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**Derrick Tyrone Smith v. State of Florida**

THE LAST CASE ON THE DOCKET THIS MORNING IS SMITH VERSUS STATE OF FLORIDA . JUSTICE QUINCE IS RECUSED ON THIS CASE , GIVING US SOME IDEA OF THE AGE OF THE CASE . NOT THE AGE OF JUSTICE QUINCE .

WE ARE ABLE TO BE BROADCAST?

YES.

AND RECORDED?

YES. pp

COUNSEL READY? MR. McLAIN? > > MAY IT PLEASE THE COURT . MY NAME IS MARTIN McLAIN. I'M HERE TODAY ON BEHALF OF MR. DERRICK SMITH ON HIS APPEAL FROM THE DENIAL OF RULE 38 FOR THE RELIEF . YOU'VE MADE MANY CLAIMS ON YOUR APPEAL , AND YOUR PETITION. ARE YOU GOING TO FOCUS ON ANY PARTICULAR ONES TODAY?

I INTEND TO FOCUS ON THE BRADY/GIGLIO. IF THERE ARE ANY QUESTIONS ABOUT ANY OTHER MATTERS I WILL BE HAPPY TO ADDRESS THEM. IN REFERENCE TO THE BRADY/GIGLIO, THERE WAS A NUMBER OF EXHIBITS , A LOT OF DOCUMENTS THAT WERE INTRODUCED AT THE TRIAL COURT LEVEL OF MATERIAL THAT WAS IN THE STATE'S FILE BUT NOT WAS DISCLOSED TO THE DEFENSE. AS TO THOSE DOCUMENTS , THE CIRCUIT COURT RULED THAT SOME OF THE MILLER VS STATE WERE NOT REQUIRED TO BE DISCLOSED, AND THE CIRCUIT COURT SAID I HAVE OR MR. SMITH HAD NOT SHOWN THAT RELYING ON MILLER WAS WRONG OR THAT THERE WAS ANY DISCOVERY OBLIGATION OVER AND BEYOND MILLER VS STATE . THIS COURT REJECTED THAT POSITION IN FLOYD THAT MILLER DOES NOT ESTABLISH THE PARAMETERS OF DISCOVERY OR DIDN'T AT THE TIME. AND MOREOVER AS THE TRIAL PROSECUTOR AT THE SECOND TRIAL. FIRST MR. SMITH WAS TRIED IN 1983. THIS COURT ORDERED A RETRIAL . AT THE TIME OF THE SECOND TRIAL, THE TRIAL PROSECUTOR IN TESTIFYING BELOW , ACKNOWLEDGED THAT THE RULES OF CRIMINAL PROCEDURE HAD CHANGED JULY 1, 1989 , AND MILLER WAS GONE WITH THAT A MENDMENT TO THE RULES OF CRIMINAL PROCEDURE REQUIRING POLICE REPORTS TO BE DISCLOSED.

WHAT SPECIFIC BRADY/GIGLIO CLAIM ARE YOU GOING TO ADDRESS? BECAUSE THERE ARE SEVERAL OF THOSE.

YES, WELL , FIRST I'M SORT OF LAYING THE GROUNDWORK. THE CIRCUIT COURT DID NOT DO A COMULATIVE ANALYSIS. THEY SAID UNDER MILLER WE HADN'T SHOWN THAT THERE WAS AN ENTITLEMENT TO THEM BY THE DEFENSE. AND THE CIRCUIT COURT ALSO SAID THOSE THINGS THAT WERE CONTAINED IN THE STATE ATTORNEY'S SYNOPSIS , WHICH IS A SUMMARY OF THE SWORN STATEMENTS MADE TO THE STATE ATTORNEY ALSO SAID THAT'S WORK PRODUCT OR PRIVILEGE AND THAT'S NOT SUBJECT TO BRADY. SO THOSE ITEMS DIDN'T GET CONSIDERED IN ANY SORT OF CUMULATIVE ANALYSIS, BUT I WILL START WITH

YOU STILL HAVE TO ALLEGE AND PROVE THAT THEY WERE WITHHELD, THAT THEY WERE EITHER IMPEACHING OR FAVORABLE TO THE DEFENDANT AND THAT THEY SUFFERED

PREJUDICE.

CORRECT, YOUR HONOR. SO WITH SORT O F FIR ST , I T WASN'T DISCLOS ED. THE JUDGE BELOW SAID SOM E O F THE STUFF HE W ASN' T CONSIDERING IN ANY SORT OF CUMULATIVE ANALY SI S. FIRST THE ONE THING HE D ID SPECIFI CALLY CONSIDER WITH D EFENDANT'S EXHIBIT NUMBER 8 , WHICH CONCERNED THE CON TACT BETWEEN M EL VI N JON ES AND -- ppDERRICK JOHNSON WHI LE THEY WERE INC ARCE RATE D T OG ETHER.

THERE WAS NO TES TIMONY AT THE R ET RI AL , T HE RE W AS N O QUESTION ASKED ABOUT WHE TH ER THEY HAD E VE R M ET , WAS T R ? pp THERE?

WELL , THE PARAM ET ER S O F WHAT HAPPENED AT THE PRETRIAL, LET ME FIRST T ALK ABOUT WHAT HAPPENED AT THE F IRST TRIAL. THE FIRST T RIAL BOTH MR. JONES AND MR. JOHNSON HAD BEEN DEPOS ED , A ND TESTIFIED AND I N THE F AC E O F QUESTIONS BY THE DEFENSE ATTORNEY FOR M R. S MITH , A S TO THEIR CONTACT, THEY ppDENIED C ON VE RSIN G A BOUT T HE CASE, KNOWING E AC H OTH ER , AND SO T HE Y BAS ICALLY S AI D N OT TRUE.

BUT NOW THAT WAS APPEA LE D , ppTHE CONVICTION IS REVERSE D. IT COMES BAC K F OR A NEW TRIAL AND W E D ON'T HAVE THE SAME TESTIMONY ON RETRIAL. THAT WAS NEV ER ASKED , RIGHT?

THOSE QUESTIONS WERE NOT ASKED A ND DEFEN SE A TTOR NEY BASICALLY THE POSITION IS W E KNOW WHAT THE ANSWER IS. THEY ARE SAYING THAT THERE IS NOTHING THERE. THERE IS NO EVIDENCE A ND NO ONE TOLD THE DEF ENSE ATTORNEY THAT, IN FACT , THE STATE KNEW THAT T HEY HAD BEEN IN A J AI L C EL L TOG ETHE R AND THAT M R. J ON ES H AD APPROACHED MR. JOHNSON WITH A MAP OF THE CRI ME S CE NE , AND SAID T HA T H E W OULD HELP HIM AT TRIAL . T HIS INFORMATION, THE DEFENSE ATTORNEY AT T HE RETRIAL DID NOT KNOW. AND, IN FACT , T HE F IRST TRIAL WHEN IN C LO SING ARGUMENT THE DEFENSE ATTORNEY WAS TRYING TO SUGGEST AND SAY THAT D ES PI TE THEIR DEN IALS, THERE H AD BEEN SOMETHING GOING O N BETWEEN JONES AND JOHNSON , THE PROSE CUTOR A RG UE D T HAT' S L UDICROUS . THERE IS NO EVI DENCE OF THAT. WELL, BUT OF C OU RSE T HE STATE HAD E VIDENCE OF THAT. THE STATE KNEW T HAT THERE HAD BEEN THE C ON TACT. IN FACT, WHEN Y OU D O S OR T O F A TIMELIN E YOU CAN F IND O UT THAT JOHNSON H AD B EE N INTERVIEWED BY A STATE ATTORNEY I NV ESTIGATOR O N ppJULY 5TH. JULY 11TH I S W HEN H E I S I N A ppJAIL CELL WITH M ELVI N J ONES ppAND M EL VIN H AS T HIS M AP AND SAYS THAT HE WILL HELP H IM.

AND THEN JOHNS ON ASK ED TO BE MOVED FROM THE C ELL AND DIDN'T WANT TO HAVE ANY CONTACT.

ACT UA LLY THERE I S NO EVIDENCE OF THAT. THE EVIDENCE OF THAT IS

DIDN'T JOHNSON T ESTI FY TO THAT EFFECT ? > > YOU A RE C ORRE CT, YO UR HONOR. BUT M R. H OG AN , THE PROSECUTORS , S AI D J OHNS ON N EVER TOLD HIM THAT. HE JUST H EARD IT FROM O THER PEOPLE SO IT WAS SORT O F THIS HEARSAY KIND O F THI NG . SECOND, IN T ER MS O F A T T HI S POINT IN TIME IN EVALUATING THE PREJUDICE , THE U.S . SUPREME COURT I N C HI LD S MAD E IT CLEAR IT DOESN 'T M AT TE R WHAT JOHNSON SAYS. NOW THE Q UE STION IS W HA T COULD HAVE BEEN P RE SENT ED T O THE JURY AT THE TIME OF T HE TRIAL. IN JOHNSON N OW , T RYIN G T O SAY , W EL L , I D ID N' T SAY ppANYTHING TO HIM. HE WAS JUST T AL KING TO ME. I WAS K IND OF S CARED AND I ASKED TO BE MOVED.

