Milo A. Rose vs State of Florida

THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION, AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

GOOD MORNING, LADIES AND GENTLEMEN. WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE COURT'S CALENDAR IS MILO ROSE VERSUS THE STATE OF FLORIDA. JUSTICE QUINCE IS RECUSED IN THIS CASE, AND THEREFORE WILL NOT PARTICIPATE IN THE DETERMINATION AND DELIBERATION. COUNSEL, ARE YOU READY TO PROCEED?

YES, CHIEF JUSTICE. MAY IT PLEASE THE COURT. MY NAME IS JOHN THOMAS SIN-. I REPRESENT MR. -- MY NAME IS JOHN TOMASINO. I REPRESENT MILO ROSE, AND WE ARE HERE ON A SECOND-DEGREE MURDER CASE, TRANSFORMED INTO A CAPITOL CASE -- A CAPITAL CASE, BASED SOLELY ON THE TESTIMONY OF TWO WITNESSES, MARK POOL AND BECKY BOURTIN. THESE TWO WITNESSES, AS WE NOW KNOW, TRADED FAVORABLE TESTIMONY FOR FAVORABLE TREATMENT.

LET ME GET THIS STRAIGHT, AS FAR AS WHEN THE DEAL WAS SUPPOSED TO HAVE BEEN MADE. WHEN WAS YOUR ALLEGATION THAT THE DEAL BETWEEN THE STATE AND EITHER OF THESE WITNESSES WERE MADE.

THE DEALS WERE MADE PRIOR TO MR. ROSE'S TRIAL, IN A DEPOSITION THAT THE STATE TOOK IN ANOTHER CASE, BY THE NAME OF RICHARD RHODES. BECKY WAS DEPOSED IN THAT CASE, AND THIS WAS ANOTHER PINELLAS COUNTY CASE. THIS WAS IN 1985. MR. ROSE'S CASE WAS IN 1982. AT THIS DEPOSITION, WHEN THE -- MR. RHODES-ATTORNEY WAS INQUIRING ABOUT DEALS, BECKY, ALL OF A SUDDEN, STARTED TALKING AT LENGTH ABOUT HER PRIOR RELATIONSHIP WITH BRUCE YOUNG, THE PROSECUTOR AGAINST MR. ROSE.

HOW DO YOU GET AROUND JUDGE SHAFER'S CONCLUSION THAT, IN TERMS OF MATERIALITY, AS A MATTER OF LAW, THAT THIS WOULD HAVE LIMITED IMPEACHMENT VALUE, ASSUMING IT WERE TRUE, BECAUSE THE SAME WITNESSES GAVE THE SAME STORY, WITHIN HOURS AFTER THE MURDER. THIS ISN'T A SITUATION, AS JUDGE SHAFER WENT IN GREAT DETAIL TO DISCUSS AT THE HEARING, WHERE IT WAS -- THESE WERE JAIL HOUSE SNITCHES THAT COME ALONG, MAYBE, A FEW MONTHS AFTERWARDS AND THEN THE ISSUE OF WHAT THE DEAL IS, IS -- BECOMES MORE, OF GREATER IMPEACHMENT VALUE, BUT WHERE THEY HAVE GIVEN THE SAME STORY THROUGHOUT. HOW DO YOU RESPOND TO THAT?

FIRST, YOUR HONOR, THE THE DEAL THAT WAS BROKERED FROM THE DEPOSITION TESTIMONY, IT IS CLEAR THAT BOTH OF THESE PEOPLE, MARK AND BECKY, HAD PRIOR EXTENSIVE RELATIONSHIPS WITH THE STATE, PRIOR TO MR. ROSE'S CRIME. THEY KNEW THE CRIMINAL JUSTICE SYSTEM. THEY HAD HAD PRIOR CONTACTS WITH THE CRIMINAL JUSTICE SYSTEM. BECKY, HERSELF, WAS ON FELONY PROBATION FOR AGGRAVATED ASSAULT, AT THE TIME THAT THIS CRIME OCCURRED. JUDGE SHAFER, THE LOWER COURT, CONCLUDED, WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING, THAT THIS -- THAT THEY HAD NO KNOWLEDGE AS TO HOW TO WORK A DEAL WITH THE STATE ATTORNEY OR HOW TO FEED THEM INFORMATION THAT THEY WANTED TO HEAR.

I THOUGHT SHE GAVE YOU THE BENEFIT OF EVERY DOUBT AND ASSUMED THAT A DEAL HAD

BEEN MADE BUT FOUND THAT THE DEAL, IF IT WAS MADE, HAD TO BE MADE SOMETIME, AS YOU SAID, BEFORE TRIAL BEFORE AFTER THEY HAD GIVEN THEIR INITIAL STATEMENTS. DO YOU HAVE ANYTHING TO CONTRADICT THE FACT THAT THE DEAL WAS MADE WITHIN -- BETWEEN THE TIME OF THIS MURDER AND THE TIME THEY GAVE THEIR FIRST STATEMENT?

