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Eddie Simmons v. State of Florida

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CHIEF JUSTICE: GOOD MORNING.

MARSHAL: PLEASE BE SEATED .

CHIEF JUSTICE: GOOD MORNING AGAIN. IF COUNSEL IS READY , YOU MAY PROCEED.

MY NAME IS ROY HEIMLICH , AND I AM FROM THE PUBLIC DEFENDERS OFFICE IN MIAMI AND I REPRESENT MR. SIMMONS.

DURING THE COURSE OF YOUR ARGUMENT, COULD YOU ADDRESS THE CIRCUMSTANCE IN THIS CASE WHERE, IF THE RECORD APPEARS CORRECTLY, THAT THE STATE ASSERTED THAT THEY DIDN'T HAVE THE IDENTITY OR LOCATION OF THIS WITNESS , AND THAT SEEMS TO GIVE THIS CASE A LITTLE DIFFERENT WRINKLE THAN THE WAY THE ISSUE WAS TREATED IN THE DISTRICT COURT AND IS BEING, YOU KNOW , TREATED HERE. ISN'T THAT A SEPARATE ISSUE , THAT IS EVEN ASSUMING THAT WE DO HAVE A CI THAT , IN THE ORDINARY COURSE , WOULD BE ORDERED TO BE DISCLOSED , AND ALLOWED TO BE DISCLOSED AND ALLOWED TO BE INTERROGATED BY THE DEFENSE, IF THE STATE SAYS I AM SORRY , THIS PERSON IS GONE AND WE TRIED BUT WE HAVE NO WAY OF LOCATING THE PERSON , DOESN'T THAT PUT A DIFFERENT WRINKLE ON IT THAN THE ISSUE THAT HAS NOW BEEN RESOLVED BY THE DISTRICT COURTS?

I DON'T THINK SO , AND I DON'T THINK THAT THAT STATEMENT IS TO BE TAKEN SERIOUSLY . I THINK WHAT THAT STATEMENT MEANS IS THAT WE ARE NOT GOING TO PRODUCE THE CI. WE WOULD RATHER HAVE THIS CASE DISMISSED THAN PRODUCE HIM. THERE IS NOTHING IN THIS RECORD THAT INDICATES THAT THE CI IN THIS CASE IS NOT AN FBI AGENT WHO WAS LOANED TO THE LOCAL POLICE , FOR THE PURPOSE OF INVESTIGATING THESE DRUG TRANSACTIONS.

IS THERE ANY INDICATION THAT IS THE CASE?

WELL, NO , THERE ISN'T , BECAUSE THEY WON'T TELL US WHO THE CI WAS AND THEIR CLAIM OF CONFIDENTIALITY PREVENTS US FROM PURSUING DISCOVERY AS TO WHO IT WAS.

BUT SHOULDN'T THERE BE A DIFFERENT IF INQUIRY - - DIFFERENT INQUIRY? THERE IS SOME CASE LAW THAT SAYS , WHERE THE STATE HAS EITHER NEGLIGENTLY OR WILLFULLY , OKAY , ALLOWED A WITNESS TO DISAPPEAR OR WHATEVER, THEN WHAT THE OPTIONS ARE AVAILABLE TO THE TRIAL COURT , BUT THIS WHOLE CASE YOU KNOW , SEEMS TO BE GOING DOWN A TRACK OF JUST ORDINARY CONFIDENTIALITY OF THE CI, AND JUST FROM WHAT YOU HAVE JUST SAID HERE , THAT MAKES IT APPEAR THIS ISN'T THE ORDINARY CASE , AND SO, BUT , THIS STATEMENT , HOW DID THIS STATEMENT , WAS IT THE LAWYER FOR THE STATE THAT MADE THE STATEMENT DURING THE COURSE OF THE HEARING?

IT WAS THE ATTORNEY THAT MADE THE STATEMENT, AND I AM NOT SURE RIGHT OFFHAND , WHETHER IT WAS MADE IN WRITING OR WHETHER IT WAS MADE ORALLY OR BOTH .

BOTH OF YOU, I THINK, ALLUDE TO IT IN YOUR STATEMENT OF THE FACTS , AS FAR AS YOU KNOW , WHAT HAD OCCURRED , SO

IT IS IN THE STATE'S WRITTEN OPPOSITION , WHICH IS APPENDIX THREE THAT I SUBMITTED WITH MY BRIEF.

OKAY.

EVERYBODY PROCEEDED IN THIS CASE ON IT AS UPTION THAT, IF THE STATE COULD NOT PRODUCE THE CONFIDENTIAL INFORMANT , THE CASE WOULD BE DISMISSED IF THEY WERE REQUIRED TO DO SO. THE STATE HAS MADE NO EFFORT TO EXPLAIN ITS STATEMENT THAT IT CAN'T FIND THE CONFIDENTIAL INFORMANT AND IT DOESN'T KNOW WHO HE IS.

I THOUGHT IT WAS IN THE RECORD THAT THEY DIDN'T KNOW WHO IT WAS. THEY DIDN'T HAVE HIS NAME, AND THEY DIDN'T KNOW WHO IT WAS.

THERE IS A STATEMENT TO THAT EFFECT BUT THEY HAVE NEVER ATTEMPTED TO EXPLAIN THAT, AND WE HAVE NEVER BEEN ABLE TO GET DISCOVERY WITH RESPECT TO THAT. I SUPPOSE THAT, IF THEY WERE TO FULLY EXPLAIN THE CIRCUMSTANCES , WHICH THEY HAVE NOT DID DONE

LET ME ASK THE QUESTION, THERE WAS A LAW ENFORCEMENT THAT DID THE BUY , CORRECT?

YES.

DID YOU HAVE AN OPPORTUNITY TO DEPOSE HIM?

YES.

DID YOU ASK HIM HOW HE CAME INTO CONTACT WITH THIS WITNESS?

NOTHING IN THE RECORD.

SO IT WAS NOT THAT YOU DIDN'T HAVE THE OPPORTUNITY. IT IS THE OPPORTUNITY WAS GIVEN AND YOU DIDN'T TAKE THE OPPORTUNITY TO ASK THE QUESTIONS.

THE STATEMENT WAS THAT THE COMMUNICATIONS WITH THE CONFIDENTIAL INFORMANT WERE CONFIDENTIAL. THEY REFERRED TO HIM AS THE CONFIDENTIAL SOURCE, SO I DON'T KNOW WHAT THE ARRANGEMENT WAS AND NONE OF THAT WAS IN THE RECORD.

SO WE DON'T KNOW WHETHER THEY TOOK THE PERSON THERE OR THE PERSON WAS OUTSIDE THE HOUSE. ALL WE KNOW IS THAT IT WAS CRITICAL OR NECESSARY IN ORDER TO GET UP TO THE PORCH, BUT WE DON'T KNOW SOMEBODY TAKEN WITH THE UNDERCOVER OFFICER OR THE UNDERCOVER OFFICER HAPPENED TO MEET SOMEBODY SITTING IN FRONT OF THE HOUSE AND SAYS I AM LOOKING FOR DRUGS AND THE GUY JUST WALKS HIM UP ON THE FRONT PORCH.

THE RECORD INDICATES THAT THE POLICE USED THE CONFIDENTIAL INFORMANT TO GAIN ACCESS TO THE PORCH WHERE THESE DRUG SALES WERE ALLEGEDLY TAKING PLACE.