BUT THE P RE JU DI CE STANDARD THEN IS WHETHER IT PRESENTS THE WHOLE TRIAL IN A COM PLETELY D IFFERENT LIGHT.IS THAT

YES.

SO HOW DOES THE FACT THAT YOU CAN NOW , BECAUSE IT WOULD REALLY BE IMPERMISSIBLE EACHMENT MATERIAL, RIGHT ? IT WOULD BE IMPERMISSIBLE EACHMENT MATERIAL?

IT IS MORE THAN IMPEACHMENT IN THAT THE TESTIMONY AT THE FIRST TRIAL AND IN THE DEPOSITIONS WAS FALSE .

THAT'S IMPERMISSIBLE .

WELL , BUT IMPERMISSIBLE - -

FIRST OF ALL THE QUESTION WAS NEVER ASKED ON RETRIAL SO YOU DON'T KNOW WHAT THE ANSWER WOULD HAVE BEEN TO SAY THAT HE WOULD HAVE LIED ON THE RETRIAL?

BUT THE DISTINCTION BETWEEN BRADY/GIGLIO IS THAT IN GIGLIO WHERE THE STATE FAILS TO CORRECT A FALSE STATEMENT OR MISLEADING STATEMENT, THERE IS A DIFFERENT BURDEN OF PREJUDICE.

BUT THERE IS NO - - SINCE THEY NEVER TESTIFIED WHETHER OR NOT THEY MET , THERE WAS NO FALSE TESTIMONY IN THE SECOND TRIAL? > > THERE WAS IN THE DEPOSITION. AND THE U.S. SUPREME COURT HAS SAID IT DOESN'T HAVE TO BE FALSE TESTIMONY IN FRONT OF THE JURY. IF THIS PROSECUTION MISLEADS THE DEFENSE THAT'S A GIGLIO VIOLATION.

THE DEFENSE KNEW WHAT THE TESTIMONY IN THE FIRST TRIAL WAS, SO THEY WEREN'T MISLEADING. THEY KNEW THAT TESTIMONY ALREADY.

THEY DIDN'T KNOW IT WAS FALSE. THEY KNEW WHAT THE TESTIMONY WAS. THE PROSECUTOR KNEW THE TESTIMONY WAS FALSE BUT HE DIDN'T TELL THE DEFENSE.

SO HOW WOULD IT HAVE PRESENTED THE WHOLE CASE IN A COMPLETELY DIFFERENT LIGHT NOW WHEN YOU HAVE THIS I GUESS THIS DOCUMENT THAT SAYS THEY MET IN A CELL WHEN THEY DIDN'T TESTIFY AT RETRIAL ABOUT IT, BUT IN THE FIRST TRIAL THEY TESTIFIED THAT THEY HAD MET . HOW WOULD IT PRESENT THE ENTIRE CASE IN A COMPLETELY DIFFERENT LIGHT NOW?

MY POINT IS THAT'S NOT THE CORRECT STANDARD FOR THAT. WHEN IT COMES TO A GIGLIO VIOLATION.

I GUESS I WAS TALKING ABOUT THE BRADY PART FIRST.

THE FIRST POINT IS IN TERMS OF THE FAILURE TO CORRECT THE FALSE TESTIMONY AND TELL THE DEFENSE THAT , IN FACT , THEY WERE TOGETHER , CONTRARY TO THEIR TESTIMONY.

THE PROBLEM I HAVE WITH THE GIGLIO ISSUE IS THAT THIS TESTIMONY WAS NEVER PRESENTED IN THE SECOND TRIAL. SO HOW CAN YOU SAY THEY TESTIFIED FALSELY IN THE SECOND TRIAL?

THE U.S. SUPREME COURT -- SPECIFICALLY SAYS IT DOESN'T HAVE TO BE IN FRONT OF THE JURY. IF THE PROSECUTION INTENTIONALLY MISLEADS THE DEFENSE SO THEY DON'T KNOW ABOUT SOMETHING , BECAUSE THEY ARE INTENTIONALLY MISLED. DELIBERATELY LIED TO. IT IS STILL A GIGLIO VIOLATION AND IT IS STILL UNDER THAT STANDARD THAT YOU LOOKED AT TO DETERMINE WHETHER OR NOT A NEW PROCEEDING IS REQUIRED. SO IN THIS INSTANCE , WE HAVE BOTH BRADY AND WE HAVE GIGLIO STUFF GOING ON AT THE SAME TIME. IN TERMS OF THIS , THIS IS INFORMATION THAT THE PROSECUTION MISLED THE DEFENSE ABOUT. IT SHOULD BE EVALUATED UNDER GIGLIO , BUT EVEN UNDER BRADY , IN THIS INSTANCE , IT CAN'T BE EVALUATED IN A VACUUM , EITHER. WE ALSO NOW KNOW BECAUSE

THE POLICE REPORTS THAT MR. JONES WAS THE ORIGINAL SUSPECT OR ONE OF THE ORIGINAL SUSPECTS LISTED ON THE POLICE REPORT.

THE ONLY REASON HE WAS A SUSPECT WAS BECAUSE HE HAD A RECORD AND HE LIVED IN THE VICINITY, NOT BECAUSE THERE WAS ANY EVEN CIRCUMSTANTIAL EVIDENCE THAT PLACED HIM AT THE SCENE EXCEPT FOR THE FACT THAT HE LIVED AROUND THE AREA.

CORRECT. THE POLICE LIST HIM IN A POLICE REPORT AS A SUSPECT, AND THEN NEVER GO TALK TO HIM. BECAUSE THAT WOULD CONSTITUTE IMPEACHMENT UNDER CHILDS OF THE ADEQUACY OF THEIR INVESTIGATION. TO GO TO HIS HOUSE TWICE, THIS IS ALSO UNDISCLOSED, TO DO AN EIGHBORHOOD CANVAS. IN FACT, THERE IS A SECOND TIME AND BOTH JONES AND HIS WIFE TESTIFY AS TO THE FIRST ONE.

AND WAS THERE TESTIMONY OR ANY EVIDENCE THAT THE POLICE ONLY WENT TO OTHER HOUSES ONCE BUT WENT TO THAT HOUSE TWICE OR THE ONLY EVIDENCE IS THEY WENT TO THAT HOUSE TWICE? WE DON'T KNOW IN RELATIONSHIP TO THE OTHER HOUSES.

THE SIGNIFICANCE TO THE FACT THEY WENT THERE TWICE WAS MELVIN JONES AND HIS WIFE TESTIFIED THAT SHE ANSWERS THE DOOR FOR THE FIRST NEIGHBORHOOD CANVAS. SHE DOES NOT TELL THEM WHAT MELVIN JONES HAS SEEN BECAUSE AT THAT MOMENT IN TIME MELVIN JONES HAD NOT TOLD HER. AS SOON AS THAT ENCOUNTER IS OVER, MELVIN JONES TELLS MELLOW JONES WHAT HE HAS SEEN SO WHEN THE NEXT POLICE OFFICER COMES EIGHT HOURS LATER SHE KNOWS THAT, AND BECAUSE THE DEFENSE DIDN'T KNOW THAT THERE HAD BEEN A SECOND POLICE OFFICER KNOCKING ON THE DOOR ASKING HER IF SHE KNEW ANYTHING, THERE WAS NO QUESTIONS ABOUT, WELL, WHY DIDN'T YOU TELL THE SECOND POLICE OFFICER? ISN'T THE REASON YOU DIDN'T TELL THE SECOND POLICE OFFICER BECAUSE YOU ARE LYING? THIS IS NOT WHAT HAPPENED? THAT IMPEACHMENT COULD N'T BE PRESENTED BECAUSE THE STATE WITHHELD THE INFORMATION REGARDING THE SECOND NEIGHBORHOOD CANVAS. IN ADDITION TO THAT, MELVIN JONES FIRST GOES TO THE POLICE JUNE 17TH. THIS MUCH IS KNOWN. AND TRIES TO WORK OUT A DEAL. HE SAYS HE GIVES THE POLICE AN ALTERED VERSION OF THE FACTS BECAUSE HE IS NOT HAPPY WITH THE CONSIDERATION HE IS GETTING. THAT ALSO NEEDS TO BE CONSIDERED IN EVALUATING THE SIGNIFICANCE OF THE JULY 11TH CONTACT WITH MR. JOHNSON. HE HAS ALREADY GONE TO THE POLICE. HE HAS TOLD THEM THE VERSION OF THE EVENTS IS NOT MATCHING WITH WHAT THEY KNOW. SO THEN HE IS SWITH DERRICK JOHNSON ON JULY 11TH GOING OVER A MAP. THEN ACCORDING TO WHAT WE CAN FIGURE OUT BECAUSE THERE IS A DEPOSITION THAT HAPPENS ON JULY 22ND.

WOULD YOU HELP ME UNDERSTAND, GOING OVER THE MAP, WHERE IN THE RECORD ARE YOU DEALING WITH THAT? I MEAN, MY PERCEPTION IS A VERY BRIEF ENCOUNTER IN A HOLDING CELL. I THOUGHT THAT WAS WHAT THE EVIDENCE THAT WE ARE DEALING WITH.

