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Dieter Riechmann v. State of Florida Docket Number: SC03-760

SGLOOM LADIES AND GENTLEMEN,THE --.

THE MARSHAL: LADIES ANDGENTLEMEN, THE FLO RI DA SUP RE ME COURT.PLEASE BE SEATED .

CHIE F JUSTICE: THE NEXT CASE ON THIS MORNING'S D OCKE T IS RIECHMANN VERSU S ST AT E OF FLORIDA. THE PARTIES R EA DY? MR. McCLAIN, YOU MAY P RO CEED .

MAY IT P LEASE T HE COURT, MY NAME IS M ARTIN M cCLAIN , I'M H ERE TODAY REPRE SE NTING MR. DIETER RIECHMANN.

CHIEF JUSTICE: DO YOU WANT TO RAISE THE MIC ?

I N H IS A EA L.

CHIEF JUSTICE: HOW D O YOU PRONOUN CE THE NAME?

RIECHMANN. I N HIS AEAL FROM DEN IAL O F 3.850 REL IEF.

CHIEF JUSTICE: WE ARE S TI LL , WE UPH EL D T HE G RANT I N G OF A NEW P ENAL TY P HA SE , COR RE CT?

PENDING T HE O UT CO ME.

CHIEF JUSTICE: SO WE ARE STILL WHERE T HE RE HASN'T BEEN A NEW PENALTY P HA SE JUS T ADDITIONAL ISSUES WERE RAISE D REGARDING WHETHER THERE SHOULD BE A N EW G UI LT O R A T OTALLY NEW TRIAL?

CORRECT. THAT'S WHERE WE ARE AT. AND I INTEND TO FOCUS O N THE FIRST TWO A RGUMENTS I N THE BRIEFS I N M Y R EMAR KS TOD AY , C ERTAINLY I WILL ADDRESS ANYTHING ELSE THAT THE COURT WANTS TO INQUIRE A BOUT . I N T HI S CAS E , M R. R IECH MANN SOUGHT TO PRESENT THE TESTIMONY OF A POLICE OFF IC ER T O T ES TI FY T HA T MR. RIECHMANN'S PROSECUTOR PRE SSURED HIM T O F ABRI CATE A STORY.

CHIEF JUSTICE: NOW, LET'S GO TO WHE N YOU A RE RAI SING T HIS I N THE LAS T COU PL E O F YEARS. I SN'T THIS SOMETHING THAT T HE L AWYE R KNEW BY T HE T IM E H E WENT TO TRI AL B AC K I N T HE 1980'S?

WHAT WAS K NOWN A T THE TIME OF TRIAL WAS THAT THI S P OL IC E OFFICER WAS DEPOS ED O N J UL Y 7TH. DURING THE DEPOSITION, HE INDICATED THAT THERE WAS A FLASHLIGHT THAT WHEN HE INVENTORY !!IED THE CAR THAT HE SEIZED FROM THE T RU NK . THE FLA SHLIGHT HAD BLO OD O N IT. T HIS WAS S IG NIFICANT EVIDENCE I N THE STATE'S C AS E I ND ICATIN G IT WAS I NC ONSIST EN T W IT H M R. RIECHMANN'S STORY THAT HE WAS AT ALL TIMES I N T HE DRIVER'S SEAT.THE NEXT DAY AFTER THE DEPOSITION HE CALLED UP THE DEFENSE ATTORNEY AND INDICATED THAT THAT WAS FAL SE.

CHIEF JUSTICE: SO THAT'S BEFORE THE FIRST T RIAL ? > > HE INDICAT ED , T HOUG H , BECAUSE H E W AS UNDER S USPENSION FOR DRUG U SAGE HIMSELF, THE POL IC E O FF IC ER .

CHIEF JUSTICE: SO WHICH PART IS NEWLY DISCOVERED THEN?

WHO PRESSED HIM, BECAUSE ALTHOUGH TOLD THE DEFENSE ATTORNEY WAS THAT WHAT HE HAD SAID WASN'T TRUE. HE WASN'T CALLED TO THE WITNESS AT THE TRIAL. HE SIMPLY SAID HE HAD FELT PRESSURE TO TESTIFY IN THAT FASHION. HE DID NOT IDENTIFY TO THE DEFENSE ATTORNEY WHO PRESSED HIM.

CHIEF JUSTICE: HYPOTHETICALLY YOU HAVE A NEW TRIAL AND HOW DO YOU THINK, WHAT EVIDENCE -- HOW DO YOU USE THIS EVIDENCE?

WELL, THIS IS EVIDENCE SHOWING THAT THE PROSECUTOR IS WILLING AND DID PRESSED WITNESSES IN ORDER TO GET THEM TO GIVE STATEMENTS AGAINST MR. RIECHMANN THAT IMPLICATED HIM.

JUSTICE: WAS THIS ADMISSIBLE AT A NEW TRIAL? ARE YOU SAYING -- AND THIS WOULD BE ADMISSIBLE TO SHOW WHAT AGAIN?

WELL, IT WOULD SHOW WHAT THE PROSECUTOR WAS WILLING TO DO IN ORDER TO GET EVIDENCE BUT IT IS ALSO ADMISSIBLE BECAUSE AFTER THIS DEPOSITION IS DONE, AFTER THE DEFENSE ATTORNEY IS TOLD WHAT HE HAD SAID WASN'T TRUE, THE PROSECUTION HAS TO A BAND ON THE FLASHLIGHT AND DURING THE TRIAL NEW EVIDENCES SURFACE AND THIS IS THE SHAWL THAT WAS ON THE DRIVER'S SEAT AND THAT MR. RIECHMANN INDICATED HE WAS SITTING ON AT THE TIME OF THE SHOOTING. DURING THE TRIAL, THE STATE DISCLOSED.

JUSTICE: THIS WAS EVIDENCE NOT USED DURING THE TRIAL?

THIS EVIDENCE WAS USED DURING THE TRIAL I'M TALKING ABOUT NOW.

JUSTICE: THE SHAWL, BUT I'M TALKING ABOUT THE FLASHLIGHT?