BUT IS THERE ANY INDICATION IN THE RECORD THAT THIS IS TRULY A CONFIDENTIAL INFORMANT , IN THE SENSE THAT THAT PERSON GAVE THE POLICE OFFICERS INFORMATION OF ILLEGAL ACTIVITY , OR THAT THEY WERE WORKING THE CI?

WE MOVE TO COMPEL DISCLOSURE OF A CONFIDENTIAL INFORMANT , AND THE STATE CAME BACK AND TOLD US WHAT THE CONFIDENTIAL SOURCE DID. THERE WAS NEVER A CLAIM IN THE TRIAL COURT, THAT HE WAS A PASSERBY , OR JUST A WITNESS , OR A TIPSTER . THEY SAID HE WAS THEIR CONFIDENTIAL SOURCE , AND THEY USE, I THINK IT IS INCREDIBLE TO BELIEVE THAT AN UNDERCOVER POLICE OFFICER WOULD USE SOMEBODY THAT HE DIDN'T KNOW , TO BRING HIM IN CLOSE CONTACT WITH DRUG DEALERS WHO WERE SELLING DRUGS ON A PORCH. THIS HAD TO BE

SOMEBODY WHO WAS ACTING AS AN INTERMEDIARY, SETTING UP THE DEAL.

WHAT IS UNUSUAL ABOUT THAT? DOESN'T THAT KIND OF THING HAPPEN ALL THE TIME, WHEN YOU GO, YOU ARE IN AN AREA YOU KNOW IS INVOLVED IN DRUGS, AND YOU ASK SOMEBODY WHERE CAN I, WHO CAN I SEE ABOUT MY \$5 PACKAGE OR WHATEVER THE TERM MIGHT BE? ISN'T THAT THE KINDS OF THING THAT IS GO ON IN THIS DRUG CULTURE?

IT IS VERY CLEAR TO ME THAT, IF PACHECKO COULD HAVE GONE UP TO THE PERSON WHO WAS ALLEGEDLY SELLING THESE DRUGS, WITHOUT THE ASSISTANCE OF SOMEBODY TO INTRODUCE HIM, HE WOULD HAVE DONE. THAT WHAT IS THE POINT OF INVOLVING ANOTHER PERSON? THE REASON ANOTHER PERSON WOULD BE INVOLVED IS BECAUSE THAT PERSON KNOWS THE PARTIES, IS IN A POSITION TO VOUCH, IN

THERE IS TWO SEPARATE CASES HERE, AS TO THE SECOND CASE, THE, EVEN ASSUMING YOU ARE CORRECT AS TO THE FIRST CASE, THE SECOND CASE HAS NO BASIS FOR BEING DISMISSED. THE CONFIDENTIAL INFORMANT WASN'T PART, ASSUMING HE IS A CONFIDENTIAL INFORMANT, WASN'T PART OF THE SECOND CASE.

I DON'T AGREE WITH THAT, JUDGE. LET ME EXPLAIN WHY. IF THE PERSON WHO SOLD DRUGS TO OFFICER PACHECKO WAS IN THE HOUSE AND THAT SOMEBODY WAS ALSO IN THE HOW IS THE NEXT DAY WHEN THE SEARCH WAS EXECUTED AND THE GUNS AND DRUGS WERE FOUND, THE GUN UNDER THE BED AND THE DRUGS IN THE PURSE OF THE HOME OWNER, THEN THE PERSON WHO WAS PRESENT THE DAY BEFORE IS MUCH STRONGER THAN THE INFERENCE THAT SIMMONS WAS. ON THE OTHER HAND, IF THE STATE IS GOING TO PROVE IN THE POSSESSION CASE, THE SECOND CASE - - .

YOUR CLIENT WOULD BE ABLE TO SAY IF THERE WERE OTHER PEOPLE KNELT HOUSE AND WOULD KNOW THAT INFORMATION. WE ARE REALLY TALKING ABOUT HERE, ASSUMING THIS PERSON IS A CONFIDENTIAL INFORMANT, HOW A DEFENDANT IS PREJUDICED BY MAINTAINING THE IDENTITY, AND I THINK YOU ARE GOING, ON THE SECOND CASE, I THINK THAT IS A PRETTY LONG STRETCH.

JUDGE, LET ME ASK YOU A QUESTION, DO YOU THINK THE STATE IS GOING TO PROVE IN THE SECOND CASE, THAT THE DEFENDANT IN THE SECOND CASE SOLD DRUGS ON THE PORCH OF THE VERY SAME HOW IS THE DAY BEFORE? I THINK THEY ARE. IF YOU PRECLUDE THEM FROM DOING THAT, THEN THE ONLY PROBLEM IS THAT IF WE COULD PROVE THAT IT WAS SOMEBODY ELSE, THEN WE WOULD HAVE THE BENEFIT OF THE INFERENCE THAT FLOWS FROM THAT.

ARE YOU CLAIMING THAT YOU HAD A RIGHT TO AN IN CAMERA INSPECTION ESSENTIALLY, BITE JUDGE.

YES. THAT IS EXACTLY RIGHT.

EXAMINATION AND SO ON, AND WE GET BACK TO THE ISSUE OF IF THE JUDGE SAYS YOU HAVE ALLEGED MISIDENTIFICATION, AND I AM GOING TO HAVE AN IN CAMERA INTERVIEW TO SEE IF THIS HELPS YOUR CASE, AND THE STATE SAYS, JUDGE, WE CAN'T PRODUCE THE CI BECAUSE WE DON'T KNOW WHO IT IS, THAT IS WHAT, IT SEEMS LIKE WHAT WE HAVE IN THE RECORD. DOES THE JUDGE NOW HAVE TO HAVE AN EVIDENTIARY HEARING, TO DETERMINE WHETHER THE STATE REALLY DOESN'T KNOW, OR IS THE LAW THAT, IF YOU ARE GOING TO USE A CI, YOU BETTER KNOW WHO IT IS, BECAUSE IF YOU CAN'T PRODUCE HIM, THEN THE CASE IS GOING TO BE DISMISSED?

IT IS MY VIEW THAT THE JUDGE DID NOT ORDER AN IN CAMERA INSPECTION HERE, BECAUSE THE STATE TOLD HIM THAT THEY COULDN'T PRODUCE THE CONFIDENTIAL INFORMANT. IF THE JUDGE SAID I WANT YOU TO PRODUCE HIM AND THEY SAID THEY CAN'T, AND WE HAD AN OPPORTUNITY TO EXPLORE THE CIRCUMSTANCES AND FIND OUT WHY THEY CAN'T, I AM NOT AWARE OF ANY

CASE THAT WOULD SAY THAT THEY HAVE LIBERTY TO USE A CONFIDENTIAL INFORMANT , THAT THE CONFIDENTIAL INFORMANT MAY HAVE EXCULPATORY TESTIMONY. THEY DON'T KEEP TRACK OF HIM. THEY LOSE HIM. THEY CAN'T FIND HIM. BUT THEY CAN TESTIFY AS TO WHAT HE DID .

THE INTERMEDIARY STEP , HASN'T I T ALWAYS BEEN ALLOWING THE JUDGE TO HAVE THIS IN CAMERA HEARING?

YES.

AND SO THE JUDGE CAN , SORT OF IN A SAFE SETTING, YOU KNOW, FIND OUT ABOUT ALL OF THIS AND MAKE A RULING ON IT THEN , AS TO WHETHER IT SFIRB OR FOUL.

YES.

AND FISH OR FOUL.

