

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

**Ponticelli v. State of Florida**  
**Docket Number: SC03-17 | SC03-1858**

THE NEXT  
CASE ON THE DOCKET, WHICH IS  
PONTICELLI VERSUS STATE OF  
FLORIDA.  
WE HAVE A GROUP IN THE  
COURTROOM.  
ARE YOU FROM DAYTONA BEACH  
COMMUNITY COLLEGE?  
WELCOME.  
THIS IS THE STUDENT PARALEGAL  
ASSOCIATION, AND WE WELCOME YOU  
TO THE FLORIDA SUPREME COURT.  
PARTIES READY?  
GOOD MORNING.  
GOOD MORNING.  
LINDA McDERMOTT ON BEHALF OF  
ANTHONY PONTICELLI.  
I WANT TO START TODAY BY  
ISSUING THE BRIEF FROM THE  
DENIAL OF THE 3.850 RELIEF, AND  
THAT CONCERNS THE BRADY GIGLIO  
VIOLATIONS THAT OCCURRED AT MR.  
PONTICELLI'S TRIAL.  
IN TERMS OF THE GIGLIO  
VIOLATION, THE PRONGS THAT  
FALLS TESTIMONY MUST HAVE BEEN  
PRESENTED.  
THAT WAS FOUND BY THE LOWER  
COURT AS TO THE QC TESTIMONY  
REGARDING TONY PONTICELLI'S  
DRUG USE ON THE EVENING OF THE  
CRIMES AND AS TO THE TESTIMONY  
BY THE WITNESSES FROM WEST  
VIRGINIA, WHO TESTIFIED THAT  
THEY HAD MET MR. PONTICELLI ON  
FRIDAY EVENING AND THAT THEY  
HAD NOT USED DRUGS WITH HIM  
THAT NIGHT OR BEFORE, WHICH WAS  
FALSE, AND THEY HAD ACTUALLY  
MET HIM THURSDAY EVENING AND  
USED DRUGS WITH HIM THEN.  
SO THERE IS FALSE TESTIMONY IN  
THIS CASE.  
ONE THING THAT THE JUDGE DIDN'T  
CONSIDER WAS THE DENNIS FREEMAN

ISSUE, WHICH WAS WHETHER OR NOT A DEAL HAD BEEN MADE, AND THAT ISN'T CONSIDERED AT ALL BY THE LOWER COURT.

THAT WAS CERTAINLY SOMETHING THAT CAME OUT OF THE EVIDENTIARY HEARING AND THAT WE ASKED OF THIS COURT AS WELL.

JUSTICE: HAD THERE BEEN SOMETHING IN THAT AREA OF THE LAW SINCE THE TIME THAT THIS CASE WAS ACTUALLY TRIED BACK IN THE '80s, WITH REGARD TO WHAT IS NECESSARY FOR THE STATE TO DISCLOSE WHAT IS NECESSARY, TO SHOW THAT A WITNESS HAS BEEN INFLUENCED, NOT NECESSARILY BY A CONTRACT OR AGREEMENT BUT WITH REGARD TO; i.e., WE ARE GOING TO HELP YOU AND THEN REJECTING IT ON THE BASIS OF WHAT DON'T HAVE A CONTRACT SO THEREFORE IT CAN'T BE USED IN THAT FASHION. WHAT DO YOU THINK THE LAW IS THERE, AND HOW DOES IT APPLY IN THIS CASE? I THINK THE LAW IS VERY CLEAR.

AT THE TIME THAT THE U.S. SUPREME COURT RELEASED BAGLEY, IN THAT CASE THAT WAS ABOUT WHETHER OR NOT THE WITNESS IN THAT CASE HAD RECEIVED A DEAL AND IN THAT CASE THEY ACTUALLY HAD CONTRACTS THAT WERE SIGNED FOR MONEY BUT THE COURT IN THAT CASE SPECIFICALLY SAID THAT THE POSSIBILITY OF REWARD GIVES THE WITNESS A DIRECT PERSONAL STAKE IN THE CONVICTION, AND THE FACT THAT THE REWARD IS NOT GUARANTEED, SERVES ONLY TO STRENGTHEN ANY INCENTIVE TO TESTIFY FALSELY.

JUSTICE: THAT IS THE CONTRACT CASE.

I AM TRYING TO SEARCH FOR WHEN THE POINT IN TIME IT SEEMED TO HAVE SHIFTED A LITTLE BIT TO SAY YOU DON'T NEED THAT CONTRACT AND A HOLDING LIKE THAT.

THE ISSUE IN BAGLEY WAS THAT THERE WAS A CONTRACT POST POSITION

BUT THERE WAS ALSO A CONDITION  
THAT THEY HAD NEVER BEEN PAID  
AND THAT IS WHY THE BAGLEY  
COURT WAS TALKING ABOUT IT  
DOESN'T MATTER --

JUSTICE: YOU THINK IT WAS  
ESTABLISHED FROM THERE.  
IT DOESN'T MATTER THAT THERE  
WAS NO DEAL, IN THIS CASE THE  
PROSECUTOR SAYING I DON'T THINK  
HE GOT ANYTHING, THAT DOESN'T  
MATTER BUT WHAT MATTERS IS WHAT  
THE WITNESS INTERPRETS THAT HE  
MAY GET.

IN BAGLEY THEY CLEARLY  
RECOGNIZED THAT THERE IS A FACT  
THAT NO CERTAIN AGREEMENT CAN  
ACTUALLY BE MORE DANGEROUS THAN  
WHEN YOU HAVE AN AGREEMENT  
SAYING THIS IS WHAT YOU ARE  
GOING TO GET AT YOUR  
SENTENCING, SO I THINK THAT THE  
LAW IS VERY CLEAR IN 1988, AT  
THE TIME OF MR. PONTICELLI'S  
TRIAL, THAT WHAT THE PROSECUTOR  
DID HERE, PROMISING THAT SHE  
WOULD RECOMMEND LENIENCY BEFORE  
MR. FREEMAN'S JUDGE, WAS  
ABSOLUTELY SOMETHING THAT  
SHOULD HAVE BEEN DISCLOSED TO  
DEFENSE COUNSEL, AND DEFENSE  
COUNSEL HIMSELF, AT THE  
EVIDENTIARY HEARING, TESTIFIED  
THAT, AS A DEFENSE ATTORNEY IN  
MY PERSPECTIVE, ABSOLUTELY THAT  
SHOULD HAVE BEEN TURNED OVER TO  
ME AND I WOULD HAVE USED THAT.  
THAT WAS IMPORTANT IMPEACHMENT  
EVIDENCE THAT I SHOULD HAVE  
HAD.

JUSTICE: A LOT OF ARGUMENTS.  
YOU HAVE ANSWERED WHAT I  
NEEDED.

JUSTICE: WHAT DID THE  
WITNESS ACTUALLY SAY HIS  
UNDERSTANDING WAS OF WHAT THE  
STATE WAS GOING TO DO ON HIS  
BEHALF?

FREEMAN DIDN'T TESTIFY AT  
THE EVIDENTIARY HEARING.

JUSTICE: SO WE DON'T HAVE  
HIS PERSPECTIVE WHAT HE WAS  
GOING TO GET, SO WHAT DO WE  
KNOW ABOUT WHAT HE WAS GOING TO

GET?

WHAT WE KNOW IS WE KNOW THAT THE PROSECUTOR SPOKE TO HIS LAWYER AND TOLD HIM THAT SHE WOULD RECOMMEND FAVORABLE TESTIMONY BEFORE THE JUDGE IN HIS CASE, JUDGE STURGIS, AND SHE SPECIFICALLY SAYS I WON'T DO ANYTHING ON THE RECORD BEFORE HIS TESTIMONY, BUT I WILL COULD NOT TESTIFY ON HIS BEHALF AND REQUEST FAVORABLE TREATMENT FOR HIM.

