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Stephen Scipio v. State of Florida

NEXT CASE , WHICH JUSTICE QUINCE WILL PARTICIPATE . THERE SHE IS. OKAY. IS CPO VERSUS STATE OFFLORIDA. AGAIN, I ANNOUN CE THAT JUSTICE WELLS WILL B E PARTICIPATING IN THE CASES THIS MO RNING. COUNSEL READY ?

YES. THANK YOU, YOUR HONO R. MAY IT PLEASE THE COURT. I AM KNOLL PENNSYLVANIA LEGAL A FROM THE SEVE NTH -- I AM NOEL PALELLA FROM THE SEVENTH CIRCUIT PU BLIC DEFEND ERS OFFICE , REPRESENTING THE DEFENDANT STEPHEN SCIPIO. HE WAS SENTENCED TO LIF E FOR MURDER AND ON DIRECT APPEAL , THE SUPREME COURT FO UND T HAT THE STATE HAD COMMITTED A DISCOVERY VIOLATION B UTFFOUND THAT THE VI OLATION WAS HARMLESS BECAUSE OF OVERWHELMING EVIDENCE.

AS A PRELI MINARY MA TTER , YOU ARE SEE KING JURISDICTION HERE, BASED ON DIRECT CONFLICT?

CONFLICT. THAT IS CORRECT.

AND YOU ARE ALLE GE ING CONFLICT WITH PE NDER AND SCHAPP?

YES.

AND SO IF WE DETERMINE THAT THE STAND ARD WAS APPLIED AS ARTICULATED IN SCHAPP, WHE THER THERE WAS --, WHERE THERE WAS A PROCED URAL PROCESS, THEN THERE WAS NO CONFLICT.

I BE LIEVE THERE IS A SITUATION SIMILAR TO THAT IN PENDER, WHERE THE COURT , THIS COURT FOUND THAT THE DISTRICT COURT HAD MISAPPLIED THE SC HAPP STANDARD, BY LOO KING AT THE EFFECT OF THE VIOLATION ON THE FACT FINDER.

MY QUESTION IS, IF WE DECIDE THAT IT DID NOT M ISS APPLY THE SCHAPP STAN DARD , THAT IT APP LIED IT AS SCHAPP PROVIDED, THEN THERE IS NO CONFLICT.

BUT I DO N'T THINK THE RECORD SHOWS THAT.

I UNDERSTAND WHAT YOUR POSITION --

I AG REE , YES , IF THEY DIDN'T APPLY IT , I WOULD AGREE , THERE WOULD BE NO CONFLICT.

LET ME ASK ABOUT THE OPINION, THE NEXT TO T HELAST PARAGRAP H OF THE OPINION, AND IT IS NOT A LONG PARAGRAPH. I WANT TO READ IT TO YOU AND SEE WHAT YOUR , WHAT THEY SAY HERE, IS HAD THE DEFENSE KNOWN ABOUT THE WITNESSES -- THE WITNESS'S CHANGE IN HIS TESTIMONY, ITS TRIAL STRATEGY COULD ONLY HAVE BEEN ONE OF TWO THINGS. ONE, IT WOULD NOT HAVE CALLED THE WITNESS. CLEARLY THE OUTCOME O F THIS CASE WOULD NOT HAVE BEEN AFFECTED, GIVEN THE M ULL 'TIL TIP HE WILL EYE -- THE MULTIPLE EYEWITNEITHER TEST MOANS --

I WITNESS TESTIMONY CONCERNING SC IPIO 'S SHOOTING . SECOND, THE DEFENSE WOULD HAVE CALLED THE WITNESS A NDSOUGHT TO IMPEACH HIM AND PRESENT THE JURY WITH HIS PRIOR

TESTIMONY. THAT IS IN EFFECT WHAT HAPPENED IN THIS CASE, WHICH IF ANYTHING, WAS MORE FAVORABLE TO SCIPPIO THAN NOT HAVING CALLED THE WITNESS. NOW, IS THAT A CORRECT ANALYSIS, UNDER SCHAPP?

NO, I SUBMIT IT IS NOT.

WHY NOT?

FIRST OF ALL, BECAUSE THE ANALYSIS CENTERS ON THE SUBSTANTIVE EFFECT OF MR. BURGESS'S TESTIMONY ON THE TRIER OF FACT.

BUT THE FIRST SENTENCE SAYS, TALKS ABOUT WHAT THE TRIAL STRATEGY WOULD HAVE BEEN OF THE PARAGRAPH THAT JUSTICE ANSTEAD JUST READ.

YES.

SO IT WAS, WHICH WOULD BE VERY DIFFERENT THAN IF YOU WERE LOOKING AT A BRADY CLAIM AND THERE WAS SOME, THAT THIS IMPEACHMENT WASN'T THERE, SO THAT IN THAT PARAGRAPH, AREN'T THEY FOCUSING ON WHAT THE STRATEGY WOULD HAVE BEEN? NOW, YOU MAY DISAGREE ABOUT HOW THEY ANALYZE THE STRATEGY, BUT AREN'T THEY FOCUSING ON THE PROCEDURAL ASPECTS?

YES, AND IN THAT SENSE, THE STRATEGY WOULD HAVE BEEN NOT TO CALL MR. BIFERP AS A WITNESS, AND THERE LIES THE PROCEDURAL PREJUDICE.

BUT IN TERMS OF WHETHER THERE IS A CONFLICT WITH SCHAPP, ONCE THE COURT IS APPLYING THE STANDARDS, WHETHER IT ACTUALLY HOLDS THAT THERE IS PROCEDURAL PREJUDICE OR NOT, IS IRRELEVANT FOR THE CONFLICT ISSUE. WHAT IS RELEVANT IS WHETHER THEY ACTUALLY APPLIED WHAT SCHAPP SAYS THEY SHOULD DO, WHICH IS ANALYZE IF THE TRIAL STRATEGY WOULD HAVE BEEN DIFFERENT, AND IF IT WOULD HAVE BEEN, WHETHER THAT WOULD HAVE AFFECTED THE OUTCOME OF THE CASE, AND THAT SEEMS TO ME WHAT THE COURT DID, BUT DISAGREES WITH YOU AS TO WHAT THE OUTCOME WOULD HAVE BEEN, BUT IT APPLIED THE ANALYSIS AS SCHAPP REQUIRES, SO HOW WOULD THAT CONFLICT WITH SCHAPP?

BECAUSE IF YOU LOOK AT THE NEXT LINE OF THEIR OPINION, I THINK IT SAYS SOMETHING ABOUT, IF WE CAUTION PROSECUTORS THAT IF A WITNESS HAD BEEN MORE MATERIAL OR THAT WE MIGHT HAVE REVERSED.

THAT IS ALL DICTUM? ISN'T THAT DICTUM? ISN'T THAT DICTUM?

YES. IF MR. HENDERSON DOES NOT CALL BIRCH AS A WITNESS, THAT IS THE PROCEDURAL PREJUDICE, CALLING HIM AS A WITNESS WHEN HE DOESN'T KNOW THERE HAS BEEN A SUBSTANTIAL CHANGE IN HIS TESTIMONY, A CATEGORY A WITNESS TO SOMETHING ELSE.

BUT YOU HAVE TO SHOW SOMETHING MORE THAN SCHAPP, DON'T YOU?

YES AND I AM GETTING TO THAT. IF HE DOESN'T CALL HIM AS A WITNESS, THEN THE PROSECUTOR DOESN'T GET UP IN CLOSING ARGUMENT, AND I INVITE THE COURT TO LOOK AT THE CLOSING ARGUMENT, THE VERY LAST THING THAT THE JURY HEARD BEFORE THE COURT BEGAN JURY INSTRUCTIONS. I THINK THAT IS FOUND AT --

WE HAVE THAT BEFORE US. YOU ARE TALKING ABOUT THE STATE'S CLOSING ARGUMENT. THEY POINT OUT.

THE STATE'S CLOSING ARGUMENT.

AND ATT ACK THE DEFENSE O N THE BASIS OF WHAT HAPPENED WITH THIS WITNESS.

