

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

THE NEXT COURT ON THE CALENDAR IS MARTINEZ VERSUS STATE.

GOOD MORNING, YOUR HONOR.

GOOD MORNING.

MY NAME IS PETER RABEN. I AM AN ATTORNEY HERE ON BEHALF OF THE APPELLANT JOAQUIN MARTINEZ. THIS IS A CASE RAISED OUT OF HILLSBOROUGH COUNTY. WE GO TO -- HILLSBOROUGH COUNTY. WE GO TO THE FUNDAMENTAL FAIRNESS, AND YOU ALL HAVE READ THE BRIEFS ON THIS CASE. I WOULD LIKE TO SIMPLY GO THROUGH THE FACTS OF THE ANALOGY. THERE WAS A SYMPOSIUM A COUPLE OF YEARS AGO AT NORTHWESTERN UNIVERSITY, DISCUSSING THE TROUBLESOME ASPECT OF THESE CASES, AND THEY DOWNED FOUND THAT THERE WERE FOUR HALL MARKS TO ALL OF THEM AND I DISCUSS THAT, BECAUSE THERE ARE FOUR HALL MARKS IN THIS CASE. FIRST, GENERALLY THERE ARE NO EYEWITNESSES. GENERALLY THAT IS WHAT WE HAVE HERE. GENERALLY THERE IS NO EVIDENCE LINKING THE WITNESS TO THE CRIME SCENE SCENE. THEY COMBED THE HOME AND THIS WAS A MESSY CRIME SCENE, AND THEY FOUND NO HAIR, BLOOD, ELEMENTS LINKING MR. MARTINEZ TO THE CRIME SCENE IN THIS FASHION. THEY FOUND THAT MOST OF WHAT WE HAVE HERE ARE A PAIR OF DISPUTED ADMISSIONS. WHAT WE HAVE, HERE, IS A PAIR OF EYEWITNESS, AN EX-WIFE AND AN EX-GIRLFRIEND THAT TESTIFIED IN THIS CASE. THE EX-WIFE PROVIDED A TRANSCRIPT, AND THERE WAS A TAPE RECORDING THAT THE EX-WIFE LEFT ON THE GIRLFRIEND GIRLFRIEND'S TELEPHONE MACHINE, THE WEEKEND THAT SHE CALLED POLICE AND INDUCED MR. MARTINEZ TO COME TO HER HOUSE AND MAKE THE TRANSCRIPT, AND THE TELEPHONE MESSAGE THAT SHE LEFT ON LAURA BABCOCK'S MACHINE, THE DAY THAT SHE FOUND OUT THAT HER HUSBAND WAS SUPPOSED TO BE WITH HER,, WAS SUPPOSED TO PAY CHILD SUPPORT AND DIDN'T, WAS THIS IS A BIRTHDAY YOU ARE ALWAYS GOING TO REMEMBER. THE OTHER GIRL, THE EX-GIRLFRIEND, TESTIFIED AT THE TRIAL THAT SHE BELIEVED THAT WALK I KNOW MARTINEZ WAS -- THAT JOAQUIN MARTINEZ WAS A WITNESS TO THE CRIME, WAS FOR 15 MINUTES SHE HAD NO EVIDENCE FOR PROTECTING THE CRIME, BUT ON THE WEEKEND BEFORE TRIAL, THE WEEKEND THAT POLICE TOLD HER THAT MR. MARTINEZ, ONE, WAS LIING IT TO HER ABOUT HIS FAITHFULNESS AND WAS SLEEPING WITH HIS EX-WIFE WHILE HE WAS LIVING WITH HER, AND, TWO --

MAY I -- YOU HAVE RAISED MANY, MANY ISSUES, AND ONE OF THE ISSUES THAT YOU HAVEN'T RAISED, AT LEAST THAT I SEE, IS THE SUFFICIENCY OF THE EVIDENCE. NOW, ARE YOU GIVING US THIS BACKGROUND TO SHOW US THAT AT WHAT POINT IS THE RELATIVE WEAKNESS OF THIS EVIDENCE IN RELATIONSHIP TO OTHER DEATH CASES? WHAT POINT DOES THAT GO TO AN APPEAL?

WELL, IT WENT TO THE PROPORTIONALITY ARGUMENT, AND WE ARE LIMITED, OBVIOUSLY, IN OUR BRIEFS IN DIRECTING THE ISSUE, BUT THE SUFFICIENCY OF THE EVIDENCE HAS TO DO WITH WHAT EVIDENCE THE STATE HAS OF THE CRIME, AND THERE WASN'T MUCH. ALL THEY HAD WAS THE TRANSCRIPT, WHICH WAS RECREATED BY THE PEOPLE, AND SLOAN'S UNDERSTANDING AS TO WHAT --

SO WE HAVE AND UNDERSTANDING, IS YOU HAVE NOT RAISED ON A SEPARATE APPEAL, AND NO ONE LIMITED HOW MANY ISSUES COULD BE RAISED, THE SUFFICIENCY OF THE EVIDENCE. NOW, THIS COURT HAS AN INDEPENDENT OBLIGATION TO LOOK AT THE SUFFICIENCY OF THE EVIDENCE, BUT YOU DID NOT RAISE THAT AS A POINT THAT YOU ASKED THIS COURT TO CONSIDER, IN SETTING ASIDE YOUR CLIENT'S DEATH SENTENCE.

THAT'S CORRECT. WE RAISE IT IN THE ISSUE OF PROPORTIONALITY, IN THE SENSE THAT EVEN THE JUDGE SAYS WE ARE GUESSING AS TO HOW OR WHY THIS CRIME OCCURRED, AND WE DIDN'T RAISE IT BECAUSE OF THE WEALTH OF CASES THAT ARE HERE ALLOWING THE JURY TO INFER PREMEDITATION OR FELONY MURDER, BASED UPON CIRCUMSTANTIAL EVIDENCE, BUT THE EVIDENCE THAT WAS BEFORE THIS COURT, WHICH THIS COURT HAS AN INDEPENDENT DUTY TO LOOK AT, IS HOW DID THIS OCCUR, BECAUSE ACCORDING TO THE EX-WIFE, HER EX-HUSBAND SAID A FIGHT BROKE OUT. IT WASN'T THE WAY IT WAS SUPPOSED TO BE, BUT, OF COURSE, THE JURY COULD INFER AND THE PROSECUTOR ARGUED THAT THEY COULD INFER, FROM THE CIRCUMSTANTIAL EVIDENCE, THE PREMEDITATION IN THE FELONY MURDER.

THEY WERE ARGUED AS ALTERNATIVE THEORIES, PREMEDITATION AND FELONY MURDER?

YES.

AND IS THE ONLY UNDERLYING FELONY FOR THE FELONY MURDER WOULD BE THE BURGLARY?

YES.

SO IF WE FOUND THAT THERE WAS NO BURGLARY, THEN IT WOULD HAVE TO BE BASED ON PREMEDITATION?

YES. YES. THE PROSECUTOR ARGUED THAT A BURGLARY OCCURRED, AS SOON AS THE DEFENDANT ALLEGED TO PULL OUT A GUN OR KNIFE, CONSENT IS PRESUMED TO HAVE BEEN WITHDRAWN, AND THAT MAKES IT A BURGLARY. THE FOURTH HALLMARK OF THESE CASES HAS TO DO WITH JAIL HOUSE INFORMANTS. I AM NOT FROM TAMPA, AND I LEARNED, IN THE COURSE OF THIS CASE, THAT WHAT DETECTIVES REGULARLY DO, AT LEAST DETECTIVE CANIGLIERO, DOES IS LET THEM SIT IN THE JAIL CELL AND THEN THEY GO DOWN TO ALL OF THESE INDIVIDUALS AND SAY WHAT DID THEY SAY TO THEM? AS A COURSE OF PRACTICE, I WOULD SUBMIT, IN HILLSBOROUGH COUNTY JAIL, THAT IF YOU WANT TO BENEFIT YOURSELF, YOU SHOULD PAY ATTENTION OR AT LEAST IN DUES THESE INDIVIDUALS INTO CONVERSATION.

AS I UNDERSTAND THERE IS NO HENRY OR JILLIO CLAIM BEING RAISED IN THIS CASE AS TO THESE JAIL HOUSE INFORM ANSWER HASN'T -- INFORMANTS?

I WANTED TO DIRECT THE CLAIM ON THAT BUT I SAY THAT INDIVIDUALS WHO SUBSEQUENTLY TESTIFIED WERE MOVED INTO THE CELL AND WERE TOLD TO INDUCE THE DEFENDANT, I DON'T KNOW ON THIS RECORD.

DOES THE RECORD SUPPORT THE ALLEGATION THAT YOU JUST MADE AS TO WHAT THE REGULAR PRACTICE IS?

YES. DETECTIVE CANIGLIERO SAYS WHAT WE DO HERE IS, WHEN WE ARREST THE PERSON, WE TAKE THEM DOWN AND GO DOWN TO THE CELL LATER AND TALK TO THE INDIVIDUALS, TO SEE IF THEY KNOW ANYTHING ABOUT THAT, AND I CAN GIVE DIRECT REFERENCE TO THAT TESTIMONY.

THE QUESTIONS WILL HOPEFULLY DRAWBACK TO THE ISSUES THAT YOU HAVE RAISED ON APPEAL, AND SINCE THE TIME IS VERY SHORT, WE NEED YOU TO ADDRESS THOSE ISSUES.

