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James Floyd v. State of Florida

THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE FLORIDA SUPREME COURT. THE FIRST CASE ON THE DOCKET IS FLOYD VERSUS STATE OF FLORIDA. AS YOU SEE, ONE JUSTICE IS RECUSED, JUSTICE QUINCE. PLEASE PROCEED.

MAY IT PLEASE THE COURT. I AM HERE TODAY, MARTIN McCLAIN, REPRESENTING MR. FLOYD AND HIS APPEAL FROM A DENIAL AFTER 3.850 RELIEF FOLLOWING AN EVIDENTIARY HEARING ORDERED BY THIS COURT, FROM A PRIOR APPEAL. I AM HERE TODAY TO FOCUS ON ARGUMENT ONE, AND CERTAINLY IF THIS COURT HAS OTHER QUESTIONS, I WILL BE HAPPY TO ADDRESS THEM. AS TO ARGUMENT ONE, ARGUMENT ONE IS CONCERNING MR. FLOYD'S DUE PROCESS CLAIM THAT BRADY AND GIGLIO WERE VIOLATED IN THE PROCEEDINGS AND THAT HE WAS ENTITLED TO A NEW TRIAL. TURNING FIRST, TO THE MOST OBVIOUS AND GLARING, THE DETECTIVE WROTE TWO REPORTS CONCERNING A NEIGHBOR LADY, TINA GLENN, HIS INTERVIEWS OF HER.

WOULD YOU, BECAUSE OF THE LIMITED TIME, WOULD YOU ADDRESS WHAT IS REFERRED TO AS A MATERIALITY PRONG FOR BRADY, WITH REFERENCE TO THAT ISSUE.

JUST TO MAKE CLEAR, THE COURT BELOW, FOUND NOT DISCLOSED, FAVORABLE EVIDENCE. THE ONLY ISSUE ON APPEAL THAT I AM CHALLENGING THE LOWER COURT ON, IS MATERIALITY STANDARD, AND THAT STANDARD IS WHETHER THERE IS A REASONABLE PROBABILITY IN THE OUTCOME, CONFIDENCE IN THE VERDICT, ET CETERA, SO IN ADDRESSING THAT, LET ME START BY INDICATING THAT THE STATE'S CASE AT TRIAL, THE PROSECUTOR CONCEDED DURING HIS OPENING AND DURING HIS CLOSING, IT WAS A CIRCUMSTANTIAL EVIDENCE CASE, DEPENDENT ON FIVE CIRCUMSTANCES AND JAILHOUSE INFORMANT. FIVE CIRCUMSTANCES. THE MOTORCYCLE TRACKED ON THE BACK PATIO DRIVEWAY THAT WAS SIMILAR TO WHAT COULD HAVE BEEN, FROM MR. FLOYD'S MOTORCYCLE. THERE WERE NEGROID HAIR FRAGMENTS FOUND IN THE BED THAT MS.^ANDERSON WAS LYING ON. THERE WAS A BUSINESS CARD FROM A LAWN SERVICE THAT WAS RUN BY MR. FLOYD'S FATHER, AND ON THE BACK OF THE CARD WAS WRITTEN COME "JAMES". MR. FLOYD'S FATHER'S NAME WAS JOHNNY.

WHERE WAS THAT CARD FOUND?

IN A BUREAU IN THE BEDROOM. THE VICTIM'S DAUGHTER TESTIFIED THAT IT APPEARED TO BE AN OLD CARD, THAT SHE HAD FOUND IT, AND SHE HAD TURNED IT OVER TO THE POLICE.

CAN YOU INDICATE ANY RELATIONSHIP PRIOR, BETWEEN THE SERVICE AND THE VICTIM?

THE ONLY INDICATION WAS THAT BUSINESS CARD, AND IT IS NOT CONTESTED THAT MR. FLOYD'S FATHER RAN A LAWN CARE SERVICE, BUT HE HAD BEEN DEAD FOR A NUMBER OF YEARS AND WAS NO LONGER DOING IT.

AND WAS THE DEFENDANT CONTINUING IN THE BUSINESS?

NO. HE HAD ONLY WORKED FOR THE FATHER, WHEN THE FATHER RAN IT. HE DID NOT CONTINUE

ON DOING IT.

WOULD YOU GO ON WITH THE FIVE.

YES. THEN THE FACT THAT MR. FLOYD WAS ARRESTED, TRYING TO CASH A CHECK FROM MS.^ANDERSON'S CHECKBOOK. YOU HAVE THE CHECKBOOK, AND HE HAD A BLOODY SOCK, A SOCK THAT HAD SOME BLOOD ON IT THAT WAS NOT HIS BLOOD. THE TESTING SHOWED THAT IT WAS NOT HIS BLOOD TYPE, AND THAT WHEN HE WAS ARRESTED, THE FIFTH CIRCUMSTANCE IS, HE MADE INCONSISTENT STATEMENTS REGARDING HIS WHEREABOUTS AND WHAT HE HAD BEEN DOING, AND THE STATE ARGUED THAT THAT SHOWED THAT HE WAS GUILTY. HE NEVER CONFESSED, BUT HE GAVE INCONSISTENT STATEMENTS, AND THEN THE OTHER THING THAT THEY HAD WAS THE JAILHOUSE INFORMANT, WHO SAID THAT MR. FLOYD HAD CONFESSED TO HIM. THAT IS THE STATE'S CASE. NOW, WHAT WE HAVE IS, ALSO, THE STATE ARGUED, AND IT IS PRETTY MUCH AGREED UPON, THAT THE MURDER HAD TO HAVE HAPPENED ON JANUARY 16, 1984, IN A TWO-HOUR WINDOW, FROM 2:00 P.M. TO 4:00 P.M., IN MS.^ANDERSON'S HOUSE. SHE WAS FOUND STABBED TO DEATH IN HER BEDROOM. AND SO THAT IS THE WINDOW, THE TIME PERIOD, AND MS.^GLENN'S STATEMENTS, ACCORDING TO DETECTIVE GOTSCHALL'S REPORT, SHE IS THE NEXT-DOOR NEIGHBOR, AND SHE IS INTERVIEWED ON WEDNESDAY, JANUARY 18. THE BODY HAD BEEN FOUND TUESDAY NIGHT, JANUARY 17. THE INTERVIEWED HAPPENED, SO IT IS HAPPENING WITHIN 48 HOURS OF THE HOMICIDE, AND SHE RECALLS THAT MONDAY AND RECALLS SEEING MS.^ANDERSON AT AROUND ELEVEN O'CLOCK IN THE MORNING IN THE BACKYARD. SHE DESCRIBES THE DRESS THAT SHE WAS WEARING, WHICH MS.^ANDERSON HAD ON WHEN HER BODY WAS FOUND. SHE SAID THAT SHE WAS WATCHING "ALL MY CHILDREN", A SOAP OPERA, AND DURING, WHILE SHE WAS WATCHING THE SOAP OPERA THAT AFTERNOON, IN THE FIRST STATEMENT SHE SAYS IT IS BETWEEN 1:30 AND TWO AND IN THE SECOND GOTSCHALL STATEMENT, SHE SAID BETWEEN ONE AND 1:30. WE DON'T KNOW WHEN IT WAS RECORDED BUT THAT WAS THE NUMBERS THAT SHE HAD GIVEN. SHE LOOKS OUT AND SEES A CAR DRIVE UP AND TWO MEN APPROACHING THE DOOR OF MS.^ANDERSON'S HOUSE. SHE DOES NOT SEE ANYBODY SPECIFICALLY, AS TO THE MEN, BUT SHE SEES THAT THEY ENTER THE DOOR OF MS.^ANDERSON'S HOUSE, SO THE BEST SCHEDULE WE HAVE IS THAT, WHILE "ALL MY CHILDREN" IS ON, SOMEWHERE BETWEEN ONE AND TWO O'CLOCK. IN HER FIRST STATEMENT, SHE SAYS THAT THE TWO MEN WERE INSIDE FOR APPROXIMATELY 30 TO 45 MINUTES. THE SECOND STATEMENT SAYS APPROXIMATELY AN HOUR. AGAIN, WE DON'T KNOW THE ACCURACY WITH WHICH GOTSCHALL HAS RECORDED, BUT THOSE ARE THE TIME FRAMES THAT WERE GIVEN, SO ACCEPTING THOSE, WE HAVE THESE TWO MEN IN MS.^ANDERSON'S RESIDENCE, DURING THE TIME PERIOD, THE TWO-HOUR TIME PERIOD THIS MURDER WOULD HAVE OCCURRED. AND THIS INFORMATION IS NOT DISCLOSED, AND SO THERE COULD NOT BE ANY FOLLOW-UP INVESTIGATION. SHE SAYS THAT, WHEN THEY LEAVE, SHE HEARS A DOOR SLAM, AND BASED ON THE LOUDNESS OF THE SLAMMING DOOR, SHE THINKS IT IS THE FRONT DOOR. SHE GETS UP. SHE GOES. SHE LOOKS, AND SHE SEES THEM MOVING RAPIDLY TO THEIR CAR THAT IS PARKED IN FRONT, HEARS ONE OF THEM SAY "LET'S GET OUT OF HERE", AND THEY HOP IN THE CAR, DRIVE OFF, SQUEALING THEIR TIRES AS THEY LEAVE.

