Rickey Bernard Roberts v. State of Florida

THE NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS ROBERTS VERSUS STATE.

MAY IT PLEASE THE COURT. COUNSEL. FORWARD, MY NAME IS MARTIN McCLAIN. I AM HERE TODAY TO REPRESENT MR. RICKEY ROBERTS. THIS CASE, IN ESSENCE, INVOLVES TWO DIFFERENT APPEALS FROM TWO DIFFERENT 3.850s THAT HAVE BEEN FILED. THE 19963.850 AND THE YEAR 2003.850. ON THE YEAR 200, 3.850, A RESENTENCING WAS ORDERED AND THE STATE HAS FILED AN APPEAL, AND I WILL ADDRESS THAT APPEAL IN MY REBUTTAL, AFTER THE STATE HAS HAD A CHANCE TO ARGUE. I INTENT TO FOCUS, IN MY INITIAL ARGUMENT ON, THE 1996 3.850, ON WHICH THE COURT DENIED RELIEF. ON 1996, THE 3.850 WAS FILED ON THE BASIS OF AN AFFIDAVIT FROM RHONDA HAINES, AND THIS COURT GRANTED AN EVIDENTIARY HEARING TO HEAR HER TESTIMONY AS RELATEED TO A BRADY-GIGLIO CLAIM.

THE JUDGE AND THE PROSECUTOR IN THIS CASE STILL AROUND?

JUDGE SOLOMON IS A SENIOR JUDGE, AND HE WAS IN 1996, AND HAS BEEN SINCE THEN, AND I DON'T KNOW IF HE IS STILL DOING CASES NOW, BUT HE IS AROUND. THE ORIGINAL TRIAL ROSECUTORS WE A MR. HOWELL AND MR. GLIK, WHO IS NOW JUDGE GLIK. IS HE A CIRCUIT COURT JUDGE IN DADE COUNTY, AND MR. HOWELL HAS CONTINUED TO BE INVOLVED IN THE CASE AND WAS INVOLVED AS RECENTLY AS THE YEAR 2000. IN 1996, BEFORE THIS COURT'S OPINION, BEFORE THE MANDATE ISSUED, I LEARNED, IN THE RICK MAN CASE THAT HAPPENED IN THE SUMMER OF 1996, THAT THERE WAS AN ILLEGAL CONTACT BETWEEN THE JUDGE AND THE PROSECUTE NOR THAT CASE. BASED ON WHAT I HAD HEARD, I HAD NOT SEEN THE TRANSCRIPT AT THAT TIME, WITH REFERENCE TO WHAT CAME OUT IN THE RICKMAN HEARING. IT CAME OUT IN THE RICKMAM IN 1996, BASED ON THAT MOTION TO DISQUALIFY, AND I FILED A SECOND MOTION TO DISQUALIFY AS RELATED TO JUDGE SOLOMON, AND A MOTION TO ASCERTAIN WHETHER JUDGE SOLOMON ENGAGED IN EXPARTE COMMUNICATIONS WITH THE STATE AND/OR ABDICAD HIS INDEPENDENT JUDICIAL ROLE AND ALLOW THE STATE TO WRITE THE FINDINGS OF FACT IN SUPPORT AFTER DEATH SENTENCE, BUT AT THAT TIME I HAD THIS MOTION TO DEPOSE AND I FILED IT IN ACCORDANCE WITH STATE V LEWIS AND THAT I NEEDED TO QUESTION JUDGE SOLOMON CONCERNING RICKMAN. AT THIS POINT THE JUDGE DOES NOT REVEAL AND THE STATE DOES NOT REVEAL AND THE JUDGE DENIES THE MOTION TO DEPOSE AND DENIES THE MOTION TO DISQUALIFY. I SUBMIT, AT THIS POINT IN TIME, GIVEN WHAT WE KNOW IN LIGHT OF THE SUBSEQUENT PROCEEDINGS, WE KNOW THAT THE EXPARTE CONTACT HAPPENED. WE KNOW THAT FROM JUDGE SOLOMON SOLOMON'S TESTIMONY, WHEN HE REVEALED IT IN APRIL OF 2000, AND BASED ON HIS TESTIMONY, ON THE STATE'S APPEAL, THE JUDGE BELOW HAS FOUND THE EXPARTE OCCURRED, BY CLEAR AND CONVINCING EVIDENCE, ONHE BASIS OF JUDGE SOLOMON'S TESTMONY,THAT HE LLOED THE SAME PROCEDURE HERE THAT HE FOLLOWED IN THE RICKMAN CASE AND IN RESENTENCING. GIVEN THAK, IT IS MY POSITION THAT WHAT ELSE COULD MR. ROBERTS DO, OTHER THAN ASK THE JUDGE TO REVEAL WHETHER IT HAD HAPPENED, AND WE DID THAT. IN NOVEMBER OF 1996. WE DID NOT GET AN ANSWER TO THAT QUESTION UNTIL APRIL OF 2000. IT IS MY POSITION, AS IT RELATES TO THE 19966 -- THE 1996 3.850 THAT THE MOTION TO DISQUALIFY WAS ERROR, HAD THOSE TWO MOTIONS BEEN GRANTED. WE HOD GO BACK, IN ESSENCE, TO NOVEMBER OF 1996.

NOW, THE MOTION TO DISQUALIFY THE TRIAL JUDGE WAS BASED ON, PURELY ON THE FACT THAT THERE HAD BEEN THE EXPARTE COMMUNICATION?

THERE WAS A SERIES OF THINGS THAT, OVER THE COURSE OF THE CASE WERE INCLUDED, SPECIFICALLY AS TO RICKMAN, WHAT I KNEW IN OCTOBER OF 1996, THE INITIAL MOTION WAS THAT THE SAME PROSECUTOR HANDLED THE RICKMAN HEARING HD EXPARTE CONTACT AND IN THE COURSE OF PREPARING ABOUT WHAT HAPPENED IN RICKMAN, I SAID THAT THAT RAISED QUESTIONS FROM MR. ROBERTS' POINT OF VIEW. IN ADDITION TO TESTIMONY THAT, CAME OUT IN THE RICKMAN CASE. THEN WHEN THE ORDER CAME OUT GRANTING RELIEF ON RICKMAN, THAT WAS MORE SUBSTANTIAL INFORMATION THAN I HAVE HAD BEFORE AND A SPECIFIC FACT FINDING. I THEN REDID THE MOTION TO ESSENTIALLY CITE WHAT HAD HAPPENED IN RICKMAN.

IN RICKMAN, DID THE PRPT OR ESSENTIALLY AGREE THAT HE HAD DONE THE SENTENCING HEARING, MADE THE TRIAL FOUNDING FOR THE TRIAL JUDGE?

