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## Mark Allen Davis v. State of Florida

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

CHIEF JUSTICE: GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE MORNING'S DOCKET IS DAVIS VERSUS THE STATE OF FLORIDA. JUSTICE QUINCE IS RECUSED ON THIS CASE, AND JUSTICE WELLS WILL PARTICIPATE. HE, HE WILL NOT BE PHYSICALLY PRESENT FOR THE ORAL ARGUMENTS THIS MORNING, SINCE HE IS OUT OF TOWN ON A FEDERAL MEETING, BUT HE WILL BE DELIBERATING WITH US IN ALL OF THE CASES THIS MORNING. SO WITH THAT, ARE THE PARTIES READY? MS. McDERMOTT, YOU MAY PROCEED.

GOOD MORNING. LINDA McDERMOTT ON BEHALF MARK DAVIS. MAY IT PLEASE THE COURT. I WOULD LIKE TO BEGIN BY ADDRESSING MR. DAVIS'S BRADY AND GIGLIO CLAIMS, AND ALSO IF TIME PERMITS, I WOULD LIKE TO MOVE ON TO HIS PENALTY PHASE CLAIM. THE PICTURE PRESENTED AT MARK DAVIS'S TRIAL WAS THAT HE HAD TORTURED THIS VICTIM, AND HE WANTED -- HE HAD TARGETED THIS VICTIM, AND HE WANTED TO RIP THIS VICTIM OFF AND DO HIM IN. THAT WAS THE TESTIMONY PRESENTED AT TRIAL. ALSO THE TWO WITNESSES WHO OBSERVED HIM ON THAT DAY, ALSO TESTIFIED THAT THE VICTIM AND MR. DAVIS WERE DRINKING BUT THAT MR. DAVIS WAS NOT INTOXICATED AND THE VICTIM WAS INTOXICATED, SEVERELY INTOXICATED BY THE END OF THE DAY. IN FACT, ONE OF THE WITNESSES SAID THAT MR. DAVIS KNEW WHAT HE WAS DOING. IN ADDITION TO THOSE TWO WITNESSES, THE STATE PRESENTED A JAIL HOUSE INFORMANT BY THE NAME OF SEAN -- OF SHANNON STEPHENS, WHO TESTIFIED THAT MR. DAVIS HAD ADMITTED TO HIM THAT HE WAS IN THE PROCESS OF TAKING MONEY FROM THE VICTIM IN THE VICTIM'S ROOM, WHEN THE VICTIM WOKE UP AND A FIGHT HAD BROKEN OUT AND MR. DAVIS -- AND A FIGHT HAD BROKEN OUT, AND MR. DAVIS HAD KILLED THE VICTIM BECAUSE HE WOULDN'T GO DOWN, SO THAT WAS THE PICTURE THAT WAS PRESENTED AT THE TRIAL. NOW, THE UNDISCLOSED REPORTS AND THE LETTERS THAT WERE INTRODUCED AT THE EVIDENTIARY HEARING, PORTRAY A VERY DIFFERENT PICTURE THAN WHAT COULD HAVE BEEN PRESENTED AT THE TRIAL. FIRST OF ALL, AS TO THE PREMEDITATION ELEMENT, THERE WERE STATEMENTS MADE BY THE TWO TESTIFYING WITNESSES, KIMBERLY WRIGHT AND BEVERLY CASTLE, AS TO THE PREMEDITATION ISSUE, BUT THE INITIAL STATEMENTS TO LAW ENFORCEMENT, HAD NO SUCH STATEMENTS IN THEM. THEY DISCUSSED THE INTOXICATION OF THE VICTIM AND OF MR. DAVIS. THEY DISCUSSED THE FACT THAT MR. DAVIS HAD SPENT TIME WITH THE VICTIM THAT DAY AND THAT THEY HAD SEEN MR. DAVIS AT 10:30 OR EVEN P.M. ON THE NIGHT CRIME AND HE WAS INTOXICATED. TRIAL COUNSEL DID NOT HAVE THE BENEFIT OF THOSE STATEMENTS --

I WAS UNDER THE IMPRESSION THAT CASTLE WAS DIRECTLY IMPEACHED AT TRIAL BY SOME OF THESE STATEMENTS. IS THAT TOTALLY INCORRECT?

SHE WAS IMPEACHED AS TO SOME OF THE INTOXICATION. SHE WAS ABSOLUTELY NOT IMPEACHED AS TO THE PREMEDITATION. TRIAL COUNSEL DID NOT HAVE THE INITIAL REPORT, AND THIS CAME OUT AT THE HEARING, THAT APPARENTLY AT THE TIME OF MR. DAVIS'S TRIAL, THE SECOND DCA HAD ISSUED AN OPINION IN MILLER VERSUS STATE, WHICH SAID THAT, IF A

STATEMENT WAS NONVERBATIM , IT DIDN'T NEED TO BE TURNED OVER TO DE FENSE COUNSEL.

DO WE HAVE ALL OF THE SEIN THIS RE CORD ? AT THE PRESENT TIME .

YES, Y OUR HON ORS . THE DEFENSE EXHI BITS, THE SPECIFIC REPORTS WERE DEFENSE EXHIBITS 5 , 6 , 7 , AND 8. THOSE WERE ALL PO LICE REPORTS AND/OR NOTES THAT POLICE OFFICERS TOOK ON T HEDAYS FOLL OWING THE CR IME, THE INITIAL DAY AND THEN THE DAYS FOLLOWING THE CRIME , THROUGHOUT THE MONT H OF JULY.

SO ON THAT ISSUE , YOU ARE ASSERTING THAT THE RECORD WILL REVEAL THAT , AT THE TRIAL , IS IT ONE WITNESS O R IS IT TWO WITNESSES THAT TESTIFY WITH REFE RENCE T O THE PREMEDITATION F A CTS , BUT THAT IN THE STATEMENT THAT THEY HAD BEGIN TO THE POLICE EARLIER , THAT THEY DID NOT INCLUDE ANY OF STATEMENTS LIKE THAT .

CORR ECT .

OKAY , AND THAT THOSE STATEMENTS GIVEN TO THE POLICE WERE NOT PRO VIDED TO THE DEFENSE .

CORRECT.

WHAT ABOUT THE INTOXICATION AS PECT?

CAN I ASK JUST ONE QUESTION TO FOLLOW UP ON THAT, TO WHAT EX TENT WAS IT DISCUSSED AT ANY DEPOSITIONS, PARTICULARLY DETECTIVE O'BRIEN'S DEPOSITION THAT WENT ON , WAS IT OR WAS IT NOT DISCUSSED PR IOR TO TRIAL , DURING A DEPOSITION , EPISODE ?

DETECT IVE O'BRIEN WAS D WE POSED -- WAS DEPOSED , A NDDURING HIS DEPOSITION, HE TOOK THE STATES ON THE D AYTHAT THEY FOUND THE VEHI CLE -- THE STATEMEN TS ON THE DAY THAT THEY FOUND THE VICTIM, AND HE TOOK STATEMENTS FROM WRIGHT, A WO MAN NAMED B ORNE AND SOUTH . BORNE AND SOUTH DID NOT TESTIFY. THIS IS HIS SYNOPSIS . MARK DAVIS SPOK E TO THE VICTIM, AND SHE SAW THEM DRINKING TOGETHER.THAT WAS HIS SY NOPSIS , SO HE NEVER MENT IONED THAT SHE DIDN'T SAY ANYTHING ABOUT THE PREMEDI TATION . THAT WAS NEVER REALLY PURSUED IN THE DEPOSI TION, B UT THAT WAS THE EXTENT OF WHAT HE REVEALED IN T HEDEPOSITION, ABOUT THE STATEMENT, SO --

DID HE REVEAL THAT STATEMENTS WERE TAKEN , A NDWAS THERE, WHAT ENTER PLAY WAS THERE, WITH REG ARD TO --

YES.

-- I HAVE STATEMENTS , AND WHAT DID COUNSEL DO WITH REGARD TO G ETTING T HOSESTATEMENTS?

HE SAID I TOOK THE STATEMENTS OF W RIGHT , SOUTH AND BORNE, AND THEN HE WENT THROUGH AND GAVE A SYNO PSIS OF WHAT THOSE STATEMENTS WERE. THAT WAS THE ISSUE AS FAR AS WHAT WAS PURS UED . DEFENSE COUNSEL NEVER DID ATTEMPT TO GET THE MILLERIZED PORTION OF THE STATEMENT, BE CAUSE APPARENTLY AT T HIS TIME T HIS IS NOT THE PR ACTICE DOWN IN PINELLAS COUNTY. DEFENSE ATTO RNEYS DIDN'T THINK THEY WERE ENTITLED TO THE MILLERIZED PORTIONS OF THE STATE MENT.