I AM ASKING THE COURT TO BE SIGNIFICANTLY TROUBLED BY THE ALIBI INSTRUCTION AREA. THE TIME TESTIMONY WAS CRITICAL, AND I WOULD LIKE TO BRIEFLY GO THROUGH T THE EX-WIFE TESTIFIED THAT, ALTHOUGH SHE HAD AN INJUNCTION AGAINST THE HUSBAND, HE VISITED HER AND MADE LOVE TO HER AT HER HOUSE, AND HE LEFT AT SOME TIME AROUND FOUR O'CLOCK THIS AFTERNOON. THAT DETECTIVE, EXCUSE ME, LET ME GO BACK A LITTLE BIT. THERE WAS A TELEPHONE CALL THAT THE STATE INTRODUCED INTO EVIDENCE FROM THE VICTIM'S HOUSE FROM THE VICTIM AT 5:01, A TOLL PHONE CALL. WE CAN SUBSEQUENTLY AGREE THAT THE

VICTIM WAS PROBABLY A LIVE AT 5:01. SLOAN, REALIZING THAT SHE HAD MADE LOVE TO HER HUSBAND WHILE AN INJUNCTION WAS OUTSTANDING, WAS TALKED BY A FRIEND INTO GOING AND LOOKING FOR JOAQUIN AT SIX O'CLOCK AND SHE SEARCHED FOR HIM AND CALLED THE POLICE AND HAD AN INJUNCTION UPON HIM AT 6:30. SO WE HAVE THE ACCOUNTING UP UNTIL ABOUT SIX O'CLOCK.

WAS THERE AN ALIBI?

NO, SIR.

ISN'T THIS MORE OF A COMPETENCY ISSUE THAN IT IS AN ALIBI ERROR BY THE TRIAL COURT?

I AM ASKING THIS COURT TO BE SIGNIFICANTLY TROUBLE BY THE INTEGRITY OF THIS PROCESS, WHERE ALL OF THE CROSS-EXAMINATIONS ARE DIRECTED TO TIME AND GEOGRAPHY. ALL OF THEM. IN SO I DIRE, THE PRETRIAL -- IN VOYEUR -- IN VOYEUR DIRE, IN THE PRETRIAL MOTIONS, EVERYTHING RELATING TO THIS CRIME.

IS THERE NOTICE BY PRETRIAL KOUNS SNELL.

NO.

THE PROBLEM AND WHAT YOU ARE ASKING US TO DO IN ONE OF THE POINTS IS TO PRESUME THAT THE COUNSEL WAS SIMPLY INCOMPETENT OR INEFFECTIVE, WHAT WE DON'T KNOW IS THAT THERE WAS ANY STRATEGY REASON FOR DEFENSE COUNSEL TO HAVE PURSUED THE STRATEGY THAT WAS PURSUED AT TRIAL.

I UNDERSTAND THE COURT'S QUESTION, AND THE COURT IS TROUBLED BY TAKING THESE ON DIRECT APPEAL. I AM ASKING THIS COURT TO FIND THIS WAS PLAIN ERROR, LIKE THE DELAWARE SUPREME COURT SAID IN GARDENER, AND I AM ASKING THIS COURT TO CONSIDER, YES --

VICTOR AND GARDENER.

THEY DID IT, THEY HELD THAT IT DIDN'T APPLY HERE, BUT WHAT GARDENER SAID IS WORDS THE MAIN OR SOLE DEFENSE, OR THE EVIDENCE IS MOSTLY CIRCUMSTANTIAL, WHERE THE EVIDENCE IS SEVERE IN A COMPLEX CIRCUMSTANTIAL CASE, WE WOULD HOLD THAT THAT WOULD BE A FUNDAMENTAL ERROR.

SO WHAT WE WOULD ASK THE TRIAL JUDGE TO DO IS LOOK AT WHETHER DEFENSES WERE RAISED AND MAKE DETERMINATIONS OF WHAT WILL INSTRUCTIONS SHOULD BE GIVEN, WHETHER OR NOT REQUESTED BY COUNSEL?

WELL, FIRST, IF I COULD ANSWER THE COURT THIS WAY, FIRST I BELIEVE THE COURT DOES HAVE A SUE A RESPONSIBILITY I -- A SUA SPONTE DUTY. COLLIE VERY ACTION SAYS THIS IS -- COLIVER ACTION SAYS THIS IS A STATE TRIAL. AND THE TRIAL JUDGE HAS AN INDEPENDENT DUTY. BUT I AM ASKING FOR A VERY INDEPENDENT DUTY, WHERE THE DEFENDANT PROVED IN ALIBI AND AS TO CONTROL OF TIME AND WHERE THE DEFENDANT CONCLUDED IN ARGUMENT, AND 12 PAGES WERE DIRECTED TO ALIBI, I AM SIMPLY SKLING THE COURT TO RAISE ITS -- ASKING THE COURT TO RAISE ITS HAND AND SAY, COUNSEL, OF ALL OF THESE FIVE DAYS WE HAVE SPEND SAYING ALIBI, I NOTICE NOBODY HAS RAISE ADD ALIBI INSTRUCTION. ARE YOU RAISING ONE? IS THERE A STRATEGIC REASON WHY YOU ARE DOING THAT? AND IF SO, STATE IT FOR THE RECORDS, SO WE DO NOT HAVE TO ADDRESS IT SUBSEQUENTLY. AND IT IS HELD THAT IT DOES NOT GO TO FUNDAMENTAL ERROR, UNLESS IT HAS ELEMENTS TO THE CASE, BUT THIS COURT, IN SOSURE SAID THERE ARE TWO CASES, WHEN THE JUSTICE ERROR IS A DENIAL OF DUE PROCESS. WHAT I AM ASKING THE COURT TO SAY IS THIS IS MORE THAN A MATTER OF I DIDN'T KNOW HE WAS A POLICE OFFICER AFFIRMATIVE DEFENSE. THE WHOLE TRIAL WAS STRUCTURED AROUND WHETHER THE

DEFENDANT HAD THE TEMPORAL AND GEOGRAPHIC OPPORTUNITY TO BE AT THE CRIME SCENE WHEN THE STATE SAID HE WAS. THAT WAS ALL THE CROSS-EXAMINATIONS AND WHAT THE WITNESSES TESTIFIED TO.

DID THE DEFENSE COUNSEL NOT ARGUE VIGOROUSLY, IN THE CLOSING ARGUMENT, THAT WHAT HAD BEEN PUT ON CONCERNING THE TEMPORAL AND POSSIBILITY OF THE CRIME, RAISED REASONABLE DOUBT AS TO HIS CLIENT'S GUILT?

ABSOLUTELY.

SO HOW, I MEAN, THE JURY WASN'T MISLED AS TO THE APPLICABLE LAW, IN THIS CASE.

I SUBMIT THEY WERE, AND LET ME EXPLAIN WHY. THE AFFIRMATIVE DEFENSE OF ALIBI IS VERY, VERY SIMPLE. ALL RIGHT. THE STATE HAS TO PROVE THE DEFENDANT'S IDENTITY AND ITS PRESENCE BEYOND A REASONABLE DOUBT, BUT WHAT THE JURY DOESN'T KNOW, IF THEY ARE NOT GIVEN AN ALIBI INSTRUCTION, IS THAT THE DEFENDANT DOESN'T HAVE TO PROVE HIS ALIBI BEYOND A REASONABLE DOUBT. THE ALIBI N.S THE JURY THAT, IF THEY HAVE A DOUBT, AS A RESULT OF THAT INSTRUCTION, THAT THEY MUST FIND THE DEFENDANT NOT GUILTY. THE COURT WAS VERY CLEAR IN ITS INSTRUCTION, AS TO WHERE IT IS IMPORTANT THAT THAT INSTRUCTION BE GIVEN. ONE OF THEM IS THAT THE JURY MAY GO BACK AND SAY, YOU KNOW, THE DEFENDANT DIDN'T PROVE TO ME BEYOND A REASONABLE DOUBT THAT HE WAS NOT THERE. HENCE I MUST FIND HIM GUILTY. THE OTHER ASPECT IS THAT THE DEFENSE SHOULDN'T BE HESITANT ABOUT INTRODUCING ALIBI TESTIMONY, AND IF THEY ARE AFRAID THAT THE JURY IS GOING TO DISBELIEVE THEIR ALIBI AND CONVICT, THEY MAY NOT DO IT.

LET ME ASK YOU, BECAUSE, AGAIN, YOU HAVE MANY POINTS, AND AS YOU HAVE CONCEDED, MANY, OR MOST, WERE NOT PROPERLY PRESERVED. OF ANY OF THE POINTS THAT YOU HAVE RAISED, ARE THERE ANY THAT, IN YOUR, IT IS YOUR CONTENTION, WERE PROPERLY PRESERVED BY OBJECTION THAT WOULD AMOUNT TO REVERSIBLE ERROR?

YES, YOUR HONOR. THANK YOU. THERE ARE TWO OF THEM. ONE HAVING TO DO WITH THE TRANSCRIPT AND THE OTHER HAVING TO DO WITH THE PREJUDICIAL MISCONDUCT, REGARDING OPINION OF GUILT AND PHOTOS. LET ME DEAL WITH THE LATTER FIRST. THE PHOTOGRAPHS THAT WERE INTRODUCED IN THIS CASE WERE EGREGIOUS. THEY APPEAR AT EXHIBITS 34 AND EXHIBIT 356 THE RECORD. NOW -- AND EXHIBIT 35 OF THE RECORD. NOW, I WOULD ASK THIS COURT TO IDENTIFY THIS. THIS WAS A WHODUNIT. WHERE AND HOW THE DECEASED WERE KILLED WAS NOT RELEVANT TO ANY OF THE MATERIAL ISSUES OF THE CASE AND WHAT THIS COURT WROTE RECENTLY IN THE ALAMEDA CASE, IS THEY HAVE TO BE NOT RESOLUTION TO PREMEDITATION BUT RELEVANT TO TRIAL.

YOU SAY NOT RELEVANT TO PREMEDITATION?

NOT THE PENALTY, NOT IN THE GUILT PHASE.

YOU SAID THE STATE WAS HAVING TO PROVE PREMEDITATION, SO THE "HOW" SEEMED, TO ME, THAT WOULD BE SOMETHING THEY WOULD WANT TO PROVE.