ACTUALLY IN THE RICKMAN HEARING, JUDGE SOLOMON ANDHE PROSECUTOR, MR. BRADY, BOTH ACKNOWLEDGED THAT THERE HAD BEEN CONTACT. THERE WAS DISAGREEMENT AS TO EXACTLY WHO SAID WHAT AND EXACTLY WHO WROTE WHAT AND WHETREDITS WERE MADE, EITHER, BUT THEY BOTH AGREED THERE WAS THE CONTACT.

NOW, IN THIS CASE DO WE HAVE A PROSECUTOR SAYING THERE WAS, OR WAS NOT THE PROSECUTOR SAYING IN THIS CASE ABOT CONTACT, AS REGARDS TO PREPARING THE SENTENCING HEARING OR SENTENCING ORDER?

THERE WERE TWO PROSECUTORS. WE HAVE MR. HOWELL, WHO IS STILL IN THE STATE ATTORNEYS OFFICE AND HE PARTICIPATED IN THE HEARING AS COUNSEL IN ADDITION TO BEING A WITNESS IN 2000. HIS POSITION WAS THAT HE, HIS BEST RECOLLECTION WAS HE HAD NEVER SEEN THE SENTENCING FINDINGS, WAS NOT INVOLVED IN THE DRAFTING, WAS NEVER ABLE TO FIND DRAFT ORDER IN THE STATE ATTORNEY'S POSSESSION AND KNEW NOTHING ABOUT IT, A AND HE INICATD THT, IF IT WAS DONE, IN ALL LIKELIHOOD, IT WAS EITHER DONE BY HIMSELF OR MR. GLICK, JUDGE CLICK, AND THAT WAS HIS TESTIMONY. JUDGE CLICK TESTIFIED THAT, IN CHROOKING, IN ANTICIPATION OF -- IN LOOKING, IN ANTICIPATION OF THIS HEARING, HE HAD LOOKED AT THE ORDER AND FRANKLY HE THOUGHT IT WAS TOO WILD TO HAVE BEEN DRAFTED BY HIMSELF. HE THOUGHT HE WAS NOT A PARTICULARLY STRONG WRITER BUT THAT WAS THE EXTENT OF HIS TESTIMONY, BUT HE SAID THAT HE COULD NOT CATAGORICALLY STATE WHETHER OR NOT HE HAD DRAFTED IT. HE COULDN'T REMEMBER WHETHER HE DRAFTED IT AND THAT IT DIDN'T LOOK LIKE HIS WRITING.

SO IN THIS CASE IT BREAKS DOWN TO THE TRIAL JUDGE SAYING THAT I FOLLOWED THE SAME PROCEDURE IN THIS CASE THAT I DID IN ALL OTHER CASES.

YES, AND THAT IS MY POINT IS THAT HE IS THE SOURCE OF THE INFORMATION. E IS ON NOTICE IN NOVEMBER OF 1996 THAT RICKMAN RECEIVED A RENTECINGN THE BASIS OF THIS PROCEDURE, AND IT SEEMS TO ME AT THAT POINT IN TIME, IT IS HIS OBLIGATION TO DISCLOSE TO MR MR. ROBERTS AND TO MR. ROBERTS'S COUNSEL THAT THE SAME THING HAPPENED IN THE ROBERTS CASE AND THEREFORE WE WOULD LITIGATE THE ISSUE.

WAS IT WRITTEN IN A SIMILAR STYLE AS THE RICKMAN ORDER OR ANY OF THAT?

NO, MA'AM. ALL, BASICALLY, THAT I PRESENTED WAS JUDGE SOLOMON'S TESTIMONY, WHICH JUDGE BAGLEY FOUND CREDIBLE AND FOUND PROVED THE CLAIM BY CLEAR AND CONVINCING EVIDENCE. SO AS TO THAT, MY FIRST ARGUMENT IS THAT WE SHOULD GO BACK TO NOVEMBER OF 1996. THE MOTION TO DEPOSE AND TO DISQUALIFY SHOULD HAVE BEEN GRANTED. THE NEXT ISSUE IS THE CERTAIN I CAN'T OF MATERIALITY -- IS THE RTIFICATE OF MATEALITY ISSUE. THIS COURT REMANDED AND SAID THAT THE EVIDENTIARY HEARING WOULD BE TO HEAR FROM RHONDA HAINES AND TO HER HERSTIMOY AND EVALUATE IT. WHEN WE GOT BACK TO THE CIRCUIT COURT, MS. HAINES WAS IN LOS ANGELES, AND WE ASKED FOR A CERTIFICATE OF MATERIALITY, IN ORDER TO HAVE AN OUT-OF-STATE SUBPOENA ISSUED AGAINST HER TO COMPEL

HER ATTENDANCE TO THE EVIDENTIARY HEARING. THE STATE TOOK THE POSITION THAT THE 3.850 PROCEEDINGS WERE SIMILAR INNATE AND NOT CRIMINAL, AND THEREFORE THE OUT-OF-STATE SUBPOENA PROVISIONS DID NOT APPLY. THEY ONLY APPLIED TO CRIMINAL PROCEEDINGS. AND JUDGE SOLOMON ULTIMATELY AGREED WITH THE STATE AND REFUSED TO ISSUE A CERTIFICATE OF MATERIALITY. THE STATE'S POSITION NOW, IS THAT, WELL, FIRST THEY ARE STILL ARGUING THAT THAT IS CORRECT, EVEN THOUGH IN EVERY OTHER CASE THAT I COULD FIND, CERTIFICATE MATERIALITY HAD ISSUED IN 3.850 PROCEEDINGS, BECAUSE IT IS TO VINDICATE THE TRIAL RIGHT, THE CRIMINAL PROCESS.

IS THERE ANY OTHER WAY YOU COULD HAVE GOTTEN THE WITNESS HERE? ANOTHER ONLY OTHER WAY WOULD BE TO RELY UPON HER TO VOLUNTARILY COME, AND THAT IS WHAT THE STATE SORT OF, ON SECOND ARGUMENT, THEY USED THE PHRASE INVITED HER. I AM NOT SURE THAT THAT IS A CORRECT ANALYSIS. I THINK WHAT THEY ARE -- INVITED ERROR. I AM NOT SURE THAT THAT IS A CORRECT ANALYSIS FORM I THINK WHAT THEY ARE TRYING TO ARGUE IS MARM LESS ERROR.

THERE IS NO OTHER WAY THAT YOU COULD COMPEL HER ATTENDANCE?

DID SHE NOT WANT TO COME? DID SHE SAY SHE WOULD NOT COME?

WHAT HAPPENED BELOW WAS THAT, AT THE EVIDENTIARY HEARING, MR. HOWELL AND MS. COREY, MS. COREY REPRESENTING MR. ROBERTS, SAID THAT SHE HAD SPOKEN TO HER ON THE PHONE AND THREE WEEKS BEFORE THE HEARING SHE WAS WILLING TO COME BUT NEEDED A PAPER OR SOMETHING FOR CHILDCARE ARE A FOR WORK. SHE INDICATED THAT THE WEEK BEFORE THE HEARING, SHE SUDDENLY CHANGED HER ATTITUDE, IN LIGHT OF THE FACT THAT SHE WAS BEING THREATENED WITH PERJURY CHARGES AND SAID THAT SHE WOULDN'T COME WITHOUT A SUBPOENA.