IS N'T THIS A TRUE BR ADY CLAIM THAT THE STATEMENTS WERE DISC LOSED . THEY DISCUSSED W E HAD STATEMENTS, BUT THIS IS NOT AN INEFFECTIVE ASSISTANCE AS OPPOSED TO A BRADY SITUATION?

QUITE FRANKLY I DON'T THINK IT MATTERS. IF IT WASN'T BRADY -- .

IS IT A DIFFERENT STANDARD?

IT IS THE SAME STANDARD , AS FAR AS BRADY GOES. IF THE SUPREME COURT SOME HOW OVERRULED THE BRADY CASE FROM 1963, THEN ABSOLUTELY IT WOULD BE AN INEFFECTIVE CLAIM AND THE SAME STANDARD THAT YOU WOULD BE LOOKING AT TO DETERMINE .

THE SECOND STANDARD, BUT THE FIRST STANDARD WOULD BE DIFFERENT , BECAUSE IF THERE WAS A CASE THAT EXISTED THAT LED COUNSEL TO A REASONABLE BELIEF THAT HE OR SHE WASN'T ENTITLED TO IT, THEN YOU WOULD HAVE TO PROVE THAT COUNSEL WASN'T FUNCTIONING AT THE SIXTH AMENDMENT REQUIRES, SO YOU WOULD AGREE YOU GOT IT MUCH EASIER , HURDLE, IF YOU CLAIM IT AS BRADY .

CORRECT, BUT I THINK IN STRICKLAND AND IN BRADY, THE ISSUE WAS CONFIDENCE ON HER MIND.

THE SECOND PRONG , AND THE FIRST PRONG ISN'T AUTOMATICALLY ESTABLISHED , BECAUSE THE STATE , SOMETHING EXISTED AND COUNSEL DIDN'T SEEK IT.

CORRECT.

BUT HOW WOULD YOU GET AROUND THAT?

I WOULD SAY THIS IS ABSOLUTELY BRADY. BRADY WAS A 1963 CASE. IT WAS LONG BEFORE THIS IDEA OF MILLER, AND BRADY DIDN'T EXEMPT DIFFERENT TYPES OF STATEMENTS OF. THEY SAID, IF SOMETHING IS EXCULPATORY, YOU TURN OVER , AND IN BANKS VERSUS DRECKE , THE RECENT UNITED STATES SUPREME COURT CASE , REITERATES THE BRADY HISTORY BY THE UNITED STATES SUPREME COURT, AND SAYS THAT THIS IS NOT A SYSTEM WHERE THE PROSECUTOR MAY HIDE AND THE DEFENDANT MUST SEEK. IF THERE IS INFORMATION THAT IS EXCULPATORY , IT HAS TO BE TURNED OVER.

SO YOU ARE SAYING, THEN , THAT IT MAKES YOUR BRADY , GOING BACK, THEN , YOU WOULD SAY THAT THE STATE, EVEN IF THEY TURNED OVER THE POLICE REPORTS, IF THEY, ON THEIR, IF THEY , CONSISTENT WITH THE SECOND DISTRICT CASE , WERE EXCISING PORTIONS , THAT THAT STILL, EVEN IF THEY DID IT IN GOOD FAITH , THAT THAT WOULD STILL BE A BRADY VIOLATION.

ABSOLUTELY. ABSOLUTELY.

WHAT ABOUT THE INTOXICATION?

AS TO THE INTOXICATION , WHAT HAPPENED AT TRIAL WAS THE, IF I MAY JUST ON THE PREMEDITATION, TO COMPOUND THE ERROR, AND I THINK THIS IS REALLY A GIGLIO PART OF THE CLAIM, THE STATE TOLD THE JURY IN THE CLOSING ARGUMENT, IF THERE HAD BEEN ANY EVIDENCE THAT MARK DAVIS DIDN'T MAKE THESE STATEMENTS TO THESE WITNESSES , TRIAL COUNSEL WOULD HAVE IMPEACHED THEM, WHICH TO ME , SEEMS LIKE IT IS A GIGLIO VIOLATION. SHE KNEW THAT THAT WAS NOT INCLUDED IN THE REPORT. SHE KNEW THAT THOSE REPORTS HADN'T BEEN TURNED OVER , AND YET SHE CAN'T IZED ON THE FACT THAT SHE WAS HIDING BEHIND THIS CASE AND SHE COULD MAKE THIS COMMENT TO THE JURY.

WHAT EVIDENCE IS THERE IN THE RECORD THAT THE PROSECUTOR KNEW THIS?

WELL , UNDER THE CASE LAW, THE PROSECUTOR IS , KNOWS EXACTLY WHAT THE POLICE DEPARTMENT KNOWS, IN TERMS OF ALL OF THE BRADY CASE LAW , THE KYLES , CALLS VERSUS WHITLEY AND BAGLEY AND THOSE CASES.

I WANT TO CLARIFY. ANOTHER KNOWLEDGE IS IMPUTED TO THE PROSECUTOR.

YOUR KNOWLEDGE IS BASED ENTIRELY ON IMPTATION.

ABSOLUTELY .

BUT JUST FOLLOWING UP ON THIS FOR GILIO , THAT WOULDN'T EXTEND TO THE GIGLIO CLAIM -- THE GIGLIO , IF GIGLIO HAD TO KNOW OF THE EXISTENCE OF THE STATEMENT, IF WE CAN GO TO THE MORE FORGIVING STANDARD OF GIGLIO. WOULD YOU AGREE?