I AGREE. THE AUTOPSY PHOTOS OF THE CRIME -- CRIME SCENE, ITSELF, WERE PROOF OF THE EVIDENCE. I WOULD ASK THIS COURT TO LOOK AT EXHIBIT 35-C. THIS IS A CLOSE-CROPPED AUTOPSY PHOTOGRAPH OF THE FEMALE DECEASED IN THIS CASE. THIS COURT HAS BLACK AND WHITE PHOTOS, AND THERE ARE COLOR PHOTOS THAT WERE PRESENTED TO THE JURY. I HAVE A PICTURE THAT I WILL NOT DISPLAY TO THIS COURT, THAT I WOULD SUBMIT THAT THIS COURT DOESN'T HAVE IN ITS FILE. THERE WAS A SPECIFIC OBJECTION TO THIS CLOSELY-CROPPED AUTOPSY PHOTO, BECAUSE IT SHOWED THE DECEASED-FACE, IT SHOWED THE DISCOLORATION, AND REMEMBER THESE INDIVIDUALS LANGUAGE WISHED FOR FOUR DAYS BEFORE THEY WERE

FOUND. THERE WAS DECOMPOSITION AND THERE WAS DISCOLORATION AND THESE PEOPLE WERE BARELY RECOGNIZABLE. THERE WAS SPECIFIC OBJECTION TO THE AUTOPSY PHOTOS AND WHEN THE PROSECUTOR WAS ASKED WHAT THE RELEVANCY WAS, HE SAID THERE WAS A STAB WOUND IN THE NECK. THAT WAS IT. THIS COURT SAID IN RUIZ AND IN ALMEDA THAT THESE AUTOPSY PHOTOS ARE NOT PERMISSIBLE, UNLESS THEY ARE RELEVANT TO A MATERIAL ISSUE. THERE WAS A RESPONSIBLE OBJECTION TO THE COURT'S CONCERN REGARDING THIS, AND I THINK THIS COURT HAS SAID IT ENOUGH, BUT I DON'T THINK THIS COURT HAS REVERSED A CASE, IN AND OF ITSELF, BECAUSE OF THESE GRUESOME AUTOPSY PHOTOS. I THINK THE COURTS IN THIS STATE, EXCUSE ME, NEED TO UNDERSTAND THAT THESE GRUESOME AUTOPSY PHOTOGRAPHS WERE NOT RELEVANT TO A MATERIAL ISSUE, SHOULD NOT BE USED. THE OTHER ISSUE THAT WAS PRESERVED HAS TO DO WITH THE OPINION OF GUILT. AFTER THE AUDIO AND VIDEO INTERCEPTION IN THE -- IN MARTINEZ'S HOUSE, THE DEFENDANT WALKED OUTSIDE. DOWN THE STREET WERE SITTING DETECTIVE CANIGLIERO AND ASSISTANT STATE ATTORNEY COX, WHO, INCIDENTALLY, WAS THE WIFE OF THE PROSECUTOR IN THIS CASE IN STATE VERSUS RUIZ. ON CROSS-EXAMINATION, THE DEFENSE ATTORNEY TRIED TO ELICIT FROM THE DETECTIVE AND ATTORNEY IN FACT THAT THIS WAS AN HOUR AND-A-HALF CONVERSATION. IN FACT THE TRANSCRIPT REFLECTS THAT ONLY ONE-THIRD OF IT WAS TRANSCRIBED AND PROBABLY NONE OF IT WAS AUTOMOBILE. HE TRIED TO EXAMINE THE DETECTIVE ABOUT HOW HE COULD ONLY HEAR BITS AND PIECES AND THAT HE COULDN'T HEAR EVERYTHING AND SOMETIMES IN AN HOUR AND-A-HALF THERE ARE THINGS THAT ARE TAKEN OUT OF CONTEXT. HE IS TRYING TO ESTABLISH THE RELIABILITY OF THE TRANSCRIPT. ON REDIRECT, THE PROSECUTOR GOT UP AND WHAT I WOULD SUGGEST IS KILLED ANANT WITH A HAND GRENADE, AND WHAT HE SAID WAS WAS THERE ANY DOUBT IN YOUR MIND ABOUT THE GUILTY OF THE DEFENDANT, BASED UPON WHAT YOU HEARD? THERE WAS AN OBJECTION. THAT IS AN IMPROPER QUESTION, AND THE COURT SAID, NO, WE WILL LET IT. WE WILL HEAR IT. AND THE DETECTIVE SAID THERE WAS NO DOUBT IN MY MIND REGARDING THE DEFENDANT'S GUILT.

THAT ISN'T -- WELL, ISN'T SAYING THAT IS AN IMPROPER QUESTION THE SAME AS SAYING IT IS AN OBJECTIONABLE QUESTION?

YES, SIR. YES.

WHAT IS -- DO YOU NOT GIVE THE COURTNEY INFORMATION UPON WHICH TO MAKE A DETERMINATION?

AS TO THE REASON THAT IT IS OBJECTIONABLE?

WELL, LET ME RESPOND TO THE COURT IN THIS WAY. I SUBMIT THAT, UNDER THE CASE LAW OF THIS STATE, HE PROPERLY PUT THE COURT ON NOTICE THAT THAT QUESTION WAS IMPROPER. IF THE COURT IS SUGGESTING THAT DEFENSE COUNSEL SAID OBJECTION. OPINION OF GUILT OR OBJECTION, PERSONAL OPINION, THAT WOULD HAVE BEEN MORE SPECIFIC, BUT I BELIEVE THE CASE LAW IN THE STATE REQUIRES THAT AN OBJECTION PRESERVES AN ISSUE FOR APPEAL, IF THE TRIAL COURT IS ON NOTICE THAT THE OBJECTION IS INAPPROPRIATE, AND MANY JUDGES DO NOT ALLOW SPEAKING OBJECTIONS AND LIMIT PRESENTATIONS IN THAT MANNER. THE STATE SUGGESTS THAT THE DEFENSE TOMP B DIDN'T -- DEFENSE ATTORNEY DIDN'T PRESERVE THE ISSUE BECAUSE HE SAID AN OBJECTION ONLY THAT IS ISN'T A PROPER QUESTION, AND I WOULD SUBMIT THAT THAT WAS A PROPER OBJECTION. IN ANY EVENT, THAT WAS PRESERVED IN AN UNPRESERVED COMMENT, THAT APPEARED ON THE HEELS OF THIS IN CLOSING ARGUMENT, I WOULD JUST LIKE TO MENTION HOW THIS POSITION WAS BOOT STRAPPED. IN CLOSING ARGUMENT, THE PROSECUTOR REMINDED THE JURY, REMEMBER, NOBODY, DETECTIVE CANIGLIERO OR ASSISTANT STATE ATTORNEY COX HAD ANY DOUBT ABOUT THE GUILTY OF DEFENDANT MARTINEZ. THAT WAS NOT PRESERVED, BUT I SUGGESTED IN MY BRIEF, DEFENSE COUNSEL ALREADY HAVING HEARD FROM THE JUDGE THAT THAT IS AN APPROPRIATE QUESTION, I WOULD SUBMIT, THAT UNDER THE CASE LAW OF THIS STATE, THAT NO OBJECTION WAS

PROPRIETOR NECESSARY, THEM HAVING BEEN WARNED THAT A FUTILE OBJECTION WOULD NOT BE WELL RECEIVED. THE OTHER OBJECTIONS THAT WERE PRESERVED HAD TO DO WITH THE CHARACTER. AT THE CLOSING ARGUMENT, THE DEFENSE ATTORNEY GOT UP AND PRESENTED ABOUT THE CHARACTER ATTACKS THAT EXISTED ON MARTINEZ, THAT HE LIED TO WOMEN AND WAS UNFAITHFUL TO HIS WIFE WHEN SHE WAS PREGNANT, THAT HE DIDN'T PAY CHILD SUPPORT ANALOGYLY GAVE -- AND ALLEGEDLY GAVE \$400, NOT SUPPORTING THE CHILD AT THAT TIME.

THOSE CHARACTER ATTACKS CAME FROM EVIDENCE THAT WAS INTRODUCED DURING TRIAL THAT WAS UNOBEYED TO?

YES. YES. THE OTHER ISSUE THAT WE BELIEVE WAS PRESERVED, WELL, WAS PRESERVED, HAS TO DO WITH THE TRANSCRIPT. THE PREPARATION OF THE TRANSCRIPT. THE ACCURACY OF THE TRANSCRIPT. THE AUTHENTICATION OF THE TRANSCRIPT. THERE WERE PRETRIAL MOTIONS FILED. THEY WERE OVERRULED. THERE WAS AN OBJECTION, TWICE, DURING THE COURSE OF THE EXAMINATION AT 5:22 -- AT 522 AND 527 OF THE RECORD, AND THE PRETRIAL MOTION OCCURS AT 55 AND 56.

LET'S SEPARATE BETWEEN THE ADMISSION OF THE TAPE AND THE USE OF THE TRANSCRIPT. ARE YOU ARGUING ON APPEAL THAT THE TRANSCRIPT, ITSELF, SHOULD NOT HAVE COME IN, BECAUSE OF THE NUMEROUS INAUDIBLE PORTIONS THAT THERE WASN'T ENOUGH AUDIBLE PORTION TO SAY MAKE IT HELPFUL TO THE JURY, BASED ON OUR CASE LAW, THAT, ON THE SUBJECT?

YES. YES. I AM ASKING, ONE, THE TRANSCRIPT SHOULD NOT HAVE BEEN USED, AND, TWO, I AM SUGGESTING THAT IT WAS IMPROPERLY --

NO. THE TAPE, I AM SAYING. I ASKED ABOUT THE TAPE, ITSELF.

WELL, THE TAPE, I THINK, WAS ESSENTIALLY WORTHLESS, ANYWAY.

SO YOU ARE NOT OBJECTING. IT IS JUST AS TO THE USE OF THE TRANSCRIPT.

NO. YES, YOUR HONOR.