THAT'S CORRECT AND T HAT IS THE PROCEDURAL PREJ UDICE , AND THAT IS THE PREJUDICE THAT WE ARE SAYING ONLY A MISTRIAL COULD HAVE CURED.

SO ARE YOU SAYING UNDER THESE CIRCUMSTANCES, THAT THE PROCEDURAL PREJUDICE IS THAT THE DEFENSE COUNSEL NEVER GOT THE OPPORTUNITY T O MAKE ANY C HOICE , BECAUSE O F WHAT HAPPENED HE RE.

THAT'S CORRECT.HE WAS B LIND S IDED.

WHAT ABOUT THE STATE'S ARGUMENT THAT YOU , THAT THE DEFENSE COUNSEL WAS ON SOME KIND OF NOTICE THAT SOMETHING WAS GOING ON , WHEN THE STATE WAS TALKING TO THE WITNESS , AND TOOK THE WITNESS B A CK INTO A R OOM , I ASSUME, TO TALK WITH HIM , AND WOULD NOT LET THE DEFENSE ATTORNEY CO ME IN , AND THEREFORE THE DEFENSE ATTORNEY WAS ON SOME KIND OF NOTICE THAT SOMETHING W ASGOING ON , AND SHOULD HAVE THEN TALKED TO THE WITNESS AGAIN .

WELL , FIRST OF ALL , I THINK WE HAVE THE S WORN TESTIMONY OF MR . BIRCH. I DON'T THINK THAT DEFENSE COUNSEL , WHEN HE SEE S MR . BIRCH , BECAUSE IT IS NOT IMPROPER FOR MR . BIRC H TO TALK TO THE STATE AT TORNEY BEFORE HE TESTIFIES . BUT I DON'T THINK THAT TRIAL COUNSEL , BECAUSE HE SEES MR . BIRCH TALKING TO THE PROSECUTOR , WOULD AUTOMATICALLY AS SUME THAT , OH, WELL, THIS GU Y THAT I THOUGHT WAS A CA TEGORY A WITNESS, I S NOW NOTHING OF THE SORT.

THIS IS RIGHT AFTER BIRCH HAS ASS URED DEFENSE COUNSEL THAT HIS TESTIMONY WOULD BE THE SAME .

IT WAS ABOUT TEN MINCE AFTER , AFTER HE WAS ASSURED. DEFENSE COUNSEL SAID HERE IS YOUR DEPO SITION. TREED .

IN HIS DEP OSITION.

THAT'S CORRECT, YOUR HONOR.

WAS THERE ANY EVIDENCE THAT THE STATE WAS AWARE OF THIS ASSU RANCE BY BIRCH T O DEFENSE COUNSEL?

WELL, I THINK IT HAND O UTIN THE HALL WAY .

ANY EVIDENCE IN THE RECORD THAT THE PROSECUTOR KNEW THAT BIRCH HAD MADE THIS AFFIRMATIVE REPRESENTATION TO DEFENSE COUNSEL?

WELL , I THINK YES.

AND TIE THAT IN WITH , WAS THERE ANY OTHER BASIS FOR THE PROSECUTOR TO K NOW THAT THE DEFENDANT WAS RELY ING UPON THIS WITNESSES NE SS'S TESTIMONY , EIT HER IN THE OPENING STATEMENTS OR THE CROSS-EXAMINATION OF THESTATE WITNESSES DURING THE TRIAL .

FIRST , I THINK WHAT MR . BIRCH SAID , IN , IN HIS TESTIMONY , WAS THAT THE PROSECUTOR APPROACHED HIM AND SAID WHAT IS ALL THIS ABOUT A GUN, OR SOMETHINGLIKE THAT , AND TO ME , THAT INDICATES THAT SOMEHOW , THE PROSECUTOR KN EW , WELL , A NDAT ANY RATE, THE PROSECUTOR WAS PRESENT AT MR . BIRCH'S DEPOSITION. THE STATE HAD A CO PY OF MR . BIRCH'S DEPO SITION . AND MR. BIRCH WAS LIST ED AS A CAT EGORY A WITNESS, WHICH IS A

WITNESS AMONG OTHER THINGS --

I GUESS MY QUESTION IS, WHAT DO WE HAVE BEFORE US THAT SHOWS THAT THE PROSECUTOR WAS AWARE THAT THE DEFENDANT OR THE DEFENDANT'S COUNSEL WAS RELYING ON THAT TESTIMONY SPECIFICALLY ?

MR. BIRCH WAS LISTED AS A DEFENSE WITNESS AS WELL.

YOU ARE SAYING IT SPEAKS FOR ITSELF, IN TERMS OF WHAT THE DEPOSITION HAD , IN ANY EVIDENCE IN THE DEPOSITION THAT WOULD HAVE BEEN HELPFUL TO THE DEFENSE , WAS THIS EVIDENCE ABOUT THE GUN .

YES.

THAT WAS APPARENT ON THE FACE OF THE DEPOSITION.

ON THE FACE OF THE DEPOSITION, AND IT IS APPARENT FROM THE FACT THAT MR. BIRCH SAID THAT THE PROSECUTOR APPROACHED HIM AND SAID WHAT IS ALL OF THIS ABOUT A GUN UNDER THE BODY?

I GUESS MY POINT IS , THERE IS NOTHING IN THE OPENING STATEMENT BY DEFENSE COUNSEL, NOTHING IN EXAMINATION OF DEFENSE COUNSEL WITH THE WITNESSES , THAT WOULD HAVE PLACED THE PROSECUTOR ON NOTICE SPECIFICALLY AND THE JURY THAT DEFENSE WAS RELYING ON , UPON THIS CREDIBILITY AS TO THE GUN?

I BELIEVE , IN OPENING STATEMENTS, WHAT WAS SAID , WAS THAT THERE WAS NO GUN UNRECOVERED IN THIS CASE . NOW, I DON'T KNOW IF THAT MEANS, I THINK WHAT THEY WERE REFERRING TO , WAS NO MURDER WE ARE GOING TO BE PUT BEFORE YOU.

HE NEVER CLAIMED IN OPENING THAT THERE WAS A GUN FOUND UNDER THE BODY?

DEFENSE COUNSEL?

YES.

OR ANYONE?NO.

NO.

NOW , LET ME GO BACK TO THIS ISSUE ABOUT WHETHER THERE IS ACTUALLY CONFLICT WITH SCHAPP. AGAIN , IF YOU, YOU CERTAINLY TAKE NO ISSUE WITH THE FIRST PART OF THE FIFTH DISTRICT'S OPINION, FINDING A DISCOVERY VIOLATION, CORRECT? AND THAT IS , YOU AGREE ?

ABSOLUTELY THERE WAS A DISCOVERY VIOLATION. A VIOLATION OF THE CONTINUING DUTY OF DISCLOSURE.

SO ON THE SECOND ISSUE , IT IS CLEAR THAT THEY , THAT THE FIFTH DISTRICT IS APPLYING SCHAPP. YOUR STATEMENT THAT THERE , THEY MISAPPLIED IT , NECESSARILY RESTS ON THE LAST SENTENCE OF THE OPINION ? WHERE THEY SAY THEY ARE INTENDED TO PREVENT, IN A DIFFERENT CASE, WHERE THE EVIDENCE IS LESS OVERWHELMING OR RECALCITRANT WITNESS MORE MATERIAL , WE WOULD BE COMPELLED TO REVERSE FOR A NEW TRIAL ?

THAT'S CORRECT.

BUT THAT IS , OTHER THAN, THAT THAT, TO YOU , INDICATES THAT THEY DIDN'T PROPERLY APPLY SCHAPP, BECAUSE THEY , ALTHOUGH THE PARAGRAPH BEFORE TALKS ABOUT WHAT THE

STRATEGY DECISIONS WOULD HAVE BEEN DIFFERENT, CORRECT?