SHE HAD HER SYNOPSIS , WHERE SHE SAID THIS IS WHAT EVERYBODY IS GOING TO TESTIFY TO, AND IN HER SYNOPSIS IN TERMS OF RIKE , SHE DIDN'T HAVE ANYTHING ABOUT THE PREMEDITATION IN THAT SYNOPSIS , SO SHE WAS EITHER DOING THAT FROM HER REPORTS OR FROM HER CONVERSATION WITH RIKE, BUT YET SHE STOOD UP IN CLOSING AND SAID THERE IS NOTHING TO SHOW THAT THESE STATEMENTS WEREN'T MADE. NOW, IN TERMS OF THE INTOXICATION, SOME OF THE INTOXICATION CAME OUT AT TRIAL. IN TERMS OF RIKE, SHE TESTIFIED THAT MR . DAVIS WAS DRINKING ON THE DATE OF THE CRIME , AND SHE TESTIFIED THAT SHE DIDN'T THINK HE WAS DRUNK. AT 4: 30 OR FIVE O'CLOCK IN THE EVENING, SHE SAYS HE DROVE HER TO GET HER BOYFRIEND 'S CAR AND HE HAD NO PROBLEMS DRIVING. HE THEN ATE DINNER WITH THEM . AT 11 :30 OR MIDNIGHT, SHE SAW HIM AGAIN AND HE WAS NOT INTOXICATED. THE ONLY THING SHE IS IMPEACHED WITH IS THAT SHE SAW MR. DAVIS GO TO A BAR THAT DAY. THAT WAS THE ONLY THING TRIAL COUNSEL IMPEACHED HER WITH. AS TO CASTLE, SHE SAID THAT SHE SAW THE VICTIM AND MR . DAVIS ALL DAY LONG WITH A CAN OF BEER IN THEIR HANDS , AND THAT THE VICTIM WAS VERY INTOXICATED, BUT MR . DAVIS WAS NOT DRUNK AT 8:00 P .M.. HE KNEW WHAT HE WAS DOING. AND AT 11:00 P.M. TO MIDNIGHT, HE CAME TO THE DOOR, AND HE WAS SOBER . NOW , IN IMPEACHMENT , THE DEFENSE ATTORNEY SAID, WELL , DIDN'T YOU SAY THAT HE GOT DRUNKER AND DRUNKER AS THE DAY WENT ON AND THAT AT 10:30 P.M. , BOTH OF THEM WERE DRUNK, AND SHE SAID YES, BUT I WAS MAKING THAT ASSUMPTION ONLY BECAUSE I SAW HIM WITH A CAN OF BEER IN HIS HAND , SO SHE EXPLAINS IT, AND SHE TRIES TO REHABILITATE HERSELF , AND THIS SORT OF COMES INTO ISSUE WITH KYLES , WHEN THEY SAY IF THE DEFENSE ATTORNEY TRIES TO IMPEACH THEM AND THE STATE OR WITNESS REHABILITATES THEIR TESTIMONY, IT IS STILL A PROBLEM , EVEN IF THERE WAS SOME IMPEACHMENT . NOW, IF YOU LOOK AT THEIR REPORTS , SPECIFICALLY IN CASTLE'S, THE STATE ATTORNEY SYNOPSIS, WHICH IS DEFENSE EXHIBIT 12 , SHE TELLS THE PROSECUTOR THAT , AT 6:30 P.M., SHE SEES MR. DAVIS COMING BACK FROM THE BAR. HIS EYES WERE GLASSY , GLAZED , HE WAS INTOXICATED . HE IS STUMBLING. SHE GIVES THIS WHOLE THING , WHICH FIRST OF ALL THIS CONTRADICTS WITH HER DAUGHTER'S TESTIMONY THAT, AT 6:30 P .M. HE WAS WITH THEM EATING DINNER AND DRIVING A CAR, SO THIS WOULD HAVE BEEN A GREAT CONTRADICTION FOR TRIAL COUNSEL TO POINT OUT, IN TERMS OF THEIR TESTIMONY , AND THE OTHER STATES THAT ARE MADE ARE SIMILAR , YOU KNOW , HE WAS DRUNK AT 10:30. BOTH OF THEM SAY WHEN HE CAME TO THEIR ROOMS BETWEEN ELEVEN AND MIDNIGHT , HE WAS INTOXICATED, AND AT THE TRIAL THEY DENIED THAT, SO AS TO THE INTOXICATION, THAT IS SORT OF THE ISSUE. NOW, IN ROME AND , THIS -- IN ROME AND , THIS COURT SAID THE ISSUE -- IN ROMAN , THIS COURT SAID THE ISSUE OF INTOXICATION IS AN ISSUE AT TRIAL AND IN THAT CASE THEY PUT ON ALLAY WITNESS AND EXPERTS TO TESTIFY AS TO INTOXICATION AND THEY PRESENTED SEVEN WITNESSES TO SAY THAT HE WAS NOT DRUNK. IT WAS DISCLOSED IN A REPORT THAT ONE WITNESS MADE A STATEMENT EARLIER THAT HE WAS DRUNK , AND THIS WAS JUST ONE WITNESS , AND THIS COURT ORDERED A NEW TRIAL AND SAID EVEN THOUGH HE WAS IMPEACHED SOMEWHAT, THE STATE REBUILT -- REHABILITATED HIM AND WE FIND IT TO BE MATERIAL. THERE WAS A LOT GOING ON, AND WE FOUND IN MR . DAVIS'S CASE AS TO INTOXICATION. AS TO SHANNON STEPHENS , SHANNON STEPHENS WAS SPECIFICALLY ASKED HAS ANYONE OFFERED YOU OR DO YOU HAVE ANY EXPECTATION OF LEEB LENIENCY AND HE SAID -- LENIENCY, AND HE SAID NO. IT WASN'T REBUTTED. HE WAS CROSS-EXAMINED. HE SAID THAT HE HAD A CONVERSATION WITH THE STATE BEFORE HE TESTIFIED , WHERE HE ASKED THEM CAN YOU GET MY GAIN TIME REINSTATED . I AM

GOING TO LOSE ALL MY GAIN TIME. IT WILL BE EQUIVALENT OF A COUPLE OF YEARS OF MY SENTENCE, AND THEY TOLD HIM WE WILL SEE WHAT WE CAN DO. FRANKLY UNDER BANKS, THIS WOULD BE MORE IMPORTANT FOR THE DEFENSE ATTORNEY TO KNOW THIS, BECAUSE IT IS NOT A SOLID DEAL. IT IS SORT OF LIKE WE WILL SEE WHAT WE CAN DO, AFTER YOU TESTIFY. IT GIVES HIM MORE OF AN INCENTIVE TO COLOR HIS TESTIMONY AND TO SAY THINGS THAT ARE MORE FAVORABLE FOR THE STATE THAN IT WOULD HAVE IF THEY HAD JUST TOLD HIM, YES, WE ARE GOING TO DO THIS AND THEY HAD REVEALED THAT TO THE DEFENSE COUNSEL. NONE OF THIS WAS REVEALED TO DEFENSE COUNSEL THAT THIS WAS AN ISSUE, AND THOSE ARE SORT OF THE PRIMARY THINGS OF THE BRADY CLAIM. I SEE MY TIME HAS EXPIRED. I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. I AM CANDACE SABELLA, REPRESENTING THE STATE. I JUST SO HAPPEN TO HAVE A COPY HERE, OF THE TAPED INTERVIEW WITH KIMBERLY RYK, WHICH TRIAL COUNSEL TESTIFIED AT EVIDENTIARY HEARING AT 624 THAT HE HAD IT IN THE DEPOSITION, AND ON PAGE 2 SHE SAYS WHAT CAN YOU TELL ME ABOUT ANY STATEMENTS THAT MARK MIGHT HAVE MADE ABOUT THE VICTIM. HE SAID THAT ORVILLE WAS A QUEER AND HE WAS GOING TO PLAY HIM FOR HIS MONEY, SO COUNSEL TESTIFIED THAT HE HAD THESE TRANSCRIBED STATEMENTS. THE ONLY THING THEY ARE ALLEGING HE DIDN'T HAVE WAS THE POLICE OFFICER'S SUMMARY OF THESE TRANSCRIBED STATEMENTS. THE POLICE OFFICER WAS DEPOSED. HE WAS ASKED ABOUT THE STATEMENTS. THEY HAD THE VERBATIM STATEMENTS. THESE WITNESSES WERE DEPOSED. THEY WERE IMPEACHED AT TRIAL. THERE SIMPLY ISN'T ANYMORE INFORMATION THAT HE SHOULD HAVE HAD THAT HE DIDN'T HAVE.

THE DISTINCTION THAT -- I AM SORRY.

JUSTICE LEWIS.

I AM SORRY THE DISTINCTION THAT YOU ARE MAKING IS THAT THERE WERE THESE RECORDED TAPES. -- I AM SORRY. THE DISTINCTION THAT YOU ARE MAKING IS THAT THERE WERE THESE RECORDED TAPES. THE TAPES WERE TURNED OVER. THE SUMMARY OF THE TAPES, IS THAT WHAT --

THAT IS THE ALLEGATION. I SUBMIT TO THIS COURT THAT THEY HAVEN'T REALLY PROVED THAT THEY DIDN'T GET THIS INFORMATION BECAUSE THERE WAS NEVER A QUESTION OF COUNSEL, HAVE YOU EVER SEEN THIS, BUT THE FACT IS PRIOR TO TRIAL, DEFENSE KUHNS HE WILL WHITE -- DEFENSE COUNSEL WHITE MADE A MOTION CONCERNING MILLER. HE OBJECTED TO THE MILLER STANDARD AND WANTED UNMILLERIZED POLICE REPORTS AND THE TRIAL COURT OVERRULED HIM, SO WE PROBABLY CAN ASSUME THAT THIS REPORT WAS MILLERIZED. THE PROSECUTOR AT EVIDENTIARY HEARING, CONCEDED THAT THIS WAS THEIR STANDARD PRACTICE AT THE TIME, ALTHOUGH HE WAS NOT THE PROSECUTOR AT THE TIME IN 1987. SO, BUT, THE ONLY THING THAT MILLER ALLOWED THEM TO DO WAS TO DELETE PORTIONS THAT WERE SUMMARIZING VERBATIM STATEMENTS.

CHIEF JUSTICE: JUSTICE ANSTEAD.

SO DID THE STATE PRESENT EVIDENCE AT THE POSTCONVICTION EVIDENTIARY HEARING BELOW, THAT THEY DID AFFIRMATIVELY PROVIDE ALL OF THESE STATEMENTS TO THE DEFENSE?

THE TRIAL COUNSEL WHITE TESTIFIED, THAT HE HAD THE TRANSCRIBED STATEMENTS, THAT HE HAD THE TAPES OF, THAT HE HAD THE DEPOSITIONS WHERE THE DETECTIVE WAS QUESTIONED ABOUT THEM. THE SPECIFIC POLICE REPORTS, NO.

SO HE TESTIFIED THAT HE HAD ALL OF THIS MATERIAL AT THE HEARING BELOW.

HE TESTIFIED THAT HE HAD ALL OF THE MATERIAL CONTAINING THEIR STATEMENTS AND THAT

THE TRIAL COURT MADE A SPECIFIC FINDING THAT HE HAD IT.