WELL

YOU SAY YOU ARE DESCRIBING THIS AS A PLAN THAT'S ALL OF THE EVIDENCE IS

WHAT WAS NOT DISCLOSED IS A CID INVESTIGATION REPORT AND ON THE CID INVESTIGATION REPORT ARE HANDWRITTEN NOTATIONS. TOM HOGAN, THE PROSECUTOR IN 1983 TESTIFIED THE HANDWRITTEN NOTATIONS ARE HIS HANDWRITING AND HERE HE SAYS, D. J., WHICH IS REFERRING TO DERRICK JOHNSON SAYS THE FIRST TIME HE EVER SAW MELVIN JONES, 7-11-83 IN HOLDING CELL BEFORE PRELIM. MELVIN JONES SHOWED D. J. MAP AND SAID HE WOULD HELP D. J. AT TRIAL. >> THERE IS NOTHING IN THERE THAT SAYS HE IS GOING OVER IT AND THEY ARE DISCUSSING THE MAP. I AM JUST TRYING TO UNDERSTAND, YOU KNOW, WE ARE AWARE OF THIS.

THE MAP IS WHAT IS CONTAINED IN THE LETTER THAT MELVIN JONES WRITES THE STATE

ATTORNEY WHICH THE STATE ATTORNEY, THE BEST WE CAN FIGURE OUT, RECEIVED ON JULY 21ST BECAUSE AT THE DEPOSITION JULY 22ND HE SAID I JUST YESTERDAY GOT COMMUNICATION FROM ANOTHER WITNESS. AT THE EVIDENTIARY HEARING HE SAYS THAT'S IN REFERENCE TO MELVIN JONES. SO MELVIN JONES SENDS THE MAP, AND ALL WE HAVE IS IN TERMS OF WHAT HAPPENS IN THE ENCOUNTER BETWEEN DERRICK JOHNSON AND MELVIN JONES IS DERRICK JOHNSON'S WORD FOR IT, AND I THINK WE RELY ON OUR OWN PAPERIL ON HIS WORD WHEN, IN FACT, HE HAS AN INTEREST IN DOWNPLAYING THE SIGNIFICANCE OF THIS.

WHAT DID JONES SAY ABOUT IT?

MELVIN JONES DID NOT TESTIFY ABOUT IT. THEY DID NOT CALL MELVIN JONES AT THE EVIDENTIARY HEARING.

WHY? YOU COULD HAVE ASKED JONES AND HAD HIM DISCUSS IF THERE WAS MORE OF A DISCUSSION.

BECAUSE THE QUESTION IS WHETHER OR NOT THE UNDISCLOSED INFORMATION COULD HAVE BEEN USED TO INTERPEACH HIM. IT MATTERS LESS THAN WHAT HAPPENED WITH MELVIN JONES. MELVIN JONES TESTIFIED THAT HE WAS SENTENCED TO THREE YEARS. WE ALSO KNOW THAT THAT'S NOT TRUE. HE GOT PROBATION.

YOU BEAR THE BURDEN OF PROOF. YOU HAD THE OPPORTUNITY TO PRESENT JONES TO GET THE FULLER SIDE OF THE STORY AND DID NOT CALL JONES, CORRECT?

UNDER CHILDREN, THE U.S. SUPREME COURT SAID IT IS NOT A QUESTION OF WHETHER YOU BELIEVE THE WITNESS NOW, IN A PROCEEDING NOW, THE QUESTION IS THE UNDISCLOSED INFORMATION, COULD THAT HAVE BEEN USED AND PRESENTED TO THE JURY SO THAT THE JURY WOULD NOT HAVE BELIEVED IT. SO WHAT IS MORE IMPORTANT IS THE DOCUMENTATION PIECES OF PAPER SHOWING THE INFORMATION THAT WAS NOT DISCLOSED TO MR. SMITH.

I GUESS BASICALLY WHAT WE HAVE IS THE ONLY THING THAT WAS REALLY PRESENTED TO THE TRIAL COURT JUDGE WAS THE HEARSAY STATEMENT ABOUT A PROSECUTOR'S NOTES, AND THEN JOHNSON'S STATEMENT, BUT WHAT OCCURRED. WE DON'T HAVE JONES' STATEMENT. HE WAS NEVER DEPOSED THOUGH THERE IS NO ARGUMENT HE IS NOT AVAILABLE. OR ANY ARGUMENT OF WHO ELSE MAY HAVE BEEN IN THE POD AT THE TIME.

BUT WHAT WE ALSO HAVE IN EXHIBIT A IS WE HAVE ATTACHED TO IT THE LOCATION RECORDS SHOWING WHERE EVERYBODY WAS LOCATED. AND, IN FACT, THE EXHIBIT HAS CROSSED OUT PORTION WHICH INDICATES THAT WHEN THE CID INVESTIGATION WAS DONE BY THE INVESTIGATOR, HE INITIALLY DETERMINED THAT THEY WERE IN THE SAME LOCATION FOR A PERIOD OF TIME. THIS HAS BEEN GIVEN TO THE PROSECUTOR WHO WHEN HE TALKS TO DERRICK JOHNSON THE HANDWRITES IN WHAT DERRICK JOHNSON TELLS HIM ABOUT THAT ENCOUNTER ON JULY 1ST.

JUST SO WE ARE CLEAR, THERE IS A DISPUTE AND WHETHER IT IS SIGNIFICANT OR NOT AS TO WHETHER THE NOTES SAID HE GAVE THEM THE MAP AND SAID IT WOULD HELP D.J. AT TRIAL VERSUS THAT HE, JONES, WOULD HELP JOHNSON AT TRIAL.

I GUESS IT IS A QUESTION OF LOOKING AT THE HANDWRITING AND REACHING A CONCLUSION.

THERE IS A DISPUTE AS TO WHAT THAT SAYS?

IT LOOKS CLEAR THAT IT IS A WHEN YOU LOOK AT THE WORD HELP AND YOU LOOK AT THE WORD IN QUESTION IT IS THE SAME FORMATION.

WELL , YOU HAVE , I M E A N , ON THIS PIECE O F E V I D E N C E , THERE IS - - S H O U L D H A V E B E E N DISCLOSED , AND IT W O U L D QUALIFY AS B R A D Y. SO T H E I S S U E C O M E S D O W N T O W H A T J U S T I C E C A N T E R O A S K E D YOU EARLIER W H I C H I S D O E S IT MEET THE T H I R D P R O N G A N D Y O U SAID WE'VE GOT TO LOOK A T I T IN EVERYTHING ELSE T H A T W A S N ' T DISCLOSED, A N D W O U L D REMIND Y O U YOU A S K E D F O R , ABOUT 30 MINUTES. 15 MINUTES IS YOUR T I M E . ONE OTHER ISSUE I S ONE O F THE OTHER B R A D Y V I O L A T I O N S.

ONE O T H E R P O I N T Q U I C K L Y I S I N R E F E R E N C E T O M c G R U D E R WHO IS T H E E Y E W I T N E S S W H O WAS AT THE H O G G L Y - W O G G L Y B A R B E C U E WHO SAW T W O B L A C K M E N ENTER INTO THE CAB. WHAT WAS N O T D I S C L O S E D A S T O H I M WAS THE F A C T T H A T A S T A T E ATTORNEY INVESTIGATION OF A S Y N O P S I S W H I C H I N C L U D E D H I S S T A T E M E N T TO T H E S T A T E ATTORNEY ON APRIL 4TH , MR. HOGAN NOTED THAT HE HAD NOT BEEN ABLE TO P I C K O U T p p E I T H E R SUSPECT F R O M A P H O T O O P W H I C H I S C O N T R A R Y T O H I S T E S T I M O N Y. HE T E S T I F I E D H E P I C K E D O U T ONE PHOTO, WHICH WAS S M I T H . ACCORDING TO THE S T A T E A T T O R N E Y , HE P I C K E D O U T NEITHER AND HE IS A L S O O F F O N H I S D E S C R I P T I O N B Y A S p p M R. HOGAN NOTES , 3 0 P O U N D S AND AS YOU G O T H R O U G H T H E P O L I C E R E P O R T S YOU SEE VARIOUS NUMBERS, S O M E W H E R E BETWEEN 40 AND 70 P O U N D S IN THE WEIGHT T H A T S U P P O S E D L Y M R. SMITH WEIGHED. THAT HAS TO B E E V A L U A T E D C U M U L A T I V E L Y AND T H E C I R C U I T COURT WHEN ANALYZING THE FAILURE TO D I S C L O S E E X H I B I T 8 AND T H E C O N T A C T AND T H E H O L D I N G C E L L R E L I E D O N M c G R U D E R ' S T E S T I M O N Y F O R p p F I N D I N G THE C O M P E T E N C E . AND M c G R U D E R ' S T E S T I M O N Y IS W O R T H L E S S W H E N YOU A C T U A L L Y K N O W WHAT HE T O L D THE S T A T E ATTORNEY.

WHAT WAS H E - - H O W WAS H E p p C R O S S - E X A M I N E D ABOUT T H O S E P H O T O P A C K S AT T R I A L ?