CORRECT. BUT THE POLICE OFFICER DID AN INVENTORY AND COLLECTED BOTH THE FLASHLIGHT AND THE SHAWL FROM THE CAR. HE ALSO INDICATES IN HIS AFFIDAVIT THAT HE HAD BEEN PRESSURED BY THE PROSECUTOR REGARDING THE SHAWL TO TESTIFY FALSELY ABOUT THE SHAWL AS WELL. HE WAS NOT CALLED. THE SHAWL DIDN'T COME UP IN THE DEPOSITION. THAT WAS NOT DISCUSSED WITH THE DEFENSE ATTORNEY. THE DEFENSE ATTORNEY DIDN'T KNOW THAT, IN FACT, THIS OFFICER WAS ALSO INVOLVED WITH REFERENCE TO THE SHAWL. THE SHAWL WAS INTRODUCED AT THE TRIAL.

CHIEF JUSTICE: HE DIDN'T KNOW, BUT WHY, I MEAN A GAIN WHAT IS IT THAT OCCURRED IN THE LAST 20 YEARS THAT WOULD HAVE PREVENTED THIS AND THIS WASN'T RAISED IN THE FIRST 3.850 EVIDENTIARY HEARING.

OFFICER VESKIDIDN'T TELL ANYBODY UNTIL 1997 THAT HE HAD BEEN PRESSURED BY BETHSREANAN TO FABRICATE HIS TESTIMONY AND HE INDICATED NOT ONLY HAD HE BEEN PRESSURED REGARDING THE FLASHLIGHT.

CHIEF JUSTICE: BUT HE DIDN'T TESTIFY.

CORRECT.

CHIEF JUSTICE: SO HOW DOES THAT UNDERMINE THE INTEGRITY OF THE TRIAL?

BECAUSE I WAS EXPLAINING THE STATE INTRODUCED EVIDENCE THERE WAS BLOOD ON THE SHAWL, AND THAT, CORRELATED TO THE STATE, PROVED THAT MR. RIECHMANN WAS NOT SITTING ON THE SHAWL AT THE TIME THAT THE GUN WAS FIRED. AND THAT BLOOD SPATTERED FROM

THE VICTIM ON T O T HE S HA WL BECAUSE HE WASN'T T HERE. HOWEVER , OFF IC ER VES KI S AI D T HE SHAWL WHEN H E S EIZE D I T TWO DAYS AFTER THE SHO OT ING WAS LYING IN T HE PASSE NG ER SEAT IN BLOOD A ND T HE BLOOD WAS STILL WET. SO THE SIG NI FI CA NCE OF THE BLOOD ON THE SHAWL IS COMPLETELY D ESTROY ED B Y OFFICER VES KI 'S T ES TI MONY AS TO WHERE HE FOUND THE S HA WL A ND THAT THAT SEA T W AS COV ERED WITH BLOOD AND WAS STILL WET .

JUSTICE: WOULD Y OU CLARIFY FOR ME WHETHER OR NOT YOU WERE CALLING T HIS WITNESS A S A N INDEPENDENT CLAIM WITH REFERENCE TO B RA DY , G IG LI O OR WHETHER OR NOT THIS W AS P AR T OF A LAR GE R C LA IM O N P OST-CONVICTION REL IE F? HELP ME WITH T HAT.

THERE ARE A NUMBE R O F REASONS TO CALL HIM. FIRST OF ALL, IT I S A B RADY-GIGLIO V IO LATION I N REFERENCE TO THE SHAWL. IT WAS NOT D ISCLOS ED THA T T HI S IS THE OFFICER WHO SEI ZED I T AND WHERE IT WAS SEIZED. IN FACT, DUR IN G HIS D EP OSITIO N , H IS INVEN TO RY , HIS N OTES , T HA T SHOW WHERE HE SEIZED IT W ERE MISSING, A ND B ETH SRE EN AN TOL D THE DEFENSE A TT ORNE Y T HE Y A RE LOST. WE CAN'T FIND THEM. WE DON'T KNOW IF THE Y S TILL EXIST. SO THERE I S SIGNI FI CA NT INFORMATION TO IMPEACH T HE STATE'S EVIDENCE REGARDING THE MEANING OF THE SHAWL BUT IT ALSO C OR RO BORA TE S T HE AFFIDAVIT FROM M R. S MYKO WSKI WHERE HE SAYS BET H S REENAN IS THE ONE T HAT TOLD HIM WHA T T O SAY. EVEN THOUGH IT WASN'T T RUE.

JUSTICE: IN TERMS OF THE ISSUES THAT YOU H AD PEN DI NG , POST-CONV ICTION R EL IE F A T T HE TIME OF THE HEA RI NG , W HICH ISS UE OR I SS UE S WER E Y OU I NTENDING T O U SE THE EVI DENC E THAT WOULD BE P RE SE NTED B Y THE OFF ICER IN THE MANNER THAT YOU ARE D ESCRIBING?

BOTH AS E VIDENCE OF A BRADY V IOLATION AS TO O FFICER V ES KI , BUT ALSO AS K OR B RES IG NATION OF WHAT MR. S MYKO WSKI SAY S A S T O WHO WAS T EL LING HIM W HAT T O SAY.

JUSTICE: AND YOU D ID SEPAR ATELY A LLEGE AS A S EPARATE CLAIM IN Y OU R POST-CONVICTION M OT IO N A C LA IM , B RADY-GIGLIO C LAIM B ASED O N THE OFFIC ER'S T ESTI MONY OR L ACK?

WELL, FIRST OF ALL LET M E BACK UP JUST TO SORT OF ALS O PUT CONTEXT.

JUSTICE: IT WOULD BE HELPFUL FOR US MAYBE IF YOU WOULD BACK UP I N T ERMS OF ARTICULATING FOR U S I 'V E G OT THIS CLAIM P ENDING , W E H AD A HEA RI NG, I W ANTE D T O C ALL T HI S O FFICER A ND B ECAU SE I T W AS RELATED TO THIS ISS UE THA T I ALLEGED IN MY M OTIO N , A ND H ER E IS HOW IT WOU LD HAV E IMP AC TED THAT ISSUE OR I SS UES.