DIDN'T THE STATE REPRESENT THAT, AT SOME POINT, SHE WOULD BE PRESENT?

DID THE STATE?

YES.

I DON'T BELIEVE SO. JUDGE SOLOMON INDICATED AT THE EVIDENTIARY HEARING THAT THE UNDERSTANDING WAS THAT SHE WOULD BE PRESENT VOLUNTARILY, BUT I DON'T BELIEVE THAT THAT WAS EVER STATED ON THE RECORD, AND IN FACT WHEN THE CASE WAS UNDER WARRANT IN 1996, I HAD ARGUED THAT WE NEED A STAY, IN ORDER TO GO THROUGH THE OUT-OF-STATE SUBPOENA PROCESS, SO IT HAS ALWAYS BEEN MY POSITION THAT THAT WAS NECESSARY. THE STATE --

WHY COULDN'T YOU TAKE HER DEPOSITION?

IN ORDER TO DO THAT, AND TO SOME EXTENT THIS CASE NEEDS TO BE EVALUATED PARALLEL WITH THE PAUL SCOTT CASE, BECAUSE IT IS SORT OF A FLIP SIGHT SIDE OF THE PAUL SCOTT -- THE FLIP SIDE OF THE PAUL SCOTT CASE. THAT IS WHAT I TRIED TO DO, TO PERPETUATE TESTIMONY AND TO PRESENT IT OF A WITNESS IN CALIFORNIA, AND THE COURT SAID YOU HAVE TO SHOW HE IS NOT AVAILABLE, SO THIS COURT AFFIRMED THAT AND SAID YOU SHOULD HAVE DONE THE OUT-OF-STATE SUBPOEA. SO HERE I HAVE DONE THE OUT-OF-STATE SUBPOENA. I MEAN, IBELIEVE AD IN FACT IT AS ARGUED AT THE STATE'S POSITION WAS THE TNESSWAS NOT UNAVAILABLE. SO THAT YOU COULD GET THE OUT OF -- THE DEPOSITION IN LIEU OF LIVE TESTIMONY.

BUT THERE WAS SOME COMPLICATIONS IN THE SCOTT CASE, AS TO WHEN THE THING WAS GOING TO BE DONE.

CORRECT. CORRECT.

AND WHETHER IT WAS GOING TO BE TIMELY. BUT HERE THERE WAS NO ATTEMPT TO TAKE HER DEPOSITION.

WELL, THE STATE WOULD NOT AGREE TO TAKE HER DEPOSITION, BECAUSE SHE WAS NOT UNAVAILABLE.

BUT THERE WAS NO ATTEMPT TO TAKE HER DEPOSITION.

I DO NOT, A FORMAL MOTION WASN'T FILED, BUT THERE WERE MANY DISCUSSIONS IN APRIL AND IN JUNE, ON THE CERTIFICATE OF MATERIALITY AND THE STATE'S POSITION WAS THAT IT WAS NOT AN AVAILABLE DEVICE. YOU COULDN'T HAVE A CERTIFICATE OF MATERIALITY ISSUE AND THAT SHE WAS AN AVAILABLE WITNESS AND SHOULD BE COMING VOLUNTARILY TO THE HEARING. SO IT IS A SITUATION WHERE, IT SEEMS TO ME, THAT IF IT IS A CATCH-22. YOU CAN'T GET THE OUT-OF-STATE PONA TO FORCE HER TO COME, AND YOU CAN'T CONTEND THAT SHE IS UNAVAILABLE, BECAUSE SHE VOLUNTARILY COULD HOP ON A PLANE IF SHE CHOSE TO. I MEAN, IN ORDER TO GET THE DEPOSITION, YOU HAVE GOT TO SHOW THAT SHE IS NOT AVAILABLE.

MAYBE I AM MISSING SOMETHING. IN A CIVIL CASE, CERTAINLY, YOU CAN, IT IS DONE ALL THE TIME, TAKE DEPOSITIONS OF WITNESSES IN OTHER STATES, AND SINCE THEY ARE 100 MILES AWAY, IF THEY ARE IN CALIFORNIA, THEN YOU CAN USE THOSE DEPOSITION INS A TRIAL PROCEEDINGS. WHY IS THAT NOT AN OPTION IN A 3.850?

MY READING OF THE PROVISIONS ON THE DEPOT TO PERPETUATE THE TESTIMONY IS THERE HAS GOT TO BE -- THE D -- THE DEPO TO PERPETUATE THE TESTIMONY IS THERE HAS GOT TO BE A SHOWING THAT THE WITNESS IS NOT AVAILABLE FOR TRIAL. AND IN CRIMINAL CASES, YOU HAVE THE ABILITY TO GET THE OUT-OF-STATE SUBPOENA TO FORCE THEM TO COME, AND WHEN YOU HAVE THAT, THAT SORT OF CHANGES WHAT YOU HAVE TO SHOW, IN ORDER TO SHOW THAT THEY ARE NOT AVAILABLE. IN THIS INSTANCE, WE ALWAYS WANTED TO PRESENT HER. WE TRIED TO PRESENT HER. THE STATE WAS INDICATING, ON THE RECORD, THAT IF SHE CAME AND IF SHE TESTIFIED IN ACCORDANCE WITH HER AFFIDAVIT, THEY WOULD CHARGE HER WITH PERJURY, AND IN THE COURSE OF PREPARING HER, TRYING TO GET HER TO -- PREPING HER, TRYING TO GET HER TO COME, WANTING TO VERIFY, WHICH IS WHAT THE AFFIDAVIT STATES AS TRUE, YOU HAVE GOT TO ATTEMPT THE CROSS-EXAMINATION, BECAUSE THE STATE IS NOT GOING TO WANT TO PRESENT A WITNESS AND COLLAPSE AND SAY THAT IS NOT TRUE. MR. CHIEF JUICE

YOU ARE IN YOUR REBUTTAL TIME.

ONE FINAL THING IS THAT THERE WAS NOT A FINAL ANALYSIS IN THE CUMULATIVE ANALYSIS THEORY. THE STATE CALLED WITNESSES AND ODDLY ENOUGH THE STATE'S WIT WITNESSES CORROBORATED WHAT WAS SAID,THAT SHE DISAPPEARED, AFTER THE WARRANT, AND THERE WAS NO ESTABLISHMENT OF A BRAID VIOLATION AND A CUMULATIVE POSITION WITH THE PREVIOUSLY PREVIOUSLY-PRESENTED BRADY CLAIM. THANK YOU.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE.

THE DISCUSSION ABOUT THE DEPOSITION, DO YOU CONCUR THAT, IN ORDER TO TAKE A DEPOSITION, THERE MUST BE A CERTIFICATE THAT THE WITNESS IS NOT AVAILABLE?