AND DID THE STATE PUT ON ANY EVIDENCE FROM THE ASSISTANT STATE ATTORNEY OR FROM THE POLICE, THAT THEY HAD PROVIDED THESE STATEMENTS TO DEFENSE COUNSEL?

NOT THE SUMMARIZED STATEMENTS BUT THE VERBATIM STATEMENTS, YES.

NEFERDZ -- IN OTHER WORDS, WHO TESTIFIED AS TO THAT?

WHITE TESTIFIED THAT HE HAD THE TRANSCRIBED STATEMENTS. EXACTLY.

YOU TOLD ME ABOUT WHITE. NOW, HOLD ON. YOU ARE WAY AHEAD OF ME. LET'S JUST PAUSE FOR A MINUTE.

I AM SORRY.

DID THE STATE PUT ON ANY EVIDENCE FROM THE ASSISTANT STATE ATTORNEY OR THE POLICE, THAT THESE STATEMENTS WERE PROVIDED TO DEFENSE COUNSEL?

THE STATE DID NOT PUT ON ANY EVIDENCE FROM THE STATE ATTORNEYS OFFICE OR THE POLICE THAT THESE STATEMENTS WERE PROVIDED TO DEFENSE COUNSEL.

SO YOU ARE RELYING ON THE TESTIMONY OF DEFENSE COUNSEL, BUT YOU SAY THAT TESTIMONY WAS AFFIRMATIVELY THAT HE GOT ALL OF THIS MATERIAL, AND THAT HE HAD IT ALL, INCLUDING THE LACK OF PREMEDITATION IN THE EARLIER STATEMENTS, THE TESTIMONY ABOUT INTOXICATION, AND THAT HE HAD ALL OF THAT, IS THAT --

YOUR HONOR, I AM RELYING ON WHITE BUT I AM ALSO RELYING ON THE RECORD. THE RECORD SHOWS --

LET'S STOP WITH WHITE FOR A MINUTE.

O KAY.

I THINK YOU ARE TELLING US THAT WHITE SAID HE HAD ALL THIS STUFF.

WHITE SAID --

ALL RIGHT. WAS HE ASKED, THEN, TO EXPLAIN, IF HE HAD IT ALL, WHY HE DIDN'T USE IT?

TO THE CONTRARY, I BELIEVE WHITE DID USE IT.

WELL, SHE HAS POINTED OUT THAT, ON THE PREMEDITATION, THAT THERE WAS TESTIMONY AT TRIAL, FROM ONE OR TWO OF THESE WITNESSES, THAT THAT ACTUALLY HAD SPECIFIC THINGS ABOUT HIM SAYING WHAT HE WAS GOING TO DO, BUT THAT IN THE STATEMENTS THAT WERE GIVEN, NONE OF THAT WAS IN THERE, AND SO DID WHITE USE THAT? DID HE IMPEACH THAT WITNESS WITH THE ABSENCE OF ANY STATEMENTS ABOUT THAT, WHEN SHE GAVE A STATEMENT TO THE POLICE?

THAT IS THE POINT I AM TRYING TO MAKE, YOUR HONOR. THAT IS A MISREPRESENTATION OF THE RECORD. THE RECORD SPECIFICALLY SHOWS THAT THE TRANSCRIBED STATEMENTS THAT WERE PROVIDED TO COUNSEL, THAT COUNSEL SAID HE HAD, THAT WERE USED IN THE DEPOSITIONS, THAT HE HAD THIS INFORMATION, AND THAT IN THAT INFORMATION, THEY MADE THE SAME STATEMENTS.

OKAY. THEN IN OTHER WORDS, THE STATE'S POSITION IS THAT, IN THE STATEMENTS, THAT

THESE WITNESSES MADE , TO THE POLICE , ALL RIGHT , THEY DID SAY THE SAME THING THAT THEY SAID AT TRIAL. IS THAT CORRECT?

CORRECT.

NOW, MOVING FROM THERE TO THE INTOXICATION .

RIGHT.

IS THAT , ALSO , THE STATE'S POSITION, THAT IS THAT THEIR TESTIMONY AT TRIAL , WAS THE SAME AS THE TESTIMONY THEY GAVE IN THEIR STATEMENTS?

NO. IT IS NOT.

IT IS NOT.

AT TRIAL , BOTH THE WITNESSES SAID THAT THEY DID NOT BELIEVE THAT HE WAS INTOXICATED.

BUT IN THEIR STATEMENTS , THEY SAID THAT --

THEY SAID THAT THEY HAD -- THAT HE HAD BEEN DRINKING.

THAT HE WAS INTOXICATED. NOW, WAS DEFENSE COUNSEL ASKED IF HE HAD THOSE STATEMENTS, WHERE THEY MAKE RATHER ELABORATE STATEMENTS ABOUT HIS INTOXICATION , WHY HE DIDN'T USE THAT MATERIAL, THEN, TO IMPEACH THOSE WITNESSES?

AGAIN, YOUR HONOR , THAT IS THE POINT. HE DID USE THOSE STATEMENTS TO --

SO HE DID CONFRONT THEM WITH THOSE STATEMENTS AND SAID YOU GAVE A PREVIOUS STATEMENT TO THE POLICE, AND HERE IS WHAT YOU SAID, WHICH DIRECTLY CONTRADICTS WHAT YOU ARE SAYING NOW.

ABSOLUTELY , AND I CAN POINT YOUR HONOR TO THE RECORD EXACTLY WHERE HE IMPEACHED THESE WITNESSES WITH THAT INFORMATION , AND , AGAIN , THE TRIAL COURT MADE A SPECIFIC FACTUAL FINDING THAT HE DID . AT THE ORIGINAL TRIAL RECORD 939 , 952 , 937-TO-984.

SO HE SPECIFICALLY USED THOSE STATEMENTS TO IMPEACH THESE WITNESSES. WHAT ABOUT THE , IS IT A JAILHOUSE INFORMANT OR WHATEVER, THAT WE HAVE HERE , SAYING THAT HE HAD NO PROMISES OF ANYTHING FROM THE STATE?

THE JAIL HOUSE INFORMANT--

WAS THAT PROVIDED TO THE DEFENSE?

CORRECT. IT WAS PROVIDED.

IN OTHER WORDS, THE DEFENSE WAS TOLD THAT THE STATE HAD TOLD HIM , THAT THEY WOULD TRY TO DO SOMETHING ABOUT HIS GAIN TIME?

NO , AND THAT IS NOT WHAT THE RECORD SHOWS AT ALL. THAT IS NOT WHAT HAPPENED. SHANNON STEPHENS TESTIFIED THAT HE NEVER ASKED FOR A DEAL, HE NEVER GOT A DEAL, THAT NO PROMISES WERE MADE TO HIM. HIS LAWYER TESTIFIED NO PROMISES WERE MADE TO HIM , AND THE ASSISTANT STATE ATTORNEY WHO WAS HANDLING THE CASE NO PROMISES WERE MADE TO HIM. HOWEVER, WHEN HE TESTIFIED AT TRIAL, DEFENSE COUNSEL DID BRING OUT THAT HE WAS HOPING THAT , FOR SOMETHING , THAT HE WAS HOPING HE WOULD GET THE LOWER END OF THE SENTENCING GUIDELINE SCALE , AND THAT THIS WAS ARGUED TO THE JURY, AND

THE TRIAL COURT MADE A --

THE SAME THING THAT THE DEFENSE IS TALKING ABOUT NOW , ABOUT HIM SAYING THAT I HAD A SERIOUS PROBLEM ABOUT GAIN TIME, AND THAT THE STATE SAID THEY WOULD SEE WHAT THEY COULD DO, THAT WAS BROUGHT OUT AT TRIAL.

THAT DID NOT HAPPEN. THAT DID NOT HAPPEN. THE STATE DID - -

THERE IS NO EVIDENCE IN THE RECORD THAT HE SAID ANYTHING LIKE THAT.

THE ONLY THING THAT THERE IS EVIDENCE IN THE RECORD ABOUT THE GAIN TIME, IS AFTER THE TRIAL , AFTER EVERYTHING WAS OVER , THE ASSISTANT STATE ATTORNEY WROTE A LETTER ON HIS BEHALF , SAYING THAT HE HAD TESTIFIED FAVORABLY IN THIS TRIAL AND THAT THEY COULD HELP HIM WITH THIS GAIN TIME , THAT WOULD BE GOOD, BUT THERE WAS NOT A PROMISE MADE TO DO IT THEN. IT WAS NOT BASED ON THAT , AND IT WAS NEVER RAISED TO THE STATE ATTORNEY AT ALL. IT WAS JUST SOMETHING THAT HE SUBSEQUENTLY DID.