A T T R I A L HE WAS N O T A B L E TO I D E N T I F Y M R. S M I T H IN T H E COURTROOM. HE S A Y S I N HIS TESTIMONY ON p p D I R E C T E X A M I N A T I O N T H A T H E P I C K E D O U T A P H O T O O F M R. SMITH , A N D H E A T O N E P O I N T IN T I M E W H I L E B E I N G E X A M I N E D BY THE STATE S A Y S THAT HE P I C K E D O U T THAT PHOTO BECAUSE HE BELIEVED THAT W A S T H E P E R S O N . I N C R O S S , H E A C K N O W L E D G E D THE DEFENSE SAID AT THAT TIME YOU W E R E U N S U R E , CORRECT AND HE SAID Y E S S O HE W A F F L E S B A C K A N D F O R T H AND IT IS P R E T T Y C L E A R WHEN YOU LOOK AT THE C L O S I N G ARGUMENT THAT THE PROSECUTION IS SAYING WE W I S H HE W E R E S M A R T E R , YOU K N O W , THERE IS A L O T O F T H I N G S WE W O U L D C H A N G E A B O U T H I M I F WE C O U L D BUT T H E Y A R E S T I L L R E L Y I N G O N H I M SO I D O p p R E C O G N I Z E THAT HE WAS I M P E A C H E D BUT I N F A C T HE H A D N O T P I C K E D M R. S M I T H ' S P H O T O O U T W H I C H I S I N F O R M A T I O N THAT THE J U R Y N E V E R H E A R D .

T H A N K Y O U . p p

M A Y IT P L E A S E T H I S H O N O R A B L E COURT , M Y N A M E I S K A T H E R I N E B L A N C O W I T H T H E ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE OF FLORIDA. BEFORE I ADDRESS THE B R A D Y C L A I M THERE IS ONE ISSUE OF CORRECTION TO THE T R I A L COURT'S ORDER THAT I W O U L D LIKE TO B R I N G TO T H I S COURT'S ATTENTION AND IT IS MY FAULT AND I A P O L O G I Z E. THIS C A S E INVOLVES A 32 VOLUME RECORD WITH O V E R 5,000 PAGES O F M A T E R I A L . IN T H E R E C O R D A S I T S T A N D S BEFORE THIS COURT IN V O L U M E 27, PAGE 4 9 4 4 T H E R E I S A p p S I N G U L A R LINE THAT S A Y S THIS IS R I C H A R D S O N S A N D E R S , T H E T R I A L C O U N S E L S P E A K I N G , W E S E N T S O M E B O D Y U P THERE TO SEE IF WE C O U L D L O C A T E W I T N E S S E S OR ANYTHING LIKE THAT. THAT IS FROM THE EVIDENTIARY HEARING HELD JULY 23 , 2002. THE T R I A L C O U R T E N T E R E D AN ORDER D E N Y I N G R E M A I N I N G C L A I M S ON F E B R U A R Y 11TH OF p p 2003 AND THAT'S IN T H E R E C O R D AT LINE 2 2 , R E C O R D p p 4089 T O 4 11 4 AND THE T R I A L C O U R T I N C L U D E D T H A T S I N G U L A R LINE ABOUT R I C H A R D S A N D E R S A L L E G E D L Y S A Y I N G WE S E N T S O M E B O D Y U P THERE TO SEE IF WE COULD LOCATE W I T N E S S E S OR ANYTHING LIKE THAT . AFTER THAT ORDER W A S E N T E R E D ON F E B R U A R Y 2 5TH , THE T R I A L COURT ENTERED T W O S M A L L ORDERS, A T W O - P A G E R I N G ORDER AND A O N E AND A H A L F P A G E ORDER C O R R E C T I N G THE RECORD. AND I D I D N O T C A T C H T H I S ONE AND A H A L F P A G E O R D E R CORRECTING THE RECORD. I T I S S I G N I F I C A N T W I T H R E S P E C T TO

THE I NE FF ECTI VE ASSISTANCE OF P EN ALTY P HA SE COUNSEL BECAUSE RICHARD ppSANDERS S UB SE QU ENTLY SUBMITTED AN AFFIDAVIT AFTER THE EVI DE NTIARY H EARING SAYING HE NEVER S EN T A N INVESTIGATOR TO NEW J ERSEY. SO, T HEREOFRE, THE T RI AL COURT A ND T HE REC OR DS SIG N ON THAT IS VOL UM E 3 2 , 4 13 ppTHR OUGH 4 12 4 THE RE FO RE S AY S THE ORDER OF FEB RU AR Y 10TH , 2 003 IS RAT IFIE D T O D ELET E T HAT S TATEMENT SO T HERE I S A SINGLE LINE IN MY ANSWER BRIEF AT PAGE 8 9 T HA T INCLUDES THIS TRIAL C OU RT 'S REFERENCE T O THE SEN DING -- ppSOMEBODY T O NEW JERSEY. I A POLOGIZE. IT SHOULD NOT H AVE BEEN INCLUDED AND I WOULD ASK THAT IT BE D EL ET ED . WITH RESPECT TO , AND I W ILL C ERTAINLY BE GLAD TO ANS WER ANY QUESTIONS WITH RES PECT TO THE I NEFF ECTI VE A SSISTANCE OF P ENALTY PHASE COUNSEL BUT OPPOSING COU NS EL HAS NOT RELIED ON THA T THI S MORNING AND I DO NOT B EL IE VE I AM E LIGI BL E T O ADD RESS THAT ARGUMENT.

IT WOULD BE HEL PFUL I F YOU FILED A W RITT EN T O T HA T EFFECT.

A WRI TT EN DOC UMENT TO THAT EFFECT.

I APOLOGIZE TO MR. McLAIN. HE WAS AT THE EVI DENTIA RY HEARING AND SOMETIMES WHENYOU ARE R EVIEWING THINGS AND READING I WAS Q UI TE F RA NK LY GOING BY THE TRANSCRIPT AND GOING BY THE FINAL ORDER.

I APPRECIATE YOU R C ANDO R IN THAT REGARD.

THANK YOU, YOUR HONOR. WITH RESPECT TO T HE B RA DY CLAIM, THE B RADY STAND AR D THIS COURT HAS R EC EN TL Y H AD THE OPPORTUNITY TO A DD RE SS CASES I NVOLVING BOT H BRA DY A ND GIGLI O , HOWEV ER YOU W ISH TO PRONOUNCE IT , M OST N OTABLE Y W IT H R ESPE CT T O T HE FLOYD CASE A ND T HE BRA DY ppSTANDARD O N MAT ER IALI TY I S WHAT WE ARE HER E O N T ODAY. QUESTION?

IN THE F IRST TRIAL WHICH I REALIZE WE ARE ON THE SECOND TRIAL, BUT W HE N T HE ppWITNESSES TES TIFIED THEY HAD NEVER MET, THAT WAS FAL SE .

THAT'S N OT M Y RECOLLECTION OF ACT UALL Y H OW THEY TESTIFIED. THE JONES WAS A SK ED DID YOU ppTALK T O J OHNS ON A BOUT Y OU R TES TIMONY HER E T OD AY . IN THE FIRST T RI AL , D EFEN SE COUNSEL S MITH ASKED J ON ES , THIS TRIAL WAS HELD I N NOVEMBER OF 1983. ON THE FIRST T RIAL, O N T HE FIRST DAY O F TRIAL N OV EMBE R 1ST , SIN CE COUNS EL S MITH ppSUS PECTED THA T THEY W ERE TOGETHER IN A HOLDING CELL AND HAD SOME OPPORTUNITY TO TALK ABOUT THE CASE , T HERE IS Q UE ST IONI NG ABO UT D ID Y OU TALK TO JOHNSON ABO UT Y OUR TESTIMONY HERE TODAY , A ND JONES DENIES IT. AND HE I S A LSO ASK ED , W EL L , WEREN'T YOU IN THE SAME HOLDING CELL. JONES PROCEEDS T O S TART RESPONDING AND THEN IS INTERRUPTED AND HE SAID, NO, WE WEREN'T EXACT LY I N T HE SAME H OLDI NG C EL L S O I T I S ppAN UNFIN IS HE D E XP LA NA TION S O CERTA INLY WE DO NOT B ELIE VE THAT THAT S TATEME NT WAS FALSE.IN FACT , QUI TE F RA NKLY , MELVIN J ON ES T OO K EVE RYTH IN G VERY LITERALLY , E XA CT LY W HA T H E W AS A SKED I S WHA T H E TRIED TO ADDRESS. DID YOU H AV E A C ONVE RS ATIO N. ppJOHNS ON IS THE SAM E WAY. DID YOU HAVE A C ON VE RSAT ION W ITH JONES. JOH NSON'S E XPLANA TION I S , N O , I DIDN'T HAVE A CON VE RS AT IO N WITH MELVIN J ON ES. WHAT JOHNSON K NE W W AS THA T ON JULY 1 1T H O F 1 98 3 , A PERSON THAT WAS UNK NO WN T O HIM APP RO AC HES H IM I N A HOLDING CELL WHERE OTHER INMATES ARE, AND SHOWS H IM A MAP OF THE C RI ME S CENE . JONES J OH NSON I N T HE P OS T C ONVICTION HEARING TES TI FI ESTHAT HE W AS ALREADY F AMILIAR WITH I NDIV IDUALS APPRO AC HING HIM, TRYING T O G ET INFORMATION A BOUT HIS CASE TO BENEF IT T HE MS EL VES A ND H E THE N A SKED F OR THE CEO O R CORRECTIONS OFFICER TO BE MOVED AND T HAT'S WHAT TOM HOGAN, THE 198 3 PRO SE CU TO R -- ppALSO TESTI FIED T O THA T , I N FACT, IT WAS HIS RECOLLECTION THAT JOH NS ON WAS SCARED A T B EI NG APPROACHED. WE USED THE LAN GU AG E TERRIFIED IN OUR BRI EF AND O PPOSING COUNSEL IS C RITICA L OF OUR USE OF THAT TER M

BUT IT IS ONE THAT WAS USED BY THE TRIAL COURT AFTER CONDUCTING THE EVIDENTIARY HEARING SO CERTAINLY WE WOULD RELY ON THE TRIAL COURT'S ORDER AND THE TRIAL COURT WHO WAS PRESENT AND MADE CREDIBILITY DETERMINATIONS.

