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Wayne Tompkins v. State of Florida

FOLLOWING A EVIDENTIARY HEARING ON THIS LIMITED ISSUE.

THIS IS JUST IN TERMS OF YOUR APPEAL OF THE GUILT PHASE ISSUES. IN OTHER WORDS THE STATUS IS THAT WE HAVE GOT A NEW PENALTY PHASE, UNLESS THE COURT OVERTURNS THE JUDGE'S ORDER ON THAT.

CORRECT.

AND THAT WAS BASED ON THE FACT THAT THE SENTENCING ORDER, THE JUDGE FOUND A SENTENCING ORDER HAD BEEN PREPARED BY THE STATE.

CORRECT. AND THE STATE IS APPEALING THAT. IN MY INITIAL PORTION I AM NOT GOING TO ADDRESS. THAT I WILL ADDRESS THAT.

BUT ON THE GUILT PHASE, THIS IS A SUCCESSIVE 3.850.

CORRECT. AND MR. TOMPKINS WAS ORIGINALLY CONVICTED IN 1985. THERE WAS A DEATH WARRANT IN 1989 AND A 3.850 WAS DONE IN 198, DURING THAT DEATH -- 1989, DURING THAT DEATH WARRANT, AND ANOTHER DEATH WARRANT WAS SIGNED IN 2001 AND THIS CURRENT 3.850 WAS DONE IN 2001. IN CONNECTION WITH 1989 THE MOTION TO VACATE, THERE WAS PUBLIC REQUEST OF MATERIALS THEN AND THERE WERE ISSUES THAT WERE PLED IN THAT 3.508 AS BRADY MATERIAL. THIS INCLUDED MEMOS OF AN INTERVIEW BY THE TRIAL PROSECUTOR, OF CATHY STEVENS AND HER STATEMENTS TO HIM THAT WEREV TRIAL TESTIMONY. THERE WAS, ALSO, INFORMATION REGARDING THE FACT THAT KENNETH TURCO, WHO HAD BEEN IN JAIL WITH MR. TOMPKINS AND TESTIFIED TO THE FACT THAT MR. TOMPKINS HAD CONFESSED TO HIM, THE PENDING TRIAL WAS NOLLE PROSSED, WEEKS AFTER THE CONFESSION TOOK PLACE. THERE WAS A HEARING HELD IN 1989 ON THOSE ISSUES AND ALSO ON THE GUILT PHASE AND THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM. JUDGE COE PRESIDED OVER THAT PROCEEDING AND ISSUED AN ORDER WHICH WE HAVE ON APPEAL, SAYING THAT THE COURT WAS SATISFIED WITH HIS FINDINGS AND IT WAS IN 1991 THAT THERE WERE NEW RECORDS DISCLOSED, PURSUANT TO A PUBLIC RECORDS REQUEST, AND THIS IS THOSE NEW RECORDS THAT GO FURTHER THAN WHAT IT WAS BEFORE.

YOU MAY WANT TO GIVE US YOUR BEST, LIKE THIS IS THE BEST BRADY CLAIM, BECAUSE WE HAVE GOT YOUR BRIEF, BUT AT LEAST ONE WAS APPARENTLY A FINDING THAT THAT, YOU HAD HAD A COPY OF THAT POLICE REPORT OR YOU OR PREVIOUS COUNSEL, BUT IT JUST WASN'T LEGIBLE. ALTHOUGH BRADY MAY NOT REQUIRE THE DUE DILIGENCE, ISN'T THERE A DUE DILIGENCE REQUIREMENT THAT, IF YOU GET MATERIALS THAT ARE NOT LEGIBLE --

RIGHT.

-- THAT THAT YOU HAVE GOT TO FOLLOW UP ON. WE CAN'T WRITE THAT OUT OF A REQUIREMENT.

ACTUALLY WITH REFERENCE TO THAT PARTICULAR DOCUMENT THAT, DOCUMENT HAD BEEN PART OF THE 1989 HEARING, AND IT WAS SPECIFICALLY 1989 EVIDENTIARY HEARING ON THE GUILT PHASE INEFFECTIVENESS OF THE ATTORNEY, ON THE TRIAL ATTORNEY, FOR FAILING TO CALL WENDY CHANCEY, THE WITNESS WHO WAS IDENTIFIED IN THE REPORT, AND THE CONCERN

WAS THE REPORT, THE COPY THAT WAS AVAILABLE IN 1989, IT WAS NOT CLEAR TO ME AS THE COLLATERAL COUNSEL AT THE TIME, THAT BARBARA DECARD WAS THE COMPLAINANT AND THAT SHE, IN FACT, CONTRARY TO HER TRIAL TESTIMONY, WAS THE ONE THAT TALKED TO THE POLICE OFFICERS AND SAID SHE LAST SAW LIZA DECARR AT TWO O'CLOCK IN THE AFTERNOON. THAT WAS PUT IN AND NEEDED TO BE CONSIDERED WITH WHAT WAS CONSIDERED BEFORE AND CUMULATIVE WITH THE NEW INFORMATION. I WOULD WANT TO FOCUS ON, FIRST, THE STATEMENT OF MAUREEN SWEENEY, WHICH WAS CONTAINED IN THE POLICE REPORT REGARDING AN ALLEGED SEXUAL ASSAULT. SHE IS INTERVIEWED ON JUNE 8, 1984, THIS IS RIGHT AFTER LIZA DECARR'S BODY HAD BEEN FOUND AND SHE CLAIMED WAYNE TOMPKINS HAD RAPED HER. WHO IS GOING TO USE THAT? WELL, THE PROBLEM IS THAT IN HER STATEMENT, SHE DESCRIBES THE DAY OF LIZA DECARR'S DISAPPEARANCE AND CASE THAT -- AND INDICATES THAT LIZA DECARR HAD -- LISA DECARR HAD COME HOME AND FOUND WAYNE TOMPKINS HAD MOVED BACK INTO THE HOUSE AND HAD A BLOW-UP AND THAT WAS THE LAST ANYBODY EVER SAW OF HER. THAT ALONE CONTRADICTS THE STORY ON WHICH THESE CONVICTIONS REST. THAT WERE BARBARA --

THIS WAS A POLICE REPORT THAT WAS PREPARED IN RESPECT TO AN INVESTIGATION WHOM?

MAUREEN SWEENEY?

SHE WAS THE ALLEGED VICTIM?

YES.

WHO WAS THE ALLEGED PERPETRATOR?

WAYNE TOMPKINS.

SO MR. TOMPKINS WAS AWARE WHEN, THAT HE, WELL, WHEN DID THIS ALLEGEDLY OCCUR?

ACCORDING TO THE POLICE REPORT, SHE SAYS THANKSGIVING OF 1983, WHICH DOESN'T MAKE SENSE TO ME OF THE IT MAY BE THAT IT WAS A SCRIVENER'S ERROR.

WHEN WAS THE INVESTIGATION?

IN JUNE 1984.

AND MR. TOMPKINS WAS AWARE THAT HE WAS UNDER INVESTIGATION?

I DON'T BELIEVE SO. I DON'T THINK EVER KNEW ABOUT THIS.

HE NEVER KNEW HE WAS UNDER INVESTIGATION.

THERE WAS NEVER ANY CHARGES FILED ON THIS. THE FIRST I LEARNED OF IT WAS WHEN IT WAS DISCLOSED IN 2001.