NOW, WAS THERE AN ARGUMENT MADE, BELOW, THAT THE PORTIONS THAT WERE, THAT YOU SAID WERE INAUDIBLE WERE WHAT WAS REPRESENTED BY SLOAN MARTINEZ TO BE THOSE PORTIONS WERE NOT ACCURATE?

YES. THERE WAS A CHALLENGE TO THE ACCURACY OF THE TRANSCRIPT IN PRETRIAL MOTIONS THAT WERE RENEWED AT THE TRIAL.

IS IT YOUR ARGUMENT THAT SLOAN MARTINEZ COULD NOT TESTIFY TO THE PORTIONS OF THE TAPE THAT, WHERE SHE WAS A PARTY TO THE CONVERSATION?

WHAT WE ARE ARGUING IS THAT THE TRANSCRIPT, ONE, IS INCOMPLETE, AND THAT THE PROSECUTOR CONCEDED TWO-THIRDS OF THE CONVERSATION IS NOT REFLECTED IN THE TRANSCRIPT. REGARDING WHAT MS. MARTINEZ SAID AND WHAT THE STATE HAS ARGUED IS MISPLACED CONFIDENCE. IT DOESN'T REALLY MATTER IF SLOAN SAYS EVERYTHING THAT IS IN THERE IS TRUE. BECAUSE THAT WAS SIGNIFICANTLY UNDERCUT BY THE DETECTIVE, BY HER TESTIMONY PRETRIAL AND THE DETECTIVE'S TESTIMONY AT TRIAL, WHICH WAS SLOAN SAID THAT IT WAS A COLLABORATIVE EFFORT. I SAT DOWN WITH THE DETECTIVE, THE PROSECUTOR, AND THE PROSECUTOR'S SECRETARY, AND WE SAT IN A LITTLE ROOM AND PLAY, REWIND, PLAY, REWIND, SO THAT WE CAME UP WITH THIS, SO ALTHOUGH SLOAN SUMMARILY STATED EVERYTHING IN THERE IS SOMETHING THAT I HEARD, THE DETECTIVE CONTRADICTED HER. THE DETECTIVE SAID THAT IT WAS A COLLABORATIVE EFFORT. THEY POOLED THEIR RESOURCES AND THEIR MEMORY AND CAME UP WITH THIS. THE QUESTION AT VOLUME 7-609, IS SO NOT ONE

PERSON'S RECOLLECTION BUT A COLLABORATION? AND HE SAYS THAT IS CORRECT. THAT IS WHAT THEY DID IS THEY SAT DOWN, THESE FOUR, AND I WOULD SUBMIT THEY ARE NOT DISINTERESTED PARTIES, AND CAME UP WITH A 33-PAGE TRANSCRIPT. WHAT I TRIED TO POINT OUT, IN MY APPENDIX HERE, IS THE BULK OF THE INCRIMINATING EVIDENCE THAT WAS USED BY THE PROSECUTOR ANNUITYLIZED BY THE JURY, WAS NOT OVERHEARD IN THE TAPE. IT IS WHAT THESE INDIVIDUALS POOLED TOGETHER BETWEEN THEIR RECOLLECTION, THEIR BY ASSIST, THEIR MOTIVES OR THEIR HEARING AND SUBMITTED TO THE JURY, AND THE MOST TROUBLING PART ABOUT IT AND WHY I WANTED TO PRESENT THAT TO THIS COURT, IS THE TRANSCRIPT WAS NOT EVIDENCE. THE JURY WAS NOT INSTRUCTED THAT IT WAS NOT EVIDENCE. THE JUDGE SIMPLY SAID LEAVE THOSE ON YOUR CHAIR. THOSE AREN'T GOING BACK. THE TAPE IS. THAT IS IT, AND, AGAIN, THERE WAS NO REQUEST FOR AN INSTRUCTION, ALTHOUGH THERE WAS AN OBJECTION TO THE USE OF THE TRANSCRIPT. WHILE, THOUGH, THE TRANSCRIPT DIDN'T GO BACK IN THE JURY ROOM, CLEARLY WHAT WAS IN THE TRANSCRIPT DID GO BACK, IN THE FORM OF WHAT THE JURY RELIED ON IN DELIBERATIONS, AND JUST IN THAT REGARD, THE ATTORNEY GENERAL, WITH ALL DUE RESPECT, MAKES THE SAME MISTAKE THAT THE PROSECUTOR DID IN HIS CLOSING ARGUMENT. HE IS HAMMERING TO THE JURY EVIDENCE THAT WASN'T EVIDENCE. HE IS ARGUING PORTIONS OF THE TRANSCRIPT WHICH WERE NOT AUDIBLE ON THE TAPE, WHICH WERE NOT INTRODUCED INTO EVIDENCE BECAUSE THEY WERE TRANSCRIPT. SO WE DON'T REALLY KNOW WHETHER THE JURY RETURNED ITS VERDICT, BASED UPON ADMISSIBLE EVIDENCE OR NOT.

COULD SLOAN MARTINEZ HAVE TESTIFIED, IF SHE SAID, WITH THE AID OF THE TRANSCRIPT, AS TO THE CONVERSATION THAT SHE HAD WITH THE DEFENDANT, AND DID SHE DO ANY OF THAT IN THIS CASE?

THE PROSECUTOR SELECTIVELY WENT THROUGH THE TRANSCRIPT AND SAID DO YOU UNDERSTAND WHAT THIS MEANS? AND THE ANSWERS WERE MOST TELLING. SHE WOULD SAY, FOR EXAMPLE, WHAT DID THE DEFENDANT MEAN WHEN HE SAID SWITCH OR TRADE, AND SLOAN WOULD SAY I WASN'T REALLY SURE. I DIDN'T KNOW WHAT HE MEANT. SO ON MANY OF THESE OCCASIONS, FOR EXAMPLE THE ALIBI. THE ALIBI IS NOT SOMETHING THAT WAS OVERHEARD, AND SLOAN IS ASKED DID HE ASK YOU ABOUT AN ALIBI? YES. YES. HE DID. I DIDN'T REALLY KNOW WHAT HEMENT. SO THE EFFORT MADE THE PROSECUTOR TO TAKE THE TRANSCRIPT AND PUT IT IN THE MIND AND SLOAN AND HAVE SLOAN REPEAT IT WASN'T ACTUALLY DONE, REGARDING THE GREATEST PORTIONS OF THIS TRANSCRIPT. THE STATE AND I ARE, BOTH, RELYING ON THE SAME CASE HERE, STATE VERSUS HILL OUT OF THIS COURT, 549 SO.2D 179. AND WHAT HILL SAYS IS TRANSCRIPTS ARE PERMISSIBLE, ONE, WHEN THE ACCURACY OF THE TRANSCRIPT IS NOT CHALLENGED, AND WE HAVE CHALLENGED IT HERE AND IT WAS DONE PRETRIAL AND BELOW, WHEN IT DOESN'T ADD TO THE TAPE, AND THAT IS WHY I SUBMITTED THAT APPENDIX. IT CLEARLY ADDED TO THE TAPE. WHEN IT IS NOT A FOCUS OF THE TRIAL, AND WE WOULD SUBMIT THAT IT BECAME THE SMOKING GUN IN THE CRITICAL PART OF THIS TRIAL, AND FINALLY, WHEN IT IS ONLY AN AID TO UNDERSTANDING. WELL, THIS WAS CLEARLY MORE THAN AN AID TO UNDERSTANDING. BUT I WANT THIS COURT, ALSO, TO BE TROUBLED BY, AGAIN, AND I WOULD ASK THIS COURT TO TALK TO THE TRIAL COURTS OF THE STATE REGARDING THEIR SUA SPONTE DUTY TO MAKE SURE THAT JURIES ARE ADEQUATELY INSTRUCTED. WHENEVER THERE IS A TRANSCRIPT THAT GOES TO A JURY, THE TRIAL JUDGE HAS A DUTY AND A BURDEN, UNDER THE DUE PROCESS CLAUSE, TO SAY THIS IS WHAT IS GOING ON HERE. IT IS AN AID TO YOUR UNDERSTANDING. IF IT CONFLICTS WITH WHAT YOU HEAR, YOU MUST GO WITH WHAT YOU HEAR. IT WAS PREPARED BY THESE INDIVIDUALS, AND YOU CONSIDER THEIR BY ASSIST, IF ANY, IN THE PREPARATION OF THIS -- THEIR BIASES, IF ANY, IN THE PREPARATION OF THIS TRANSCRIPT. IT IS NOT EVIDENCE, BUT IT IS AN AID TO UNDERSTANDING. THERE ARE OTHER ISSUES. THE MILLER BURGLARY ISSUE, WHICH, AGAIN, WAS NOT RAISED, BUT I WOULD NOTE IN MILLER THIS COURT, APPARENTLY SUA SPONTE, TOOK THAT UNDER VICEMENT, BECAUSE THE MILLER OPINION -- UNDER ADVISEMENT, BECAUSE THE MILLER OPINION REVEELS THAT THE COURT LOOKED AT NO SUA SPONTE.

DID YOU RAISE THAT ISSUE?

