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Derrick Tyrone Smith v. State of Florida

THE LAST C AS E O N T HE D OCKE T THIS MORNING IS S MITH VER SU S STA TE OF F LORI DA . JUSTICE QUINCE IS R ECUSED O N ppTHIS C AS E , G IV IN G U S S OM E IDEA OF THE A GE O F THE C AS E . NOT THE AGE O F J USTICE QUINCE .

WE ARE A BL E TO B E BROADCAST?

YES.

AND R EC ORDE D?

YES. pp

COUNSEL R EADY? MR. McLAIN? > > MAY IT PLEASE THE C OU RT . MY NAME IS M AR TI N M cL AIN. I'M HERE TODAY O N B EH ALF O F MR. D ERRICK SMITH O N H IS APPEAL FROM THE DENIAL OF R ULE 3 8 FOR THE REL IE F . Y OU'VE MAD E M AN Y C LA IM S O N YOUR APPEAL , A ND YOU R PETITION. ARE YOU GOING TO F OCUS O N ANY PARTICULAR ONES T ODAY?

I INT END T O F OC US O N THE ppBRADY/GIGLIO. IF THERE ARE A NY Q UE STIONS ABOUT ANY OTHER MATTERS I WILL BE HAPPY T O ADDRESS THEM. IN REFERENCE T O THE ppBRA DY/GIGLIO, T HERE WAS A NUMBER OF EXH IBIT S , A L OT O F DOCUM ENTS THAT WERE INTRODUCED AT T HE TRI AL COURT L EV EL O F M AT ER IA L T HA T WAS IN THE STATE 'S FIL E B UT NOT WAS DIS CL OSED T O THE DEFENSE. AS TO T HOSE D OCUM EN TS , T HE ppCIRCUIT COURT R ULED T HAT SOME OF THE M UND ER M ILLE R V S TATE WERE NOT R EQUIRED TO BE D IS CLOSED, A ND T HE CIRCUIT COURT SAID I HAVE OR MR. SMITH HAD NOT S HO WN THA T RELYING ON MIL LE R W AS W RONG OR THAT THERE WAS A NY DISCOVERY OBLIGATION OVER AND BEYOND MILLER V STA TE . THIS COURT REJECTED THA T P OSITION I N F LO YD T HA T MILLER DOES NOT E STABLISH THE PARAMETER S O F DIS CO VE RY OR DIDN'T AT T HE TIM E. AND MOR EO VE R A S T HE T RI AL PRO SECUTOR AT THE SECOND TRIAL. FIRST MR. SMITH WAS TRIED I N 1983. THIS COURT ORDERED A R ETI L E. R ET RI AL . AT THE TIME OF THE SECOND TRIAL, THE T RIAL P ROSE CU TOR IN TESTIFYING BEL OW , ACKNOWLEDGED THAT THE RULES OF CRIMINAL PROCEDURE HAD CHANGED JULY 1, 1 989 , A ND MILLER WAS GONE W IT H THA T A MENDMENT TO THE RULES O F CRIMINAL PROCEDURE REQUIRING POLICE REPORTS TO BE DISCLOSED.

WHA T SPE CI FI C BRADY/GIGLIO CLAIM ARE YOU GOING TO ADDRESS? BECAUSE THERE ARE SEVERAL OF THOSE.

YES, WELL , F IRST I 'M S OR T OF LAYING T HE G ROUN DWORK. THE C IR CUIT COURT D ID N OT D O A C UM UL ATIV E ANA LY SI S. THEY SAID UNDER MILLE R W E HADN'T SHOWN THAT T HERE WAS AN E NTITLEMENT TO THEM B Y THE DEFENSE. AND THE CIRCUIT C OU RT A LS O ppSAID THOSE THINGS T HAT W ERE CONTAINED IN THE STATE A TTORNEY'S S YN OPSIS , WHI CH IS A SUMMARY OF THE SWO RN STATEMENTS MADE TO THE STATE A TTORNEY ALSO SAID T HAT' S WORK PRODUCT OR P RI VI LEGE AND THAT'S NOT SUBJECT TO BRADY. SO THOSE ITEMS D ID N' T G ET CONSIDERED IN ANY SORT OF C UMULATIVE ANALYSI S, BUT I WILL START WITH

YOU STILL HAVE T O A LLEGE AND PRO VE T HAT T HE Y WER E ppWITHHELD, THA T THEY W ER E EITHER IMPEA CH ING O R FAVORABLE TO T HE D EFENDANT AND THAT THEY S UFFERE D

PREJUDICE.

CORRECT, YOUR HONOR. SO WITH SORT OF FIRST, I T WASN'T DISCLOSED. THE JUDGE BELOW SAID SOME OF THE STUFF HE WASN'T CONSIDERING IN ANY SORT OF CUMULATIVE ANALYSIS. FIRST THE ONE THING HE DID SPECIFICALLY CONSIDER WITH DEFENDANT'S EXHIBIT NUMBER 8, WHICH CONCERNED THE CONTACT BETWEEN MELVIN JONES AND -- DERRICK JOHNSON WHILE THEY WERE INCARCERATED TOGETHER.

THERE WAS NO TESTIMONY AT THE PRETRIAL, THERE WAS NO QUESTION ASKED ABOUT WHETHER THEY HAD EVER MET, WAS THERE? ppTHERE?

