONVERSATIONS HE HAD HAD WITH BONIFAY, YES, WYNN IS RELATING NOTHING BUT WHAT BONIFAY SAID TOM.

WAS THIS PLED AS A CONSPIRACY ALSO?

NO, MA'AM. THERE WERE SEPARATE TRIALS.

CHIEF JUSTICE: WHAT ELSE LINKS -- WHAT ABOUT LET'S TAKE IT THAT WE AT LEAST HAVE A PRESUMPTION THAT THE TRIAL COURT IS CORRECT IN HIS FINDING THAT MR.^BONIFAY WAS NOT CREDIBLE WHAT DOES POINT TO CONCERNS THAT THE COURT SHOULD HAVE ABOUT THE ISSUE OF CREDIBILITY? FIRST OF ALL, THE TRIAL COURT TALKED ABOUT THE LENGTH OF TIME BETWEEN WHEN BONIFAY ORIGINALLY TESTIFIED AND THEN THE RECANTATION BEING 12 YEARS -

TEN, YES, MA'AM.

CHIEF JUSTICE: SO IS THAT A FACTOR THAT IS AN OBJECTIVE FACTOR THAT SHOULD BE CONSIDERED IN LOOKING AT THE CREDIBILITY OF A RECANTATION?

OF COURSE IT IS. TIME IS ALWAYS A FACTOR IN RECANTATION. HOWEVER, THE TRIAL COURT SEEMED TO SUGGEST THAT THIS WAS A SELF-SERVING STATEMENT THAT HIS RECANTATION WAS SOMEHOW GOING TO HELP MR.^BONIFAY AND IN FACT THE OPPOSITE IS TRUE IF YOU LOOK AT THE RECORD. DURING THE TEN YEARS THAT PASSED FROM THE TIME OF THE TRIAL TO THE TIME OF MR.^BONIFAY'S RECANTATION THEY WERE BOTH GOING THROUGH RESENTENCINGS, AND MR.^BONIFAY DECIDED NOT TO TESTIFY AGAIN AT MR.^ARCHER'S RESENTENCING, FOR WHATEVER REASONS HE TOOK THE 5TH. SO DURING THAT TIME THEY WERE BOTH GOING THROUGH RESENTENCING, OBVIOUSLY HOPING FOR SOME RELIEF. THEY WERE BOTH GOING THROUGH THEN THE APPEALS FROM RESENTENCING AND THEY WERE BOTH GOING THROUGH POST-CONVICTION RELIEF. MR.^BONIFAY WAS IN THE MIDST OF HIS POST-CONVICTION ACTION. HE MADE HIS FIRST SPONTANEOUS STATEMENT TO THE JUDGE DURING HIS HEARING AND THERE IS NO ALLEGATION WHATSOEVER THAT MR.^ARCHER INSTIGATED THE RECANTATION. IN FACT, MR.^ARCHER HAD ALREADY FILED HIS FINAL 3.850 MOTION AND HAD ALREADY HAD HIS HUFF HEARING. THE ISSUES FOR EVIDENTIARY HEARING HAD ALREADY BEEN DECIDED.

IS THERE IS NO NECESSITY THAT HE IN CITY GATE IT?

NO, THAT IS SOMETHING TO LOOK AT.

IN OTHER WORDS, THAT REALLY LET'S SAY THAT THE RECANTATION WAS BROUGHT ABOUT BY THAT DEFENDANT, CODEFENDANT OR WHATEVER WE WANT TO REFER TO AS SIMPLY FEELING, YOU KNOW, MAYBE I CAN AVOID THE DEATH PENALTY FOR MY CODEFENDANT IF I COME UP WITH THIS. NOW, AND THAT THAT -- AND HE FEELS THAT, YOU KNOW, HE HAS HAD A RELIGIOUS CONVERSION AND HE WANTS TO SAVE ALL OF THE LIVES NOW THAT HE CAN, AND SO HE SAYS THAT IS HOW I AM GOING TO DO IT, AND HE JUSTIFIES IT TO HIMSELF. I WOULD APPRECIATE IT IF YOU WOULD TAKE THE TRIAL JUDGE HERE, YOU KNOW, DID AN ANALYSIS STARTING WITH THE JURY INSTRUCTIONS ABOUT CREDIBILITY AND SO TELL US WHERE THE TRIAL JUDGE WENT WRONG IN TERMS OF USING THAT ANALYSIS, COUPLED WITH THEN AS JUSTICE PARIENTE SAYS THIS SORT OF PRESUMPTION THAT HE ACTED CORRECTLY IN THIS CREDIBILITY ANALYSIS, BECAUSE IT IS HEAVILY FACTUALLY BASED SO WHERE DID HE GO WRONG IN THAT ANALYSIS?

YES, SIR. FIRST OF ALL, THE JUDGE COMPARED OR TRIED TO COMPARE MR. BONIFAY'S RECANTATION TESTIMONY WITH THE TRIAL TESTIMONY, AND LET'S SEE I WAS GOING TO SAY RESENTENCING TESTIMONY BUT THERE WASN'T ANY SO ITS ORIGINAL TRIAL TESTIMONY. HOWEVER, JUDGE JONES WAS NOT THE ORIGINAL TRIAL JUDGE. SO ALL HE REALLY HAS IS A COLD RECORD UPON WHICH TO COMPARE THE RECANTATION TESTIMONY, THE LIVE RECANTATION TESTIMONY. ALL HE HAS TO COMPARE IS THE COLD RECORD OF THE TRIAL.

BUT NEVERTHELESS ISN'T THAT ALWAYS A STARTING POINT AND THAT IS THAT, BOY, IF SOMEBODY IS SAYING SOMETHING DIFFERENT NOW AND THEY HAVE SWORN UNDER OATH BEFORE TO SOMETHING ELSE AND RIGHT AWAY THERE IS SORT OF A QUESTION MARK?

ABSOLUTELY.

SO THAT CLEARLY IS A LEGITIMATE FACTOR TO CONSIDER AND THAT EXISTS FACTUALLY, DOES IT NOT? IN OTHER WORDS, CONFLICTING SWORN TESTIMONY BY THE WITNESS?

ABSOLUTELY, BUT I THINK THE JUDGE WAS GOING BEYOND THAT, AND SAYING, YOU KNOW, I FIND HIS Demeanor AND HIS ATTITUDE WHICH ALL RELATES TO HIS CREDIBILITY IN COMPARISON TO HIS TRIAL TESTIMONY MAKES HIM NOT CREDIBILITY AND ALL I'M SAYING IS FROM THE COLD RECORD THAT TYPE OF OR THAT LEVEL OF COMPARISON SIMPLY CAN'T BE DONE BY THIS JUDGE WHO IS NOT THE ORIGINAL TRIAL JUDGE.