NOW, SHE DIDN'T TESTIFY AT THE POSTCONVICTION HEARING, IS THAT CORRECT?

THAT'S CORRECT. WELL --

WHAT IS THE CORRECT FORMULA OR ANALYSIS, CONSIDERING THAT EVIDENCE WHICH, OBVIOUSLY, YOU CONTEND IDENTIFIES A POTENTIAL ASSAILANTS OF THE VICTIM HERE AND WAS NOT DISCLOSED TO THE DEFENSE, IN TERMS OF THIS MATERIALITY ANALYSIS THAT IS REQUIRED? WOULD YOU GIVE US YOUR VIEW OF HOW YOU DO THAT, AND WHAT IS THE SIGNIFICANCE OF HER NOT TESTIFYING AT THE POSTCONVICTION HEARING?

WELL, FIRST AS TO HER NOT TESTIFYING AT THE POSTCONVICTION HEARING, THE EVIDENCE WAS

PRESENTED THAT SHE COULD NOT BE LOCATED IN 2003, TO TESTIFY AT THE HEARING. SHE HAD BEEN LOCATED IN 1994. SHE GAVE THE CCR INVESTIGATOR WHO INTERVIEWED HER IN 1994, AN AFFIDAVIT. THE AFFIDAVIT WAS PROFFERED. THE JUDGE REFUSED TO ADMIT IT INTO EVIDENCE, SAYING THAT IT WAS HEARSAY AND NOT ADMITTING IT, BUT SHE HAD BEEN INTERVIEWED AND SHE JUST COULD NOT BE FOUND, 20 YEARS AFTER THE INCIDENT, THAN IS WHY SHE DIDN'T TESTIFY. AS TO THE STANDARD, DOES IT CAST THE CASE IN A WHOLE NEW LIGHT?

I THINK, MAYBE FOLLOWING UP ON WHAT JUSTICE ANSTEAD IS STAYING, HAVEN'T WE SAID, AND WHETHER IT WAS IN THE SECOND JONES CASE THAT, IN LOOKING AT WHAT THE NEW EVIDENCE IT, IT WOULD BE, IT SEEMS TO ME, THE SAME AS WE WOULD BE LOOKING AT IN A BRADY SITUATION, THAT WE HAVE TO LOOK AT WHAT IS THE ADMISSIBLE EVIDENCE. NOW, IF WE WERE TO GRANT RELIEF AND GRANT A NEW TRIAL, HOW WOULD YOU ESTABLISH WHAT MS.^GLENN WAS GOING TO SAY?

FIRST, I BELIEVE THE U.S. SUPREME COURT HAS MADE IT CLEAR THAT YOU DON'T LOOK TO SEE IF THE EVIDENCE IS ADMISSIBLE. THE QUESTION ISN'T WHETHER YOU HAVE --

IT WOULD LEAD TO SOMETHING, NOW, BUT IF YOU CAN'T FIND HER, HOW IS, WHAT --

WE OBTAINED AN AFFIDAVIT FROM HER UNDER OATH.

I KNOW, BUT THAT IS NOT --

UNDER U.S. SUPREME COURT CASE LAW, CHAMBERS V MISSISSIPPI, IT WOULD BE ADMISSIBLE. CHAMBERS V MISSISSIPPI, SAYS THAT THE RIGHT, THE DEFENDANT'S DUE PROCESS RIGHT TO PRESENT FAVORABLE EVIDENCE, TRUMPS A HEARSAY RULE.

THE SAME CASE, YOU WOULD HAVE TO GET THROUGH, IN OTHER WORDS, WE HAVE TO LOOK AT, WOULD THE AFFIDAVIT BE ADMISSIBLE?

AGAIN, THE U.S. SUPREME COURT HAS SAID, DOES THE INFORMATION THAT IS NOT DISCLOSED, CAST A WHOLE NEW LIGHT ON THE CASE. IF NOT, DO YOU FIND ADMISSIBLE EVIDENCE, AND IS THAT ADMISSIBLE EVIDENCE, SUCH THAT IT UNDERMINES CONFIDENCE IN THE OUTCOME, BUT WHEN THE EVIDENCE IS NOT DISCLOSED FOR TEN YEARS, YOU CAN'T REWARD THE STATE, BY SAYING THAT NOW THAT TIME HAS PASSED AND YOU ARE NOT ABLE TO GIVE THE INFORMATION THAT YOU WOULD HAVE BEEN ABLE TO GET, HAD IT BEEN DISCLOSED TIMELY, THEN YOU LOSE.

DO YOU HAVE INFORMATION THAT GOES TO THIS, WHERE WE ARE LOOKING AT IT AND WE SAY, WE DON'T THINK THE AFFIDAVIT COMES IN, BUT WE ARE GOING TO GIVE YOU ANOTHER SHOT AT DEFENDING THIS CASE, EVEN THOUGH WE KNOW NOTHING ABOUT WHAT GLENN HAS SAID IS GOING TO COME IN. I MEAN, IS THERE CASE LAW THAT EVALUATES THAT IN THE CONTEXT OF A BRADY VIOLATION, AS OPPOSED TO A NEWLY-DISCOVERED EVIDENCE?

GENERALLY, CASE LAW IS YOU LOOK AT THE DOCUMENTATION, AND IF THE DOCUMENTATION THAT WAS NOT DISCLOSED UNDERMINES CONFIDENCE BECAUSE IT CASTS A WHOLE NEW LIGHT, THERE HAS BEEN NO REQUIREMENT TO ACTUALLY GO AND GET THE WITNESS AND BRING THE WITNESS IN. I HAVE NEVER SEEN THAT REQUIRED IN ANY BRADY CASE. TIME TRYING TO THINK, IF A NEW TRIAL COMES AND WHAT IS DIFFERENT, IF YOU CAN'T, WE WILL ASK THIS QUESTION, MAYBE IT IS BECAUSE OF THE STATE'S FAULT, AND SO WHO BEARS THE BURDEN, BUT THEY DON'T HEAR ABOUT THESE TWO PEOPLE, BECAUSE THERE IS NOTHING --

WELL, CERTAINLY AT A NEW TRIAL, YOU ARE GOING TO BE ABLE TO PRESENT, THE STATE PRESENTED EVIDENTIARY HEARING, DETECTIVE ENGLEBY, TO EXPLAIN WHAT HAPPENED, WHY NOTHING FURTHER WAS DONE BY TINA GLENN WITH THE STATE. NOW, THAT IS GOING TO BE

ADMISSIBLE, AND HE SAYS, WELL, WE FOUND MR. FLOYD. SO AFTER THESE TWO INTERVIEWS WERE CONDUCTED ON THE MORNING OF JANUARY 18, THEY FIND MR. FLOYD AT NOON, AND THEY DO NOTHING WITH TINA GLENN'S INFORMATION. TINA GLENN IS AN EYEWITNESS NEXT DOOR. I MEAN, IF MR. FLOYD COMMITTED THE MURDER, WOULDN'T SHE GO BACK AND ASK HER, DID YOU SEE MR. FLOYD? THAT WASN'T DONE. IT GOES TO THE RELIABILITY OF THE INVESTIGATION THEY HAD A MENTALLY-RETARDED BLACK MAN IN CUSTODY AND THEY WERE DONE. WHAT OTHER --

WHAT IS THE TRIAL COURT'S DENIAL OF THE CLAIM? ANOTHER TRIAL COURT'S DENIAL WAS DIDN'T FIND MATERIALITY.

BUT DIDN'T FIND MATERIALITY AND PLAY THAT ON OUT. IT IS BECAUSE HE FELT THAT THE REST OF THE EVIDENCE THAT ACTUALLY WAS PRESENTED, WAS SO OVERWHELMING, THAT THIS WOULD BE, LIKE A DROP OF WATER IN THE OCEAN, OR WHAT? HELP ME WITH IT.

I BELIEVE THAT HE JUST SIMPLY SAYS, WELL, ONE SENTENCE THAT HE SAYS IN HIS ORDER ON PAGE 16, CCRC SOUTH HAS FAILED TO SHOW THAT THE STATE WAS OBLIGATED TO DISCLOSE THE INFORMATION. THAT PART OF HIS ORDER, I THINK THAT THAT IS CLEARLY WRONG. AND ULTIMATELY HE SAYS MOREOVER HAVING KNOWN ABOUT THIS WITNESS AND HER STATEMENT TO OVER TEN YEARS, CCRC SOUTH HAS FAILED TO SHOW THAT THIS INFORMATION IS MATERIAL OR THAT IT COULD REASONABLY BE TAKEN TO PUT THE WHOLE CASE IN SUCH A DIFFERENT LIGHT AS TO UNDERMINE THE --

WHAT HAPPENED WITH THE AFFIDAVIT IN 1994, WHEN WAS THE EVIDENTIARY HEARING IN THIS CASE?