DO I CONCUR THAT TO TAKE A CIVIL DEPOSITION?

NO. A CRIMINAL, IN THIS SITUATION. WOULD A DEPOSITION HAVE BEEN AN APPROPRIATE WAY TO GO?

I THINK THAT PERHAPS YOU COULD HAVE DONE A DEPOSITION. PERHAPS YOU COULD HAVE DONE SATELLITE TESTIMONY. THERE ARE CERTAINLY OTHER WAYS TO GO. THEY WERE NEVER TRIED. THE CERTIFICATE OF MATERIALITY ONLY APPLIES, AND THE RIPROCAL STATUTE AND IT NEEDS TO BE APPLIED UNIFORMLY ACROSS THE COUNTRY, IN ORDER TO HAVE RECIPROCAL EFFECT, AND IT ONLY APPLIES TO STEPS IN CRIMINAL PROSECUTIONS AND GRANT OR INVESTIGATION. BY -- AND GRANTO INVESTIGATIONS. BY ITS OWN TERMS, IT HAS NEVER BEEN USED --

HAS IT BEEN USED IN A 3.850?

THERE IS NO OPINIONS ON IT BEING USED IN THIS COURT.

HAS IT, IT SAID IT SHOULD NOT BE --

FROM THE STATE OF KENTUCKY THERE HAVE BEEN OPINIONS THAT SAY, NO, THIS IS NOT. NO. BUT IT IS A RECIPROCAL STATUTE.

HERE IS, QUITE FRANKLY, THE VERY PRACTICAL PROBLEM THAT I SEE IN THIS CASE. THIS COURT, REHEARING DEPEND, SEPTEMBER 1996, SENT THIS CASE BACK WHEN IT WAS UNDER WARRANT, IF FOR ONE REASON, AND THAT WAS TO EVALUATE THE RECANTED TESTIMONY OF THIS WITNESS. NOW, IT LOOSE TO ME LIKE THAT BOTH THE LAWYER FOR THE DEFENDANT AND THE LAWYER FOR THE STATE HAD AN OBLIGATION TO GET THAT TESTIMONY IN WHATEVER FORM IT WAS GONNA BE GOTTEN, BERE THE TRIAL COURT SO THAT IT COULD BE EVALUATED. DON'T YOU AGREE WITH THAT?

WELL, I DON'T AGREE THAT IT IS THE LAWYER FOR THE STATE'S JOB, BECAUSE IT IS THEIR MOTION AND THEIR JOB TO PRESENT THEIR --

OBVIOUSLY THE CASE WASN'T GOING TO GO FORWARD UNTIL THAT WAS DONE.

THE STATE OBTAINED THE AGREEMENT OF MS. HAINES TO APPEAR VOLUNTARILY, AND THEN DEFENSE COUNSEL TURNED AROUND AND TOLD HER THEY ARE GOING TO CHARGE YOU WITH PERJURY IF YOU COME HERE. WE CAN'T CHARGE HER WITH PERJURY FOR WHAT HAPPENED AT TRIAL. THE STATUTE OF LIMITATIONS HAS RUN. WE, EVEN THOUGH IT HAS SINCE BEEN EXTENDED, THAT DOESN'T EXTEND STATUTES THAT HAVE ALREADY RUN.

DID YOU TELL HER THAT? WAS SHE TOLD THAT THE STATUTE OF LIMITATIONS HAD RUN?

I DON'T KNOW WHETHER THE STATE ATTORNEY TOLD HER THAT AT ALL. THE STATE ATTORNEY HAD NO INTENTION WITH CHARGING HER WITH PERJURY OVER. THAT WE KNEW WE COULDN'T. BESIDES WHICH WE BELIEVE HER RIALESTIMONY TO BE TRUE. THE ONLY WAY SHE COULD BE CHARGED --

DID YOU MAKE A STATEMENT ON THE RECORD THAT IF SHE CAME AND TESTIFIED CONSISTENT WITH HER AFFIDAVIT?

IF SHE PERCENTAGEERRED -- PERJURED HERSELF, NOW, YES, WE WOULD ARREST HERE.

-- ARREST HER.

LET'S BE CLEAR. LET'S PAUSE FOR A MINUTESO WE KNOW. TELL US EXACTLY WHAT THE STATE OF THE RECORD IS, INSOFAR AS THIS ISSUE ABOUT WHETHER OR NOT -- ABOUT WHETHER THE STATE IS CONTEMPLATING IF SHE TESTIFIED CONSISTENT WITH HER AFFIDAVIT, SHE WOULD BE CHARGED WITH PERJURY?

YES. WE DO BELIEVE THAT THAT AFFIDAVIT IS PERCENTAGE YURS AND THAT THAT TESTIMONY --

IS PERJURIOUS, AND THAT THAT TESTIMONY IS --.

SO DID YOU TELL HER IF YOU DO COME AND YOU TESTIFY ACCORDING TO YOUR AFFIDAVIT, THAT WE WILL CHARGE YOU WITH PERJURY?

NO.

YOU SAID SHE VOLUNTEERED --

SHE COLORADO UN -- SHE VOLUNTEERED TO COME AND SHE HAD.

YOUR VIEW ABOUT THE PERJURY CHARGE.

WHEN SHE GETS HERE TO FLORIDA THEN THE JUDGE HAS A DUTY AS IT WOULD WITH ANY WITNESS WHO IS FACING, GIVING UP THEIR FIFTH AMENDMENT RIGHT OR ANY OTHER POSSIBLE CHARGE, THE JUDGE HAS THE DUTY TO INFORM THAT WITNESS AND TO SEE THAT THAT WITNESS HAD COUNSEL. IT WAS NOT THE DEFENSE --

WHY WOULD THE STATE OBJECT TO HER COMPELLED APPEARANCE?

BECAUSE THE STATUTE DOESN'T APPLY.

WHY WOULD THE STATE OBJECT? WHY WOULD THE STATE NOT LET THAT PLAY ITSELF OUT AND IF THE JUDGE AGREES WITH ISSUING IT AND IF THE DEFENSE LAWYER WANTS IT, WHY WOULD THE STATE BE THE ONE THAT WOULD TRY TO PREVENT HER BEING COMPELLED TO COME?

BECAUSE STATE HAS THE DUTY TO ENFORCE THE LAWS, AND THATLAW DOESN'T SAY THAT YOU CAN DO THIS. AND NO MATTER WHAT, IF SHE HAD SHOWN UP UNDER SUBPOENA OR NOT AND HAD PERJURED HERSELF UNDER THAT SUBPOENA, SHE STILL COULD HAVE BEEN ARRESTED, AND THAT WAS WHAT WE ARE GOING TO CHARGE HER WITH PERJURY WITH, WAS FOR TESTIFYING IN COURT RJURIOUSLY AND NO SUBPOENA IN THE WORLD WOULD HAVE PROTECTED HER FROM THAT.