NOW, THIS 2001 DISCOVERY WAS SUBSEQUENT TO THE TRIAL COURT GRANTING THE STAY OF EXECUTION?

NO. WHAT HAPPENED IS PUBLIC RECORDS REQUESTS WERE MADE. AS THE PROCEDURE IS NOW, THE AGENCY RESPOND BY SENDING THE RECORDS TO THE REPOSITORY. THEY WERE RECEIVED BY COLLATERAL COUNSEL ON APRIL 14, WHICH WAS A SATURDAY, AND COUNSEL WAS UNDER AN OBLIGATION, THE JUDGE ORDERED A 3.850, IF ONE WAS GOING TO BE FILEDn, TO BE FILED ON APRIL 16. WE HAD APRIL 14 AND 15 TO PREPARE THE MOTION THAT WAS FILED ON APRIL 16. THE HUFF HEARING WAS APRIL 17.

THAT, WASN'T THAT DURING THE WARRANT PERIOD?

YES. THE EXECUTION AT THAT POINT IN TIME, WAS SCHEDULED FOR MAY 1.

RIGHT. SO THIS WAS THE, A PUBLIC RECORDS PRODUCTION THAT WAS DONE AFTER THE WARRANT WAS SIGNED.

CORRECT. THE PUBLIC RECORDS REQUESTS HAD BEEN MADE IN 1989. AND THEY WERE ALSO MADE ONCE THE WARRANT HAD BEEN SIGNED, AGAIN, ASKING FOR ALL RECORDS TO DETERMINE ABSOLUTELY, THAT THERE WAS NOTHING THAT HAD BEEN MISSED, THAT HAD BEAN FAILED TO BE DISCLOSED BEFORE, AND FOR REASONS THAT I CAN'T EXPLAIN, THE TAMPA POLICE DEPARTMENT PROVIDED DIFFERENT MATERIAL THIS TIME THAN THEY HAD BEFORE. THEY PROVIDED A STACK OF MATERIAL THAT INCLUDED REPORTS ON THE LIZA DECARR CASE, ON THE JESSYAL BACK CASE AND -- JESSY ALBACK CASE AND ON THE SWEENEY CASE. WHAT WE PLED IS THAT THIS WAS NEW MATERIAL THAT HAD NOT BEEN PREVIOUSLY DISCLOSED, INCLUDING THE MAUREEN SWEENEY STATEMENT, AND ALSO INCLUDED A REPORT ON JESSY ALBACK THAT INCLUDED AN INTERVIEW OF BARBARA DECARR IN MID-JUNE 1984, ACTUALLY IN JULY 1984, IN WHICH SHE, NO, I HAVE THE WRONG YEARS, IN JUNE OF '83 LISA DECAR DISAPPEARED IN MARCH 1983 AND THE BODY WAS FOUND IN '84, SO THERE WAS A 15-MONTH GAP. IN JUNE AFTER JESSY ALBACK DISAPPEARED AND LISA DECARR DISAPPEARED, MAUREEN SWEENEY WAS INTERVIEWED AND SAID THAT SHE THOUGHT THE GIRLS WERE STILL ALIVE AND LIVING IN THE HYDE PARK REGION, AND THAT WAS NOT DISCLOSED TO COLLATERAL COUNSEL OR TRIAL COUNSEL, NEITHER, PREVIOUS TO 2001. SO AT THIS POINT IN TIME, WELL, LET ME, THE JUDGE DENIED THE 3.8 A 50 ON THIS CLAIM -- THE 3.850 ON THIS CLAIM, SAYING THAT THOSE SPECIFIC REPORTS IS PREVIOUSLY BARRED, BECAUSE A BRADY CLAIM HAD BEEN PRESENTED IN 1989 AND HAD BEEN DENIED, AND SO HE DENIED ON THAT BASIS, AS TO THOSE. THERE WAS ALSO INFORMATION REGARDING JESSE ALL BACK, AND -- JESS -- JESSE ALBACK AND THE NAKED CITY AND THE FACT THAT THERE WAS AN INTERVIEW WITH THE PERSON THAT FOUND HER BODY, ET CETERA. ON THOSE ITEMS THE JUDGE SAID THERE WAS A LACK OF DILIGENCE. THEY COULD HAVE BEEN FOUND BEFORE, BASED ON THE STATE'S ADMISSION IN 1989 ON A PUBLIC RECORDS REQUEST, IN WHICH THEY SPECIFICALLY SAID THAT JESSE ALBACK'S NAME HAD NOT BEEN SPECIFICALLY MENTIONED IN THE PUBLIC RECORDS REQUEST.

THE NATURE OF THAT WAS THAT THE TWO GIRLS WERE FRIEND? WHAT IS --

AT THE TIME, THE POLICE REPORTS SHOW THAT THERE WAS AN OVERLAP. THEY WERE FRIENDS. THEY WERE IN THE SAME SCHOOL. THEIR FAMILIES KNEW EACH OTHER. WE WERE TOLD, WHEN WE WENT IN 2001, TO INSPECT THE PHYSICAL EVIDENCE IN CONNECTION WITH THE REQUEST FOR DNA TESTING BY DETECTIVE BURKE, THAT HE HAD CLOSED THE ALBACK FILE BECAUSE HE WAS CONVINCED THAT WAYNE TOMPKINS DID IT. HE JUST HAD NO EVIDENCE TO PROVE IT. SO THAT IS THE ONLY EXPLANATION THAT WE CAN FIGURE OUT AS TO WHY ALL OF THE RECORDS WERE KEPT TOGETHER, IS BECAUSE THE POLICE DEPARTMENT HAD PUT THEM ALL IN ONE FILE FOLDER, BECAUSE THEY BELIEVE THEY ALL RELATED TO WAYNE TOMPKINS.

HOW CAN YOU GET, JUST ASSUME THAT WE FOUND ANY OF THESE MATERIALS TO MEET THE FIRST PRONG OF BRADY, THAT THIS -- THAT IS THAT THEY WERE FAVORABLE TO THE ACCUSED, AND REALIZING THAT, YOU KNOW, FOR SUMMARY DENIAL, THAT YOU HAVE GOT TO TAKE THE FACTS AND ASSUME THAT YOUR WELL-PLED ALLEGATIONS HAVE MERIT. HOW, AS A MATTER OF FACT, CAN THERE BE ANY PREJUDICE, GIVEN THIS WHOLE RECORD? I MEAN, AREN'T THESE ALL COLLATERAL KIND OF POTENTIAL IMPEACHMENT THINGS, SORT OF JUST SEEMS TO ME, EVEN THOUGH THERE IS SOME DIFFERENTTERS, IT IS KIND OF A REHASH OF WHAT HAS BEEN CLAIMED IN 1989.