LET ME SPECIFICALLY, YOU TALKED ABOUT RECOMMENDATION OF LENIENCY, AND WHAT SPECIFICALLY DID THE PROSECUTOR SAY SHE WOULD DO?

THE PROSECUTOR SAID -- OTHER THAN SAY TO THE JUDGE THAT HE TESTIFIED ON BEHALF OF THE STATE, AND HIS TESTIMONY WAS HELPFUL.

LET ME FIND THE QUOTE.

JUSTICE: WHILE YOU ARE LOOKING, BASICALLY CAN YOU AGREE WITH WHAT I SAID, WHICH WAS THE INFERENCE WAS THAT SHE WOULD TELL THE JUDGE HE TESTIFIED ON BEHALF OF THE STATE AND ASSISTED THE STATE IN PROVING THEIR CASE?

NO.

WHAT SHE SAYS IS I TOLD HIM I WOULD MAKE NO FIRM OFFER PRIOR TO THE DEFENDANT'S TRIAL BUT ASSURED HIM HIS COOPERATION WOULD BE REMEMBERED WITH FAVOR BEFORE MITIGATING JUDGE STURGIS.

SHE IS NOT SAYING THAT SHE IS GOING TO GO IN AND SAY HE DID A GOOD JOB.

SHE IS SAYING THAT HIS COOPERATION WOULD BE REMEMBERED WITH FAVOR, SO AND WHAT DID, IN FACT, HAPPEN IS SHE SIGNS OFF ON MR. FREEMAN BEING RELEASED, AND, FROM THE DEPARTMENT OF CORRECTION CUSTODY, SO THERE WAS, FROM THE JAIL, SO THERE IS MORE GOING ON IN THIS THAN WHAT SHE TESTIFIED TO AT TRIAL, BUT, SO FREEMAN WAS NEVER, FREEMAN

IS A ISSUE THAT WAS NEVER  
ADDRESSED IN THE CIRCUIT  
COURT'S ORDER.  
GOING BACK TO THE ISSUE ABOUT  
THE COCAINE USE --  
CHIEF JUSTICE: BUT KEITH ACTUALLY TESTIFIED  
FALSELY.  
RIGHT. CHIEF JUSTICE: BUT WHAT  
EVIDENCE IS THERE THAT THE  
STATE KNEW THAT THAT WAS FALSE  
TESTIMONY?  
WELL, HE TOLD THE STATE  
ATTORNEY THAT MR. PONTICELLI  
HAD USED DRUGS THE NIGHT OF THE  
CRIME, WITHIN AN HOUR OF THE  
CRIME.  
HE HAD AN INTERVIEW WITH THE  
STATE ATTORNEY AND SHE HAS  
NOTES FROM THAT INTERVIEW.  
THE NOTES FROM THE INTERVIEW,  
SHE IS WRITING DOWN WHAT HE IS  
SAYING.  
PONTICELLI WAS MAKING PHONE  
CALLS, AND THEN IT SAYS "DID  
COKE".  
THAT IS HER ABBREVIATION FOR  
COCAINE, AND THEN SHE CONTINUES  
ON AND SAYS KEESEY SAYING I  
TOLD HER, THEN THE NOTES SAYING  
SOMEONE DID COKE, AND KEESEY  
SAID I WAS TALKING ABOUT TONY.  
HE WAS ON THE PHONE MAKING  
PHONE CALLS, AND HE WAS  
DOING COCAINE.  
JUSTICE: HE HAD GREAT  
RESPONSIBILITY FOR KNOWING  
THESE THINGS HIMSELF, SO HELP  
US WITH WHAT THE CASE LAW IS  
WITH REFERENCE TO THAT ISSUE.  
THAT IS THAT, IF IT, OBVIOUSLY  
IF IT APPEARS  
THAT WE HAVE ANOTHER WITNESS  
WHO WAS SAYING THAT THE  
DEFENDANT WAS USING DRUGS OR  
COCAINE OR ALCOHOL, WHATEVER  
THE SUBSTANCE IS, AND THAT THAT  
IS NOT DISCLOSED OR IT IS  
ALLOWED TO BE TESTIFIED TO  
UNDER CIRCUMSTANCES LIKE THIS,  
IS THERE A LEGITIMATE BASIS TO  
RELY ON THE FACT CLEARLY, THAT  
THE DEFENDANT'S LAWYER KNEW  
THAT THE CASE LAW IS FAIRLY  
CLEAR.

WHAT ABOUT THE ISSUE, OBVIOUSLY  
IF THE DEFENDANT PARTICIPATED,  
THE DEFENDANT SHOULD BE WRITING  
A NOTE OR THE TRIAL JUDGE IS  
REALLY SAYING THAT THE  
DEFENDANT SHOULD BE WRITING A  
NOTE TO HIS LAWYER, THAT THAT  
IS WRONG.

WE WERE TOGETHER DOING DRUGS OR  
WHATEVER.

SO I THINK YOU UNDERSTAND MY  
QUESTION.

WHAT IS THE LAW?

WITH REFERENCE --

IF YOU CAN LOOK AT THE US  
SUPREME COURT CASE LAW AND EVEN  
THE CASE LAW FROM THIS COURT,  
THERE IS CLEAR THERE IS NO  
DILIGENCE REQUIREMENT.

CASE LAW MAKES THAT CLEAR.

IT IS NOT WHAT COUNSEL COULD  
KNOW OR WHAT HE KNOWS.

IT IS WHAT THE DEFENDANT KNOWS  
IS IN EVIDENCE AND WHAT CAN  
DEFENSE COUNSEL USE IN HIS  
CASE?

HE CAN'T USE MR. PONTICELLI  
SAYING KEESEY IS LING IN HIS

CASE, BUT HE CAN USE THE

STATEMENT THAT KEESEY MAKES THAT SAYS DIDN'T YOU TELL THE  
PROSECUTOR THAT PONTICELLI USED  
DRUGS THAT NIGHT?

AND THAT WAS BE IMPEACHMENT  
EVIDENCE.

JUSTICE: I THOUGHT WE HAD  
VERY RECENT PRECEDENT ON THE  
FACT THAT, IF THE DEFENDANT  
KNOWS IT, THEN IT IS NOT A  
BRADY VIOLATION.

NO.

JUSTICE: WE SAID THAT.

IT IS NOT WHAT THE DEFENDANT  
KNOWS.

HE DIDN'T KNOW THAT KEESEY.

JUSTICE: IF THE DEFENDANT  
KNOWS IT, ISN'T THERE SOME  
OTHER OBLIGATION HERE?

IF YOU LOOK AT THE FACTS OF  
THE CASES, LOOK AT BRADY FOR  
EXAMPLE.