YES. WHAT WE DISCUSSED IN OUR BRIEF IS THE IDEA THAT WE HAVE ABSOLUTELY NO IDEA WHAT HAPPENED IN THIS CASE. THERE IS NO EVIDENCE LINKING MR. MARTINEZ TO THE CRIME SCENE AT ALL, OTHER THAN THE EX-WIFE AND THE TRANSCRIPT THEY CREATED AND THE GIRLFRIEND, REGARDING SOME UNTOWARD INCIDENT, WHICH IS ALLEGED TO HAVE HAPPENED THAT FRIDAY NIGHT. PROPORTIONALITY, WHAT WE RAISED IS, IN SITUATIONS LIKE THIS, WHERE THERE IS A GNAWING DOUBT, WHAT THE STATE REFERS TO AS LINGERING DOUBT, A GNAWING DOUBT AS TO WHAT HAPPENED, WHETHER, IF IT WAS PREMEDITATION, THE POSITION WAS CIRCUMSTANCE, AND THE -- CIRCUMSTANTIAL, AND THE TRIAL JUDGE DIDN'T GIVE A PUNIARY GAIN HERE, AND WHAT WE HAVE HERE ARE THREE AGGRAVATING FACTORS ARE PRETTY MUCH UPHELD, BECAUSE OF THE BURGLARY CONVICTION AND THE TWO CONVICTION IN HIS THIS CASE. THERE WERE TWO AUTOMATIC AGGRAVATORS, AND THE COURT ESTABLISHED NINE MITIGATING FACTORS, THREE STATUTORY AND SIX NONSTATUTORY. WHAT WE SUBMITTED IN OUR BRIEF IS IT THAT THIS COURT HAS A SUA SPONTE DUTY, NOT ONLY TO LOOK AT THE RECORD OF THE CASE BUT TO LOOK AT THE FACTS THAT WERE SUGGESTED, AND WE DRAW AN ANALOGY TO A CASE WHERE THE ROBBERIES HAVE GONE BAD, BECAUSE WHERE THE PROSECUTORS THREW UP HIS HANDS AND SAID WE DON'T KNOW WHAT HAPPENED IN THIS CASE, THERE WERE THREE DIFFERENT THEORIES. ONE INMATE SAID IT HAD TO DO WITH MS. McCAUGHEY AND -- WITH MS. MCCOY AND ANOTHER IN MADE SAID IT REFLECTED LAWSON, AND THERE WAS A SWITCH AND A TRADE WITH HIM AND THAT IS WHAT HAPPENED.

NO MATTER WHAT HAPPENS, THERE IS A SECOND VICTIM, SO THERE IS A PRIOR OR A CONTEMPORANEOUS CONVICTION, AND YOU AGREE TO THAT.

YES. YES.

AND AS FAR AS THE HEINOUS, AT TROBIOUS AND CRUEL, THE -- TROBIOUS AND CRUEL, THE JUDGE FOUND THAT IN THIS CASE, SO WITH TWO AGGRAVATORS, DO WE NOT HAVE CASES THAT -- WHAT IS YOUR STRONGEST CASE, I GUESS, FOR SAYING THAT WE HAVE NOT IMPOSED THE DEATH PENALTY IN SIMILAR CASES?

WELL, I WOULD HAVE TO RELY ON THE BRIEF ON THAT. I DO NOT HAVE THOSE AT HAND, AND I NOTICE THAT I AM INTO MY ARE YOU BUTTAL TIME -- INTO MY REBUTTAL TIME, BUT I WOULD LIKE TO SUPPLEMENT THAT AND RESPOND TO THE COURT, BUT TO BE SINCERE TO THIS COURT, WE DIRECTED MOST OF OUR ISSUES TO THE GUILT PHASE, BECAUSE WE ARE ASKING THIS COURT TO SAY IN SO MANY SITUATIONS LIKE THIS, WHERE SO MANY THINGS WENT FUNDAMENTALLY WRONG, ALBEIT ASSISTANCE, THAT WE WOULD ASK TO PRESERVE AND ASK FOR A REMAND AND A NEW TRIAL.

THANK YOU.

MAY IT PLEASE THE COURT. I AM CANDANCE SABELLA, REPRESENTING THE STATE OF FLORIDA IN THIS CASE. AS COUNSEL HAS SUGGESTED MOST OF THE OBJECTIONS THAT HE PRESENTED TO THIS COURT WERE NOT PRESENTED TO THE TRIAL COURT BELOW, AND WE ASSERT THAT THERE SHOULD BE NO-SHOWING TO THIS COURT WITH REGARD TO FUNDAMENTAL ERROR. WITH REGARD TO THE CASES THAT WERE PRESENTED TO THE COURT --

LET ME ASK YOU ON THE ALIBI, AND ON ISSUE ONE.

OKAY.

REALIZING THAT THE TRIAL LAWYER DIDN'T REQUEST AN ALIBI INSTRUCTION AND DIDN'T FILE A NOTICE, IT WOULD APPEAR THAT THAT WAS HIS PRINCIPLE DEFENSE, FROM THE POINT OF VIEW OF SAYING THERE COULD BE, ALSO, A STRATEGY REASON. CAN THE STATE OFFER APPLAUSE

APPLAUSEABLE -- A PLAUSIBLE EXPLANATION WHY SOMEONE WHO WAS RELYING ON ALIBI AS HIS MAIN DEFENSE DIDN'T REQUEST THE ALIBI INSTRUCTION?

I SUBMIT TO THIS COURT THAT ALIBI WAS NOT NECESSARILY HIS MAIN OR SOLE DEFENSE. WHAT HIS ARGUMENT WAS IT WENT TO THE REASONABLE DOUBT. HE DID GO THROUGH, AND THIS --

I GUESS WHAT I AM ASKING, IS THERE -- IT IS CERTAINLY AN INSTRUCTION THAT WOULD HELP A DEFENSE ALONG, TO HAVE IT. IS THERE SOMETHING ABOUT IF YOU FILE A NOTICE OF AN ALIBI DEFENSE, THAT YOU LOSE SOMETHING ELSE, OR SOMETHING THAT WOULD MAKE IT A LOGICAL OR REASONABLE THING FOR SOMEBODY WHO HAS BEEN CAREFULLY PUTTING TOGETHER THAT HE ONLY HAD LESS THAN AN HOUR TO DO THIS AND, YOU KNOW, HE WAS AT HIS BROTHER'S, THAT WOULDN'T WANT THAT INSTRUCTION?

WE ARE SPECULATING HERE, AND I AM JUST GUESSING, BECAUSE I DON'T KNOW, BECAUSE THIS ISSUE WAS NOT PRESENTED TO THE TRIAL COURT, BUT GUESSING, I WOULD SAY THAT THIS TRIAL COUNSEL HAD HIS KAGAN EAT IT, TOO, BECAUSE HE DIDN'T HAVE TO FILE A NOTICE OF ALIBI. HE DIDN'T HAVE TO NARROW DOWN WHERE HE WAS SPECIFIC TIMES. HE DIDN'T HAVE TO COME UP WITH A SPECIFIC STORY.

IN OTHER WORDS THAT -- THERE ARE CERTAIN BURDENS THAT GO WITH FILING A NOTICE OF ALIBI DEFENSE?

YOU ARE GOING TO HAVE TO PRESENT A COHESIVE STORY THAT I WAS HERE AT X AMOUNT OF TIME, AND WHETHER THAT IS A RESULT OF THE TIME OF THE MURDER NOT BEING EXACTLY KNOWN OR JUST AM NOT BEING ABLE TO NARROW IT DOWN, HE WAS ABLE TO ARGUE TO THE JURY THAT MY CLIENT WAS HERE AT THESE CERTAIN TIMES, WITHOUT ACTUALLY HAVING TO PINPOINT IT AND TO PRESENT SUBSTANTIAL EVIDENCE TO SUPPORT THAT. HE, ALSO, HAD TO COMPLICATE MATTERS, IS THERE WAS EVIDENCE FROM SLOAN THAT MARTINEZ HAD ASKED HER TO PROVIDE HIM WITH AN ALIBI. SO HE STARTS TALKING ALIBI TO THIS JURY. IT IS A SIGNAL TO THIS JURY, WAIT A MINUTE, HE IS ALREADY ASKING SOMEBODY TO LIE, SO IF WE CAN STAY AWAY FROM THE WORD ALIBI AND JUST PUT THE STATE TO THEIR PROOF, THEN SAY THERE IS REASONABLE DOUBT. I WAS HERE. THIS HAPPENED. THESE PEOPLE ARE LYING. THEY HAVE A MOTIVE. THEN HE IS NOT LIMITED IN THAT. THIS COULD HAVE BEEN THE STRATEGY.

AND YOUR ARGUMENT WOULD BE THAT THAT HAS TO, THEN, BE SOMETHING THAT WOULD BE LOOKED AT POST CONVICTION.

ABSOLUTELY. IT WAS NOT ARGUED TO THE TRIAL COURT. WE DON'T KNOW. WE HAVEN'T EXPLORED IT, AND WITHOUT AN EVIDENTIARY EXPLANATION, WE WOULD SIMPLY BE SPECULATING AS TO THE BASIS FOR IT. WITH REGARD TO WHAT HE CHARACTERIZES AS PROSECUTOR MISCONDUCT, HE GIVES YOU A LITANY OF THINGS THAT HE SUGGESTS CONSTITUTE THAT, AND I SUGGEST TO THIS COURT THAT, IN THE CONTEXT OF THIS CASE, THAT THERE IS NO PROSECUTOR MISCONDUCT. FIRST OF ALL, WITH REGARD TO THE PHOTOS, THIS COURT HAS THE PHOTOS. I AM SURE YOU WILL LOOK AT THEM. WHEN YOU ANALYZE THEM, THERE WERE ONLY TWO PHOTOS FROM THE CRIME SCENE SHOWING THE VICTIMS. THERE ARE CLOSE-UP AUTOPSY PHOTOS SHOWING THE WOUNDS AND THE NATURE OF THE WOUNDS. CLEARLY, AS YOUR HONOR NOTED, THIS IS SOMETHING THE STATE IS GOING TO HAVE TO ESTABLISH, IN ORDER TO PROVE PREMEDITATION. THESE ARE NOT TERRIBLY GRUESOME PHOTOS. UNFORTUNATELY THESE WERE DECEASED PEOPLE THAT HAD BEEN DECOMPOSING, BUT IN THE CONTEXT OF THESE CASES, THESE PHOTOS WERE TOTALLY APPROPRIATE.

HOW MANY PHOTOS WERE ACTUALLY ADMITTED THAT THE JURY GOT TO SEE?

I DON'T KNOW EXACTLY. IT WAS PROBABLY -- I WOULD GUESS AROUND A DOZEN, MAYBE.