WELL, THE PARAMETER OF WHAT HAPPENED AT THE PRETRIAL, LET ME FIRST TALK ABOUT WHAT HAPPENED AT THE FIRST TRIAL. THE FIRST TRIAL BOTH MR. JONES AND MR. JOHNSON HAD BEEN DEPOSED, AND TESTIFIED AND IN THE FACE OF QUESTIONS BY THE DEFENSE ATTORNEY FOR MR. SMITH, AS TO THEIR CONTACT, THEY ppDENIED CONVERSING ABOUT THE CASE, KNOWING EACH OTHER, AND SO THEY BASICALLY SAID NOT TRUE.

BUT NOW THAT WAS APPEALED, ppTHE CONVICTION IS REVERSED. IT COMES BACK FOR A NEW TRIAL AND WE DON'T HAVE THE SAME TESTIMONY ON RETRIAL. THAT WAS NEVER ASKED, RIGHT?

THOSE QUESTIONS WERE NOT ASKED AND DEFENSE ATTORNEY BASICALLY THE POSITION IS WE KNOW WHAT THE ANSWER IS. THEY ARE SAYING THAT THERE IS NOTHING THERE. THERE IS NO EVIDENCE AND NO ONE TOLD THE DEFENSE ATTORNEY THAT, IN FACT, THE STATE KNEW THAT THEY HAD BEEN IN A JAIL CELL TOGETHER AND THAT M.R. JONES HAD APPROACHED MR. JOHNSON WITH A MAP OF THE CRIME SCENE, AND SAID THAT HE WOULD HELP HIM AT TRIAL. THIS INFORMATION, THE DEFENSE ATTORNEY AT THE RETRIAL DID NOT KNOW. AND, IN FACT, THE FIRST TRIAL WHEN IN CLOSING ARGUMENT THE DEFENSE ATTORNEY WAS TRYING TO SUGGEST AND SAY THAT DESPITE THEIR DENIALS, THERE HAD BEEN SOMETHING GOING ON BETWEEN JONES AND JOHNSON, THE PROSECUTOR ARGUED THAT'S RIDICULOUS. THERE IS NO EVIDENCE OF THAT. WELL, BUT OF COURSE THE STATE HAD EVIDENCE OF THAT. THE STATE KNEW THAT THERE HAD BEEN THE CONTACT. IN FACT, WHEN YOU DO SOMETHING ON A TIMELINE YOU CAN FIND OUT THAT JOHNSON HAD BEEN INTERVIEWED BY A STATE ATTORNEY INVESTIGATOR ON ppJULY 5TH. JULY 11TH IS WHEN HE IS IN A ppJAIL CELL WITH MELVIN JONES ppAND MELVIN HAS THIS MAP AND SAYS THAT HE WILL HELP HIM.

AND THEN JOHNSON ASKED TO BE MOVED FROM THE CELL AND DIDN'T WANT TO HAVE ANY CONTACT.

ACTUALLY THERE IS NO EVIDENCE OF THAT. THE EVIDENCE OF THAT IS

DIDN'T JOHNSON TESTIFY TO THAT EFFECT? >> YOU ARE CORRECT, YOUR HONOR. BUT M.R. HOGAN, THE PROSECUTORS, SAID JOHNSON NEVER TOLD HIM THAT. HE JUST HEARD IT FROM OTHER PEOPLE SO IT WAS SORT OF THIS HEARSAY KIND OF THING. SECOND, IN TERMS OF AT THIS POINT IN TIME IN EVALUATING THE PREJUDICE, THE U.S. SUPREME COURT IN CHILDS MADE IT CLEAR IT DOESN'T MATTER WHAT JOHNSON SAYS. NOW THE QUESTION IS WHAT COULD HAVE BEEN PRESENTED TO THE JURY AT THE TIME OF THE TRIAL. IN JOHNSON NOW, TRYING TO SAY, WELL, I DIDN'T SAY ppANYTHING TO HIM. HE WAS JUST TALKING TO ME. I WAS KIND OF SCARED AND I ASKED TO BE MOVED.

BUT THE PREJUDICE STANDARD THEN IS WHETHER IT PRESENTS THE WHOLE TRIAL IN A COMPLETELY DIFFERENT LIGHT. IS THAT

YES.

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

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

THAT'S IMPEACHMENT.

WELL, BUT I MP EACHMENT --

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 MISTAKEN LEAD IN A STATEMENT, THERE IS A DIFFERENT BURDEN OF PREJUDICE.

BUT THERE IS NO -- SINCE THEY NEVER TESTIFIED WHETHER 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 ISLED AS 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 I 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 WHERE NOT THEY DIDN'T TESTIFY AT RETRIAL ABOUT IT, BUT IN THE FIRST TRIAL THEY TESTIFIED THAT THEY HAD MET. HOW WOULD I 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. ppDELIBERATELY 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 ppPROCEEDING 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 MISLEADS THE DEFENSE ABOUT. IT SHOULD BE EVALUATED UNDER ppGIGLIO, BUT EVEN UNDER BRADY, IN THIS INSTANCE, I CAN'T BE EVALUATED IN A VALID ACUUM, 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 EVIDENCE THAT PLACED HIM AT THE SCENE EXCEPT FOR THE FACT THAT HE LIVED IN 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 AND CHALLENGES OF THE ADEQUACY OF THEIR INVESTIGATION. TO GO TO HIS HOME TWICE, THIS IS ALSO UNKNOWN, TO DO AN EIGHT HOUR 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 OCCURRED, 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 IMPACT COULD NOT 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 WORKING 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 PREFERENCE 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 CLOUD INVESTIGATION REPORT AND ON THE CID INDEXES TESTIMONY 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 TRIAL. MELVIN JONES SAW 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 WROTE TO THE STATE

