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Arthur Rutherford v. State of Florida

THE MARSHAL: ALL WITH CAUSE TO PLEA DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THIS GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: THE ONLY CASE ON THIS MORNING'S DOCKET IS RUTHERFORD VERSUS STATE OF FLORIDA. JUSTICE BELL IS RECUSED ON THIS CASE, AS HE WAS THE TRIAL JUDGE AT ONE OF THE EVIDENTIARY HEARINGS. SO WITH THAT, THE PARTIES ARE READY. MR. ^MCLAIN, YOU MAY PROCEED.

I AM MARTIN McLAIN, I AM HERE TODAY REPRESENTING MR. ^AD RUTHERFORD IN THIS MOTION TO APPEAL AND VACATE.

IF YOU CAN SPEAK UP, I DON'T THINK WE CAN HEAR YOU VERY WELL.

THE MICROPHONE IS LOW THERE.

USUALLY THAT IS NOT A PROBLEM WITH MY VOICE.

BEFORE YOU GET STARTED, CAN YOU TELL US WHETHER OR NOT, WHAT ISSUES IN THIS CASE MAY BE INVOLVED IN THE HILL CASE WITH REFERENCE TO THE STAY ENTERED BY THE U.S. SUPREME COURT PENDING THEIR REVIEW OF CERTAIN ISSUES IN THAT CASE?

YES. MY UNDERSTANDING OF WHAT HAPPENED YESTERDAY, THE U.S. SUPREME COURT GRANTED CERTIORARI REVIEW IN THE CASE ARISING FROM THE 11TH CIRCUIT AND THAT THE ISSUE THAT THEY ARE ADDRESSING IS WHAT IS THE PROPER VEHICLE FOR PRESENTING A METHODS CHALLENGE IN FEDERAL COURT. WHETHER IT IS A HABEAS PETITION OR WHETHER IT IS A 1983.

CHIEF JUSTICE: YOU MEAN METHOD OF EXECUTION? SO IT RELATES TO THE LETHAL INJECTION?

YES, AND THE METHOD OR THE PROCEDURE IN FEDERAL COURT FOR PRESENTING THE CLAIM.

THEY DIDN'T GRANT A STAY IN THE CERT PETITION FROM THIS COURT'S DECISION?

THAT'S MY UNDERSTANDING BUT MY UNDERSTANDING IS THEY HAVE NOT RULED ON THE CERT PETITION FROM THIS COURT AS WELL, AND IT TAKES FIVE VOTES FOR GRANT A STAY AND FOUR VOTES TO GRANT A CERT AND ONCE THE STAY IS GRANTED THAT IS NECESSARY FOR THE U.S. SUPREME COURT TO GRANT CERT IN THE CASE ARISING FROM THE SUPREME COURT SO I AM ASSUMING AT SOME POINT IN TIME WE WILL FIND OUT WHAT THE POSITION IS ON THAT CERT PETITION BUT MY UNDERSTANDING IS IT IS STILL PENDING.

THEY HAVE STAYED EXECUTION FOR ANY OTHER STATES THAT USE LETHAL INJECTION?

NO, YOUR HONOR. AND, AGAIN, IT IS WHETHER THE PROPER CASE IN PRESENTING IF FED -- FEDERAL COURT WAS 1983 SO CIRCUITS INVOLVING OTHER STATES HAVE ENTERTAINED THE MERITS.

IT IS MY UNDERSTANDING THAT TEXAS DOES USE LETHAL INJECTION AND THEY HELD AN

EXECUTION YESTERDAY.

CORRECT, YOUR HONOR, AND MY UNDERSTANDING FIRST I HAVE NOT REVIEWED THE PAPERS IN THAT CASE TO SEE EXACTLY WHAT WAS PRESENTED BY THE CONDEMNED, BUT I KNOW THAT THE 5TH CIRCUIT HAS NOT AGREED WITH THE 11TH CIRCUIT. I THINK THEY HAVE NOT RESOLVED THE QUESTION OF WHETHER IT IS 1983 OR FEDERAL HABEAS SO I DON'T KNOW SPECIFICALLY WHAT THEY DID IN THAT CASE. I HAVE NOT HAD A CHANCE TO LOOK.

CHIEF JUSTICE: LET'S NOW START WITH THE MERITS OF THIS CASE AND SPECIFICALLY ADDRESS THE ARGUMENTS OF THE NEWLY DISCOVERED EVIDENCE.