BUT WAS THERE A LIMIT? IN OTHER WORDS THE JUDGE, THERE ARE MANY TIMES THAT THE JUDGE WILL SAY I WILL LET YOU SHOW THESE. TWO IS ENOUGH OR THREE IS ENOUGH. WAS THERE A LIMIT ON WHAT THE PROSECUTOR GOT TO PUT IN?

I DON'T RECALL. I DON'T RECALL.

WERE THEY USED BY ANY WITNESS?

YES. THEY WERE USED BY THE MEDICAL EXAMINER, TO EXPLAIN THE NATURE OF THE WOUNDS AND HOW THEY WERE INFLICTED.

ALL OF THEM?

ALL OF THE PHOTOS THAT WERE INTRODUCED, YES, YOUR HONOR. THERE, HE, ALSO, RAISES SOME CLAIMS ABOUT THE PROSECUTOR IMPROPERLY ARGUED THAT THERE WAS EVIDENCE OF A FINANCIAL MOTIVE. WE SUBMIT THAT THERE WAS EVIDENCE, THROUGH SLOAN, LAURA, EADEN AND RONNIE SABATO. HE ARGUES THAT. HE ARGUES THAT THEY SUGGESTED SPOUSAL ABUSE. THAT IS NOT SUPPORTED BY THE RECORD. PRIOR TO TRIAL, DEFENSE COUNSEL FILED A MOTION, LIMITING TO EXCLUDE ANY EVIDENCE THAT THIS INJUNCTION, THE NATURE OF THIS INJUNCTION WENT TO SPOUSAL ABUSE. THEY DECIDED THAT THEY WOULD REFER TO IT AS LEGAL PAPERS RATHER THAN EXPLAINING THE NATURE OF IT. DURING HER EXAMINATION, SLOAN REFERRED TO IT AS AN INJUNCTION. THERE WAS AN OBJECTION. IT WAS NOT MADE A FEATURE. IT JUST WENT PAST. THAT SUBSEQUENTLY SHE MENTIONED AFTER HE WAS ARRESTED, SHE WAS AT THE SPRING. THERE WAS NO EXPLANATION AS TO WHAT THE SPRING WAS.

DO YOU AGREE THAT IT WAS ARGUMENT FOR THE POLICE OFFICER TO TESTIFY AS TO HIS OPINION TESTIMONY?

DO I AGREE THAT IT WAS WHAT?

THAT THAT WAS ERROR?

NO, YOUR HONOR. I DO NOT AGREE.

A POLICE OFFICER CAN COME IN AND TESTIFY "I BELIEVE THAT THIS PERSON KILLED"?

NORMALLY THAT WOULD BE ERROR. IN THE CONTEXT OF THIS CASE, AS THIS COURT HELD IN GARCIA, IN THE CONTEXT OF GARCIA AND THE CIRCUMSTANCES OF THAT CASE, IT WAS NOT INAPPROPRIATE. IN GARCIA, YOU HAD DEFENSE COUNSEL SUGGESTING THAT THE PROSECUTOR HAD ONLY PROSECUTED HIS CLIENT BECAUSE IT WAS TO MAKE HER NAME AND TO GET HER CASE AND THAT IT WAS JUST TO SIMPLY BUILD HER CAREER, AND THIS CASE, WE HAVE THE DEFENSE COUNSEL SUGGESTING TO CANEGLIERO, WELL, HAVEN'T YOU HAD CONVERSATION IT IS WHERE THINGS WERE TAKEN OUT OF CONTEXT, AND WITH THEM TAKEN OUT OF CONTEXT, YOU WOULDN'T UNDERSTAND, AND THESE THINGS IN THE TAPE, THEY WERE TAKEN OUT OF CONTEXT, AND IF YOU HAD HEARD THE WHOLE THING, YOU WOULDN'T KNOW? CANEGLIERO HEARD THE WHOLE THING, AND ON REDIRECT, THE STATE CAME UP AND SAID YOU HEARD THE WHOLE CONVERSATION. TAKEN IN CONTEXT, DID YOU HAVE ANY DOUBT THAT HE DID IT? AND CANEGLIERO SAID, NO, I DIDN'T.

I SUGGEST THAT THAT IS PROBABLY ERROR, BUT YOU ARE INTO THE ARGUMENT OF THE PROSECUTION. AND I SUGGEST THAT IT MIGHT HAVE BEEN COMPOUNDED BY THE PROSECUTOR ON, THEN, ARGUING TO THE JURY THAT THE POLICE OFFICER TOLD YOU THAT THIS IS WHAT HAPPENED. AND HE TOLD YOU THIS WAS HIS OPINION. SO WHY DON'T YOU HAVE CUMULATIVE ERROR THERE?

WELL, FIRST OF ALL, THE INITIAL ONE, I SUBMIT, WAS NOT ERROR. I SUBMIT THAT THAT WAS PROPER REBUTTAL TO WHAT DEFENSE COUNSEL HAD SUGGESTED. THE DEFENSE COUNSEL HAD SUGGESTED THAT, IN CONTEXT THE JURY KNEW WHAT WAS GOING ON AND THAT THEY WOULD KNOW HE WAS TALKING ABOUT SOMETHING ELSE AND THAT HE WASN'T GUILTY. TO PUT THAT IN CONTEXT AND SAY THIS IS WHAT YOU WOULD THINK IF YOU HEARD IT, CANEGLERIO HEARD ABOUT IT. IN CLOSING ARGUMENT, THE DEFENSE WENT OVER THE WHOLE CONVERSATION AND SAID THE PEOPLE DIDN'T DIDN'T HAVE A DOUBT. THEY HER IT IN CONTEXT. THERE WAS NO OBJECTION TO IT UNTIL AFTER CLOSING ARGUMENTS, AND AT THAT POINT DEFENSE COUNSEL RAISED IT, AND IN PARKER HAD, THIS COURT HELD THAT THAT IS NOT SUFFICIENT. YOU HAVE GOT TO DO IT AT THE TIME, AND MAYBE HE DIDN'T DO IT AT THE TIME, BECAUSE HE DIDN'T THINK THAT IT WAS THAT EGREGIOUS, THAT HE WOULD RATHER NOT CALL ATTENTION TO IT OR FOR WHATEVER REASON, BUT HE DID NOT OBTO IT. IT DOESN'T GO TO THE HEART OF THIS CASE. IT IS NOT FUNDAMENTAL ERROR, AND I SUBMIT, NO, THAT IT WASN'T ERROR.

HOW DO YOU ADDRESS THE DEFENSE ALSO ARGUED THAT THE PROSECUTOR, ALSO, ARGUED EVIDENCE THAT WAS NOT TRULY NOT EVIDENCE, REALLY, MADE UP FROM THE RECORD?

I DON'T KNOW WHAT YOU ARE REFERRING TO, YOUR HONOR. FOR EXAMPLE?

IT WAS SUGGESTED THAT THE PROSECUTOR MADE IMPROPER ARGUMENTS RELATIVE TO EVIDENCE THAT THE RECORD WAS RECONSTRUCTED, AND SKIP THE QUESTION.

I AM SORRY, YOUR HONOR. I DON'T KNOW WHAT YOU ARE REFERRING TO.

SPEAK TO THE SUVs OF THE OBJECTION TO THE -- TO THE SUFFICIENCY OF THE OBJECTION TO THE OPINION TESTIMONY.

ON REDIRECT, WHEN, IN FACT, I HAVE IT RIGHT HERE, FROM THE RECORD. ON REDIRECT HE ASKS CORPORAL, WHEN YOU WERE LISTENING, LIVE, TO WHAT WAS HAPING ON JANUARY 28, RIGHT AFTER THAT YOU SAID YOU AUTHORIZED THE ARREST. ANSWER. ABSOLUTELY. QUESTION, WAS THERE ANY MEMORY, NOT BASED ON THE TRANSCRIPT, BUT ON YOUR MEMORY, WAS THERE ANY QUESTION THAT HE HAD COMMITTED THE CRIMES? THE COURT OVERRULED. BY MR. COX. WAS THERE ANY DOUBT IN YOUR MIND, BASED ON WHAT HE SAID, THEN, THAT HE WAS RESPONSIBLE FOR THE MURDER OF DOUGLAS LAWSON? THERE WAS NO DOUBT THAT HE DID IT. THAT WAS IT. HE DID NOT RAISE THE BASIS THAT THERE -- THAT THEY ARE RAISING RIGHT NOW. HE JUST SAYS THAT IS NOT A PROPER QUESTION. WHETHER HE WAS REFERRING TO THE FORM OR EXACTLY WHAT THE BASIS OF HIS OBJECTION WAS, WE DON'T KNOW. HE DID NOT ARGUE IT, SO I SUBMIT THAT HE HAS TO PUT THE TRIAL COURT ON NOTICE AS TO WHAT THE PROBLEM IS, BUT IN ANY CASE, I THINK THE TRIAL COURT CORRECTLY OVERRULED THE OBJECTION, BECAUSE IT IS AN APPROPRIATE REBUTTAL TO THE QUESTION THAT WAS PREVIOUSLY PRESENTED TO CANEGLIERO.

AND THAT IS THE STATE. THAT THE PROSECUTOR MADE IN READING THAT WHO SAID, AFTER THE OBJECTION WAS MADE, HE IS TRYING TO GET THE THING IN CONTEXT. YOU JUST READ IT.

YES, YOUR HONOR.

WAS THAT WHAT THE PROSECUTOR SAID?

THAT IS THE PROSECUTOR'S RESPONSE TO HIS OBJECTION IS HE IS ASKING ABOUT TAKING THINGS OUT OF CONTEXT. YES.

ALL RIGHT.

WHAT AUTHORITY DO YOU SUGGEST TO US, WITH REGARD TO THE GROUP MEMORY CONCEPT OF THE TRANSCRIPT, AS OPPOSED TO THE SINGULAR MEMORY OF THE WITNESS THAT CAN BE CROSS-

EXAMINED? DO WE KNOW WHOSE MEMORY IS REALLY BEING RECORDED?