2003.

WHY WOULDN'T THERE HAVE BEEN SOME ATTEMPT TO IMMEDIATELY PRESERVE HER TESTIMONY IN 1994?

AN AFFIDAVIT WAS OBTAINED, AND A 3.850 WAS PLED, AND AN EVIDENTIARY WAS REQUESTED. THE JUDGE DENIED THE EVIDENTIARY HEARING. IT CAME UP TO THIS COURT FOR APPEAL. THIS COURT SAID YOU HAVE GOT TO HOLD AN EVIDENTIARY HEARING.

AND THAT TOOK SEVEN YEARS?

THAT --

SEVEN YEARS.

I MEAN, THE 3.850 WAS FILED IN 1994.

WHAT ABOUT THE LETTERS FROM ANDERSON?

THE LETTERS FROM ANDERSON.

I MEAN, HOW DOES THAT, THERE WAS A LOT YOU HAD, DIDN'T YOU, AT THE ORIGINAL TRIAL, TO BE ABLE TO IMPEACH ANDERSON. IS THIS, TELL ME HOW THIS WOULD HAVE CHANGED.

WELL, THE JUDGE DOESN'T FIND THE LETTER, WELL, FIRST OF ALL HE FINDS THE LETTER FROM ANDERSON NOT DISCLOSED AND THAT THEY ARE FAVORABLE TO THE DEFENSE, SO WE DON'T HAVE THOSE TWO ISSUES. THE ONLY ISSUE THAT WE HAVE IS MATERIALITY, AND HE FINDS THAT, BECAUSE ANDERSON WAS SO THOROUGHLY IMPEACHED, IT WOULDN'T MAKE A DIFFERENCE, AND THE FACT THAT ANDERSON WAS A RACIST, THAT HE WAS TRYING TO GET OUT OF JAIL, THOSE THINGS CAME OUT.

WHAT IS THE DIFFERENCE BETWEEN THE CONTENTS OF THE LETTERS AND THE FACT OF THE LETTERS, AND THE ACTUAL IMPEACHMENT OR OTHER EVIDENCE THAT WAS BROUGHT OUT IN --

THE SIDE LETTER WAS ALSO THE STATE ATTORNEYS SYNOPSIS, WHICH WAS ABSOLUTELY PRIVILEGED, NEVER SUBJECT TO DISCHARGE, AND IN ONE OF THE SYNOPSES, THERE IS A SWORN STATEMENT THAT IS TRANSSCRIBED, FROM MR. ANDERSON, OUR WITNESS, AND IT WAS NEVER DISCLOSED, AND IN IT, HE REVEALS, HE IS ASKED BY THE PROSECUTION, YOU MENTIONED THAT THE OFFICER SAID TO KEEP YOUR EYES OPEN. THIS IS WHEN HE IS PUT IN THE JAIL AFTER HIS ARREST. I HAD ASKED HIM IF I COULD HEAR SOMETHING, IF I HEARD ANYTHING ABOUT ANY TYPE OF CASE, WOULD THAT HELP ME ON MY CASE. THEY SAID THAT THEY COULDN'T MAKE ANY PROMISES. PROSECUTOR. DID THEY SEND YOU IN THERE TO LISTEN? ANDERSON. NO. THEY MADE THAT VERY SPECIFIC. LIEUTENANT HENSLEY MADE THAT SPECIFIC. NOW, LIEUTENANT HENSLEY IS THE SUPERVISOR. WAS NEVER DISCLOSED AT TRIAL THAT HE HAD ANY CONTACT WITH THIS WITNESS. IN THE LETTERS --

I STILL DON'T THINK, YOU ARE IN YOUR REBUTTAL, THAT WE ARE TRYING TO QUICKLY UNDERSTAND WHAT IS DRAMATICALLY DIFFERENT ABOUT THIS THAT WOULD HAVE LED TO A DIFFERENT TYPE OF IMPEACHMENT OF ANDERSON.

WELL, FLAGLER WAS GOING, ACCORDING TO THESE LETTERS, TO COURT, TO PROSECUTORS, TRYING TO WORK A DEAL OUT. HE SAYS THAT IN HIS LETTERS. AND THAT HENSLEY WAS INVOLVED. IT IS PRETTY CLEAR WHEN YOU READ THESE LETTERS AND THE SWORN STATEMENT. HOW DO THE POLICE SAY WE ARE SPECIFICALLY NOT TELLING YOU TO LISTEN TO SO-AND-SO BUT JUST KEEP YOUR EARS OPEN. THAT DOESN'T MAKE ANY SENSE. THAT, IN FACT, IS A WAY OF SPECIFICALLY TELLING HIM THAT, A HENRY CHALLENGE, THAT HE WAS, IN FACT, A STATE AGENT, BUT MORE THAN THAT, HE SPECIFICALLY, AND THE PROSECUTOR ARGUED IN HIS CLOSING, THAT IS THERE WAS NO DEAL, YET WE HAVE IN HIS LETTERS, THAT FLAGLER HAS BEEN GOING TO COURT, GOING TO STATE ATTORNEYS, TRYING TO SWING A DEAL FOR HIM, AND ONE OF THE LETTERS SAYS WHY WASN'T FLAGLER IN COURT TODAY, SO THERE WAS ACTIVITY, BUT --

THERE WAS NO DEAL. DOES THAT SHOW THAT A DEAL WAS REACHED?

HE SAYS THAT, FLAGLER HAS TOLD ME THAT THE ROBBERY CHARGE IS GOING TO BE TAKEN CARE OF. AND THAT HE HAS TALKED TO THE STATE ATTORNEY. EVERYTHING IS A GO.

WERE THE ROBBERY CHARGES TAKEN CARE OF?

MY UNDERSTANDING ULTIMATELY, THINGS WERE RESOLVED FAVORABLY FOR HIM. AT THE MOMENT SPECIFICALLY, WHICH ROBBERY CHARGES HE IS TALKING ABOUT, I AM SORRY, IT IS ESCAPING ME AT THE MOMENT.

YOU HAVE LIMITED TIME, I KNOW, AND I WOULD LIKE TO HAVE YOU JUST HIT A LICK ON YOUR CLAIM ABOUT INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE.

LOWER COURT ASSUMED, WITHOUT FINDING, DEFICIENT PERFORMANCE. SO DEFICIENT PERFORMANCE PRONG HAS NOT BEEN ADDRESSED BY THE LOWER COURT, OTHER THAN ASSUMING WITHOUT FINDING, SIMPLY FOUND A LACK OF PREJUDICE, AND IN THIS INSTANCE, THERE WERE TWO AGGRAVATING CIRCUMSTANCES. THE CIRCUIT COURT HAD FOUND NO MITIGATING CIRCUMSTANCES AT THE TIME OF THE RESENTENCING, AND SO SCHOOL RECORDS, D.O.C. RECORDS ALL SHOWING IQ IS IN THE FIFTIES, AND MENTAL HEALTH EXPERTS ALL AGREEING THAT CURRENTLY, HIS IQ IS IN THE LOW SEVENTIES, SEEMS TO ME TO BE PRETTY SUBSTANTIAL MITIGATION THAT THE JURY NEVER HEARD. AND CERTAINLY UNDER RECENT U.S. SUPREME COURT CASE LAW, COMPETENCE HAS GOT TO BE UNDERMINED IN THE OUTCOME HERE. THANK YOU.

GOOD MORNING, YOUR HONORS, MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE ATTORNEY GENERALS OFFICE, REPRESENTING THE STATE OF FLORIDA.

COULD YOU GET TO THE MATERIALITY PRONG. IT SEEMS, OR AT LEAST IT APPEARS TO ONE MEMBER OF THE PANEL UP HERE, THAT IT IS APPARENT THAT THE NONDISCLOSURE OF THIS NEIGHBOR'S STATEMENT TWICE THAT AT AROUND THE TIME OF THE MURDER THAT SHE SAW THESE MEN ENTER THE HOME AND THEN REMAIN THERE AND THEN LEAVE IN A QUICK MANNER, AND THAT THAT WAS NOT DISCLOSED, SO THAT WE, REALLY, END UP WITH A MATERIALITY ANALYSIS HERE HERE, IS THE CRUCIAL ISSUE. WOULD YOU APPROACH THAT, FIRST OF ALL.

THE TRIAL COURT DID NOT MAKE AN EXPRESS FINDING ON ANY EXCULPATORY VALUE. WHAT THE TRIAL COURT SAID WAS IT WAS NOT DISCLOSED. WE AGREED IT WAS NOT DISCLOSED. THAT WAS NOT IN DISPUTE, AND THE TRIAL COURT CLEARLY SHOWED THERE WAS NO OBLIGATION TO DISCLOSE THIS.