YES. AND ONE OF THOSE STRATEGY DECISIONS AS I SAID, THE PROCEDURAL PREJUDICE, IS IN THE FACT THAT DEFENSE COUNSEL WAS, IN A WAY, TRICKED INTO CALLING MR. BIRCH AS A WITNESS, WHEN HE CERTAINLY WOULD HAVE DONE THAT, IF HE KNEW THE -- WOULDN'T HAVE DONE THAT, IF HE HAD KNOWN THE TRUTH, BUT THE SECOND PART OF THAT ANALYSIS IS THAT YOU CAN'T CALL A WITNESS FOR THE PURPOSE OF IMPEACHING HIM, SO THE SECOND PART OF THE DISTRICT COURT'S ANALYSIS IN THAT RESPECT, WE SUBMIT, ERRONEOUS. I THINK THE BO LAND CASE THAT WE CITED IN OUR BRIEF TALKS ABOUT THAT.

THAT WOULDN'T BE CONFLICT, IN LOOKING, THERE REALLY WEREN'T TWO STRATEGY DECISIONS IS WHAT YOU ARE SAYING.

NO, THERE WEREN'T.

THAT THERE WAS ONLY ONE, AND BY PUTTING ON A WITNESS THAT JUST THEN TURNED AND PUT THE DEFENSE, THE DEFENSE LAWYER LOST ALL CREDIBILITY.

ABSOLUTELY.

LET ME ASK YOU A QUESTION AS TO THE ISSUE OF THE DISCOVERY VIOLATION.

YES.

IN THIS CASE WE ARE NOT TALKING ABOUT A WRITTEN STATEMENT OR OTHER STATEMENT PROVIDED BY THE STATE, TO THE DEFENDANT. WE HAVE A DEFENSE DEPOSITION AFTER LISTED STATE WITNESS, CORRECT?

YES.

IS THAT IS NOT DIRECTLY PARALLEL WITH EVANS. CAN YOU SPEAK TO THE DISCOVERY VIOLATION.

YES. IN EVANS --

I MEAN, COMPARE, I GUESS WHAT I AM QUESTIONING, LET'S SAY THAT THE DEFENDANT HAD DISCLOSED TO THE STATE, TESTIMONY, AND SOMEHOW THE STATE GETS EVIDENCE THAT THE DEFENSE WITNESSES' PRIOR STATEMENT IS GOING TO BE DIFFERENT. IN ALL THOSE CIRCUMSTANCES, YOU ARE SAYING THAT BOTH SIDES HAVE THE OBLIGATION TO TELL THE OTHER SIDE THAT THERE IS GOING TO BE A MATERIAL CHANGE IN THE TESTIMONY?

YES. AND HERE IS WHY.

BECAUSE THIS WAS THE DEFENSE DISCOVERY, I MEAN THE DEFENSE DEPOSITION.

YES. I DON'T THINK THAT, I THINK WHAT THE COURT IS ASKING, IS, DOES THE RECIPROCAL OR CONTINUING DUTY TO DISCLOSE, DOES THAT TURN ON WHO TAKES A DEPOSITION OR WHOSE WITNESS IS IT, AND I DON'T THINK IT DOES. I THINK, IF DISCOVERY IS A SEARCH FOR THE TRUTH, THEN BOTH PARTIES ARE ENTITLED TO KNOW THE TRUTH, THAT ONE PARTY CAN'T HIDE THE TRUTH FOR WHATEVER REASON, THAT AS SOON AS IT BECOMES KNOWN, THEN DEFENSE COUNSEL HAS A RIGHT TO KNOW THE TRUTH.

MY QUESTION IS, WHICH SPECIFIC RULE WAS VIOLATED.

THE CONTINUING DUTY OF DISCLOSURE, UNDER RULE 3.220 --

J?

I BELIEVE THAT IS IT . J. YES. HERE IT IS. YES. AND I SEE THAT I AM RUNNING INTO MY REBUTTAL TIME, BUT LET ME MAKE THIS QUICK POINT . THE COURT, IN EVANS , CITED THE RULE OF PROCEDURE THAT WE ARE TALKING ABOUT. AFTER FILING THE CHARGING DOCUMENT, THE DEFENDANT MAY ELECT TO PARTICIPATE IN THE DISCOVERY PROCESS PROVIDED BY THESE RULES, INCLUDING THE TAKING OF DISCOVERY DEPOSITIONS . BY FILING WITH THE COURT AND SERVING ON THE PROSECUTING ATTORNEY A NOTICE OF DISCOVERY, WHICH SHALL BIND BOTH THE PROSECUTOR AND THE DEFENDANT , TO ALL OF THE DISCOVERY PROCEDURES CONTAINED IN THESE RULES.

OKAY. CAN YOU GO ON , THEN , WHICH DISCOVERY RULE HAS BEEN VIOLATED. YOU STILL HAVEN'T SAID WHICH DISCOVERY RULE HAS BEEN VIOLATED.

THE ONE WE JUST REFERRED TO. J.

J , SAYS A CONTINUING OBLIGATION, IF IT IS DISCOVERED THAT ADDITIONAL WITNESSES OR MATERIAL, THE PARTY WOULD HAVE BEEN UNDER A DUTY TO DISCLOSE OR PRODUCE AT THE TIME OF THE PREVIOUS COMPLIANCE.

THAT'S CORRECT.

SO J ASSUMES THAT THERE IS A PREVIOUS OBLIGATION TO DISCLOSE. THE ONLY RULE THAT I FIND AN OBLIGATION TO DISCLOSE IS THE STATEMENT OF A WITNESS, SO WE WOULD HAVE TO FIND THAT A DEPOSITION IS A STATEMENT , AND 3.220. B . 1.B DOESN'T SEEM TO DEFINE STATEMENT TO INCLUDE A DEPOSITION. A STATEMENT SEEMS TO BE WHERE SOMEBODY WROTE OUT A STATEMENT AND SIGNED A STATEMENT, DAVE IT TO THE POLICE, AND THE POLICE TURNS IT OVER TO THE DEFENSE. WHICH IS DIFFERENT FROM A DEPOSITION, BECAUSE THE DEFENDANT IS THERE OR A COUNSEL IS THERE, PRESENT AT THE DEPOSITION, SO THE STATE DOESN'T HAVE TO TURN THAT OVER TO THE DEFENDANT IN THE FIRST PLACE.

NO. I THINK THE CONTINUING DUTY OF DISCLOSURE , MEANS THAT THE DEFENSE OR EXCUSE ME, THE STATE INITIALLY , LISTED MR . BIRCH AS A CATEGORY A WITNESS, WHICH INCLUDES , AMONG OTHER THINGS, THAT HE IS EITHER AN EYEWITNESS OR THAT HE MAY HAVE SOME EVIDENCE THAT COULD TEND TO BE EXCULPATORY . IF THAT CHANGES , THEN THE PROSECUTION AT THE VERY LEAST , HAS AN OBLIGATION TO INFORM THE DEFENSE , , NOT THE SUBSTANCE OF THE CHANGED TESTIMONY , BUT , UNDER EVIDENCE I WOULD SAY THAT IS ARGUABLE, BUT AT THE VERY LEAST , TO SAY, LOOK, THIS WITNESS WAS ABOUT TO TESTIFY. YOU TALK TO HIM TEN MINUTES AGO AND HE WAS A CATEGORY A WITNESS, WELL , HE IS NOT ANYMORE.

WAS THAT THE ARGUMENT THAT WAS MADE AT TRIAL , THAT THE STATE DID NOT INFORM THE DEFENSE THAT THIS WITNESS WAS NOT GOING TO TESTIFY? IS THAT THE ARGUMENT THAT THE TRIAL COUNSEL MADE?

THAT THE STATE NCHLD Z --

THE -- THAT THE STATE INFORMED --

THAT DEFENSE COUNSEL BIRCH WAS NOT GOING FOR TESTIFY.

NO. NO. NO. NO.

SO THAT IS NOT THE ISSUE HERE, WHETHER OR NOT HE WAS A CATEGORY A WITNESS ANYMORE.

NO. I AM SAYING THAT IS THE VIOLATION OF DUTY OF DISCLOSURE THAT WE ARE TALKING ABOUT.

THAT HE WAS NOT A CATEGORY A WITNESS?

THAT AT THE VERY MINIMUM, THAT WAS THE OBLIGATION IMPOSED BY PARAGRAPH J.

BUT THAT IS NOT ARGUMENT THE TRIAL COUNSEL MADE TO THE COURT.