YES. AND SO WAS THERE DISCUSSION OF HAVING AN IN CAMERA HEARING HERE AND YOU KNOW , IN OTHER WORDS, WHAT OCCURRED ABOUT THAT, IF ANYTHING?

THE RECORD IS THAT THE TRIAL COURT RULED THAT , SINCE THEY DIDN'T KNOW WHEREHE WAS, THERE WAS NO POINT IN ORDERING AN IN CAMERA HEARING , AND THE FIRST CASE WOULD BE DISMISSED. THEN THE JUDGE DISMISSED THE SECOND CASE.

SO LET ME , WHERE DID THEJUDGE DO THAT? THAT IS I AM NOT CERTAIN THAT I SAW THAT . THAT I S DID THAT ACTUALLY HAPPEN? DID THE JUDGE, IN A HEARING OR IN AN ORDER, SAY THAT I WOULD HAVE AN IN CAMERA HEARING , BUT SINCE THE STATE SAYS THAT THIS, THEN , THAT OBHAVE IATES THAT STEP, AND I A M OBVIATES THAT STEP , AND I AM GOING TO RIGHT TO THE DISMISSAL?

THE STATE IS APPENDIX FOUR AND THERE IS A TRANSCRIPT WHICH IS APPENDIX SIX , AND IN THE ORDER AND IN THE TRANSCRIPT , THE JUDGE INDICATES THAT HE IS GOING TO GO DIRECTLY FROM THE CONCLUSION THAT WE NEED THE CONFIDENTIAL INFORMANT , TO DISMISSAL ON THE GROUNDS THAT THE STATE CAN'T PRODUCE HIM , WITHOUT EXAMINING IN ANY WAY , THE STATE'S ASSERTION THAT THEY CAN'T PRODUCE HIM.

SO WHERE IS YOUR CASE LAW IN SUPPORT THAT THE STATE, ONE , HAS AN OBLIGATION TO DO SO IN VIOLATION OF THAT OBLIGATION, AUTOMATICALLY RESULTS IN DISMISSAL OF THE INFORMATION AND INDICTMENT?

I DON'T HAVE ANY CASE LAW THAT SUPPORTS AUTOMATICALLY , BECAUSE THE STATE NEVERASKED FOR A HEARING I N THE TRIAL COURT , AS TO WHY IT COULD NOT PRODUCE THE CONFIDENTIAL INFORMANT. THE STATE NEVER ARGUED IN THE TRIAL COURT THAT THIS SHOULDN'T BE DISMISSEDBECAUSE THIS CONFIDENTIAL INFORMANT WAS MERELY A TIPSTER OR A WITNESS. IN FACT THEY NEVER CLAIMED THAT AT ALL. THEY SAID HE WAS A CONFIDENTIAL SOURCE , AND THE STATE MORE OR LESS ACQUIESCED IN THE FACT THAT, IF THEY COULDN'T PRODUCE HIM, THE FIRST CASE AT LEAST WOULD BE DISMISSED.

EVEN WHEN YOU TALK ABOUT THE CONFIDENTIAL SOURCE , WHEN YOU LOOK AT THE TRANSCRIPT THAT YOU REFERRED TO A S EXHIBIT 6 , IT SAYS THE PROSECUTOR IS TALKING TO THE JUDGE, AND HE SAYS, WELL , JUDGE , AGAIN , MY UNDERSTANDING OF THE FACTSWAS THAT ALL , THEY WERE ALREADY GOING TO THE PORCH TO MAKE THE TRANSACTION. THEY NEEDED A FACE TO GET THEM UP TO THE PORCH , OKAY , FOR THE GUY TO OPEN THE DOOR. THIS STILL SEEMS TO ME , LIKE UNDER THOSE FACTS THAT THEY ARE ALLEGING HERE IN THIS TRANSCRIPT, HIS PARTICIPATION WAS REALLY MINIMAL. IT WAS SOMEBODY THAT EVIDENTLY THIS PERSON KNEW , AND SO HE LET THEM ON TO THEPORCH.

WELL , THAT BRINGS ME TO THE CONFLICT WITH McCRAE . BECAUSE McCRAE SAYS THAT , I F THE DEFENSE IS MISIDENTIFICATION , AND IF THE DEFENSE IS SUPPORTED BY A STATEMENT UNDER OATH THAT I WAS NOT THERE. I DIDN'T SELL DRUGS , WHICH IS THIS CASE , AND I F THE CONFIDENTIAL INFORMANT WAS SO SITUATED THAT HE KNOWS WHO THE BUYER AND THE SELLER WERE , THEN THE STATE HAS TO PRODUCE THE CONFIDENTIAL INFORMANT , AND IT DOESN'T MATTER

THE PROBLEM WE HAVE IN THIS CASE IS THAT THE STATE HAS SAID WE DON'T KNOW WHO THE CONFIDENTIAL INFORMANT IS, SO WE ARE NOT REALLY WITHIN McCRAE . IT SEEMS TO ME THAT, IF WE ACCEPT YOUR PROPOSITION , WE WOULD HAVE TO RULE THAT THE POLICE CANNOT USE ANONYMOUS TIPS OR ANONYMOUS INFORMANTS. ISN'T THAT WHAT YOU ARE SAYING? WE WOULD ALWAYS, THE STATE WOULD ALWAYS HAVE TO KNOW THE IDENTITY OF THE CONFIDENTIAL INFORMANT , AND HASN'T THE U.S. SUPREME COURT SAID THAT , CONSTITUTIONALLY, YOU CAN USE ANONYMOUS TIPS, AS LONG AS THE TIP IS VERY PARTICULAR I N WHAT THEY ARE ASSERTING THE IDENTITY OF THE SUSPECT IS.

THE STATE , IN THE CIRCUIT COURT , CLAIMED THE RIGHT TO NOT DISCLOSE THIS CONFIDENTIAL INFORMANT , BECAUSE HE WAS A CONFIDENTIAL INFORMANT . A CONFIDENTIAL INFORMANT IS A PERSON WHO HAS A CONFIDENTIAL RELATIONSHIP WITH THE LAW ENFORCEMENT PEOPLE, PURSUANT TO WHICH HE GIVES THEM INFORMATION AND THEY AGREE EXPRESSLY O R IMPLIEDLY , NOT T O DISCLOSE THAT HE IS THE PERSON WHO DAVE THE INFORMATION , SO IT IS LIKE A PRIVILEGE.

YOU ARE SAYING THAT THE STATE DID NOT ALLEGE THAT THEY DIDN'T KNOW THE IDENTITY.

NO. I AM SAYING , I AM SAYING THAT THE STATE HAS COMPLETELY SHIFTED ITS POSITION FROM SAYING THAT THIS WAS A CONFIDENTIAL SOURCE IN THE TRIAL COURT, TO NOW SAYING IT WAS A TIPS TERROR PASSERBY . A TIPSTER OR A PASSERBY. THERE IS NO PRIVILEGE NOT T O DISCLOSE A PASSERBY .

I FEEL LIKE, AGAIN , THAT WE ARE ON TWO DIFFERENT LEVELS HERE, AND I KNOW YOU HAVE YOUR CONFLICT ISSUE , WHICH IS ASSUMING AS YOU JUST SAID , THERE IS MISIDENTIFICATION AND HE IS A WITNESS, THAT THERE SHOULD BE DISCLOSURE , BUT AT THE FIRST LEVEL WHAT YOU ARE TELL ME GO AND WHAT YOUR RELIEF WOULD BE IS THAT THERE BE AN I N CAMERA INSPECTION, NOT DISCLOSURE BUT AN I N CAMERA INSPECTION , CORRECT?