HOW WOULD THIS BE, THAT IF WE HAVE GOT THE POLICE INVESTIGATING, AND THE FIRST PLACE THEY GO IS TO THE NEIGHBOR, AND THEY ASK THE NEIGHBOR IF THEY SAW ANY ACTIVITY AT THE HOUSE WHERE THE VICTIM LIVES. THE VICTIM LIVED ALONE, IS THAT CORRECT?

YES, YOUR HONOR.

OKAY. THE NEIGHBOR GIVES THE POLICE A STATEMENT THAT COINCIDES, APPARENTLY, WITH THE TIME OF THIS INCIDENT, TRAGEDY, AND THE DEATH OF THE VICTIM, AND IDENTIFIES TWO PEOPLE IN THAT HOUSE THAT ARE THERE FOR A SUBSTANTIAL PERIOD OF TIME AND THEN LEAVE, SO HOW COULD THAT NOT BE EXCULPATORY, BECAUSE IT REALLY PROVIDES THE POTENTIAL FOR OTHER PEOPLE HAVING COMMITTED THIS OFFENSE, DOES IT NOT?

NO.

WHY NOT?

WE ARE FORTUNATE IN THIS CASE. WE HAVE A VERY NARROW TIME FRAME. HE IS TALK ABOUT THE VICTIM HAVING BEEN SEEN AT ELEVEN O'CLOCK. THE VICTIM WASN'T HOME AT ELEVEN O'CLOCK. THE TESTIMONY AT TRIAL SHOWED THE VICTIM WAS IN A MEETING AT CHURCH, UNTIL AT LEAST 11:30. WE ALSO KNOW THAT THE VICTIM WAS AT HER BANK CASHING A CHECK AT 1:47 THAT DAY, SO THE SUGGESTION THAT SOMEBODY WAS IN THE HOUSE AT ONE O'CLOCK, AND I REALIZE IT VARIES. IT IS ONE O'CLOCK, IT IS ONE-THIRTY, IT IS STILL BEFORE TWO O'CLOCK. SHE WASN'T HOME. SHE WAS AT HER BANK AT 1:47, CASHING THE CHECK, SO YOU HAVE THAT PROBLEM THAT, IT DOES NOT COINCIDE WITH THE TIME.

I DON'T SEE ANYTHING IN THE JUDGE'S ORDER THAT REFERRED TO THAT.

THAT WAS FROM THE TRIAL TESTIMONY, THE TESTIMONY AT TRIAL WAS THAT SHE WAS --

THE TRIAL JUDGE'S ORDER OPPOSE THE CONVICTION RELIEF MAKES NO REFERENCE TO WHAT YOU JUST DESCRIBED.

NO. THE TRIAL COURT'S ORDER SAID THERE WAS NO OBLIGATION TO TURN OVER THE FULL INVESTIGATORY REPORTS, WHEN THEY ARE NOT MATERIAL.

YOU KNOW, AGAIN, MAYBE WE NEED TO GO INTO MATERIALITY. TO ME, SOMEBODY CLOSE IN TIME WAS A NEIGHBOR WHO HAS NO AX TO GRIND, SEES TWO WHITE MEN GOING INTO THE HOUSE, CLOSE ENOUGH IN TIME. MAYBE SHE IS NOT GOING TO BE, MAYBE SHE HAS NO REASON TO, NOT TO TELL THE TRUTH. HOW COULD THAT NOT BE TURNED OVER?

WELL, AGAIN, YOU HAVE TO ASSESS THE MATERIALITY, AND I THINK YOU DO THAT --

MATERIALITY IS THE THIRD PRONG. WE ARE JUST TALKING ABOUT THE SECOND PRONG THAT, IT IS BRADY, IT IS FAVORABLE TO THE ACCUSED.

WELL, NO, BRADY MEANS MORE THAN FAVORABLE TO THE ACCUSED. BRADY MEANS MATERIAL AND WOULD MAKE THE MATERIAL DIFFERENCE.

MAYBE WE ARE LOOKING AT THREE PRONGS. THERE ARE THREE PRONGS.

OKAY. YES, YOUR HONOR.

WASN'T DISCLOSED. WE AGREE WITH THAT.

YES.

IT IS FAVORABLE TO THE ACCUSED, AND IT IS MATERIAL, WHICH IS WHAT, MAYBE, WE ARE MIXING TOGETHER, SO I THINK WE ARE, DO YOU AGREE THAT THIS IS, CERTAINLY WOULD BE SOMETHING THAT A DEFENSE LAWYER WOULD WANT TO EXPLORE, THAT SOMEONE CLOSE IN TIME WAS, TWO WHITE MEN UNKNOWN, ENTERED THIS, THE VICTIM'S HOUSE, WOULD THAT BE SOMETHING, IF YOU ARE A DEFENSE LAWYER, THAT YOU MIGHT WANT TO PURSUE?

I AM SURE THE DEFENSE ATTORNEY, THEY WANT TO KNOW AS MUCH AS THEY CAN POSSIBLY KNOW AND CHASE AS MANY TRAILS AS THEY CAN HAYES CHASE, BUT IF IT IS NOT GOING TO LEAD INTO ANYTHING MATERIAL, IT IS NOT A BRADY VIOLATION. YES, I THINK THAT ROBERT LOVE TESTIFIED AT THE EVIDENTIARY HEARING, GEE, IT WOULD HAVE BEEN NICE TO HAVE THIS, BUT THAT IS NOT THE STANDARD FOR BRADY. IT HAS TO BE SOMETHING MORE THAN SOMETHING THAT WOULD BE NICE FOR THE DEFENSE ATTORNEY TO V.

SO YOU ARE SAYING THAT THERE WAS NO OBLIGATION FOR THE STATE, TO DISCLOSE THIS STATEMENT OF THE NEIGHBOR, ABOUT THESE TWO PEOPLE THAT WERE IN THE HOUSE FOR AN HOUR OR 45 MINUTES THAT, THE NEIGHBOR THAT LIVES RIGHT NEXT DOOR IN BROAD DAYLIGHT, OKAY, OBSERVED. IS THAT THE POSITION OF THE STATE?

YES, YOUR HONOR. UNDER THE CASE LAW, IT IS UP TO THE PROSECUTOR, HAS DISCRETION IN DETERMINING WHETHER OR NOT SOMETHING IS MATERIAL. PERSONALLY, I WOULD HAVE LIKED TO HAVE DISCLOSED IT. IT WOULD HAVE BEEN NICE TO HAVE DISCLOSED IT.

HAS BRADY TAKEN AWAY THAT DISCRETION?

NO, YOUR HONOR, BRADY GRANTS THAT DISCRETION.

I SEE. TELL ME HOW THE LANGUAGE IN BRADY, GRANTS DISCRETION TO THE STATE, OKAY, TO DISCLOSE EXCULPATORY EVIDENCE TO THE DEFENSE. WHAT LANGUAGE IN BRADY, ARE YOU RELYING ON, THAT SAYS IT IS IN THE DISCRETION OF THE STATE, AS TO WHETHER OR NOT TO DISCLOSE THIS EVIDENCE?

I DO NOT HAVE A COPY OF BRADY BEFORE ME TO QUOTE FROM IT, BUT I WOULD BE HAPPY TO PROVIDE THAT TO THE COURT.

WHAT LANGUAGE DO YOU BELIEVE THE U.S. SUPREME COURT USED IN BRADY, IN IMPOSING THIS OBLIGATION ON THE STATE, THAT SAID WE ARE IMPOSING THIS OBLIGATION, BUT WE ARE MAKING IT DISCRETIONARY?

WELL THERE, ARE SUBSEQUENT CASES THAT DISCUSS WHERE THERE HAS BEEN A BRADY

VIOLATION THAT PLACE THE DISCRETION WITH THE PROSECUTOR, ON WHAT TO DISCLOSE. NOW, MANY STATE ATTORNEYS AM OFFICE, I THINK, VERY -- STATE ATTORNEYS OFFICE, I THINK, VERY WISELY HAVE A POLICY THAT THEY ARE GOING TO BE OPEN AND THAT IS ENCOURAGED.

ARE YOU TALKING ABOUT SOMETHING THAT THE POLICE WERE REFERRING TO OR THE PROSECUTOR AS THE MILLER RULE?

WELL, THAT WAS THE SCOPE OF THE RULE AT THE TIME. STATE V MILLER.

IS IT YOUR POSITION THAT THAT RULE TRUMPED BRADY?

NO, YOUR HONOR, NO, BUT I DO THINK IT IS IMPORTANT TO ADDRESS, AND I WOULD LIKE TO HAVE THE OPPORTUNITY TO ADDRESS WHY THIS IS NOT MATERIAL ON THE FACTS OF THIS CASE. ALL RIGHT.