IF SHE TESTIFIED ACCORDING TO HER PREVIOUS TESTIMONY, SHE WOULD BE CHARGED WITH PERJURY. DID SHE KNOW THAT?

IF SHE TESTIFIED ACCORDING TO HER TRIAL TESTIMONY?

YES.

NO. WE DON'T BELIEVE THAT IS PERJURIOUS AND WE WOULDN'T CHARGE HER WITH PERJURY FOR THAT.

BUT YOU WOULD CHARGE HER WITH PERJURY IF SHE DID WHAT?

IF SHE PERJURED HERSELF.

IN WHAT RESPECT? IF SHE WAS CONSISTENT WITH WHAT SHE HAD ALREADY SAID, SHE WOULD, OF NECESSITY, PERJURE HERSELF. IS THAT CORRECT?

IF SHE WAS CONSISTENT WITH HER TRIAL TESTIMONY OR HER AFFIDAVIT?

HER AFFIDAVIT.

IT IS THE STATE'S BELIEF THAT THAT TESTIMONY WAS FALSE, AND THAT GIVING THAT TESTIMONY UNDER OATH IN FLORIDA WOULD BE ERY. NOW, WE WOULD HAVE TO PROVE THAT CHARGE.

SHE IS GIVEN A -- SHE HAS GIVEN AN AFFIDAVIT, AND IF SHE SHOWS UP AND IS EXAMINED RELATIVE TO THAT AFFIDAVIT, SHE WILL SURELY BE CHARGED WITH PERJURY.

AND IF THAT AFFIDAVIT IS TRUE THEN WHAT DOES SHE HAVE TO WORRY ABOUT? IT IS ONLY IF THAT AFFIDAVIT IS FALSE THAT SHE HAS ANYTHING TO WORRY ABOUT.

BUT AREN'T WE BACK TO, AS THE QHEEF JUDGE HAS SAID -- AS THE CHIEF JUDGE HAS SAID, A VERY PRACTICAL SITUATION. THIS COURT REMANDED IT FOR THE COURT TO CONSIDER THAT TESTIMONY AND AS HE SAID, THERE IS NOTHING GOING TO HAPPEN UNTIL THAT IS DONE, BUT THE STATE HAS DONE EVERYTHING IT SEEMS, TO --

THE STATE OBTAINS THE WITNESS'S AGREEMENT TO APPEAR VOLUNTARILY. IT IS ONLY WHEN THE DEFENSE CALLED HER UP AND SAID YOU SHOW UP, THE CHAT STATE IS GOING TO CHARGE YOU WITH PERJURY. IF SHE IS TESTIFYING TRUTHFULLY, THEN HE SHOULD TELL HER AS LONG AS YOU ARE TESTIFYING TRUTHFULLY THEN WHAT DO YOU HAVE TO WORRY? HE IS REPRESENTING MR. ROBERTS. HE SHOULD NOT BE INTERFERING WITH MR. ROBERTS CALL AGO WITNESS. HE IS VIOLATING HIS DUTY TO MR. ROBERTS BY DISSUADEING THAT WITNESS.

THAT BEING THE CASE, HE SOUGHT TO COMPEL HER ATTENDANCE, AND --

BY A MEANS THAT DOESN'T APPLY.

AND SO WHAT ARE WE GOING TO DO?

BEYOND THAT, THE TRIAL COURT TOOK THE AFFIDAVIT, AND THE TRIAL COURT ACTUALLY CONSIDERED IT AS PRESENTED TESTIMONY, AND THEN HE LOOKED AT THE TESTIMONY PRESENTED BY THE STATE, THAT CONTRADICTED THAT. THERE WERE NEVER 11 ARRESTS IN BROWARD COUNTY. THEY NEVER EXISTED. THEY WERE A FIG MEANT OF MS. HAINES'S IMAGINATION. THEY PRESENTED EVIDENCE THAT THERE WERE NO PUBLIC RECORDS THAT THESE ARRESTS EVER EXISTED, THAT THEY WERE NEVER ON NCIC, THAT NCIC HAD BEEN CHECKED AND THE WAY THEY CAME UP AT TRIAL IS MS. HAINES SAID THEY EXIST. NO ONE ELSE HAS EVER SAID THEY EXISTED, AND THE EVIDENCE SHOWED THAT THE ONE ARREST THAT DID EXIST WAS NOT TAKEN CARE OF BY THE STATE, THAT SHE PLED GUILTY TO IT THREE YEARS AFTER TRIAL, AND CONSIDERING THE AFFIDAVIT AS HER TESTIMONY, AND CONSIDERING THE REBUTTAL PUT ON BY THE STATE IT WAS FOUND THAT THE STATE'S EVIDENCE WAS CREDIBLE AND THE AFFIDAVIT WASN'T.

SO I COME BACK TO THE FACT THAT IT SEEMS TO ME THAT A FUNDAMENTAL THAT IS BY THIS CASE IS THIS COURT DIRECTED THAT THERE BE AN EVIDENTIARY HEARING CONDUCTED WITHIN 60 DAYS, AND HERE IT IS SIX YEARS LATER, AND THERE HASN'T BEEN THAT EVIDENTIARY HEARING, WITH THE JUDGE, THE TRIAL JUDGE EVALUATING THIS WITNESS'S TESTIMONY, AND THE FUNDAMENTAL QUESTION, IT SEEMS TO ME, THAT WE GET TO IS WHO IMPOSE -- IS WHO, IN POSTCONVICTION, IS GOING TO CARRY THE BURDEN OF MOVING THESE CASES FORWARD? IS IT GOING TO BE THE STATE, OR IS IT GOING TO BE THE, OR IS THE STATE GOING TO HANG AROUND AND WAIT FOR THE DEFENDANT TO DO SOMETHING, WHICH THE DEFENDANT HAS DEMONSTRATED THAT IS NOT GOING TO HAPPEN?

YOUR HONOR, WITH ALL DUE RESPECT, THE EVIDENTIARY HEARING DID HAPPEN. THE STATE LOST ITS RIGHT TO CROSS-EXAMINATION THIS WITNESS BECAUSE HER AFFIDAVIT WAS CONSIDERED. THE TRIAL COURT CONSIDERED THAT AFFIDAVIT AS IF SHE HAD TESTIFIED, AND EVALUATED THE CREDIBILITY OF THAT AFFIDAVIT, WHICH THE STATE WOULD HAVE A BETTER SHOT IF WE HAD DONE THE DEPOSITION. WE WOULD HAVE GOTTEN TO CROSS-EXAMINE HER. THE DEFENSE HAS NOW GOTTEN THE BEST OF BOTH WORLDS. THEY DIDN'T ACTUALLY HAVE TO BRING IN THE WITNESS AND SUBJECT HER TO CROSS-EXAMINE, BUT THEY HAD HER TESTIMONY CONSIDERED.

DID THE STATE TAKE THIS WITNESS'S DEPOSITION?