RIGHT.

BUT THEN WHAT HAPPENS IS, WHEN THE JUDGE WAS GOING TO ORDER AN I N CAMERA INSPECTION BUT THE STATE SAYS WE CAN'T PRODUCE HIM ANYWAY, WHICH IS SORT OF LIKE ONE OF THESE CASES WHERE YOU HAVE A DISCOVERY VIOLATION. YOU TRY TO MOVE TO COMPEL DISCOVERY. THEY ARE OBJECTING , AND THEN WHEN YOU FINALLY GET THE ORDER , THEY GO W E DIDN'T HAVE ANYTHING ANYWAY. YOU CAN'T, THAT IS A DIFFERENT ISSUE THAT IS WHETHER THE STATE IN BAD FAITH , USED SOMEBODY THAT THEY, THEN , JUST LET GO AND THEREFORE LET GO OF CRITICAL EVIDENCE AND WOULD ARGUE ALLOW YOU TO ARGUE TO THE JURY THAT THEY HAD A WITNESS THAT THEY COULDN'T PRODUCE, BUT TO ME THAT IS A DIFFERENT CASE THAN A CASE INVOLVING A KNOWN CONFIDENTIAL INFORMANT TO THE STATE THAT NEEDS TO BE DISCLOSED, SO HOW DO YOU DISTINGUISH THOSE TWO? IT SEEMS LIKE WE ARE AT TWO DIFFERENT LAYERS HERE. THAT IS THAT THE JUDGE WOULD HAVE HAD THE EVIDENTIARY HEARING OR I N CAMERA HEARING, BUT FOR THE STATE'S REPRESENTATION THAT THEY DID NOT IN FACT , KNOW WHO THE CONFIDENTIAL INFORMANT WAS

> IT IS M Y PERCEPTION THAT , IF THE STATE WERE USING A FEDERAL AGENT WHO WAS LOANED

TO THE M O N CONDITION THAT THEY NOT DISCLOSE HIM .

WHERE IS THAT EVEN COMING FROM?

IT IS A HYPOTHESIS . A SUGGESTION. BECAUSE I DO NOT BELIEVE THE STATE'S ASSERTION THAT THEY DON'T KNOW WHO THIS IS!

SO, THEN , THERE FOR WE HAVE SOMETHING AKIN TO BADFAITH AND, PERHAPS, A RICHARDSON INQUIRY , BUT WE DON'T HAVE AN ISSUE OF YOU HAVE GOT TO PRODUCE HIM FORAN IN CAMERA INSPECTION, IF THEY DON'T KNOW WHO IT IS. NOW, IF THEY IN BAD FAITH , MAKE SURE THEY DON'T KNOW WHO IT IS , THEN THAT SEEMS TO ME AS A TOTALLY DIFFERENT ISSUE THAT, REALLY , WE ARENOT EQUIPPED TO DECIDE IN THIS CASE , UNDER THE FACTUAL POSTURE THAT EXISTS.

WELL , JUDGE, LET ME ASK YOU ANOTHER QUESTION , IF WE CAN FIND HIM , CAN WE CALL HIM ? ARE WE ENTITLED TO CONDUCT DISCOVERY TO FIND OUT WHO HE IS?

JUSTICE CANTERO WILL ANSWER THAT QUESTION.

LET ME ASK YOU A QUESTION. IS THERE ANY ASSERTION BY A PUBLIC DEFENDER BELOW , NOWTHAT WE ARE ASKING EACH OTHER QUESTIONS , THAT THE STATE ATTORNEY WAS LYING AND THE PUBLIC DEFENDER DEMANDED AN EVIDENTIARY , HOLD ON , DEMANDED AN EVIDENTIARY HEARING , IN WHICH OFFICER PACHECKO COULD BE EXAMINED UNDER OATH, ABOUT WHETHER HE KNEW THE IDENTITY O F THE CONFIDENTIAL INFORMANT?

NO, BECAUSE WHEN THE STATE SAID WE DON'T KNOW WHO THE CONFIDENTIAL , WHERE THE CONFIDENTIAL INFORMANT IS AND WE CAN'T PRODUCE HIM FOR AN IN CAMERA EXAMINATION , EVERYBODY UNDERSTOOD THAT,IF THE COURT CONCLUDED THAT HIS PRO DUTION WAS PRO DUTION PRODUCTION WAS NECESSARY, THAT WOULD NOT AID THEM IN PRODUCTION AND THIS NEXT STEP WOULD FOLLOW.

DOESN'T THAT AID THEM IN THE CASE THAT AT LEAST IF THE THE PUBLIC DEFENDER CLAIMS THAT THERE IS SOME BAD FAITH, DOESN'T BELIEVE THE STATE'S ASSERTION , SHOULDN'T THERE AT LEAST BEFORE THE CASE IS DISMISSED , OLD, THERE BE A N EVIDENTIARY HEARING IN WHICH AN OFFICER CAN TESTIFY, NO , I DON'T KNOW THE CONFIDENTIAL INFORMANT , AND WHICH MR . HEIMLICH CAN DO A VERY EFFECTIVE CROSS-EXAMINATIONOF THE OFFICER, SAYING I DON'T BELIEVE YOU. ISN'T IT TRUE THAT IT IS REALLY AN FBI AGENT? THEN WE AT LEAST NEED THAT IN THIS CASE?

I THINK THE STATE HAS TO REQUEST THAT , AND I THINK IT IS TOO LATE FOR THE STATE TO REQUEST THAT.

WHERE IS THERE ANY CLAIMIN THE RECORD THAT THE DEFENDER DID NOT BELIEVE THE STATE? WHY SHOULD THE STATE HAVE TO REQUEST IT, IF THERE IS NO ASSERTION THAT THE STATE IS LYING?

WHAT I AM SAYING IS THEREIS NO ASSERTION THAT THE STATE WAS LYING, BECAUSE EVERYBODY ASSUMED THAT THERE WOULD BE A SMITH, IF

WHERE ARE ALL O F THESE ASSUMPTIONS COMING FROM?

FROM THE RECORD.

READ ME THE RECORD THAT SAYS WE ASSUME , NOW , THAT. AND PERHAPS THE MARSHAL HAS TURNED ON THE LIGHT FOR YOUR REBUTTAL TIME. SO IF , WHAT YOU MIGHT DO IS PAUSE AND

SAVE THAT TIME AND FIND THAT, YOU KNOW, WHEN YOU COME BACK UP. THANK YOU. GOOD MORNING.

GOOD MORNING. IF IT PLEASE THE COURT, BARBARA ZAPPI ON BEHALF OF THE STATE. EXACTLY AS THE COURT HAS BEEN ASKING QUESTIONS, NUMBER ONE, THIS CASE IS NOT IN DIRECT CONFLICT WITH McCRAE, BECAUSE IN McCRAE, THAT DEFENDANT ALLEGED THAT THE INFORMANT KNEW HIM. WE HAVE NO SUCH ALLEGATION HERE.