IT IS VERY HARD TO SWALLOW BECAUSE ARE SAYING, BECAUSE I DON'T KNOW, I WILL SAY JUST FOR ME, THAT --

LET ME RESPOND TO THE MATERIALITY QUESTION.

-- THAT WOULD BE THE KIND OF THING THAT YOU MIGHT SAY, GEE, I DON'T KNOW IF THIS IS GOING TO BE HELPFUL, THIS IS PRETTY CLOSE IN TIME, SO IT IS SOMETHING THAT THE DEFENSE LAWYER SHOULD HAVE HAD THE RIGHT TO BE ABLE TO KNOW THIS WITNESS EXISTED, TALK TO HER, TAKE HER DEPOSITION, AND THEN DECIDE IF THIS IS GOING TO BE HELPFUL OR NOT, SO LET'S GO TO THE THIRD PRONG.

LET'S GO TO THE MATERIALITY. ALL RIGHT. THE MATERIALITY IS, IT DID NOT IMPACT ANY OF THE INCRIMINATING EVIDENCE PRESENTED AT TRIAL. THE MATERIALITY IS THAT IT WAS INCONSISTENT WITH THE EVIDENCE FROM TRIAL, HER STATEMENTS. NOT ONLY WAS THE TIME FRAME BUT HER STATEMENTS, AND SHE DIDN'T JUST SAY SHE THOUGHT SHE HEARD THE FRONT DOOR SLAM. SHE WAS SURE SHE HEARD THE FRONT DOOR SLAM, AND SHE EXPLAINED TO THE OFFICER TAKING THE REPORT THAT THERE WAS A DISTINCT DIFFERENCE BETWEEN HEARING THE FRONT DORAN HEARING THE BACK DOOR, AND SHE WAS CERTAIN THIS WAS THE FRONT DOOR SLAM. WE KNOW FROM EVIDENCE AT TRIAL AS WELL AS THE POLICE REPORT, THAT THE FRONT DOOR WAS DEADBOLTED. THERE WAS A SCREEN. THERE WAS AN EYE HOOK AND A DEADBOLT ON THE SCREEN AND THE FRONT DOOR. THE BACK DOOR WAS CLOSED BUT UNLOCKED. THE BACK DOOR IS WHERE THE MATCHING TIRE TO THE MOTORCYCLE WAS IMPRINTED, NEAR THE BACK DOOR. THE ENTRY WAS ALWAYS BELIEVED TO BE THE BACK DOOR. THE EXIT WAS BELIEVED TO BE THE BACK DOOR. THERE IS NO WAY THE PERPETRATORS OF THIS OFFENSE LEFT THROUGH THE FRONT DOOR. SO WE HAVE, IT IS NOT THE SAME ON THE TIME. IT IS NOT THE SAME WITH WHAT SHE REMEMBERS. ALSO WE HAVE SOME CREDIBILITY CONCERNS AND OBVIOUSLY HER NOT BEING AVAILABLE. THE STATE HAS NEVER BEEN ABLE TO TEST HER CREDIBILITY.

ISN'T THIS GOING BACK TO WHAT MR. McCLAIN WAS SAYING, WHICH IS DISCONCERTING, WHICH IS THAT WE CAN'T REALLY TEST HER CREDIBILITY NOW, BECAUSE THE STATE DIDN'T MAKE HER AVAILABLE, AND WHO IS SUPPOSED TO PAY THE PRICE OF THAT, IF IT IS THE STATE THAT IS SUPPOSED TO HAVE DISCLOSED IT IN THE FIRST PLACE. SOMEONE MADE A DECISION, WELL, SHE SAID THE FRONT DOOR. IT IS NOT CREDIBLE. BUT JUST LIKE PEOPLE ARE MISTAKEN, MAYBE HAVING HER DEPOSITION TAKEN, SHE WOULD HAVE EXPLAINED WHERE THE DISCREPANCIES WERE, BUT IF SHE SAID I AM CERTAIN, THOUGH, THAT TWO WHITE MEN WERE IN THIS HOUSE, WE DON'T KNOW WHETHER SHE WAS DRINKINT AT THE TIME OR WHETHER SHE IS A SCHOOL TEACHER. WE DON'T KNOW WHAT HER BACKGROUND IS, SO HOW DOES THAT, YOU ARE NOW SAYING THAT SHOULD WORK AGAINST THE DEFENDANT, BUT WHY SHOULDN'T THAT WORK AGAINST THE STATE? ANOTHER PROBLEM IS, IF SHE IS ACCURATE AND THERE ARE NO CREDIBILITY PROBLEMS, THEN THE THINGS SHE REMEMBERS ARE INCONSISTENT WITH THE

TESTIMONY AT TRIAL, AND IF SHE IS NOT ACCURATE, THAT ISN'T WHAT HAS BEEN EXPLORED, BUT IF SHE IS NOT ACCURATE, THEN IT IS NOT ANYTHING THAT HAS BEEN OFFICIAL, SO WE HAVE THE -

LET ME, THIS CASE WAS INVESTIGATED IN THE EARLY '80s.

YES, YOUR HONOR, 1983, JANUARY.

SO IT WAS ACTUALLY GOING ON ABOUT THE SAME TIME THE CASE OVER IN DAYTONA BEACH, SUAVEORD WAS GOING ON.

YES, AND IT WAS JANUARY 1984 ON THE MURDER. IT WAS JANUARY OF 1984.

RIGHT. AND SO THE CONTEXT IN WHICH THE STATE WAS WORKING AT THAT TIME, I TAKE IT, WAS IN THE SAME CONTEXT THAT THE STATE WAS WORKING IN SUAVEORD, IN ITS ANALYSIS, I MEAN, IN WHAT IT WAS DISCLOSING, BECAUSE I DO KNOW THAT THIS COURT SAID, IN THE FIRST SWAFFORD OPINION, THAT NOT EVERY PART OF A POLICE REPORT --

YES. YOUR HONOR.

-- IS HANDED OVER. IS THAT THE CONTEXT THAT WE ARE DEALING WITH THIS IN?

THAT IS FAIR WITH RESPECT TO THE CONTEXT THAT THIS IS COMING.

WERE THERE OTHER POLICE REPORTS IN SUAVEORD, OF OTHER INCIDENTS?

I DON'T RECALL THE, SPECIFICALLY THAT FROM SWAFFORD. BUT, AGAIN, THE POINT THAT I WANT TO GET TO ON THE MATERIALITY, IS HOW THIS IS CONSISTENT WITH THE INCRIMINATING EVIDENCE AT TRIAL, AND I KNOW THAT MR. McCLAIN SAID THAT THERE ARE FIVE POINTS, AND HE MENTIONED THE TIRE TRACK, HAIR EVIDENCE, BUSINESS CARDS, THE DEFENDANT'S STATEMENTS, WHICH I WOULD LIKE TO GET INTO A LITTLE MORE. I DON'T RECALL HIM SAYING THE MAIN REASON THAT FLOYD WAS INITIALLY A SUSPECT, IS HE IS AT THE BANK, CASHING A CHECK. HE HAS HER CHECKBOOK IN HIS POCKET THAT WAS TAKEN FROM THE DRAWER. HE IS DOING THAT AT FOUR O'CLOCK THE SAME AFTERNOON THAT SHE HAD BEEN AT THE BANK AT 1:47. VERY QUICK TIME FRAME. HE IS THERE AT FOUR O'CLOCK CASHING THE \$500 CHECK. HE RETURNS NOT THE NEXT DAY. THAT WAS A MONDAY, BUT HE RETURNS ON WEDNESDAY AT ABOUT NOON WITH A \$700 CHECK. THAT IS WHEN THE BANK WAS SUSPICIOUS US AND CALLED THE POLICE. THEY COME OUT TO ARREST HIM FOR PASSING THE FORGED CHECKS. THEY FIND IN HIS POSSESSION, HE HAS GOT A JACKET THAT HAS A BLOODY SOCK IN THE POCKET. THE BLOOD IN THE SOCK MATCHES THE BLOOD TYPE OF THE VICTIM, DOES NOT MATCH MR. FLOYD'S BLOOD TYPE. HE, AT THAT POINT, IS TAKEN INTO CUSTODY. HE IS GIVEN HIS MIRANDA RIGHTS. HE IS ABLE TO READ THE MIRANDA CARD, HIMSELF, OUT LOUD TO THE DETECTIVES. HE TELLS THE DETECTIVE THAT HE FOUND THIS CHECKBOOK, THAT HE WAS, HE WAS PASSING A CHECK THAT HE FOUND, HE FOUND THIS CHECKBOOK THAT MORNING AT A CONVENIENCE STORE, AND HE EXPLAINS WHAT THE CONVENIENCE, HE DESCRIBES THE CONVENIENCE STORE, AND THE DETECTIVE SAYS WHY DID YOU GO SO FAR TO GET TO THAT PARTICULAR CONVENIENCE STORE. HE SAYS HE WAS GOING TO BUY BEER, THAT HE BOUGHT SCHLITZ MALT LIQUOR AND THEY HAD THE COLDEST BEER IN TOWN AND HE ALWAYS GOES THERE TO BUY HIS BEER. HE LOOKED AROUND THE DUMPSTER AND SAW BANK STATEMENTS AND DOCUMENTS AND THE CHECKBOOK. HE TOOK THE CHECKBOOK AT THAT TIME AND WENT TO THE BANK. HE IS CONFRONTED WITH THE FACT THAT THEY KNOW THERE IS A EARLIER CHECK. HE IS NOT TOLD WHAT DATE. HE IS NOT TOLD WE KNOW YOU WERE THERE MONDAY. HE IS TOLD, BUT WE KNOW THIS IS THE SECOND CHECK. AND THEN HE REVISES IT AND SAYS, YES, I FOUND THE CHECKBOOK ON TUESDAY, AND THEN THEY SAY, WELL, YOU WERE CASHING A CHECK ON MONDAY. THAT IS WHEN HE ENDS THE INTERVIEW, SO YOU HAVE HIM NOT ONLY MAKING THESE INCONSISTENT STATEMENTS, BUT THIS WAS HIS HYPOTHESIS OF INNOCENCE