YES, IT IS MY INTENTION TODAY TO ADDRESS ARGUMENT ONE OF THE INITIAL BRIEF. CERTAINLY TO THE EXTENT THAT THE COURT HAS QUESTIONS REGARDING ANY OF THE OTHER ISSUES IN THE CASE I WILL ADDRESS THEM.

WHAT ADMISSIBLE EVIDENCE DO YOU CLAIM THAT YOU HAVE AVAILABLE WITH REFERENCE TO THAT CLAIM?

WELL, THE STATEMENT OF MARY HEATON TO ALAN GILKERSON WOULD BE ADMISSIBLE. ALSO THE STATEMENTS MARY HEATON MADE TO MICHAEL GLANTZ WOULD BE ADMISSIBLE.

CHIEF JUSTICE: AS IMPEACHMENT OF HER TRIAL TESTIMONY?

CERTAINLY FOR THAT PURPOSE BUT ALSO A STATEMENT ADMITTING HAVING COMMITTED THE HOMICIDE AND ARRANGING FOR SOMEBODY ELSE TO TAKE THE FALL.

CHIEF JUSTICE: HOW DO YOU -- YOU ARE IN A SITUATION SO THE JURY WOULD HEAR THAT SOMEBODY, 20 OR PLUS YEARS LATER TELLS SOMEBODY THAT THEY COMMITTED A CRIME AND THE NEXT A WEEK LATER TELLS THEM THAT SHE WAS PRESENT WHILE THE FATAL BLOW WAS BEING STRUCK, AND THAT WOULD IMPEACH WHAT PART OF HER TRIAL TESTIMONY?

WELL, JUST TO CLARIFY, THE CHRONOLOGY, THE STATEMENTS TO ALAN GILKERSON WOULD HAVE BEEN IN THE EARLY '90s SO MAYBE TEN YEARS AFTER THE TRIAL AND THE STATEMENT TO MICHAEL GLANTZ WAS IN 2005 WHICH IS ANOTHER TEN YEARS LATER SO THEY ARE SEPARATED TEN YEARS IN TIME.

DID HE EVER, DID MR. ^-- WHAT'S HIS NAME?

ALAN GILKERSON?

DID HE EVER MAKE ANY KIND OF STATEMENT ABOUT THIS PRIOR TO DECEMBER OF LAST YEAR?

NOT TO MY KNOWLEDGE.

AND HOW DID THAT COME TO THE ATTENTION OF CCRC OR THE COUNTY?

IT WAS DETAILED IN THE 3.850 WAS THAT WE WERE LOOKING FOR ELIZABETH WARD, TRYING TO FIND HER, AND IN THE COURSE OF THAT, STUMBLED UPON THE NAME ALAN GILKERSON BECAUSE HE HAD FATHERED A CHILD BY HER, AND SO IN THE COURSE OF TRYING TO FIND IT WAS BEFORE WE CONTACTED HIM AND THEN THAT'S WHEN HE MADE -- THAT'S WHEN HE TOLD US THE INFORMATION.

AND HOW DOES HIS TESTIMONY REALLY SQUARE WITH THE TESTIMONY THAT WAS PRESENTED AT THE TRIAL? I MEAN, DOES IT REALLY, THE ELIZABETH WHO WAS THE NIECE OF MARY HEATON TESTIFIED AT THE TRIAL, ALSO, AND THERE WAS EVIDENCE IF I RECALL CORRECTLY THAT

MR.^RUTHERFORD WAS IN POSSESSION OF THE MONEY FROM THE CASHED CHECK AND SO HOW REALLY DOES THIS INFORMATION NEGATE THAT KIND OF INFORMATION?

TO CLARIFY, THE EVIDENCE CONCERNING MR.^RUTHERFORD'S POSSESSION ACTUALLY THE POLICE NEVER FOUND ANY MONEY IN HIS POSSESSION THAT CAME FROM THE CASHED CHECK. IT WAS ONE WITNESS.

ONE WITNESS WHO TESTIFIED THAT HE HAD \$1500.

AND, AGAIN, JUST TO REMIND THE COURT THAT AT TRIAL, THERE WAS THE STATE'S CASE AND THERE WAS A DEFENSE CASE, AND MR.^RUTHERFORD TOOK THE STAND AND SPECIFICALLY SAID, MARY HEATON'S TESTIMONY WAS NOT TRUE. HE DID NOT SEE HER THAT DAY. SPECIFICALLY SAID, JOHNNY'S TESTIMONY WASN'T TRUE TO AN EXTENT. SHE SAID I DID GO TO JOHNNY PARROT'S HOUSE WE DID NOT HAVE THAT CONVERSATION AND I HAVE NO WHY IDEA WHY HE IS SAYING THAT.