DID THE STATE TAKE THIS WITNESS'S --

COULD THE STATE HAVE TAKEN THIS WITNESS'S DEPOSITION, GONE TO CALIFORNIA, TAKEN HER DEPOSITION, GOTTEN THISN THE RECORD, AND THEN THIS CASE WOULD BE ON THE BASIS THAT THIS COURT SENT IT BACK TO DO?

YES, BUT THE STATE HAD OBTAINED HER VOLUNTARY AGREEMENT TO COME.

WELL --

AND IT WAS ONLY THE DEFENSE MADE HER, THAT SHE DOESN'T COME. THEY ARE THE ONES THAT KEPT HER FROM BEING THERE, WHEN IT WAS NONE OF THEIR BUSINESS TO DO THAT IS, AND AS FAR AS THE DISQUALIFICATION GOES, THEY NEVER ACTUALLY MOVED TO DISQUALIFY JUDGE SOLOMON BASED ON WHO WROTETE SENTENCING ORDER IN THIS CASE. THEY MOVED TO KISS DEFENSE -- TO DISQUALIFY HIM BASED ON YOU MUST HAVE HAD EXPARTE COMMUNICATION ITH THE STATE AND WE WANT TO FIND OUT WHAT YOU TALKD ABOUT WITH RICKMAN, NOT WHO WROTE THE SENTENCING ORDER IN SFLOBTS THEY RECEIVED THE DEPOSITION, NOW, OF JUDGE GLICK IN FEBRUARY OF 1996. THEY DIDNT FILE --

IS IT SIGNED?

YES.

HOW DID JUDGE GLICK GET IT?

THAT IS A GOOD QUESTION. HE DOES NOT RECALL HOW HE GOT IT BUT HE HAD AN UNSIGNED COPY, AND HE TURNED IT OVER TO THE DEFENSE IN 1996.

BUT DURING THE HEARING, WHILE THAT MAY BE SO, THE EVIDENCE WAS PRETTY CLEAR, WAS IT NOT, FROM ALL OF THE PEOPLE TESTIFYING ON BEHALF OF THE STATE, THAT THERE WAS NO SUCH ORDER EXISTING?

THEY DIDN'T WRITE ANDER. WHETHER AN UNSIGNED COPY EXISTED OR NOT WAS ANOTHER QUESTION.

JUDGE SOLOMON NEVER MADE ANY CONTACT WITH THEM?

YES. AND ALL OF THEM SAY, NEW YORK CITY IDON'T RECALL DOING THIS. I DI'TTHIS.

BUT HAD YOU NOT GIVEN UP YOUR ARGUMENT OF DUE DILIGENCE, ISN'T THAT WHAT THE TRIAL JUDGE FOUND?

THAT IS WHY THE TRIAL JUDGE ERRED, BECAUSE IT IS SITING THERE IN A 1996 RECORD. THEY HAD POSSESSION. THEY TOOK THAT DEPOSITION.

BUT YOU MADE A DIFFERENT -- YOU WERE TAKING, AFTER THE HEARING, SOMETHING AND BRINGING IT BACK IN AND TRYING TO APPLY THE ARGUMENT YOU MADE AT THE HEARING TO THAT. OR HAD YOU NOT ABANDONED THE ISSUE OF DUE DILIGENCE?

THE FACT THAT WE DON'T THINK THE CLAIM HAS MERIT DOESN'T MEAN THAT THEY DIDN'T HAVE TO PRESENT IT WITH DILIGENCE.

AT THAT POINT, IN FEBRUARY OF 1996, THIS CASE WAS STILL IN FRONT OF THIS COURT.

NO, YOUR HONOR, IT WAS BEFORE THE SECOND RULE 3 WAS FILED. THERE WERE DEPOSITIONS TAKEN FOR PUBLIC RECORDS PURPOSES, BEFORE THE SECOND RULE 3 WAS FILED, BEFORE THIS CASE COMES BACK TO THE COURT UNDER WARRANT, AND AT THAT POINT, BECAUSE THOSE DEPOSITIONS ARE PART OF THE OPINION THAT THIS COURT ISSUED, WHETHER CERTIFIED QUESTIONS FROM THOSE DEPOSITIONS SHOULD HAVE BEEN ANSWERED, THEY ARE HANDED, DURING THAT DEPOSITION, AN UNSIGNED COPY OF THE SENTENCING ORDER. MR. McCLAIN ADMITTED THAT THE REASON THE STATE WROUGHT SENTENCING ORDER IS THE STATE'S POSITION OF -- POSSESSION OF AN UNSIGNED COPY. THEY KNEW THAT WE HAD THE EVIDENCE. IT SITS THERE IN THE RECORD. WE DID AN ANALYSIS, AND IF IT IS SITTING THERE IN THE RECORD, YOU SHOULD INVESTIGATE IT. IT IS SITING THERE IN THE RECORD RECORD. IT IS SITING THERE, AN UNSIGNED COPY. THIS MOTION WAS NOT MADE. THEY DIDN'T GET AROUND TO THE QUESTION OF WHO WROTE THE SENTENCING ORDER UNTIL 2000. YES, TO DISQUALIFY ABOUT WHO WROTE THE SENTENCING ORDER, INSTEAD THEY SAID I WANT TO DISQUALIFY YOU BECAUSE OF CONVERSATIONS YOU HAD WITH ANOTHER WITNESS IN ANOTHER CASE. IT IS NOT CLEAR TO SAY A SENTENCING ORDER. THEY DID NOT PROVIDE DUE DILIGENCE.

WHY DID YOU NOT BRING THIS, IF YOU HAD THE ORDER, UP AT THE HEARING?

I DON'T KNOW. I WASN'T AT THE HEARING.

IS THAT LACK OF DUE DILIGENCE ON THE PART OF THE STATE?

WE ARE NOT REALLY CONCERNED WITH THE STATE'S DILIGENCE. THE STATE DID PRESERVE THIS. STE DID INFORM THE TRIAL COURT BEFORE HE RULED THAT IT EXISTED. THE STATE PRESENTED IT TOM. ITIS IN THE RECORD T WAS PRESERVED. THE STATE IS NOT HERE RAISING CLAIMS ABOUT THE VALIDITY OF ITS SENTENCE. THE DEFENSE IS. THE INTEREST THAT THE DUE DILIGENCE PRONG SERVES IS FINALITY.

ISN'T THAT WHAT, IN EFFECT, THE TRIAL JUDGE FOUND, THAT YOU HAD WAIVED THE ARGUMENT OF DUE DILIGENCE?

AGAIN THAT IS WHY THE TRIAL COURT ERRED, BECAUSE WE HAD RAISED THE ISSUE. IT IS SETTING THERE IN THE RECORD, AND, AGAIN, THEY GOT THE BEST OF BOTH WORLDS WITH REGARD TO THIS EVIDENTIARY HEARING, BECAUSE THEY GOT TO PRESENT THIS PERSON UNREBUTTED, UNCROSS-EXAMINED. SHE GOT TO HAVE THAT AFFIDAVIT CONSIDERED AS IF SHE HAD TESTIFIED TO IT LIVE, WITHOUT ANY CROSS-EXAMINATION AND THEN THE STATE GOT TO PUT ON ITS REBUTTAL, AND THE TRIAL COURT CHOSE TO BELIEVE THE STATE'S REBUTTAL.