WELL, BEFORE YOU GET TO McCRAE, OKAY, WE DO HAVE THIS STATEMENT BY THE ASSISTANT STATE ATTORNEY IN THE RECORD HERE, THAT I DON'T KNOW WHO IT WAS? THE STATE DOESN'T KNOW WHO IT WAS, THE IDENTITY OF WHO IT WAS, AND HAVE NO WAY OF LOCATING THIS PERSON. OKAY. NOW, ORDINARILY, AS WE HAVE BEEN DISCUSSING, THE TRIAL COURT COULD HAVE A NICE, SAVE, IN CAMERA EXAMINATION AND FIND OUT WHAT THE TRUE SCOOP IS, AND IF IT TURNS OUT THAT IT WAS SOMEBODY THAT THE POLICE OFFICER FOUND ON THE STREET AND IN THE NEIGHBORHOOD AND JUST SAID WOULD YOU DO ME A FAVOR, OR IF IT WAS THE FBI INFORMANT IN A RED SUIT, IF ALL OF THAT COULD BE DETERMINED THERE, IT APPEARS THAT THE STATE IS SAYING, WELL, THERE IS NO WAY THERE CAN BE AN IN CAMERA HEARING HERE, BECAUSE WE DON'T EVEN KNOW WHO THIS WAS, AND MUCH LESS KNOW YOU KNOW, WHERE THAT PERSON IS. NOW, DOESN'T THAT ISSUE HAVE TO BE RESOLVED BEFORE WE CAN GO FURTHER IN THIS CASE?

ABSOLUTELY. AT THIS HEARING, THE ONLY PEOPLE SPEAKING AT THE HEARING, WERE THE, WAS THE DEFENSE ATTORNEY AND THE PROSECUTOR, AND NEITHER ONE ARE WITNESSES. THEY COULDN'T TESTIFY TO WHAT ACTUALLY HAPPENED. THE POLICE OFFICER, OFFICER PACHECO WAS NEVER BROUGHT IN TO TESTIFY AT THIS HEARING. THE DEFENDANT NEVER DEPOSED HIM, AFTER HE FOUND OUT, YOU KNOW, WHO THE UNDERCOVER OFFICER WAS. THEY KNOW HIS NAME.

SO THE CASE GETS DISMISSED, AND IT GOES UP TO THE THIRD DISTRICT. DO YOU MAKE TWO DIFFERENT ARGUMENTS? ONE IS THAT CONFIDENTIAL INFORMANT WOULD NOT NEED TO BE DISCLOSED, BECAUSE IT, THEY DON'T MEET THE CRITERIA OF THE CASE LAW, REQUIRING THAT IT IS NECESSARY FOR THE DEFENSE, AND, TWO, EVEN IF THE FACTS WOULD BE SUCH THAT DISCLOSURE WOULD BE APPROPRIATE, THERE IS AN IMPOSSIBILITY, BECAUSE WE DON'T KNOW WHO HE IS OR I MEAN, YOU COULD SAY HE HAD AN ACCIDENT, HAS HAD, OR HE IS DEAD. I MEAN, AND WE CAN'T DISCLOSE HIM, AND SO THEREFORE DISMISSAL IS TOO HARSH, BECAUSE YOU ARE ASKING US TO PERFORM A LEGAL IMPOSSIBILITY. WERE THOSE TWO DIFFERENT, TO ME THEY ARE, FIRST OF ALL DO YOU AGREE THOSE ARE TWO DIFFERENT ARGUMENTS?

YES.

OKAY. WERE THOSE TWO DIFFERENT ARGUMENTS MADE TO THE THIRD DISTRICT BY THE STATE?

YES. IN OTHER WORDS, NUMBER ONE, WE DON'T BELIEVE THIS WAS EVEN A CONFIDENTIAL INFORMANT, PROBABLY MIGHT HAVE BEEN A TIPSTER. WE DON'T KNOW. THERE, NO FACTS ARE DEVELOPED IN THIS RECORD, AND IN THAT CASE, YOU WOULD NOT NEED TO DISCLOSE YOUR OF WHO IT WAS, BECAUSE NUMBER ONE, THE SALE WAS MADE TO THE UNDERCOVER OFFICER, NOT TO THIS OTHER PERSON, IF THEY IN FACT WERE

BUT ISN'T THAT IN FACT WHY YOU HAVE AN IN CAMERA HEARING, TO GET IT ALL OUT. LET'S NOT ALL SPECULATE ABOUT WHAT IS GOING ON AND WHETHER THAT PERSON WAS STANDING THERE AT THE TIME OR WHETHER THAT PERSON WAS THE FBI AGENT IN THE RED SUIT OR JUST THAT SOMEBODY ON THE NEIGHBORHOOD PLAYGROUND, YOU KNOW?

THE IN CAMERA HEARING WOULD BE WITH THE INFORMANT, THAT'S MY UNDERSTANDING.

RIGHT.

AND THEN , WHICH WE DON'T HAVE IN THIS CASE , BUT YOU COULD AT LEAST HAVE A HEARING WHERE THE OFFICER IS BROUGHT IN. HOW DID YOU MEET THIS PERSON? IS IT SOMEONE THAT YOU KNEW , ILLEGAL DRUG ACTIVITY?

DID THE STATE, AND I GUESS IT IS A QUESTION OF WHO SHOULD HAVE DONE IT , BUT WHEN THE JUDGE I S ANNOUNCING WE ARE GOING TO DISMISS IT , THE STATE DIDN'T SAY , BUT , JUDGE , SINCE WE DON'T EVEN HAVE THE ABILITY TO FIND OUT WHO IT IS , DISMISSAL ISN'T APPROPRIATE IN THIS CASE. THIS CASE DOESN'T FALL INTO THE SAME LINE OF CASES INVOLVING CONFIDENTIAL INFORMANTS THAT ARE KNOWN T O US BUT WHOSE IDENTITY WE DON'T WANT TO DISCLOSE. I GUESS I AM HAVING A HARD TIME, BECAUSE NOW WE ARE SAYING NOT ONLY WASN'T HE A CONFIDENTIAL INFORMANT BECAUSE HE DIDN'T MEET THE DEFINITION OF A CONFIDENTIAL INFORMANT , BUT HE IS ANONYMOUS TIPSTER .

MAYBE.

MAYBE. BUT THE CASE THE WAY IT WAS ARGUED IN FRONT OF THE THIRDDISTRICT, THEY RARELY CERTIFY CONFLICT, THEY OBVIOUSLY TREATED THIS PERSON AS A CONFIDENTIAL INFORMANT THAT PRESUMABLY COULD HAVE BEEN PRODUCED , BECAUSE THEY, THAT IS WHY THEY CERTIFIED CONFLICT WITH McCRAE.

THEIR OPINION DOES ALLUDE TO THAT.