BRADY IS ABOUT A DEFENDANT  
SAYING I WAS INVOLVED IN THIS  
MURDER, BUT MY CODEFENDANT DID  
THE ACTUAL SHOOTING, AND HE

GOES TO TRIAL AND GETS  
CONVICTED AND HE GETS THE DEATH  
PENALTY N POSTCONVICTION, A  
CONFESSION SURFACES FROM THE  
CODEFENDANT, THAT HE WAS THE  
ACTUAL KILLER!  
AND THE UNITED STATES SUPREME  
COURT SAYS THAT THAT IS BRADY.  
IT DIDN'T MATTER THAT THE  
DEFENDANT WAS SAYING ALL ALONG,  
HE WAS THE SHOOTER.  
WHAT MATTERED WAS THAT THEY  
ACTUALLY HAD EVIDENCE THAT HE  
WAS THE SHOOTER, THAT THE  
CODEFENDANT WAS THE SHOOTER.  
THAT WAS WHAT WAS THE BRADY,  
AND IF YOU LOOK AT THE CASES OUT OF THIS COURT, YOUNG,  
CARDONA, ROMANI, ALL BRADY CASES  
WHERE THE DEFENDANT IS PRESENT  
OR INVOLVED IN THE MURDER AND  
THEY ARE USING A DEFENSE,  
SELF-DEFENSE, INTOXICATION,  
LESS THAN FIRST-DEGREE MURDER,  
AND IN ALL OF THOSE CASES,  
CERTAINLY THOSE DEFENDANTS KNEW  
WHAT THEIR ACTIONS WERE.  
CHIEF JUSTICE: WELL, IN THIS  
CASE WAS THE DEFENDANT SAYING  
ALL ALONG THAT HE WAS USING  
COCAINE?  
WELL, THE DEFENDANT, THE DAY  
AFTER THE CRIME, TELLS JOHN  
TURNER AND JOHN TURN HE WERE  
TELLS TRIAL COUNSEL, THIS IS  
TONY'S STORY.  
THAT YOU KNOW, HE --  
CHIEF JUSTICE: WAS HIS  
DEFENSE AT TRIAL THAT I WAS ON  
A COCAINE HIGH?  
ABSOLUTELY.  
WAS IT A DEFENSE?  
IN OPENING STATEMENT, TRIAL  
COUNSEL GETS UP AND SAYS THIS  
IS A CASE ABOUT COCAINE  
PSYCHOSIS.  
I AM GOING TO GIVE YOU  
EVIDENCE.  
CHIEF JUSTICE: DID HE TELL  
HIS LAWYER THAT HE HAD USED  
COCAINE WITH THE WEST VIRGINIA  
BOYS?  
DID HE TELL --  
CHIEF JUSTICE: THAT IS THE  
ISSUE ABOUT, I GUESS THAT I

THOUGHT THAT, WHERE THE RESPONSIBILITY WAS, IS, DID HE, DID THE LAWYER KNOW TO FOLLOW UP OR SHOULD THE LAWYER KNOWN TO HAVE FOLLOWED UP, TO REALLY ASK THE QUESTIONS TO THE WEST VIRGINIA BOYS AND KEESEE, ABOUT THE COCAINE USE?

HE ASKS KEESEE ON DEPOSITION, DID TONY PONTICELLI USE COCAINE THAT NIGHT AND KEESEE SAYS NO. HIS NEXT QUESTION IS DID YOU EVER TELL ANYONE THAT TONY PONTICELLI USED COCAINE THAT NIGHT AND HIS ANSWER IS NO. IN THE PROSECUTOR'S DEPOT NOTES, SHE HAS NEXT TO THAT UNDERLINED HE DIDN'T TELL ANYBODY.

AND SHE WRITES NEXT TO THAT, "TOLD BM", WHICH IS BRUCE MUNSTER, THE INVESTIGATOR, AND "TAPED", WAS THERE A TAPED STATEMENT OUT THERE?

CHIEF JUSTICE: WAS THERE A TAPED STATEMENT?

WE DON'T KNOW.

BECAUSE IT WAS NEVER MADE AVAILABLE TO POSTCONVICTION TRIAL COUNSEL.

CHIEF JUSTICE: I THOUGHT SOMEBODY SAID IF THEY HAD ASKED ME DIRECTLY ABOUT THE COCAINE USE, I WOULD HAVE ANSWERED. THE WITNESS SAID IF THEY HAD CONFRONTED ME WITH MY STATEMENT, I WOULD HAVE TOLD THE TRUTH.

CHIEF JUSTICE: HOW ABOUT THE WEST VIRGINIA BOYS?

THE WEST VIRGINIA BOYS WERE THE SAME WAY, AND IT IS INTERESTING BECAUSE IT GOES BEYOND THE COCAINE ISSUE.

THE SEQUENCE OF EVENTS THE WAY THE STATE WANTS TO SET THE TIME LINE FOR THE NIGHT OF THE CRIMES IS ENTIRELY BASED ON THE WEST VIRGINIA BOYS AND THEIR TESTIMONY AND WHEN TONY PONTICELLI FORMED THE INTENT TO ALLEGEDLY KILL THE VICTIM, SO, BUT WHAT THEY SAY IS THEY SAY THAT THEY HAD MET HIM THE NIGHT BEFORE.

THEY HAD USED COCAINE WITH HIM.



THEY HAD THIS PARTY THAT WENT ON TO THE EARLY MORNING HOURS OF FRIDAY, AND SO THIS WHOLE IDEA THAT THEY MET HIM FRIDAY EVENING, THEY SEE HIM WHILE THEY ARE WATCHING "SCARFACE". HE COMES BACK AND TELLS THEM HE IS GOING TO KILL THE VICTIMS, AND THEN HE COMES BACK AND CONFESSES THAT THE WHOLE THING CAN'T BE TRUE.

IT CAN'T BE TRUE BECAUSE THEY DIDN'T MEET HIM ON FRIDAY NIGHT.

THEY MET HIM ON THURSDAY NIGHT ANTONE I PONTICELLI COULDN'T HAVE BEEN AT THEIR HOME WATCHING "SCARFACE" WITH THEM AND VOICING AN INTENT TO KILL, WHEN HE WAS ALREADY AT THE VICTIM'S TRAILER.

JUSTICE: WHAT DID THE STATE KNOW ABOUT THAT FALSIFICATION? WHAT DID THEY KNOW?

MUNSTER WAS TOLD BY FREEMAN AND BY JOHN TURNER ABOUT THE PARTY, AND --

JUSTICE: WHAT DID THE WEST VIRGINIA BOYS KNOW ABOUT THE TESTIMONY?

BRUCE MUNSTER WAS TOLD THAT

HE WENT AND BOUGHT DRUGS FOR

THESE GUYS, THE WEST VIRGINIA BOYS ON THURSDAY EVENING. SO HE KNEW ABOUT THAT AND HE KNEW THAT THERE WAS A PARTY ANN FREEMAN ONE ALSO TELLS HIM THAT TONY HAD SAID THERE WAS A PARTY, SO MONSTER --

JUSTICE: THIS GOES BACK TO SOMETHING ELSE, NOT STATEMENTS MADE BY FREEMAN TO THE WEST VIRGINIA BOYS.

THAT IS THE PROBLEM WITH THAT, AND I JUST WANT TO POINT OUT, I SEE I AM INTO MY REBUTTAL, BUT THIS CASE WAS ENTIRELY ABOUT THE ISSUE OF WHAT WAS TONY PONTICELLI'S STATE OF MIND AT THE TIME OF THE CRIME, AND TRIAL COUNSEL AT THE EVIDENTIARY HEARING, YOU

KNOW, SAYS, LOOK, THIS WAS A CASE ABOUT COCAINE. I FILED THE NOTICE FOR INTENT, THE INSANITY DEFENSE, THE REQUEST FOR EXPERT WITNESSES, ALL BASED ON THE FACT THAT I WAS GOING TO BE USING THE FACT THAT HE USED COCAINE IN MY DEFENSE.

AND WHAT THE STATE DID WAS THEY COMPLETELY SANITIZED THE CASE. THEY MOVED TO KEEP OUT KEESEE'S DRUG USE.

THEY MOVED TO KEEP OUT THE VICTIM'S TOXICOLOGY REPORTS THAT SHOWED THAT THEY HAD DRUGS IN THEIR SYSTEM, AND BASICALLY SHE, THE PROSECUTOR ARGUED REPEATEDLY TO THE COURT, ON, EVERY TIME THAT ANYTHING CAME UP ABOUT COCAINE, WE DON'T HAVE ANY EVIDENCE OF COCAINE. SHE KEPT --

JUSTICE: TWO DEFENSES ARE, I THINK, EITHER THAT HE WAS INSANE OR VOLUNTARILY INTOXICATED.