THE SECOND PROBLEM WITH THE LOWER COURT'S ANALYSIS IS THAT THEIR TESTIMONY DID NOT REMAIN THE SAME FROM THEIR INITIAL POLICE STATEMENTS TO THE TIME THAT THEY TOOK THE STAND AT TRIAL, AND AS WE WENT TO GREAT LENGTHS, IN OUR BRIEF, TO SHOW, BECAUSE OF THE SUMMARY DENIAL OF THE GUILT PHASE INEFFECTIVENESS CLAIM IN THE 1988 POSTCONVICTION HEARING, POSTCONVICTION COUNSEL HAS NEVER BEEN ABLE TO SHOW OR PROVE THAT THEIR STORY DID NOT REMAIN THE SAME, FROM THE TIME THAT THEY WERE INTERVIEWED INITIALLY, THE NIGHT OF THE MURDER, TO THE TIME THAT THEY GOT ON THE STAND.

WHAT DOES THE RECORD SHOW US, RIGHT NOW, ABOUT THE SIMILARITY OF THOSE STATEMENTS OR THE DIFFERENCE IN THOSE STATEMENTS AND WHAT IS CRITICAL TO YOUR POSITION NOW? WHAT DOES THE RECORD SHOW US RIGHT NOW?

THE RECORD SHOWS US, RIGHT NOW, THAT MARK POOL DID NOT INITIALLY STATE THAT MILO ROSE ASKED HIM FOR AN ALIBI. THE RECORD SHOWS US, NOW. THAT CONTRADICTS THE LOWER COURT'S FINDING IT THAT THEIR STORY DID NOT CHANGE. ADDITIONALLY STATEMENTS THAT HAVE BEEN ATTRIBUTED TO MR. ROSE, BY BECKY, AT TRIAL, AND HAVE SOMEWHAT BECOME THE HISTORY OF THIS CASE, OF CLOSER READING OF THE RECORDS AND THE POLICE REPORTS AND THE DEPOSITION SHOW THAT SHE MADE STATEMENTS THAT, THEN, WERE ATTRIBUTED TO MR. ROSE. SO IF THERE IS TWO PROBLEMS WITH THE LOWER COURT'S ANALYSIS. ONE THE FACT THAT THE STORY SEEMS TO HAVE STAYED THE SAME, FROM THE NIGHT OF THE ARREST TO THE TIME OF TRIAL, IS IMMATERIAL, BECAUSE THESE TWO PEOPLE HAD PRIOR EXTENSIVE CONTACTS WITH THE STATE ATTORNEY'S OFFICE. THAT WOULD HAVE BEEN THE STATE'S JOB IN EVIDENTIARY HEARING, TO HAVE BROUGHT THAT OUT FROM THESE TWO WITNESSES. THAT THEY HAD NO REASON. WHAT WE, NOW, KNOW, THESE TWO WITNESSES ARE THE ONLY TWO WITNESSES, THE ONLY PEOPLE TO TESTIFY THAT MR. ROSE WAS NOT INTOXICATED THE NIGHT OF THE CRIME. WHAT WE NOW KNOW, THE TITLE PICTURE OF THIS CASE, IS THAT THE VEHICLE I AM TIM'S MOTHER -- THE VICTIM'S MOTHER WAS AVAILABLE TO TESTIFY THAT THE NIGHT OF THE CRIME, MR. ROSE CAME HOME AND WAS SEVERELY INTOXICATED. AS TO THE I WITNESSES TO THE -- AS TO THE EYEWITNESSES TO THE CRIME, THE STATE RELIED ON FOUR EYEWITNESSES. THIS DID NOT COME OUT AT TRIAL BUT IN POLICE REPORTS AND IN THEIR TAPED STATEMENTS TO POLICE, ALL FOUR OF THE EYEWITNESSES TALKED ABOUT MILO ROSE'S AND THE VICTIM'S INTOXICATION. MARY ANN HUTTON, IN A TAPED STATEMENT, SHE WAS ONE OF THE EYEWITNESSES, STATED I FIGURED THEY WERE JUST LIKE, DRINKING AND STUMBLED AND FELL. IN HER POLICE REPORT, HUTTON STATED BOTH MEN APPEARED INTOXICATED. MELISSA MASTRITCH, ANOTHER ONE OF THE EYEWITNESSES, IN A TAPED INTERVIEW, WHEN DESCRIBING ONE OF THE EYEWITNESSES, SHE STATED HE WAS DRUNK. HE WASN'T WALKING VERY WELL. SHE WAS STAGGERING AROUND. HE WASN'T WALKING IN A STRAIGHT LINE. THAT IS FOR SURE. IN A POLICE REPORT, SHE SAID THAT THE MEN WERE NOISY, DISORDERLY AND APPEARED INTOXICATED. KATHERINE BASS, ONE OF THE STATE'S EYEWITNESSES, TESTIFIED THAT THE TWO DRUNKS WERE WALKING DOWN THE STREET, AND WHEN THE STATE ASKED HER IS IT POSSIBLE THAT THESE MEN WERE DRUNK, SHE SAID YES.