DIDN'T HE ALSO COMPARE HIS TESTIMONY TO HIS -- DIDN'T HE MAKE STATEMENTS TO THE POLICE AFTER HE WAS ARRESTED AND SAID SOMETHING TO THE EFFECT OF I SHOT THE WRONG GUY OR I KILLED THE WRONG GUY?

YES.

AND WHY WOULD HE MAKE THAT STATEMENT, ALMOST AN EXCITED UTTER ANSWER TO THE -- UTTERANCE TO THE POLICE IF, IN FACT, HE HADN'T SPOKEN TO ARCHER BEFORE AND ARCHER HADN'T TOLD HIM KILL THIS PARTICULAR PERSON? DIDN'T THAT -- WASN'T THAT TAKEN INTO ACCOUNT ALSO IN DETERMINING HIS CREDIBILITY AT THIS HEARING?

YES, BUT BONIFAY TESTIFIED AT THE EVIDENTIARY HEARING THAT HE MADE THAT STATEMENT NOT AS AN INDICATION OF THIS CONTRACT OR HIT ARRANGEMENT, BUT BECAUSE HE KNEW FROM TALKING WITH ARCHER THAT THERE WAS SUPPOSED TO BE A PARTICULAR CLERK AT THE AUTO PARTS STORE THAT NIGHT.

BUT THE JUDGE DOESN'T HAVE TO BELIEVE THAT TESTIMONY, DOES HE?

NO.

AND HOW ARE WE GOING TO REVERSE HIS DECISION NOT TO BELIEVE IT?

BECAUSE THERE ARE OTHER CORROBORATING FACTORS THAT SUPPORT HIS CREDIBILITY, THE CREDIBILITY OF HIS RECANTATION.

CHIEF JUSTICE: IS IT ALL OR NOTHING HERE? FIRST, THERE IS APPARENTLY THERE IS THE ISSUE ABOUT WHETHER THE MOTIVATION BEFORE GOING IN WAS TO KILL THIS PARTICULAR CLERK BECAUSE ARCHER HAD ASKED HIM TO DO IT. AND THEN, THOUGH, THERE WAS THE ISSUE OF WHETHER HE, AFTER THE FIRST TIME WHEN HE WENT IN, WHETHER HE WAS THREATENED WITH HARM TO THE FAMILY IF HE DIDN'T KILL HIM AND THAT PART IS COMPLETELY RECANTED AND THAT'S THE PART THAT THE PROSECUTOR SAYS HE DIDN'T EVEN BELIEVE THAT TESTIMONY AT THE TIME THAT TESTIMONY WAS MADE. SO IS THERE ANY IS IT ALL OR NOTHING IN THIS SITUATION, EITHER WE BELIEVE AND THE TRIAL COURT SHOULD EITHER BELIEVE EVERYTHING THAT BONIFAY SAID OR NOTHING? IS THERE ANY MIDDLE GROUND? DOES THAT HELP YOU AT ALL?

CERTAINLY NO ONE HAS TO BELIEVE EVERYTHING THIS WITNESS SAYS. HOWEVER, THE STANDARD IS WHETHER THE RECANTATION WOULD LIKELY PRODUCE AN ACQUITTAL.

CHIEF JUSTICE: THEN LET ME ASK YOU THIS: BECAUSE THE STATEMENT ABOUT BEING THREATENED TO THE FAMILY WASN'T MADE IN ANY OF BONIFAY'S PRETRIAL STATEMENTS AND ONLY MADE AT THE TIME OF TRIAL, AND THAT'S BEEN RECANTED AND SO THAT WAS INCONSISTENT WITH HIS PRIOR TESTIMONY AND THAT WAS EVEN A AT THE SAME TIME THAT EVEN THE PROSECUTOR THOUGHT WAS EMBELLISHING SOMETHING. THAT'S NOT ENOUGH IN ITSELF IF WE SAY THAT PART SOUNDS LIKE HE PROBABLY MADE THAT UP. TO MEET THE SECOND PRONG OF JONES WHICH IS THE LIKELIHOOD OF ACQUITTAL ON RETRIAL, CORRECT?

I DON'T THINK YOU SHOULD TAKE IT PIECEMEAL STATEMENT BY STATEMENT. COLLECTIVELY WHAT MR. BONIFAY CAME IN AND SAID IN HIS RECANTATION IS THERE WAS NO CONTRACT, THERE WAS NO HIT. THERE WAS NO PLAN TO KILL THE CLERK.

WHAT DID HE OFFER AS THE EXPLANATION THEN TO IMPLICATE ARCHER FROM THE BEGINNING? BECAUSE HE CERTAINLY DIDN'T --

HE WANTED TO SHOVE RESPONSIBILITY OFF TO AN OLDER PERSON. HE WAS TALKING WITH THE POLICE AND THE POLICE WERE TELLING HIM, AND THIS IS HIS TESTIMONY, THEY WERE THREATENING HIM WITH THE ELECTRIC CHAIR. HE IS 17 YEARS OLD AND HIS ARGUMENT WAS, YOU KNOW, I'M SITTING HERE, I'M 17, I'M HIGH. THEY ARE TELLING ME ABOUT THE CHAIR. I'M READY TO SHOVE RESPONSIBILITY ON TO SOMEBODY ELSE SO I PICKED ARCHER. HE IS OLDER, AND HE WAS --

HOW MUCH OLDER WAS HE AT THE TIME?

HE WAS 26.

AND THEY WERE COUSINS?

THEY WERE NOT REALLY RELATED. THEY WERE LIKE --

DID THEY CALL EACH OTHER COUSINS OR CONSIDER?

AT TIMES, YES. AT TIMES, NO. ULTIMATELY I THINK BONIFAY WAS THE STEPSON OF A PERSON BY MARRIAGE OR SOMETHING.

CHIEF JUSTICE: BUT THE TRIAL COURT FOUND AND I ASSUME YOU AGREE WITH THIS, THE DEFENDANT, HE REITERATED THAT THE DEFENDANT TOLD HIM HOW TO COMMIT THE CRIME, WHERE THE SECURITY MEASURES WERE, WHERE THE MONEY WAS KEPT, WHERE THE STORE AND HOW THE STORE SERVED AS A COLLECTION POINT AND ALSO ASSERTED HE DID HAVE A PROBLEM WITH DANIEL WELLS. HE STILL SAYS EVEN IN HIS RECALLED TESTIMONY THAT ARCHER WAS KIND OF CRITICAL TO HIM BECAUSE HE TOLD HIM MAYBE NOT TO COMMIT IT, BUT HOW TO COMMIT IT.

RIGHT, YES.

CHIEF JUSTICE: YOU AGREE WITH THAT. SO THIS IS NOT LIKE HE PICKED ARCHER OUT OF THIN AIR?

THAT'S CORRECT.

CHIEF JUSTICE: ARCHER WAS PRETTY CONNECTED WITH THIS CRIME?