ATTORNEY WHICH THE STATE ATTORNEY, THE BEST WE CAN FIGURE OUT, RECOGNIZE D ON JULY 21ST BECAUSE AT THE END OF JULY 22ND HE SAID I JUST YESTERDAY GOT COMMUNICATION FROM ANOTHER WITNESS. AT THE END DURING HEARING HE SAYS THAT'S IN REFERENCE TO MELVIN JONES. SO MELVIN JONES SENSITIVE MAP, AND A LOT OF HEARING 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 WHERE ELSE YOU OUR OWN PERSPECTIVE 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 EVIDENT 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 INSTRUCT PEEPER EACH HIM. IT MATTERS WHETHER 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 CHILDS, 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 MURKIN.

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 THE JOHNSON'S STATEMENT, BUT WHAT OCCURRED. WE DON'T HAVE JONES' STATEMENT. HE WAS NEVER DEPOSED THOUGH THERE IS NO RECORD OF IT BEING 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 POSITION WHICH INDICATES THAT WHEN THE 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 WHEATLEKS TO DERRICK JOHNSON AND HAND WRITES 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 HE NOT ES SAID HE GAVE THEM THE MAP AND SAID IT WOULD HELP D.J. AT TRIAL WHETHER 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 H 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 EA N , ON THIS PIECE O F E VI DE NC E , THERE IS - - S HO UL D H AV E B EEN DISCLOSED , AND IT W OU LD QUALIFY AS BRA DY. SO T HE I SS UE C OM ES D OW N T O W HAT JUS TICE C ANTE RO ASKED YOU EARLIER W HICH I S DOE S IT MEET THE THIRD PRO NG A ND Y OU SAID WE'VE GOT TO LOOK A T I T IN EVERYTHING ELSE THA T WASN'T DISCLOSED, A ND W OU LD REMIND Y OU YOU A SKED FOR , ABOUT 30 MINUTES. 15 MINUTES IS YOUR TIM E . ONE OTHER ISSUE I S ONE O F THE OTHER BRADY V IO LA TIONS.

ONE OTH ER P OINT Q UI CKLY I S I N R EFEREN CE T O M cGRU DE R WHO IS T HE EYE WI TNES S W HO WAS AT THE H OG GLY- WO GG LY BARBECUE WHO SAW T WO B LACK MEN ENTER INTO THE CAB. WHAT WAS N OT DIS CL OSED A S T O HIM WAS THE F AC T T HA T A S TATE ATTORNEY INVESTIGATION OF A S YNOP SI S W HI CH I NCLU DE D HIS S TATEMENT TO T HE S TA TE ATTORNEY ON APRIL 4TH , MR. HOGAN NOTED THAT HE HAD NOT BEEN ABLE TO PIC K OUT ppE I THER SUSPECT FRO M A P HOTO OP WHICH I S C ON TRARY T O HIS T ESTIMONY. HE T ESTI FIED H E P IC KE D O UT ONE PHOTO, WHICH WAS S MI TH . ACCORDING TO THE STATEA TTORNEY, HE PIC KED O UT NEITHER AND HE IS A LSO OFF ON H IS D ESCRIP TION B Y A S ppMR. HOGAN NOTES , 3 0 P OU ND S AND AS YOU GO T HROUGH T HE POLICE REPORTS YOU SEE VARIOUS NUMBERS, SOM EWHERE BETWEEN 40 AND 70 P OU NDS IN THE WEIGHT THA T SUP PO SE DL Y MR. SMITH WEIGHED. THAT HAS TO B E EVA LUAT ED CUMUL ATIVE LY AND T HE CIR CU IT COURT WHEN ANALYZING THE FAILURE TO D ISCL OS E EXHIB IT 8 AND T HE CONTACT AND T HE HOLDING C EL L R EL IE D O N M cGRUDER 'S T ES TIMO NY F OR ppFINDING THE C OMPE TENC E. AND McG RU DE R 'S T ES TIMONY IS WORTHLESS W HEN YOU ACT UALL Y KNOW WHAT HE TOLD THE S TA TE ATTORNEY.

WHAT WAS H E - - H OW WAS H E ppCROSS-EXAMINED ABOUT T HOSE PHOTO PAC KS AT TRI AL?

AT TRIAL HE WAS N OT ABL E TO IDE NTIFY M R. S MI TH IN T HE COURTROOM. HE SAYS I N HIS TESTIMONY ON ppDIRECT E XA MINA TI ON T HAT H E PICKED OUT A P HO TO O F M R. SMITH , A ND H E A T O NE POINT IN TIM E W HI LE B EI NG EXAMINED BY THE STATE SAY S THAT HE PICKED O UT THAT PHOTO BECAUSE HE BELIEVED THAT W AS T HE P ERSO N. I N CROSS , H E A CK NO WLED GE D THE DEFENSE SAID AT THAT TIME YOU WERE U NS URE , CORRECT AND HE SAID YES S O HE WAFFLES BACK A ND F OR TH AND IT IS PRE TTY C LE AR WHEN YOU LOOK AT THE CLO SI NG ARGUMENT THAT THE PROSECUTION IS SAYING WE WISH HE WERE S MART ER , YOU KNOW, THERE IS A LOT O F THINGS WE WOULD CHANGE A BOUT HIM I F WE C OU LD BUT T HEY A RE STILL RELYING O N HIM SO I D O ppRECOGN IZE THAT HE WAS IMPEACHED BUT I N F AC T HE H AD NOT P ICKED M R. S MI TH 'S P HO TO O UT WHICH I S I NF ORMATION THAT THE J URY NEVE R HEARD .