WHAT WAS THE DEFENSE AT THE GUILT PHASE?

THE DEFENSE AT THE GUILT PHASE WAS, A, THAT MILO ROSE WAS NOT THE PERPETRATOR OF THIS CRIME AND, B, VOLUNTARY INTOXICATION. AT THE HEARING IN 1988, ON THE PENALTY-PHASE ISSUES, TESTIFIED THAT IT WAS VERY IMPORTANT TO BRING OUT TO THE JURY, THROUGH THE BACK DOOR, THE EVIDENCE OF THE INTOXICATION OF MR. ROSE. -HE STATED THAT HE BROUGHT OUT WHAT HE FELT WAS IMPORTANT DURING THE TRIAL, BUT UNFORTUNATELY, DURING THE

TRIAL AND THOSE STATEMENTS, NONE OF THE WITNESSES DID NOT TESTIFY THAT THEY WERE WALKING DOWN THE STREET INTOXICATED.

YOU INDICATED ABOUT THE BACK DOOR, THAT THIS WAS NOT THE LEAD DEFENSE IN THE CASE. IT WAS THAT, YES, I DID IT BUT I WAS DRUNK OR, THROUGH THE LAWYER, YES, HE DID IT, BUT HE WAS DRUNK. ANOTHER BACK DOOR PHRASE WAS DARYL RASSON'S OWN STATEMENT AT THE EVIDENTIARY HEARING, AND HE FELT THAT IT WAS IMPORTANT TO GET THAT EVIDENCE OUT TO THE JURY.

HOW DID HE ARGUE THE CASE TO THE JURY?

HE ARGUED THE CASE TO THE JURY THAT IT WAS NOT MR. ROSE, BUT HE DID GET THE LOWER COURT TO GIVE AN INSTRUCTION ON VOLUNTARY INTOXICATION, AND HE DID ADDRESS THAT TO A DEGREE. HOWEVER, EVEN THOUGH HE PRIDE HIMSELF ON DOING A GOOD JOB, HE DID NOT BRING, FROM THE I WITNESSES -- FROM THE EYEWITNESSES, THE PEOPLE THAT THE STATE RELIED ON AS TO HOW THIS CRIME OCCURRED, ALL OF THEM SAW THAT THESE MEN WERE DRUNK. HE NEVER GOT THAT OUT IN FRONT OF THE JURY. IN ADDITION TO THE EYEWITNESSES, MILO'S PRIOR TRIAL ATTORNEYS, BEFORE DARYL ROUSSON TESTIFIED AT THE PENALTY-PHASE HEARING THAT THEY WERE ABLE TO DOCUMENT THAT MR. ROSE HAD DONATED A PINT OF PLASMA THE MORNING OF THE CRIME, AND CONSUMED IN EXCESS OF TEN BEERS DURING THE DAY LEADING UP TO THE CRIME. ADDITIONALLY, A WITNESS WAS AVAILABLE TO TESTIFY HE WAS AT A PUB, MANO'S PUB, WHERE MILO ROSEANNE THE VICTIM WERE DRINKING THAT NIGHT. -- ROSE, AND THE VICTIM, WERE DRINKING IT THAT NIGHT. HIS WORDS WERE THEY WERE SMASHED AND STILL DRINKING, WHEN HE LEFT THE BAR AT 9:30 P.M.

ARE YOU, NOW, TRYING TO REARGUE THE PRIOR SUMMARY DENIAL OF THE INEFFECTIVE ASSIST CHRANLS AND ARE AFFIRMING THAT PREVIOUSLY? I AM NOT QUITE SURE I UNDERSTAND WHERE THIS IS LEADING.

THAT THE LOWER COURT DID NOT EVALUATE THE TOTAL PICTURE OF THE CASE, AS PRESENTED AT TRIAL, IN POSTCONVICTION, WHEN LOOKING AT THE EFFECT OF MARK AND BECKY'S TESTIMONY. AGAIN, THESE WERE THE ONLY TWO PEOPLE THAT WELL ARE AWARE OF THAT HAD A MOTIVE TO LIE, CONCERNING --

BUT YOU ARE TALKING ABOUT THAT THIS COULD HAVE -- YOU ARE SAYING THIS COULD HAVE BEEN MATERIAL IN CHANGING THE OUTCOME OF THE GUILT PHASE, IF THE DEFENSE AT TRIAL, HAD BEEN DIFFERENT, INTOXICATION, THIS WOULD HAVE BEEN DIFFERENT? AGAIN, I AM NOT SURE HOW IT ALL WOULD HANG TOGETHER.

IF THE JURY HAD KNOWN THAT THE ONLY TWO PEOPLE THAT HAD A MOTIVE TO LIE WERE THE ONLY TWO PEOPLE WHO TESTIFY THAT MR. ROSE WAS THOUGHT DRUNK THAT NIGHT.