I SUBMIT, FIRST OF ALL, IT IS CUMULATIVE TO WHAT WAS PRESENTED IN 1989 BUT IT PUSHES IT OVER THE EDGE, BECAUSE IN THIS CASE THE CASE WAS THAT LISA DECARR WAS MURDERED

BETWEEN 8 A.M. AND 9:00 A.M. ON MARCH 23, MARCH 24, 1983. THAT WAS THE TESTIMONY OF CATHY STEVENS, WHAT SHE OBSERVED, AND BARBARA DECARR'S TESTIMONY WAS ALSO TAILORED TO ESTABLISH THAT AS THE TIME PERIOD WHEN IT WOULD HAVE HAPPENED. THE PROSECUTOR ACKNOWLEDGED THAT THAT WAS CIRCUMSTANTIAL EVIDENCE FROM THOSE TWO AND THEN KENNETH TURKO TESTIFIED AS TO A CONFESSION HE SUPPOSEDLY OBTAINED FROM MR. TOMPKINS, INDICATING THAT IT HAPPENED AT THAT TIME IN THE FASHION THAT CATHY SENTENCE HAD DESCRIBED. IF MAUREEN SWEENEY'S STATEMENT IS CORRECT THAT BARBARA DECARR HAD INDICATED TO HER THAT LISA RAN AWAY WHEN SHE CAME HOME AT NOON AND FOUND MR. TOMPKINS IN THE HOUSE, MOVING INTO THE HOUSE, ALL THREE WITNESSES ARE IMPEACHED.

HOW WOULD YOU ACTUALLY, OKAY, IF YOU HAVE A NEW TRIAL AND YOU HAVE GOT THE MOTHER TESTIFIES THAT THIS IS, YOU KNOW, TO WHAT SHE TESTIFIED ORIGINALLY, WHERE, HOW DO YOU IMPEACH, MAUREEN SWEENEY, AGAIN, IS SOMEBODY THAT HAS SAID THAT TOMPKINS SEXUALLY ASSAULTED HER.

CORRECT.

HOW --

MIKE WILLIS IS ALSO --

HOW DO YOU IMPEACH THAT?

MIKE WILLIS IS ALSO IN THE POLICE REPORT AND INDICATED THAT HE HAD ALSO HEARD THE SAME THING. MIKE WILLIS WE HAVE LOCATE LOCATED AND HE INDICATES HE DIDN'T BELIEVE THE RAPE STORY. HE THOUGHT THAT MAUREEN SWEENEY WAS TELLING THE RAPE STORY BECAUSE HE DIDN'T -- SHE DIDN'T WANT HIM TO BE UPSET WITH HER THAT SHE HAD HAD SEX WITH WAYNE TOMPKINS. BE THAT AS IT MAY, MIKE WILLIS IS ALSO WILLING TO TESTIFY THAT THE INFORMATION THAT HE AND MAUREEN SWEENEY HAS ABOUT THE DISAPPEARANCE.

CHIEF JUSTICE: YOU ARE DIVIDING YOUR TIME. EYE WILL FINISH. IN ADDITION, THIS, THEN, BOLSTERS THE COMPLAINT REPORT THAT SHOWS BARBARA D EVENT CARR INDICATING THAT -- DECARR INDICATING THAT LISA DISAPPEARED IN THE AFTERNOON.

THE TIME DIFFERENCE. JUST REAL BRIEFLY, BECAUSE I WANT, WHAT DNA EXISTS THAT YOU SAY REASONABLY HAS NOT BEEN TESTED? -- THAT YOU SAY ERRONEOUSLY HAS NOT BEEN TESTED?

THE REMAINS OF THE BODY.

THAT IS AS TO THE IDENTIFICATION OF THIS BEING LISA DECARR.

CORRECT.

WHAT ABOUT AS TO ANY ALLEGATION THAT THERE ARE SOME DNA THAT WOULD EITHER DISPROVE THAT, THEY NEVER LINKED DNA TO YOUR CLIENT, BUT ARE YOU SUGGESTING THERE IS SOME PIECE OF EVIDENCE THAT WOULD SHOW SOMEBODY ELSE COMMITTED THE MURDER?

THE POLICE REPORTS INDICATED THAT HAIR WAS FOUND AT THE BODY. WE ORIGINALLY WERE REQUESTING FOR THE TESTING OF THE HAIR.

BUT THAT IS GONE. ANOTHER STATE'S POSITION AT THE TIME OF THE PROCEEDINGS BELOW WAS THAT THE HAIR IS MISSING. YOU NEVER KNOW. IT MAY POP-UP AGAIN, IF WE GO BACK, BUT THAT IS THE POSITION BECAUSE SOMEBODY HAD CHECKED IT OUT AND THEY CAN'T FIND IT, BUT THE BONE COULD STILL BE TESTED, AND IT COULD BE DETERMINED WHETHER IT IS LISA DECARR IN

FACT. SO WITH THAT ILL ASK THE COURT TO REMAND -- I WOULD ASK THE COURT TO REMAND FOR AN EVIDENTIARY HEARING ON THIS PORTION OF THE CASE.

MAY IT PLEASE THE COURT. BOB LANDRY APPEARING ON BEHALF THE STATE OF FLORIDA ON THIS APPEAL TODAY. WITH RESPECT TO THE POST ISSUE THAT HAS BEEN RAISED, THE, I THINK THE TRIAL COURT CORRECTLY DENIED RELIEF WITHOUT AN EVIDENTIARY HEARING. ALL OF THESE CLAIMS, ALL OF THESE 14 DOCUMENTS THAT ALLEGEDLY THEY HAVE JUST OBTAINED THROUGH PUBLIC RECORDS REQUESTS, MOST OF THEM ARE IRRELEVANT TO ANYTHING AT ALL. THEY PERTAIN TO THE INVESTIGATION OF THE ALBACK FILE, THE, AS NOTED HERE EARLIER, THE COPY OF THE MARCH 24, 1983 REPORT THAT, THE DEFENDANT CLAIMED BELOW, WAS ILL LEDGEABLE. THEY HAD HAD THE PRIOR 1989 HEARING. THEY EVEN HAD IT AT THE TIME OF TRIAL. IT WAS ONE OF THE DISCOVERY RESPONSES MADE BY THE STATE TO TRIAL COUNSEL. WITH RESPECT TO THE JUNE 8 REPORT OF, THAT THE MAUREEN SWEENEY REPORT, THAT DETECTIVE MALERNO TOOK, APPARENTLY MAUREEN SWEENEY IS TALKING ABOUT HOW, AFTER, WHEN THE STATEMENT WAS TAKEN, APPARENTLY, SHE THOUGHT THAT IT WAS UNUSUAL, BECAUSE OF WHAT SHE HAD HEARD. SHE HAD HEARD THAT THERE HAD BEEN A FIGHT, THAT THERE HAD BEEN A DISAGREEMENT THAT LISA HAD ABOUT THE DEFENDANT BEING THERE AND THAT SHE STORMED OUT OF THE HOUSE. SHE DIDN'T HAVE ANY PERSONAL KNOWLEDGE OF ANY OF THIS. THIS IS WHAT SHE HEARD, AND SHE APPARENTLY HEARD IT EITHER FROM TOMPKINS OR BARBARA DECARR OR SOMEBODY. THERE WAS TALK ON THE STREET OR WHATEVER, BUT I MEAN, THERE WAS NOTHING IN THERE AT ALL THAT REALLY CHANGES OR MAKES QUESTIONABLE THE RESULT OF THE PROCEEDING, AND THE VERDICT THAT WAS ACHIEVED.

HOW CRITICAL WAS THE TIME? THIS NINE-TO-TEN TIME PERIOD TO THE STATE'S CASE?