OFF ICER V ESKI G AV E A N A FFIDAVIT T O MR. RIE CH MANN 'S C OLLATERAL COUNSEL I N 1 99 7. AT THE TIME THAT THE A FFID AVIT WAS GIVEN, M R. R IECHMA NN 'S PREVIOUS AEAL AND THE STATE'S AEAL OF THE P RI OR 3 .850 W AS PEN DI NG I N T HI S COURT.A MOTION TO HOLD THOSE PROCEEDINGS IN ABEYANCE ANS WER SO THAT MR. VES KI'S INFORMATION COULD B E S UB MITT ED IN THE CIRCUIT C OU RT W AS F ILED IN THIS COURT. THIS COURT DENIE D THA T MOTION AND REFUSED T O HOLD THE PROCEEDINGS IN A BEYA NC E ANS WER . SO WHEN IT C OU RT FIN ISHE S W IT H THAT 3 .8 50 A EA L AND THE PROCEEDINGS ARE OVER AND JURISDI CTION GOES BACK TO CIRCUIT COURT, A 3 .8 50 I S FILED SO IN THE 3 .850 T HERE I S A C LA IM 3 A ND A C LAIM 4 . B OTH C ON CERN P ROSE CU TORI AL CONDUCT, B RADY -G IGLI O AND T HE Y BOT H CROSS -REFER EN CE EACH OTHER INDICATING T HE FAC TU AL ALLEGATIO NS INCLUDED ELSEWHERE IN THE MOTION ARE INC LU DE D HEREIN.

JUSTICE: DO EITHER ONE O F THEM CITE THIS OFFICER AND T HE RELATIONSHIP WITH THE STATE AND THE PROSECUTOR WITH THE OFFICER?

CLAIM 3 S PECI FI CALL Y FOCUSED ON SMYKOWSKI AND C LAIM 4 FOCUSES O N O TH ER PROSECUTORIAL MISCOND UC T . AND I NC LUDES R EFEREN CE T O VESKI AND V ESKI 'S I ND IC AT IO N THAT HE WAS COE RC ED B Y T HE PROSECU TOR TO LIE . SO E VERYTHING IS I N T HE 3 .850 . THEY ARE T ECHN IC ALLY L IS TE D I N DIFFE RENT CLAIMS BUT THE Y CROSS-REFERENCE EACH OTHER AND INCLUDE IN EACH OTHER T HE FACTUAL ALLEGATIONS FROM EACH OTHER.

SO YOU R C LAIM NOW IS W IT H RELATION TO TRYING TO P ROVE THOSE TWO CLAIM S T HA T T HE COURT E RRED IN NOT A LL OWIN G YOU TO P RESENT THI S O FF IC ER 'S TESTIMONY?

CORRECT. THERE WAS A HEARI NG G RA NTED . THE T RA NS CRIPT F ROM WHEN T HE JUDGE ANNOUNCES W HA T T HE HEARING IS O N , D OE SN 'T EXI ST . T HE PARTIES A RE TOL D O R T HI S DISCU SSION LATER O N BUT THE PARTIES UNDERSTAND T HAT SMYKOWSKI IS WHAT T HE J UDG E HAS GRANTED THE HEARI NG O N , BUT M R. R IE CHMANN 'S COUNS EL ALSO N OT IF IE S AND ENL IS TS OFFICER VESKI AS A W IT NESS . AND S O OFFICER V ES KI I S A W ITNESS. OFFICER VESKI IS N OT GOING T O BE AVAILABLE TO T RA VE L T O MIAMI SO THERE IS A R EQ UEST T O HAVE HIM TESTIFY V IA TEL EP HONE A ND THAT , T HE JUD GE SAYS , WEL L , THE STATE DOESN'T HAVE AN OBJECTION TO THA T I F I T I S ADMIS SIBLE SO W HAT ADD RE SS ES ADMISSIBILITY WHEN WE ARE ACTUALLY IN THE HEARING BUT IT IS OKAY FOR H IM TO AEAR B Y PHONE. SO WHEN HE IS GOING TO BE T HE NEXT WITNESS TO A EA R B Y PHONE, THAT'S WHEN THE STATE OBJECTS ON R ELEV AN CY GRO UN DS TO HIS TES TIMONY S AYING I T IS NOT R ELEVANT TO THE B RA DY CLAIM REGARDING SMYKO WS KI .

JUSTICE: WELL, AND N OW ARTICULATE FOR US HOW IT IS RELEV ANT TO THE BRADY C LA IM RELATING TO THA T O TH ER WITNESS?

IT IS R EL EV AN T , B EC AU SE FIRST O F A LL , A LL O F THE B RADY MATERIAL HAS TO B E EVA LU ATED CUM ULATIVELY S O T O T HE E XTENT THAT THERE HAS - - T HE RE WAS EVIDENCE OF B RADY VIOLA TI ON S AT THE FIR ST 3.8 50 P RO CE ED IN G , I. E. T HE S TA TE H AD RED ACTE D THE POLIC E R EP OR TS A ND N OT DISCLOSED THE POLIC E R EP OR TS , THAT HAS TO B E E VA LUATED WIT H SMYKOWSKI AS WELL AS W HA T VESKI HAS TO SAY. S ECOND IT ALSO IS R EL EVAN T I N TERMS OF THE CREDIBI LITY O F BETH SREENAN. BETH SREENAN T ESTI FI ED BOTH I N 1996 AND I N 200 2 A T T HE EVIDENTIARY HEARING REGARDING THESE MATTERS, AND S HE D EN IE D PRESSURING VESKI AND SHE DENIED PRESSURING SMY KOWSKI . T O THE EXTENT THA T HER CREDIBILITY IS AT I SS UE , W HAT OFFICER VESKI H AS T O SAY I S RELEVANT T O EVA LUAT IN G WHE THER BETH S REENAN I S TELLING THE TRUTH.

JUSTICE: A S YOU WERE MAKING THIS PRESENTATION, YOU INITIALLY, I THOUGHT I UNDERSTOOD YOU TO SAY T HA T THERE WERE SEPARATE AND INDIVIDUAL CLAIMS DIRECTE D TO THE POLICE OFFICER AND W HA T HAD HAENED. BUT THEN IN RESPONSE TO T HIS LAST QUESTION, YOU ARE TALKING ABOUT A HEARI NG T HA T DEALS WITH THE OTHER W ITNE SS .

WELL , THE W AY IT H AD B EE N PLU GGED IS THAT T HERE ARE T WO CLAIM H EADINGS BUT T HE Y A RE BOTH DEALING WITH PROSECUTORIAL MISCOND UCT. SMYKOWSKI IS LISTED IN ONE. BASICALLY THE OTHER ONE IS THE CATCH-ALL FOR EVERYTHING ELSE.

JUSTICE: SO THERE IS NOT A SEPARATE ONE THAT TALKS ABOUT THE POLICE OFFICERS SPECIFICALLY?