ALTHOUGH BONIFAY SAID HE HAD BEEN TO THE STORE. IN THE RECALLED TESTIMONY HE ADMITTED HE HAD BEEN TO THE STORE. HE KNEW WHERE THE COLLECTION BOXES WERE. HE HAD SOME INFORMATION. HE DIDN'T GET IT ALL FROM ARCHER, BUT, YES, HE STILL IMPLICATES ARCHER IN AT LEAST PROVIDING SOME OF THE INSIDE INFORMATION AND THAT'S ONE OF THE INDICIA OF CREDIBILITY OR ONE OF THE CORROBORATING CIRCUMSTANCES THAT SUPPORTS CREDIBILITY. IF HE HAD WANTED TO HE COULD COME IN AND SAY ARCHER HAD NOTHING WHATSOEVER TO DO WITH THIS. WE DIDN'T TALK. HE DIDN'T GIVE ME ANY INSIDE INFORMATION, ZERO, BUT HE DIDN'T. HE IS STILL IMPLICATING HIM TO SOME DEGREE.

IN ADDITION TO WHEN THERE WAS ALSO TESTIMONY BY A FELLOW NAMED WEBBER, WAS THERE NOT?

YES, SIR.

AND THEN HIS TESTIMONY WAS THAT HE TALKED WITH ARCHER OR ARCHER AND HE WERE TOGETHER THE DAY AFTER THIS CRIME WHEN THEY CAME OVER OR THEY CAME OVER TELEVISION?

IT WAS A NEWS REPORT, RIGHT.

AND THAT ARCHER SAID SOMETHING TO THE EFFECT THAT HE KNEW HOW THAT CRIME WAS COMMITTED AND HE HAD TOLD HIM O -- HE HAD TOLD THIS FELLOW HOW TO DO IT OR SOMETHING LIKE THAT; ISN'T THAT CORRECT?

HE ASKED MR. WEBBER WHAT THE NEWS REPORT WAS. WEBBER TOLD HIM AND HE SAID I THINK I KNOW WHO DID THIS. I TOLD THEM HOW THEY COULD DO IT, AND THERE WAS QUITE AN EXCHANGE AT THE TRIAL WHEN MR. WEBBER, ABOUT DID ARCHER SAY HE TOLD THEM TO DO IT, AND MR. WEBBER SAID, NO, ABSOLUTELY NOT. IT WAS JUST HE GAVE HIM INFORMATION AND HE RELATED TO MR. WEBBER WHAT HE SAID, TO THE SUSPECTED PERPETRATORS.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL IF YOU WOULD LIKE TO SAVE SOME TIME.

YES, I WOULD, THANK YOU.

MAY IT PLEASE THE COURT, CURTIS FRENCH REPRESENTING THE STATE OF FLORIDA IN THIS CAUSE. ADDRESSING THE RECALLED TESTIMONY INITIALLY WE WOULD JUST RELY VERY STRONGLY ON THE FACT THAT THE TRIAL COURT IN THIS CASE MADE AN EXPRESS FINDING THAT MR. BONIFAY'S TESTIMONY WAS NOT CREDIBLE.

CHIEF JUSTICE: LET ME GO OVER THIS FIRST OF ALL. THE ORIGINAL TRIAL AND THIS IS -- CONCERNS ME, AND I HAVE TO BE VERY CANDID THAT WE HAVE EITHER THE TRIAL COURT IS CREDIBLE. WE HAVE UPHELD IT IF WE FIND IT IS NOT CREDIBLE WE HAVEN'T. MOST OF THE RECANTATION CASES I'VE SEEN INVOLVE THESE JAILHOUSE SNITCHES WHO WE TALK ABOUT YOU NEVER KNOW WHEN THEY ARE TELLING THE TRUTH, ANYWAY, BUT HERE THIS IS A PERSON THAT IS BEING PROSECUTED FOR A CRIME SOLELY AS A PRINCIPAL, CORRECT? HE WASN'T AT THE SCENE?

CORRECT.

SO HOW DOES THE STATE HAVE TO RELY ON BONIFAY PRIMARILY?

WE DISAGREE WITH THAT.

OKAY. TELL US --

THE STATE WAS NOT EVEN GOING TO USE BONIFAY AS A WITNESS. HE WAS A CODEFENDANT IN THIS CASE. BONIFAY WAS PROSECUTED AND I BELIEVE, WELL, FIRST THE GUILT PHASE IN BONIFAY OCCURRED FIRST AND THEN THE GUILT PHASE IN ARCHER AND THEN THE PENALTY PHASE IN BONIFAY AND THEN THE PENALTY PHASE IN ARCHER AND I BELIEVE THAT BONIFAY CAME OR THROUGH HIS ATTORNEY APPROACHED THE STATE ABOUT TESTIFYING IN ARCHER'S CASE ONLY AFTER HE WAS CONVICTED. IT WAS A VERY SHORT TIME BEFORE THE TRIAL SO THE STATE DID NOT EVEN PLAN TO USE BONIFAY.

CHIEF JUSTICE: HOW WOULD THEY GO AND CONNECT HIM TO HAVING BEEN THE -- I MEAN AGAIN THIS IS A 7-5 JURY FINDING ON THE PENALTY PHASE.

OBVIOUSLY THE FACT THAT ARCHER WAS THE INSIDE MAN, NUMBER ONE, WHO PROVIDED ALL SORTS OF INFORMATION THAT WAS CRITICAL TO CARRYING OUT THIS CRIME.

CHIEF JUSTICE: THROUGH WHO WAS GOING TO TESTIFY? WHO TESTIFIED TO THAT, OTHER THAN BONIFAY?

THERE WERE THE OTHER CODEFENDANTS IN THE CASE, INCLUDING BARTH, THERE WAS WYNN.

CHIEF JUSTICE: HOW, HAS BARTH ALSO RECANTED HIS TESTIMONY?

NO, MA'AM. WHAT HE TESTIFIED, AND BARTH TESTIFIED IN BONIFAY'S TRIAL WHICH AGAIN OCCURRED FIRST THAT BONIFAY HAD APPROACHED HIM OR THEY WERE IN JAIL TOGETHER AND BONIFAY HAD HAD SOUGHT TO ELICIT FROM HIM CERTAIN TESTIMONY THAT HE SAID WAS NOT TRUE BUT BARTH TESTIFIED THEN AND HAS TESTIFIED SINCE THAT CONSISTENTLY HIS TESTIMONY AT TRIAL HE SAID WAS THE TRUTH AND HE HAS NEVER RECANTED THAT, AND THAT WAS THAT BONIFAY APPROACHED HIM ABOUT COMMITTING THIS CRIME AND TOLD HIM ARCHER WANTED IT COMMITTED AND ALL OF THE VARIOUS THINGS THAT HAPPENED DURING THE CRIME.