TRIAL COUNSEL SAID, YOUR HONOR, I HAVE BEEN SURPRISED. THIS WITNESS HAS TOTALLY CHANGED HIS TESTIMONY FROM WHAT HE SAID IN HIS DEPOSITION.

RIGHT, NOT THAT THE STATE SAID HE WAS GOING TO CALL HIM AS WITNESS AND NOW HE IS NOT GOING TO CALL HIM. THAT IS THE VIOLATION. THAT IS NOT THE ARGUMENT THAT WAS MADE. THE ARGUMENT THAT YOU ARE ARGUING IS THAT HE CHANGED HIS TESTIMONY FROM WHAT HE SAID AT THE DEPOSITION.

NO. THAT HIS CATEGORY AS A WITNESS CHANGED. THAT WAS THE STATE'S INITIAL DISCOVERY OBLIGATION, TO PROVIDE WHAT CATEGORY OF A WITNESS HE WAS. THAT CHANGED.

I DON'T SEE ANY STATEMENT BY TRIAL COUNSEL THAT, REGARDING CATEGORY OF THE WITNESS. I DON'T REMEMBER SEEING ANY OF THAT.

NO, BUT --

IN HIS TESTIMONY.

BUT I DON'T THINK THAT COUNSEL IS REQUIRED TO UTTER MAGIC WORDS.

YOU ARE SAYING THAT THIS IS JUST LIKE IF THEY HAD TAKEN THE DEPOSITION OF THE INVESTIGATING POLICE OFFICER, WHO HAD GONE TO THE SCENE AND INTERVIEWED WITNESSES OR WHATEVER, AND HAD TOLD THE DEFENSE COUNSEL WHAT THE RESULT OF ALL OF THAT WAS, BUT THEN LATER, CHANGED HIS VIEW, AND HE WAS GOING TO BE A WITNESS, THAT THE THANK, THAT THE STATE WOULD HAVE A -- THAT THE THING, THAT THE STATE WOULD HAVE A GOBBLEGATION, IF THE POLICE OFFICER NOW SAID, OH, I MADE A MISTAKE, AND THIS WITNESS OR THIS EVIDENCE WAS DIFFERENT, THAT THE STATE, WITH REFERENCE TO THE DISCOVERY OF THE INVESTIGATION OF THE CRIME AND ALL OF THAT, WOULD HAVE AN OBLIGATION TO LET THE DEFENSE KNOW IF THERE WAS A SIGNIFICANT CHANGE IN THAT.

I THINK THAT IS THE ESSENCE OF EVANS, AND IT IS THE ESSENCE OF THE CONTINUING DUTY TO DISCLOSURE. THERE IS NO REASON TO HIDE THE TRUTH, ONCE YOU KNOW IT.

THE DIFFERENCE BETWEEN THIS CASE AND EVANS, KNOW, IS -- EVANS, THOUGH, IS EVANS ACTUALLY WAS A STATEMENT, CORRECT? IT WAS A STATEMENT THAT WAS GIVEN TO THE POLICE AND THAT THE POLICE TURNED OVER TO THE DEFENSE.

I BELIEVE THAT'S CORRECT. I WILL RESERVE THE REST OF MY TIME.

CHIEF JUSTICE: WE WILL HEAR YOU ON REBUTTAL.

MAY IT PLEASE THE COURT. COUNSEL. GOOD MORNING. MY NAME IS KELLIE NIELAN, AND I AM HERE ON BEHALF OF THE STATE OF FLORIDA.

MS. NIELAN, LET ME GIVE YOU MY PERCEPTION, AND YOU HELP ME UNDERSTAND THIS. IT SEEMS TO ME THAT WE HAVE A WITNESS WHO IS PREPARED TO STEP ON THE STAND AND TESTIFY, AND THE STATE HAS, EITHER, HAS INTERVENED, HAS MANUFACTURED, HAS

PARTICIPATED IN, WHAT EVER THE WORD IS , IN A TOTAL SHIFT OF THAT WITNESS'S TESTIMONY, AND WE CAN SIT HERE ALL DAY AND WE CAN CALL A PIG A THOROUGH BRED OR WHAT HAVE YOU, WITH REGARD TO WHETHER IT WAS A PROCEDURAL DEFECT, BUT AS WE GET DOWN AND LOOK AT WHAT ACTUALLY HAPPENED AS TO WHAT THE FIFTH DISTRICT SAID, IS THAT THERE IS JUST SO MUCH EVIDENCE AGAINST THIS GUY THAT THIS DOESN'T MAKE ANY DIFFERENCE, ANYWAY. ISN'T THAT REALLY WHAT HAPPENED IN THIS CASE, AND ARE WE GOING TO OPERATE IN THIS STATE , WHERE REPRESENTATIVES OF THE STATE INTERCEPT WITNESSES AFTER THEY NOT ONLY AFTER A DEPOSITION BUT AFTER THEY HAVE CONFIRMED WHEN THEY APPEAR FOR TRIAL , THAT THEY ARE GOING TO TESTIFY, YES , ACCORDING TO MY DEPOSITION , AND THEN WE SUCKER THEM WERE PUTTING THAT WITNESS ON THE STAND. WHAT KIND OF SYSTEM DO WE HAVE?

YOUR HONOR, I THINK THAT, WHEN A DEFENSE ATTORNEY IS GOING TO CALL A WITNESS, HE HAS SOME OBLIGATION, JUST AS A PROSECUTOR DOES , AND THE PROSECUTOR TURNED OVER THE DISCOVERY IN THIS CASE. THERE WAS NO MENTION OF A FIREARM ANYWHERE IN THE DISCOVERY. THERE WAS --

WAS IT IN THE STATEMENT? LET ME SAY OBLIGATION , WAS THERE TESTIMONY THAT, IN A DEPOSITION?

YES , THERE WAS.

AND DID HE, LET ME ASK YOU A QUESTION. DID HE , ON THAT MORNING , SAY , YOU KNOW, HERE IS THE DEPOSITION. IS THIS YOUR TESTIMONY, AND THAT WITNESS SAID , YES, SIR, IT IS?

YES. THAT IS WHAT IS REFLECTED IN THE RECORD.

WHAT DO YOU EXPECT A DEFENSE LAWYER TO DO?

I WOULD EXPECT A DEFENSE ATTORNEY, IF THEY ARE GOING TO CRY DISCOVERY VIOLATION , TO CRY IT AT THE TIME THAT THIS WITNESS TESTIFIES IN A DEPOSITION THAT I SAW A GUN AT THE SCENE AND IT WAS TURNED OVER TO LAW ENFORCEMENT. THIS IS THE EVIDENCE THAT IS TOTALLY CONTRARY TO EVERYTHING THAT THE STATE HAS TURNED OVER IN DISCOVERY. DISCOVERY IS WHERE YOU LET THE DEFENSE KNOW EXACTLY WHAT YOU ARE GOING TO PRESENT IN YOUR CASE. THE STATE PRESENTED --

JUSTICE QUINCE .

I THINK YOU ARE MISSING THE ESSENCE OF WHAT IS BEING SAID HERE. IS THAT THE DEFENSE HAD A WITNESS PREPARED TO SAY THAT I SAW A GUN UNDER THE BODY. CORRECT?

CORRECT.

THAT IS WHAT MR . BIRCH SAID IN HIS DEPOSITION.

CORRECT.

THE STATE WAS THERE WHEN THE DEPOSITION WAS TAKEN , CORRECT? AND HOW FAR IN ADVANCE WAS THAT BEFORE TRIAL?

EIGHT MONTHS.

EIGHT MONTHS BEFORE TRIAL. THEN THE STATE, ON THE MORNING OF TRIAL , GETS TO THIS WITNESS , AND IN SOME MANNER , GETS THE WITNESS TO, THEN, CHANGE THE TESTIMONY. THAT IS EXACTLY WHAT HAPPENED, ISN'T IT?

WELL , WHAT THE RECORD SHOWS WHAT HAPPENED, IS DEFENSE COUNSEL SAID, DID YOU REVIEW YOUR DEPOSITION. IS THAT HOW YOU ARE GOING TO TESTIFY? YES.THE PROSECUTOR --

AND THERE AFTER --

ASKED ABOUT THE GUN. SPECIFICALLY ASKED ABOUT THEGUN.