OKAY. ALL RIGHT. WHAT WE REALLY HAVE HERE IS A RECONCILIATION , THEN , OF THE REPRESENTATIONS MADE BY YOUR OPPONENT AS OPPOSED --

ABSOLUTELY . ABSOLUTELY.

ALL RIGHT. WOULD YOU ADDRESS, ALTHOUGH YOUR OPPONENT DIDN'T ADDRESS IT DURING HER DIRECT ARGUMENT, THE INEFFECTIVENESS OF COUNSEL CLAIM, WITH REFERENCE TO THE PENALTY PHASE HERE.

ABSOLUTELY .

PARTICULARLY I AM CONCERNED ABOUT THE , APPARENTLY THE , THE FACT THAT THE DEFENSE COUNSEL SPENT A LIMITED AMOUNT OF TIME INVESTIGATING MITIGATION , AS WAS DEMONSTRATED BY EITHER HIS TIME RECORDS OR SOMETHING LIKE THAT . AND COMPARED TO THE EVIDENCE THAT WAS PUT ON AT THE POSTCONVICTION HEARING , IN TERMS OF THE AVAILABILITY OF MITIGATION. SO WOULD YOU --

THE HURDLE THAT DAVIS NEEDS TO GET OVER , IS HE HAS TO SHOW THAT THERE WAS INFORMATION THAT COUNSEL FAILED TO OBTAIN IN HIS INVESTIGATION, THAT WOULD HAVE --

IF I UNDERSTAND IT CORRECTLY , HE CALLED THE DEFENDANT TO TESTIFY AT THE PENALTY PHASE, AND THAT WAS IT?

WELL , THAT IS WHAT HAPPENED FINALLY , BUT THAT IS NOT --

I REALIZE .

THAT IS NOT THE INFORMATION HE HAD TO BEGIN WITH.

THAT IS WHAT HE PUT ON , IS THAT CORRECT?

CORRECT. BUT FIRST OF ALL , PRIOR TO TRIAL HE HAD A MENTAL HEALTH EXPERT WHO EVALUATED THE DEFENDANT.

HOW LONG BEFORE TRIAL?

I DON'T KNOW HOW LONG THE INITIAL EVALUATION WAS. THE REPORT WAS GIVEN TO HIM ON JANUARY 12, AND THE TRIAL STARTED JANUARY 13.

WAS IT LESS THAN A WEEK BEFORE TRIAL THAT HE HAD THE MENTAL HEALTH --

THAT IS VERY POSSIBLE, YOUR HONOR. I CAN'T REPRESENT THE SPECIFIC DATE.

WAS THERE SOME INFORMATION FROM THAT?

NO BUT YOU CAN CERTAINLY SEE THAT THERE WOULD BE A REASONABLE STRATEGY FOR THAT, BECAUSE YOU WOULDN'T WANT THIS INFORMATION TO BE IN THE HANDS OF THE STATE, SO AS MUCH AS YOU CAN LIMIT --

IF IT IS A CONFIDENTIAL, MENTAL HEALTH EXPERT, THEN THAT TAKES CARE OF THAT ISSUE, DOES IT NOT?

IN THE EVENT YOU ARE GOING TO USE IT, THEN THERE IS GOING TO BE ANOTHER SITUATION ALL TOGETHER, SO IF HE WAS GOING TO USE IT, HE WOULD HAVE HAD TO GIVE IT TO THE STATE.

CHIEF JUSTICE: JUSTICE CANTERO HAS A QUESTION.

WHAT WERE THE DEFENDANT'S INSTRUCTIONS TO COUNSEL REGARDING MITIGATION THAT WAS TO BE PRESENTED?

WELL, YOUR HONOR, AND REALLY I WANTED TO PUT THIS CASE IN CONTEXT, BECAUSE ALTHOUGH OPPOSING COUNSEL DISAGREES WITH THIS, DAVIS WAS APPOINTED TO ACT AS CO-COUNSEL. THIS COURT FOUND SO ON DIRECT APPEAL. THE TRIAL COURT, WHO WAS ALSO THE TRIAL JUDGE, WAS ALSO THE POSTCONVICTION JUDGE. HE ALSO FOUND SO, AND IN DAVIS'S PENALTY PHASE TESTIMONY, HE SPECIFICALLY ASKED, YOU WERE CO-COUNSEL IN THIS CASE, CORRECT? AND FROM TIME TO TIME YOU ASSISTED ME IN THE PRESENTATION BY DOING RESEARCH, MUCH LIKE IDEAS AND TACTICS AS TO HOW WE SHOULD PROCEED. BASED ON THIS, THE LAWYER HAD, WHO HAD JUST BEEN APPOINTED A FEW MONTHS PRIOR, ANOTHER PUBLIC DEFENDER HANDLED IT, HAD DONE THE BACKGROUND INVESTIGATION, HAD DONE THE DEPOSITIONS. WHITE ALSO DID DEPOSITIONS, HIMSELF, AND HE ALSO MADE INQUIRY OF DAVIS'S MOTHER AND FAMILY. BASED ON THE INFORMATION THAT HE HAD, HE DETERMINED THAT THE MOTHER WOULD BE THE BEST PERSON TO BRING OUT THE FACT THAT HE HAD A DEPRIVED CHILDHOOD, THAT HIS FATHER WAS AN ALCOHOLIC AND THAT HE WAS INTO DRUGS AND ALCOHOL. THE TRIAL COURT, BECAUSE SHE TESTIFIED AT THE HEARING, AGREED THAT SHE WOULD HAVE BEEN THE MOST SYMPATHETIC WITNESS, AND THAT THAT WAS A VERY REASONABLE STRATEGY. WHEN SHE CAME DOWN, SHE, THEN, GOT UPSET CONCERNING THAT HER TESTIMONY WAS GOING TO BE THE THING THAT GOT HER SON THE DEATH PENALTY. WHITE TOLD DAVIS ABOUT THIS AND DAVIS'S DECISION WAS NOT TO PUT HIS MOTHER ON. WHITE SAID HE DID NOT DISAGREE WITH THAT, AND THAT THEY TOOK THAT INFORMATION, AND THEY WERE ABLE TO MAKE HAY OUT OF IT, AND AS THE TRIAL COURT FOUND, HE MADE A VERY EFFECTIVE ARGUMENT AS TO THE FACT THAT HE WANTED TO PROTECT HIS MOTHER AND THAT HE WAS CONCERNED FOR HER AND YOU KNOW, WE COULD HAVE PUT HER ON AND SHE WOULD HAVE BEEN VERY SYMPATHETIC BECAUSE SHE COULD HAVE TOLD YOU ALL OF THESE THINGS ABOUT HIS YOUTH BECAUSE SHE WOULD HAVE BEEN VERY SIMPHTREATIB, BUT HE IS NOT GOING TO PLAY ON YOUR OTHER EMOTIONS BECAUSE HE -- ON YOUR EMOTIONS BECAUSE HE CARES ABOUT HIS MOTHER, AND THAT IS ALL IN THE BEGINNING.

WAS THERE SOME RECORD THAT DAVIS TOLD HIS COUNSEL THAT HE WANTED THE DEATH PENALTY THAT, ELEVEN YEARSON DEATH ROW WAS ENOUGH FOR HIM?

JOHN WHITE TESTIFIED AT THE EVIDENTIARY HEARING THAT THAT WAS THE DEFENDANT'S POSITION, THAT BASICALLY THE DEFENDANT HAD BEEN INCARCERATED SINCE HE WAS 13 AND HE REALLY FELT LIKE ANOTHER TEN OR ELEVEN YEARS ON DEATH ROW WAS SUFFICIENT FOR HIM.

WELL , ON THE MENTAL HEALTH EXPERT , WHAT WAS COUNSEL'S POSITION? DID DAVIS TELL HIM NOT TO PUT ON MENTAL HEALTH MITIGATION?

NO. THEY HAD DR . DIFFENDALE EXAMINE THE DEFENDANT. HE DID SEVERAL INTERVIEWS AND DID TESTS.

BUT THE INTERVIEWS AND EVALUATION OCCURRED ONLY A WEEK BEFORE THE PENALTY PHASE?

WELL , YOUR HONOR , THERE IS - -

JUST --

THE REPORT WAS ISSUED TO HIM THE DAY BEFORE THE TRIAL , OKAY, BUT THERE WAS --

BEFORE THE TRIAL.