OKAY. BUT THAT, I GUESS, GOES BACK TO THE ORIGINAL QUESTION, THAT IS THAT THE ORIGINAL STATEMENT THAT THEY MADE WAS THAT HE CONFESSED TO THEM.

THAT IS CORRECT.

ALL RIGHT. THERE IS NOTHING ABOUT THAT THAT CHANGED THROUGHOUT THE VARIOUS STATEMENTS IN THEIR DEPOSITION NOR AS OF THE PRESENT TIME, HAVE THEY INDICATE HAD THAT THAT TESTIMONY WAS NOT TRUE.

WHAT WE DO KNOW IS THAT THEY TESTIFIED THAT HE WAS NOT DRUNK, AND THERE IS A WEALTH OF EVIDENCE IN THE RECORD, AND IT COULD HAVE BEEN PRESENTED, AND THIS COMES OUT IN 1988 EVIDENTIARY HEARING, THAT HE WAS DRUNK. THE JURY NEVER GOT TO EVALUATE THE CREDIBILITY OF MARK AND BECKY, WITH THIS IMPEACHMENT EVIDENCE THAT THEY COLORED

THEIR TESTIMONY, BASED ON A DEAL THEY GOT WITH THE STATE. IF YOU TAKE A LOOK --

BUT AREN'T YOU IGNORING THE FACT THAT THERE HAS ALREADY BEEN A COMPLAINT THAT COUNSEL STRATEGY, BASED ON WHAT MR. ROSE WANTED, WAS TO DENY THAT IT WAS MR. ROSE, AND THAT THAT WAS THE MAJOR DEFENSE IN THE CASE, NOT THE DEFENSE OF INTOXICATION, AND THAT IT WAS ROSE THAT WAS CONTROLLING THIS, WAS IT NOT? ISN'T THAT WHAT THE --

THE TRIAL -- IT NEVER GETS THAT SPECIFIC WITH DARYL ROUSSON, AT THE EVIDENTIARY HEARING IN 1988, BUT HE DOES STRESS --

BUT THE PREVIOUS CLAIM THAT COUNSEL SHOULD HAVE USED INTOXICATION AS THE LEAD DEFENSE HAS BEEN REJECTED. IS THAT CORRECT?

THAT WAS REJECTED WITHOUT THIS COURT AND WITHOUT THE LOWER COURT KNOWING, AT THAT TIME, THAT MARK AND BECKY, THE TWO WITNESSES WHO SAY THIS MAN WAS NOT INTOXICATED --

BUT IT WAS REJECTED AT A TIME WHEN THERE WAS AN ABUNDANCE OF TESTIMONY IN EVIDENCE AVAILABLE, OUT THERE, INDEED, THAT THE DEFENDANT, YOU KNOW, HAD CONSUMED THIS LARGE AMOUNT OF -- IN OTHER WORDS IT WAS REJECTED AT A TIME WHEN COUNSEL KNEW HE HAD LOTS OF EVIDENCE LIKE THAT, BUT THAT HE DIDN'T INTEND TO APPROACH THAT HEAD ON, AS YOU INDICATED BEFORE, WITH THIS COMMENT ABOUT THE BACK DOOR PRESENTATION, SO WASN'T IT REJECTED IN THE CONTEXT OF A DECISION BY COUNSEL TO DEFEND THIS CASE, ON THE BASIS THAT IT WAS NOT ROSE?

YES, YOUR HONOR.

I MEAN, IN POSTCONVICTION PROCEEDINGS, CAN YOU SHIFT FROM THAT BEING THE FOCUS AND SAY, WELL, ONCE COUNSEL HAS DETERMINED NOT TO HAVE BEEN INEFFECTIVE FOR FOLLOWING THAT STRATEGY, FOR AN ABUNDANCE OF REASONS, AND NOW WE STILL ARE OPERATING ON THE ASSUMPTION THAT JUST BECAUSE OF THE CHANGE IN THESE TWO WITNESSES' TESTIMONY, OKAY, ABOUT THE -- THAT HE WOULD HAVE FOLLOWED THAT STRATEGY? I AM TRYING TO SEE HOW CRITICAL TO THAT DEFENSE THIS EVIDENCE WOULD HAVE BEEN, SINCE WE ALL KNOW, AND YOU CONCEDE, I BELIEVE, THAT THE STRONGEST TESTIMONY ABOUT INTOXICATION WAS THERE, WAS KNOWN BY DEFENSE COUNSEL, BUT NOTWITHSTANDING THAT, HE CHOSE TO ADOPT A DEFENSE OF MY CLIENT DIDN'T DO IT.