WELL, YOU DO GOING BACK TO BRADY, I THINK YOU AGREE OR THE TRIAL COURT FOUND THAT THIS WAS - - SHOULD HAVE BEEN DISCLOSED.

THE TRIAL COURT FOUND THAT IT WAS FAVORABLE AND THAT IT HAD NOT BEEN DISCLOSED.

I MEAN, IT CERTAINLY COULD HAVE BEEN USED IN IMPEACHMENT AT LEAST SORT OF AN ODD THINGS THAT SOMEONE IS GOING TO GO UP TO SOMEONE IN A CELL AND GO, HEY, HERE'S A MAP. THIS CAN HELP YOU.

NOT FOR JONES, NOT WHEN YOU READ ABOUT THE TYPE OF INDIVIDUAL THAT HE IS TRYING TO SHOW EVERYONE HIS MAP. HE SENDS THIS MAP AND A HANDWRITTEN LETTER OUTLINING WHAT HE HAS SEEN SIMULTANEOUSLY TO BOTH THE STATE ATTORNEY'S OFFICE AND THE PUBLIC DEFENDER'S OFFICE AND HE OFFERS AN OUTLINE OF WHAT HE WITNESSED AND INCLUDES INFORMATION THAT JOHNSON DIDN'T KNOW SPECIFICALLY THAT THE SECOND TAXI CAB ARRIVED AND THEN THE POLICE ARRIVED AFTER THAT TAXI CAB.

SO IT WAS KNOWN THAT HE HAD OBVIOUSLY THAT HE SENT THE MAPS AND HE WAS A STATE TO THE STATE ATTORNEY AND TO THE PUBLIC DEFENDER?

THAT WAS DISCLOSED TO THE DEFENSE AND DURING JONES' DEPOSITION HE IS ASKED A LENGTH ABOUT HIS 1983 DEPOSITION, SEPTEMBER OF '83 HE IS ASKED AT LENGTH ABOUT THE MAP THAT HE DREW, THE PLACEMENT OF THE PARTIES, THE LETTER THAT HE WROTE, AND SO HE IS ASKED ABOUT IT BOTH AT DEPOSITION AND AT TRIAL ABOUT THE LETTER - - AT THE FIRST TRIAL ABOUT THE LETTER. AT THE SECOND TRIAL ALSO ABOUT THE LETTER.

WHAT WAS THE MOTIVATION FOR SHOWING EVERYBODY THE MAP?

JONES WANTED EVERYBODY TO KNOW THAT HE KNEW WHERE EVERYTHING WAS. THAT HE, PERHAPS IT WAS THAT HE WAS ABLE TO GIVE PARTICULAR FACTS THAT WOULD NOT HAVE BEEN KNOWN BY ANYONE BUT AN EYEWITNESS SPECIFICALLY THE COLOR OF THE SHIRT.

HE WANTED TO GET SOME KIND OF A DEAL FROM THE STATE?

I DON'T THINK THAT'S REALLY SERIOUSLY QUESTIONED. HE WASN'T HAPPY THAT

AT ONE POINT HE ACTUALLY CHANGED THE FACTS.

SURE.

OR WHATEVER IN TERMS OF ALTERING IT. IT WASN'T WHAT HE ULTIMATELY SO HE CLEARLY WAS FOOLING AROUND IN THE SENSE OF

JONES IS LOOKING TO BENEFIT JONES.

HE WAS SORT OF DOING WHAT WAS CHARACTERIZED BEFORE AS THE OTHER PRISONERS APPROACHING, YOU KNOW, ANOTHER DEFENDANT AND TRYING TO FIND OUT INFORMATION ABOUT THEIR CASE AND IN HOPES THEY COULD GET INFORMATION AND THEN THEY COULD USE IT. SO JONES FITS THAT PROFILE BECAUSE HE HAD VERY SERIOUS CHARGES PENDING AGAINST HIM. IS THAT CORRECT?

HE HAD A LOT OF CHARGES PENDING AGAINST HIM. HE IS A BAD CHECK WRITER AND HE



HAD A CABIN ETMAKING BUSINESS WHERE HE WOULD ACCEPT MONEY FOR DOING CABINET WORK AND THEN NOT DO THE WORK AND SO HE HAD I BELIEVE 17 OR 18 CHARGES AT THE TIME. HE ACTUALLY TESTIFIED AT TRIAL THAT HE HAD 24 FELONY CONVICTIONS. THE JURY DIDN'T KNOW THAT THEY WERE BAD CHECKS AND GRAND THEFT TYPE CHARGES, BUT THEY DID KNOW THAT HE HAD, INDEED, 24 CHARGES. JONES ADMITTEDLY WAS NOT HAPPY THAT THE POLICE DETECTIVE, SAN MARCO, SAID, WELL, OKAY, MAYBE YOU CAN SERVE YOUR TIME WITH POLICE OFFICERS AND SO JONES, AND THAT IS BROUGHT OUT.

I GUESS GOING BACK TO, THOUGH, HOW IT WOULD HAVE HELPED THE DEFENSE, THE DEFENSE, WHETHER YOU THINK IT IS A -- HOW WE THINK IN HINDSIGHT WE ARE TRYING TO SHOW THAT JONES AND JOHNSON HAD KIND OF COME UP WITH THIS TOGETHER TO FRAME THEM; IS THAT CORRECT?

THAT'S THE DEFENSE -- ppTHEORY.

SOMEHOW IT HELPED THE DEFENSE TO BE ABLE TO SAY AND YOU WERE IN THE SAME CELL AND YOU EVEN GET THE MAP THAT WAS, YOU SAID ppWOULD HELP HIM. NOW, I MEAN, I DON'T KNOW, A GAIN THIS IS -- TO ME THAT'S SORT OF DIFFERENT FROM, WELL, THEY DIDN'T EVEN KNOW EACH OTHER. THERE WAS NO CONTACT. NOW, WHETHER IT MEETS THAT PRONG SO IT UNDERMINE YOUR CONFIDENCE AND PUTS THE WHOLE TRIAL IN A DIFFERENT LIGHT WOULD BE A QUESTION LOOKING AT THE OTHER THINGS, BUT IT IS DEFINITELY SOMETHING THAT IS -- COULD BE USED BY A GOOD DEFENSE LAWYER TO FURTHER DEVELOP A THEME THAT THEY WANTED TO DEVELOP ABOUT THIS GUY, JONES, WHO IS A LITTLE, YOU KNOW, A GOOD EYEWITNESS IS A LITTLE SCREWY AND NOW HE IS APPROACHING JOHNSON SO AT LEAST I THINK THAT'S SOMETHING THAT, YOU KNOW, AGAIN WHETHER HE GETS THE MESSAGE OVER THE HUMPOF WHETHER IT THERE SHOULD BE A NEW TRIAL IS A DIFFERENT STORY BUT IT DOES IMPRESS ME AS SOMETHING THAT COULD BE DEVELOPED.

YES, JUSTICE, IT IS TRUE IT MIGHT HAVE BEEN HELPFUL. THAT IS NOT THE BRADY TEST THE FACT THAT IT MIGHT HAVE BEEN HELPFUL TO MATERIALITY, HELPFUL TO THE DEFENSE.

YOU HAVE HERE A SITUATION WHERE YOU'VE GOT JONES ppPICKING OUT SMITH. YOU'VE GOT OBVIOUSLY JOHNSON HAS AN AX TO GRIND. YOU'VE GOT AN EYEWITNESS THAT COULDN'T PICK OUT THESE PEOPLE, YOU KNOW, COULDN'T PICK THEM OUT OF A PHOTO PACK. YOU'VE GOT THE WEAPONS NOT I MEAN, THE RESISTANCE TO BE A CONCERN AS TO WHETHER ALL OF THESE THINGS ADD UP TO A NARROW TIGHT CASE AGAINST MR. SMITH AS BEING THE ppPERPETRATOR OF THIS CRIME.