BEFORE THE TRIAL. THE GUILT PHASE.

THE GUILT PHASE. AND THE REASON WAS THAT PART OF WHY HE WAS HAVING DR . DIFFEND -- DR . DIFFENDALE EXAMINE HIM BECAUSE THE VICTIM HAD MADE OVERTURES AND ATTACKED HIM WITH A KNIFE AND AS A RESULT OF THIS, HE KIND OF WENT CRAZY , SO THEY WERE BRINGING DR . DIFFENDALE TO SUPPORT THAT AND UNFORTUNATELY HIS REPORT -- UNFORTUNATELY HIS REPORT WENT FURTHER THAN THAT AND SAID IF A PERSON CAME ON TO HIM , THAT HE ADMITTED HE WOULD GO PAST THE POINT WHERE THEY WERE STOPPED AND THAT HE WOULD JUST KEEP GOING. HE WAS A VERY VIOLENT PERSON, ALTHOUGH HE IS CLAIMED TO HAVE BEEN INTOXICATED , THERE WAS INFORMATION IN THE REPORT THAT HIS INTOXICATION , FOR HIM , BECAUSE HE WAS USED TO DRINKING ALCOHOL , IT JUST KIND OF SPEEDED HIM UP AND GAVE HIM MORE ENERGY , SO THERE REALLY WASN'T A WHOLE LOT BENEFICIAL IN THE REPORT . YOU KNOW , THERE WAS INFORMATION THAT HE HAD BEEN INCARCERATED. THERE WAS INFORMATION ABOUT HIS FAMILY. HE DENIED ANY PRIOR SEXUAL ABUSE TO THE EXPERT , SO WHITE AND DAVIS , TOGETHER, MADE THE DECISION NOT TO PUT HIM ON. IT WAS A REASONABLE , INFORMED STRATEGY , AND ACCORDINGLY IT JUST SIMPLY CAN'T BE TOUCHED.

COULD WE JUST EXPLORE JUST A LITTLE BIT, I THINK YOUR OPPOSITION PLACES GREAT EMPHASIS ON THE TIMING , WHEN THE WORK STARTED AND HOW LIMITED IT WAS, AND CERTAINLY AS WE SEE THE CAPITAL CASES BEING LITIGATED AND THAT , THE ART OF THAT , BEING PERFECTED AND , REALLY, PROGRESSING OVER THE YEARS.

CORRECT.

IS THERE ANY , ANY THING THAT THE INVESTIGATION WOULD HAVE TOUCHED UPON THAT WAS BROUGHT OUT AT THE COLLATERAL HEARING , FROM A QUALITATIVE STANDPOINT ? CERTAINLY WE CAN TALK ABOUT THE SAME THINGS OVER AND OVER, BUT HELP ME AND CANDIDLY HELP ME WITH REGARD TO THAT.

THAT IS A GOOD POINT , YOUR HONOR , FOR TWO REASONS. ONE IS, NO , THERE IS NOT , JUST A COMPLETE REPETITION OF EVERYTHING THAT HE ALREADY KNEW. HE KNEW ABOUT HIS FAMILY BACKGROUND. HE KNEW ABOUT THE DRUGS AND ALCOHOL. THE ONLY THING THAT THEY PRESENTED THAT WAS DIFFERENT WAS DR. MAYOR'S TESTIMONY AND DR. MARROW - AND DR . MAKE HER FOUND THAT HE WAS HOME -- AND DOCTOR MAKE HER FOUND THAT HE WAS HOMOPHOBIC AND HE DID NOT FIND HIM TO BE CREDIBLE AND TO THE CONTRARY THE DOCTOR THAT EVALUATED DR . DIFFENDALE'S REPORT , HE FOUND IT A CREDIBLE REPORT AND THAT IS WHAT HE RELIED ON. THIS WAS IN 1986 WHEN THEY WERE PREPARING FOR THIS, AND AS COUNSEL TESTIFIED AT THE EVIDENTIARY HEARING, THINGS WERE COMPLETELY DIFFERENT BACK IN THE

MID'80 s. YOU WOULD NEVER REPRESENT A CAPITAL CASE IN THE YEAR 2000 THAT YOU WOULD HAVE THEN, BUT THE FACT REMAINS THAT THERE IS NOTHING THAT THEY HAVE PRESENTED OR COULD HAVE THAT COUNSEL DID NOT KNOW AND DID NOT MAKE A DETERMINATION ON HOW TO HANDLE.

YOU REALIZE AS WE ALL DO, THAT THE EMPHASIS HAS BEEN ON MAKING SURE THAT THERE IS A SUFFICIENT INVESTIGATION.

CORRECT.

AND HERE, THEY SEEM TO BE SUGGESTING THAT THIS TIME, IN AND OF ITSELF, SHOWS THAT, REALLY, DIDN'T DO AN INVESTIGATION.

WELL, AGAIN, THE, HE WAS PREVIOUSLY REPRESENTED BY ANOTHER LAWYER. THAT LAWYER HAD DONE THE DEPOSITIONS AND HAD DONE THE INVESTIGATION.

SO NOW OUR DIFFICULTY IS BOTH WITH THE BRADY ISSUE AND WITH THIS ISSUE AS WELL, THEN, WOULD BE YOUR VIEW, BECAUSE BEFORE, I MEAN, MUCH OF THE INFORMATION WAS GIVEN TO PRIOR COUNSEL.

CORRECT.

THAT IS ARGUED ABOUT A BRADY PROBLEM AS WELL, CORRECT?

CORRECT.

SO HERE THIS OVERLAP THIS OVERLAY OF A SUBSTITUTE COUNSEL KIND OF COMPLICATES BOTH ISSUES JUST A LITTLE BIT THEN.

IT ONLY COMPLICATES IN THE ASSERTION THAT, WHAT WHITE DID AND HOW MANY HOURS WHITE SPENT, BUT WHAT WHITE SAID IS I HAD ALL THIS INFORMATION AND I STUDIED IT AND I HAD MY CASE, AND IF I HAD NEEDED MORE TIME, I WOULD HAVE ASKED FOR MORE TIME, AND IF I HAD NEEDED AN INVESTIGATOR, I WOULD HAVE ASKED FOR AN INVESTIGATOR, AND IF I HAD THOUGHT THERE WAS A REASON TO FILE MOTIONS, I WOULD HAVE FILED MOTIONS, BUT BASED UPON EVERYTHING THAT HE HAD, HE FELT COMFORTABLE GOING TO TRIAL, AND THE BOTTOM LINE IS THEY HAVEN'T SHOWN ANYTHING TO THE CONTRARY. I WOULD ALSO LIKE TO POINT OUT WITH REGARD TO THE JAILHOUSE INFORMANTS, THAT I AM NOT REALLY CONFIDENT I KNOW WHAT THE CLAIM IS. THEY HAD THREE JAILHOUSE INFORMANTS, TWO OF WHICH DIDN'T TESTIFY AT TRIAL AND REALLY DIDN'T PROVIDE ANY INFORMATION TO THE STATE, BUT THE FACT IS THE RECORD SHOWS THAT COUNSEL KNEW ABOUT BOTH OF THESE. WHITE HIMSELF, TOOK A DEPOSITION OF KENNETH GARDENER AND DURING THE KENNETH GARDENER DEPOSITION, HE MENTIONS THE FACT THAT HE AND GARY DOLAN HAD DISCUSSED THE DEFENDANT'S CASE AND THAT DOLAN KNEW AND HAD INFORMATION ABOUT IT, TOO, SO CLEARLY HE WAS ON NOTICE THAT THESE PEOPLE EXISTED. DOLAN WAS LISTED AS A WITNESS, A POTENTIAL WITNESS AT TRIAL, AND THERE REALLY WAS NOTHING THAT THEY DIDN'T ALREADY HAVE. FURTHERMORE, FOR THERE TO BE A BRADY CLAIM, THEY HAVE GOT TO SHOW IT IS EXCULPATORY, AND CLEARLY THERE IS NO INFORMATION THAT THESE PEOPLE HAD THAT WAS EITHER EXCULPATORY OR COULD BE USED FOR IMPEACHMENT, SO THERE IS SIMPLY NO VIOLATION. WITH THAT, THANK YOU.

ONE OTHER THING.

YES.