THAT WAS SOMETHING THAT WE WOULD LIKE TO EXPLORE IN EVIDENTIARY HEARING. HAD DARYL ROUSSON KNOWN THAT THE EVIDENCE TO REBUT INTOXICATION WAS TAINTED, WAS IMPEACHABLE, WAS AS ALEABLE BECAUSE THE STATE FELT IT NECESSARY TO MAKE A DEAL WITH THEM, THEN DARYL ROUSSON, PERHAPS, WOULD HAVE DECIDED THE FRONT DOOR WAS WHAT WAS NECESSARY FOR THE INTOXICATION DEFENSE. WITH WHAT HE GNAW AT THE TIME, WITHOUT KNOWING OF THE DEAL, HE TESTIFIED THAT HE FELT IT WAS CRITICALLY IMPORTANT TO GET THE INTOXICATION DEFENSE OUT THERE IN FRONT OF THE JURY. SO HAD HE KNOWN THAT THE TWO PEOPLE, THE ONLY TWO PEOPLE THE STATE HAD TO RELY ON, TO SAY THAT MR. ROSE WAS NOT INTOXICATED, HAD MADE A DEAL WITH THE STATE TO GET AWAY FROM A FELONY PROBATION DEFAULT. HAD HE KNOWN THAT, HE VERY WELL MIGHT HAVE CHANGED HIS EMPHASIS, SINCE HE ALREADY STATED THAT HE FELT IT WAS CRITICALLY IMPORTANT. SAVE THE REMAINDER OF MY TIME FOR REBUTTAL. GOOD MORNING. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR, FROM THE STATE ATTORNEY'S OFFICE, STATE OF FLORIDA. I HAVE A CHANCE TO RESPOND, ALTHOUGH I DIDN'T THINK WE WOULD HAVE ENOUGH TIME. THESE WITNESSES REBUTTING A CRIT CAM IMPEACHMENT DEFENSE HAS NEVER BEEN SUGGESTED BEFORE. IT IS NOT SUGGESTED IN THE APPELLANT'S BRIEF. IT IS SUGGESTED HERE FOR THE FIRST TIME, IN ORAL ARGUMENT THAT, THAT IS WHAT MAKES THESE WITNESSES CRITICAL. IN FACT, AT THE BEGINNING OF THE HUFF HEARING, THE ATTORNEY FOR MR. ROSE IS ADDRESSING THE COURT

AND GIVING HER PRELIMINARY COMMENTS, AND SHE STARTS ON PAGE 713 OF THE RECORD, SAYING KEEPING IN MIND THAT THIS COURT HAS PREVIOUSLY INQUIRED, REGARDING TRIAL COUNSEL'S DEFENSE AT TRIAL, THE DEFENSE AT TRIAL WAS AN INSUFFICIENCY OF THE EVIDENCE, NOT GUILTY DEFENSE, PRIMARILY. IN THESE ALLEGATIONS, THEREFORE, AND SHE IS TALKING ABOUT THE ALLEGATIONS THAT MARK POOL DID NOT DISCUSS ROSE ASKING HIM FOR AN ALIBI IN HIS DEPOSITION TESTIMONY, THESE ALLEGATIONS, THEREFORE, ARE VERY RELEVANT TO THE ACTUAL SITUATION AT HAND HERE. SO THERE WAS NEVER A SUGGESTION THAT THERE WAS THIS HUGE INTOXICATION DEFENSE OUT THERE THAT WASN'T BEING PURSUED. THIS IS, AGAIN, JUST REHASHING WHAT WAS RESENTED AND -- PRESENTED AND REJECTED IN THE INITIAL POSTCONVICTION MOTION. FURTHERMORE, THE TESTIMONY GIVEN BY BECKY BOURTIN AND MARK POOLE WAS NOT AS DAMAGING TO ANY POSSIBLE INTOXICATION DEFENSE AS YOU ARE LED TO BELIEVE THIS MORNING. THE STATE NEVER TOOK THE POSITION THAT MR. ROSE HAD NOT BEEN DRINKING. THERE WAS EVIDENCE OF AN EARLIER ALTERCATION. THERE WAS SOME SUGGESTION THAT ALCOHOL WAS INVOLVED IN THAT, AND IN FACT, MARK POOLE, WHEN HE WAS ASKED ABOUT WHETHER MR. ROSE WAS DRINKING, HE SAID, YOU KNOW, WHEN HE GOT IN THE TRUCK I SMELLED ALCOHOL, BUT I HAD BEEN DRINKING THAT NIGHT. I DIDN'T KNOW IF IT WAS FROM ME OR FROM HIM. THEY DIDN'T COME OUT AND SAY HE WASN'T INTOXICATED, BUT THE FOUR EYEWITNESSES BEFORE HIM, ALTHOUGH THEY SPECULATED THAT THEY HAD BEEN DRINKING, THEY WEREN'T SAYING THAT THEY WERE FALLING DOWN INTOXICATED.

WHAT WAS THE TESTIMONY CONCERNING THE PRIOR ALTERCATION? HOW MANY -- HOW LONG BEFORE THE MURDER, AND THIS IS THE ONE WHERE ONE OF THE POLICE OFFICERS -- OFFICERS ACTUALLY SPOKE TO BOTH OF THEM SO KNEW THEY HAD ALREADY BEEN ENGAGED IN SOME FIGHTING.

THAT'S CORRECT. THAT'S CORRECT.

DID HE DISCUSS WHETHER THEY WERE INTOXICATED AT THAT TIME? DID THAT COME OUT?