YES, JUSTICE PARIENTE, I WOULD LIKE TO ADDRESS THOSE OTHER FACTORS. I AM GOING TO START WITH THE PHOTO PACK. THE REPORT THAT OPPOSING COUNSEL IS REFERRING TO THIS MORNING WITH REGARD TO DAVID McGRUDER, MR. McGRUDER WAS THE COOK AT THE BARBEQUE RESTAURANT, THE ppHOGGLEY-WOBGLEY BARBECUE AND MR. GRUDER BETWEEN THE END OF MARCH AND THE BEGINNING OF APRIL, I BELIEVE 3-31 TO 4-4 THE STATE ATTORNEY IS INTERVIEWING MULTIPLE WITNESSES AND THERE IS A NOTATION THAT McGRUDER COULD NOT PICK OUT THE INDIVIDUALS OUT OF A PHOTO PACK. WELL, THERE IS AN EXPLANATION FOR THAT AND THAT COMES ABOUT AND IS ACTUALLY ESTABLISHED AT THE TIME OF TRIAL. IN VOLUME 7 OF THE TRIAL RECORD AT PAGE 1189 DETECTIVE SAN MARCO TESTIFIES THAT ON 3-21 A PHOTO PACK CONTAINING SEVEN PICTURES IS SHOWN TO ppMR. McGRUDER. ppNEITHER DEFENDANT'S PICTURE, NEITHER JOHNSON OR SMITH'S PHOTO IS IN THAT PHOTO PACK. HE PICKED OUT NONE. THE SECOND PHOTO PACK IS SHOWN TO MR. McGRUDER ON 3-23. THIS IS A FIVE-PICTURE PHOTO PACK WITH JOHNSON, THE TALL, ppLIGHTER SKINNED INDIVIDUAL WHO REMAINED OUTSIDE OF THE ppBARBECUE RESTAURANT. JOHNSON'S PHOTOGRAPH IS IN THAT. McGRUDER DOESN'T PICK OUT ANY PHOTO. THE THIRD PHOTO PACK THAT DETECTIVE SAN MARCO TESTIFIES TO AND THIS IS IN THE RECORD AT PAGE T

-1 11 1 WAS SHOWN TO HIM O N 4 -8-9 3 AFTER THE S TA TE A TTOR NE Y' S W HERE M cG RU DE R T EL LS TOM HOG AN

YOU MEAN ' 83 , R IGH T ?

'93. '83 , Y OU 'RE R IGH T , THA NK Y OU , ppYOUR HONOR, I A PPRE CI ATE I T. '83, M cGRU DE R P IC KED OUT A PHOTO WHICH WAS T ESTIFIED T O AT TRIAL A S B EI NG D ERRI CK TYRONE SMITH WHICH THE DEFENSE DISPU TE D A T THE TIM E DURING CLOSING A RGUMENT. MR. SANDERS SAYS THEY SHOWED YOU A PHO TO THA T H E S IGNE D AND THEY SAY IT I S SMITH BUT I DON'T REALLY THINK SO.

WAS IT A P HO TO P AC K?

IT WAS A PHOTO P ACK.

AND THE F IRST PHO TO PAC K HE IS SHOWN T HA T S MI TH IS IN?

ACCORDING TO DETECTIVE SAN M ARCO 'S T ES TI MO NY .

THAT S OUNDS LIKE A REA LL Y ODD WAY O F , Y OU K NO W , DOE S THA T MAKE SENSE T O Y OU A S FAR AS THE POLICE?

IT MAY B E T HA T T HEY D O ppSHOW A P HO TO P AC K WIT H N O SUSPECTS TO TEST, YOU KNOW , I DON'T KNOW. I DO K NOW O NLY WHA T DETECTIVE SAN MARCO TESTIFIED TO. SO T HE FAC T THA T McGRU DE R SAYS I C OULDN'T P IC K O UT ANYONE OUT OF A P HO TO P AC K IN EARLY A PR IL B EF OR E H E I S SHOWN THE PHOTO P AC K B Y SA N MARCO THA T H AS S MITH 'S P HO TO IN IT I S Q UI TE F RANK LY A RED HERRING. THERE IS NOTHING TO THAT. AND R EG AR DLES S O F M cG RU DE R 'S INABILITY TO E ST IM ATE M R. SMITH'S ACTUA L W EIGH T , ppTHAT HAS NOTHING TO D O W ITH THE FIN GERPRINT THAT IS FOUND ON T HE T ELEP HO NE A T THE H OGGL Y- WOGGL Y B ARBE CU E AND THAT IS SIGNIFI CANT BECAUSE YOU H AV E THE C AB COM PANY DIS PA TC HE D CONFIRMING AT 12 :2 8:00 A.M . ON MARCH 3 1S T , 198 3 T HE Y RECEIVED A DISPATCH TO THE B ARBECUE RESTA UR AN T AND T HAT IS THE T ELEP HONE THA T W AS USED BY THE SHORTER , D AR KE R INDIVID UAL, THE INDIVIDUAL THAT IS DES CR IB ED B Y MR. McGRUDER. IN ADDITION OF COURSE Y OU HAVE DERRICK J OHNS ON W HO TESTIFIES AT THE PRELIMINARY ppHEARING I N J UN E A ND O F COURSE DOES, IN FACT , IDENTIFY T HE DEF ENDA NT ppDER RICK TYR ON E SMITH A S THE SHOOTER. IN DECISION YOU YOU HAVE THE GUN, THE GUN WHICH W AS DESCRIBED WAS CON SIST ENT WITH THE GUN M ISSING FRO M R OY C ON E' S R ESID EN CE W HO W AS THE UNCLE T O D ER RICK T YRON E SMITH. HE WAS U NA WARE W HE N T HE G UN WAS MISSI NG BUT K NE W H E H AD HAD IT FOR NEW YEAR'S EVE AND DERRICK T YR ON E SMITH H AD BEEN OVER TO HIS HOUSE SOMETIME BEFORE MARCH. THE MIDDLE - - M ET AL COMPOSITION WAS FAM ILIA R T O ppBULLETS P URCHAS ED T EN YEARS EARLIER. THAT SAME GUN , THE R OB BERS D IDN'T GET ANY M ON EY F RO M THE C AB D RIVER. FOR M R. S ON GE R F LE D TRY IN G ppTO GET A WA Y FRO M THE A RMED GUNMEN AND HE WAS SHO T IN THE BACK AND KILLED. ppNOW , S O D ER RI CK T YRON E S MITH'S ROB BERY A TTEM PT I S ppUNSUCCESSFUL. AS A RESULT , 1 2 H OU RS LAT ER , H E U SE S A GUN I N A M OTEL ROBBERY. WE KNOW IT IS D ER RICK T YRON E SMITH BECAUSE HIS FINGERPRINTS ARE RECOVEREDFROM THE SCENE, THEY ARE RECOVERED F RO M B EL ON GING S TO THE V ICTIM , H E ALS O P UN CHES THE V IC TIM AND T HR EATE NS H IM WITH THE GUN AND ALSO HAS A WATCH, A V ER Y DISTI NC TIVE WATCH. THIS IS A C AN AD IA N C OUPLE THAT H AS F RENC H LET TERING ON IT. SO IT IS A V ER Y D IS TINC TI VE WATCH THAT IS LINKE D THI S ARMED R OBBERY 1 2 HOU RS A FT ER THIS SHOOTING.

BUT ARE THE G UN S NEV ER ppRET RIEV ED ?

THE GUN IS NEVER RETRIEVED.

AND THEN THE BULLET , I GUESS THIS IS WHERE I UNDERSTAND HOW DOES T HA T HELP SHOW THA T THAT WAS H IM -- pp12 H OURS E AR LI ER?