CHIEF JUSTICE: DID HE ALSO TAKE THE STAND AND EXPLAIN WHY HIS PALM PRINTS WERE IN THE SHOWER?

ABSOLUTELY.

CHIEF JUSTICE: AND THAT WAS THOROUGHLY IMPEACHED BECAUSE HE SAID IT WAS BECAUSE HIS NIECES AND NEPHEWS, LET ME JUST FINISH. THAT NIECES AND NEPHEWS HAD COMPLAINED THAT THE DOOR WAS OFF AND THAT THEY SHOWED SHE HAD NO NIECES AND NEPHEWS.

HE SAID THAT THE WOMAN, MISS SALAMON HAD TOLD HIM THAT THE DOOR WAS OFF THE HINGES AND INDICATED SOMETHING TO HIM ABOUT NIECES AND NEPHEWS MUCH HE HAD NO PERSONAL KNOWLEDGE OF WHETHER THAT WAS TRUE, CORRECT OR ANYTHING. IT WAS JUST THAT HE WAS ASKED TO COME THERE. THAT'S WHEN SHE REPORTED IS THAT THOSE DOORS WERE BROKEN. YES, THE STATE PRESENTED SOME EVIDENCE IN THE CASE OF THE NEIGHBOR WAS UNAWARE OF ANY NIECES OR NEPHEWS, AND CERTAINLY HE HAD NO INFORMATION OF THE AGE, WHETHER THEY WERE CHILDREN OR WHETHER THEY WERE ADULTS. SO BUT THERE IS A DISPUTE, AND, IN FACT, DURING THE CROSS-EXAMINATION OF MR.^RUTHERFORD THE STATE MAKES A BIG DEAL ABOUT ASKING HIM, YOU KNOW, YOU ARE THE ONLY CONNECTION BETWEEN MARY HEATON AND MRS.^SALAMON. DO YOU HAVE ANY EXPLANATION FOR HOW MARY HEATON WOULD HAVE HAD ANY CONNECTION IN HERE AND WHAT WE HAVE IN THE STATEMENTS IS THE ANSWER TO THAT QUESTION. SHE KNEW HER. BOTH OF THESE STATEMENTS INDICATE THAT SHE KNEW MRS.^SALAMON AND SHE KNEW HER BETTER THAN MR.^RUTHERFORD KNEW HER. THAT'S WHAT SHE INDICATED TO MR.^GLANTZ.

LET'S PUT THE EVIDENCE IN THE FRAMEWORK OF THE STANDARD OF REVIEW OR YOUR STANDARD FOR GETTING A NEW TRIAL. YOU HAVE TO SHOW THAT THIS NEWLY DISCOVERED EVIDENCE WOULD PROBABLY RESULT IN AN ACQUITTAL. CORRECT?

PROBABLY RESULT IN THE JURY FINDING A REASONABLE DOUBT ABOUT MR.^RUTHERFORD'S GUILT.

WHICH IS AN ACQUIT {L}. -- ACQUITTAL. SO HOW DO YOU COMPARE THE NEW EVIDENCE WITH THE FOUR WITNESSES THAT TESTIFIED THAT RUTHERFORD HAD TOLD THEM EITHER BEFORE THE CRIME THAT HE WAS GOING TO KILL THE VICTIM, OR AFTER THE CRIME THAT HE HAD KILLED THE VICTIM? HOW DO WE COMPARE THAT AND THE CONTRADICTORY AFFIDAVITS? BECAUSE MISS HEATON HERSELF IN THE AFFIDAVIT SAYS THAT HE KILLED THE VICTIM, AND THAT SHE WAS JUST THERE PRESENT. SO HOW DOES ALL OF THAT TESTIMONY TOGETHER PRODUCE AN ACQUITTAL?

FIRST THERE IS ALSO A BRADY CLAIM BECAUSE SHE INDICATES SHE TOLD THE POLICE SHE WAS --

I UNDERSTAND THE BRADY CLAIM AND THAT'S ANOTHER ISSUE. I'M TALKING ABOUT THE NEWLY DISCOVERED EVIDENCE.

THIS COURT HAS INDICATED YOU DON'T ANALYZE THEM AND SEPARATELY. THIS COURT HAS SAID WHEN YOU HAVE A NEWLY DISCOVERED EVIDENCE CLAIM AND A BRADY CLAIM YOU DO A CUMULATIVE ANALYSIS OF WHETHER OR NOT IT IS UNDERMINING THE OUTCOME.