AND BRINGS THE WITNESS INTO SOMEPLACE WHERE THE DEFENSE ATTORNEY ISN'T.

CORRECT.

AND TALKS ABOUT THIS GUN .

CORRECT.

AND YOU KNOW WHAT REALLY BOTHERS ME, ALSO, ABOUT, THIS IS ISN'T THERE SOME INDICATION THAT THISPROSECUTOR HAD DONE THIS BEFORE?

NO.

I THOUGHT I READ SOMEPLACE THAT THIS PROSECUTOR HAD BEEN ADMONISHED FOR DEALING WITH A WITNESS IN BASICALLY THE SAME MANNER.

NOT THAT I AM AWARE OF, YOUR HONOR.

WELL, I HOPE WE ARE NOT HERE THIS MORNING, AND WE, WITH JUSTICE LEWIS'S INITIALQUESTIONS , WE HAVEN'T GIVEN YOU TIME TO GIVE THE STATE'S POSITION, BUT I SURE HOPE THE STATE IS NOT HERE THIS MORNING , CONDONING WHAT THIS PROSECUTOR DID.

YOUR HONOR , I AM NOT CONDONING IT, BUT I AM NOT , I AM , ALSO, SAYING WHAT THE PROSECUTOR DID IN THIS CASE, IS NOT AGAINST A DISCOVERY RULES , AND IT IS NOT AGAINST ANY RULES THAT ARE SET FORTH.

LET ME JUST ASK YOU THIS QUESTION, BECAUSE WE WERE HERE YESTERDAY ON WHETHER PROSECUTORS SHOULD BE SUBJECT TO THE CONTINUING , THE INITIAL PRACTICING WITH PROFESSIONALISM, AND MR . JACOBS, THE LOBBYIST AND COUNSEL FOR THE PROSECUTOR, SAID, NO, THEY ARE , PROSECUTORS ARE DIFFERENT. THEY HAVE EXTRADUITIES , AND WE ENFORCE THAT IN EVERY SINGLE SEMINAR , AND THIS IS UNDERSTOOD. ARE YOU, LET'S JUST SAY, FOR THE SAKE OF ARGUMENT , THAT MAYBE THERE IS NOT A TECHNICAL VIOLATION OF A SPECIFIC RULE. ARE YOU SAYING THAT , AFTER THIS CASE OR EVEN WITH THIS CASE, THAT YOU WOULD , FROM A PROFESSIONAL AND ETHICALPOINT OF VIEW , SAY THAT A PROSECUTOR, COULD PURCHASE A RECANTATION, WHICH MAY HAVE BEEN, NOT SAYING THAT THEY , SUPPORT PERJURY JUST THAT THEY PROCURED A RECANTATION , KNOWING THAT THAT DEFENSE LAWYER WAS GOING TO PUT HIM ON THE STAND, AND NOT AS A JUST MATTER OF PROFESSIONAL ETHIC , TELL THE DEFENSELAWYER, YOU MAY NOT WANT , YOU BETTER NOT PUT THIS GUY ON THE STAND BECAUSE HE IS NOT GOING TO SAY WHAT YOU THINK HE IS GOING TO SAY?

I DON'T THINK IT IS THE PROSECUTOR'S RESPONSIBILITY TO LET THE DEFENSE COUNSELKNOW WHAT HIS OWN WITNESS IS GOING TO SAY, WHEN IT IS APPARENT TO THE DEFENSE ATTORNEY THAT THAT --

ISN'T IT MISCONDUCT ON THE PART OF THE PROSECUTOR HERE , AS JUSTICE LEWIS HAS LAID OUT , THE DEFENSE COUNSEL HAS DONE EVERYTHING TO BE REASSURED ABOUT WHAT THE TESTIMONY OF THIS WITNESS WOULD BE , JUST A FEW MINUTES BEFORE HE IS GOING TO CALL HIM AS A WITNESS. YOU ALL ALLUDED EARLIER, AND I THINK -- YOU ALL UDED EARLIER , AND I

THINK YOU ARE ABSOLUTELY RIGHT, TO THE FACT THAT THERE ARE ALL KINDS OF OTHER EVIDENCE THAT THERE WASN'T A GUN THERE, SO WHEN DEFENSE COUNSEL DECIDES TO PUT THIS WITNESS ON WHO HAS SAID THAT THERE WAS A GUN THERE, AND APPARENTLY A HIGHLY CREDIBLE WITNESS, BECAUSE THIS IS SOMEBODY THAT WORKED FOR THE STATE, IS THAT CORRECT?

CORRECT.

AT THAT TIME, THE DEFENSE COUNSEL KNEW THAT HE WAS GOING TO BE FACING REBUTTAL BY THE STATE, YOU KNOW, THAT MIGHT BE OVERWHELMING, IN TERMS OF THERE NOT BEING A GUN THERE, AND THE PHOTOGRAPHS OF THE SCENE AND ALL OF THAT, BUT THAT IS A CHOICE HE MAKES, YOU KNOW, KNOWINGLY, BECAUSE THAT IS ALL ABOVE BOARD, AND ON THE TABLE, WHEN COUNSEL MAKES A DECISION, BUT IN THIS CASE, ALL RIGHT, HE TALKS TO THE WITNESS. THE WITNESS REASSURES HIM, AND NOW HE PUTS HIM ON, AND THE VERY PURPOSE, AND AM I CORRECT THIS IS THE ONLY WITNESS THAT THE DEFENSE PUT ON?

NO. THE DEFENSE PUT ON AN OTHER WITNESS.

OKAY. HOW MANY OTHER WITNESSES?

ONE OTHER WITNESS.

WHAT WAS THE OTHER WITNESS?

IT WAS THE PERSON WHO, WHEN THE VICTIM WAS SHOT, CAME OUT OF THE BAR, CRAWLED UNDERNEATH THE CAR, AND IT WAS THE PERSON WHO PULLED HIM OUT FROM UNDERNEATH THE CAR AND TRIED TO RENDER FIRST AID, UNTIL THE PARAMEDICS ARRIVE.

SO HE PUTS THIS WITNESS ON AND THERE IS A TRAP DOOR, BECAUSE THE WITNESS NOW, THE VERY PURPOSE FOR HAVING PUT HIM ON AS FAR AS HAVING SEEN THAT GUN, THE WITNESS NOW SAYS I MADE A MISTAKE. I DIDN'T SEE A GUN. YOU KNOW, IT WAS A PAGER OR WHATEVER, AND THEN, IN FINAL ARGUMENT, THE STATE ARGUES TO THE JURY, YOU KNOW, THERE IS NO DEFENSE IN THIS CASE, AND WHATEVER DEFENSE THERE IS, IS LUDICROUS, AND THE BEST WAY TO DEMONSTRATE THAT IS BY THE ABSURDITY OF THE DEFENSE LAWYER, PUTTING ON THIS WITNESS HERE, WHO DIDN'T SEE A GUN. YOU KNOW, THERE WAS NO GUN. AND HOW MORE LUDICROUS COULD THERE BE A DEFENSE, THAN WHAT HAPPENED WITH REFERENCE TO THIS WITNESS AND THE DEFENSE TRYING TO MAKE SOMETHING OUT OF THAT? I AM REALLY CONCERNED AND DISTRESSED, THAT THE STATE WOULD STAND HERE AND I AM GETTING THE IMPRESSION FROM YOUR APPEARANCE, THAT YOU ARE NOT ONLY SAYING THERE WAS NOTHING WRONG WITH THIS, BUT YOU ARE SAYING THAT THIS IS GOOD ADVOCACY ON BEHALF OF THE STATE, THAT HAS THIS EXTRA OBLIGATION TO SEE THAT JUSTICE IS DONE, AND AM I MISREADING WHAT YOU ARE SAYING?