WELL, THE STATE, THE TESTIMONY AT TRIAL BY, YOU KNOW, CATHY STEVENS, WAS THAT SHE CAME BY EARLIER THAT MORNING AND SAW THE DEFENDANT STRUGGLING WITH LIZA -- LISA AND LEFT AND DIDN'T GO OFF TO THE POLICE. DIDN'T TELL ANYBODY APPARENTLY, AND LATER IN THE AFTERNOON, WHEN BARBARA DECARR CAME HOME OR MET WITH MR. TOMPKINS, WITH WHOM SHE WAS LIVING, THAT IS WHEN HE HAD TOLD HER THAT LISA HAD WALKED OUT THE DOOR AND HAD GONE TO THE STORE AND SAID SHE WAS LEAVING. SO OBVIOUSLY YOU KNOW, IN CERTAINLY MARCH OF '83, WHEN LISA DISAPPEARED, BARBARA DECARR WAS OF THE VIEW THAT LISA HAD RUN AWAY OR HAD BEEN, HAD DISAPPEARED IN THAT CONTEXT. SO AS A MATTER OF FACT, EVEN CATHY STEVENS, WHEN SHE TESTIFIED AT TRIAL, INDICATED THAT FIRST, WHEN LISA HAD DISAPPEARED, SHE WAS UNDER THE IMPRESSION THAT LISA HAD RUN AWAY, BECAUSE THEY HAD BEEN TALKING ABOUT THAT AS A POTENTIAL COME, FOR THEIR LIVES -- AS A POTENTIAL COURSE OF ACTION FOR THEIR LIVES, AND EVEN, I DON'T WANT TO SAY PARTICIPATED, BUT SHE CERTAINLY KIND OF INDICATED OR SPREAD THE RUMOR AROUND THAT LISA HAD PROBABLY RUN AWAY OR WHATEVER. IT WAS ONLY AFTER LISA'S BODY WAS DISCOVERED UNDERNEATH A HOUSE IN JUNE OF '84, IS WHEN YOU KNOW, OBVIOUSLY AT THAT POINT, CATHY STEVENS WAS GOING TO COME FORWARD AND SAY WHAT SHE KNEW.

THAT WAS THE FIRST TIME CATHY SENTENCE CAME FORWARD.

CATHY STEVENS CAME FORWARD WITH HER KNOWLEDGE, AFTER THE BODY WAS RECOVERED.

AFTER THE BODY. AND SO SHE, AS FAR AS HER RELIABILITY AS A WITNESS, SHE WAS IMPEACHED AT TRIAL?

OH, YEAH, I MEAN, AND AS PART OF THE PREVIOUS EVIDENTIARY HEARING IN 1989, THERE WERE COMPLAINTS THAT SHE HAD MADE A STATEMENT TO MR. BONITA, THE PROSECUTOR, ON THE PHONE, AND HE HAD TAKEN NOTES FROM THAT, AND THAT MATERIAL ALLEGEDLY HAD NOT BEEN GIVEN TO THEM. AS IT TURNED OUT IN THE 1989 EVIDENTIARY HEARING, I THINK IT WAS, IS THAT THE TRIAL COUNSEL AND THE PROSECUTOR AGREED THAT THE DEFENDANT, SHE WAS CROSS-

EXAMINED ABOUT HER RECENT COMING FORWARD, AND SHE APPARENTLY HAD MADE A COUPLE OF DIFFERENT STATEMENTS TO MR. BONITA ON DIFFERENT PHONE CALLS AND ALL OF THAT ACTION, BUT ALL OF THAT WAS FULLY AIRED OUT AT THE 1989 EVIDENTIARY HEARING.

THE PERJURY, WHAT WAS HER PERJURY CONVICTION FOR?

THEY HAVE INTRODUCED SOME KIND OF A DOCUMENT WHICH SAYS THAT SHE HAD A VIOLATION OF PROBATION FOR PERJURY IN 1986, WHICH WAS WELL AFTER THE 1985. IT HAS NOTHING, THEY HAVE MADE NO ALLEGATION AT ALL THAT ANYTHING THAT HAD ANYTHING TO DO WITH HER TESTIMONY IN 1985. AND CONSEQUENTLY, IT IS, AND THEY ALSO TALK ABOUT THAT MR. TURKO HAS SUBSEQUENTLY BEEN INVOLVED IN AN EXTORTION BACK IN 1995 OR SOMETHING, WHICH WAS SOME TEN YEARS AFTER THIS TRIAL AND AFTER THAT TESTIMONY. IT HAS NOTHING TO DO WITH ANYTHING ELSE. SO ALL OF THE CLAIMS, IN TERMS OF BRADY, INEFFECTIVE COUNSEL, ALL OF THAT, ALL OF THOSE ISSUES AND SUBISSUES, WERE LITIGATED THOROUGHLY IN THE 1989 EVIDENTIARY HEARING.

NOW, ON CHAUNCY, SHE DIDN'T TESTIFY, IS IT SHE, DIDN'T TESTIFY AT TRIAL, AND COUNSEL WAS FOUND NOT TO BE INEFFECTIVE IN NOT CALLING HER.

THERE WAS A CLAIM MADE IN THE 1989 HEARING, IN THE STATE AND FEDERAL POSTCONVICTION STUFF, THAT, COUNSEL TESTIFIED THAT HE HAD AN INVESTIGATOR GO OUT AND TALK WITH HER AND SAID THE WITNESS IS SQUIRRELLY AND TAKES DRUGS AND IS SUBJECT TO ABUSE OR WHATEVER AND WOULDN'T BE A GOOD WITNESS.

IS THERE ANYTHING NOW THAT WOULD HAVE BEEN DISCLOSED OR ASCERTAINED THAT WOULD HAVE SHOWN THAT SHE WOULD HAVE BEEN A VERY RELIABLE WITNESS, OR COULD YOU JUST GIVE ME THE QUICK RESPONSE TO THAT.

WELL, YOU KNOW, AS I LOOK AT THESE DOCUMENTS THAT THEY ARE RELYING ON NOW, MOST OF THEM ARE SAYING THINGS LIKE WENDY OR, I MEAN, LISA AND JESSE WERE FRIENDS. I MEAN, ALL OF THAT WAS WELL-KNOWN. DETECTIVE STONY BURKE HAD TESTIFIED IN DEPOSITION AND AT TRIAL HAD TESTIFIED THAT HE KNEW THEY WERE FRIENDS AND BARBARA DECARR HAD CALLED UP DETECTIVE BURKE THAT SALBA -- THAT MS. ALBACK WAS MISSING. WITH REGARD TO CHAUNCY, I DON'T KNOW THAT THERE IS ANYTHING WITH ANYMORE. APPARENTLY THEY HAVE GONE TO GREAT EFFORTS TO SAY THAT IT IS MR. GRAY THAT OWNED THE NAKED CITY, WHICH APPARENTLY WAS, SOME KIND OF BAR OR STRIP JOINT OR SOMETHING, AND THAT HE HAD A LIQUOR LICENSE PROBLEM OR SOMETHING ALONG THAT LINE, AND, OF COURSE, GRAHAM WAS THE ONE WHO FOUND THE ALBACK BODY, BUT I MEAN, THERE HASN'T BEEN ANYTHING IN HERE THAT I CAN SEE THAT RECEIPTS TO THE DECARR HOMICIDE.

YOU DON'T, KEEP AN EYE ON YOUR TIME, IF YOU ARE GOING TO GET TO YOUR CROSS APPEAL.