WITH THE EVIDENCE THAT YOU HAVE, WERE YOU ABLE TO ESTABLISH THAT, IF THEY HAD HAD, THE DEFENSE COUNSEL HAD THIS ADDITIONAL TESTIMONY, THAT EITHER THE DEFENSE OF INSANITY OR VOLUNTARY INTOXICATION WOULD HAVE BEEN A VIABLE DEFENSE? YES.

AT THE EVIDENTIARY HEARING, DR. BRANCH, TRIAL COUNSEL, WHO WANTED TO TESTIFY DURING TRIAL AND HE WAS EXCLUDED BASED ON THE FACT THAT THERE WAS NO BASIS FOR HIS TESTIMONY, HE TESTIFIED, AND HE TESTIFIED ABOUT COCAINE PSYCHOSIS.

HE IS THE ONLY ONE THAT TESTIFIED --

JUSTICE: I AM NOT TALKING DIMINISHED CAPACITY.

I AM TALKING VOLUNTARY INTOXICATION OR INSANITY.

THE PROSECUTION ARGUED HE WOULD HAVE USED THAT TO ARGUE INSANITY AND AT THE TIME OF MR. PONTICELLI'S TRIAL, YOU WERE

ALLOWED TO ARGUE DIMINISHED  
CAPACITY BUT ALL OF THE EXPERTS  
AT THE EVIDENTIARY HEARING  
TESTIFIED THAT THE DRUG USE WAS  
WITHIN THE HOUR BEFORE THE  
CRIMES, WOULD HAVE SUPPORTED A  
  
VOLUNTARY INTOXICATION DEFENSE.

JUSTICE: WHAT WAS THE  
EVIDENCE OF THE DRUG USE WITHIN  
THE HOUR OF THE CRIME THAT WAS  
JUST AT THE HOME WITH KEESE?  
RIGHT.

RIGHT.

JUSTICE: THAT IS THE ONE.  
THAT WAS THE HOUR BEFORE THE  
CRIME.

YES.

JUSTICE: WAS THERE ANY  
EXPERT TESTIMONY AT EVIDENTIARY  
HEARING THAT THAT WOULD HAVE  
ESTABLISHED EITHER VOLUNTARY  
INTOXICATION OR IN SAN SIT?

YES.

-- OR INSANITY?

YES.

DR. HERKOFF SAID THAT IS THE  
MOST IMPORTANT PIECE OF  
EVIDENCE, THAT HE USED DRUGS  
RIGHT BEFORE THE CRIME.

CHIEF JUSTICE: I WANT TO  
POINT OUT THAT YOU HAVE USED --

I WANT TO POINT OUT THAT THE  
CASE WAS, UNDER HALLWORTH  
BEFORE THIS COURT, IT CANNOT BE  
BASED ENTIRELY ON SELF REPORT.

THERE HAD TO BE SOME  
CORROBORATION TO GIVE AN  
OPINION ABOUT VOLUNTARY  
INTOXICATION.

THERE HAD TO BE SOME  
CORROBORATION, SO TRIAL COUNSEL  
COULD NOT HAVE HAD AN EXPERT,  
EVEN IF TONY PONTICELLI HAD  
COOPERATED WITH AN EXPERT AND  
TOLD THEM I USE DRUGS BEFORE  
THE TRIAL, HE COULDN'T HAVE  
GOTTEN AN EXPERT ON THE STAND  
UNDER THOSE CIRCUMSTANCES AT  
THE TIME THE LAW WAS, HE NEEDED  
PC IN ORDER TO GET AN EXPERT AT

THIS TRIAL AND HE DIDN'T HAVE PC, AND HE DIDN'T HAVE THE WEST VIRGINIA BOYS AND HE DIDN'T HAVE FREEMAN, AND BASICALLY UNDER GIGLIO, WE ARE LOOKING AT WAS THIS A FAIR PROCEEDING, AND WHAT WE SEE IN THIS CASE RECEIVERY WITNESS, EVERY CRITICAL WITNESS TALKING ABOUT DRUG USE, LIED.

EVERY WITNESS ABOUT PREMEDITATION, WHO SUBSTANTIATES ANYTHING ABOUT PREMEDITATION, LIED. THERE COULD HAVE BEEN SOME ELEMENTS THAT HAPPENED OR DIDN'T HAPPEN BUT THE BOTTOM LINE IS THE JURY DIDN'T GET TO HEAR ANY OF THIS EVIDENCE TESTED.

THEY DIDN'T GET TO HEAR A VOLUNTARY INTOXICATION DEFENSE, AND THEY DIDN'T GET TO HEAR THAT MR. PONTICELLI WAS INSANE AT THE TIME OF THE CRIME.

I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT.

I AM KEN NUNNELLEY.

I REPRESENT THE STATE OF FLORIDA IN THIS PROCEEDING.

JUSTICE BELL, IF I COULD START IN RESPONSE TO YOUR QUESTIONS ABOUT KEESE AND THE DRUG USE IMMEDIATELY BEFORE THE CRIME.

MR. KEESE TESTIFIED AT THE EVIDENTIARY HEARING THAT THEY USED ONE MATCH STICK-SIZED LINE OF COCAINE.

THAT IS HIS DESCRIPTION NOT MINE, AND THAT WAS APPARENTLY BETWEEN THE TWO VICTIMS, THE GRANDINETTI BROTHERS AND THE DEFENDANT, AND I BELIEVE THE EVIDENCE AT THE EVIDENTIARY HEARING, WILL BE THAT, GIVEN MR. PONTICELLI'S EXPERIENCE WITH COCAINE, THAT THAT AMOUNT OF POWDER COCAINE WOULD NOT HAVE MADE MUCH DIFFERENCE TO MR. PONTICELLI.

JUSTICE: WHAT ABOUT THE TESTIMONY THAT THERE WAS EXTENSIVE PARTYING, AND

PARTYING IN THE CONNOTATION  
THAT EXTENSIVE DRUG USE  
PARTYING IS GOING ON A FULL DAY  
BEFORE THE WITNESSES ACTUALLY  
ACCOUNTED FOR THAT IN THEIR  
TESTIMONY AT TRIAL?  
THAT IS THAT, AS OPPOSED TO  
ANYTHING, RELATIONSHIP STARTING  
JUST SHORTLY BEFORE THE  
OFFENSE, THAT THEY HAD BEEN  
PARTYING ALL NIGHT AND USING  
DRUGS DURING THAT PARTYING.  
WELL, JUSTICE ANSTEAD, I  
DON'T MEAN, I AM NOT TRYING TO  
DEFLECT QUESTION BUT THE ANSWER  
TO THAT IS THAT THE TESTIMONY  
AT TRIAL PROVED THE WITNESS  
JOSEPH LEONARD WAS THAT HE AND  
MR. PONTICELLI HAD BEEN ON A  
THREE OR FOUR-WEEK-LONG COCAINE  
RUN, WHERE THEY HAD BEEN USING  
COCAINE EVERYDAY, ALL DAY, ALL  
NIGHT, GO TO BED AT THREE  
O'CLOCK IN THE MORNING, WAKE UP  
AT EIGHT O'CLOCK AND GO GET  
MORE COCAINE!

JUSTICE: WHAT ABOUT THE  
SPECIFICS, THOUGH, A COUPLE OF

DAYS PRECEDING THE ACTUAL  
EVENT?

WAS THERE, IN OTHER WORDS YOUR  
OPPONENTS ARE SUGGESTING TO US  
THAT THERE REALLY WAS A  
MISLEADING OR FALSE PICTURE  
PAINTED, IN TERMS OF THE DRUG  
USE IN THE 24 HOURS PRECEDING  
THIS OFFENSE?