WE WILL GET TO CUMULATIVE ANALYSIS, BUT AS FAR AS THE NEWLY DISCOVERED EVIDENCE CLAIM.

I'M TRYING TO MAKE IT CLEAR WHAT THE STANDARD OF REVIEW IS IN THE FIRST INSTANCE BUT IN TERMS OF ANALYZING IT, IT WAS A CREDIBILITY BATTLE. THE TIMELINE THAT WAS SET FORTH BY THE STATE'S WITNESSES AND THE TIMELINE SET FORTH BY MR.^RUTHERFORD AND HIS WITNESSES CREATED THIS CREDIBILITY BATTLE, BECAUSE FOR ONE THING, WE KNOW THAT AT 2:02 P.M.. A CHECK IS CASHED ON THE WOMAN'S ACCOUNT BY MARY HEATON. MARY HEATON CLAIMS THAT MR.^RUTHERFORD IS WITH HER FROM 11:30 A.M. UNTIL AFTER THAT CHECK IS CASHED, AND HE DRIVES HER HOME. AND THE EVIDENCE IS JUST INCONSISTENT WITH THAT. MR.^RUTHERFORD TESTIFIED THAT HE DID GO TO MRS.^HEATON'S HOUSE.

THE EVIDENCE SHOWS THAT SHE HAD MORE TO DO WITH THE CRIME, MORE INVOLVEMENT THAN SHE SAYS SHE HAD, OKAY? HOW DOES THAT RESULT IN AN ACQUITTAL FOR MR.^RUTHERFORD?

MR.^RUTHERFORD INDICATED THE SEQUENCE OF EVENTS WAS THAT HE WENT TO THE HEATON HOUSE AT 11:30 A.M. TO DROP OFF DOORS, TALK TO MRS.^HEATON'S FATHER. DID NOT SEE MRS.^HEATON THERE WHICH IS PROBABLY THE TIME PERIOD IN WHICH THE MURDER IS HAPPENING. HE THEN GOES TO TOM THUMB IN ORDER TO BUY BEER. A WITNESS VERIFIES BETWEEN 12:00 AND 12:30 HE WAS THERE. HE THEN SAYS HE GOES TO SEE JOHNNY PARROT AT ABOUT 1:00. TALKED TO HIM ABOUT A HALF A HOUR. JOHNNY'S TESTIMONY IS IMPEACHED. FIRST HE SAID MR.^RUTHERFORD ARRIVED BETWEEN 12:00 AND 1:00 AND HE HAS THE MONEY FROM THE CASHED CHECK WHICH THE CHECK ISN'T CASHED BETWEEN 2:02. SO BY THE TIME OF TRIAL HE SUDDENLY HAS A NEW VERSION AND THE NEW VERSION IS THAT MR.^RUTHERFORD ARRIVED AFTER 2:00, BUT HIS OWN ORIGINAL STATEMENT TO THE POLICE IS INCONSISTENT WITH THAT. IN ANY EVENT, MR.^RUTHERFORD DOES INDICATE HE IS THERE AT 1:00, TALKS TO JOBBY -- JOHNNY PARROT AND GETS HOME AT 2:00 WHICH HIS WIFE CONFIRMS. HE GETS HOME, GENERAL HOSPITAL IS ON AND THEY DECIDE TO GO RUN ERRANDS.

I'M NOT SURE YOU ARE ANSWERING MY QUESTION.

THERE IS A SPLIT IN THE EVIDENCE AND THIS CLEARLY --

MY QUESTION IS YOU HAVE FOUR OTHER WITNESSES WHO SAID THAT HE TOLD THEM EITHER BEFORE THAT HE WAS GOING TO COMMIT THE CRIME OR AFTER THAT HE DID.

EACH AND EVERY ONE WAS IMPEACHED AT TRIAL. AT TRIAL THERE IS A QUESTION OF WHETHER OR NOT THEY ARE TELLING THE TRUTH. THE DEFENSE CONTENDED EACH AND EVERY ONE OF THEM FOR DIFFERENT REASONS YOU COULDN'T BELIEVE WHAT THEY WERE SAYING. MR.^ADDAWAY WAS FACING CHARGES FOR POSSESSING 50 POUNDS OF MARIJUANA. HE IS ALSO THE PERSON WHO WAS ARRESTED AND PICKED UP WITH MR.^RUTHERFORD THAT NIGHT.