THANK YOU . pp

MAY IT PLEAS E T HI S HONORABLE COURT , MY N AME I S KAT HERINE BLA NC O W ITH T HE ATTORNEY GENERAL'S OFFICE REPRESENTING THE STATE OF FLORIDA.BEFORE I ADDRESS THE BRADYCLAIM THERE IS ONE ISSUE OF CORRECTION TO THE T RIAL COURT'S ORDER THAT I WOULD LIKE TO B RING TO T HIS COURT'S ATTENTION AND IT IS MY FAULT AND I APOLOGIZE. THIS CAS E INVOLVES A 32 VOLUME RECORD WITH O VER 5,000 PAGES O F MATERIA L . IN T HE RECOR D A S IT S TA ND S BEFORE THIS COURT IN V OL UM E 27, PAGE 4 94 4 T HE RE I S A ppSINGULAR LINE THAT SAYS THIS IS RICHA RDSON SAN DERS , T HE TRIAL COUNSEL SPE AK IN G, W E S ENT SOMEBODY UP THERE TO SEE IF WE C OU LD LOC AT E WITNESSES OR ANYTHING LIKE THAT. THAT IS FROM THE EVIDENTIARY HEARING HELD JULY 23 , 2002. THE TRIAL COU RT ENT ERED AN ORDER DENYING R EM AINI NG CLAIMS ON FEBRUARY 11TH OF pp2003 AND THAT'S IN T HE RECORD AT LINE 2 2 , REC OR D pp4089 T O 4 11 4 AND THE T RIAL C OURT INCLUDED T HAT SIN GU LA R LINE ABOUT RICHARD S ANDE RS ALLEGEDLY SAYING WE SEN T SOMEBODY UP THERE TO SEE IF WE COULD LOCATE W ITNE SSES OR ANYTHING LIKE THAT . AFTER THAT ORDER W AS E NT ERED ON FEBRUARY 25TH , THE TRIAL COURT ENTERED T WO S MA LL ORDERS, A TWO -P AG E RIN G ORDER AND A O NE AND A HAL F P AGE ORDER C ORRECTING T HE RECORD. AND I DID NOT CAT CH T HI S ONE AND A HAL F P AG E ORD ER CORRECTING THE RECORD.IT I S S IGNIFI CANT W ITH RESPECT 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 HEREFORE, 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 FORE 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 TO 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 EMBER 1ST , SIN CE COUNSEL S MITH ppSU PPECTED THA T THEY WERE 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 NK LY , MELVIN J ON ES T OO K EVE RYTH IN G VERY LITERALLY , E XACT 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 RSAT IO N WITH MELVIN J ON ES. WHAT JOHNSON K NE W W AS THA T ON JULY 1 1T H O F 1 983 , 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 1983 PRO SE CU TO R -- ppALSO TESTI FIED T O THA T , I N FACT, IT WAS HIS RECOLLECTION THAT JOH NSON 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 ARE GOING TO 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, I CERTAINLY COULD HAVE BEEN USED IN IMPEACHMENT AT LEAST OR TO FAN OUT 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 WHETHER 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 BEEN PREVIOUSLY 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 WOULD AS A STATE TO THE STATE ATTORNEY AND TO THE PUBLIC DEFENDER?

THAT WAS DISCLOSED TO THE DEFENSE AND DURING JONES' DEPOSITION HE IS ASKED AT 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 WHETHER IN TERMS OF ALTERING IT. IT WASN'T WHAT HE ULTIMATELY SOHE CLEARLY WAS FOLLOWING AROUND IN THE SENSE OF

JONES IS LOOKING TO BENEFIT JONES.

HE WAS SORT OF DOING WHAT WAS CHARACTERIZED 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 CHECKER WRITER AND HE

HAD A CABIN ETMAKI NG BUSINESS WHERE HE WOU LD ACCEPT MONEY FOR DOING CABINET WORK AND THEN NOT D O THE WORK AND S O H E H AD I BELIEVE 17 OR 18 C HARG ES AT T HE TIME. HE ACTUALLY TESTIFIED AT TRIAL THAT HE HAD 24 FEL ON Y CONVICTIONS. THE JURY DIDN'T KNOW THA T THEY WERE B AD C HE CKS A ND GRAND THEFT T YPE CHA RG ES , BUT THEY DID KNO W THAT HE HAD, INDEED , 24 C HA RG ES . JONES ADMITTEDLY W AS N OT HAPPY THAT T HE POL IC E DETECTIVE , SAN MAR CO , S AI D , W ELL , OKAY , M AYBE YOU CAN SERVE YOUR TIME WITH P OLICE OFFICERS AND SO J ONES , AND T HAT IS BROUGHT OUT.