CAN YOU ADDRESS, ON YOUR CROSS APPEAL, THE COURT FOUND THAT THE FORMER STATE ATTORNEY ADMITTED DRAFTING THE SENTENCING ORDER, AND IT FOUND THAT THE STATE ATTORNEY DRAFTED THE SENTENCING ORDER, AFTER BEING CONTACTED BY THE JUDGE OR THE JUDGE'S OFFICE, AND IT FOUND THAT THE SENTENCE OF THE DEFENDANT WAS PRONOUNCED IMMEDIATELY AFTER THE JURY PROVIDED ITS RECOMMENDATION, AND FLORIDA STATUTES REQUIRE THAT THE JUDGE INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES. GIVEN THOSE FACTUAL FINDINGS, HOW CAN WE REVERSE THE COURT'S --

WELL, I THINK -- -- ORDER. YEAH. GO AHEAD.

I THINK THE JUDGE WAS, JUDGE PERRY WAS INCOMPLETE IN HIS ANALYSIS OF, FACTUALLY, OF WHAT HAD OBVIOUSLY, YOU KNOW, BONITA HAD TESTIFIED THAT HE HAD GOTTEN SOME KIND OF COMMUNICATION TELEPHONICALLY, APPARENTLY, FROM THE JUDGE'S SECTOR MAYBE THE

JUDGE HAD TOLD HIM IN COURT. HE COULDN'T RECALL ALL THE DETAILS ON THAT, AND BONITA'S TESTIMONY WAS THAT, WHEN HE LOOKED AT THE SIGNED ORDER THAT WAS SHOWN TO HIM OF JUDGE COE, HE RECOGNIZED THE AGGRAVATING FACTORS IN THERE, THAT HE HAD, THAT SOMETHING THAT HE WOULD HAVE WRITTEN, BECAUSE THE JUDGE HAD TOLD HIM AT CLOSING ARGUMENT WHAT AGGRAVATING FACTORS THAT HE COULD RELY ON. SO I MEAN, THERE WAS THAT COMMUNICATION ALONG THAT LINE. HE DIDN'T TESTIFY, BONITA DIDN'T TESTIFY AS TO WHETHER THAT WAS THE FINAL DRAFT, AND WHETHER THE JUDGE HAD DONE EXACTLY AS HE HAD PUT IN THE AGGRAVATORS OR WHETHER THE JUDGE HAD ADDED OR SUBTRACTED ANYTHING ELSE. I MEAN, HE DIDN'T HAVE ANY MEMORY ALONG THAT LINE. JUDGE PERRY INDICATED THAT HE DIDN'T THINK THAT JUDGE COE HAD ENTERED INTO AN INDEPENDENT ANALYSIS OF AGGRAVATING AND MITIGATING FACTORS. I GUESS PRIMARILY BECAUSE, WHEN THE JURY IMMEDIATELY CAME BACK, WITH THEIR RECOMMENDATION OF 12-0, HE IMMEDIATELY ANNOUNCED SENTENCE AT THAT TIME, AND THEN THEY DRAFTED THE ORDER AFTER THAT, BUT WHAT IS INTERESTING IS THAT, IF YOU LOOK AT THE CLOSING ARGUMENTS OF BOTH THE PROSECUTOR, MR. BONEITY-, AND -- BONITA, AND TRIAL COUNSEL HERNANDEZ, MR. BONITA IS ARGUING THAT AGE IS NOT A MITIGATING FACTOR IN THIS CASE, AND HE ARGUES THERE ARE THREE AGGRAVATING FACTORS THAT WERE REFERRED TO, AND HE SAYS THE AGE ISN'T MITIGATING, BUT EVEN IF YOU WERE TO FIND AGE, THAT IS, WHAT IS AGGRAVATING IN THIS CASE IS, FAR OUTWEIGHS ANYTHING ELSE. THE DEFENSE ARGUED, AND THIS IS AT, I BELIEVE IT IS FROM PAGES 439 THROUGH 447, I BELIEVE, OR 452 OF THE DIRECT APPEAL RECORD, MR. HERNANDEZ IS ARGUING THAT HIS AGE, HIS AGE OF 26 IS A MITIGATING FACTOR, AND HE ALSO POINTS OUT THAT WE, ALSO, PRESENTED THE TESTIMONY FROM THREE WITNESSES, FRIENDS OR RELATIVES OF THE DEFENDANT, ABOUT HIS BEING A GOOD FRIEND, NOT A VIOLENT PERSON, THAT HE IS A GOOD WORKER, GOOD EMPLOYEE AND ALL OF. THAT WHEN YOU LOOK AT JUDGE COE'S SIGNED ORDER, THE JUDGE HAS FOUND AGE AS A MITIGATING FACTOR. THE JUDGE HAS INDICATED A CONSIDERATION OF THE NONSTATUTORY MITIGATION OF WHAT THE FAMILY MEMBERS HAD SAID ABOUT HIM BEING A GOOD WORKER AND INDUSTRIES AND ALL OF THAT, SO WHAT THE DEFENSE DID ARGUE, THE JUDGE FOUND.

BUT HOW DOES THIS DIFFER FROM, AND I MEAN, WHAT WE HAVE PROHIBITED AND WHY WE HAVE REVERSED SEVERAL OF THESE CASES, UNFORTUNATELY, IS BECAUSE OF THE EXPARTE COMMUNICATION, THE REQUEST THAT THE ORDER BE PREPARED BY THE STATE NOT NECESSARILY THAT THERE HAS GOT TO BE, THAT THE JUDGE JUST WAS A COMPLETE AUTOMATON IN THE PROCESS, BUT THAT THE PRESENCE OF THOSE THINGS UNDERMINES THE INTEGRITY OF THE SENTENCING PROCESS, TO SUCH AN EXTENT THAT A NEW SENTENCING HEARING IS REQUIRED, SO HOW DOES THIS CASE DIFFER, GIVEN THE FACTUAL FINDINGS THAT JUSTICE CANTERO HAS POINTED OUT FROM THE OTHER CASES, WHERE WE HAVE REVERSED, AND HOW DOES THIS DIFFER FROM THE CASE THAT, THE HOLTON CASE, WHERE THE STATE HAD CONCEDED WITH THE SAME EXACT JUDGE, IN HIS PROCEDURES, THAT A NEW SENTENCING HEARING WAS REQUIRED?

WELL, I THINK THE, THIS WAS, THE TRIAL WAS IN 1985. I THINK THE COURT'S OPINIONS OUT OF THIS COURT, YOU KNOW, INFORMING TRIAL COURTS THAT THEY WERE NOT TO GET INVOLVED IN HAVING PROSECUTORS DO THE SENTENCING ORDERS, THAT STARTED A LITTLE BIT LATER, I THINK IN '85 OR '87. IN ANY EVENT, IT SEEMS TO ME WHAT THE PROPER ANALOGY IN THIS CASE PROBABLY IS, IS TO A GARDENER VIOLATION. IN OTHER WORDS, IF THE TRIAL JUDGE, IF A SENTENCING JUDGE RELIES ON SOMETHING, SOME FACTUAL MATERIAL WHICH THE DEFENDANT HAS NOT HAD AN OPPORTUNITY TO REBUT, THE REMEDY IS TO GO BACK AND ALLOW HIM TO REBUT, TO PROVIDE EVIDENCE OR ANSWER IT.

HAVEN'T WE ALREADY CROSSED THAT PATH, THOUGH, WITH OUR CASES?