NO, YOUR HONOR. I AM SAYING IF WE ARE GOING TO TALK ABOUT PROFESSIONAL ETHICS HERE, I THINK WE NEED TO LOOK AT THE CONDUCT OF THE DEFENSE ATTORNEY, WHO KEEPS GOING --

LET'S STOP RIGHT NOW. THE CONDUCT OF DEFENSE COUNSEL IS NOT, REALLY WHAT THE SUBJECT IS BEFORE US. LET'S GET THROUGH WITH THE CONDUCT OF THE STATE, NOT BY SHIFTING THE FOCUS OVER TO SOMEBODY ELSE, YOU KNOW, LIKE THE FACT THAT A VICTIM IN A CRIME MAY HAVE HAD SOME OTHER PROBLEMS OR SOMETHING LIKE THAT. LET'S JUST STOP RIGHT HERE. IS IT YOUR POSITION, AND THE STATE IS REPRESENTING TO US, THAT THIS IS PERFECTLY ACCEPTABLE CONDUCT, ON BEHALF OF A PROSECUTOR. NOW, JUST ANSWER THAT QUESTION ALONE. IS THAT YOUR POSITION TO THIS COURT?

MY POSITION IS --

JUST ANSWER MY QUESTION. IS IT YOUR POSITION THAT THIS IS PERFECTLY ACCEPTABLE CONDUCT, BY A PROSECUTOR IN THE STATE OF FLORIDA?

IT DID NOT VIOLATE ANY OF THE RULES OF TRIAL.

YES OR NO?

IN THIS CASE, YES, IT WAS ACCEPTABLE.

ALL RIGHT. THANK YOU. YES .

CHIEF JUSTICE: JUSTICE BELL, DID YOU HAVE A QUESTION?

JUSTICE PARI ENTEMENTIONED YOUR REPRESENTATIVE YESTERDAY IN A RULES CASE, AND WHAT HE SAID IS THE REASON THEY DON'T NEED TO PARTICIPATE IN THE PROFESSIONISM COURSE OFFERED BY THE BAR IS BECAUSE WE ARE MINISTERS OF JUSTICE, AND IF YOU LOOK IN THE DICTIONARY , JUSTICE SAYS WE ARE SEEKERS OF TRUTH. IF THIS PROCESS A TRUTH-SEEKING PROCESS , HOW CAN YOU SIT -- PROCESS , HOW CAN YOU SIT HERE BEFORE THIS COURT AND DEFEND THAT THIS PROSECUTOR'S ACTIONS IN THIS CASE, FURTHERED THAT GOAL OF SEEKING THE TRUTH? WE HAVE A STATE INVESTIGATOR THAT HE KNOWS IS GOING TO SAY, I MADE A MISTAKE. THAT IS EXACTLY WHY THAT PROSECUTOR TOOK HIM BACK TO THE ROOM, PROCEEDED DEFENSE COUNSEL, WAS BECAUSE HE WANTED TO MAKE SURE THAT THIS GUY UNDERSTOOD THAT THIS WAS NOT A GUN BUT A PAGER AND THAT HIS TESTIMONY WAS GOING TO CHANGE , AND WHY NOT AT THAT POINT , IF PROSECUTORS ARE SUPPOSED TO BE MINISTERS OF JUSTICE , DID NOT THE PROSECUTOR GO TO DEFENSE COUNSEL AND SAY , LOOK, I KNOW YOU DIDN'T HAVE MUCH IN THIS CASE BECAUSE WE HAVE GOT ALL OF THESE WITNESSES. YOU DON'T HAVE MUCH OF A DEFENSE . I REALIZE THAT THE ONLY THING THAT YOU THINK YOU HAVE IS THIS TESTIMONY. THAT GUY IS GOING TO GET UP ON THE STAND AND NOT SAY. THAT THE ONLY MOTIVATION THAT I CAN THINK OF FOR THIS PROSECUTOR NOT TO DO THAT, IS TO DISCREDIT THE DEFENSE IN THIS CASE AND SO THAT THE DEFENDANT WOULD NOT HAVE THE SANDWICH, WOULD HAVE BOTH SIDES OF THE OPENING AND CLOSING OF THE ARGUMENT OR THE REBUTTAL IN THE CLOSING ARGUMENT. WHAT OTHER MOTIVATION WOULD THERE BE NOT TO GO TO THE DEFENSE ATTORNEY AND SAY , LOOK, THIS GUY HAS CHANGED HIS TESTIMONY. I HAVE SHOWN HIM THE PICTURES. WE HAVE LOOKED AT IT A LITTLE MORE CLOSELY AND HE SAYS HE HAS MADE A MISTAKE.

YOUR HONOR, I DON'T KNOW WHAT THE MOTIVATIONS ARE , BUT WHAT I AM HERE ON IS WHETHER OR NOT A DISCOVERY VIOLATION OCCURRED . IT IS NOT WHAT THE PROSECUTOR -- VIOLATION OCCURRED. IT IS NOT WHAT THE PROSECUTOR'S MOTIVATIONS WERE. THEY HAVE NOT ALLEGED A DUE PROCESS , SOME ETHICAL VIOLATION ON THE PART OF THE PROSECUTOR AND YOU GET A MISTRIAL. THE ISSUE HERE IS WHETHER A DISCOVERY VIOLATION OCCURRED.

AND DO YOU THINK THAT THERE WAS A DISCOVERY VIOLATION?

NO, I DON'T, NOT UNDER THIS COURT'S CASES.

WHY NOT?

BECAUSE UNDER THIS COURT'S CASE IN BUSH, THE COURT SPECIFICALLY SAID A CHANGE IN TESTIMONY DOES NOT RISE TO THE LEVEL AFTER DISCOVERY VIOLATION WHICH REQUIRES A RICHARDSON INQUIRY.

SHOULD THERE BE A DIFFERENCE, IF IT IS PROCURED OR ENCOURAGED OR OBTAINED, WITH THE AFFIRMATIVE CONDUCT OF THE -- CONDUCT OF THE STATE? IS THAT A DIFFERENCE, A WITNESS MAY CALL AND SAY I MADE A MISTAKE, BUT SHOULD THERE BE A DIFFERENT RULE IF THE STATE

PROSECUTOR TAKES SOMEBODY INTO A PRIVATE OFFICE AND LETS NO ONE IN THERE AND PARTICIPATES IN THE CHANGE OF THAT TESTIMONY?

NO. THERE IS NO EVIDENCE THAT HE COERCED THE TESTIMONY -- THAT HE COERCED THE TESTIMONY .

THE BUSH EVIDENCE MODIFIES BUSH ? WAS WASN'T THERE A CHANGE OF STATEMENT GIVEN AND THIS COURT SAID THAT THAT NEEDED TO BE DISCLOSED ?

HOWEVER, THE COURT IN EVANS SAID THAT BUSH DOES THOUGHT CONTROL WHERE THE STATE PROVIDES A DEFENDANT WITH A WITNESS STATEMENT , AS THAT TERM IS DEFINED IN 3.220.0.B.1. THIS DEFENSE DISCOVERY DEPOSITION WAS NOT A STATEMENT THAT WAS PROVIDED -- PROVIDED BY THE STATE UNDER DISCOVERY RULES.

DIDN'T STATE VERSUS EVANS MODIFY BUSH, TO THE EXTENT THAT, WHEN THERE IS A STATEMENT, HOWEVER THAT TERM IS DEFINED, AND THE WITNESS'S TESTIMONY IS LATER CHANGED, THAT THE PROSECUTION DOES HAVE AN OBLIGATION TO INFORM THE DEFENSE COUNSEL?

NO. FIRST OFF, YOUR HONOR, THAT IS WHAT I AM SAYING. IT SAYS WHERE THE STATE ORIGINALLY PROVIDES THAT STATEMENT. THE STATE DID NOT PROVIDE THAT STATEMENT.

I UNDERSTAND. WHETHER EVANS APPLIES HERE OR NOT IS A DIFFERENT ISSUE. WHAT I AM ASKING IS, DID EVANS NOT MODIFY BUSH, TO THE EXTENT THAT, WHEN THERE IS A STATEMENT PROVIDED AND TESTIMONY IS LATER CHANGED , THAT THE PROSECUTOR HAS AN OBLIGATION TO INFORM THE DEFENSE OF THE CHANGE.