WOULD THAT HAVE BEEN ADMISSIBLE?

EXCUSE ME?

HOW WOULD THE STATE HAVE GOTTEN IN BONIFAY'S STATEMENT TO BARTH? BECAUSE I'M REALLY CONCERNED HERE, BECAUSE AS I LOOK AT THIS RECORD, NEITHER WYNN NOR WEBBER NOR ANYONE ELSE ACTUALLY EVER HEARD OR ARCHER TELL BONIFAY THAT HE WANTED SOMEONE KILLED. WE ALL CAN AGREE THAT HE GAVE HIM INSTRUCTIONS ABOUT ROBBING THE PLACE, HOW TO GET IN, HOW TO GET AROUND THE SECURITY CAMERAS, THOSE KINDS OF THINGS, BUT THE ONLY PERSON, AS I LOOK AT THIS RECORD, WHO ACTUALLY SAYS THAT ARCHER ASKED

THAT WELLS BE KILLED WAS BONIFAY. NO ONE ELSE EVER HEARD THAT.

BUT IT WASN'T JUST HIS TESTIMONY. IT WAS ALSO HIS STATEMENTS THAT HE MADE TO OTHERS BEFORE THE CRIME OCCURRED.

THAT WHO MADE TO OTHERS?

THAT BONIFAY MADE FOR ONE EXAMPLE TO WYNN.

THOSE ARE THE STATEMENTS I'M ASKING YOU ABOUT. HOW DO YOU GET THOSE STATEMENTS INTO EVIDENCE IN MR.^ARCHER'S TRIAL?

CHIEF JUSTICE: IN OTHER WORDS YOU WERE SAYING IN ANSWER TO MY QUESTION, THERE WAS OTHER EVIDENCE YOU DIDN'T REALLY NEED BONIFAY SO JUSTICE QUINCE IS SAYING HOW WOULD THAT OTHER EVIDENCE COME IN?

WELL, IT DID COME IN. RIGHT OFF THE TOP OF MY HEAD I'M NOT SURE I KNOW EXACTLY HOW IT CAME IN. IT IS IN THE EVIDENCE.

CHIEF JUSTICE: IT IS BLATANT HEARSAY WHAT BONIFAY SAYS TO SOMEBODY ELSE ABOUT ARCHER CAN'T COME IN DIRECTLY. I MEAN, IF WE WERE --

IT CAN COME IN TO SHOW THAT THERE WAS, IN FACT, A PLAN TO KILL.

DID IT COME IN AS A COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE?

RIGHT OFF THE TOP OF MY HEAD I DON'T KNOW HOW IT CAME IN. IT CAME IN.

BUT EVEN -- IT JUST SEEMS TO ME THAT WHEN YOU LOOK AT MR.^WYNN'S STATEMENT, MR.^WYNN NEVER SAYS THAT ARCHER WANTED THIS GUY KILLED. HE SAYS, WELL, HE SAYS ARCHER WANTED THIS GUY KILLED, BUT HE NEVER SAYS THAT ARCHER ASKED BONIFAY TO KILL MR.^WELLS. NONE OF THESE PEOPLE ACTUALLY SAY, MAKE THAT KIND OF STATEMENT. THAT'S WHAT IS TROUBLING TO ME.

AS I READ THE TESTIMONY, THEY SAY, NUMBER ONE, THAT BONIFAY, I MEAN THAT ARCHER HAD PROVIDED THE PLAN FOR THIS TO BE CARRIED OUT AND THAT HE WANTED A CERTAIN PERSON KILLED, AND THEN OF COURSE BONIFAY ULTIMATELY TESTIFIED TO THAT FACT.

CHIEF JUSTICE: I GUESS I ASKED YOU THAT THIS REQUIRED BONIFAY -- IN ORDER TO PUT ARCHER AS A PRINCIPAL IN THIS CRIME, HE WASN'T AT THE SCENE, DIDN'T YOU NEED BONIFAY? YOU SAID, NO, THERE WAS LOTS OF OTHER EVIDENCE SO I JUST NEED YOU TO TELL ME WHAT ALL OF THAT LOTS OF OTHER EVIDENCE IS.

I POINTED OUT THE EVIDENCE THAT CAME IN AND IT IS IN THERE AND --.

CHIEF JUSTICE: BUT WE ARE HERE. THIS GUY IS NOW ON A 7-5. I'M VERY CONCERNED ABOUT THIS CASE, BECAUSE I HAVE, AGAIN, I UNDERSTAND WE GIVE THE TRIAL COURT GREAT LEEWAY IN TERMS OF DECIDING CREDIBILITY, BUT IT ALSO SEEMS THAT WE RELY ON A JURY TO REALLY MAKE ULTIMATE DETERMINATIONS OF CREDIBILITY, AND THIS RECANTATION BEING THAT IT WAS SPONTANEOUS, I REALLY DON'T SEE HOW IT WAS SELF-SERVING, AND SO REALLY WE ARE KIND OF LOOKING AND SAYING SOMEHOW THE JUDGE DECIDED BASED ON HIS Demeanor, IT WASN'T CREDIBLE, BUT THAT'S, YOU KNOW, HOW DO YOU REVIEW THAT? DO YOU JUST ACCEPT --.

THE ONLY LENGTH OF DELAY, YOU LOOK AT THE CONFLICT WITH THE OTHER EVIDENCE IN THE CASE, AND YOU LOOK AT HIS POSSIBLE INTEREST. I DISAGREE THAT HE HAD NO INTEREST IN

TESTIFYING IN THE MANNER HE DID IN HIS RECANTATION.

CHIEF JUSTICE: BUT ISN'T IT TRUE AND THIS IS NOT SOMETHING WHERE THE LAWYER, THE LAWYER ADVISED HIM AGAINST THE TESTIMONY. HE TOLD HIM NOT TO TESTIFY. HE TESTIFIED AGAINST HIM LAWYER'S WISHES. JUDGE JONES WAS SO CONCERNED AT THE TIME THAT MR. BONIFAY BEGAN TELLING ALL OF THIS THAT HE AGAIN WARNED HIM, YOU KNOW, ANYTHING YOU SAY CAN BE USED AGAINST YOU.

IT WAS INCRIMINATING TO BONIFAY WITH REGARD TO THE GUILT PHASE INsofar AS THE PENALTY PHASE IS CONCERNED, THOUGH, IF HIS TESTIMONY IS BELIEVED CCP AGGRAVATOR DOES EXIST SO THAT EXTENT IT DOES HELP HIM. THE ONLY DIFFERENCE IN HIS RECANTATION TESTIMONY IN HIS PRIOR TESTIMONY IS THAT WHAT HE SAYS NOW IS THAT ARCHER DID NOT TELL HIM TO DO THE CRIME AND THERE WAS NO PLAN TO KILL BUT THERE IS A LOT OF EVIDENCE THERE WAS A PLAN TO KILL INCLUDING AND NOT LIMITED TO THE FACT THAT THEY WORE SKI MASKS SO THEY COULDN'T BE IDENTIFIED BY THE CAMERAS BUT THEY DIDN'T PUT THEM ON UNTIL AFTER THE CLERK SAW THEIR FACES FRIDAY NIGHT AND SATURDAY NIGHT.