W EL L , THA T W AS A DD RE SSED ON DIRECT APPEAL BY THE COURT WITH RESPECT TO THE SIMILARITY OF A HAND GUN , T HE USE OF A HAN D G UN , THE USE OF FORCE, THE M OT IV E , THE IDE NTITY A ND L IN KING H IM TO THE P ER SO N T HA T'S IN POSSESSION OF A G UN. EAR LIER THAT EVENING, YOU HAD SEVERAL W IT NE SSES IDENTIFYING SMITH AS THE PERSON BEING IN POSSESSION OF A GUN. YOU HAVE M R. ROU S TES TI FY IN G AT THE NAME OF THE GAM E , W HICH I S A CLU B W HE RE H E I S WORKING AS A DISC J OC KE Y , H E IS IN POS SESSION OF A GUN. HE ASKS M R. ROU SE TO C ONCE AL THE G UN NEAR THE T URNTAB LE . YOU ALSO H AVE B OT H C AR OL I N MATH IS AND R EGIN A M AT H IS C ONFIRMING T HA T THE D EFENDANT HAD A GUN O R BULLET THAT N IGH T AND TRI ED TO SELL THE GUN A ND A LS O THAT SAME NIG HT T HA T T HE ppDEFENDANT TELLS R EGIN A MATHIS HE IS GOING T O HUS TL E MONEY BECAUSE H E DOESN'T HAVE MONEY AND W E ALS O H AVE ppPRISCILLA WAL KE R AND J AMES MATTHEWS. PRISCILLA WALKE R I S T HE INDIVIDUAL THAT S EES THE DEFENDANT WHEN HE C OMES BACK TO HER R ES ID EN T - - R ES ID ENCE AFTER THE SHOOTING AND H E TELLS HER SOMETHING SIGNIFICANT.HE TELLS HER HE SHO T A C RACKER CAB DRIVER IN THE BACK BECAUSE HE DIDN'T WANT TO GIVE UP HIS MON EY. NOW, WHO BUT T HE P ER SO N T HAT IS INVOLVED IN THIS WOULD KNOW FIRST O F A LL T HE IDENTITY OF THE VICTIM , A ND SECOND THAT THE ROB BE RY W AS U NSUCCE SSFUL.SO THAT'S A VER Y S IGNIFICA NT FACTOR THAT COMES ON T HE HEELS OF THE SHOOT IN G. TO JAMES M AT HI S , A N INDIVIDUAL THAT TESTIFIES AT TRIAL T HAT S AY S D ERRI CK TYRONE SMITH AND I WERE FRIENDS.HE SAYS THAT H E M IGH T HAV E SHOT SOMEONE. HE WAS S CARED AND NEE DE D A PLACE TO STAY, AND T HA T 'S ALL ON THE E VENI NG , T HE 24-HOUR P ERIOD SURRO UNding THIS OFF ENSE. SO THE STRENGTH OF THE STATE'S E VIDENCE IN EVALUATING A CLA IM O F ppUNDISCLOSED EVIDENCE YOU DON'T TAKE AWAY AND S EE WHAT IS LEFT. WHAT YOU DO IS ADD T O A ND SEE WHAT HAPPENS THEN. YOU ESS ENTIALlY S AY , W HETH ER THE FAVOR ABLE E VIDE NC E C OULD R EASONABLY BE TAKEN T O P UT THE WHOLE CASE IN SUCH A DIFFERENT LIGHT A S TO UND ERMINE CONFIDENCE IN THE VERDICT. WE HAVE THE DEFEN SE K NOWS THAT THESE IND IVIDUALS ARE ALL H OU SE D A T M AX IM UM SECURITY PINEL LAS C OU NT Y JAIL. AS A MATTER OF FACT, WHEN JOHNSON TESTIFIES AT TRI AL ON REDIR EC T E XAMI NA TI ON , J OHNSON TESTI FI ES T HA T H E COULD HEA R SMI TH AND J ON ES A RGUING WITH EAC H OTH ER . AND SO YOU H AVE AND Y OU A LS O HAVE JONES TESTIFYING T HAT , YES, INDEED , SMITH HAD THREATENED HIM WHILE THEY WERE IN THE J AI L TOG ETHER. IT IS N O G REAT S URPR IS E T HA T THEY WERE I NC ARCE RA TE D A T THE SAME PLACE. THEY WERE NOT PLA CE D IN T HE SAME CELL. THEY WERE A T O NE POINT I N TIME APPARENTLY IN A H OLDI NG CELL WHERE THE MAP T HA T H AS BEEN DISCLOSED TO THE - - T HE ppMAP T HA T I N Q UEST ION.

YOU ARE TALKING ABOUT JOHNSON AND JONES NOW?

JOHNSON , J ON ES AND S MITH WERE ALL THREE AT PINEL LA S COUNT Y JAIL. THEY WERE ALL I N MAX IMUM SECURITY. NOT SURPRISING. YOU 'VE G OT J OHNS ON A ND S MITH WHO ARE A RR ESTE D SHO RT LY AFTER THE MURDER, I THINK SMITH WAS A RRES TE D 1 6 D AY S AFTER THE MUR DER AND J OHNS ON HAD ALREADY BEEN ARR ES TED. JOHNSON IS MAKING STATEMENTS TO PEOPLE AT HIS MOT HE R'S SCHOOL, TO HIS MOTHER WIT H REGARD TO HIS K NOWLEDGEABOUT THE O FFENSE AND S O VERY QUICKLY THEY A RE DISCOVERING THE JOHNSON AND THEN THE DERRICK TYR ON E SMITH LINK AND THOSE P EO PLE AT THE NAME OF THE GAME WER E ABLE TO PLACE JOH NSON AND SMITH TOGETHER THAT NIGHT AND SMITH IS ALWAYS THE O NE THAT IS IN P OSSE SSIO N O F T HE HAND GUN.

MR. L AN GSTO N S TART ED OUT B Y SAYING THA T THE T RI AL JUDGE H AD E XC LU DED CER TAIN CUMULATIVE EVIDENCE IN THE ANALYSIS OF W HA T I MPAC T THE UNDISCLOSED EVIDENCE MIGHT HAVE HAD. YOU HAVE J US T D ONE A N EXCELLENT JOB OF TRYING T O DRAW OUT, YOU KNOW , W HAT T HE EVIDENCE WAS AGA INST T HI S DEFENDANT AND T HE N U SI NG T HE ppTHINGS T HA T WER EN'T DISCLOSED , YOU KNO W , T O PRESENT THAT WHOLE C ON TE XT . W

WOULD YOU RESPOND, THOUGH, TO HIS INITIAL STATEMENT THAT THE JUDGE ERRONEOUSLY EXCLUDED SOME THINGS THAT WEREN'T DISCLOSED AND NOT DOING A PROPER CUMULATIVE ANALYSIS? pp

YOUR HONOR, I BELIEVE THAT MAY BE REFERRING TO A SECOND ARGUMENT, HIS SECOND ISSUE WITH REGARD TO LIMITATION AT THE EVIDENTIARY HEARING. I'M NOT SURE I UNDERSTAND IT FAIRLY ENOUGH TO RESPOND TO IT. I KNOW THAT THE TRIAL COURT DOES ANNOUNCE THAT HE HAS MADE AN INDIVIDUAL AND A CUMULATIVE ANALYSIS IN THE ORDER AND HE CERTAINLY UNDERSTANDS HIS RESPONSIBILITY, THE TRIAL COURT OUTLINES THE LEGAL STANDARDS THAT HE DOES HAVE TO FOLLOW. I WOULD HAVE TO RELY ON THE TRIAL COURT'S ORDER BECAUSE I MAY BE MISUNDERSTANDING THAT.

BUT THERE WEREN'T ANY CLAIMS IN THIS REGARD THAT THE TRIAL COURT SUMMARILY OBJECTED WITHOUT CONSIDERING AT THE EVIDENTIARY HEARING?

THAT'S ACTUALLY MR. McLAIN'S SECOND ARGUMENT, AND THE - - OUR ARGUMENT RESPONSIVE, IT IS A THREE-PAGE ARGUMENT IN THEIR INITIAL BRIEF. MY RED LIGHT IS ON. MY IC CONTINUE?

YES.

THANK YOU, YOUR HONOR, I APPRECIATE THE INDULGENCE. FROM PAGE 77 TO 80 IS MR. SMITH'S ARGUMENT WITH RESPECT TO THE LIMITATION OF THE EVIDENTIARY HEARING, AND OUR RESPONSE IS THAT THAT WAS INSUFFICIENT TO ACTUALLY LET US KNOW EXACTLY WHAT HE WAS COMPLAINING ABOUT. BECAUSE THERE WERE SEVERAL FACTORS, AND I CAN ONLY DIRECT THIS COURT'S ATTENTION TO THE RECORD AT PAGE 3431 AND THAT'S THE TRIAL COURT'S ORDER WHICH DOES, IN FACT, EXPAND SEVERAL AREAS TO INCLUDE ADDITIONAL ALLEGATIONS. I WON'T BELIEVE THE POINT BUT WOULD ASK THE COURT LOOK AT THAT ORDER. THAT IT IS THE MAY 10TH, 2002 ORDER AT 313 - - 3431. THANK YOU, YOUR HONOR.

FIRST, AS TO JOHNSON AND JONES' TESTIMONY, DURING THE DEPOSITION, JONES TESTIFIED THAT HE HAD NEVER BEEN INCARCERATED IN THE SAME PLACE WITH DERRICK JOHNSON. ppTHAT WAS HIS TESTIMONY UNDER OATH. THAT WAS AT THE FIRST TRIAL. THAT'S NOT TRUE. HE SAID I NEVER TALKED TO NOBODY ABOUT THIS CASE. ppTHAT'S NOT TRUE. THAT WAS UNDER OATH. THAT WAS AT THE FIRST TRIAL.

WHO SAID THAT?

JONES.

JOHNSON SAID, WAS ASKED WHETHER HE HAD DISCUSSED THIS CASE WITH MELVIN JONES AT THE FIRST TRIAL. JOHNSON REPLIED, NO, I NEVER HAVE.

BUT THAT IS TRUE, I MEAN, ACCORDING TO JOHNSON, HE - - WHEN HE WAS - - HE DID NOT DISCUSS IT.