BUT THE FIRST PART OF EVANS IS THAT IT HAS TO BE A STATEMENT THAT IT WAS PROVIDED BY THE STATE. THAT IS WHAT THE EVIDENCE TORT SAID.

I UNDERSTAND. THAT WAS PART OF MY QUOTE. DOESN'T IT REQUIRE, ONCE THAT HAPPENS , THAT THE STATE INFORM THE DEFENSE OF THE CHANGE?

IF IT IS , IF IT TURNS THE WITNESS'S TESTIMONY FROM A WITNESS WHO DIDN'T SEE ANYTHING INTO A WITNESS WHO OBSERVED MATERIAL ASPECTS OF THE CRIME CHARGED , AND I DON'T THINK EITHER PRONG IS MET IN THIS , NUMBER ONE.

LET ME SEE IF THIS IS HOW YOU WOULD WANT US TO SLICE EVANS, AND IT WOULD BE THAT , IF THE , A POLICE OFFICER HAD FAVORABLE TESTIMONY TO THE DEFENDANT AND HAD PUT THAT IN THE FORM OF A STATEMENT, AND THEN THE DEFENSE RELIES ON THE STATEMENT, AND THEN , AGAIN, TALKS TO THE POLICE OFFICER RIGHT BEFORE, AND IT IS VERIFIED THAT THAT IS WHAT HE IS GOING TO SAY , BUT THEN A FEW MINUTES AFTER THAT, THE PROSECUTOR MEETS AND THE POLICE OFFICER RECANTS WHATEVER WAS IN THAT STATEMENT , YOU AGREE THAT EVANS, THE DISCOVERY RULES REQUIRE THAT THAT BE , THAT THE DEFENSE ATTORNEY KNOW ABOUT THAT. CORRECT?

IF IT WAS A MATERIAL ASPECT , A KEY WITNESS.

ALL RIGHT. IF THE , ON THE OTHER HAND , IF THE POLICE OFFICER IS LISTED AS A CATEGORY A WITNESS , BY THE STATE , WHICH IS WHAT , AND INSTEAD OF THERE BEING A STATEMENT , THE DEFENSE LAWYER , THERE IS NO STATEMENT. THE DEFENSE LAWYER DEPOSES AND FINDS OUT WHY THAT WOULD HAVE BEEN SOMEBODY THAT MIGHT HAVE BEEN MATERIAL TO HIM.

UM-H UM.

AND THEN THE SAME EXACT THING HAPPENS, AND THE WITNESS CHANGES HIS TESTIMONY, YOU ARE SAYING UNDER THAT CIRCUMSTANCE, SOMEHOW THE RULES IN OUR CASE LAW, WOULD SAY EVEN THOUGH THAT IS STRONGER HAVING A SWORN STATE UNDER OATH THAT YOU SORT OF CAN RELY ON, THAT UNDER THAT CIRCUMSTANCE, THE STATE WOULD HAVE NO OBLIGATION, AND YOU ARE SAYING THAT SOMEHOW, YOU WOULD LIKE THIS COURT TO TELL THE PROSECUTORS OF THE STATE THAT THAT IS A GOOD DISTINCTION TO MAKE, THAT THEY CAN, IF IT IS A DEPOSITION AND THE TESTIMONY CHANGES AFTERWARDS, DON'T WORRY ABOUT IT, BUT IF IT IS A STATEMENT, AN UNSWORN STATEMENT, IT CHANGES, YOU HAVE GOT IT.

IT IS A DIFFERENT SITUATION THERE.

A REALLY INTELLIGENT, RATIONAL DISTINCTION FOR WHAT WE TRY TO SEEK IN DISCOVERY, TO PREVENT UNFAIR SURPRISE, TO PREVENT TRICKERY, TO PREVENT A MOCKERY OF THE WHOLE SYSTEM AND OF ALL OF THE PLACES FOR THIS TO HAPPEN, TO HAPPEN IN A CRIMINAL TRIAL, JUST IS, IN HIS MIND BOGGING TO ME.

WELL, YOUR HONOR, IN YOUR SECOND SCENARIO, YOU SAY THERE WERE ORIGINALLY NO STATEMENTS PROVIDED, JUST DEPOSITION. IN THIS CASE, WE HAVE ORIGINAL STATEMENTS. WE HAVE ORIGINAL POLICE REPORTS, AND ALL OF THOSE REPORTS, NONE OF THEM INDICATED THAT A WEAPON WAS FOUND.

OF THIS POLICE OFFICER?

THIS MEDICAL INVESTIGATOR, YES, HE HAD DONE A REPORT.

SO HIS, NOW HE HAD A STATEMENT, THEN HIS DEPOSITION CONTRADICTED THE STATEMENT?

CORRECT.

SO AT THAT POINT, YOU ARE SAYING, WELL, THEN, ALL HE WAS REALLY DOING WAS CONFIRMING HIS TESTIMONY TO HIS STATEMENT?

ORIGINALLY YES. IF THERE WAS THAT BIG OF A DIFFERENCE, TO ME THAT WOULD HAVE BEEN THE TIME TO CRY DISCOVERY VIOLATION. SUDDENLY THIS WITNESS IS REVEALING THAT A GUN WAS FOUND!

LET ME TRY TO CLARIFY THAT. IS IT THE FACT THAT THE MEDICAL INVESTIGATOR THEY WERE TALKING ABOUT IN THIS CASE, THAT HE DID NOT MENTION THAT THERE WAS A FIREARM, OR THAT HIS REPORT SPECIFICALLY SAID THERE WAS NO FIREARM?

I DON'T KNOW THAT. I DON'T BELIEVE IT SPECIFICALLY SAID THAT, NO, THERE WAS NO FIREARM, BUT ALL OF THE REPORTS --

I THINK IT SAID IT WAS A BEEPER, RIGHT?

PAGE R.

THE REPORT SAID IT WAS A PAGER.

WAS IT HIS REPORT OR THE FDLE'S REPORT THAT SAID THERE WAS A PAGER ON THE BODY?

IT MAY HAVE BEEN THE FDLE REPORT.

IS IT TRUE THAT HIS REPORT DIDN'T NEXT MENTION ONE WAY OR THE OTHER, THAT THERE WAS A FIREARM OR A PAGER?

THAERB. NO REPORT IN THIS CASE MENTION AT FIREARM .

THE DEPOSITION IS TAKEN AND HE SAYS IT IS A FIREARM , AND THE STATE SETTING THERE WITH THE STATEMENT , DOESN'T SAY, MR. SO-AND -SO , IT REALLY WAS A PAGER , DIDN'T YOU SAY THAT? THEY DON'T CLARIFY IT AT THE TIME.

NO, FRANKLY AND , YOUR HONOR , PROSECUTOR MAY HAVE BEEN ON A PHONE CALL OR DOING OTHER WORK OR MAY NOT HAVE BEEN PAYING ATTENTION. I DON'T KNOW WHY THE PROSECUTOR WASN'T PAYING ATTENTION BUT I DON'T KNOW WHY THE DEFENSE ATTORNEY WASN'T PAYING ATTENTION. IF HE IS GOING TO RELY THIS STATEMENT FROM ONE WITNESS TO BASE HIS ENTIRE CASE ON, WHICH IS TO TALLY CONTRARY TO ALL OF THE OTHER EVIDENCE IN THE CASE, I THINK HE HAS AN OBLIGATION TO INVESTIGATE AND SEE IF THERE REALLY IS A FIREARM IN THIS CASE.

WE GO BACK TO THE POINT, IF IT WASN'T SO IMPORTANT TO THE STATE THAT THE PROSECUTOR WAS NOT PAYING ATTENTION, THEN WHY RIGHT BEFORE THE GUY IS GETTING READY TO TAKE THE STAND, DID THE PROSECUTOR PULL HIM TO THE SIDE, EXCLUDE DEFENSE COUNSEL, SHOW HIM THE PICTURES AND MAKE SURE THAT HE, IN ESSENCE , CLARIFIED THAT HE WAS GOING TO SAY THAT SOMETHING CONTRARY TO HIS DEPOSITION? DOESN'T THAT INDICATE HOW IMPORTANT IT WAS?