WELL, I THINK IN A NUMBER OF DIFFERENT KINDS OF CONTEXTS, I THINK YOU HAVE HAD THIS KIND OF SITUATION. I WOULD SUBMIT THAT ANY ERROR IN THIS SITUATION IS HARMLESS, IN

LIGHT OF THE FACT THAT, YOU KNOW, THESE THREE AGGRAVATING FACTORS ARE, YOU KNOW, BLATANT. I MEAN, THERE IS NO, REALLY, ANY CHALLENGEABLE GROUND TO BE MADE TO THEM. IT WOULDN'T HAVE MADE ANY DIFFERENCE, AND THE MITIGATION THAT WAS PRESENTED AT THE TIME OF TRIAL, WAS EXTREMELY IN SUBSTANTIAL. OBVIOUSLY THIS COURT, AND THIS COURT HAS HELD, IN THE GARDENER CONTEXT, THE GARDENER WAS A FLORIDA SITUATION, THAT ANY KIND OF AN ERROR THAT OCCURS UNDER THOSE CIRCUMSTANCES CAN BE HARMLESS ERROR. IN THE VINING CASE, FOR EXAMPLE, SO I WOULD SUBMIT THAT THIS IS REALLY LIKE, SIMILAR TO A GARDENER-TYPE SITUATION, IN WHICH THE COURT CAN TAKE A LOOK AT IT AND SEE THAT THIS WOULDN'T HAVE MADE ANY DIFFERENCE, IN LIGHT OF THE IN SUBSTANTIALITY OF THE MITIGATION AND THE THREE EXTREMELY BRUTAL AGGRAVATORS THAT WERE INVOLVED IN THIS CASE.

BUT HAVEN'T WE DONE THAT BEFORE? DOES THAT REQUIRE A RECEDING FROM CASES WHERE WE HAVE REMANDED FOR A NEW PENALTY PHASE? I MEAN, AND I HAVE TO GO BACK AND LOOK AT THOSE, BUT ISN'T THAT, AREN'T YOU PROPOSING A NEW STANDARD TO BE APPLIED IN THIS CIRCUMSTANCE?

WELL, I DON'T KNOW THAT I AM ASKING FOR A NEW STANDARD. I AM JUST TRYING TO DISCERN, YOU KNOW, THEw3 NATURE OF THE PROBLEM HERE, AND THAT IT SEEMS TO ME THAT IT IS SIMILAR TO THE GARDENER-TYPE SITUATION, IN WHICH, YOU KNOW, HE REALLY CAN'T COMPLAIN THAT THE HOMICIDE WASN'T HAC, HE REALLY CAN'T COMPLAIN THAT IT WAS COMMITTED DURING AN ATTEMPTED SEXUAL BATTERY. OR THAT HE HAD PRIOR VIOLENT FELONY CONVICTIONS. I MEAN, DEFENSE COUNSEL TOLD THE JURY, YES, HE HAS PRIOR VIOLENT FELONY CONVICTIONS. WE DON'T THINK THEY ARE AS BAD AS THE STATE THINKS THEY ARE BUT YOU CERTAINLY COULDN'T SET THEM ASIDE.

IN THE CASES WHERE WE HAVE SAID THAT A JUDGE MAKING AN EXPARTE CONTACT WITH THE PROSECUTOR AND ASKING THE PROSECUTOR TO DRAFT AN ORDER AND WE RECENTLY CAME OUT ROBERTS DECEMBER LAST YEAR AND MARAHAJ AND REICHMAN. IN ANY OF THOSE CASES, DID WE UNDERTAKE A HARMLESS-ERROR ANALYSIS?

I CAN'T RECALL OFFHAND, AND I THINK THE COURT HAD INDICATED THAT, YOU KNOW, IF THE PROSECUTOR IS INVOLVED IN DRAFTING THE SENTENCING ORDER OR SOMETHING, SO LONG AS THE TRIAL JUDGE HAS THE OPPORTUNITY TO EXERCISE INDEPENDENT JUDGMENT IN REVIEWING IT, THEN YOU KNOW, THE ERROR CAN BE HARMLESS. I THINK THAT WAS IN ONE OF THE EARLIER CASES THAT THIS COURT CAME OUT, NOT ONE OF THE MORE RECENT ONES.

DO WE HAVE A DRAFT OF THE MEMORANDUM OR THE ORDER AS PREPARED BY THE PROSECUTOR OR THE COURT FOUND THAT THERE WAS SUCH AN ORDER BUT THERE WAS NONE IN THE RECORD?

NO, SIR. WHAT, AS I RECALL, THE TESTIMONY OF MR. BONITA AT THE EVIDENTIARY HEARING, WAS WHATEVER HE HAD DRAFTED, HE HAD SENT OVER, AND YOU KNOW, HE DIDN'T KNOW -, PROBABLY IF THEY HAD BEEN, THEY WOULD HAVE BEEN TURNED OVER IN THE PRIOR REQUEST FOR DOCUMENTS, AND I DON'T UNDERSTAND OPPOSING COUNSEL TO BE MAKING A CLAIM THAT THEY HAVE A DOCUMENT OF A DRAFT THAT WAS PREVIOUSLY MADE.

SO THIS JUDGE COULDN'T ANALYZE TWO DIFFERENT DOCUMENTS, TO DETERMINE HOW MUCH THE JUDGE HAD TAKEN VERBATIM FROM A DRAFT ORDER AND HOW MUCH WAS HIS OWN?

RIGHT. THAT'S CORRECT. AND IT IS BASICALLY THE TESTIMONY OF MR. BONITO, THAT IN THE PAST, AND IN THIS CASE, THAT JUDGE COE WOULD ASK THE PROSECUTOR, WOULD ASK HIM TO DRAFT THE SENTENCING THING, AND THAT IS, AND HE RELIED ON THE AGGRAVATING FACTORS --

THE YELLOW LIGHT IS ON. IS THERE GOING TO BE A REBUTTAL HERE? IS THAT THE WAY THIS IS SET UP?

I HAVE PRETTY MUCH SAID WHAT I THINK IS NECESSARY FOR THAT ISSUE. I MEAN, IF THE COURT HAS ANY QUESTIONS ABOUT ANY OF THE OTHER ISSUES.

COULD YOU JUST QUICKLY ADDRESS, IS THEIR HAIR, IS THERE SOMETHING TO BE TESTED IN THIS CASE? WHAT IS THE STATUS ON THE DNA?