I GUESS GOING BACK TO , THOUGH, HOW I T WOULD HAV E HELPED THE D EFENSE , THE DEFENSE, WHETH ER Y OU T HINK IT IS A - - H OW W E THI NK I N HIN DSIGHT WE ARE TRY ING T O SHOW THAT J ONES AND J OH NSON HAD KIND OF COME U P WITH THIS TOGETHER T O FRA ME T HE M ; IS THAT CORRECT?

THAT'S T HE DEF ENSE -- ppTHEORY.

SOMEHOW IT H ELPE D THE DEFEN SE TO BE ABLE T O S AY AND YOU WERE IN THE S AM E CELL A ND Y OU E VE N G AV E T HE M A MAP THA T W AS , Y OU SAI D ppWOULD HEL P H IM . NOW, I MEAN , I DON 'T KNO W , A GAIN THIS IS - - T O M E THAT'S SORT OF DIF FERE NT FROM, WELL, THEY D ID N' T E VE N KNOW EACH OTHER. THERE WAS NO CONTACT. NOW, WHETHER I T M EE TS T HA T P RONG SO I T U ND ER MINE S O UR CONFIDENCE AND PUTS THE WHOLE TRIAL IN A DIF FERE NT LIGHT WOULD BE A QUESTIO N LOOKING AT THE O THER THI NG S , BUT IT IS DEFIN ITELY SOM ETHING THAT I S - - C OU LD BE USED BY A GOO D D EF ENSE LAWYER TO F URTHER D EV EL OP A THEME THAT THEY W ANTE D T O DEVELOP ABOUT T HI S GUY , J ONES, W HO IS A LIT TLE , YOU KNOW, A G OO D E YEWI TNES S I S A LITTLE S CR EW Y AND N OW H E I S A PPROACHING JOHNSON S O A T LEAST I THINK THAT'S SOMETHING THAT , Y OU KNO W , AGA IN WHETH ER H E G ET S T HE M OVER THE HUM P O F W HETH ER I T THE RE SHOULD BE A N EW T RIAL IS A DIFFERENT STORY B UT I T DOES IMPRESS ME AS SOMETHING THAT COULD B E D EV ELOPED.

YES, JUSTICE , I T I S T RU E IT MIGHT HAVE B EE N HELPF UL . THAT IS NOT T HE BRADY TES T THE FACT THAT IT MIGHT H AV E BEEN HELPFUL TO MATER IALITY , HELPFUL TO THE DEFENSE.

YOU HAVE HERE A S ITUATION WHERE YOU'V E G OT JONES ppPICKING OUT SMITH. YOU'VE GOT OBVIO US LY J OH NSON H AS AN A X T O GRI ND. YOU'VE GOT AN E YEWI TN ES S THAT C OULD N' T PICK O UT T HESE PEOPLE, Y OU KNOW , C OULD N'T PICK THEM OUT O F A P HOTO PACK. YOU'VE GOT T HE WEA PONS NOT I MEAN , T HE RE S TART S T O BE A CONCERN AS T O W HE TH ER A LL O F T HESE THI NG S ADD UP TO A N AIR TIGH T CAS E AGA IN ST MR. SMITH AS BEING T HE ppPERPETRATOR OF THIS CRI ME .

YES , J US TI CE PAR IENT E , I WOULD LIKE TO ADDRE SS T HO SE OTHER FACTORS. I AM GOING T O S TART WITH T HE PHOTO PACK. THE REPORT T HAT OPP OSIN G COUNSEL IS R EF ERRING T O T HI S MORNING WITH REGARD T O D AV ID M cGRUDER, M R. M cG RUDE R W AS THE COOK AT THE BAR BE CU E RESTAURANT, THE ppHOGGLY-WOBGGLY BARBECUE AND MR. GRUDER BETWEEN THE END OF MARCH AND THE BEGINNING OF APRIL, I BELIEVE 3 -3 1 T O 4-4 THE S TATE A TT ORNEY I S INTERVIEW ING M UL T B EL L - - MUL TIPLE W ITNE SSES AND T HERE IS A NOTATION T HA T McG RUDE R COU LD NOT PICK OUT THE INDIVIDUALS OUT OF A P HOTO PACK. WELL, THERE IS A N EXPLANATION FOR THAT AND THAT COMES ABOUT AND IS ACTUALL Y ESTABLISHED AT THE TIME OF TRIAL. IN VOL UME 7 O F T HE T RIAL R ECORD AT P AG E 118 9 DETECTIVE SAN MARCO TESTIFIES THAT ON 3-2 1 A PHOTO PACK CON TA IN ING SEVEN PICTURES IS SHOWN TO ppMR. McGRUDER. ppNEITHER D EFEN DANT'S PIC TU RE , NEITHER JOHNSON OR S MI TH'S PHOTO IS IN THA T P HOTO P AC K. H E PICKED OUT N O ONE . THE SECOND PHOTO PACK I S SHOWN TO M R. M cG RUDE R O N 3 -23. THIS IS A F IV E- PI CT UR E PHO TO PACK WITH JOHNSON, THE TAL L , ppLIGHTER SKINNED INDIVIDUAL WHO R EMAINED OUTSIDE OF THE ppBAR BECUE RESTAURANT. JOHNSON'S PHOTOGRAPH IS IN THAT. McGRUDER D OESN 'T PICK OUT ANY PHOTO. THE THIRD P HO TO P AC K T HA T D ETECTIVE SAN MARCO TESTIFIES TO AND THIS IS I N THE RECOR D A T P AG E T

-1 11 1 WAS SHOWN TO HIM ON 4-8-93 AFTER THE STATE ATTORNEY'S WITNESS MCGRUDE REPORTEDLY SHOWED HIM A PHOTOGRAPH WHICH WAS TESTIFIED TO AT TRIAL AS BEING IDENTIFIED BY TYRONE SMITH.