YES, WE DO, YOUR HONOR. AND, AGAIN, I WOULD REFER YOU TO THE RECORD, BECAUSE OBVIOUSLY WE HAVE A DISAGREEMENT AS TO WHAT THE RECORD OBVIOUSLY SAYS. WHAT SLOAN TESTIFIED TO IS THAT SHE AND CANEGLIERO, WITH THE SECRETARY, NICK COX'S SECRETARY, LISTENED TO THIS TAPE, OVER A MATTER OF DAYS. SHE SAID THEY WENT BACK THREE OR FOUR TIMES, AND SHE WOULD GO BACK AND FORTH AND REWIND AND GO BACK AND BACK, AND WHEN SHE HEARD SOMETHING, SHE WOULD SAY IT, AND THEN NICK COX'S SECRETARY WOULD WRITE THAT DOWN. SHE SAID, AT THE END, WHEN THEY WERE DONE, THAT THIS TRANSCRIPT WAS WHAT HAD HAPPENED. THAT THERE WAS NOTHING ON THIS TRANSCRIPT THAT SHE HAD NOT HEARD ON THE TAPE. WHETHER IT HAD BEEN WRITTEN BY NICK COX OR HAD BEEN WRITTEN BY HER, SHE AUTHENTICATED IT AT THE END AND SAID EVERYTHING THAT WAS IN THE TAPE THAT I COULD HEAR, MYSELF, IS ON HERE. THAT THERE IS NOTHING ON HERE THAT I COULD NOT HEAR. THE SUGGESTION THAT SOMEBODY ELSE HAVING HAD SOMETHING TO DO WITH IT REFUTES THAT IS NOT -- IS JUST NOT SUPPORTED HERE. FURTHERMORE, HE SAYS THEY CHALLENGED THE ACCURACY. THEY DID CHALLENGE THE ACCURACY, BUT THEY DIDN'T POINT TO ANY PLACE IN THERE AND SAY, WELL, WAIT A MINUTE. HERE YOU SAY HE SAID I WAS AT DOUG LAWSON'S, AND WHAT HE IS ACTUALLY SAYING IS DOUG LAWSON OWNED A HORSE. THERE IS NO PLACE IN HERE WHERE THEY ARE SAYING YOU SAY IT SAYS ONE THING. WE SAY IT SAYS SOMETHING ELSE.

ON THAT, THOUGH, IF WE WERE TO LISTEN TO THE EXACT TAPE, AND AS TO THE PLACES THAT ARE NOT CROSSED OUT ON THE APPENDIX, WOULD WE BE ABLE TO, AS MANY TIMES LISTENING TO THE TAPE, COME UP WITH WHAT IS IN THE TRANSCRIPT? IN OTHER WORDS IS IT, IN FACT, AUDIBLE?

I UNDERSTAND YOUR SUGGESTION.

IT IS INAUDIBLE?

IT IS VERY DIFFICULT TO HEAR IN MANY PLACES.

SO THERE IS NO REAL WAY, I GUESS, AS TO HOW DOES SOMEONE, IF SOMETHING IS TOTALLY INAUDIBLE, HOW DOES SOMEONE CHALLENGE THE ACCURACY, IF THEY ARE NOT TAKING THE STAND TO SAY I DIDN'T SAY THAT. I SAID IT WAS DOUG JOHNSON. I MEAN HOW DO YOU DO THAT?

THEY DO IT THE SAME WAY THAT SLOAN AND CANEGLIERO DID. THEY GO BACK. THEY PLAY T SHE SAID THAT, ALTHOUGH SHE REMEMBERED WHAT HAPPENED WHEN THEY WERE PLAYING THE TRANSCRIPT, SHE WAS DOING IT FROM WHAT SHE HEARD. DEFENSE COUNSEL IS IN EQUALLY THE SAME POSITION AS TO SIT THERE, REWIND IT, PRESS HIS EAR UP AGAINST THE TELEVISION, THE SPEAKER, WHATEVER, AND LISTEN TO IT, AS THE STATE IS. THERE WAS NOTHING THERE THAT WAS DEPENDENT UPON HER MEMORY. SO IF YOUR HONOR CHOOSES TO TAKE THIS TAPE AND ASSUMING YOU HAVE THE ORIGINAL, AND YOU CAN SIT DOWN AND PLAY IT BACK AND FORTH AND DO THIS, IT IS VERY POSSIBLE THAT YOU COULD COME UP WITH THIS. I DON'T KNOW.

HOW WAS THE TRANSCRIPT USED, THEN, DURING THE TRIAL? COUNSEL FOR THE DEFENSE SAID THAT IT WAS, THEN, APPARENTLY GIVEN TO THE JURY, BUT THE JURY WAS THEN TOLD TO LEAVE IT ON THEIR SEATS WHEN THEY WENT BACK FOR DELIBERATION.

THE TRANSCRIPT WAS ADMITTED AS AN EXHIBIT. IT WAS NOT ADMITTED INTO EVIDENCE. IT WAS GIVEN TO THEM SOLELY FOR THEM TO LISTEN TO DURING THE COURSE OF THE TAPE. THERE WAS A COMPLETE AGREEMENT OVER THE PART OF THE STATE AND THE COURT --

SO THE TAPE WAS PLAYED. THE JURY, THE TRANSCRIPT WAS IDENTIFIED.

UM-HUM.

BUT NOT ADMITTED INTO EVIDENCE.

RIGHT.

AND THEN THE WITNESS TESTIFIED OR WAS THE TAPE PLAYED BACK?

SLOAN TESTIFIED THEY INTRODUCED THE TAPE DURING SLOAN'S TESTIMONY, AND THEN, AFTER THE TAPE WAS PLAYED, THE PROSECUTOR WENT OVER WITH HER, CERTAIN PARTS OF THE TAPE, AND ASKED HER ABOUT HER RECOLLECTION OF IT, WHICH BRINGS ME TO ANOTHER POINT. IN ODOM, THIS COURT SAID THAT, WHERE THE PERSON WHO IS THERE FOR THE CONVERSATION IS AVAILABLE TO TESTIFY, THAT THE USE OF A TRANSCRIPT OR THE PLAYING AFTER TAPE IS HARMLESS, BECAUSE THIS PERSON IS COMPETENT TO TESTIFY TO IT. SO ANYTHING THAT THIS JURY HEARD ON THIS TAPE COULD HAVE BEEN TESTIFIED TO BY SLOAN. THERE IS NO ALLEGATION THAT SLOAN WAS NOT COMPETENT TO TESTIFY TO THIS, AND THERE IS NO ALLEGATION THAT IT WOULDN'T HAVE -- IT WOULD HAVE BEEN INADMISSIBLE. SO ANY ERROR THAT THERE MAY OR MAY NOT HAVE BEEN, WITH REGARD TO THIS TRANSCRIPT, IS CLEARLY HARMLESS, IN THE LIGHT OF THE FACT THAT SLOAN COULD HAVE TESTIFIED TO IT AND DETECTIVE CANEGLIERO, WHO SAID THAT HE COULD HEAR THE CONVERSATION MUCH BETTER AND HE HEARD THE WHOLE THING OUT IN THE VAN, WHERE THEY WERE LISTENING TO IT, RATHER THAN ON THE RECORDING THAT THEY HAD. WITH REGARD TO THE INEFFECTIVE ASSISTANCE, A COUNSEL CLAIMED, I SUBMIT TO THIS COURT, THAT IS SOMETHING THAT IS APPROPRIATE FOR 3.850, THAT THESE ARE QUESTIONS OF TRIAL TACTICS AND STRATEGY AND THIS IS SOMETHING THAT NEEDS TO BE EXPLORED WITH DEFENSE COUNSEL, AND IF THIS COURT ACCEPTED COUNSEL APARTMENTS INVITATION TO JUST JUMP RIGHT -- COUNSEL'S INVITATION TO JUST JUMP RIGHT INTO THAT, THEN WE MIGHT AS WELL -- MIGHT AS WELL DO AWAY WITH THE CONTEMPORANEOUS RULE, AND I SUGGEST THAT IT IS NOT. AND FINALLY BACK TO PROPORTIONALITY.

LET ME GO BACK TO ONE OF THE SUGGESTED ARGUMENTS, WHICH WAS THE ATTACK ON THE DEFENDANT'S CHARACTER. WOULD YOU AGREE THAT THAT, IF THAT ARGUMENT HAD BEEN OBEYED TO, THAT THAT ARGUMENT IS A -- HAD BEEN OBJECTED TO, THAT THAT ARGUMENT IS AN IMPROPER ARGUMENT?

WHICH ARGUMENT ARE YOU REFERRING TO?

THE ONE ABOUT THE DEFENDANT RUNNING AROUND ON HIS WIVES AND BASICALLY ATTACKING HIS CHARACTER, AS A REASON FOR FINDING HIM GUILTY OF THIS CRIME.

I THINK THIS IS SOMETHING THAT HAS BEEN CONSTRUED BY COUNSEL AS AN ATTACK ON THE CHARACTER. I THINK THAT WHAT WE HAVE HERE ARE COMMENTS ON THE EVIDENCE. THAT, FOR EXAMPLE, HE TALKS ABOUT THE FACT THAT HE DIDN'T PAY CHILD SUPPORT, THAT HE HAD A GIRLFRIEND. THESE ARE ALL THINGS THAT ARE IN EVIDENCE. THESE ARE ALL THINGS THAT DEFENSE COUNSEL CHALLENGED THEIR TESTIMONY, BASED UPON THAT THEY WERE NOW EX-ES AND THEY ARE DUMPED AND THAT THEY HAVE AN AX TO GRIND, THAT THESE ARE ALL PROPER COMMENTS ON THE EVIDENCE, AND IT WAS NOT AN ATTACK ON THE DEFENDANT'S CHARACTER. ONE OF THE OTHER THINGS THAT HE RAISES AS AN ATTACK ON THE DEFENDANT'S CHARACTER IS THE FACT THAT THE DEFENDANT'S FATHER PAID \$400 TO GERARD JONES, BECAUSE HE WAS TOLD BY THE DEFENDANT THAT JONES WAS IN JAIL AND HIS FAMILY NEEDED THE MONEY, WHEREAS HIS OWN CHILDREN WERE NOT RECEIVING MONEY. THAT IS AN APPROPRIATE COMPARISON TO MAKE IN THIS CASE, BECAUSE HE HAS PAID THIS MONEY TO THIS MAN TO SUBMIT HIM A FALSE AFFIDAVIT, SAYING THAT SOMEBODY ELSE HAD COMMITTED THE CRIME, AND TO SAY THAT YOU WOULD JUST PAY THIS MONEY OUT OF THE GOODNESS OF YOUR HEART, WHEN YOU ARE NOT TAKING CARE OF YOUR OWN CHILDREN, REFUTES THAT EVIDENCE, AND IT IS APPROPRIATE.