IF YOU FINISHED RESPONDING TO THE MENTAL HEALTH ASPECT, I WOULD LIKE TO TOUCH UPON

WHETHER WE HAVE NOW FLESHED OUT THIS ISSUE WITH REGARD TO JUVENILE CONVICTIONS, TO ADULT CONVICTIONS, GOING THROUGH AND LOOKING AT THE DOCUMENTS, I PERCEIVE IT AS A PLEASE I WOULD ASK, ALSO, MS. McDERMOTT TO CORRECT ME IF I AM WRONG WITH REGARD TO THAT, BUT IT APPEARS FROM LOOKING AT THOSE OUT-OF-STATE RECORDS THAT THERE WAS AN ADULT CONVICTION, BUT THEN WHEN IT CAME TIME WHEN HE WAS PLACED ON PROBATION, THAT WAS SUPERVISED STILL BY THE JUVENILE AUTHORITIES, IS WHAT IT APPEARED FROM THE DOCUMENTS IN THE RECORD. IS THAT A MISSTATEMENT? HAVE WE CONCLUDED NOW, THAT THIS WAS AN ADULT CONVICTION?

YOUR HONOR, THE TRIAL COURT, AT THE TIME OF SENTENCING, MADE A FINDING THAT IT WAS AN ADULT JUDICATION. THIS COURT, ON DIRECT APPEAL, FOUND THAT IT WAS AN ADULT ADJUDICATION, AND AFTER THE EVIDENTIARY HEARING, THE TRIAL COURT ONCE AGAIN FOUND THAT IT WAS AN ADULT ADJUDICATION, AND THE IR CLAIM IS THERE WAS PROSECUTORIAL MISCONDUCT FOR RELYING UPON THIS, BUT THE FACT IS IT WAS COMPLETELY FLESHED OUT TO THE TRIAL COURT. DEFENSE COUNSEL ARGUED AGAINST IT AND SUBMITTED EVIDENCE TO THE CONTRARY AND THE STATE SUBMITTED EVIDENCE IN SUPPORT, AND THE TRIAL COURT MADE A FACTUAL DETERMINATION THAT IT WAS AN ADULT ADJUDICATION.

I AM TRYING TO UNDERSTAND THE SOURCE OF THAT PROBLEM. WE SHOULD BE ABLE TO LOOK AT RECORDS AND DETERMINE WHETHER IT IS AN ADULT OR JUVENILE PROBLEM. WHAT WAS THE GENESIS OF THE PROBLEM OR THIS DISPUTE ON WHETHER IT WAS JUVENILE OR AN ADULT CONVICTION?

I THINK THE GENESIS OF THE PROBLEM WAS, AT THE TIME OF THE CRIME HE WAS 16.

RIGHT.

AND WHEN THE STATE INITIALLY GOT THE INFORMATION, THEY WERE UNDER THE BELIEF THAT HIS 1980 CONVICTION WAS A JUVENILE ADJUDICATION, AND WHEN THEY FIRST INTRODUCED IT TO THE TRIAL COURT, THEY WERE ARGUING AS A JUVENILE ADJUDICATION, BECAUSE AT THAT TIME IN 1987, THERE WAS NO PRECONCLUSION OF ADMITTING JUVENILE, PRIOR JUVENILE CRIMES, BUT SUBSEQUENTLY, THE STATE CAME BACK AND SAID, YOUR HONOR, WE HAVE GOT MORE INFORMATION, AND WE HAVE NOW MADE A DETERMINATION THAT THIS WAS AN ADULT ADJUDICATION, AND DEFENSE COUNSEL ARGUED AGAINST IT, AND THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. MS. McDERMOTT.

JUST TO REVISIT THE BRADY ISSUE. THANK YOU. THAT IS ABSOLUTELY FALSE, THAT TRIAL COUNSEL HAD THE POLICE REPORTS. WHAT HE HAD WERE THE TRANSCRIBED TAPED STATEMENTS THAT HAPPENED AFTER, SEVERAL DAYS AFTER THE CRIME. AND IF HE HAD HAD THE POLICE REPORTS, HE COULD HAVE SHOWED THAT THERE WAS THIS PROGRESSION, AS EVERY TIME THE WITNESS WAS INTERVIEWED, MORE AND MORE DETAILS WOULD COME ABOUT, ABOUT HOW LESS MR. DAVIS WAS INTOXICATED AND ABOUT HOW MUCH MORE PREMEDITATION THERE WAS, SO --

LET ME MAKE SURE, AND OBVIOUSLY WE CAN LOOK AT THIS, HOPEFULLY LOOK AT THIS IN THE RECORD AND FLESH THIS OUT. MISS SABELLA IS REPRESENTING THAT EXACTLY WHAT IS IN THE TRANSCRIBED STATEMENT, IS JUST, THAT THE, WHAT WAS IN THE POLICE REPORT WAS JUST A SUMMARY OF THE TRANSCRIBED STATEMENT.

NO. THE POLICE REPORT WAS A STATEMENT, TAKEN FROM THE WITNESS. THEN THEY DID A TAPED STATEMENT.

SO AFTER --

SO THEY GAVE ANOTHER STATEMENT. THEN THE STATE ATTORNEY HAD A SYNOPSIS .

CLARIFY THAT IT WASN'T REALLY A STATEMENT. IT WAS IF THEY WERE TALKING AND WRITING DOWN WHAT THE WITNESS HAD SAID . IT WAS NOT A TAPED STATEMENT. LET'S MAKE SURE, BECAUSE WE HAVE GOT A DISPUTE GOING ON HERE THAT SHOULDN'T HAPPEN IN AN APPELLATE COURT. WE HAVE GOT A FIGHT OVER WHAT THIS RECORD SHOWS. AND SO LET'S BE SURE THAT WE -- LET'S BE SURE THAT WE TALK EXACTLY ABOUT WHAT IT WAS IN RESPONSE TO HER QUESTION, AND SHE IS ENTITLED TO AN ANSWER IN THIS, IN THAT THERE WAS A POLICE REPORT , A POLICE PERSON WRITING DOWN WHAT THEY ARE TOLD ABOUT A SCENE. THAT IS NOT REALLY A STATEMENT.

WHAT IT IS --

HOLD ON. HOLD ON. THAT IS NOT REALLY A STATEMENT, CORRECT?

OF COURSE IT IS A STATEMENT IN YOUNG VERSUS STATE, THIS COURT SAID THAT THE NOTES OF THE POLICE OFFICERS, OF WITNESSES , THAT WAS A STATEMENT. IT WASN'T TURNED OVER TO THE DEFENSE COUNSEL.

YOUR POINT IS THAT THIS WAS THE CLOSEST IN TIME , TO WHAT WAS SAID TO THE POLICE , EVEN THOUGH THERE ARE LATER STATEMENTS WHICH ARE ACTUALLY STATEMENTS , WHERE YOU HAVE THE PERSON SAYING WORD FOR WORD VERBATIM.

CORRECT.

SO THAT IS YOUR POINT.

CORRECT.

OKAY.

JUST TO GET --

THEY SPOKE TO THE POLICE. EXHIBITS 6, 7, 8 AND 12 ARE THE EXHIBITS WHERE THEY SPOKE TO THE POLICE , THEY SPOKE TO THE STATE ATTORNEY. THERE IS NOTHING IN THIS RECORD AND IN FACT THE STATE ATTORNEY AT THE EVIDENTIARY HEARING, SPECIFICALLY SAID THAT WAS NOT TURNED OVER TO TRIAL COUNSEL .

I AM VERY CONCERNED, YOU KNOW, ABOUT THIS DISPUTE, TOO , BECAUSE YOUR OPPONENT SAYS THAT THE VERY THINGS THAT YOU CLAIM WERE WITHHELD , AND THAT ON THEIR FACE AT LEAST , CERTAINLY APPEAR THAT THEY WOULD BE PREJUDICIAL , NOT TO DISCLOSE , i. e. STATEMENTS IN WHICH THESE WITNESSES SAID THAT HE WAS ABSOLUTELY INTOXICATED , COMPARED WITH THEIR TRIAL TESTIMONY, THAT HE WASN'T INTOXICATED . THAT THOSE STATEMENTS WERE PROVIDED TO DEFENSE COUNSEL . AND NOW LET JUST STOP FOR , JUST FOCUS ON THAT FOR A MINUTE.

OKAY.

ALL RIGHT. DID DEFENSE COUNSEL TESTIFY , AND WOULD THE RECORD DEMONSTRATE HERE , THAT HE WAS PROVIDED STATEMENTS IN WHICH THESE WITNESSES SAID THAT HE ABSOLUTELY WAS INTOXICATED. YOU KNOW, I AM PARAPHRASING OBVIOUSLY, AND YOU KNOW , THAT WOULD BE IN SHARP CONTRAST, THEN, TO WHAT THEY TESTIFIED TO AT TRIAL. JUST FOCUS ON THAT FOR A MINUTE.