THE POLICE ONE IS INC LU DED IN THE ONE THA T I S S ORT O F T HE CATCH-ALL REFERENCING THE FAC T THAT THE AFFIDAVIT H AD BEE N FILED WITH THIS COURT W HILE THE AEAL WAS PENDING . NOW, THE S TA TE'S P OS ITION WIT H REFERENCE TO VESKI WAS THAT THIS COU RT , I T A LS O A EA RE D IN THE STATE HABEA S I N F RONT OF THIS C OURT AND THIS COURT HAD SAID I N FOO TN OT E 2 2 I F THIS ISN'T CON GN IZ ABLE O N S TATE HAB EA S. THE STATE BEL OW SAI D T HE RE W AS NO MERIT REG AR DI NG T HE C LAIM TO MR. V ES KI . SO THERE MAY B E C ON FU SI ON B UT PART OF THE CONFUSION IS WE DON'T HAVE A TRANSCRIPT OF THE HEARING WITH THE

JUDGE SPECIFICALLY D ELINEA TE S W HA T HE IS TAKING E VI DE NCE ON BUT I'M SUBMITTING THAT IT IS RELEVANT REGARDLESS BECAUSE IT IS RELEVANT TO DO THE CUMULATIVE ANALYSIS OF SMYKOWSKI INFORMATION. IT IS ALSO RELEVANT TO EVALUATING THE CREDIBILITY OF BETH SREEN AND SMYKOWSKI. SDPLOS WAS THAT ALL ARTICULATED TO THE TRIAL COURT JUDGE AT THE TIME?

I BELIEVE IT WAS. I MADE A PROFFER OF WHAT HE WOULD TESTIFY TO, AND HOW I BELIEVED IT WAS RELEVANT, AND WHY IT NEEDED TO BE ADMITTED. AND ALSO RENEWED IT LATER AND ALSO IN THE CLOSING ARGUMENT RELIED ON IT POINTING OUT THAT THE JUDGE HAD BEEN WRONG IN NOT TAKING THIS EVIDENCE BECAUSE IT HAD TO BE -- IT WAS PART OF A CUMULATIVE EVALUATION OF THE BRADY. >> CHIEF JUSTICE: JUSTICE CANTERO?

JUSTICE: MY UNDERSTANDING OF THE RECORD IS YOU HAD NOT BEEN ABLE TO ACTUALLY FIND MR. SMYKOWSKI?

THAT'S THE WAY THE STATE PHRASES IT. WE HAD FOUND HIM. THE THING IS MR. SMYKOWSKI WAS AN IMMIGRANT AND HE WAS WARRANTED BY THE U.S. MARSHAL SERVICE BECAUSE OF A PAROLE VIOLATION. HE WAS SCARED.

JUSTICE: DID YOU HAVE AN ADDRESS AND PHONE NUMBER FOR HIM?

NO, WE DID NOT HAVE AN ADDRESS AND PHONE NUMBER FOR HIM.

JUSTICE: YOU NARROWED IT TO A PARTICULAR CITY OR COUNTRY?

HE WOULD NOT ALLOW THE REPORTER OR HE TOLD THE REPORTER NOT TO GIVE US HIS LOCATION. THE REPORTER ARRANGED FOR US TO MEET WITH HIM. WE MET WITH HIM IN MARCH OF 2002, AND SUBSEQUENTLY AS WAS PUT ON THE RECORD, THE PROSECUTOR, MR. REED RUBEN GOT A PHONE NUMBER FOR HIM AND MR. RUBEN INDICATED HE HAD TALKED TO MR. SMYKOWSKI AS WELL.

JUSTICE: AND DIDN'T THE TRIAL COURT DENY THE MOTION WITHOUT PREJUDICE FOR YOU TO COME BACK AND RENEW THE MOTION ONCE YOU HAD A PHONE NUMBER, ADDRESS AND WERE ACTUALLY ABLE TO --

WHEN WE WERE NOTIFIED BY THE PROSECUTOR THAT HE HAD A PHONE NUMBER AND HAD TALKED TO MR. SMYKOWSKI WE RENEWED THE REQUEST SAYING FOR THE PURPOSES OF THE RULING AND RULE, SINCE THE PROSECUTOR HAS A PHONE NUMBER FOR MR. SMYKOWSKI AND HAS TALKED TO HIM THAT SHOULD SATISFY THE REQUIREMENT. WE ALL KNOW WHERE HE IS AT. IT IS JUST A QUESTION OF PHYSICALLY, I MEAN HE IS HIDING FROM THE U.S. GOVERNMENT, AND SO HE WON'T GIVE US A STREET ADDRESS.

CHIEF JUSTICE: HOW IS HE GOING TO BE ABLE TO BE SWORN UNDER OATH AND HAVE RELIABLE TESTIMONY? I MEAN, HOW WOULD THAT HAPPEN? IN OTHER WORDS, ASSUME THE JUDGE PERMITTED IT, WHAT THEN HAPPENS? WHO SWEARS HIM UNDER OATH AND HOW DO WE THEN -- HOW DOES THE JUDGE EVALUATE THE CREDIBILITY OF WHAT HE HAS TO SAY?

WE DIDN'T GET TO THAT POINT BECAUSE THE JUDGE DENIED THE MOTION.

CHIEF JUSTICE: I WANT TO UNDERSTAND THAT, THOUGH.

WITHOUT ADDRESSING.

CHIEF JUSTICE: YOU SAID WITHOUT PREJUDICE BUT I THOUGHT ONE OF THE ISSUES WAS THERE WAS NO PROCEDURE FOR EVEN SWEARING IN THIS WITNESS.

WELL, THERE IS A P R O C E D U R E CERTAINLY FOR SWEARING IN I N THAT A COURT REPORTER CAN SWEAR IN. THE STATE'S POSIT ION WAS T HAT ON THE B A S I S O F H A I R L , W H I C H WAS DECID ED O N T H E B A S I S O F THE CON FR ONTATION CLAUSE , EXCUSE ME, THERE SEEMS TO BE SOMETHING IN MY THROAT.

CHIEF JUSTICE: DO YOU NEED SOME W A T E R ? W E H A D M R. R I C H A R D S C O U G H I N G EARLIER.

MAYBE THERE I S SOMETHING IN THE AIR. ANYWAY, I N THE HAR R E L L C A S E THE QUESTION WAS T H E CONFRONTATION CLAUSE REQ UIREMENT THAT THE T E S T I M O N Y , THERE HAS TO B E A N O A T H T H A T CAN BE ENFORCED. IN OTHER WORDS YOU HAVE TO BE SUBJECT TO EXTRA ADDITION F O R P E R J U R Y , A N D I N T H I S I N S T A N C E H E WAS I N D E V I E B E C A U S E T H E R E WAS NOT A N E X T R A D I T I O N T R E A T Y . T H E S T A T E ' S P O S I T I O N WAS T H A T I T WAS NOT A N E N F O R C E A B L E O A T H .