WHY DO WE HAVE ANY MAYBES AT ALL? ISN'T THE STATE RESPONSIBLE FOR KNOWING WHO THIS PERSON IS AND WHAT ROLE THIS PERSON PLAYED IN THIS TRANSACTION , AND WITHOUT DISCLOSING THE PERSON'S IDENTITY , COMMUNICATING THAT TO THE TRIAL COURT JUDGE, THAT IS NOT SAY WE DON'T KNOW WHO HE IS OR WHAT HE IS OR WHETHER HE WAS A BYSTANDER WALKINGBY ON THE SIDEWALK OR THE FBI AGENT IN THE RED SUIT. DOESN'T THE STATE HAVE THE OBLIGATION TO TELL THE TRIAL COURT JUDGE , JUDGE , THIS IS A CONFIDENTIAL INFORMANT THAT WE HAVE ON RETAINER OR WHATEVER , AND WE HAVE USED HIM SUCCESSFULLY IN THIS NEIGHBORHOOD , YOU KNOW , FOR INSTANCE, FOR YEARS , AND THIS IS OUR BIGGEST WEAPON AGAINST DRUG CRIME , AND THAT NEIGHBORHOOD, AND I F WE DISCLOSE HIM , YOU KNOW , WE WILL LOSE THAT VERY VALUABLE RESOURCE FOR THE PUBLIC GOOD. DOESN'T THE STATE HAVE AN OBLIGATION TO TELL THE JUDGE , SINCE THIS IS , THE STATE'S PERSON , IF YOU KNOW , IN SOME WAY , OR FOR THE STATE T O SAY , JUDGE , ALL THIS WAS , WAS SOMEBODY SHOOTING HOOPS AT THE CORNER , THAT THE POLICE OFFICER BROUGHT OVER AND ASKED IF HE WOULD GO UP ON THE PORCH FIRST , OR SOMETHING , BUT DOESN'T THE STATE HAVE AN OBLIGATION TO TELL THE JUDGE, SO THAT WE ARE NOT SITTING HERE NOW , I N THE FLORIDA SUPREME COURT , HOWEVER MANY MONTHS OR YEARS LATER , AND WONDERING ABOUT THIS?

MAKING PRESUMPTION UPON PRESUMPTION, AS THE COURTS HAVE DONE .

SURE THING.

NUMBER ONE , THE BURDEN IS ON THE DEFENDANT TO ALLEGE WHY AN EXCEPTION TO ONE OF THE REGULAR EXCEPTIONS

WHY SHOULD IT BE AN EXCEPTION , IF THE STATE HASN'T CLEARLY DISCLOSED TO THE TRIAL COURT JUDGE , THAT THIS IS A CONFIDENTIAL INFORMANT ? THIS IS, IF IT IS JUST A WITNESS , DOESN'T HE HAVE A RIGHT TO HAVE THE STATE JUST THROUGH DISCOVERY, TELL HIM ABOUT ANY WITNESSES THAT THEY KNOW TO THE TRANSACTION?

WELL , THAT

WE DON'T GET TO THE EXCEPTION BEFORE WE GET THE PRIVILEGE , CONFIDENTIAL INFORMANT

PRIVILEGE INVOKED , SO WE DON'T HAVE IT INVOKED HERE.

AND ALL THE DEFENDANT HAS ALLEGED IN THEIR MOTION TO DISCLOSE, IS THAT THIS PERSON WAS A WITNESS TO WHAT HAPPENED.

WHY, DON'T THEY HAVE THE RIGHT IN DISCOVERY , IF THE STATE KNOWS ABOUT A WITNESS , THAT THE STATE TELL THEM WHO THE WITNESSES ARE , AND THEN THE ONLY WAY WE GET TO WHERE WE ARE NOW IF I UNDERSTAND IT, IS THAT, FOR THE STATE TO SAY, NO , WE ARE NOT GOING TO DISCLOSE THIS WITNESS , BECAUSE WE CLAIM THAT THAT WITNESS IS A CONFIDENTIAL INFORMANT. ISN'T THAT THE WAY IT WORKS?

BUT THE STATE HAS NEVER CLAIMED HE WAS A CONFIDENTIAL INFORMANT . THE DEFENDANT CLAIMED THIS PERSON , THAT THEY CHARACTERIZE HIM AS A CONFIDENTIAL INFORMANT , WAS A WITNESS.

WAS THERE ANY DISCOVERY IN THIS CASE?

THERE WAS NO DISCOVERY IN THIS CASE, AND THE DEFENDANT KNEW THE NAME OF THE UNDERCOVER OFFICER , OFFICER PACHECKO.

SO THE STATE IS NOT CLAIMING IN THIS CASE , THAT THEY HAVE NO RESPONSIBILITY TO DISCLOSE THE IDENTITY OR LOCATION OF THIS PERSON , BECAUSE THAT PERSON IS A CONFIDENTIAL INFORMANT. THAT IS NOT THE STATE'S POSITION.

NOT REALLY.

NOT REALLY .

WAIT A MINUTE. IN THE RESPONSE TO THE MOTION TO COMPEL , THE STATE SAYS, IN THE STATEMENT OF FACTS , IN ITS OCTOBER 29 , 2002 RESPONSE, IT SAYS, ALSO PRESENT DURING THIS TRANSACTION , WAS A CONFIDENTIAL SOURCE. THE AUTHORITIES UTILIZE THE CONFIDENTIAL SOURCE FOR THE SOLE PURPOSE OF GAINING ACCESS TO THE FRONT DOOR OF THE RESIDENCE. AND THE STATE HAD NO ADDITIONAL INFORMATION REGARDING THE WHEREABOUTS OF THE CONFIDENTIAL SOURCE.

NOT EXACTLY. WHICH DOESN'T REALLY SAY THAT HE WAS OR SHE , WAS AN INFORMANT , PER SE, BUT A SOURCE THAT THEY KNEW.

THEY REFER TO CONFIDENTIAL. WHAT KIND OF , ISN'T THAT WHAT THEY MEAN WHEN THEY SAID ALL OF THIS? DIDN'T THAT HAPPEN AGAIN AT THE HEARING ON THE MOTION TO DISCLOSE THE IDENTITY? DIDN'T THEY TREAT THIS AS A CONFIDENTIAL INFORMANT?

THEY REALLY DID.

YEAH. SO THAT IS WHAT WE ARE STUCK WITH.

THEY REALLY DID . THAT IS RIGHT. THAT IS WHAT WE ARE STUCK WITH. BUT THE CASE LAW SAYS, WHEN YOU HAVE A SALE OR A BUY OR A SALE THAT IS NOT MADE TO THE SOURCE BUT TO THE OFFICER, IT IS NOT NECESSARY TO DISCLOSE THE SOURCE.

NOW WE ARE DEALING WITH WHAT WOULD BE , IF THE FACTS WERE AS WE NOW PORTRAY THEM , THE CONFLICT ISSUE, WHICH IS ASSUMING THIS PERSON IS A CONFIDENTIAL INFORMANT , DID YOU HAVE TO DISCLOSE HIS EXISTENCE OR HER EXISTENCE .

EXACTLY.

SO , AND WHY IS IT THAT YOU YOU DON'T SEE THAT McCRAE IS , WAS WHAT IS THE DIFFERENCE? THERE IS MISIDENTIFICATION . THERE IS NOBODY ELSE ON THE PORCH THAT IS A WITNESS TO THE TRANSACTION, OTHER THAN THE UNDERCOVER POLICE OFFICER , AND THEREFORE THIS PERSON COULD BE A WITNESS TO SAY WAS NOT IN FACT THIS DEFENDANT.IT WOULD BE A NEW, SOMEBODY THAT IS OTHER THAN THEPOLICE OFFICER. WHY ISN'T THAT SOMETHING THAT THE DEFENSE OUGHT TO HAVE AN OPPORTUNITY OR AT LEAST THE JUDGE OUGHT TO BE ABLE TO INQUIRE INTO THAT ? OBVIOUSLY IF , THERE COULDAND LOT OF F'S , BUT WHY, THAT IS ALL THAT A LOT OF IF'S, BUT THAT IS ALL THAT IS BEING ASKED FOR AT THIS TIME IS THE RIGHT TO HAVE THE JUDGE DETERMINE THIS ISSUE IN CAMERA, AND THAT IS WHERE THE CONFLICT IS , IF WE GET PAST THE OTHER ISSUES ASTO WHAT THE STATUS OF THIS PERSON WAS OR WASN'T.