YOU MEAN '83, RIGHT?

'93. '83, YOU'RE RIGHT, THANK YOU, YOUR HONOR, I APPRECIATE IT. '83, MCGRUDE REPORTEDLY SHOWED HIM A PHOTOGRAPH WHICH WAS TESTIFIED TO AT TRIAL AS BEING IDENTIFIED BY TYRONE SMITH WHICH THE DEFENSE DISPUTED AT THE TIME DURING CLOSING ARGUMENT. MR. SANDERS SAYS THEY SHOWED YOU A PHOTO THAT HE'S IDENTIFIED AND THEY SAY IT IS SMITH BUT I DON'T REALLY THINK SO.

WAS IT A PHOTO TO PACKAGE?

IT WAS A PHOTO PACKAGE.

AND THE FIRST PHOTO PACKAGE HE IS SHOWN THAT SMITH IS IN?

ACCORDING TO DETECTIVE SAN MARCO'S TESTIMONY.

THAT SOUNDS LIKE A REALLY ODD WAY OF, YOU KNOW, DOES THAT MAKE SENSE TO YOU AS FAR AS THE POLICE?

IT MAY BE THAT THEY DO SHOW A PHOTO PACKAGE WITH NO SUSPECTS TO TEST, YOU KNOW, I DON'T KNOW. I DO KNOW ONLY WHAT DETECTIVE SAN MARCO TESTIFIED TO. SO THAT FACT THAT McGRUDE REPORTEDLY SHOWED ANYONE OUT OF A PHOTO PACKAGE IN EARLY APRIL BEFORE HE IS SHOWN THE PHOTO PACKAGE BY SAN MARCO THAT HAS SMITH'S PHOTO IN IT IS QUITE FRANKLY A RED HERRING. THERE IS NOTHING TO THAT. AND REGARDLESS OF MCGRUDE'S INABILITY TO ESTIMATE MR. SMITH'S ACTUAL WEIGHT, THAT HAS NOTHING TO DO WITH THE FINGERPRINT THAT IS FOUND ON THE TELEPHONE AT THE HOGGLY BARKER CUE AND THAT IS SIGNIFICANT BECAUSE YOU HAVE THE CAB COMPANY DISPATCH CONFIRMING AT 12:28:00 A.M. ON MARCH 31ST, 1983 THAT HE RECEIVED A DISPATCH TO THE BARKER RESTAURANT AND THAT IS THE TELEPHONE THAT WAS USED BY THE SHORTER, DARRICK INDIVIDUAL, THE INDIVIDUAL THAT IS DESCRIBED BY MR. McGRUDE. IN ADDITION OF COURSE YOU HAVE DERRICK JOHNSON WHO TESTIFIES AT THE PRELIMINARY HEARING IN JUNE AND OF COURSE DOES, IN FACT, IDENTIFY THE DEFENDANT DERICK TYRON SMITH AS THE SHOOTER. IN DECISION YOU HAVE THE GUN, THE GUN WHICH WAS DESCRIBED AS CONSISTENT WITH THE GUN MISSING FROM ROYCE'S RESIDENCE AS THE UNCLE TO DERICK TYRON SMITH. HE WAS UNKNOWNLY HEATED BY THE GUN BUT KNOWNLY HAD IT FOR NEW YEAR'S EVE AND DERRICK TYRON SMITH HAD BEEN OVER TO HIS HOUSE SOMETIME BEFORE MARCH. THE MIDDLE - METAL COMPOSITION WAS FAMILIAR TO BULLETS PURCHASED TEN YEARS EARLIER. THAT SAME GUN, THE ROBBERS DIDN'T GET ANY MONEY FROM THE CABIN RIVER. FOR MR. SANDERS TO TRY TO GET A WAY FROM THE ARMED GUNMEN AND HE WAS SHOT IN THE BACK AND KILLED. NOW, SODERICK TYRON SMITH'S ROBBERY ATTEMPT IS UNSUCCESSFUL. AS A RESULT, 12 HOURS LATER, HE USED A GUN IN A MOTEL ROBBERY. WE KNOW IT IS DERICK TYRON SMITH BECAUSE HIS FINGERPRINTS ARE RECOVERED FROM THE SCENE, THEY ARE RECOVERED FROM MABEL LING'S TO THE VICTIM, HE ALSO OWNED THE VICTIM AND HE EATENS HIM WITH THE GUN AND ALSO HAS A WATCH, A VERY DISTINCTIVE WATCH. THIS IS A CANADIAN COUPLE THAT HAS BEEN LETTING ON IT. SO IT IS A VERY DIFFICULTIVE WATCH THAT IS LINKED THIS ARMED ROBBERY 12 HOURS AFTER THIS SHOOTING.

BUT ARE THE GUNS NEVER RETRIEVED?