CHIEF JUSTICE: SINCE YOU ARE IN YOUR R E B U T T A L AND YOU ARE COUGHING WHY DON'T WE H E A R FROM THE STATE AND ALLOW Y O U TO GET UP ON R E B U T T A L ?

MAY IT PLEASE THE C O U R T , SANDRA J A G G A R D H E R E O N B E H A L F OF THE THE STATE. BEFORE THE RECORD ON A E A L FROM THE F I R S T R U L E 3 W A S FILED, THEY H A D O F F I C E R V E S K I T E L L I N G THEM HE WAS P R E S S U R E D AT T H E T I M E O F T R I A L , T H E Y R E C E I V E D H I S N O T E S B E F O R E T H E F I R S T R U L E 3 . W H I L E THE RECORD ON A E A L H A V I N G NOT P R E S E N T E D THIS EVIDENCE AT THE F I R S T R U L E 3 H E A R I N G W H E R E T H E Y W E R E G R A N T E D AN EVIDENTIARY HEARING ON EVERY C L A I M T H E Y A S S E R T E D THAT THEY W A N T E D AN EVIDENTIARY HEARING ON , T H E Y D I D N ' T P R E S E N T O F F I C E R V E S K I . T H E Y T H E N C O M E I N B E F O R E THE RECORDS ON A E A L W E R E P R E P A R E D B U T W H I L E I T I S O N A E A L AND MAKE A M O T I O N TO G O TO O F F I C E R V E S K I O N T H E B A S I S THAT SOMEHOW HE I S G O I N G TO S H O W THE STATE'S W I T N E S S E S L I E D , THAT THE B L A N K E T W A S I N THE CHAIR AND A B O U T THE FLASH LIGHT WHICH WAS NEVER P R E S E N T E D AT T R I A L .

CHIEF JUSTICE: SO YOU ARE SAYING THAT THERE R E A L L Y W A S NO REASON THEY COULDN'T H A V E P R E S E N T E D THIS AT THE TIME OF THE F I R S T E V I D E N T I A R Y H E A R I N G ?

OR THEY COULD HAVE P R E S E N T E D THIS AT THE TIME OF THE T R I A L .

CHIEF JUSTICE: LET ME WITH THIS.

THEY SHOULD HAVE I N V E S T I G A T E D I T T H E N .

CHIEF JUSTICE: THE FLASHLIGHT, N O T H I N G ABOUT THE FLASHLIGHT I S P R E S E N T E D AT THE T R I A L ?

NO.

CHIEF JUSTICE: EXPLAIN T H E S H A W L . W H A T WAS THE STATE'S POSITION ABOUT W H E R E THE S H A W L WAS ?

T H E B L A N K E T W A S L A Y I N G - - S H A W L .

CHIEF JUSTICE: A R E W E U S I N G B L A N K E T AND S H A W L I N T E R C H A N G E B L I ?

YES. I T I S M Y U N D E R S T A N D I N G I T I S A P L A I D B L A N K E T . I ' M N E V E R S E E N I T . I T WAS F O L D E D S I T T I N G I N T H E D R I V E R ' S S E A T . T H E D E F E N D A N T H I M S E L F T E S T I F I E D THAT'S W H E R E I T I S W H E N THE CRIME I S C O M M I T T E D . T H E C R I M E S C E N E P H O T O G R A P H S S H O W THAT'S W H E R E I T I S AND THE D E F E N S E P R E S E N T S EVIDENCE W H E N I T I S R E C O V E R E D FROM THE CAR THAT I T H A S B E E N M O V E D T O THE PASSENGER S E A T AND T H A T ' S P R E S E N T E D AT 3 2 7 8 T H R O U G H 3 2 7 9 O F T H E D I R E C T A E A L R E C O R D . > > C H I E F J U S T I C E : I N O T H E R W O R D S , T H E Y - - T H E P O S I T I O N A T T

TRIAL WAS THAT AT THE TIME OF THE CRIME IT WAS IN THE - - ON THE DRIVER'S SEAT?

YES, AND THAT'S SHOWN IN THE CRIME SCENE PHOTOGRAPHS AND THE DEFENDANT HIMSELF ADMITS THAT.

CHIEF JUSTICE: AND THE DIFFERENCE IS THAT VESKI SAYS THAT IT WAS ACTUALLY THAT HE RECOVERED IT FROM THE PASSENGER SIDE?

WHEN HE INVENTORIED THE CAR TWO DAYS LATER IT WAS ON THE PASSENGER SEAT . AND THAT WAS PRESENTED AT TRIAL.

CHIEF JUSTICE: AT THE TIME OF ORIGINAL TRIAL BECAUSE THE VOIR DEAR OF HANLON SAID IT SHOWED THAT IT WAS RECOVERED FROM THE RIGHT SEAT OF THE CAR?

THEY KNEW THE BLANKET HAD BEEN MOVED. IT WAS ON THE SEAT DURING THE CRIME. NOBODY DISPUTED THAT. THE DEFENDANT HIMSELF ADMITTED THAT.

JUSTICE: WAS THERE TESTIMONY THAT VESKI WAS PRESSURED AS TO THAT TESTIMONY REGARDING THE BLANKET?

THERE WAS NO - - THIS ALL COMES UP IN POST-CONVICTION. VESKI DOESN'T TESTIFY AT TRIAL.

JUSTICE: I'M SORRY , IN HIS AFFIDAVIT IS THERE ANY TESTIMONY THAT WE HAVE NOW THAT VESKI SAYS HE WAS PRESSURED AS TO THE BLANKET?

HE SAYS HE WAS PRESSURED TO TESTIFY ABOUT WHERE THE BLANKET WAS RECOVERED BUT WHERE THE BLANKET WAS RECOVERED WAS ALWAYS KNOWN. IT IS NOT ANYTHING THAT WE EVER CHANGED. IT WAS KNOWN THAT IT WAS RECOVERED TWO DAYS LATER FROM THE PASSENGER SEAT AT THE TIME OF THE CRIME IT WAS IN THE DRIVER'S SEAT AND THAT WAS BEYOND - - .

JUSTICE: THEN WHY WOULD THEY PRESSURE HIM?

I HAVE NO IDEA WHY HE WAS PRESSURED BUT THIS CLAIM WASN'T RAISED. IT WAS JUST RAISED IN THE MOTION TO RELINQUISH JURISDICTION.