THAT IT APPEARED AT TRIAL NONE  
OF THAT CAME OUT AT TRIAL,  
WHEREAS THE REALITY WAS THAT HE  
AND A NUMBER OF THESE WITNESSES  
THAT TESTIFIED AT TRIAL,  
ACTUALLY HAD BEEN CONSUMING  
DRUGS IN THE 24-HOUR PERIOD  
EXTENSIVELY IN THE 24-HOUR  
PERIOD, IMMEDIATELY PRECEDING  
THESE OTHER EVENTS THAT LED  
IMMEDIATELY TO THE CRIME.

WELL, THE VERSION THAT WE  
HAVE NOW THAT IS FROM THE  
EVIDENTIARY HEARING, IS THAT  
THE THANKSGIVING EVENING  
COCAINE PARTY THAT IS,

APPARENTLY WITH THE WEST VIRGINIA BOYS, IS WHAT THEY HAVE COME TO BE CALLED, ENDED BEFORE DAYLIGHT OR AROUND DAYLIGHT, MR. PONTICELLI WENT HOME.

THERE IS NO TESTIMONY TO SUPPORT THE NOTION THAT MR. PONTICELLI WAS USING DRUGS IN THE TIME PERIOD BETWEEN THE END OF THE PARTY, CALL IT EIGHT O'CLOCK, AND THE TIME THAT HE TURNS UP AT THE GRANDINETTI'S TRAILER, WHICH IS EIGHT O'CLOCK IN THE EVENING, WITH THE EXCEPTION OF KEESE, AND I THINK WE CAN ALL AGREE THAT A MATCH STICK SPLIT THREE OR FOUR WAYS ISN'T GOING TO MAKE A WHOLE LOT OF DIFFERENCE TO MR. PONTICELLI.

JUSTICE: IS IT CORRECT THAT THE THANKSGIVING EVE DRUG PARTY AND THE EXTENSIVE USE THERE, DID NOT COME OUT AT TRIAL? THAT SPECIFIC TESTIMONY DID NOT COME OUT AT TRIAL.

I WOULD ALSO POINT OUT, HOWEVER, THAT BASED UPON WHAT WE HAVE IN THE EVIDENTIARY HEARING, THERE IS NO TESTIMONY TO SUPPORT MR. PONTICELLI'S DRUG CONSUMPTION AT THE THANKSGIVING EVENING PARTY. THE TESTIMONY THAT HE WAS THERE, TESTIMONY THAT HE WAS GETTING THE COCAINE, AND THERE IS TESTIMONY THAT HE WAS COOKING THE COCAINE UP, BUT I BELIEVE THE RECORD WILL BEAR OUT THAT THERE IS NOT ANY TESTIMONY THAT MR. PONTICELLI WAS SMOKING MORE THAN HIS SHARE OR EVEN HIS SHARE AT ALL.

JUSTICE: SO THE POSTCONVICTION HEARING TESTIMONY WILL NOT BEAR OUT THAT HE WAS PARTICIPATING IN HEAVY DRUG USE THAT DAY OR EVENING.

IN OTHER WORDS THE THANKSGIVING DAY BEFORE?

I THINK THE WAY I WANT TO ANSWER THAT QUESTION, JUSTICE ANSTEAD, THAT THE TESTIMONY

THAT WAS PUT IN AT TRIAL  
THROUGH LEONARD AND I BELIEVE  
TURNER, WHOSE FIRST NAME I  
CAN'T REMEMBER, WAS ABOUT

EXTENSIVE HEAVY CONTINUES  
COCAINE USE FOR THREE-TO-FOUR  
WEEKS UP TO THE MURDER, AND IF  
YOU HAVE THAT ALREADY OUT  
THERE, THE QUESTION BECOMES  
WHAT REAL DIFFERENCE FROM A  
MATERIALITY STANDPOINT,  
AND I AM JUMPING  
PAST BRADY, BUT FOR THE SAKE  
OF 15 MINUTES LEFT, IF YOU PUT  
THE WHOLE THING IN CONTEXT, WHAT YOU HAVE IS  
MR. PONTICELLI USING DRUGS  
HEAVILY NO, QUESTION ABOUT IT,  
AND THEN YOU HAVE THE WEST  
VIRGINIA BOYS WHO COME IN YEARS  
LATER AND SAY YEAH, WE WERE  
DOING COCAINE WITH HIM AT THE  
HOUSE THANKSGIVING EVENING,  
ROLLING INTO THE MORNING AFTER  
THANKSGIVING.

JUSTICE: WHAT WAS THE ISSUE,  
I AM HAVING A LITTLE BIT OF  
DIFFICULTY, IF YOU ARE SAYING  
THERE ALREADY WAS EXTENSIVE  
TESTIMONY TO CORROBORATE HIS  
DRUG USE, THEN WHAT WAS THE  
ISSUE ABOUT THE EXPERT WITNESS  
NOT BEING ALLOWED TO EXPRESS  
OPINIONS ABOUT THE EFFECT OF  
THE DRUG USE ON HIM, BECAUSE IT  
WAS ONLY SELF REPORTING?

WELL --

JUSTICE: IN OTHER WORDS  
WASN'T THERE AN ISSUE THAT THE  
EXPERT'S TESTIMONY WAS EXCLUDED  
BECAUSE IT WAS ONLY SELF  
REPORTING ABOUT THE DRUG USE?

DR. BRANCH'S TESTIMONY WAS  
EXCLUDED.

DR. BRANCH IS NOT A CLINICAL  
PSYCHOLOGIST.

HE IS NOT A PSYCHIATRIST.

HE IS A RESEARCHER DOING  
RESEARCH INTO THE EFFECTS OF  
COCAINE USING RATS AND SQUIRREL  
MONKEYS AND PIGEONS, I THINK IT  
IS.

JUSTICE: THAT WAS EXCLUDE ON  
THE BASIS OF QUALIFICATIONS AND

NOT ON THE BASIS OF AN ADEQUATE  
PREDICATE?

I BELIEVE THAT IS CORRECT,  
JUSTICE ANSTEAD.

I AM WRESTLING A LITTLE BIT  
WITH HOW THAT WORKED.

JUSTICE: WE HEARD FROM YOUR  
OPPONENT IN THE DIRECT  
PRESENTATION TO US, WAS THAT  
THERE WAS ONLY THE SELF  
REPORTING, AND THAT THERE WAS  
NOT THE CORROBORATION SUCH AS  
WOULD BE PROVIDED BY THE WEST  
VIRGINIA BOYS OR WHATEVER.

WELL, JUSTICE ANSTEAD, I CAN  
ANSWER THAT QUESTION FOR YOU  
UNEQUIVOCALLY, BECAUSE THE, IT  
IS IT NOT SELF REPORTING,  
BECAUSE THERE WAS NO SELF  
REPORTING BY MR. PONTICELLI,  
BECAUSE HE WAS DENYING DRUG USE  
TO EVERYBODY.

SO THAT CAN'T BE THE REASON IT  
WAS EXCLUDED.

THE RECORD IS, I AM A LITTLE  
FUZZY ON THE RECORD AS TO THAT,  
BUT MY RECOLLECTION IS THAT  
THERE WAS NOT A SUFFICIENT  
PREDICATE THAT TIED DR.  
BRANCH'S WORK, DR. BRANCH'S  
RESEARCH INTO WHAT HE WAS  
TRYING TO TESTIFY ABOUT.

JUSTICE: WOULDN'T YOU HAVE  
TO AGREE THAT, IF YOU HAD

TESTIMONY FROM MR. KEESE OR  
THE VIRGI KNOW YEAH BOYS THAT  
SAY THAT -- FROM THE VIRGINIA  
BOYS THAT SAY THAT MR.  
PONTICELLI WAS IN FACT  
INGESTING COCAINE IN THE HOUR  
OR HOURS BEFORE THIS MURDER,  
THAT THEN DR. BRANCH'S  
TESTIMONY BECOMES MORE  
RELEVANT?

AND WOULD NOT BE EXCLUDED  
BECAUSE IT WAS SELF-REPORTING.  
WELL, THERE ARE THREE ANSWER  
TO SAY THAT QUESTION, JUSTICE  
QUINCE.