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 SSSES 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 IGHT 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 IGNIFICANT 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 IGHT 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 ENTIALL S AY , W HETH ER THE FAVOR ABLE E VID E 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 TRIAL 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 EACH OTH ER . AND SO YOU H AV E 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 ETHE. 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

OULD YOU RES POND , T HO UGH , TO HIS INITIAL STA TEMENT THAT THE JUD GE ERR ON EOUS LY E XCLUDED SOM E THING S THA T WEREN'T D ISCL OSED AND N OT DOING A P ROPE R C UM ULAT IV E A NALYSIS ? pp

YOUR HONOR, I B ELIE VE THAT MAY BE REFERRING TO A ppSECOND ARGUMENT , H IS S EC ON D ISSUE WITH REGARD TO LIMITATION AT THE EVIDENTIARY HEARING. I'M NOT SURE I U ND ERSTAND I T FAIRLY ENOUGH T O RESPOND TO IT. I KNOW THAT THE T RIAL C OU RT DOES ANNOUNCE THA T HE H AS MADE AN I NDIVID UA L A ND A CUMULATIVE A NA LYSI S I N THE O RDER AND HE CERTA INLY UNDERSTANDS HIS RESPONSIBILITY, THE TRIAL COURT OUTLINES THE L EG AL STANDARDS THAT HE D OES HAVE TO FOLLOW. I WOULD HAVE TO REL Y O N T HE TRIAL COURT'S ORDER B EC AUSE I MAY B E M ISUN DERS TAND IN G THAT.

B UT T HE RE WER EN'T ANY CLAIMS IN THIS REGARD T HAT THE TRIAL C OURT S UMMA RILY OBJ ECTED WITHOUT C ON SIDERI NG AT THE EVIDENTI A RY HEARING?

THAT'S A CT UA LLY MR. McLAIN'S SECOND A RG UMENT , AND THE - - O UR A RG UM EN T R ESPONSIVE, IT IS A ppTHREE-PAGE ARG UMENT I N T HEIR INITIAL BRIEF. MY RED LIG HT I S ON. MY I C ONTINUE?

YES.

THANK YOU, YOUR HONOR, I APPRECIATE THE INDULGENC E . FROM PAGE 77 TO 8 0 I S MR. SMITH'S ARGUMENT WITH RESPECT TO THE LIMIT AT IO N OF THE EVIDENTIARY HEA RING , AND O UR RESPONSE IS THA T T HA T WAS I NS UF FI CI EN T TO A CT UA LLY LET US KNOW EXACTLY WHAT H E WAS COMPLAINING ABOUT. BECAUSE THERE W ER E S EVERAL FACTORS, AND I CAN ONL Y DIRECT THIS C OURT'S ATTENTION TO THE RECORD AT PAGE 3 43 1 AND THA T' S THE TRIAL C OURT'S ORDER WHICH DOES, IN FACT , E XSPAN D SEVERAL AREAS T O E XC LUDE ADDIT IONAL A LLEGATIONS. I WON'T BEL AB OR T HE P OI NT BUT WOULD ASK T HE C OU RT L OOK AT THAT ORDER. THAT IT I S THE M AY 10T H , 2002 ORDER AT 3 13 - - 3 431. T HANK YOU , YOUR H ONOR .

F IR ST , A S T O J OH NSON AND JONES' T ESTIMO NY , DUR ING T HE D EPOSITION , J ON ES TES TI FIED THAT HE HAD NEVER BEEN INCARCERATED IN THE SAME PLACE WITH D ER RI CK J OH NS ON . ppTHAT WAS H IS TESTI MONY U NDER OATH. THAT WAS AT THE FIRST TRIAL. THAT'S NOT TRUE. HE SAID I NEV ER T ALKE D T O N OBODY ABOUT THIS CAS E. ppTHAT'S NOT TRUE. THAT WAS UNDER OATH. THAT WAS AT THE FIR ST T RI AL .

WHO SAID T HAT?

J ONES.

JOH NSON S AI D , WAS A SK ED WHETHER HE HAD DISCUSSED THIS CASE WITH MELVI N J ON ES AT THE FIRST TRIAL. JOHNSON REPLIED, NO , I N EV ER HAVE.

B UT T HA T I S T RU E , I M EA N , ACCORDING TO JOHNSON , H E - - WHEN HE WAS - - H E DI D N OT DISCUSS IT.

JOH NSON'S TESTIMONY AT THE EVI DENTIARY HEA RING WAS THEY HAD A CONVERSATION. THEN THAT COM ES O UT I N ppDIRECT LATER IN REDIR ECT AND THE STATE G ETS HIM T O SAY , WELL, IT WASN'T A ppDISCUSSION. SO ONE PLACE H E SAYS I T WAS A CONVERSATION. LATER ON HE T RIED T O SAY B UT IT WASN'T A DISCUSSION. HE DOES S AY I NI TI AL LY WHE N HE SAID IT WAS A CONVERSATION, JONES WAS ASKING HIM QUESTIONS, AND H E ANSWERED THEM , B UT T HE N LATER ON HE SAYS , W EL L , N O , I N EVER REALL Y S AI D A NYTH ING . BUT

WHAT DOES HE SAY O N DIRECT AS TO THE S UB ST AN CE OF THE C ONVERSATION?

HE SAYS IN DIRECTOR HE SUBSTANCE OF THE CONVERSATION IS JONES IS APPROACHING HIM WITH THIS MAP, AND TELLING HIM THAT HE IS GOING TO HELP HIM. BEYOND THAT THAT'S A MONGOLOG. WHERE IS THE MONGOLOGUE? WHAT WAS JOHNSON'S RESPONSE? HE SAYS THAT JONES ASKED HIM QUESTIONS ABOUT LOCATIONS, AND pp STILL A MONGOLOG. WHAT WAS JOHNSON'S PART OF THE CONVERSATION?