PROBABLY, NO , I THINK WHAT PROBABLY HAPPENED WAS , WHEN THE PROSECUTOR FOUND OUT THE DEFENSE WAS GOING TO CALL THIS WITNESS , HE SAYS , WHY IS HE CALLING THIS WITNESS? AND THAT IS PROBABLY THE FIRST TIME THE PROSECUTOR EVER EVEN LOOKED AT THE DEPOSITION AND SAW THAT HE HAD MENTIONED THAT THERE WAS A GUN.

SO HE KNEW THAT THE REASON HE WAS GOING TO CALL HIM WAS PROBABLY RELATED TO THIS STATEMENT THAT IT WAS A FIREARM . VERIFIES IT WITH THE WITNESS. THE WITNESS CHANGES THE TESTIMONY, AND THE PROSECUTOR SAYS I GOT HIM .

I DON'T KNOW THAT THAT IS NECESSARILY, I THINK THE PROSECUTOR, THIS IS, YOU KNOW, A WITNESS THAT HE WORKS WITH ON VIRTUALLY A DAILY BASIS , DOESN'T WANT THE WITNESS TO GET UP THERE AND BE EMBARRASSED. AGAIN , THE BOTTOM LINE HERE IS --

WHY WOULD HE PRECLUDE DEFENSE COUNSEL?

PARDON ME? WHY WOULD HE PRECLUDE DEFENSE COUNSEL?

BECAUSE HE TOOK HIM INTO THE STATE ATTORNEYS OFFICE WHERE HE PROBABLY HAD ALL OF HIS WORK PRODUCT. THIS PROSECUTOR DOES NOT WORK OUT OF THAT OFFICE. HE PROBABLY HAD A SPACE THERE THAT WAS AVAILABLE TO HIM. AGAIN THERE WAS NOTHING TO STOP DEFENSE COUNSEL FROM SPEAKING TO THIS WITNESS AFTER THE PROSECUTOR TALKED TO HIM.

THE STATE WOULD LIKE US TO TAKE THIS CASE, THEN , YOU SAY THAT IT CONFLICTS WITH BUSH AND EVANS , AND --

CORRECT.

AND SO YOU WOULD LIKE US TO RETAIN JURISDICTION , AND YOUR VIEW IS WE SHOULD QUASH THE FIFTH DISTRICT ON THAT FIRST POINT.

CORRECT.

HOW WOULD IT CONFLICT WITH EVANS? IF THEY FOUND A VIOLATION , JUST LIKE EVANS FOUND A VIOLATION, HOW IS THAT A CONFLICT WITH EVANS?

BECAUSE I DON'T BELIEVE THERE IS A VIOLATION IN THIS CASE.

THAT IS ONE THING. THE QUESTION IS WHETHER THE CONFLICT WITH EVANS , HOW IS THERE A CONFLICT WITH EVANS?

BECAUSE THE DISTRICT COURT CITED EVANS IN FINDING A DISCOVERY VIOLATION IN THIS CASE, AND I BELIEVE THAT --

HOW DOES IT CONFLICT WITH EVANS?

BECAUSE THERE IS NO DISCOVERY VIOLATION IN THIS CASE . THE DISTRICT COURT , I BELIEVE THEIR EXACT LANGUAGE WAS THE FAILURE TO DISCLOSE A SIGNIFICANT CHANGE IN A WITNESS'S TESTIMONY IS AS MUCH A DISCOVERY VIOLATION AS COMPLETE FAILURE TO DISCLOSE THE WITNESS. WELL, THAT IS NOT --

WHAT IN EVANS CONTRADICTS THAT? WHAT RULE OF LAW IN EVANS CONTRADICTS THAT?

WHERE EVANS CLARIFIED BUSH .

WHERE DOES IT CONTRADICT THE STATEMENT THAT YOU JUST READ?

BECAUSE UNDER BUSH , BUSH APPLIES WHERE THE STATE PROVIDES, BUSH DOES NOT APPLY , WHERE THE STATE PROVIDES DEFENDANT WITH A WITNESS STATEMENT. IN OTHER WORDS, THE DISTRICT COURT SHOULD HAVE APPLIED BUSH IN THIS CASE. THEY SHOULD NOT HAVE APPLIED EVANS IN THIS CASE, BECAUSE UNDER THIS COURT'S CLARIFICATION OF BUSH IN EVANS , THIS STILL FITS UNDER THE BUSH SCENARIO.

DID YOU ALL EYE ANYWHERE IN YOUR BRIEF , THAT THE DCA OPINION CONFLICTS WITH EVANS OR BUSH?

NO. NO. NOT IN OUR JURISDICTIONAL BRIEF BUT CERTAINLY IN MY MERITS BRIEF, YES.

CHIEF JUSTICE: YOUR TIME HAS EXPIRED.

OKAY. I WOULD ASK THIS COURT , AS YOU SAID JUSTICE PARIENTE, TO QUASH THE DECISION OF THE FIFTH. THANK YOU.

YOUR HONOR, FIRST OF ALL , THERE IS NO DISCOVERY VIOLATION AT THE TIME THAT DEFENSE COUNSEL IS TAKING MR . BIRCH 'S DEPOSITION. THERE IS NO REASON THAT DEFENSE COUNSEL WOULD JUMP UP AND SAY THERE IS A DISCOVERY VIOLATION, WHEN MR . BIRCH SAYS I SAW A GUN , AND IT WAS TURNED OVER TO LAW ENFORCEMENT . AND THE DUTY OF DISCLOSURE , THE CONTINUING DUTY OF DISCLOSURE, SHOULD NOT BE AND CANNOT BE CONTINGENT ON WHETHER OR NOT SOMETHING A WITNESS SAYS IN A DEPOSITION , IS INCONSISTENT WITH WHATEVER THE OTHER EVIDENCE IS. THERE WOULD BE NO CONTINUING DUTY OF DISCLOSURE , IF THAT WERE THE CASE ! JUST SIMPLY BECAUSE, I MEAN , THAT IS THE REASON THAT THERE WAS PROCEDURAL PREJUDICE IN THIS CASE, BECAUSE --

YOU READ EVANS, I TAKE IT, THEN, NOT TO BE SUCH A NARROW OPINION THAT ONLY IF , AS A STATEMENT THAT THE PROSECUTOR ORIGINALLY GAVE AND IT IS NOW CHANGED, BUT THAT ANY STATEMENT THAT IS GIVEN BY EITHER PARTY AND THERE IS A MATERIAL CHANGE , THEN THAT PARTY HAS AN OBLIGATION TO INFORM THE OTHER PARTY OF THAT CHANGE.

ABSOLUTELY. MY FEELING IS THIS. IT IS CALLED RECIPROCAL DISCOVERY FOR A REASON. THAT MEANS IT IS NOT A UNILATERAL SEARCH FOR THE TRUTH. IT IS NOT THAT ONE PARTY CAN PARTICIPATE IN DISCOVERY AND THEN SUDDENLY TURN OFF THE DUTY OF DISCLOSURE FOR

WHATEVER REASON , BECAUSE THE TESTIMONY IN THE DEPOSITION CONFLICT ED WITH OTHER EVIDENCE IN THE CASE OR WITH THE WITNESS MI GHT RECANT , YOU KNOW, WHEN HE T AKES T HESTAND. THE SIM PLE FACT IS THAT THE CONTINUING DUTY OF DISCLOSURE, AS I READ IT , UNDER EVANS , SAYS THAT , AT A VERY MINIMUM , WHEN DEFENSE COUNSEL IS WALKING UP THE ISLE WITH THAT WITNESS , THE PROSECUTOR SAYS EXC USE ME , BUT I THINK YOU BETTER T ALK TO THIS GUY, BECAUSE HE IS NOT GOING TO SAY WHAT WE ALLTHOUGHT HE WAS GOING TO SAY , UNTIL TEN MINUTES AGO.

CHIEF JUSTICE: OKAY. THANK YOU VERY M UCH. YOUR TIME HAS EXPIRED , AND WE WILL TAKE THE CASE UNDER CONSIDERATION.ALL RIGHT.THE COURT WILL TAKE ITY MORNING REC ESS OF 15 MINUTES.

MARSHAL: PLEASE RI SE.