MY UNDERSTANDING IS THAT THEY WERE REQUESTING TO HAVE DNA TESTING DONE ON THE HAIRS. THAT BECAME THE FOCUS OF AN INQUIRY IN A HEARING BELOW, IN WHICH AFTER A THOROUGH SEARCH OF EVERYTHING, APPARENTLY, IN EVERYBODY'S OFFICES AND CLERKS' OFFICES AND EVERYBODY ELSE, THAT THOSE HAIRS ARE MISSION. IT HAS BEEN 17 YEARS. APPARENTLY THE FBI SENT BACK THE HAIRS, ALONG WITH A LETTER TO THE, INDICATING THAT, UNDER THE CURRENT TECHNOLOGY, THIS IS ALL THAT CAN BE DONE. BLAH BLAH BLAH. MAYBE SOMETHING WILL HAPPEN IN THE FUTURE. THOSE HAIRS ARE NOW GONE. APPARENTLY THERE WAS A HEARING IN WHICH DETECTIVE BLACK TESTIFIED THAT, ON THE LOG-IN SHEET, THAT THEY HAVE A DETECTIVE BLACK CHECKING IT OUT. I THINK WHAT SUBSEQUENTLY HAPPENED, AND OPPOSING COUNSEL, I THINK, SENT IN A NOTICE OF SUPPLEMENTAL FILING, IS THAT POLICE INVESTIGATED THAT AND FOUND OUT THAT, WHEN IT CAME BACK, THERE WAS A MISS NUMBERING ON THE EXHIBIT, AND IT WAS CHECKED OUT AND LOST IN A DIFFERENT CASE, SO IN TERMS OF THE HAIRS, THE HAIRS ARE GONE. NOW, NOW, THERE HAS BEEN SOME MENTION, I THINK, OF A BONE OR SOMETHING. I DON'T KNOW WHAT ANY KIND OF DNA REVIEW OF THAT WOULD REVEAL. I MEAN, IT IS QUITE, IT COULD WELL BE ANIMAL BONE, I MEAN, BECAUSE IN BOTH THIS CASE AND IN THE OTHER CASES, THERE WAS APPARENT A LOT OF ANIMAL ACTIVITY AT THE GRAVE SITE. IF THE DETERMINATION IS TRYING TO BE MADE THAT THIS IS NOT LISA DECARR AND THIS BONE WOULD PROVE IT, I DON'T KNOW HOW THAT WOULD DO THAT. YOU HAVE THE --

DIDN'T THE ELEVENTH CIRCUIT SAY THAT THERE IS SO MUCH OVERWHELMING EVIDENCE --

THEY SAID IT WAS PREPOSTEROUS TO ARGUE OTHERWISE THAT IT WAS NOT LISA UNDER THERE. YOU HAVE HER UNIQUE CLOTHING, TOOTH, THE ROBE AND SASH THAT SHE WAS WEARING, ALL OF THAT DEMONSTRATED, AND SHE WAS BURIED UNDER HER HOUSE WHERE SHE LIVED. I MEAN, EVEN IF WE FOUND, IF THESE HAIRS WERE AVAILABLE, THEY WOULD AVAIL THE DEFENDANT NOT, BECAUSE IF THEY ARE THE DEFENDANT'S HAIRS, HE CAN SAY, WELL, I LIVED WITH HER IN THE HOUSE. TRANSFERS HAPPENED ALL THE TIME, AND ONLY UNDER THE KING DAYS CASE, YOU HAVE ALL KINDS OF CONTAMINATION PROBLEMS WHEN RECOVERY TEAMS PICK UP BODIES. SO I DON'T SEE THAT THERE IS ANYTHING IN HERE THAT, AS THE TRIAL COURT FOUND, THAT DOESN'T GO TO ANY MATERIAL ISSUE, THAT IS, YOU KNOW, OPEN LITIGATION AT THIS POINT. SO WE WOULD SUBMIT THAT THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED ON THE DENIAL OF GUILT PHASE. ALL OF THESE ALLEGED DOCUMENTS, NONE OF THEM MEET THE HIGH STANDARDS OF STRICKLER VERSUS GREEN, THAT THERE WOULD AND REASONABLE PROBABILITY AFTER DIFFERENT RESULT. WE WOULD ASK THE COURT TO REVERSE THE JUDGE'S DETERMINATION ON THE SENTENCING ORDER. IF THE COURT HAS NO FURTHER QUESTIONS. THANK YOU.

TURNING, FIRST, TO THE GUILT PHASE ISSUES, I JUST BRIEFLY WANTED TO COVER THE FACT THAT, IN MAUREEN SWEENEY'S STATEMENT, NOT ONLY IS MAUREEN SWEENEY REPORTING WHAT SHE HAS BEEN TOLD BY BARBARA DECARR REGARDING LISA'S DISAPPEARANCE, SHE ALSO TESTIFIED THAT BILLY RAN AFTER LISA, WHO WOULD ALSO BE SOMEBODY, A SPECIFIC WITNESS, AND DOESN'T SHOW UP AND ALSO JENNIFER DAVIS, EXPRESSING CONCERNS WITH HIM OVER LISA'S DISAPPEARANCE.

HAVE YOU FOLLOWED UP, I MEAN THAT IS A DIFFERENT ISSUE AS TO WHETHER THERE IS NEWLY-DISCOVERED EVIDENCE. BUT YOU ARE NOT RAISING ANY NEWLY-DISCOVERED EVIDENCE.

WE DID FILE THE AFFIDAVIT OF GINGER DAVIS AND THIS COURT STRUCK IT, SO WE FILED A NEW

3.850 WITH HIS AFTERWARDIVITY IN THE -- AFFIDAVIT IN THE CIRCUIT COURT, BUT REMEMBER WE GOT THIS MATERIAL ON APRIL 14 AND WE HAD TO FILE ON APRIL 16. WE HAVE DONE FOLLOW-UP, BUT THE QUESTION IS WE CAN'T PRESENT THAT TO YOU BECAUSE IT IS NOT IN THE RECORD. THIS CASE IS ALREADY UP HERE.

THE SENTENCING ORDER, IS THIS CASE DISTINGUISHABLE FROM ROBERTS AND MAHARAJ AND --

NO. NO.

THERE IS A DISTINCTION, ISN'T THERE, THAT IN THOSE CASES, AND, WELL, LET ME ASK YOU, WAS THERE, IN THOSE CASES, EVIDENCE THAT THERE WAS AN ORDER, PROPOSED ORDER SUBMITTED BY THE STATE ATTORNEY, AND THE JUDGE ADOPTED THAT ORDER VERBATIM OR WITH VERY LITTLE CHANGES, OR WAS IT SIMPLY THE COMMUNICATION BETWEEN ONE OFFICE AND THE OTHER?

IN ROBERTS, IT WAS THE JUDGE WHO REVEALED, IN A DEPOSITION, NO, ACTUALLY, AT A HEARING ON A RELINQUISHMENT, THAT THE STATE HAD DRAFTED THE ORDER FOR HIM. NO DRAFT WAS EVER FOUND. AND SO IT WAS SIMPLY HIM SAYING, AND THE STATE DISAGREEING AND SAYING IT DIDN'T HAPPEN, HIM SAYING THAT IT DID HAPPEN, AND THAT WAS THE BASIS OF RELIEF, AND THIS COURT REJECTED ANY KIND OF CLAIM THAT THERE SHOULD BE A HARMLESS-ERROR ANALYSIS. IN MAHARAJ, THAT ISSUE WAS NOT ACTUALLY APPEALED. THAT WAS THE JAM JUDGE AS IN ROBERTS, AND I DON'T KNOW WHETHER THERE WAS A SENTENCING ORDER, BECAUSE I DON'T HAVE, I HAVEN'T SEEN ANY BRIEFS ON THAT, BECAUSE THE STATE DID NOT DO A CROSS-APPEAL. IN REICHMAN, THERE WAS A DRAFT ORDER. THAT IS WHAT TIPPED OFF THE ATTORNEYS THAT, THEY FOUND THAT IN THE PUBLIC RECORDS, BUT THERE WAS DISCUSSION BETWEEN THE TESTIMONY FROM THE JUDGE AND THE TRIAL PROSECUTOR DISAGREEING AS TO WHETHER THE JUDGE MADE CHANGES OR DIRECTED CHANGES OR EXACTLY HOW THAT WORKED. AND SO THAT IS THE REICHMAN SITUATION, BUT THOSE AREN'T THE ONLY CASES. THERE IS A BUNCH OF CASES WHERE THE STATE STIPULATED TO RELIEF, IN BELTRAN, LOPEZ, HOLTON AND LINDSEY, ALL FROM THE UNDERSTANDING THAT THIS COURT'S PRECEDENT THAT HARMLESS, IT IS EXPARTE COMMUNICATION. IT IS A VIOLATION OF DUE PROCESS. IT IS, IN THE WORDS OF THE U.S. SUPREME COURT, STRUCTURAL ERROR.