SO THE COMMENT I AM TALKING ABOUT IS YOU SAY YOU THINK, ABOUT THE DEFENDANT, YOU HAVE GOT TO REALIZE WHO YOU ARE DEALING WITH. YOU THINK A MAN WHO THINKS ABOUT BEING NUMBER ONE, A MAN WHO DOESN'T TELL THE TRUTH. HE DOESN'T TELL THE TRUTH TO THE WOMEN HE IS INVOLVED W HE CHEATS ON THEM. HE RUNS AROUND ON THEM. NOT JUST ONCE, NOT JUST TWICE. THAT IS WHO WE ARE DEALING WITH HER. -- WITH HER. THAT THAT -- THAT IS NOT HOW THE STATE USED THAT EVIDENCE. THAT IS NOT HOW IT CAME OUT, TO SAY, WELL, WE ARE ALLOWED TO GET INTO HIS EXTRAMARITAL AFFAIRS BECAUSE WE WANT THE JURY TO KNOW THE KIND OF MAN THEY ARE DEALING WITH. IT CAME OUT IN ANOTHER CONTEXT. SO ARE YOU SAYING THAT FACT --

THIS IS THE GUILT-PHASE ARGUMENT, YOU ARE REFERRING TO HERE?

YES.

IT WAS NOT OBJECTED TO.

ASSUMING IT HAD BEEN OBJECTED TO, DO YOU AGREE THAT THAT IS AN I AM PROPER?

IT PROBABLY WAS NOT THE EFFICIENT USE OF TIME IN CLOSING ARGUMENT. I WOULD AGREE WITH THAT. FINALLY, WITH REGARD TO PROPORTIONALITY, WE HAVE THREE AGGRAVATORS. THE FELONY, WHICH IS THE CONTEMPORANEOUS MURDER OF DOUG LAWSON. WE HAVE THE MURDER IN THE COURSE OF A BURGLARY AGGRAVATOR, WHICH I SUBMIT IS APPROPRIATE IN THIS CASE, BASED UPON THIS COURT'S DECISIONS IN ROBERTSON AND MILLER, AND THE HEINOUS, TROB US AND CRUEL, WHICH -- AT TROBIOUS AND CRUEL, WHICH HAS NOT BEEN CHALLENGED AND COMPARED IN THE EVIDENCE. IN CASES OF FEENEY AND WILLIAMSON AND ALLISON, WHERE YOU HAVE THE TYPE OF MURDERS IN THIS HOME, THE CASE WARRANTS THE DEATH PENALTY, AND IT SHOULD BE ENFORCED. THANK YOU.

THANK YOU. COUNSEL. REBUTTAL?

THANK YOU. IF THE COURT PLEASE. MR. JUSTICE WELLS, WHAT HAPPENED IS THE TAPE WAS INTRODUCED INTO EVIDENCE, AND THE JURY WAS TOLD WE ARE GOING TO PLAY THE TAPE. WE ARE GOING TO GIVE YOU THESE TRANSCRIPTS. FOR AN HOUR AND-A-HALF, AN INAUDIBLE TAPE WAS PLAYED. THERE WAS STATIC IN THE COURTROOM. WHILE THE JURY READ THIS 33-PAGE TRANSCRIPT. IT IS THE ONLY OTHER REFERENCE THAT WE HAVE TO IT IS, AT THE END OF THE DAY, THE JURY WAS TOLD YOU CAN JUST LEAVE THOSE ON YOUR SEATS. THAT IS IT. THAT IS ALL THE JURY WAS INSTRUCTED REGARDING THE TRIMENTS, AND THE RINGING ENDORSEMENT GIVEN BY THE PROSECUTOR REGARDING THE ACCURACY, AT PAGE 526, QUOTE, THE TRANSCRIPT IS WHAT WE WERE ABLE TO COME UP WITH, AND IT IS ACCURATE, AS BEST YOU CAN MAKE OUT FROM THIS TAPE.

COULD THIS TRANSCRIPT HAVE BEEN USED BY THIS WITNESS TO REFRESH HER RECOLLECTION?

THE PROSECUTOR UTILIZED IT AFTER THE TAPE WAS PLAYED, BY SAYING ON PAGE 7, DO YOU KNOW WHAT THE DEFENDANT MEANT WHEN HE SAID THIS? AND SHE GAVE HER BEST EXPLANATION OR INTERPRETATION AS TO HOW IT WAS MEANT. BUT THE PROBLEM -- AS TO HOW IT WAS MEANT. BUT THE PROBLEM THAT I AM ASKING THE COURT TO HAVE WITH IT IS THE POOLED EFFORT, IN THAT THE TAPE WAS NOT ONE PERSON'S RECOLLECTION. THESE PEOPLE SAT DOWN SIX MONTHS LATER AND SAID, ALL RIGHT, LET'S TRY AND FIGURE OUT, THE BEST WE CAN, AS TO WHAT THE BEST FOOD FORWARD THAT WE ARE GOING TO PRESENT.

BUT IF AND I HAVEN'T, AS OF YET, AND I CERTAINLY WILL, READ THE PART OF THE RECORD, BUT

IF THE WITNESS HAD BEEN ASKED IF, SINCE WE CAN'T UNDERSTAND THE TAPE, AND THAT YOU, DID YOU PREPARE A TRANSCRIPT, AND SHE WOULD SAY, YES, WITH, YOU KNOW, I SAT DOWN WITH THESE PEOPLE, AND DID THAT, AND THE WITNESS, THEN, ASKED, IS THE REFERENCE TO THE TAPE REFRESH YOUR RECOLLECTION, AS TO WHAT WAS SAID IN THOSE TELEPHONE CONVERSATIONS, THEN, AND SHE SAID YES, THEN THE WITNESS COULD CERTAINLY TESTIFY FROM THE TRANSCRIPT. COULDN'T --

ABSOLUTELY. AND IF WE HAD NOT HAD THE TRANSCRIPT, THE PROSECUTOR WOULD BE ALLOWED TO ALLOW THE WITNESS TO REFRESH HER RECOLLECTION FROM USING THE TRANSCRIPT, BUT WHAT WE ARE COMPLAINING ABOUT IS THE JURY, SITING FOR AN HOUR AND-A-HALF, READING THE TRANSCRIPT. IT IS BASICALLY AS IF, TO USE A 1990s ANALOGY, THE PROSECUTOR SAID, OKAY, YOU CAN REMEMBER EVERYTHING THAT HAPPENED. RIGHT? LET ME DOWN LOAD FROM YOUR MIND EVERYTHING THAT YOU CAN REMEMBER, ALTHOUGH IT IS POOLED, AND LET ME PUT IT IN THE MIND OF THE JURY LIKE THAT.

WHAT YOU ARE COMPLAINING ABOUT IS, THEN, IS THE GIVING OF THE TRANSCRIPT TO THE JURY, SO THE JURY COULD FOLLOW THE WIT'S TESTIMONY?

-- THE WITNESS'S TESTIMONY?

THAT WAS THE ON OBJECTION. AND SECONDLY, WITHOUT INSTRUCTION TO THE JURY HAD, THIS IS AN AID. IF YOU ARE RECOLLECTING OR IF YOU ARE HEARING --

WAS THERE A REQUEST TO INSTRUCT THE JURY?

NO. NO. THERE WASN'T. ALTHOUGH AT A PRETRIAL MOTION, WHEN THERE WAS AN OBJECTION, THE TRIAL COURT SAID I AM GOING TO ALLOW THE TAPE. THE TRANSCRIPT WON'T GO IN, BUT THERE WILL BE INSTRUCTIONS, BUT NO ONE EVER FOLLOWED UP ON THAT. REGARDING THE DOUBT, I WOULD SUBMIT TO THE COURT THAT THE TRIAL JUDGE WAS PUT ON NOTICE THAT THIS WAS NOT A PROPER QUESTION. IT WAS NOT A PROPER QUESTION. AND ANYTHING MORE THAN THAT WAS NOT APPROPRIATE FOR THE COURT TO KNOW THAT. I REALIZE THAT MY TIME IS UP. I WOULD ASK THIS COURT TO BE CONCERNED REGARDING THE INTEGRITY OF THE PROCESS HERE, JUST LIKE THIS COURT WAS IN ROBINSON. IT WAS INEFFECTIVE ASSISTANCE TO COUNSEL, BUT THE DEFENDANT DIDN'T GIVE UP ANYTHING, IF HE WAS ASKING FOR AN ALIBI INSTRUCTION. ALL THE WITNESSES WERE LISTED. HE DIDN'T GIVE UP A THING. THANK YOU.

THANK YOU VERY MUCH, COUNSEL. THANKS TO BOTH OF YOU. WE WILL BE IN RECESS FOR 15 MINUTES. BAILIFF: PLEASE RISE. [ORAL ARGUMENTS WILL CONTINUE.] BAILIFF: PLEASE RISE. PLEASE BE SEATED.

ALL RIGHT. THE NEXT CASE ON THE COURT'S