HERE WE HAVE A SITUATION IN WHICH THIS WITNESS HAD TESTIFIED IN HER DEPOSITION BEFORE THE TRIAL, IN ONE WAY, TESTIFIED AT THE TRIAL ANOTHER WAY, FILED THIS AFFIDAVIT, WHICH REALLY REVERTED BACK TO HER PREVIOUS DEPOSITION, AND SO THIS COURT SAID, YOU KNOW, THIS REQUIRES AN EVIDENTIARY HEARING, TO SORT IT OUT. AS TO WHEN SHE WAS LYING, WHETHER SHE WAS LIING IN HER DEPOSITION OR LYING AT THE TRIAL.

AND THEY GOT THE BENEFIT OF THAT, YOUR HONOR. THEY GOT TO HAVE HER TESTIMONY IN THE FORM OF THAT AFFIDAVIT, CONSIDERED.

BUT THE POSTCONVICTION JUDGE DIDN'T GET TO EVALUATE HER IN PERSON OR IN SOME WAY THAT WOULD PUT THE QUESTION TO HER AS TO WHY HER TESTIMONY ACTUALLY, NOW, HAD REVERTED BACK TO THE FORM THAT IT WAS IN, IN HER DEPOSITION.

THAT'S RIGHT. SHE GOT TO PRESENT THE UNCROSS-EXAMINED TESTIMONY THAT I WAS PRESSUREURED BY MR. RAIN I KNOW, WHO -- BY MR. RIBIN, THAT I WASN'T WITH THE STATE ATTORNEYS OFFICE AND COULDN'T HAVE QUESTIONED HER, THAT I RECEIVED THESE BENEFITS

THAT NO ONE GAVE HER ABOUT AN ARREST THAT DIDN'T EXIST, SO SHE GOT TO PRESENT HER TESTIMONY, WITHOUT ANY CROSS-EXAMINATION BY THE STATE, SO INSTEAD OF GETTING HER UP THERE AND CROSS-EXAMINING HER ABOUT HER INITIAL STATEMENT AT E TIME OF THE ARREST AND THE DEPOSITION AND THE TRIAL TESTIMONY AND THE NEW AFFIDAVIT AND THE NEW TESTIMONY, THEY GOT TO PRESENT HER ON PAPER, WITHOUT BEING CROSS-EXAMINED. SO THEY GET THE BENEFIT OF HER SUBSTANTIVE TESTIMONY, WITHOUT THE DETRIMENT OF HER BEING CROSS-EXAMINED, AND THE TRIAL COURT, THEN, IS ABLE, THIS IS THE SAME TRIAL COURT WHO SAW THIS WOMAN AT THE TIME OF TRIAL, WHO HEARD HER BEING CROSS-EXAMINED ABOUT THE PRIOR STATEMENTS BEFORE, WHO NOW HAS ANOTHER STATEMENT FROM HER THAT HE IS CONSIDERING, OKAY, THIS IS THE EVIDENCE. I WILL CONSIDER THIS AS IF SHE TESTIFIED, AND NOW LET'S LOOK AT WHAT HAPPENED. THERE WERE ARRESTS? NO. THERE WERE NO RECORD OF ANY ARRESTS. WAS MR. RABIN AVAILABLE TO PRESSURE HER? NO. HE HAD LEFT THE STATE ATTORNEYS OFFICE TENMONTHS BEFORE TRIAL. NO. E WASN'T AROUND TO PRESSURE HER. DID THE OTHER STATE ATTORNEYS HELP HER? NO. THEY ALL TESTIFIED THAT THEY DIDN'T. THE RECORDS SHOW THAT SHE PLED GUILTY TOONE CHARGE THREE YEARS AFTER TRIAL, THE ONE CHARGE THAT TRULY EXISTED, SO AS FAR AS IT GOES, THEY GOT THE BENEFIT OF THE EVIDENTIARY HEARING THAT YOU ALL ORDERED, WITHOUT HAVING TO ACTUALLY PRESENT THAT WOMAN LIVE AND SUBJECT HER TO CROSS-EXAMINE. THERE FOR THE STATE RESPECTFULLY RESPECTS RESPECTFULLY REQUESTS THAT YOU DENY THE SECOND MOTION FOR POSTCONVICTION RELIEF AND GRANT THE THIRD MOTION FOR POSTCONVICTION RELIEF. MR. CHIEF JUSTICE

THANK YOU, MS. JACK ARRESTED. MR. Mc-- MS. JAGGARD. MR. McCLAIN.

FIRST, I WANT TO POINT OUT THAT MR. HOWELL TESTIFIED AT THE EVIDENTIARY HEARING THAT WAS CONDUCTED WITHOUT MS. HAINES'S PRESENCE THAT, HE MADE NO EFFORT TO DO ANYTHING REGARDING THOSE ELEVEN MISSING WARRANTS. IN FACT, THIS IS HIS TESTIMONY. THE PROSECUTOR'S TESTIMONY. IN FACT, THEY WERE STILL PENDING AT THE TIME OF TRIAL. THEY WERE STILL PENDING, WHEN WE PUT HER ON THE AIRPLANE TO GO HOME, AND MR. LANG POINTED THAT OUT OVER AND OVER, DURING THE COURSE OF THE TRIAL, SO IT IS NOT JUST MS. HAINES. THEY HAD THE FULL TESTIMONY AT TRIAL THAT THESE ELEVEN WARRANTS EXISTED. MR. HOWELL TESTIFIED THEY EXISTED, AFTER THE TRIAL, WHEN HE PUT HER ON THE PLANE TO GO HOME. NOW, ANOTHER ODD THING HERE IS THE STATE IS ARGUING THAT, WELL, SHE WOULDN'T COMMIT PERJURY IF SHE TESTIFIED THE WAY SHE TESTIFIED AT TRIAL. AT THE SAME TIME THEY SAY HER TESTIMONY AT TRIAL WAS FALSE, WHEN SHE SAID SHE HAD ELEVEN WARRANTS OUTSTANDING! IT DOESN'T MAKE ANY SENSE.

DID HOWELL TESTIFY EXPLICITLY THAT THESE CHARGES WERE THERE AND PENDING AND, OR DID HE JUST SAY IF THERE WERE CHARGES PENDING, THEY STILL REMAIN?

NO. HIS TESTIMONY IS HE RECALLED VERY VIVIDLY WHEN HE FOUND OUT ABOUT THE CHARGES. IT WAS DURING THE DEPOSITION, AND THEN HE EXPLAINS THAT THOSE CHARGES, HIS TESTIMONY IS THEY WERE STILL PENDING AT THE TIME OF TRIAL.