CHIEF JUSTICE: WE TALK ABOUT GUILT PHASE AND ALSO PENALTY PHASE. CERTAINLY THE CONCERN I HAVE IS IN THE PENALTY PHASE IN TERMS OF THE CCP AGGRAVATOR, THAT IF SOMEHOW THAT ARCHER IS, YOU KNOW, HELPED THEM TO COMMIT THE CRIME BUT WAS HE PLANNING, WAS THERE THIS DETAILED PLAN IN ADVANCE TO SPECIFICALLY KILL SOMEBODY?

IT WAS A DETAILED PLAN.

BUT THE PLAN TO KILL OR A PLAN TO ROB?

WELL, BOTH OF THEM. THE PLAN TO KILL WAS -- IF THEY HAD WORN THE MASKS FROM THE OUTSET I DON'T KNOW THERE WOULD BE ANY EASY IT TO KILL HIM. ONCE THEY ALLOWED HIM TO IDENTIFY THEMSELVES THE ONLY REASON THEY KILLED THE CLERK IS BECAUSE WELLS WANTED THE PERSON TO BE KILLED.

WHAT ABOUT THESE OTHER RED FLAGS THAT ONE OF THEM THAT WAS ALLUDED TO I THINK BY AN ASSISTANT STATE ATTORNEY. THAT IS, THAT BONIFAY'S STORY WAS THAT HE WAS THREATENED AND APPARENTLY THE ASSISTANT STATE ATTORNEY SAID THAT HE NEVER PUT ANY STOCK IN THAT AND THEN THERE IS ANOTHER RED FLAG AND THAT IS THAT IF I UNDERSTAND BONIFAY'S FIRST STATEMENT IT WAS THAT HE WAS PROMISED A MILLION DOLLARS OR SOMETHING BY SOMEBODY THAT CLEARLY DIDN'T HAVE ACCESS, YOU KNOW, TO A HUGE SUM OF MONEY.

PROBABLY DOESN'T HAVE ACCESS TO THAT MUCH MONEY. HE HAD ACCESS TO MONEY.

BUT WHAT ABOUT THOSE -- HOW WAS THE MONEY ISSUE EVENTUALLY RESOLVED BY THE WAY? WAS THERE EVER ANY CREDIBILITY IN THAT STATEMENT THAT HE WAS PROMISED, THE AMOUNT, HALF A MILLION DOLLARS?

BONIFAY SAID THAT ARCHER TOLD HIM IT WAS HALF A MILLION DOLLARS BUT HE KNEW IT WASN'T THAT MUCH. NOW, THE TRIAL JUDGE IN THE SENTENCING ORDER SAID WHETHER HE WAS GOING TO GET AN ADDITIONAL SUM FROM ARCHER WAS ONLY SUPPOSED TO RECEIVE THE PROCEEDS FROM THE STORE WHICH HE EXPECTED TO BE CONSIDERABLE SINCE IT WAS THE DROP FOR ALL OF THE STORES IN THE AREA. IT DOESN'T MATTER THAT THAT WAS STILL THE PROMISE FOR REMUNERATION FOR COMMITTING THE CRIME AND I ALSO HAVE TO POINT OUT I THINK IT IS HIGHLY SIGNIFICANT THAT BONIFAY TOLD THE POLICE SHORTLY AFTER HE WAS ARRESTED THAT ARCHER TOLD HIM HE HAD KILLED THE WRONG MAN. BONIFAY COULD NOT POSSIBLY HAVE KNOWN IF THE WRONG MAN WAS KILLED OR NOT KILLED. HE DIDN'T KNOW WHO WAS THERE THAT NIGHT AND WHO WAS THERE THE NIGHT BEFORE. HE DIDN'T KNOW WELLS AND HE HAD NO

MOTIVE TO KILL WELLS UNLIKE ARCHER. SO THAT INDICATES, A, THAT THERE WAS A PLAN TO KILL AND NOT JUST A PLAN TO KILL BUT TO KILL A CERTAIN PERSON.

HOW DOES THIS FIT IN WITH WHAT BENEFIT BONIFAY WOULD GET BY CHANGING HIS TESTIMONY AT THIS TIME? I THINK FORDHAM HAS ALWAYS ALLEGED THERE IS NEVER ANY PLAN TO KILL?

FORDHAM DIDN'T TESTIFY. BARTH TESTIFIED THAT BONIFAY DIDN'T TELL HIM THERE WAS A PLAN TO KILL. BONIFAY TOLD THAT TO WYNN WHO HE TRIED TO RECRUIT AS A DRIVER FOR THE CRIME AND WYNN DECLINED. ON THAT BASIS.

I GUESS IF HE CHANGES THE STORY THERE WAS NO PLAN TO KILL; IS THAT CORRECT?

THAT'S CORRECT.

IT IS JUST A ROBBERY GONE BAD?

AND THE EVIDENCE CONTRADICTS THAT.

HOW DOES THAT BENEFIT BONIFAY?

THERE IS NO PLAN TO KILL, IF THERE IS NO PLAN TO KILL THE CCP AGGRAVATOR DOESN'T EXIST AND ALL YOU HAVE IS A MURDER DURING THE COURSE OF A ROBBERY. AND AT THE TIME BONIFAY RECALLED HE WAS STILL DEATH ELIGIBLE. IT WAS THE SUPREME COURT DECISION ROVER CAME OUT MANY, MANY MONTHS AFTER HE RECALLED WHILE BONIFAY'S CASE WAS UP ON APPEAL HERE.

SO THE AGE DOES PLAY INTO IT AS A FACTOR WITH THE TIMING OF WHEN THIS WAS DONE?

WHAT WAS YOUR QUESTION? I'M SORRY?

THE AGE FACTOR IS A CONSIDERATION WITH REGARD TO THE TIMING AND THAT IS SOMETHING THAT IS SURROUNDING THE RECALLED? IS THAT WHAT YOU ARE SUGGESTING TO US?

I'M SUGGESTING THAT IT IS NOT A FACTOR.

IT IS NOT A FACTOR?

BECAUSE HE RECALLED AT A TIME WHEN HE WAS STILL EXPOSED.

ROPER WAS DECIDED AFTERWARDS?

AT LEAST A YEAR AFTERWARDS. I'M NOT SURE EXACTLY, BUT EARLIER THIS YEAR.

NOW, AT THE TIME THAT THIS OCCURRED, IT APPEARS TO ME THAT ARCHER WAS 26.

THAT'S CORRECT.