OKAY. WHAT HE HAD , WHAT HE HAD, HE HAD THE TAPED VERBATIM STATEMENTS FROM CASTLE

AND REICH. IN THOSE STATEMENTS , REICH , CASTLE DID MAKE COMMENTS , WHICH HE IMPEAC HED HER WITH , ABOUT THE INTOXICATION. HOWEVER , IF YOU LO OK AT THE POLICE REPORTS, WHICH ARE 6 , 7 , 8 AND 12 AND THE STATE ATTORNEYS SY NOPSIS , SHE MADE OTHER STATEMENTS THAT HE DIDN'T HAVE ACCESS TO.

AND HOW ARE THOSE EAR LIER STATEMENTS OR SUMM ARIES O F STATEMENTS, DIF FER FROM THE TAPED STATEMENTS?

FOR EXAM PLE ON CASTLE, HEDID NOT HAVE THE STATEMENTTHAT SHE SAW HIM AT 6:30 IN THE EVENING, COMING BACK FROM THE BAR. HIS EYES WERE GLA SSY. THIS IS IN THE BRIEF, TOO , THIS SPEC IFIC QU OT E , HIS EYES WERE GLAS SY. HE WAS STUMBLING. HE WAS INTOXICATED , WHICH AS I SAID CONFLICTS WITH HER DAUGHTER'S TESTIMONY ABOUT WHAT HE WAS DOING AT 6:30 P.M., DRIVING A CAR , PERFECTLY SOBER , TO TALLY CONFLICTS WITH THAT, BUT ALSO IN AND OF ITSELF , IT I S ANOTHER TIME PER IOD WHERE SHE WAS SAYING HE WAS N OTDRUNK, WHERE HE WAS --

BUT YOU ARE SAYING THERE ARE SUBSTANTIAL DIFFER ENCES IN THE STATEMENTS THAT WERE MADE THAT WEREN'T DISCLO SED , THAT WOULD HAVE BEEN EVEN STRONGER IMPEACHMENT OF THESE WIT SNEZ -- WITNESSES?

CORRECT.

WHICH OFFICERS' REPORTS ARE YOU REFERRING TO , BECAUSE WHAT YOU ARE REFERRING TO IS AN OFFICER TAKING A STATEMENT FROM THESE WITNESSES, CORRECT?

CORRECT.

WHICH OFFI CER?

THE REPORTS WERE DEFENSE EXHIBIT NO. 5 WAS DIRECT IVE ROADS ---DETECTIVE RHODES 'S REPORT FROM JULY 3 1. DETECTIVE O'BRIEN'S REPORT WAS TA KEN THE DAY --

DID HE READ THEM INTO THE RECORD DURING HIS DEPOSITION?

NO , NO, AND RH ODES WASN'T DEPOSED ABOUT THE REPORT.

BUT WHETHER O'BR IEN WAS DEPOSED, DID HE READ BASICALLY WHAT T HOSESTATEMENTS WERE , DURING THE DEPOSITION?

NO. HE GAVE A SUM MARY OF THEM AND THEN DEFENSE EXH IBIT 7 IS NOTES WITH INTERVIEWS , WHICH WERE NOT TURNED OVER . THAT WAS WITH CARL K ERNY , HUBBARD , DAVID KE RNY , REICH AND CASTLE AND THEN DEFENSE EXHIBIT 8 IS DETECT IVE RHODES' JULY 5 REPORT WHERE REICH AND CASTLE WERE INTERVIEWED AND DEFENSE EXHIBIT 12 IS THE STATE ATTORNEYS SUMMARY WHERE THEY HAVE THE SUMMARY AND T HESTATEMENTS OF SEVERAL OF THE WITNESSES.

LET'S MO VE TO THE PREMEDITATION AS PECT OF IT. THE STATEMENTS THAT WERE PROVIDED TO DEFENSE COUNSEL , THE TRANSCRIPTIONS OR WHATEVER THEY WERE , DID THEY CONTAIN ANY STATEMENT ABOUT PREMEDITATION?

YES. THOSE STATEMENTS B Y THE POINT THEY TOOK THEIR TAPED STATEMENTS, THEIR STATEMENTS HAD EVOL VED, TO WHERE THEY WERE, BOTH , SAYING THAT M A RK DAVIS HAD MADE THESE COMMENTS.

SO YOU ARE , THE O TH ERSTATEMENT THAT YOU ARE CLAIMING WERE NOT DISCLOSED , WERE

TAKEN EARLIER , AND THEY --

CORRECT.

-- DIDN' T HAVE ANYTHING IN THEM ABOUT PREMEDITATION?

CORRECT.

OKAY. WHAT ABOUT THE JAILHOUSE INFORMANT THING ?

WELL , FIRST OF ALL , STEPHENS TESTIFIED AT THE EVIDENTIARY HEARING, THAT HE HAD A CONVERSATION WITH THE STATE ATTORNEY, WHERE HE ASKED THEM , CAN YOU HELP ME WITH MY GAIN TIME , AND THEY TOLD HIM, WE WILL SEE WHAT WE CAN DO. I DON'T , I AM NOT SURE, THE STATE IS SAYING THAT HIS LAWYER TESTIFIED. HIS LAWYER NEVER TESTIFIED , AND STEPHENS DIDN'T TESTIFY AND SAY THAT HE DIDN'T HAVE THAT CONVERSATION.HE SAID WE HAD THAT CONVERSATION, AND THEN AFTER THE TRIAL , THIS LETTER SHOWS UP AND SAYS , AND STEPHENS SPECIFICALLY SAID I DIDN'T HAVE ANY CONVERSATIONS WITH THE STATE AFTER THE TRIAL. I SPOKE TO THEM BEFORE THE TRIAL. AND AFTER THE TRIAL, A LETTER SHOWS UP , TO THE PAROLE AND PROBATION COMMISSION SAYING , HEY, THIS GUY HELPED US -- COMMISSION, SAYING , HEY, THIS GUY HELPED US. CAN YOU REINSTATE HIS GAIN TIME.

YOUR TIME HAS EXPIRED WITH OUR HELP. YOU DIDN'T TOUCH ON THE PENALTY PHASE , BUT I ASSUME YOU WILL JUST RELY ON YOUR BRIEF.

YES, YOUR HONOR. CAN I ADDRESS JUSTICE LEWIS'S QUESTION ABOUT THE JUVENILE ADJUDICATION BRIEFLY, IF YOU STILL WOULD LIKE ME TO.

IF THERE IS SOMETHING THAT YOU THINK WOULD ENLIGHTEN THE COURT.

JUST YOUR HONOR , IF YOU LOOK AT THOSE DOCUMENTS , NOTHING IN THEM SHOW THAT THEY ARE AN ADULT CONVICTION. WHAT HAPPENED WAS , WHEN HE TURNED 18 , HE WAS PUT ON ADULT PROBATION, AND THEREFORE --

WAS HE PLACED ON PROBATION TO BE SUPERVISED AFTER THE ADULT CONVICTION BY JUVENILE AUTHORITIES? THAT IS WHAT IT LOOKS LIKE TO ME .

NO. WELL, AND THEN THE OTHER DOCUMENT IS --

TELL ME WHY I AM WRONG IN LOOKING AT IT THAT WAY .

BECAUSE WHEN YOU LOOK AT THE DOCUMENT, THEY SHOW THAT WHEN HE WAS 18 , HE WAS PLACED ON ADULT PROBATION. THAT IS THE ONLY THING THAT COMES OUT OF THOSE DOCUMENTS , AND THAT IS WHERE THE STATE IS GETTING THEIR WHOLE ARGUMENT THAT IT WAS AN ADULT CONVICTION. THAT IS WHAT THEY ARE SAYING. THEY IN FACT, HAD A MEMO , AND THIS IS ANOTHER PART OF THE BRADY ISUE. THEY HAD A MEMO SAYING THAT IT WAS A JUVENILE CONVICTION , AND THAT IS AT EXHIBIT NO. 22 THAT -- NUMBER 22 THAT WE INTRODUCED, AND THE OFFICIAL STATEMENT FROM THE 1983 CASE WAS THAT IT WAS A JUVENILE ADJUDICATION. THANK YOU , YOUR HONOR.

CHIEF JUSTICE: THANK YOU TO BOTH OF YOU, FOR YOUR TIME IN THIS ORAL ARGUMENT AND YOUR ASSISTANCE IN OUR DECIDING THIS CASE. THANK YOU.