AT TRIAL, THAT HE HAD FOUND THIS CHECKBOOK. NOT ONLY DO YOU HAVE THE FACT THAT HE IS MISREPRESENTING THE DETAILS OF HOW HE FOUND IT, YOU HAVE THE CONVENIENCE STORE CLERK, WHO CAME IN TO SAY NOBODY SOLD ANY SCHLITZ MALT LIQUOR THAT DAY. SHE WAS ON DUTY AND KNOWS THE REGULAR CUSTOMERS THAT COME IN IN AND DID NOT RECOGNIZE MR. FLOYD. PART OF HER DUTIES INCLUDE GOING OUT AND GOING OVER THE GROUNDS. SHE TESTIFIED THERE WERE NO CHECK AND BANK RECORDS THERE. SHE PRESENTS THIS EVIDENCE AND IT IS IN CONTRAST WITH THE EVIDENCE HE PRESENTED AT TRIAL. IT IS A CIRCUMSTANTIAL EVIDENCE CASE BUT A VERY STRONG CIRCUMSTANTIAL EVIDENCE CASE, AND MOST IMPORTANTLY, WHAT TINA GLENN THOUGHT SHE SAW THAT DAY DOES NOT IN ANY WAY MATCH THE EVIDENCE. AND IF YOU LOOK AT THE BRADY CASE, CARDONA AND ROGERS, IT IS INCRIMINATING EVIDENCE THAT HAD BEEN PRESENTED AGAINST THE DEFENDANT AT TRIAL. IT IS TESTIMONY SHOWING A CRITICAL STATE WITNESS THAT COULD HAVE BEEN IMPEACHED, A CRITICAL STATE WITNESS THAT THE DEFENSE DID NOT KNOW ABOUT. THIS IS BRADY TYPE OF WHERE THEY SAY YOU KNOW WHAT? WE NOW KNOW THAT THE TIRE TRACK WAS INCONSISTENT. WE KNOW THE BLOOD TYPING WAS WRONG. WE KNOW THAT THE HAIR EVIDENCE WAS WRONG. THAT WOULD RAISE SERIOUS PROBLEMS. WE DON'T HAVE ANY OF. THAT WE HAVE THE SAME HIGHLY INCRIMINATING EVIDENCE FROM TRIAL, COMPLETELY UNSCATHED BY THE STATEMENT THAT SHE REMEMBERS TWO OTHER PEOPLE BEING AT THE HOUSE, SO IT CAN'T BE MATERIAL, BECAUSE IT, THERE IS NO REASONABLE PROBABILITY OF AN ACQUITTAL, EVEN IF TINA GLENN WAS AVAILABLE, EVEN IF SHE WAS AVAILABLE TO TESTIFY AT A NEW TRIAL, WHICH SHE ISN'T, EVEN IF SHE COULD SAY, YES, I REMEMBERED THIS, IT DOESN'T MATCH THE EVIDENCE. EVEN IF THEY COULD GET AROUND HER CREDIBILITY PROBLEMS, WHICH IS WHAT THE TRIAL COURT SAYS, EVEN IF THEY COULD GET AROUND THAT, THERE IS NO REASONABLE PROBABILITY OF AN ACQUITTAL, BECAUSE THE INCRIMINATING EVIDENCE WAS SO STRONG.

IT SEEMS AS THOUGH, IF WE CAREY YOUR ANALYSIS FORWARD, -- IF WE CARRY YOUR ANALYSIS FORWARD, THAT IF MS.^GLENN HAD SEEN SOMEONE WALKING OUT THE FRONT DOOR, WIPING BLOOD FROM A KNIFE, THAT, TOO, WOULD NOT BE INCONSISTENT WITH ALL THIS OTHER EVIDENCE, SO THEREFORE THAT WOULD NOT BE, THAT WOULD NOT BE MATERIAL, ACCORDING TO THE ANALYSIS THAT YOU ARE PROFFERING NOW, IF THAT IS OUR TEST.

WELL, I --

DOES THAT --

YEAH. THAT IS A CLOSER QUESTION, BECAUSE YOU HAVE SOMETHING MORE THERE IS, SO I THINK IT IS A WEIGHING, AND I THINK THAT IS WHY --

GOING BACK TO IT IS NOT INCONSISTENT WITH ALL OF THE OTHER EVIDENCE THAT YOU SAY EXIST, THE BLOOD ON THE SOCK AND ALL OF THOSE OTHER KINDS OF THINGS, AND IT WOULD APPEAR TO ME THAT MATERIALITY WOULD INCLUDE THE TEST, AND THAT WOULD INCLUDE THE PRINCIPLE OF LAW THAT IS APPLICABLE, AND THAT WOULD SEEM A LITTLE STRANGE. ANOTHER TEST IS ACQUITTAL, IF YOU HAVE A DIFFERENT RESULT, SO ALTHOUGH JUDGE LUCE DID NOT CONDUCT THE ORIGINAL TRIAL, HE DID CONDUCT SOME LIMITED GUILT PHASE AND WAS VERY FAMILIAR WITH ALL OF THE EVIDENCE FROM TRIAL. HE FOUND NO REASONABLE PROBABILITY OF ACQUITTAL. THE LEGAL --

THAT IS THE STANDARD UNDER JONES FOR NEWLY-DISCOVERED EVIDENCE. BRADY IS AKIN TO THE SECOND PRONG, WHICH IT UNDERMINES CONFIDENCE IN THE OUTCOME. WOULD YOU AGREE WITH THAT IT IS NOT A REASONABLE PROBABILITY STANDARD UNDER BRADY?

I THINK THAT WHAT THE COURTS HAVE SAID IS THE STANDARD IS, IN ORDER TO UNDERMINE THE CONFIDENCE, THERE HAS TO BE A REASONABLE PROBABILITY OF A DIFFERENT RESULT, WHETHER YOU ARE TALKING ABOUT, IT IS THE SAME AS INEFFECTIVE ASSISTANCE OF COUNSEL, BUT WITH

INEFFECTIVE ASSISTANCE OF COUNSEL --

WHAT IS THE STANDARD, THEN, FOR NEWLY DISCOVERED EVIDENCE. WHAT IS THE SECOND PRONG FOR THAT?

NEWLY DISCOVERED EVIDENCE IS A HIGHER STANDARD.

HIGHER THAN THE PROBABILITY OF A DIFFERENT RESULT?

YES. THE LOWER STANDARD IS FOR A GIGLIO CLAIM, YOU HAVE TO -- FOR A GIGLIO CLAIM, YOU HAVE TO SHOW SOME EFFECT ON THE VERDICT, AND THE BRADY WITH A SLIDING SCALE, THE QUESTION IS A REASONABLE PROBABILITY OF ACQUITTAL.

COULD YOU GO TO THE PENALTY PHASE. IN 1984, THE RESENTENCING -- ARE THE SCHOOL RECORDS OBTAINED FOR THE RESENTS SOMETHING.

NO. DEFENSE ATTORNEY ROBERT LOWE TESTIFIED THAT HE DID NOT SEEK THE SCHOOL RECORDS.

WHAT WAS HIS REASON FOR THAT?

THAT THAT WAS NOT SOMETHING THAT WAS TYPICALLY DONE AT THAT TIME. TODAY HE ACKNOWLEDGED THAT THE STANDARDS ARE MUCH DIFFERENT. HE ACKNOWLEDGED THAT THERE IS MUCH MORE INVESTIGATION. HE EXPLAINED WHAT HE DID TO THOROUGHLY INVESTIGATE. HE HAD AN INVESTIGATOR THAT HE HAD HIRED, AND HE SAID THE INVESTIGATOR WAS NOT JUST SOMEBODY SERVING SUBPOENAS. THE INVESTIGATOR WAS ALSO OUT INTERVIEWING WITNESSES. HE TALKED TO THE DEFENDANT'S FAMILY. HE TALKED TO THE DEFENDANT'S FRIENDS.