AND BONIFAY WAS 17. WERE THE REST OF THESE --

THERE WERE 17 ALSO.

MEN WERE ALSO 17 SO ARCHER WAS THE OLDEST?

CORRECT.

AND THEN AS THE PROSECUTOR POINTED OUT IN HIS CLOSING ARGUMENT WHEN THEY FIRST

FOUND OUT ABOUT THIS CRIME.

AND THERE WAS A DETERMINATION IN THIS CASE THAT THERE HAD BEEN CCP?

CORRECT. THAT IT WAS PLANNED IN ADVANCE BY ARCHER WHO PUT BONIFAY UP TO IT.

CHIEF JUSTICE: WAS THE UNCONSTITUTIONAL INSTRUCTION GIVEN IN THIS CASE? I HAVE A NOTE ABOUT THAT.

I DON'T RECALL. I BELIEVE THAT WAS AN ISSUE ON APPEAL, BUT I DON'T RECALL HOW THAT WAS.

ALL RIGHT.

CHIEF JUSTICE: SO AGAIN I'M STILL TRYING TO FIGURE OUT THE SELF INTEREST ISSUE. YOU HAVE IN THIS CASE, I WOULD THINK IF THIS RECANTATION OCCURRED AFTER HE WAS NO LONGER ELIGIBLE FOR THE DEATH PENALTY THEN THERE IS NO, YOU KNOW, HE COULD TESTIFY AND TOTALLY EXONERATE ARCHER. WHAT GIVES ME, AGAIN, CAUSE ABOUT THE CREDIBILITY HERE IS THAT AS MISS DYEHOUSE SAID IT IS NOT LIKE A TOTAL RECANTATION TO MAKE IT INCREDIBLE. HE STILL SAYS, YES, ARCHER GAVE ME A LOT OF DETAILS ABOUT THE CRIME. WE KNOW THAT BONIFAY WAS COMMITTING CRIMES AT AROUND THIS TIME WITHOUT ARCHER'S INVOLVEMENT, THE VARIOUS CRIMES THAT HE WAS GUILTY OF, AND YET ALL HE IS REALLY, YOU KNOW, SO HOW DOES IT HELP THAT HE WAS STILL DEATH ELIGIBLE IF HIS OWN LAWYER ADVISED HIM AGAINST GIVING THIS TESTIMONY?

HIS OWN LAWYER AT THAT TIME HAD SOME GUILT PHASE ISSUES, INCLUDING THE MOTION TO SUPPRESS AND SOME OTHER ISSUES THAT WOULD HAVE BEEN AFFECTED BY HIS TESTIMONY. THAT IS NOT TO SAY THAT BONIFAY DIDN'T HAVE AN INTEREST.

CHIEF JUSTICE: AGAIN IF WE ARE REALLY LOOKING AT -- LET ME FINISH. IF WE ARE REALLY LOOKING AT THE TOTALITY OF THE CIRCUMSTANCES HERE, EVEN THOUGH SOMEONE NOT IN MANY OF THESE CASES AGAIN IN CCR THAT GOES TO THE JAIL, FINDS THE PERSON AND THEN THERE IS SOME PART OF RECANTATION. THIS IS SO DIFFERENT FROM THAT SITUATION YOU'VE GOT A PERSON THAT IS STILL UNDER THE GUILT PHASE ISSUES, HIS OWN ATTORNEY IS TELLING HIM NOT TO TESTIFY. HE RECANTS NOT THE WHOLE THING BUT SOME CRITICAL ASPECTS, STILL PUTS, YOU KNOW, ARCHER IN AS POSSIBLY HE COULD THAN FOUND GUILTY AS A PRINCIPAL, BUT IT SEEMS LIKE ESPECIALLY FOR THE PENALTY PHASE THERE WOULD BE SOME SERIOUS QUESTIONS THE JURY MIGHT HAVE WITH WHAT BONIFAY HAS TO SAY, AND I AM NOT SURE. I GUESS I'M JUST STRUGGLING WITH THE TESTIMONY OF I MEAN THE FINDING OF THE JUDGE THAT NONE OF THIS WAS CREDIBLE.

WELL, HE MADE THAT FINDING BASED ON A NUMBER OF FACTORS, INCLUDING THE FACTOR I JUST ENUMERATED PLUS HIS OBSERVATION OF HIS TESTIMONY AND LET ME POINT OUT AND ALSO THE FACT THAT SOME OF THESE THINGS CAME OUT AFTER HE WAS ON TRIAL. TALKING ABOUT THE RED FLAG ABOUT BONIFAY SAYING THAT HE ONLY WENT BACK BECAUSE OF THE THREAT. WELL, THAT WAS CONTRARY TO STATEMENTS HE HAD MADE SATURDAY AFTER THE ABORTED FRIDAY ATTEMPT TO HIS CODEFENDANTS, AND ANOTHER PERSON, WHICH WAS THAT THAT ATTEMPT GOT ABORTED NOT BECAUSE HE GOT COLD FEET OR WAS DECIDING HE COULDN'T GO THROUGH WITH IT, BUT ONLY BECAUSE THE CLERK HAD HEARD HIM DOCKING THE GUN -- COCKING THE GUN AND HAD SHUT THE WINDOW. THE STATE ATTORNEY SAID THAT EITHER THE THREATS WEREN'T MADE OR HE CANNOT THINK THAT WAS WHY HE WENT BACK AND THAT'S WHAT HE ARGUED AT THE TIME, TOO, THAT THAT'S NOT WHY WILL BONIFAY RETURNED SATURDAY NIGHT. HE WANTED TO CARRY OUT THE CRIME AND GET THE MONEY THAT HE HAD BEEN PROMISED.

WELL, THE TRIAL JUDGE, I DO NOTE, WAS OBVIOUSLY UNDER THE PRE-ROPER CONCEPT THAT BONIFAY WAS ELIGIBLE FOR THE DEATH PENALTY.

CORRECT.

AND HE DEALT WITH THAT IN HIS ORDER. DID BONIFAY HAVE AN INTEREST AND HOW THE CASE SHOULD BE DECIDED, AND HE ANSWERED THAT THIS WAS NOT A PLANNED MURDER BUT SIMPLY A ROBBERY GONE BAD THEN BONIFAY IS PROBABLY NOT ELIGIBLE FOR THE DEATH PENALTY, AND THAT'S --

I THINK THAT IS A LEGITIMATE FACTOR TO CONSIDER. THERE IS ALSO THE FACT THAT HE HAS BEEN INCARCERATED ALL OF THIS TIME, AND SOMETIMES PEOPLE THAT HAVE BEEN IN PRISON FOR A LONG TIME AFTER THEY HAVE COOPERATED WITH THE STATE THEY DO RECONT LATER BECAUSE THEY HAVE BEEN HARASSED OR WORSE BECAUSE THEY WERE A SNITCH AND COOPERATED WITH THE STATE AND RECONT THEIR TESTIMONY AND THAT'S WHY RECONTATIONS ARE ARE CONSIDERED UNRELIABLE, BUT I'M NOT ASKING YOU TO LOOK JUST AT THAT FACTOR AND JUST AT THE OTHER FACTOR BUT ALSO THE OTHER THINGS. I MEAN, HIS TESTIMONY, HIS PRESENT TESTIMONY THAT THERE WAS NO PLAN TO KILL JUST CONTRADICTED BY A VARIETY OF FACTORS.