FIRST OF ALL, WE DON'T KNOW  
WHAT HAPPENED IN THE CAR AFTER  
MR. PONTICELLI LEFT THE  
GRANDINETTI'S RESIDENCE.



THERE ARE THREE PEOPLE THAT KNOW AND TWO OF THEM ARE DEAD. SECONDLY, AT THE PENALTY PHASE, COUNSEL BACKED UP AND USED DR. MILLS, WHO TESTIFIED BASED ON A SERIES OF HYPOTHETICALS, ABOUT THE EFFECT OF COCAINE ON AN INDIVIDUAL, AND THE REASON THAT COUNSEL HAD TO USE THE HYPOTHETICALS, RATHER THAN DIRECT QUESTIONS OR DIRECT EVIDENCE BASED UPON DR. MILLS' EVALUATIONS OF MR. PONTICELLI, WAS THAT PONTICELLI KEPT TELLING EVERYBODY THAT HE WASN'T DOING DRUGS! HE HAD REPEATEDLY DENIED DRUG USE. THERE WERE THREE DOCTORS INVOLVED.

IT WAS A COMPETENCY ISSUE THAT CAME UP PRIOR TO THIS. CHIEF JUSTICE: I ASKED MS.^McDERMOTT THAT ISSUE, WHICH WAS DID HE ADMIT THAT HE WAS USING COCAINE OR NOT? NOW YOU ARE SAYING THAT HE DENIED IT. SHE SAID, NO, THAT WAS THEIR DEFENSE, SO WHAT, WHICH IS IT? IF YOU GIVE ME JUST A MOMENT, I WILL GIVE YOU THE RECORD CITATIONS.

AT RECORD 1147, DR. KROP'S REPORT, DR. KROP STATES THE DEFENDANT MINIMIZED HIS DRUG USAGE.

RECORD 1156, DR. MATRA, PONTICELLI REPORTS TO MATRA THAT HE HAD NOT USED DRUGS FOR THE FOUR MONTHS PRECEDING THE MURDERS.

RECORD 1161, DR. POETER DIAGNOSIS MR. PONTICELLI AS SUFFERING FROM SUBSTANCE ABUSE IN REMISSION.

THERE IS NO SUGGESTION IN THE REPORT OR IN THE RECORD, RATHER, THAT THE SUBSTANTIAL ABUSE IN REMISSION DIAGNOSIS WAS BASED UPON THE FACT THAT MR. PONTICELLI WAS LOCKED UP. CHIEF JUSTICE: I THOUGHT YOU SAID IT CAME OUT AT TRIAL THAT

FOR THE THREE MONTHS BEFORE, HE  
WAS ON A COCAINE HIGH.

HE DID.

THAT IS WHERE WE HAVE THESE --

CHIEF JUSTICE: WHO PUT THAT  
EVIDENCE IN?

THE STATE.

THE STATE.

WHEN THEY CALLED JOSEPH LEONARD  
TO TESTIFY.

CHIEF JUSTICE: THE STATE  
WANTED TO SHOW THAT HE WAS  
DOING, THAT HE WAS DOING  
COCAINE?

I DON'T KNOW IF THE STATE  
CARED IF THEY SHOWED THAT HE  
WAS DOING COCAINE OR NOT.

CHIEF JUSTICE: WHY DID THEY  
PUT ON EVIDENCE THAT FOR THE  
THREE MONTHS OR FOUR MONTHS  
BEFORE THAT HE WAS DOING  
COCAINE?

I AM NOT SURE WHAT THE  
RATIONALE FOR THE EVIDENCE  
BEING PUT ON WAS, BUT IT CAME  
ON, IT WAS PUT IN IN CONNECTION  
WITH JOSEPH LEONARD, WHO BY THE  
WAY SUPPLIED THE MURDER WEAPON  
TO THE DEFENDANT, WITH HIS  
TESTIMONY.

CHIEF JUSTICE: THIS IS,  
THERE IS SOME DISCONNECT HERE,  
BECAUSE IF YOU AGREE --  
I AGREE.

CHIEF JUSTICE: FOR WHATEVER  
REASON, THAT KEESE, BURGESS AND  
BROWN TESTIFIED FALSELY AT  
TRIAL BY DENYING COCAINE USE.  
THAT IS WHAT THE TRIAL JUDGE  
WHO HEARD THE EVIDENCE AND SAW  
THE WITNESSES TESTIFY FOUND.

CHIEF JUSTICE: DID THEY  
EITHER ADMIT TO COCAINE USE AT  
THE TIME OF TRIAL OR DID THEY  
DENY COCAINE USE?

THEY ULTIMATE, AT THE TIME  
OF THE TRIAL, THEY DENIED  
COCAINE USE.

CHIEF JUSTICE: OKAY.

SO --

AT THE EVIDENTIARY HEARING,  
THEY SAID THEY WERE USING  
COCAINE AND CAME UP WITH A --  
HAVE

CHIEF JUSTICE: AND THE JUDGE FOUND THAT WAS FALSE TESTIMONY. NOW, THE QUESTION IS, EVEN THOUGH YOU HAVE GONE TO THE THIRD PRONG OF BRADY OR THIRD PRONG OF GIGLIO, IS WHAT THE STATE KNEW.

MS. McDERMOTT IS TAKING THE POSITION THAT THE STATE HAD AN INTEREST IN SANITIZING THIS TRIAL TO MAKE SURE THAT IT LOOKED LIKE NOBODY WAS DOING COCAINE.

YOU ARE SAYING THAT, NO, IT WAS ALL OVER THE PLACE, SO I AM TRYING TO FIND OUT DID THE STATE KNOW THAT KEESE HAD ADMITTED TO COCAINE USE?

THE TRIAL COURT'S FINDINGS, AND I, WELL, I HAVE GOT TO RELY ON THE TRIAL COURT'S FINDINGS, BUT IF YOU REVIEW THE NOTES AT ISSUE, I DON'T WANT TO GET INTO THE, HE SAID/SHE SAID ISSUE ABOUT WHAT THEY SAY, BUT I WOULD SUGGEST TO THE COURT THAT THOSE NOTES THAT HAVE BEEN REPRESENTED TO THIS COURT AS BEING UNEQUIVOCAL RED FLAGS WAVING AND ROCKETS GOING OFF ABOUT WHAT THE STATE KNEW, ARE NOT ANYWHERE NEARLY SO DIRECT. THE NOTES ARE SUBJECT TO INTERPRETATION.

PROSECUTOR'S MEMORY AS TO WHAT THOSE NOTES WERE IS SOMEWHAT FAULTY.

THE INTERPRETATION, I BELIEVE, AND I THINK MY OPPONENT'S ARGUMENT BEARS THIS OUT, DEPENDS UPON ONE'S PERSPECTIVE OF THE CASE.

AND I WOULD SUGGEST THAT, WHEN THE EVIDENCE IS VIEWED IN THE LIGHT MOST FAVORABLE TO THE PREVAILING PARTY, WHICH IS WHAT THE COURT DETERMINES, SHOULD BE HELD IN SUPPORT OF THE GIGLIO CLAIM.

CHIEF JUSTICE: YOU ARE NOT GIVING AN ANSWER.

I AM SORRY.

I AM TRYING.

CHIEF JUSTICE: WHETHER THE STATE AT THE TIME OF THE TRIAL

WANTED TO PORTRAY THIS AS NOT INVOLVING COCAINE USE BY EITHER MR. PONTICELLI OR EVERYONE CONNECTED WITH HIM OR THEY DID WANT THAT TO COME OUT?

WELL, JUSTICE PARIENTE, I DON'T KNOW WHAT THE STATE'S THEORY WAS.

I DON'T KNOW.

I WASN'T THERE.