JUSTICE: WAS THERE AN INVENTORY SHEET THAT TALKED ABOUT WHERE THESE THINGS WERE FOUND? WAS THERE SOME PROBLEM WITH THE INVENTORY SHEET SAYING ONE THING AS OPPOSED TO --

THERE WERE HANDWRITTEN NOTES THAT WERE NOT DISCLOSED AT THE TIME OF TRIAL BUT DISCLOSED BEFORE THE FIRST POST-CONVICTION HEARING. THEY HAD THEM THEN .

JUSTICE: THE BLANKET IS PRETTY CRITICAL EVIDENCE , ISN'T IT? THIS IS WHERE PART OF THE THEORY WAS THAT HE WAS NOT IN THAT SEAT AT THE TIME AS HE CLAIMED BECAUSE IT HAD BLOOD ON IT. I MEAN, ISN'T THAT - - SO I MEAN IT IS REALLY PRETTY --

THAT'S PART OF THE STATE'S CASE.

CHIEF JUSTICE: .

JUSTICE: A PRETTY SIGNIFICANT PART.

IT WAS SHOWN THERE WAS BLOOD BOTH ON THE TOP OF THE BLANKET WHERE IT WOULD HAVE GOTTEN FROM THE SHOOTING AS WELL AND IT IS NOT BLOOD. WE NEVER COULD SHOW IT WAS BLOOD. IT WAS JUST SPECS OF ITEMS THAT TESTED POSITIVE FOR BLOOD BUT THERE WERE

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

C H I E F J U S T I C E : A G A I N T H A T C O U L D H A V E H A P P E N E D I F I T W E R E M O V E D A F T E R T H E - -
O R I T C O U L D H A V E H A E N E D --.

C H I E F J U S T I C E : I T W A S N ' T D I S P U T E D T H A T I T W A S M O V E D A F T E R T H E C R I M E H A D O C C U R R E D ?

Y E S , I T W A S N O T D I S P U T E D T H A T I T W A S M O V E D A F T E R T H E C R I M E O C C U R R E D .

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

C H I E F J U S T I C E : W E L L , H I S T E S T I M O N Y A T T R I A L W A S N O T T H A T T H E D E F E N D A N T A D M I T T E D K I L L I N G T H E V I C T I M , B U T T H A T H E T A L K E D A B O U T H O W H E W A S G O I N G T O B E C O M E A M I L L I O N A I R E .

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

C H I E F J U S T I C E : A N D T H E I S S U E T H A T T H E G E R M A N C O U N S E L A T E H A S B R O U G H T U P , D O E S T H A T R E L A T E T O T H I S I S S U E O N A E A L ?

N O , I T R E L A T E S T O I S S U E S I N T H E D I R E C T A E A L A N D T H E P R I O R R U L E 3 A N D T H E D E F E N D A N T H A S R E C E N T L Y F I L E D A S T A T E H A B E A S T H A T R E L A T E S T O T H O S E I S S U E S , B U T I T D O E S N O T R E L A T E T O A N Y I S S U E S T H A T A R E P R E S E N T L Y B E F O R E T H E C O U R T A N D T H E R E F O R E T H A T A M I C U S B R I E F I S N O T A P R O P E R A M I C U S B R I E F A N D I T I S T H E S T A T E ' S P O S I T I O N I T S H O U L D B E R E J E C T E D F O R T H O S E G R O U N D S A S W E L L A S T H E Y S H O U L D S T E P I N T O T H E S H O E S O F T H E D E F E N D A N T A N D T H E S T A T E I S B A R R E D .

J U S T I C E : W H A T I S T H E S T A T E O F T H E R E C O R D O N T H E W H E R E A B O U T S O F S M Y K O W S K I ?

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

THE ONE THAT WAS ATTACHED TO THE RULE 3. AN EVIDENTIARY HEARING WAS GRANTED IN THIS CASE ON THE AMENDED SUCCESSIVE MOTION BECAUSE THE VESKIC CLAIM DOESN'T COME UP UNTIL THE AMENDED SUCCESSIVE MOTION AND IT IS RAISED IN CLAIM 4 AND AN EVIDENTIARY HEARING IS GRANTED ON CLAIMS 1 AND 3.

CHIEF JUSTICE: THE AFFIDAVIT, WAS THERE TWO ASPECTS TO IT, ONE IS THAT HE IS GIVEN FAVORS AND THE OTHER THAT HE RECALIBRATES HIS STATEMENT? >> HE SAYS HE DID IT ALL BECAUSE HE WAS GIVEN ALL OF THESE FAVORS.

CHIEF JUSTICE: IN THE AFFIDAVIT? AND THEN HE CALLS YOU AND SAYS WHAT I SAID IN THE AFFIDAVIT IS FALSE?

IS A LIE. IT HAS NOTHING TO DO WITH IT. WE RECEIVE A PHONE CALL FROM SOMEONE WHO SAYS I'M WALTER SMYKOWSKI AND THIS IS A LL A LIE.

CHIEF JUSTICE: THAT'S HELPFUL TO THE STATE?