THIS RECONTATION FIRST CAME OUT DURING BONIFAY'S 3.850?

THE RECONTATION?

RIGHT.

YES, HE MADE STATEMENTS AND THEN THEREAFTER --

DOES OUR RECORD IN THIS CASE REFLECT WHAT BONIFAY'S CONTENTIONS WERE AT HIS 3.850 AS TO WHY HE --

YES, THE TRIAL JUDGE, AT THE REQUEST OF THE PARTIES, TOOK JUDICIAL NOTICE IN THIS CASE OF BONIFAY'S TRIAL, ARCHER'S SENTENCING AND RESENTENCING AND BONIFAY'S POST EVIDENTIARY HEARING SO ALL OF THAT WAS BEFORE THE TRIAL AND COURT AND I WOULD ASSUME BEFORE THIS COURT, ALSO.

YOU KEEP ALLUDING TO THE FACT THAT THERE IS EVIDENCE THAT ACTUALLY CONTRADICTS HIS STATEMENT THAT THERE WAS NO PRE-PLAN TO KILL. WHAT IS SPECIFICALLY THE EVIDENCE THAT YOU RELY ON THAT YOU SAY CONTRADICTS THAT STATEMENT?

WELL, TWO THINGS. NUMBER ONE, THAT THEY BROUGHT SKI MASKS TO THE SCENE OF THE CRIME TO PUT ON SO THAT THE SECURITY CAMERAS WOULD NOT IDENTIFY THEM, BUT THEY DID NOT PUT ON THE SKI MASKS UNTIL AFTER THE CLERK SAW THEIR FACE OR SAW BONIFAY'S FACE. THAT'S NUMBER ONE.

AND THAT MEANS WHAT?

WELL, IF THEY HAD PUT ON THE SKI MASKS AHEAD OF TIME AND THEY COULD NOT BE IDENTIFIED IT JUST SEEMS TO ME THAT'S CONSISTENT WITH A PLAN TO KILL IF THEY ALLOW THE CLERK TO SEE WHO THEY ARE AND ONLY THEN PUT ON THE SKI MASKS.

CHIEF JUSTICE: WHY DID THEY BRING THE MASKS?

SO SECURITY CAMERAS COULD NOT IDENTIFY THEM. THERE WERE SECURITY CAMERAS IN THE MAIN PART OF THE STORE AND THE BACK OF THE STORES AND THEY ACTUALLY FILMED THEM SHOWING THEY WERE IN A TOTAL OF FOUR MINUTES. THEY COMPLETED THIS CRIME, THEY WORE SKI MASKS AND COULD NOT BE IDENTIFIED FROM THE SECURITY CAMERAS. THAT'S SOMETHING

ARCHER TOLD THEM ABOUT. HE ALSO KNEW THEY HAD TO ROB THE PLACE BETWEEN 10:00 AND 12:00 BECAUSE AFTER 10:00 THERE WOULD BE ONLY ONE PERSON IN THE STORE. HE ALSO PROVIDED --

I GUESS I'M STILL HAVING A PROBLEM CONNECTING THOSE TWO FACTORS WITH HOW THEY NEGATE HIS STATEMENT THAT THIS WAS NOT A PLAN TO KILL. I MEAN, IT IS ALL QUITE CLEAR THAT THERE WAS A PLAN TO CERTAINLY ROB THIS PLACE, AND SO --

AND ARCHER WAS BEHIND IT, TOO.

AND NO DOUBT ALL OF THEM SEEMED TO SAY THAT ARCHER SUPPLIED A GUN AND DID, YOU KNOW, OTHER THINGS THAT CERTAINLY WOULD MAKE HIM A COCONSPIRATOR TO A ROBBERY.

CORRECT.

BUT I AM STILL TRYING TO, I'M GRAPPLING WITH WHAT ARE THOSE FACTS THAT NEGATE HIS STATEMENT THAT THERE WAS NO PREPLAN TO KILL?

ARCHER ALONE HAD THE MOTIVE TO DO IT. I THINK WE ARE ENTITLED TO RELY ON BONIFAY'S ORIGINAL TESTIMONY AND HIS STATEMENTS TO THE POLICE THAT THERE WAS A PLAN TO KILL AND ARCHER PROVIDED THAT PLAN TO KILL AND HE TOLD THE POLICE THAT. HE TOLD OTHER PEOPLE BEFORE THE CRIME EVEN OCCURRED. HIS PRESENT RECANTED TESTIMONY HAS BEEN FOUND NOT TO BE CREDIBLE AND I SEE MY TIME IS UP.

CHIEF JUSTICE: THANK YOU, MR. FRENCH.

I JUST HAVE A FEW POINTS I WOULD LIKE TO MAKE.

CHIEF JUSTICE: COULD YOU JUST CLARIFY BARTH, WHETHER BARTH GAVE -- WHAT TESTIMONY BARTH WAS PRESENTED AT THE EVIDENTIARY HEARING?

BARTH CAME IN AND SAID THAT BONIFAY APPROACHED HIM IN JAIL, IN JUVENILE DETENTION AND ASKED HIM TO LIE ABOUT THIS CONTRACT TO KILL. THAT THEY WERE GOING TO BE PAID MONEY TO KILL THE CLERK, AND BARTH TOLD BONIFAY NO, I'M NOT GOING TO TESTIFY TO THAT, BECAUSE THAT'S A LIE.

CHIEF JUSTICE: SO BARTH TESTIFIED TO THAT IN THIS EVIDENTIARY HEARING?

YES, MA'AM.

CHIEF JUSTICE: THAT WAS NOT TESTIMONY THAT WAS PRESENTED -- THAT WAS KNOWN OR TESTIFIED TO IN THE PENALTY PHASE OF ARCHER'S CASE?

AT THE GUILT PHASE BARTH TESTIFIED THAT BONIFAY ALSO ASKED HIM TO LIE ABOUT ANOTHER ASPECT OF THE CASE. I CAN'T REMEMBER. I'M SORRY.