SO A FAIR READING OF HIS TESTIMONY WOULD BE THAT HE SAID, YES, I KNOW ABOUT THOSE CHARGES. THEY EXISTED, AND THEY WERE STILL PENDING AT THE TIME OF TRIAL.

YES.

WOULD YOU, NOW, RESPOND TO THE MOTION TO DEPOSE THE JUDGE.

YES, YOUR HONOR.

AND YOUR OPPONENT SAYS THAT THAT MOTION WASN'T DIRECTED TO RECUSING THE JUDGE AT ALL, THAT IT WAS DIRECTED TO THE OTHER CASE.

OPPOSING COUNSEL IS IGNORING THE MOTION TO DEPOSE AND FOCUSING ON THE MOTION TO DISQUALIFY. MY READING OF STATE V LEWIS, THE GOVERNING LAW AT THE TIME, WAS THAT I COULDN'T DO A MOTION TO DISQUALIFY, SAYING I WANT TO DEPOSE YOU. I NEEDED TO DO A MOTION TO DEPOSE AND THEN, IF THAT IS GRANTED, THEN I CAN GET THE DISQUALIFICATION. PERHAPS IT IS WHICH COMES FIRST. I AM NOT SU. BUT IN THE MOTION TO DEPOSE, IT SPECIFICALLY SAID I WANT TO INVESTIGATE JUDGE SOLOMON'S CONDUCT OF MR. ROBERTS'S TRIAL AND POSTCONVICTION PROCEEDINGS, TO DETERMINE WHETHER JUDGE SOLOMON ENGAGED IN EXPARTE COMMUNICATIONS WITH THE STATE AND/OR ABDICATEED AN INDEPENDENT JUDICIAL ROLE AND ALLOWED THE STATE TO WRITE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW SENTENCING MR. ROBERTS TO DEATH. I DON'T THINK IT COULD BE ANY CLEARER. THIS WAS FILED IN NOVEMBER 1996. NOW, THE STATE IS ARGUING THAT I LEARNED IN THE DEPOSITION OF JUDGE GLICK IN FEBRUARY OF '96, THAT THERE WAS THIS UNSIGNED SENTENCING ORDER. FIRST OF ALL, THE DEPOSITION I WASN'T PRESENT FOR. I WAS IN MARYLAND HAVING TO LITIGATE THE STATE POSTCONVICTION PROCEEDING IN MARYLAND. THE TRANSCRIPT NEVER REFERS TO THE UNSIGNED SENTENCING ORDER. THEY GO THROUGH AND ANALYZE EVERYTHING THAT JUDGE GLICK HAS BROUGHT BEING ATTACHED TO THE DEPOSITION, AND THAT IS NOT MENTIONED. IT IS NEXT TO THE FINAL DISPOSITION ORDER, AND I DON'T KNOW WHAT HAPPENED. NO ONE HAD EVER BEEN QUESTIONED ABOUT THAT, BUT LET'S ASSUME WORST CASESCERIO -- SCENARIO. LET'S ASSUME THAT THAT GIVES US NOTICE OF SOMETHING AND I HAVE ONE YEAR TO FOLLOW UP FROM FEBRUARY OF 1996. IN 1996, I ASKED THE JUDGE TO REVEAL WHETHER IT HAD HAPPENED. WHAT MORE IS THERE TO DO? JUST FILING AN UNSIGNED SENTENCING ORDER SAYING I WIN, I AM NOT GOING TO WIN ON AN UNSIGNED SENTENCING ORDER. THE ISSUE IS WHETHER THERE WAS EXPARTE CONTACT. I HAVE TO HAVE EITHER THE PROSECUTOR OR THE JUDGE SAY THERE WAS EXPARTE CONTACT. IN NOVEMBER OF 1996, I WANT TO KNOW DID IT HAPPEN, AND NO ONE TELLS ME FOR FOUR YEARS!

WOULD YOU RESPOND TO THE STATE'S ASSERTION, TO, THAT THEY HAD THIS WITNESS FROM CALIFORNIA, A IMPORTANT WITNESS THAT EVERYBODY HAS BEEN FOCUSED ON, READY TO COME TO THE HEARING AND THAT YOU REALLY KILLED THAT DEAL, INTENTIONALLY, TO PREVENT HER FROM COMING?

FIRST OF ALL, ALL WE HAVE ARE THE ORAL REPRESENTATION OF THE ATTORNEYS INVOLVED. MR. HOWELL AND MISS COREY, AT THE BEGINNING OF THE EVIDENTIARY HEARING. NOTHING IS UNDER OATH. IN FACT, MISS COREY BRING THAT IS UP PERHAPS WE SHOULD HAVE TESTIMONY, IF WE ARE PURSUING THIS, AND THE JUDGE SORT OF CUTS IT OFF. MR. HOWELL INDICATES THAT, IN HIS CONVERSATIONS, EVEN THE BEST CASE, SHE WANTED SOMETHING IN WRITING. SHE HAD CHILDREN. SHE WAS WORRIED ABOUT CHILDCARE. NOW, THINK ABOUT THAT FROM A DEFENSE POINT OF VIEW. YOU ARE BRINGING A WITNESS IN. SHE TELLS YOU SHE, HER AFFIDAVIT IS TRUE. THAT IS THE TRUE STUFF. SHE IS ON THE STAND AND BEING CROSSED BY THE STATE AND SAYING, YOU KNOW, YOU ARE GOING TO BE CHARGED WITH PERJURY IF YOU ARE SAYING SOMETHING NOW THAT WE DON'T BELIEVE. SHE HAS GOT CHILDREN IN CALIFORNIA THAT SHE HAS ARRANGED TO HAVE SOMEBODY TAKE CARE OF. I MEAN, I THINK I AM OBLIGATED TO KNOW WHAT HER REACTION IS GOING TO BE, WHEN THAT COMES UP, AND THERE IS NO QUESTION BUT THAT THE STATE SAID, ON THE RECORD, IF SHE SAYS WHAT SHE SAID IN HER AFFIDAVIT, WE WILL CHARGE HER WITH PERJURY. I THINK I AM OBLIGATED, IN THOSE CIRCUMSTANCES, TO KNOW HOW SHE IS GOING TO REACT, AND I AM ATTEMPTING TO GET HER THERE THROUGH THE OUT-OF-STATE SUBPOENA, AND I WOULD, ALSO, NOTE THAT -- HOW MUCH TIME IS GONE? I WAS JUST GOING TO NOTE -- WELL I WOULD ASK THE URT AFFIRM THE GRANT OF THE RESENTENCING AND REMAND FOR AN EVIDENTIARY HEARING ON THE 3.850. MR. CHIEF JUSTICE

THANK YOU, MR. McCLAIN. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL TAKE ITS MORNING RECESS AND HIM BE IN RECESS FOR 15 -- AND WILL BE IN RECESS FOR 15 MINUTES.