I WASN'T PRACTICING LAW IN FLORIDA WHEN THIS CASE WAS TRIED, BUT I CAN TELL YOU THIS. JUSTICE: FROM THE RECORD AND THE TRANSCRIPTS, ISN'T IT CLEAR THAT THE STATE WANTED TO PORTRAY THIS AS A COLD, SOBER, DELIBERATE, I MEAN THIS WAS A HORRIBLE EXECUTION KILLING OF TWO PEOPLE, AND THE STATE WAS ATTEMPTING TO PORTRAY THIS AS A COLD AND DELIBERATE, UNAFFECTED, REALLY, BY COCAINE USAGE OR WHATEVER, AND IT WAS THAT THE DEFENSE LAWYER DID ARGUE TO THE JURY, TO THE CONTRARY.

WASN'T IT THE STATE'S POSITION THAT, NO, THIS WASN'T SOMETHING INFLUENCED BY DRUG USAGE. IT WAS A COLD, CALCULATED EXECUTION-STYLE KILLING, UNAFFECTED BY THE USE OF DRUGS.

ISN'T THAT, THAT WAS THE STATE'S POSITION AT TRIAL, WAS IT NOT?

IN A NUTSHELL, PROBABLY SO. BUT THE RECORD REFLECTS THAT COCAINE IS, JUSTICE ANSTEAD, COCAINE IS TALKED ABOUT THROUGHOUT THIS RECORD, AND I MEAN LITERALLY.

LITERALLY!

JUST ABOUT ON EVERY --

JUSTICE: IN OTHER WORDS, THIS IS A GROUP OF PEOPLE APPARENTLY, THAT IS HEAVILY INVESTED IN THE SELLING AND MARKETING OF DRUGS, AND DRUGS WERE ALL OVER THE PLACE IN THAT CONTEXT.

IS THAT CORRECT?

WELL, JUSTICE, YOU HAVE GOT PEOPLE USING COCAINE, SELLING COCAINE, TALKING ABOUT USING

COCAINE, TALKING ABOUT SELLING COCAINE AND TRYING TO GET MORE COCAINE ON EVERY SINGLE PAGE OF THE RECORD OF THIS TRIAL, AND IT IS 2000 SOME-ODD PAGES, AS I RECALL.

THIS IS A TYPICAL DRUG CASE.

YOU HAVE GOT A BUNCH OF PEOPLE INVOLVED.

YOU HAVE GOT A SCENE SPREAD OUT ALL OVER THE PLACE AND ALL OF THAT, BUT --

JUSTICE: IS THERE A DIFFERENCE IN THE RECORD WHEN YOU HAVE COCAINE ALL OVER THE PLACE, AS YOU SAID, ABOUT SELLING AND USING, BUT WHEN YOU GET DOWN TO SPECIFICS, ISN'T THAT WHEN THE STATE REALLY MAKES THE ARGUMENT TO EXCLUDE PARTICULAR EVIDENCE, AND SO WHEN YOU GET DOWN TO SPECIFICS AND THIS PERSON USING AND THE DEFENDANT USING AND THOSE KINDS OF THINGS, IT IS REALLY DIFFERENT FROM SAYING, OH, WELL, FOR THE LAST THREE WEEKS THE DEFENDANT AND HIS FRIENDS WERE OFF ON A COCAINE BINGE. BUT JUSTICE QUINCE, WE ARE STILL TALKING ABOUT ONE MATCH STICK-SIZED LINE OF COCAINE THAT KEESE IS TALKING ABOUT.

JUSTICE: YOU CAN SEE THE SEMBLANCE OF EFFECT OF THE TESTIMONY OF KEITH AND THE WEST VIRGINIA BOYS, ONE MATCH STICK SIZE OF COCAINE?

IF WE ARE TALKING ABOUT DRUG USE IN THE COUPLE OF HOURS IMMEDIATELY PRECEDING THE MURDERS, YES, MA'AM, IT IS. THAT IS WHAT WE ARE TALKING ABOUT.

SO THE WEST VIRGINIA BOYS WERE ONLY TALKING ABOUT COCAINE USE ON THE THANKSGIVING DAY PARTY.

YES, MA'AM.

THEY HAD NO EVIDENCE OF ANY COCAINE USE ON THE DAY OF THE MURDER.

THAT IS CORRECT.

I DO NOT REMEMBER OFF THE TOP

OF MY HEAD, IF THEY MAY HAVE  
HAD EVIDENCE ABOUT COCAINE USE  
AFTER THE MURDER.  
I AM NOT COMPLETELY CLEAR ABOUT  
THAT.

JUSTICE: WE ARE TALKING  
ABOUT BEFORE THE MURDER ON THE  
SAME DAY OF THE MURDER, THE  
WEST VIRGINIA BOYS HAD NO  
TESTIMONY TO THAT EFFECT.  
NOT AFTER APPROXIMATELY  
EIGHT O'CLOCK THAT MORNING, NO,  
MA'AM, ABSOLUTELY NOT.

JUSTICE: YOU HAVE KEESEE  
THAT IS WHAT THE RECORD  
SHOWS.

THAT IS WHAT YOU ARE  
PRESENTING TO US.

CHIEF JUSTICE: LET'S TALK  
ABOUT THE ISSUE OF FREEMAN AND  
THE ISSUE ABOUT WHETHER  
SOMETHING WAS OFFERED TO  
FREEMAN THAT WASN'T DISCLOSED  
TO THE DEFENSE, AND THIS IS  
ALWAYS A DIFFICULT SITUATION,  
BECAUSE THE STATE DOESN'T WANT  
TO SHOW THAT DEALS ARE MADE,  
AND SO THE CONCERN BECOMES  
WHETHER IN FACT, INSTEAD OF  
THERE BEING AN EXPRESS WRITTEN  
DEAL, THERE IS THE  
UNDERSTANDING WINK-WINK THAT IF  
THE WITNESS TESTIFIES  
FAVORABLY, THE PROSECUTOR WILL  
COME IN AND MAKE SURE THAT THE  
WITNESS IS TREATED FAVORABLY IN  
THE CRIMINAL CASE, SO TELL US  
HOW THAT SHAKES OUT HERE.

LET ME BEGIN BY ANSWERING  
THAT MR. FREEMAN WAS  
THOROUGHLY IMPEACHED OR  
THOROUGHLY CROSS-EXAMINED FOR  
PAGES AND PAGES AND PAGES.  
HE HAS 26 FELONY CONVICTIONS AT  
THE TIME OF THE OFFENSE.

THE PROSECUTOR'S NOTE INDICATED  
THAT, IN A CONVERSATION SHE HAD  
WITH FREEMAN'S ATTORNEY, THAT THERE WOULD BE NO DEALS PRIOR  
TO TRIAL, THAT COOPERATION  
WOULD BE, QUOTE, REMEMBERED  
WITH FAVOR, CLOSE QUOTE, BEFORE  
SENTENCING.

REMEMBERED WITH FAVOR IS A  
SOMEWHAT ARCAINE TERM.

I AM NOT ENTIRELY SURE WHAT THAT MEANS IN THE SENSE THAT IT IS NOT A PHRASE I WOULD PERSONALLY USE.

I SUSPECT THAT THAT MEANS THAT THE PROSECUTOR WOULD MAKE KNOWN TO THE SENTENCING COURT THAT FREEMAN HAD COOPERATED.

CHIEF JUSTICE: SO SHOULD THAT BE TURNED OVER TO THE DEFENSE?

I WISH IT HAD BEEN.

CHIEF JUSTICE: OKAY.

WHETHER --

JUSTICE: WAS FREEMAN CROSS-EXAMINED ABOUT THE FACT THAT HE HAD PENDING CHARGES AND THINGS LIKE THAT, AND EVEN THOUGH HE DENIED IT, WAS COUNSEL ABLE TO GET THE INFERENCE THAT HIS TESTIMONY WOULD BE FAVORABLY CONSIDERED? FREEMAN WAS CROSS-EXAMINED EXTENSIVELY.