NO. THERE WERE VERY LITTLE DETAILS, OTHER THAN THE POLICE OFFICER, OFFICER McKENNA, WHO HAPPENED TO RESPOND TO THE MURDER SCENE, RECOGNIZED --

RECOGNIZED THE VICTIM AS BEING IN THE ALTERCATION WITH ROSE EARLIER THAT DAY.

EARLIER THAT DAY.

THAT DAY. OKAY.

SO SO THEY ARE VERY VAGUE. WE REALLY DON'T HAVE THE SPECIFICS ABOUT THAT PRIOR ALTERCATION IN THE RECORD. THEY NEVER REALLY DEVELOPED. BUT WHAT IS REALLY CRITICAL TO ASSESSING THE CURRENT CLAIM ABOUT THIS DEAL IS, AS WAS SUGGESTED EARLIER, JUDGE SHAFER VERY CAREFULLY ANALYZED IT, AND GIVING EVERY BENEFIT OF THE DOUBT TO THE DEFENSE, FINDING THAT THERE WAS A DEAL, ALTHOUGH SHE CONCLUDED THAT THE EVIDENCE OF THE DEAL WAS, AT BEST, CONFUSING, BUT SHE ASSUMED THAT A DEAL HAD OCCURRED, AND SAID THERE IS STILL NO WAY IT COULD HAVE MADE ANY DIFFERENCE, BECAUSE THESE WITNESSES GAVE THE SAME STATEMENTS THE NIGHT OF THE MURDER, WITHIN A COUPLE OF HOURS OF THE MURDER, AND THE SAME TESTIMONY AT TRIAL. NOW, THE SUGGESTION THAT, WELL, THEY WEREN'T EXACTLY THE SAME, BECAUSE YOU HAVE THIS ISSUE OF MARK SAYING, WELL, HE ASKED ME ABOUT DOING AN ALIBI. THAT IS NOT MENTIONED IN THE DEPOSITION. IT IS MENTIONED IN THE TRIAL TESTIMONY, AND IT IS MENTIONED IN THE POLICE STATEMENTS THE NIGHT OF THE MURDER. THE SAME THING WITH BECKY BOURTIN. HER TRIAL TESTIMONY IS CONSISTENT, AND I THINK WHAT HAPPENED IS THE DEPOSITIONS WERE TAKEN ABOUT TWO WEEKS BEFORE THE TRIAL TESTIMONY, AND I DON'T BELIEVE THOSE WITNESSES HAD REALLY GIVEN A LOT OF THOUGHT TO WHAT THEY HAD SAID ON THE NIGHT. I THINK THAT PROBABLY

THEIR MEMORY WAS REFRESHED BY REVIEWING THEIR POLICE STATEMENTS, BEFORE THEY WENT IN AND TESTIFIED, SO THERE ARE SOME DETAILS, THOSE TWO DETAILS, THAT ARE NOT CLEAR FROM THE DEPOSITION. THEY ARE NOT REALLY TALKED ABOUT IN THE DEPOSITION. BUT THEY ARE. THE TRIAL TESTIMONY IS CONSISTENT WITH THE POLICE STATEMENTS THAT WERE GIVEN THE NIGHT OF THE MURDER.

SO ACTUALLY IF THE DEAL HAD BEEN MADE, IT WOULD HAVE BEEN MADE, PROBABLY, BEFORE THE DEPOSITION TESTIMONY, AND YET THE DEPOSITION TESTIMONY IS ACTUALLY THE WEAKEST OF THEIR THREE STATEMENTS. IS THAT -- WEAKEST FROM THE STATE'S POINT OF VIEW?

BECKY BOURTIN'S PLEA TO THE MISDEMEANOR MARIJUANA CHARGE WAS ENTERED IN DECEMBER OF 1982 AND THE DEPOSITION WAS TAKEN IN 1983 AND THEN THE TRIAL WAS TWO WEEKS LATER.

AND SHE WAS ACTUALLY ARRESTED FOR MISDEMEANOR MARIJUANA.

THAT'S CORRECT.

SO THIS ISN'T A SITUATION WHERE CHARGES WERE ACTUALLY REDUCED. CHARGES REMAIN THE SAME.

THAT'S TRUE. THE CHARGE IS CONSISTENT WITH WHAT SHE WAS ARRESTED FOR. BUT FOR PURPOSES OF THE HUFF HEARING, THE JUDGE, JUDGE SHAFER, ASSUMED THAT THERE WAS SOME SORT OF DEAL, AND JUST WENT ON TO FIND THAT THERE WAS NO WAY THAT IT COULD HAVE AFFECTED THE OUTCOME OF THE TRIAL.

I MEAN APPARENTLY JUDGE SHAFER SAID IT COULD HAVE HAPPENED THAT SHE SAID, LISTEN, I AM NOT GOING TO TESTIFY, IF YOU DON'T GIVE ME SOMETHING, AND YET THAT STILL DIDN'T CHANGE WHAT THEY SAID WITHIN HOURS OF --

THAT IS TRUE. THAT IS TRUE. IN FACT, IN THE RHODES DEPOSITION, WHICH WAS TAKEN IN 1985 --

THAT IS RH?