WHEN DID THIS INFORMATION FROM MR. BONE EIGHTIETH ---FROM MR. BONITO, WHEN DOES THE DEFENSE CLAIM THAT IT FIRST LEARNED OF THIS?

FIRST INNING LINK OF IT WAS ON MAR -- FIRST INKLING OF IT WAS ON MARCH 31, BECAUSE I HAD WORKED ON HOLTON AND WAS ASKED TO WORK ON TOMPKINS. DURING THE WARRANT PERIOD. IT SUDDENLY HIT ME THIS IS THE SAME CIRCUMSTANCE AND THE STATE CONFESSED ERROR THERE. TALKED TO THE STATE AND SHE -- TALKED TO THE STATE AND SHE PROPOSED THAT THAT WAS THE JUDGE'S PREFERENCE. WE TALKED TO THE STATE, AND THEIR RESPONSE --

WHAT BOTHERS ME ABOUT THIS WHOLE SITUATION IS THAT THE EVIDENCE IS PLAIN, AND THAT THERE HAD BEEN WIDESPREAD EVIDENCE AROUND HILLSBOROUGH COUNTY COURTHOUSE FOR YEARS THAT, THIS WAS JUDGE COE'S PRACTICE. AND YET WE END UP IN THE WARRANT PERIOD, IN MARCH OF 2001, AND IT IS THE FIRST TIME THAT IT IS RAISED AS AN ISSUE. NOW, THAT IS, THAT CONCERNS ME.

THIS COURT, IN HOLTON, ON DIRECT APPEAL, SPECIFICALLY SAID THERE IS NO EVIDENCE THAT THAT WAS OCCURRING. THIS COURT REJECTED THAT. THERE WAS NOTHING IN THE RECORD IN HOLTON TO INDICATE THERE WAS ANY EXPARTE CONTACT BETWEEN THE STATE AND THE JUDGE. IT IS NOT UNTIL, IN 2000, WHEN THE HOLTON 3.850 IS FILED, AND IN THE PUBLIC RECORDS --

BUT YOU JUST SAID THAT THIS WAS, IT WAS STANDARD PRACTICE. STANDARD PRACTICE IS KNOWN.

OKAY. THE STANDARD PRACTICE, THIS COURT SAID IT WASN'T HAPPENING IN HOLTON. THIS COURT REJECTED THE CLAIM IN NEIBERT, SAID IT DIDN'T HAPPEN IN NEIBERT. WHAT DO I HAVE TO PLEAD? I HAVE BEEN ACCUSED OF FILING CONCLUSORY AND SPECULATIVE PLEADINGS. IN HOLTON, THERE WAS A DRAFT ORDER DISCLOSED TO MR. HOLTON'S COUNSEL. THAT IS WHY LINDA McDERMOTT PLED IT. SHE PLED IT IN HOLTON AND THE STATE CALLS HER UP IN AUGUST 2000 AND SAYS WE HAVE GOT A PROBLEM. YOU ARE RIGHT. WE ARE CONFESSING ERROR, SO THAT WAS IN AUGUST OF 2000 AND WE FILED THIS IN APRIL OF 2001. THAT IS THE SCENARIO, AND THE STATE IS NOT CONTENDING HERE THAT THERE WAS ANY DRAFT ORDER THAT WE SHOULD HAVE SEEN BEFORE. IT IS WHAT HAPPENED IN HOLTON, AND BECAUSE I HAPPENED TO BE ON BOTH CASES, THAT OCCURRED TO ME THIS WAS THE SAME FACTUAL SCENARIO AS IN HOLTON AND THEY ARE ONE YEAR APART. 1985, 19866.

WOULD YOU SHARE WITH -- 1985, 1986.

WOULD YOU SHARE WITH ME THE DNA STATUS AND THAT WHICH WE APPEAR TO HAVE IN THIS CASE VERY DETAILED AND COMPLETE FORENSIC EVIDENCE ABOUT THE DENTAL SITUATION, THE CLOTHING, THE RINGS AND THOSE KINDS OF THINGS AND SEPARATING THAT FROM THE HAIR, IF YOU COULD DO THAT FOR ME. WITH REFERENCE TO, I WOULD SUBMIT IT IS NOT AT ALL THAT CLEAR IN TERMS OF THE BOYD MUCH. -- OF THE BODY. THE ONLY IDENTIFICATION THAT HE MADE WAS HIS DETERMINATION REGARDING BARBARA DECARR DESCRIBING THE EXCLUDED TOOTH. THAT WAS ALL. THE RINGS, BUT WHAT WE HEAR IN A MOTION FOR HEARING IS THAT THE NEIGHBOR LADY THEY CAME BACK THE NEXT DAY TO FIND THE RINGS. THE RINGS WEREN'T FOUND WITH THE BODY, BECAUSE BARBARA DECARR SUGGESTED THERE WOULD BE RINGS. THEY GO BACK TO AN UNSECURE CRIME SCENE AND SUDDENLY FIND RINGS. THERE IS A QUESTION, PARTICULARLY GIVEN THE FACT THIS BODY IS FOUND 14 MONTHS AFTER THE FAMILY HAD MOVED OUT OF THAT HOUSE. THEY MOVED OUT OF THE HOUSE WITHIN WEEKS. THEY WERE IN THE PROCESS OF MOVING OUT, THE DAY SHE DISAPPEARED. THEY WERE PACKING STUFF UP. SO THERE IS THIS SUBSTANTIAL TIME PERIOD, AND THERE, WE CAN KNOW, NOW, FOR SURE IF IT IS HER BOYD, AND IF THE FACT THAT THE ELEVENTH CIRCUIT OR A JURY HAS DETERMINED SOMEBODY IS GUILTY PRECLUDES DNA TESTING, THEN WHY DO WE HAVE DNA TESTING? I MEAN, WE CAN NEVER CROSS THAT THRESHOLD! MY READING OF THE RULE WAS THAT, IF YOU CAN MAKE AN ARGUMENT THAT THERE IS A RESULT OF THE DNA TESTING THAT WOULD EXONERATE YOU OR LEAD TO A NEW TRIAL, THEN YOU SHOULD BE ABLE TO HAVE THE DNA TESTING. IF THIS IS NOT LISA DECARR, THEN THERE IS A PROBLEM WITH THIS CONVICTION. AND WE NOW HAVE THE ABILITY TO KNOW FOR SURE. WE CAN DO THE MITOCHONDRIAL D NMENT A OF THE BONO-DNA AND KNOW FOR SURE -- WE CAN DO THE MITOCHONDRIAL DNA OF THE BONE AND SUBMIT IT FOR TESTING. I SEE MY LIGHT IS RED. I HAD MORE TO SAY, BUT I WILL END THERE.

CHIEF JUSTICE: THANK YOU.