SO HE DID NOT DO ANYTHING, AND, AGAIN, THIS IS 1987, SO IT IS NOT, '77, HE DID NOTHING TO EXPLORE THE MENTAL STATUS OF THE DEFENDANT?

HIS INVESTIGATION WAS ACTUALLY '86. THE RESENTENCING WAS JANUARY 1987. SO I THINK YOU HAVE TO LOOK AT LEADING UP TO --

DID YOU SAY '86 OR '87?

'87.

WELL, I DON'T THINK THINGS CHANGED TOO MUCH BETWEEN '86 AND '87.

EVERY YEAR YOU ARE TALKING ABOUT, HOPEFULLY WE GET BETTER, CERTAINLY ON THE LONG-TERM.

IN 1987 OR '86, CERTAINLY IN A PERSONAL INJURY CASE, GETTING SCHOOL RECORDS IS NOT --

WHAT ROBERT LOWE TESTIFIED WAS THAT, AT THAT TIME HE MADE THE DECISION BASED ON WHAT HE COULD DEVELOP FROM TALK TO GET DEFENDANT, ASKING THE DEFENDANT HOW DID YOU DO IN SCHOOL, WHAT KIND OF EMPLOYMENT HISTORY DO YOU HAVE, TALKING TO THE EMPLOYERS, TALKING TO THE FAMILY.

LET'S TALK ABOUT THESE SCHOOL RECORDS. DOES IT SHOW THAT, IN SCHOOL, THAT HE WAS DESIGNATED AS BEING MENTALLY RETARDED?

IT DOES NOT SHOW A DESIGNATION FOR MENTAL RETARDATION. WHAT WE HAVE IN THE SCHOOL RECORDS, WE HAVE BASICALLY, THERE ARE ABOUT FIVE PAGES OF SCHOOL RECORDS THAT WERE ADMITTED AT THE EVIDENTIARY HEARING, PROVIDED TO THE MENTAL HEALTH EXPERTS, AND EXPLORED AT THE EVIDENTIARY HEARING. WE HAVE TWO PAGES, WHICH IS A CUMULATIVE

REPORT FROM HIS ELEMENTARY YEARS THAT, SHOWS THAT HE WAS RETAINED IN FIRST GRADE. IT IS ALL S's, U's AND I's, SATISFACTORY AND UNSATISFACTORY, AND IS NOT A LETTER-GRADE-TYPE OF THING, SO WE HAVE COMMENTS FROM THE TEACHERS --

WAS THERE SOMETHING ABOUT HIM BEING MENTALLY RETARDED?

THERE WAS A PSYCHOLOGICAL ASSESSMENT DONE IN EIGHTH GRADE, BECAUSE HE HAD HAD PROBLEMS AT SCHOOL. HE WAS GETTING IN FIGHTS. HE WAS MISBEHAVING IN SCHOOL. THEY ASSESSED HIM AT THAT TIME AND DID INTELLIGENCE TESTS, AND BASED ON THE INTELLIGENCE TESTS, THEY DETERMINED THAT HE WAS OPERATING ON THE INTELLIGENCE, AND THEY SCORED IT WITHIN THE RANGE OF MENTAL RETARD. HOWEVER, THE PROBLEM -- PARDON ME, YOUR HONOR?

HOW FAR DID HE GO IN SCHOOL?

HE WENT TO NINTH GRADE. HE DROPPED OUT AFTER NINTH GRADE. AFTER THIS ASSESSMENT, AND THIS IS INNATE GRADE, AND THE PROBLEM THEY IDENTIFY IN THE ASSESSMENT, IS THAT IN THE MIDDLE SCHOOL ENVIRONMENT, HE IS SOCIALLY ADVANCED, AND THEY DON'T EVEN SAY HE IS SOCIALLY ADVANCED FOR MIDDLE SCHOOL ENVIRONMENT. THEY SAY HIS SOCIAL ENVIRONMENT IS ABOVE WHAT YOU WOULD SUGGEST OF SOMEONE ABOVE HIS CHRONOLOGICAL AGE AND HE SHOULD BE IN HIGH SCHOOL. HE WAS IN MIDDLE SCHOOL, BUT THEY WERE RECOMMENDING THAT HE BE TRANSFERRED TO HIGH SCHOOL AND BE PLACED IN AN APPROPRIATE EMR, THE EDUCATIONAL MINORITY RETARDED CLASS IN HIGH SCHOOL. NOW, WE HAVE A HIGH SCHOOL RECORD THAT DOES NOT REFLECT THAT HE WAS ACTUALLY PLACED IN THE SPECIAL CLASS. ALL THE HIGH SCHOOL RECORD FROM NINTH GRADE REFLECTS IS THAT, BEFORE HE DROPPED OUT, YOU HAVE HIS BASIC GRADES, THAT IN MATH AND PHYS-ED HE MADE F'S, IN SOCIAL STUDIES HE MADE A C AND IN LANGUAGE HE MADE As. SO THAT IS THE RECORD THAT HE HAVE FROM HIGH SCHOOL. WE DO HAVE THE ASSESSMENT WHICH PEOPLE HAVE JUMPED ON BECAUSE OF THE IQ SCORE, OBVIOUSLY A GREAT, VARIED FROM THE IQ SCORES THAT WERE VERY CONSISTENT FROM THE EXPERTS THAT TESTIFIED AT THE EVIDENTIARY HEARING, SO THEY DID NOT PUT A LOT, THE EXPERTS THAT THE TRIAL COURT FOUND CREDIBLE, DID NOT PUT, REALLY, ANYTHING INTO THE SCHOOL RECORD, AND I KNOW THAT DR. GAMASH, WHO THE TRIAL COURT FOUND TO BE HIGHLY CREDIBLE AND SHOWED TO THE COURT THAT THIS WAS NOT A DIAGNOSIS OF MENTAL RETARDATION. ALL IT SHOWED WAS A LOW IQ SCORE AND LOW INTELLIGENCE.

DURING THE RETRIAL, WAS THE EVIDENCE WITH REGARD TO IT APPEARS THAT THIS PERSON, BASICALLY, WAS WORKING IN SHELTERED EMPLOYMENT, LAWN SERVICE, WITH HIS FATHER, AND WAS UNABLE TO EVEN KEEP ANY OF THAT TYPE OF WORK GOING AFTER HIS FATHER'S DEATH. WAS THAT TYPE OF INFORMATION PRESENTED AT THE NEW PENALTY PHASE, SO THAT THE JURY HEARD ABOUT THAT, BECAUSE WE HAVE ONLY, WHAT, ONE YEAR, NINTH GRADE OF SCHOOL KIND OF THING.

YES. WELL, WHAT THEY HEARD WAS HIS EMPLOYMENT HISTORY. THEY HEARD FROM A LOT OF NEIGHBORS AND FAMILY FRIENDS ABOUT HOW HE HAD BEEN VERY HELPFUL. HE HAD BEEN TAKING CARE OF HIS YOUNGER BROTHERS AND SISTERS SINCE HIS FATHER'S DEATH. HIS FATHER'S DEATH AFFECTED HIM VERY DEEPLY. HE WAS CLOSE TO HIS FATHER. HIS MOTHER WAS AN ALCOHOLIC, AND BECAUSE OF THAT WHEN HIS FATHER WAS OUT OF THE PICTURE, FLOYD HAD TO TAKE ON SOME PARENTING RESPONSIBILITIES OF THESE OTHER CHILDREN. HE ALSO HAD A CHILD, I BELIEVE, TWO CHILDREN OF HIS OWN, SO WHILE THEY WERE WITH THE MOTHER, HE WAS PAYING CHILD SUPPORT FOR HIS CHILDREN. HE HAS THIS EMPLOYMENT HISTORY, AND THE, ONE OF THE WITNESSES HAD BEEN, HAD BEEN, WORKED WITH HIM AT THE CHURCH THAT HE WORKED FOR ABOUT A YEAR, AND THAT WITNESS INDICATED THAT THE PROBLEM WAS THERE WERE CONCERNS WITH HIS EMPLOYMENT, BECAUSE THEY THOUGHT THAT HE WAS STEALING FROM THE

CHURCH, AND THEY ULTIMATELY HAD TO FIRE HIM. HIS LAST PAYCHECK HE RECEIVED A WEEK BEFORE THIS MURDER OCCURRED, BUT WHAT THAT WITNESS FELT WAS THAT, ONCE HIS FATHER DIED, THAT HE STARTED GETTING IN WITH THE WRONG CROWD. HE BELIEVED THAT HE WAS DOING DRUGS, THAN IS CONSISTENT WITH STATEMENTS THAT EMPLOYED MADE TO HIS MENTAL HEALTH, AND APPARENTLY, ALSO, TO ROBERT LOWE, HIS RESENTENCING COUNSEL, BECAUSE LOWE WAS AWARE THAT HE HAD SMOKED MARIJUANA. THANK YOU VERY MUCH, I WOULD ASK YOU TO AFFIRM THE TRIAL COURT'S ORDER.