CHIEF JUSTICE: BUT THAT TESTIMONY --

HE ASKED HIM TO LIE ABOUT ONE THING AND THAT CAME OUT AT THE TRIAL AND THE EVIDENTIARY TESTIMONY WAS THAT HE ASKED HIM TO LIE ABOUT SOMETHING ELSE,, NAMELY THE CONTRACT AND THE MONEY AND THE THREAT. SO THAT WAS HIS TESTIMONY. RELATING TO THE SKI MASK AND THE ISSUE OF THE SKI MASK THE PLAN WAS ORIGINALLY ALLEGEDLY THE PLAN WAS ORIGINALLY TO GO UP TO THE WINDOW AND ASK FOR A PART. SEND THE CLERK BACK INTO THE BACK ROOM AND CRAWL THROUGH THE WINDOW. YOU CAN'T ASK FOR A PART WITH A SKI MASK ON. SO IT COULD HAVE BEEN THAT THE INTENTION WAS TO ASK FOR THE PART AND

THEN WHILE THE CLERK IS GONE PUT THE SKI MASK ON AND GO IN TO HIDE FROM THE CAMERAS. NOW, THAT STILL MEANS THAT THE CLERK CAN IDENTIFY THEM, BUT, YOU KNOW, THE PLAN WASN'T NECESSARILY FOOLPROOF. I THINK THAT WAS JUST ONE ASPECT OF THE PLAN AND AN INCONSISTENT ASPECT IN THEIR ALLEGED PLAN TO ROB THE STORE.

TELL ME ABOUT YOUR RESPONSE AGAIN TO THE STATEMENT EARLIER MADE THAT I HAVE KILLED THE WRONG MAN OR WE KILLED THE WRONG MAN. WHAT'S YOUR EXPLANATION OF HIM HAVING STATED THAT EARLIER?

BONIFAY'S EXPLANATION AT THE EVIDENTIARY HEARING WAS I SAID THAT BECAUSE ARCHER TOLD ME WHO WAS GOING TO BE IN THE STORE, AND THE SAME PERSON WAS SUPPOSED TO BE IN THE STORE BOTH NIGHTS. WELLS WAS SUPPOSED TO BE THERE BOTH NIGHTS BUT HE GOT SICK, SO BILLY COKER STOOD HIM FOR HIM ON SATURDAY NIGHT. SO BONIFAY SAID HE KNEW WHO WAS SUPPOSED TO BE IN THE STORE AND HE MADE THAT STATEMENT BECAUSE IT WAS A DIFFERENT PERSON. THE FACT THAT HE USED THE WORD WRONG, YOU KNOW, I'M NOT SURE THAT WE ARE NOT TAKING THAT OUT OF CONTEXT OR GIVING IT, YOU KNOW, MORE WEIGHT THAN WE SHOULD, BUT HE CERTAINLY EXPLAINED THAT THERE WAS NO CONTRACT, THERE WAS NO MONEY, THERE WAS NO THREATS, AND THERE WAS NO WRONG MAN BECAUSE THERE WAS NO CONTRACT.

THE ORDINARY MEANING OF I KILLED THE WRONG PERSON WAS THAT I MEANT, I'M SUPPOSED TO KILL SOMEBODY ELSE, IS IT NOT? ISN'T THAT THE WAY THAT WOULD BE TAKEN?

YES, THAT CERTAINLY COULD BE.

AND I'M HAVING DIFFICULTY WITH YOUR EXPLANATION.

OF COURSE.

OF HOW THAT IS NOT CONSISTENT WITH HAVING GONE IN THERE INTENDING TO KILL A PARTICULAR PERSON AND THEN ENDING UP KILLING, QUOTE, THE WRONG PERSON.

YES, CERTAINLY THAT STATEMENT COULD BE TAKEN TO MEAN THAT THERE WAS GOING TO BE A KILLING, ABSOLUTELY. BUT BONIFAY'S EXPLANATION WAS THERE WASN'T. THERE WASN'T AN INTENTION. IT IS JUST THAT THERE WAS A KILLING, AND IT JUST SO HAPPENED THAT THE PERSON WAS DIFFERENT ON SATURDAY NIGHT THAN IT WAS ON FRIDAY NIGHT. IT WAS NOT THE PERSON HE ANTICIPATED.

CHIEF JUSTICE: THAT WOULDN'T BE YOUR STRONGEST ARGUMENT. JUSTICE, DID YOU HAVE A QUESTION?

I WOULD LIKE TO ADD THAT WYNN WAS FACING CHARGES FOR ANOTHER CASE AT THE TIME OF HIS TESTIMONY SO I REALIZE THIS IS THE THIRD ISSUE AND I'M SORRY I'M NOT TRYING TO RAISE A SEPARATE ISSUE BUT WYNN WAS FACING CHARGES AND HAD REASONS TO TESTIFY FAVORABLY FOR THE STATE.

CHIEF JUSTICE: HOW DID THAT COME, AGAIN THIS IS SORT OF BACK TO WHAT JUSTICE QUINCE ASKED MR. FRENCH, HOW DID WYNN AND BARTH, HOW DID THAT ALL COME IN AGAIN ARCHER? I MEAN IT WASN'T ANYTHING THAT ARCHER SAID TO THEM?

RIGHT.

CHIEF JUSTICE: SO HOW DID THAT EVIDENCE COME IN?

I BELIEVE IT WAS COCONSPIRATOR HEARSAY STATEMENTS AND THEY RESOLVED THE BURDEN ISSUES AND IT ALL CAME IN. BUT I THINK CRITICALLY, YOU KNOW, IN TERMS OF WHAT THE JURY

KNEW AS OPPOSED TO --.

CHIEF JUSTICE: THEY WERE BEING TRIED AT THE TIME TOGETHER?

NO.

CHIEF JUSTICE: OKAY.

THEY WERE BEING TRIED SEPARATELY. ONE AFTER THE OTHER.

THEY WOULDN'T HAVE TO BE TRIED TOGETHER FOR IT TO COME IN AS A COCONSPIRATOR STATEMENT?

CHIEF JUSTICE: I THOUGHT YOU SAID THEY RESOLVED THE BRUTEN ISSUE. ANYWAY, GO AHEAD.

MY UNDERSTANDING IS THE STATEMENTS CAME IN, THE HEARSAY STATEMENTS CAME IN AS COCONSPIRATOR STATEMENTS. WHETHER THEY SHOULD HAVE OR NOT IS ANOTHER ISSUE. BUT CRITICALLY, YOU KNOW, THIS COURT AND THE TRIAL COURT RELIED UPON THE CONTRACT, THE BRIEFCASE FULL OF MONEY AND THE THREAT IN AT LEAST IMPOSING THE DEATH PENALTY AND IN SUPPORTING THE CONVICTION SO THOSE THINGS ARE CRITICAL ISSUES, CRITICAL FACTS THAT ARE NOW HIGHLY IN DISPUTE.

CHIEF JUSTICE: THANK YOU VERY MUCH. I APPRECIATE BOTH SIDES AND I APPRECIATE YOUR CANDOR AND IN RESPONDING TO OUR QUESTIONS.