WELL, IN McCRAE , THEY KNEW WHO , THEIR SOURCE OR INFORMANT WAS , AND IT WAS SENT BACK FOR AN IN CAMERA. IT WAS NOT DISMISSED. WHEREAS HERE, IT WAS DISMISSED .

SO THE JUDGE , NOW , THAT IS, THE ISSUE MAY BE THAT THE JUDGE , I DIDN'T THINK ANYONE WAS SAYING THAT THE JUDGE'S DISMISSAL SHOULD BE UPHELD. I THOUGHT THAT THE ISSUE OF , AT THE VERY BEST FOR THEDEFENDANT , WOULD BE TO GO BACK FOR AN EVIDENTIARY HEARING . I DIDN'T THINK WE WERE TALKING ABOUT DISMISSAL AS THE REMEDY .

OKAY.

I MEAN, BECAUSE TO ME, I MEAN , JUST FROM MY POINT OF VIEW, IF THERE I S REALLY AN IMPOSSIBILITY TO PRODUCE THE PERSON , THEN THE ISSUE HASTO COME BACK T O ISSUES OF BAD FAITH ON THE PART OF THESTATE , WHICH ARE NOT PRESENT IN THIS RECORD.

NO. ABSOLUTELY NO

DO YOU AGREE WITH THAT? BUT YOU AGREE WITH THAT, THAT THE DISMISSAL WOULD NOT BE A PROPER REMEDY , UNLESS THAT THE STATE IS A DEMONSTRATION THAT THE STATE HAS ACTED I N BAD FAITH?

YES. ABSOLUTELY I WOULD AGREE WITH THAT , AND IN ITSRESPONSE, THE STATE DID CITE TO A CASE OF STATE V SMITH IN FOOTNOTE ONE , I BELIEVE , SPEAKING TO THE FACT THAT DISMISSAL IS IMPROPER , BUT YOU COULD PRECLUDE ANY TESTIMONY O R EVIDENCE AT THE TRIAL. HERE THERE WAS N O TRIAL.

IT DIDN'T SEEM LIKE THE STATE AT THE HEARING , WHEN THE JUDGE WAS SAYING HE WASGOING TO DISMISS IT , IT WAS , WELL , JUDGE , WAIT , DON'T DO THAT. AT LEAST DO THIS . I MEAN, IN TERMS OF THE STATE, YOU KNOW , IS MR. HEIMLICH CORRECT THAT IT WAS REALLY MORE OF , LISTEN , WE WANT THIS , THE IDENTITY OF THE SOURCE PROTECTED SO MUCH , THAT WE DON'T EVEN WANT TO DISCLOSE IT IN CAMERA. WE ARE READY TO STAY IN DISMISSAL RATHER THAN TO HAVE AN IN CAMERA INSPECTION. WAS THAT NOT THE ADMISSION OF THE STATE?

THE STATE , I WOULD DISAGREE, BECAUSE THE STATE SAID THEY DIDN'T KNOW WHO THIS WAS, SO THEY COULDN'T, THEY WEREN'T PROTECTING THE IDENTITY. THEY DIDN'T KNOW WHO THE PERSON WAS . THAT WAS THEIR WHOLE POSITION ALL ALONG. WE DON'T HAVE THIS PERSON'S NAME. WE DON'T KNOW THEIR WHEREABOUTS.

HOW CAN YOU HAVE ACONFIDENTIAL INFORMANT AND NOT KNOW WHO IT IS?

THAT, IN THE TYPE OF DRUG SCENARIO, THEY PROBABLY COME AND GO DAILY , YOU KNOW . PERSONALLY I AM NOT FAMILIAR WITH THAT SCENARIO , BUT YOUKNOW , YOU READ ENOUGH OF THESE CASES AND YOU SEE - -

ISN'T, REALLY, THE SITUATION HERE , IS THAT THIS CASE SHOULD GO BACK TO THE TRIAL COURT

AND DEVELOP THE RECORD , BEFORE THE ISSUES OF ALL OF THESE ISSUES WHICH ARE DEPENDENT UPON WHAT IS IN A DEVELOPED RECORD, ARE RESOLVED?

EXACTLY. WE HAVE NO , REALLY NO RECORD. THE ONLY RECORD WE HAVE ARE PRESUMPTION UPON PRESUMPTIONMADE BY THE TRIAL COURT AND PRESUMPTION INCLUDED .

DON'T YOU AGREE WITH JUSTICE WAEMS QUESTION ? WOULDN'T THAT WITH JUSTICE WELLS'S QUESTION? WOULDN'T THAT BE THE APPROPRIATE OUTCOME FOR THIS CASE, TO GO BACK AND START AT SQUARE ONE AND GET A COMPLETE RECORD HERE, SO THAT WE KNOW THE CIRCUMSTANCES CLEARLY?

I WOULD AGREE .

WELL , THAT'S, ALL RIGHT , THANK YOU.

BUT I THINK IT MAY NOT BE NECESSARY . WE HAVE N O BAD FAITH. THE SALE WAS

WE DON'T KNOW , DO WE? WE DON'T KNOW, BECAUSE THERE HASN'T BEEN A HEARING. YOU KNOW. WHEN THE JUDGE O R LAWYERS OR WHATEVER , IF , I ASSUME SOMEBODY IS GOING TO COME BACK AND EITHER AFFIRM THAT RESPONSE THAT JUSTICE CANTERO READ FROM AND THAT NOW EVERYBODY WILL HAVE AN OPPORTUNITY TO SAY , WELL , IF HE I S A CONFIDENTIAL INFORMANT , IS IT A SHE OR A HE OR DO WE EVEN KNOW THAT?

WE DON'T KNOW. THAT.

WHOEVER IT IS, THAT A S JUSTICE WELLS SAID , WE COULDHAVE A FULL EXPLORATION OF THAT AND FIND OUT , YOU KNOW , THAT

JUST A MINUTE. YOU SAID THAT THERE WAS NO DISCOVERY. I THOUGHT I HEARD MR . HEIMLICH SAY THAT DETECTIVE PACHECKO WAS DEPOSED.

NO. HE WAS NEVER DEPOSED. THAT IS NOT IN THIS RECORD. HE NEVER TESTIFIED AT THEHEARING.WE HAVE NOTHING.

WHEN WE SAY WE DON'T ALL KNOW AND IT GOES BACK TO JUSTICE WELLS'S QUESTION , PRESUMABLY THE DETECTIVEKNOWS IF THIS PERSON WAS A MAN OR A WOMAN THAT INTRODUCE HIM AND WHETHER IT IS SOMEBODY THAT THEY WORKED WITH BEFORE OR NOT .

IT MIGHT HAVE JUST BEEN A FACILITATING FACE THAT THEY USED. WE KNOW NOTHING.

WE JUST DON'T KNOW.

NO , AND THIS CASE SHOULD STAND AS IT IS THAT THE DISMISSAL WAS REVERSED , ANDIT SHOULD GO BACK TO A N EVIDENTIARY HEARING AND TO TRIAL.

LET ME ASK THIS QUESTION , DID THE STATE CITE T O ITS THIRD DCA CASES IN THE CASE OF PAUTIER OR SADIERGA? ALL OF THESE CASES STAND FOR THE POSITION THAT DISMISSALWAS NOT THE APPROPRIATE REMEDY , AND WERE THOSE PARTICULAR CASES CITED TO THE THIRD DCA?