HE MADE, AND LET ME GO BACK TO THE EARLIER SERIES OF QUESTIONS, JUSTICE CANTERO, JUST FOR A MOMENT BEFORE I FORGET THIS, BECAUSE IT IS IMPORTANT.

THE WEST VIRGINIA BOYS AND PC, ALSO CAME BACK AND REITERATED ON CROSS-EXAMINATION, THAT THEIR TESTIMONY ABOUT MR. PONTICELLI'S ACTIONS IN CONNECTION WITH THE MURDERS OF THE GRANDINETTI BROTHERS WERE TRUTHFUL.

THEY DID NOT RETRACT, MODIFY OR CHANGE THE SUBSTANTIVE TRIAL TESTIMONY.

NOW, JUSTICE CANTERO, WITH RESPECT TO REAM P FREEMAN'S -- WITH RESPECT TO FREEMAN, FREEMAN MADE THE COMMENT DURING CROSS-EXAMINATION WHEN HE WAS ASKED IF HE WAS GETTING ANY BENEFIT FOR HIS TESTIMONY, AND HE WAS ASKED IN SEVERAL WAYS THROUGHOUT THE COURSE OF THE TESTIMONY, HE SAID, AND I QUOTE, I WON'T SAY I HADN'T THOUGHT ABOUT IT. IT IS THE BEST I CAN DO ON

THAT.

BUT ONCE AGAIN, YOU HAVE, WITH RESPECT TO FREEMAN, THE WEST VIRGINIA BOYS, AND KEESE, YOU HAVE THIS CONVERGENT VALIDITY AND LET'S DON'T FORGET YOU HAVE GOT A COUPLE OF WITNESSES OUT THERE WHO AREN'T ATTACKED. THAT IS JOEY LEONARD AND WHEN YOU TAKE ALL OF THIS AND PUT IT TOGETHER, VIEWING ALL OF THE EVIDENCE IN CONNECTION WITH NOT ONLY WHAT WE HAVE NOW WHICH DOES NOT CHANGE THE SUBSTANTIVE FACTS OF THE CRIME, YOU HAVE MINIMAL IMPEACHMENT EVIDENCE THAT DOES NOT CHANGE THE RESULT.

THERE IS NO REASONABLE LIKELIHOOD AFTER DIFFERENT RESULT, AND I WOULD ASK THE COURT TO AFFIRM.

THANK YOU.

CHIEF JUSTICE: THANK YOU.

REBUTTAL.

YES, YOUR HONOR.

THAT IS NOT THE STANDARD.

THE STANDARD IS NOT WHAT THE CIRCUIT COURT SAYS, THAT THERE IS OVERWHELMING EVIDENCE OF GUILT.

THE STANDARD IS, AND KYLE SAYS THAT SPECIFICALLY.

THIS ISN'T A SUFFICIENCY OF EVIDENCE TEST.

THIS IS ABOUT WHAT WOULD TRIAL COUNSEL HAVE DONE WITH THIS EVIDENCE, AND THIS COURT LOOKS WITH THE DISCOVERY VIOLATION WITH PROCEDURAL PREJUDICE.

IN BRADY YOU HAVE TO CONSIDER BOTH, SO THAT DISTINCTION DOES NOT MATTER.

WHAT WOULD TRIAL COUNSEL HAVE DONE IN THIS MATTER?

HE WOULD HAVE GOTTEN AN EXPERT ON THE STAND TO TALK ABOUT COCAINE PSYCHOSIS AND GOTTEN A WITNESS TO TALK ABOUT THE CONSCIOUSNESS OF GUILT AND NOT USING DRUGS AS THE REASON FOR THE MURDER THAT NIGHT.

JUSTICE: YOUR OTHER

REFERENCE ABOUT THE WITNESSES



AND PARTING EARLY THE NIGHT  
BEFORE OR THE EARLY MORNING  
HOURS OR WHATEVER IT WAS, HE  
TESTIFIED THAT NONE OF THEM  
SAID THAT THE DEFENDANT USED  
ANY DRUGS.

THEY TESTIFIED ABOUT THEIR OWN  
USE OF DRUGS BUT THAT NONE OF  
THEM SAID THAT HE USED DRUGS AT  
THAT TIME.

THAT IS NOT TRUE.

THE WEST VIRGINIA BOYS SAID THAT THEY USED DRUGS WITH MR.  
PONTICELLI.

THAT IS NOT TAKING INTO  
ACCOUNT ON THE DAY OF THE  
CRIME.

LET'S GO BACK AND SEE WHAT THE  
FACTS ARE.

WE ARE PLAYING FAST AND LOOSE.  
IS THAT, AND JUSTICE ANSTEAD  
ASKED YOU A QUESTION, IS THAT,  
AFTER EIGHT O'CLOCK THAT  
MORNING IS THERE EVIDENCE THAT  
THE WEST VIRGINIA BOYS SAID  
THAT THIS DEFENDANT USED DRUGS  
WITH THEM?

THAT IS WHAT HE ASKED YOU.  
NO.

THE CRITICAL PART --

JUSTICE: SO YOUR ANSWER IS  
NOT YES.

IT IS NO.

CORRECT?

I AM REFERRING TO THE NIGHT  
BEFORE.

OKAY.

THE DAY, THESE MURDERS OCCURRED  
THE DAY AFTER THANKSGIVING.  
IS THAT CORRECT?

YES.

JUSTICE: NOW, IF I  
UNDERSTAND IT CORRECTLY, THE  
WEST VIRGINIA BOYS AT THE  
POSTCONVICTION HEARING AND  
OTHERS, TESTIFIED THAT THERE  
WAS EXTENSIVE PARTYING GOING  
ON, ON THANKSGIVING.

YES.

JUSTICE: AND INTO THE EARLY  
MORNING HOURS.

IT CONCLUDED AT 5:00 A.M.

JUSTICE: THAT TESTIMONY DID  
NOT COME OUT AT TRIAL.  
MY QUESTION IS, DID THEY

TESTIFY AS TO USING DRUGS, THAT  
THE DEFENDANT USED DRUGS DURING  
THAT PARTY ON THANKSGIVING DAY?

YES.

YES.

ABSOLUTELY.

THEY SAY TONY PONTICELLI USED  
DRUGS WITH US THAT NIGHT, AND  
KEESEE, I WANT TO POINT  
SOMETHING OUT --

CHIEF JUSTICE: MS.^McDERMOTT, WITH OUR HELP YOU  
HAVE USED UP YOUR TIME.

I WANT TO SAY THAT THIS  
COURT FOUND ON SENTENCING THAT  
THE STATUTORY MENTAL HEALTH  
MITIGATORS DID NOT APPLY,  
SIMPLY BECAUSE THERE WAS NO  
TESTIMONY THAT DRUGS WERE USED  
ON THE EVE OF THE CRIMES, AND  
WE NOW KNOW THAT THAT IS NOT  
TRUE AND THE CIRCUIT COURT  
DOESN'T EVEN USE ANY ANALYSIS  
AT THE PENALTY PHASE TOWARDS  
THE BRADY INFORMATION, AND THAT  
IN COMBINATION WITH THE  
INEFFECTIVE ASSISTANCE CLAIM AT  
A MINIMUM WOULD REQUIRE A NEW  
PENALTY PHASE, BUT CERTAINLY WE  
ARE ASKING THAT THIS COURT  
GRANT MR. PONTICELLI A NEW  
TRIAL.

CHIEF JUSTICE: THANK YOU  
VERY MUCH.

THE COURT WILL  
TAKE THIS MATTER UNDER  
ADVISEMENT AND WILL NOW TAKE  
ITS MORNING RECESS OF 15  
MINUTES.