YES, BUT WE WOULD LIKE TO HAVE A SITUATION WHERE WE HAVE MR. SMYKOWSKI IN SOME WAY, SHAPE OR FORM IN THE MANNER A STATE CAN BE ASSURED WE ARE ACTUALLY SPEAKING TO MR. SMYKOWSKI AND NOT SITTING BY A PHONE WAITING FOR THE MTO CALL US, NOT SOME -- THIS EVIDENTIARY HEARING WENT ON FOR MONTHS. WE ARE AT THE END OF THE EVIDENTIARY HEARING. THE TRIAL COURT HAS ALREADY SAID HE IS NOT EXTENDING IT ANY MORE AND AT THE END OF THE DAY BEFORE WE ARE SUOSED TO END THEY SAY OH, NOW THE STATE HAS HEARD FROM SMYKOWSKI. NOW WE SHOULD BE ABLE TO GO PERPETUATE HIS TESTIMONY. WE ARE AT THE END OF THE PROCEEDINGS. THEY'VE HAD YEARS TO BRING SMYKOWSKI IN. THEIR ONLY EFFORTS TO LOCATE SMYKOWSKI AT THE TIME OF THE ORIGINAL DEAL, THE ORIGINAL RULE 3 WAS TO CALL INS. THEY NEVER EVEN CALLED THE MARSHAL SERVICE WHICH IS HOW SMYKOWSKI IS EVENTUALLY LOCATED BY THE GERMAN REPORTER. THEY NEVER INVESTIGATED IT. THEY KNEW ABOUT THE LETTER FROM THE SMYKOWSKI TO THE STATE ATTORNEY ABOUT THE DAUGHTER THEY KNEW ABOUT CONCERNS ABOUT THE DAUGHTER FROM THE TIME OF TRIAL. THEY NEVER MADE ANY ATTEMPTS TO FIND THE DAUGHTER. IT IS A SUCCESSIVE MOTION WHERE YOU HAVE AN INSUFFICIENT ATTEMPT TO BRING IN A WITNESS AFTER TWO EVIDENTIARY HEARINGS GRANTED ON A CLAIM AND YEARS GRANTED TO DO THIS AND INSTEAD WE WERE SUOSED TO ACCEPT A PHONE CALL, I SUOSE, BECAUSE THEY NEVER EVEN PROPOSED HOW WE WERE GOING TO PERPETUATE THIS DEPOSITION OTHER THAN THIS PHONE CALL IN THE ORIGINAL MOTION, SO THEY NEVER PROPOSED HOW WE WOULD GET THIS TESTIMONY IN THE MIDDLE OF THE EVIDENTIARY HEARING, AND WE HAVE SERIOUS PROBLEMS. I MEAN, WE HAVE A DEFENSE ATTORNEY WHO WE HAVE ON TAP OFFERING TO MAKE A CHARITABLE CONTRIBUTION TO THE WITNESS BEFREEFUND. WE HAVE A \$15,000 REWARD OFFERED FOR TESTIMONY OF THE WITNESSES THAT THEY DIDN'T TELL US ABOUT. WE ARE NOT REAL WILLING TO ACCEPT THAT WE ARE JUST GOING TO PUT SOMEBODY ON A PHONE WHERE WE DON'T KNOW WHERE THIS MAN IS FROM. WE WANT SOME INDICIA FOR LIABILITY HERE. IF THEY WANTED A MOTION TO PERPETUATE A DEPOSITION THEY SHOULD HAVE DONE IT PROPERLY WITH ACCURATE ADDRESSES SO WE COULD BE SURE WE HAVE THE REAL WITNESS.

JUSTICE: WHAT DO YOU UNDERSTAND THE POSITION'S POSITION TO BE ABOUT THIS ARGUMENT?

MY UNDERSTANDING OF THE SUBSTANCE OF THE SMYKOWSKI CLAIM.

JUSTICE: NO, THE BLANKET.

THE BLANKET?

JUSTICE: YES.

AT THIS POINT THEY ARE SAYING IT IS CONTAMINATED. IN THE RULE 3 IT WAS WET TESTIFIED FALSELY ABOUT WHERE IT WAS DURING THE CRIME, PARTICULARLY CONSIDERING THAT THE CLAIM WITH REGARD TO THE BLANKET BEING IN -- VESKI ALSO HAD A CLAIM WENEEDED DNA TESTING BECAUSE IT WOULDN'T BE MISKISCHNICK'S BLOOD ON THE BLANKET. IF THE BLOOD IS ON THE BLANKET BECAUSE OF CONTAMINATION IT WOULD BE MISKISCHNICK'S BLOOD.

CHIEF JUSTICE: THAT DNA TESTING HAD NOT OCCURRED YET?

THEY WERE GRANTED PERMISSION TO DO THE DNA TESTING. I HAVE NO IDEA WHAT THE STATUS OF THE DNA TESTING IS. BUT IT IS THE STATE'S POSITION THAT THE VESKI CLAIM WAS BARRED AND PROPERLY REFUSED TO HEAR TESTIMONY ON A BARRED CLAIM BECAUSE THIS COURT WHEN YOU TALK ABOUT CUMULATIVE ANALYSIS CONTINUALLY STATES WE ARE LOOKING AT THE CUMULATIVE ANALYSIS OF THE CLAIMS THAT AREN'T BARRED. NOT THE CLAIMS THAT ARE BARRED. AND TO HAVE AN EVIDENTIARY HEARING WHERE YOU HAVE A BARRED CLAIM, YOU HAVE BEEN DENIED AN EVIDENTIARY HEARING ON IT IS IMPROPER TO HEAR THAT TESTIMONY AND THE STATE'S POSITION THEY DID NOT MAKE SUFFICIENT EFFORT TO BRING MR. SMYKOWSKI FORWARD AND THAT, THEREFORE, THAT CLAIM WAS PROPERLY DENIED WHEN NO EVIDENCE WAS PRESENTED UPON IT. AND THE STATE RESPECTFULLY RESPECTS YOU AFFIRM AND ALLOW US TO MOVE FORWARD WITH RESENTENCING.

CHIEF JUSTICE: MR. McCLAIN, REBUTTAL?

YES, YOUR HONOR. FIRST, OFFICER VESKI'S AFFIDAVIT, WHICH IS FROM 1997, INDICATES THAT HE FIRST TOLD THE DEFENSE ATTORNEYS ABOUT THIS IN THE SPRING OF 1997, RIGHT BEFORE HE SIGNED THE AFFIDAVIT. INDICATED HE HAD TALKED TO THEM BEFORE BUT HE HAD WITHHELD THIS INFORMATION. HE SAID THAT HIS MOTHER WAS DYING, HE WAS UPSET, HE COULDN'T FOCUS.

CHIEF JUSTICE: ON THE BLANKET, ISN'T THERE EVIDENCE THAT AT THE DEFENDANT KNEW AT THE TIME OF THE TRIAL THAT VESKI HAD FOUND THE SHAWL ON THE PASSENGER SEAT. > > WHO FOUND THE SHAWL ON THE PASSENGER SEAT? THAT WASN'T DISCLOSED BUT IT HAD BEEN FOUND ON THE PASSENGER SEAT BUT THE IMPORTANT THING IS IN VESKI'S AFFIDAVIT HE SAYS THAT IT WAS WET WITH BLOOD BUT THE ENTIRE CAR WAS TWO DAYS LATER IT HADN'T DRIED. IT WAS THE SUMMERTIME AND HE WAS, IN FACT, HE SAYS IN HIS AFFIDAVIT CRITICIZED FOR SEARCHING THE CAR WHEN IT WAS STILL WET WITH BLOOD.

CHIEF JUSTICE: THE BLANKET WAS WET WITH BLOOD AND YOU ASKED TO HAVE DNA TESTING DONE OF THE BLANKET?