JOHNSON'S TESTIMONY AT THE EVIDENTIARY HEARING WAS THEY HAD A CONVERSATION. THEN THAT COMES OUT IN ppDIRECT LATER IN REDIRECT AND THE STATE GETS HIM TO SAY, WELL, IT WASN'T A DISCUSSION. SO ONE PLACE HE SAYS IT WAS A CONVERSATION. LATER ON HE TRIED TO SAY BUT IT WASN'T A DISCUSSION. HE DOES SAY INITIALLY WHEN HE SAID IT WAS A CONVERSATION, JONES WAS ASKING HIM QUESTIONS, AND HE ANSWERED THEM, BUT THEN LATER ON HE SAYS, WELL, NO, I NEVER REALLY SAID ANYTHING. BUT

WHAT DOES HE SAY ON DIRECT AS TO THE SUBSTANCE OF THE CONVERSATION?

HE S A Y S I N D I R E C T T H E S U B S T A N C E O F T H E C O N V E R S A T I O N I S J O N E S I S A P P R O A C H I N G H I M W I T H T H I S M A P , A N D T E L L I N G H I M T H A T H E P P L S G O I N G T O H E L P H I M . B E Y O N D T H A T T H A T ' S A M O N O L O G . W H E R E I S T H E D I A L O G U E ? W H A T W A S J O H N S O N ' S R E S P O N S E ?

HE S A Y S T H A T J O N E S A S K E D H I M Q U E S T I O N S A B O U T L O C A T I O N S , A N D P P

S T I L L A M O N O L O G . W H A T W A S J O H N S O N ' S P A R T O F T H E C O N V E R S A T I O N ?

A C C O R D I N G T O J O H N S O N , J O H N S O N ' S R E S P O N S E S W E R E T H A T H E S A I D , I D O N ' T K N O W . I D O N ' T W A N T T O T A L K A B O U T I T .

A N D T H E R E I S N O T H I N G I N T H E R E C O R D T O C O N T R A D I C T T H A T ?

G R A N T E D . B U T I C A N T E L L Y O U T H A T O N P P T H E C R O S S - E X A M I N A T I O N O F J O H N S O N W O U L D B E D E C I D E D L Y D I F F E R E N T W I T H O U T T H I S I N F O R M A T I O N A T T H E T R I A L . Y O U M E A N T O T E L L M E A T T H E T I M E T H I S C O N V E R S A T I O N H A P P E N E D , T H E S T A T E C A N ' T D E C I D E W H E T H E R J O H N S O N I S T E L L I N G T H E T R U T H O R S M I T H I S T E L L I N G T H E T R U T H . T H E R E A R E P O L I C E R E P O R T S I N T H I S R E G A R D . T H E Y D O N ' T K N O W W H O D I D W H A T . A N D J O N E S M A G I C A L L Y A P P E A R S A T A P O I N T I N T I M E W H E N J O H N S O N N E E D S S O M E B O D Y T O B E T H E T I E B R E A K E R T O H E L P H I M O V E R T H E E D G E B E C A U S E O N J U L Y 5 T H I S W H E N T H E S T A T E P P A T T O R N E Y I N V E S T I G A T O R G O E S A N D T A L K S T O J O H N S O N A N D J U L Y 1 1 T H T H E N J O H N S O N H A S T H I S E N C O U N T E R , W H A T E V E R W O R D Y O U W A N T T O U S E , A P P D I S C U S S I O N , A C O N V E R S A T I O N , W H A T E V E R , B U T T H E R E I S T H I S M E E T I N G . T H E Y A R E I N A C E L L T O G E T H E R , A N D A T T H A T M O M E N T I S W H E N T H I N G S S U D D E N L Y S H I F T A N D J O N E S T H E N W I T H I N T E N D A Y S S E N D S A L E T T E R T O T H E S T A T E A T T O R N E Y S O F F I C E A N D T O T H E P U B L I C D E F E N D E R S O F F I C E A N D T H E Y M A K E A B I G D E A L W I T H T H E P U B L I C D E F E N D E R S O F F I C E . T H E P U B L I C D E F E N D E R S O F F I C E I S R E P R E S E N T I N G J O H N S O N S O H E S E N D S I T S O T H E S T A T E A N D J O H N S O N ' S L A W Y E R , S U D D E N L Y I N D I C A T I N G H E I S A N E Y E W I T N E S S . H E S A W I T . W E L L , O F C O U R S E , H E H A D B E E N W I T H J O H N S O N .

HE D O E S N ' T W R I T E T H E L E T T E R A B O U T T H I S U N T I L A F T E R H E H A S B E E N I N T H E C E L L W I T H J O H N S O N ?

C O R R E C T . A N D J O H N S O N , I N F A C T , L O O K S A T T H E M A P T H A T W A S A T T A C H E D T O T H E L E T T E R A T T H E E V I D E N T I A R Y H E A R I N G . A N D S A I D , Y E S , T H A T L O O K S L I K E T H E M A P A L T H O U G H S O M E O F T H A T W R I T I N G W A S N ' T O N T H E R E A T T H E T I M E .

Y O U D O N ' T H A V E M U C H T I M E L E F T , B U T Y O U R O O P P O N E N T P P A T T E M P T E D T O D R A W U S A N O V E R A L L S C H E M E H E R E O F W H A T E V I D E N C E W A S P R E S E N T E D A N D T H E S T R E N G T H O F T H E S T A T E ' S C A S E A G A I N S T Y O U R C L I E N T T O A T T E M P T T O D E M O N S T R A T E T H I S W O U L D N O T P U T T H E C A S E I N A N E N T I R E L Y D I F F E R E N T L I G H T I N T E R M S O F T H E M A T E R I A L I T Y O R P R E J U D I C E A N A L Y S I S . W O U L D Y O U H I T A L I T T L E O N P P T H A T B E F O R E Y O U S I T D O W N ?

Y E S , Y O U R H O N O R . F I R S T T H E S T A T E I S A T T E M P T I N G T O R E L Y H E A V I L Y O N P R I S C I L L A W A L K E R . I W A S P R E C L U D E D F R O M A S K I N G A N Y Q U E S T I O N S A T T H E E V I D E N T I A R Y H E A R I N G R E G A R D I N G T H E B R A D Y M A T E R I A L A S T O H E R . I N 1 9 8 3 S H E W A S I N T E R V I E W E D B Y T H E P O L I C E . T H E R E W E R E P O L I C E R E P O R T S U N D I S C L O S E D .

S I N C E Y O U D O N ' T H A V E M U C H T I M E , C A N Y O U J U S T A N S W E R J U S T I C E A S T E A D ' S Q U E S T I O N A B O U T T H E O T H E R E V I D E N C E T H A T W A S P R E S E N T E D A T T H E T R I A L A N D W H E T H E R T H E U N D I S C L O S E D E V I D E N C E W O U L D P U T T H E C A S E I N S U C H A D I F F E R E N T L I G H T ?

F I R S T T H E S T A T E R E L I E S H E A V I L Y O N J O N E S . H E R E T O D A Y I N T H E O R A L A R G U M E N T T H E R E I S A R E C O G N I T I O N T H A T J O N E S I S O U T T H E R E A N D U N R E L I A B L E . J O N E S W A S N E G O T I A T I N G W I T H T H E S T A T E C A L L I N G T H E M U P W H E N H E W A S F O R T H E R E T R I A L S A Y I N G , I ' M A F R A I D I ' M G O I N G

TO BE CHARGED WITH SEXUAL ABUSE OF MY STEPDAUGHTER. ppTHE LOWER COURT SAID THAT'S ppNOT DISCOVERABLE.

WALKER MATTHEWS?

WALKER MATTHEWS, PRESIDENTIAL LAW ALKER WAS INTERVIEWED IN 1983. THIS WASN'T DISCLOSED. I COULDN'T ASK QUESTIONS ABOUT THAT. SHE TESTIFIED IN 1990 THAT SMITH SAID I SHOT A CRACKER. SHE DIDN'T TELL THE POLICE THAT IN '83. SHE DIDN'T TELL OTHER PEOPLE SHE TALKED TO BETWEEN '83 AND '87 AND THERE IS A STATE ATTORNEY INVESTIGATOR'S NOTE THAT HE GETS IT OUT OF HER I THINK IT IS IN '88. ppSO THE FIRST TIME SHE TELLS ANYBODY I SHOT A CRACKER IS FIVE YEARS LATER. THAT IS SIGNIFICANT IMPEACHMENT. SOME OF THAT WAS KNOWN AT THE TIME THAT THE POLICE REPORTS DOCUMENTING THE CONTACT WITH THE STATE BACK IN 1983 WERENOT DISCLOSED. ALSO OCTAVIOUS JONES TESTIFIED AT THE FIRST HEARING, SHE IS MELVIN JONES' KNEES ACCORDING TO HIS DEPOSITION, AND - - NIECE AND SHE IS THE PERSON SUPPOSEDLY DERRICK JOHNSON CONFESSED TO. THERE IS A CONNECTION BETWEEN THESE TWO PEOPLE. IT COULD HAVE BEEN SHOWN HAD ALL OF THE INFORMATION BEEN DISCLOSED. I SUBMIT WHENEVERYTHING IS LOOKED CUMULATIVELY, I AM CONFIDENT IN THE OUTCOME.

THANK YOU TO BOTH SIDES FOR A VERY INFORMATIVE ORAL ARGUMENT AND BEING RESPONSIVE TO OUR QUESTIONS. WITH THAT THE COURT IS IN RECESS UNTIL 9:00 TOMORROW MORNING.

PLEASE RISE.