ACCORDING TO JOHNSON, JOHNSON'S RESPONSES WERE THAT HE SAID, I DON'T KNOW. I DON'T WANT TO TALK ABOUT IT.

AND THERE IS NOTHING IN THE RECORD TO CONTRADICT THAT?

GRANTED. BUT I CAN TELL YOU THAT ON THE CROSS-EXAMINATION OF JOHNSON WOULD BE DECLINEDLY DIFFERENT WITHOUT THIS INFORMATION AT THE TRIAL. YOU MEAN TO TELL ME AT THE TIME THIS CONVERSATION HAPPENED, HE STATED HE CAN'T DECIDE WHETHER JOHNSON IS TELLING THE TRUTH OR SMITH IS TELLING THE TRUTH. THERE ARE POLICE REPORTS IN THIS REGARD. THEY DON'T KNOW WHO DID WHAT. AND JONES MAGICALLY APPARENTLY AT A POINT IN TIME WHEN JOHNSON NEEDS SOME BODY TO BE THE TIE BREAKER TO HELP HIM OVER THE EDGE BECAUSE ON JULY 5TH IS WHEN THE STATE ppATTORNEY INVESTIGATOR GOES AND TALKS TO JOHNSON AND JULY 11TH THEN JOHNSON HAS THIS ENCOUNTER, WHETHER EVER WORD YOU WANT TO USE, A ppDISCUSSION, A CONVERSATION, WHATEVER, BUT THERE IS THIS MEETING. THEY ARE IN A CELL TOGETHER, AND AT THAT MOMENT WHEN THINGS SUDDENLY SHIFT AND JONES THEN WRITE IT IN AND DAY SENDS A LETTER TO THE STATE ATTORNEY'S OFFICE AND TO THE PUBLIC DEFENDERS OFFICE AND THEY MAKE A BIG DEAL WITH THE PUBLIC DEFENDERS OFFICE. THE PUBLIC DEFENDERS OFFICE IS REPRESENTING JOHNSON SO HE SENDS IT TO THE STATE AND JOHNSON'S LAWYER, SUDDELY INDICATING HE IS AN EYEWITNESS. HE SAW IT. WELL, OF COURSE, HE HAD BEEN WITH JOHNSON.

HE DOESN'T WRITE THE LETTER ABOUT THIS until AFTER HE HAS BEEN IN THE CELL WITH JOHNSON?

CORRECT. AND JOHNSON, IN FACT, LOOKS AT THE MAP THAT WAS ATTACHED TO THE LETTER AT THE EVIDENTIARY HEARING. AND SAID, YES, THAT LOOKS LIKE THE MAP ALTHOUGH SOME OF THAT WRITING WASN'T ON THERE AT THE TIME.

YOU DON'T HAVE MUCH TIME LEFT, BUT YOUR OPPONENT ppATTEMPTED TO DRAW US AND OVERALL SCHEME HERE OF WHETHER EVIDENCE WAS PRESENTED AND THE STRENGTH OF THE STATE'S CASE AGAINST YOUR CLIENT TO ATEMPT TO DEMONSTRATE THIS WOULD NOT PUT THE CASE IN AN ENTIRELY DIFFERENT LIGHT IN TERMS OF THE MATERIALITY OR PREJUDICE ANALYSIS. WOULD YOU HIT A LETTER ON ppTHAT BEFORE YOU SIT DOWN?

YES, YOUR HONOR. FIRST THE STATE IS ATTEMPTING TO RELY HEAVILY ON PRIOR HISTORY. I WAS PRECLUDED FROM ASKING ANY QUESTIONS AT THE EVIDENTIARY HEARING REGARDING THE BRIEFLY MATERIAL AS TO HER. IN 1983 SHE WAS INTERVIEWED BY THE POLICE. THERE WERE POLICE REPORTS UNDISCLOSED.

SINCE YOU DON'T HAVE MUCH TIME, CAN YOU JUST ANSWER JUSTICE STEAD'S QUESTION ABOUT THE OTHER EVIDENCE THAT WAS PRESENTED AT THE TRIAL AND WHETHER THE UNDISCLOSED EVIDENCE WOULD PUT THE CASE IN SUCH A DIFFERENT LIGHT?

FIRST THE STATE RELIES HEAVILY ON JONES. HERE TODAY IN THE ORAL ARGUMENT THERE IS A RECOGNITION THAT JONES IS OUT THERE AND UNRELATED. JONES WAS NEGOTIATING WITH THE STATE CALLING THEM UP WHEN HE WAS FOR THE RETRIAL SAYING, I'M A FRIEND I'M GOING

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

WALKER MATTHEWS, PRESENTLY LAKER WAS INTERVIEWED IN 1983. THIS WASN'T DISCLOSED. I COULDN'T ASK QUESTIONS ABOUT THAT. SHE TESTIFIED IN 1990 THAT SHE 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'S NOTE THAT HE GETS IT OUT OF HER I THINK IT IS IN '88. ppSO THAT 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 WERE NOT 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 WHENEVER RYTHING IS LOOKED CUMULATIVELY, I AM CONFIDENT IN THE OUTCOME.

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

PLEASE RISE.