YES. RHODES. BOURT I KNOW ADMITTED AT THAT -- BOURTIN ADMITTED THAT SHE WAS ARRESTED IN MAY, BEFORE THE TRIAL, AND SHE TRIED TO GET THE STATE TO DO SOMETHING ON HER BEHALF AND IN FACT TOLD THE PROSECUTOR THAT SHE WAS GOING TO FORGET WHAT SHE KNEW ABOUT MILO ROSE, IF HE DIDN'T HELP HER OUT WITH THE DUI AND SHE ADMITS THAT, IN HER LATER DEPOSITION, THAT SHE TRIED TO GET A DEAL BUT WAS UNSUCCESSFUL IN DOING SO ON THE LATER DUI AND IN FACT, ENDED UP BEING SENTENCED AND PLEAING TO THAT, AS WELL. THERE ARE, ALSO, OF COURSE, AS JUDGE SHAFER NOTED, FOUR OTHER EYEWITNESSES, WHO DID SEE THE CRIME AS IT WAS OCCURRING. THEY WERE ABLE TO DESCRIBE THE DELIBERATENESS OF ROSE'S ACTIONS AS HE WENT ABOUT SEARCHING FOR THE CINDER BLOCK THAT HE FOUND IN THE VACANT LOT AND CAME BACK TO THROW -- USED TO KILL THE VICTIM, AND THAT TESTIMONY WAS QUITE DAMAGING AND CERTAINLY MUCH MORE SO THAN BOURTIN AND POOLE'S TESTIMONY, SO THAT IS ANOTHER FACTOR.

WERE THEY ABLE TO IDENTIFY, WITHOUT DOUBT, THAT IT WAS ROSE.

THAT IT WAS ROSE. YES. ONE SAID SHE COULD NOT. THREE OF THE FOUR PICKED HIM OUT AFTER PHOTO PATH THAT WAS PREPARED THAT EVENING AND, ALSO, IDENTIFIED HIM DURING THE TRIAL. ONE OF THEM SAID, APPARENTLY, FROM THE VERY BEGINNING, THAT SHE WASN'T SURE SHE COULD IDENTIFY HIM AGAIN. SO BASED ON THAT EVIDENCE AND JUDGE SHAFER'S ANALYSIS, WE WOULD ASK THIS COURT TO AFFIRM THE SUMMARY DENIAL. THANK YOU.

THANK YOU, MS. DITTMAR. MR. TOMASINO.

IT WAS CLEAR FROM BECKY'S TESTIMONY IN 198 R5 THAT SHE KNEW HOW TO WORK WITH THE STATE. SHE WENT BACK AND TRIED TO WORK ON A DEAL. OUR POSITION IS THE JURY HAD A RIGHT TO KNOW THIS. THE STATE, AT THE TIME THAT THEY CUT A DEAL WITH MS. BOURTIN, HAD A DUTY TO TURN IT OVER TO DEFENSE COUNSEL. THE STATE DID NOT DO. THAT THE JURY, HAD THEY BEEN PRESENTED WITH THE TESTIMONY OF THE EFFORTS THAT BECKY WENT TO, TO SECURE FAVORABLE TREATMENT FOR HERSELF, COULD HAVE, THEN, EVALUATED THEIR STATEMENTS THAT THEY DID NOT BELIEVE MR. ROSE WAS INTOXICATED, IN COMPARISON WITH THE REST OF THE EVIDENCE THAT DID COME OUT AND SHOULD HAVE COME OUT, REGARDING HIS INTOXICATION. THE LOWER COURT RELIED ON BECKY AND MARK'S TESTIMONY FOR A FINDING OF CCP, OF COLD CALCULATED AND PREMEDITATED. ALL OF THE OTHER -- AND PREMEDITATED. ALL OF THE OTHER EVIDENCE IN THIS CRIME WAS THAT HE WAS INTOXICATED, BUT WE HAVE A FINDING OF HEIGHTENED PREMEDITATION.

THERE WAS, ALSO, THE EYEWITNESSES, WHO, AFTER KNOCKING HIM DOWN, THE DEFENDANT, WENT AND GOT A CINDER BLOCK AND THEN DELIBERATELY KNOCKED HIM, CONTINUED TO PULLET HIM. IS THAT CORRECT?

NONE OF THE WITNESSES TESTIFIED THAT MR. ROSE KNOCKED HIM DOWN. THEY ALL TESTIFIED THAT THEY DID NOT SEE HOW. THEY BELIEVED HE FELL.

THEY TESTIFIED TO HIS DELIBERATE ACTION OF GOING OVER AND GETTING THE CINDER BLOCK.