THOSE PARTICULAR CASES , I DON'T BELIEVE SO.

WAS THE LAW BEFORE THE THIRD DCA THAT DISMISSAL WAS AN APPROPRIATE REMEDY, UNLESS YOU MAKE FINDINGS CITED? BECAUSE IT IS NOT REFERENCED IN THE OPINION BEFORE US.

THE LAW CITED TO THE THIRD DCA WAS TO SAM OR, AWHICH I S OUT OF THE ZAMORA, WHICH I S OUT OF THE THIRD DCA , AND THAT IS EXTREMELY TELLING CASE. THERE THERE WERE MULTIPLE

DEFENDANTS. TWO OF THE DEFENDANTS THEN SAID, IMPLICATED OR ONE OF THE DEFENDANTS IMPLICATED ONE OF THE OTHERS , AND IT, AND THAT DEFENDANT WAS SAYING, WELL, I NEED TO KNOW WHO THE CI WAS , BECAUSE NO ONE ELSE IS IMPLICATING ME , OTHER THAN THIS ONE DEFENDANT , AND IN THAT CASE, IT WAS HELD NO , THAT CONFIDENTIAL INFORMANT OR TIPSTER IN THAT CASE WAS PRESENT AT MULTIPLE CONVERSATIONS , HEARINGS ABOUT WHAT WAS GOING T O HAPPEN , AND - -

WHAT CASE LAW DID THE STATE CITE, WITH REFERENCE TO THIS ISSUE OF THE STATE NOT KNOWING WHO THIS PERSON WAS O R HOW TO LOCATE THEM? DID THE STATE CITE ANY CASES TO THE COURT ON THAT ISSUE ?

OF NOT KNOWING . I DON'T BELIEVE SO. I AM TRYING TO REMEMBER, TO RECALL. I THINK MOST O F THE CASES THAT WERE CITED TO THE THIRD DISTRICT COURT OF APPEAL WERE ALSO CITED TO THIS COURT.

CHIEF JUSTICE: ALL RIGHT. THANK YOU VERY MUCH. COUNSEL , WHY ISN'T JUSTICE WELLS RIGHT THAT , THIS REALLY NEEDS TO GO BACK AND HAVE ALL OF THIS EXPLORED , SO WE KNOW, YOU KNOW , WHAT IS GOING ON HERE?

WELL , I WOULD BE HAPPY WITH THAT RESULT , BUT I THINK IT IS A BETTER RESULT FROM THE STATE THAT IS REALLY WARRANTED, BECAUSE THE STATE NEVER ARGUED ANY OF THIS IN THE TRIAL COURT OR IN THE CIRCUIT COURT, AND WHAT , SUCH A DECISION WOULD GIVE THEM AN OPPORTUNITY TO GO BACK AND GET A SECOND BITE OF THE APPLE.

BUT WE DON'T HAVE ANY REFUTATION OF THE STATEMENT IN THIS RESPONSE THAT SAYS WE DON'T KNOW THE IDENTITY OF THIS PERSON AND WE DON'T KNOW HOW TO LOCATE THEM , SO THERE IS NO , THERE CERTAINLY IS NO FACTUAL BASIS HERE , TO RESOLVE ANY OF THESE ISSUES THAT, IS THIS IS NOT SOMETHING WHERE THE POLICE OFFICER TESTIFIED BEFORE THE JUDGE OR ANYBODY , SO WE ARE IN A MAZE OF JUST NOT KNOWING , YOU KNOW , WHAT HAPPENED HERE , AND WHO WAS ON FIRST .

THE CIRCUIT COURT'S ORDER, WHICH IS APPENDIX FOUR , SAYS BEGIN THAT THE POLICE FAILED TO OBTAIN OR MAINTAIN INFORMATION AS TO THE INFORMANT 'S IDENTITY OR LOCATION , DISMISSAL OF ALL CHARGES FILED UNDER CASE NUMBER FO 2-9992, IS WARRANTED.

THERE IS NO FACTUAL BASIS FOR THAT FINDING.

WELL , THE FACTUAL BASIS FOR THAT FINDING IS THAT THE STATE SAYS THEY DON'T KNOW WHO HE IS. THE STATE CAN'T

THERE IS NO FACTUAL BASIS , IN THE SENSE THAT THERE WAS NO HEARING. THERE WAS NO EVIDENCE PRESENTED. ALL WE ARE TALKING ABOUT IS ONE LAWYER ASSERTING WE WANT THIS PERSON DISCLOSED , BECAUSE OF THE ROLE THAT H E PLAYED, AND ON THE OTHER SIDE , THEY ARE SAYING, NO , WE SHOULDN'T DO IT , AND FURTHERMORE , WE DON'T EVEN KNOW WHO IT IS OR WHERE THEY ARE, AND WE HAVE NO EVIDENCE.

THE STATE SAID THEY COULDN'T FIND HIM FORM THE STATE SAID THEY COULDN'T PRODUCE HIM COULDN'T FIND HIM. THE STATE SAID THEY COULDN'T PRODUCE HIM FOR AN IN CAMERA HEARING , AND THE STATE NEVER SAID THE COURT SHOULD NOT DISMISS BECAUSE THEIR INABILITY TO FIND HIM WAS EXCUSEABLE.

THE THIRD DCA CASE SAYS THE SANCTION OF DISMISSAL MAY BE IMPOSED WHERE THE FAILURE OF THE STATE TO COMPLY WITH AN ORDER TO PRODUCE A CONFIDENTIAL INFORMANT , ARISES FROM THE STATE'S WILLFUL NONCOMPLIANCE, CALCULATED OFFICIAL IGNORANCE OR DELIBERATE INTENTIONAL ACTIVITY. THEY CITE A COUPLE MORE CASES, THEN THEY SAID

CLEARLY THE TRIAL COURT HAD VIABLE ALTERNATIVES TO THIS MOST SEVERE AND HARSH ES OF SANCTIONS . THE TRIAL COURT COULD HAV E , ONE , ORDER AN IN STANTURE WRIT OF BODILY ATTACHMENT TO THE CI , TWO CHARGE TO THE STATE, OR THREE HELD AN EVIDENTIARY HEARING TO DETERMINE THE CIRCUMSTANCES TO DETERMINE WHY THE CONFIDENTIAL INFORMANT COULDN'T BE FOUND, OR FOURTH, AND IT MANTIONS A FOURTH. NONE OF THIS WAS DONE . NONE OF THIS CASE LAW WAS PRESENTED BY THE STATE TO THE TRIAL COURT OR TO THE THIRD DCA.

NOTHING. AND IN THAT CASE , M Y SUSPICION WOULD BE THAT THE STATE ASKED THE COURT TO DO THAT. IN THE THIS CASE, THE COURTS AID WE DON'T KNOW WHERE HE IS. WE CAN'T FIND HIM. THE DEFENSE LAWYER ASKED FOR DISMISSAL. THEY, THE EVIDENCE , THE COLLOQUY IS AT PAGE 5 OF APPENDIX SIX, WHICH IS THE TRANSCRIPT. THE STATE RESPONDED WITH CASE LAW , MARTIN , CARNEGIE BANKS , NOT ANY CLAIM THAT THEY SHOULDN'T DISMISS BECAUSE THEY CAN'T FIND THE GUY , AND THE JUDGE DISMISSED IT.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON THAT NOTE. WE THANK YOU BOTH FOR YOUR HELP IN RESPONDING TO OUR INQUIRIES. THE COURT WILL STAND IN RECESS.