SHE WENT A COUPLE OF MINUTES OVER. I WOULD ASK THE COURT'S INDULGENCE TO BRIEFLY, FIRST, ADDRESS THE LATTER. SHE TALKED ABOUT THE SCHOOL RECORDS. SHE NEVER ACKNOWLEDGES THE IQ SCORE OF 51. D.O.C. RECORDS YEARS LATER, SHOW AN IQ IN THE 50s. DR. TUMER IN 1992, WHO FIRST EVALUATES HIM, SHOWS AN IQ SCORE OF 60. WHEN HE IS IN A BERENS ENVIRONMENT, HIS IQ SCORE GOES UP INTO THE 70s. NOTHING WAS PRESENTED. THE EXPLANATION WAS JUST THAT HE WAS A THIEF, A DRUGGIE AND A BAD MAN. NOTHING CAME OUT THAT THIS IS A PERSON WHO CAN'T COPE IN SOCIETY. WHAT MR. LOVE SAID WAS IT WAS HIS FIRST CAPITAL CASE. HE DIDN'T DO IT. HE HAS NO EXPLANATION FOR WHY. HE WOULD DO IT NOW.

THIS ISN'T, AGAIN, GOING BACK, '87, '86, DO YOU HAVE, THROUGH, SAY, CASES THAT WE DECIDED DURING THAT PERIOD OF TIME, TO SHOW THAT THAT WAS GATHERING RECORDS, D.O.C., SCHOOL RECORDS, I MEAN, CERTAINLY D.O.C. RECORD WOULD BE THING THAT IS A COMPETENT ATTORNEY WOULD DO?

THE U.S. SUPREME COURT IN WILLIAMS V TAYLOR ADDRESSED A 1986 CASE, SAID THAT THAT WAS SOMETHING THAT SHOULD BE DONE. THAT WAS FROM THE U.S. SUPREME COURT.

YOU ARE SAYING THAT ALONE, SETS THE STANDARD.

I THINK THE U.S. SUPREME COURT DOES SET THE STANDARD.

THEY DO, CERTAINLY, IN CERTAIN CASES.

MANY TIMES THEY DO. TURNING TO THE FIRST CLAIM, SHE SAYS IT IS INCONSISTENT WITH ALL OF THE EVIDENCE AT TRIAL, SO THEREFORE IT DOESN'T UNDERMINE CONFIDENCE, AND THEN SHE SAYS, BUT IT IS CONSISTENT. I MEAN, SHE SAYS BOTH AT THE SAME TIME. FOR EXAMPLE AS TO REVEREND MARTIN SAYING HE SAW HER, SHE SAYS, AT ELEVEN THIRTY THAT MORNING AND SHE WAS AT THE CHURCH SO SHE COULDN'T HAVE COME HOME. IN FACT, SHE SAYS, THERE WAS A MEETING GOING ON. I LEFT AT ELEVEN THIRTY. I THINK SHE WAS STILL THERE BUT I DON'T KNOW.

I AM HAVING TROUBLE ON THIS FIRST ISSUE. I AM HAVING TROUBLE WITH THIS IDEA THAT THIS WOULDN'T HAVE BEEN DISCLOSED, AND SO I DON'T BUY THAT ARGUMENT. IT SHOULD HAVE BEEN DISCLOSED IN MY VIEW. THE PROBLEM I HAVE IS THAT JUST THINKING AFTER TRIAL THAT WOULD HAVE OCCURRED, AGAIN, WITH THE CHECKBOOK, WITH THE BLOODY SOCK IN HIS JACKET.

IF I CAN ADDRESS THAT.

BUT I DON'T KNOW, TWO WHITE PEOPLE IN AND OUT AT SOME POINT, HOW THAT WOULD HAVE -- IT IS CONSISTENT WITH THE DEFENSE.

-- PUT THIS CASE -- LET ME, CAN I JUST GET MY QUESTION IN. I KNOW YOU YOU ARE ANXIOUS TO GET YOURS.

I AM SORRY.

-- THAT IT WOULD PUT THAT HAVING THAT ADDITIONAL THING MIGHT BE A LITTLE BIT TO CAUSE

US TO THINK FOR A MOMENT, WELL, WHAT WERE THOSE GUYS? WERE THEY DELIVERY PEOPLE? OR SHOULD IT UNDERMINE OR WOULD IT UNDERMINE OUR CONFIDENCE IN THE RESULT, GIVING ALL OF THESE WHAT I SEE TO BE PRETTY STRONG CIRCUMSTANCES THAT PLACE THE BLAME ON YOUR CLIENT.

HIS DEFENSE WAS HE FOUND THEM IN A DUMPSTER, THE SOCK AND THE CHECKBOOK. TWO WHITE MEN WHO FLEE THE HOUSE, KNOWING THAT THEY TOOK --

SO YOU TAKE A BLOODY SOCK FROM A DUMPSTER AND PUT IT IN YOUR JACKET?

MENTALLY RETARDED. I AM SORRY. THE STATE MADE FUN OF HIS DEFENSE, BUT HAVING TWO WHITE MEN FLEEING A HOUSE, KNOWING THEY HAVE COMMITTED A MURDER, WANTING TO GET, IT IS LOGICAL TO ASSUME ANY INCRIMINATING THEY HAD, THEY WERE SMART ENOUGH TO GO, WE NEED TO GET RID OF THIS, AND IT CERTAINLY IS A PRETTY GOOD EXPLANATION FOR WHY THEY WOULD DISPOSE OF INCRIMINATING EVIDENCE IN A DUMPSTER!

HOW WOULD YOU DEAL WITH THE TESTIMONY, SHE SAYS THAT THE VICTIM WAS PLACED AT THE BANK AT 1:27, 1:47, IS THAT CORRECT?

THAT IS CORRECT. AND, FIRST, THE POLICE REPORTS SHOW THAT THEY HAD EVIDENCE THAT THERE WERE WHITE MEN IN THE NEIGHBORHOOD, GOING AROUND BILKING OLD LADIES WITH MONEY, BY THIS PAINT JOB ON THE HOUSE. THE UNDISCLOSED POLICE REPORTS SHOW HER HOUSE WAS PAINTED. THAT WAS ALSO UNDISCLOSED, THAT THE WHITE GUYS WERE GOING AROUND DOING THIS. THIS WAS A PHOTO PACK THAT WAS SHOWN TO MS.^GLENN, DO YOU RECOGNIZE THIS WHITE MAN WHO HAS BEEN GOING AROUND, BILKING THESE OLD WOMEN, SO SOMETHING IS GOING ON THERE IN THAT REGARD, AND THAT WOULD BE SIGNIFICANT, TO SHOW PAINTERS MAY GET KEYS TO THE HOUSE. THEY, ALSO, MAY HAVE GOTTEN IN AND THEN SHE LEFT AND WENT TO GET, TO CASH THE CHECK. MS.^GLENN INDICATED SHE WENT OUT AND WALKED THE DOG AT ONE POINT IN TIME, DURING THAT 45-MINUTE-TO-HOUR PERIOD, SO SHE WASN'T CONSTANTLY WATCHING. IT IS POSSIBLE THAT SHE LEFT AND CAME BACK AND THEN CAUGHT THEM DOING SOMETHING AND INTERRUPTED. THE STATE'S WHOLE POSITION WAS THIS WAS NOT A FORCED ENTRY, AND MS.^GLENN IS INDICATING THIS WAS NOT A FORCED ENTRY. IT IS CONSISTENT. SHE SAID THAT SHE HEARD NOISES, LIKE STUFF BEING MOVED AROUND WHILE THEY WERE IN THERE. THE POLICE REPORTS THAT WERE NOT DISCLOSED SHOW THE BED WAS MOVED. THE DUST MARK SHOWS THE BED WAS MOVED. DRAWERS WERE OPENED. ALL CONSISTENT WITH WHAT SHE DESCRIBES AS NOISE EMANATING FROM THE HOUSE, PEOPLE MOVING FURNITURE, LOOKING FOR SOMETHING, AND THE OTHER THING IS THE PUBIC HAIR, THE BODY HAIRS WERE FOUND IN THE SHEET OF A MADE BED. THAT IS AN UNDISCLOSED POLICE REPORT. HOW SIGNIFICANT IS IT THAT NEGROID HAIRS ARE IN A SHEET UNDER A BEDSPREAD, UNDER AN AFGHAN, UNDER PAPERS, UNDER A BODY. IT IS OF NO SIGNIFICANCE AT ALL, AND THE FACT THAT A BUSINESS CARD THAT IS EIGHT YEARS OLD OR SO, THAT IS NOT INCRIMINATING. I ASK FOR A NEW TRIAL.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU BOTH, FOR A VERY HELPFUL ORAL ARGUMENT.