THEY DID, YOUR HONOR, AND THOSE WITNESSES, ALSO, TOLD THE POLICE, IN THEIR TAPED STATEMENTS, THAT WHEN THIS MAN WAS LOOKING FOR THIS BLOCK, HE WAS STAGGERING. HE COULDN'T EVEN WALK A STRAIGHT LINE. THEY WERE DESCRIBING A VERY DRUNK MAN. TO SUPPORT A FINDING OF COLD, CALCULATED AND PREMEDITATED, THE LOWER COURT HAD TO RELY ON THE TESTIMONY OF MARK AND BECKY THAT THIS MAN WAS NOT INTOXICATED. ADDITIONALLY, THE LOWER COURT IN THE STATE, THREE MENTAL HEALTH PROFESSIONALS HAVE TESTIFIED, ONE AT THE ORIGINAL TRIAL AND TWO AT THE PENALTY-PHASE EVIDENTIARY HEARING, ALL THREE OF THEM WERE POSED WITH A HYPOTHETICAL THAT WAS BASICALLY MARK AND BECKY STATING THAT MR. ROSE WAS NOT INTOXICATED. BASED ON THE HYPOTHETICAL POSED TO THEM, ALL THREE OF THEM WERE UNABLE TO SAY THAT THE TWO STATUTORY MENTAL HEALTH MITIGATORS APPLIED. SO A FINDING OF COLD, CALCULATED AND PREMEDITATED, IS BASED, TO A DEGREE, ON THE TESTIMONY OF MARK AND BECKY, AND THE FINDING OF NO STATUTORY MITIGATION, AND IT WAS, ALSO, USED TO DEFEAT SOME OF THE NONSTATUTORY MITIGATION, AGAIN, WAS RELIED ON THE TESTIMONY OF MARK AND BECKY, TWO WITNESSES WITH THE MOTIVE TO LIE, THAT MR. ROSE WAS NOT INTOXICATED. GUNSBY, SWAFERD AND LIGHTBOURNE TELL US TO LOOK AT THE CASE. SEVERAL OF THOSE DEALT WITH BOTH BRADY AND INEFFECTIVE ASSISTANCE OF COUNSEL. WHAT WE KNOW, TODAY, THE TOTAL PICTURE OF THE CASE, AND THIS IS WHERE WE SAY THE LOWER COURT DID NOT EVALUATE THE BRADY CLAIM IN THIS LIGHT, AS IS REQUIRED TO DO, WE, NOW, KNOW THAT MR. ROSE GAVE A PINT OF PLASMA ON THE DAY OF THE HOMICIDE. MR. ROSE SPENT THE DAY WITH THE VICTIM, DRINKING AT SEVERAL DIFFERENT BARS. WITNESSES SAW MR. ROSE LESS THAN AN HOUR BEFORE THE HOMICIDE AND DESCRIBED HIM AS TOTALLY SMASHED, AND MR. ROSEANNE THE VICTIM WERE KICKED OUT OF A BAR, DUE TO THEIR HIGH LEVEL OF INTOXICATION. ALL THREE EYEWITNESSES TO THE CRIME DESCRIBE MR. ROSE AS DRUNK. ONE EYEWITNESS STATED THAT MR. ROSE COULDN'T EVEN WALK A STRAIGHT LINE. THE FOURTH EYEWITNESS, CALLED HAYWOOD, WHO IS A GENTLEMAN THAT CAME OUT AFTER THE THREE OTHER EYEWITNESSES YELLED FOR HIS ASSISTANCE, STATED THAT WHEN MR. ROSE OR THE MAN THAT HE SAW LEAVING THE SCENE WAS STAGGERING, THAT DID NOT COME OUT AT TRIAL. WE HAVE THE VICTIM'S MOTHER, WHO DESCRIBED MR. ROSE AS VERY INTOXICATED. WE HAVE THE BLOOD ALCOHOL LEVEL OF THE VICTIM AT .19, AND WE KNOW THAT THE TOTAL PICTURE OF THIS CASE IS THAT THESE TWO MEN WERE TOGETHER, ALL DAY LONG, DRINKING. THIS CASE SHOULD NOT HAVE BEEN A FIRST-DEGREE MURDER CASE, AND CERTAINLY, DUE TO THE HIGH LEVEL OF BOX

INDICATION AND THE EVIDENCE WAS -- LEVEL OF INTOXICATION, AND THE EVIDENCE WAS THERE, THERE COULD BE NO FINDING OF COLD, CALCULATED AND PREMEDITATED APPLIED, AND EVIDENCE OF STATUTORY MENTAL HEALTH MITIGATORS. WE ASK THIS COURT TO REMAND THIS CASE BACK TO THE LOWER COURT, SO THAT A HEARING CAN BE CONDUCTED ON THE BRADY AND THAT A CUMULATIVE ANALYSIS CAN, THEN, BE CONVICT DEDUCTED, LOOKING -- BE CONDUCTED, LOOKING AT BOTH THE BRADY AND THE PRIOR EVIDENCE. THANK YOU.

THANK YOU, COUNSEL. WE WILL BE IN RECESS FOR A FEW MOMENTS. THE MARSHAL: PLEASE RISE.