YES.

CHIEF JUSTICE: AND WHAT'S THE STATUS OF THAT?

WE DON'T HAVE CUS TODY OF IT. WE ARE RELYING ON SOME BODY ELSE TO TRANSFER TO FDL FOR THE TESTING AND IT HASN'T OCCURRED. I DON'T KNOW WHAT WE CAN MORE DO OTHER THAN GET AN ORDER FROM THE COURT. IT DIDN'T GET TRANSFERRED. NO ONE WILL TAKE IT TO FDL FOR THE TESTING. IN ANY EVENT, THE AFFIDAVIT.

JUSTICE: WAIT, THERE IS A COURT ORDER THAT ORDERS SOMEBODY TO DO SOMETHING, AND WHAT ORDER IS THAT?

THE JUDGE GRANTED THE DNA TESTING AFTER -- A UT HORIZING HIM TO DO IT. MY U

UNDERSTANDING OF THE ORDER WAS THAT THE BLANKET WOULD BE SENT TO FDLE.

JUSTICE: ORDERED THE STATE ATTORNEY'S OFFICE TO SEND IT ; IS THAT YOUR REPRESENTATION?

WELL , I DON'T RECALL IF THEY SAID THE STATE OR THE SHERIFF'S DEPARTMENT OR WHO, BUT WE DON'T HAVE CURRENTLY OF IT. WE CAN'T - -.

JUSTICE : HOW LONG AGO DID THIS HAPPEN?

IT WAS IN 2002. >> JUSTICE: THREE YEARS LATER AND NOBODY HAS FOLLOWED UP ON IT?

THE CIRCUIT COURT DOESN'T HAVE JURISDICTION SO THERE IS NOTHING.

CHIEF JUSTICE: BUT, MR. McCLAIN, AND YOU ARE A PASSIONATE ADVOCATE. YOU ARE TELLING US THAT THIS SHOWS SOMEHOW WHEN MR. -- OFFICER VESKI FOUND THIS THAT IT IS ALL WET WITH BLOOD , AND I ASKED YOU ABOUT , WELL , WHAT ABOUT THAT DNA TESTING AND YOU GO, WELL, NOTHING HAS HAPPENED WITH IT. DOES THAT SORT OF SAY TO YOU THAT WE SORT OF WONDER HOW MUCH YOU THINK THAT THAT WOULD VERIFY WHETHER THERE IS BLOOD ALL OVER THE BLANKET?

ACTUALLY THIS IS ONE POINT THAT THE STATE AND I MAY AGREE ON IN THAT GIVEN WHAT VESKI SAYS, IT IS PROBABLY THE VICTIM'S BLOOD BECAUSE IT WAS IN THE PASSENGER SEAT. CERTAINLY THE DNA TESTING COULD ESTABLISH ONE WAY OR ANOTHER IF IT IS , IN FACT , BLOOD.

JUSTICE: DID THAT COME OUT AT THE TRIAL , THAT THE BLANKET WAS IN THE PASSENGER SEAT?

IT CAME OUT THAT IT WAS IN THE PASSENGER SEAT , NOT THAT THE PASSENGER SEAT WAS WET WITH BLOOD TODAY SLATER , BECAUSE IT HADN'T DRIED .

SO IS THAT THE NEW -- A GAIN , LET'S TAKE AWAY THE FLA SHLIGHT , LET'S TAKE AWAY WHERE THE BLANKET IS FOUND , AND NOW IS THE ISSUE THAT THE NEWLY DISCOVERED EVIDENCE THAT THE BLANKET IS WET WITH BLOOD , IS THAT WHAT YOU WOULD -- BECAUSE THIS GOES BACK TO WHAT I ASKED YOU YOU DIRECTLY IS THAT YOU WOULD PRESENT A NEW TRIAL VESKI SAYING THE BLANKET IS WET WITH BLOOD?

YES.

CHIEF JUSTICE: I DIDN'T HEAR THAT.

BECAUSE, I MEAN , THAT SHOWS THAT IT IS NOT INCONSISTENT WITH MR. RIECHMANN'S TESTIMONY THAT HE WAS SITTING ON THE BLANKET AT THE TIME OF THE SHOOTING. THAT AFTER HE EXITS THE CAR WHEN THE POLICE ARE TRYING TO RESUSCITATE THE VICTIM AND -- RESUSCITATE THE VICTIM. SHE GETS MOVED OVER TO THE PASSENGER SEAT WET WITH BLOOD. SO, THEREFORE, THE FACT THAT THE STATE --.

CHIEF JUSTICE: THAT'S WHAT I SAID. IT CAME OUT AT TRIAL THAT THE STATE DIDN'T DISPUTE THAT IT WAS FOUND AT THE TIME OF THE CRIME IN THE DRIVER'S SEAT?

WELL --.

CHIEF JUSTICE: ISN'T THAT CORRECT?

THERE IS A DIFFERENCE BETWEEN THE TIME OF THE CRIME AND THE TIME IT IS SEIZED FROM THE CAR. EVERYBODY AGREES AT THE TIME OF THE CRIME IT IS IN THE DRIVER'S SEAT. THE QUESTION IS WHAT DOES THAT MEAN WHEN THERE IS BLOOD ON IT? IF IT IS ALWAYS THERE AND MR. RIECHMANN IS SITTING ON IT, THEN IT IS INCONSISTENT WITH HIM HAVING SAT ON IT IF THERE IS BLOOD ON IT BUT IF AFTER HE IS OUT OF THE CAR THE POLICE MOVE IT OVER INTO THE PASSENGER SEAT AND IT IS WET WITH BLOOD AND IT GETS BLOOD TRANSFERRING FROM THE PASSENGER SEAT, THE SIGNIFICANCE OF THE PRESENCE OF BLOOD AND IT BEING INCONSISTENT WITH MR. RIECHMANN'S TESTIMONY IS COMPLETELY BLOWN. IF IT GETS BLOOD BECAUSE IT IS IN THE PASSENGER SEAT THAT IS WET WITH BLOOD AFTER THE SHOOTING, THEN THE SIGNIFICANCE OF THE BLOOD BEING PRESENT ON IT, IT JUST DOESN'T MATTER.

CHIEF JUSTICE: WELL, ON THAT WE'LL HAVE TO TAKE THE MATTER UNDER ADVISEMENT AND TRY TO PUT THE PIECES OF THE PUZZLES TOGETHER. THANK YOU VERY MUCH TO BOTH SIDES.