AND THIS NEW WITNESS, ISN'T HE CURRENTLY INCARCERATED AS WELL?

YES.

OKAY. AND WHAT IS HE IN JAIL FOR?

OFF THE TOP OF MY HEAD I DON'T KNOW BUT AT THE TIME OF THE TRIAL.

ISN'T THAT RELEVANT TO KNOW OF HIS CREDIBILITY?

WHAT IS RELEVANT TO KNOW AT THE TIME OF MR.^RUTHERFORD'S TRIAL THE CHARGES ON THIS MARIJUANA WAS PENDING AGAINST MR.^ADDAWAY AND HAS NOT BEEN RESOLVED AND AFTER HE TESTIFIED AGAINST RUTHERFORD IT GOES AWAY. IT WAS HIS CREDIBILITY, HE WAS IMPEACHED. HE WAS ALSO PICKED UP WITH MR.^RUTHERFORD ON THE WORD THEY HAD BEEN THERE TOGETHER.

SO WHEN YOU PRESENT NEWLY DISCOVERED EVIDENCE IN THE FORM OF WITNESSES IT IS NOT RELEVANT TO KNOW THE WITNESS' CREDIBILITY?

THE AFFIDAVIT FROM MR.^GILKERSON, ACCORDING TO THIS COURT'S CASE LAW, HAS TO BE ACCEPTED AS TRUE.

IT HAS TO BE ACCEPTED THAT HE IS GOING TO SAY THAT. HIS CREDIBILITY, A NEW TRIAL, DOESN'T HAVE TO BE ACCEPTED, DOES IT?

THE ISSUE IS NOT WHETHER OR NOT TO GRANT A NEW TRIAL. THE ISSUE IS WHETHER OR NOT TO GRANT AN EVIDENTIARY HEARING AND TO HEAR THE TESTIMONY OF MR.^GILKERSON SO SOMEBODY CAN EVALUATE HIS CREDIBILITY AND CERTAINLY THE STATE AT THAT HEARING WANTS TO BRING OUT HIS RECORD AND ARGUE HE DOESN'T HAVE CREDIBILITY. THAT'S WHAT THE EVIDENTIARY HEARING IS FOR.

CHIEF JUSTICE: IS THERE ANYTHING IN THE RECORD THAT SHOWS HOW OLD MARY HEATON WAS AT THE TIME OF THE CRIME, HOW MUCH, HER SIZE, ANYTHING?

NOTHING ABOUT HER SIZE, BUT MY RECOLLECTION IS THAT SHE WAS ABOUT 31. SHE SAID THAT SHE HAD KNOWN MR.^RUTHERFORD FOR ABOUT TEN YEARS. ALSO WHAT COMES OUT IN TERMS OF MARY HEATON.

CHIEF JUSTICE: AND HOW LARGE IS MR.^RUTHERFORD?

FRANKLY OFF THE TOP OF MY HEAD I DON'T RECALL IN TERMS OF THE PHYSICAL SIZE.

CHIEF JUSTICE: AND AT TRIAL MARY HEATON WAS THOROUGHLY IMPEACHED EVEN AS TO THE ISSUE OF THE CHECK OR WHAT EXACTLY HAPPENED, BECAUSE SHE WAS IN A MENTAL INSTITUTION AND HAVING PROBLEMS DISTINGUISHING FACT FROM FANTASY, ISN'T THAT WHAT THE DEFENSE --

THE DEFENSE BROUGHT OUT SHE WAS IN A MENTAL INSTITUTION BUT INFORMATION SHE MAY HAVE COMMITTED THE MURDER MAY EXPLAIN WHY SHE WOULD HAVE A BREAKDOWN AND BE SO FEARFUL OF BEING EXAMINED BY THE DEFENSE. SHE DID INDICATE THAT INITIALLY SHE HAD TOLD THE POLICE THAT MR.^RUTHERFORD SIGNED THE CHECK. SHE THEN INDICATED THAT AT ONE POINT IN TIME SHE COMPLETELY CHANGED IT AND AT THE ORIGINAL TRIAL, SHE SAID OH, SHE HAD LIED TO THE POLICE. IN FACT, SHE HAD SIGNED THE CHECK. THEN AT THIS TRIAL SHE GOES BACK TO SAYING MR.^RUTHERFORD SIGNED THE CHECK.

ISN'T IT CORRECT THAT THE SUM TOTAL OF THESE LAST-MINUTE AFFIDAVITS IS THAT MISS HEATON MADE CONTRADICTORY STATEMENTS OR ALLEGED TO HAVE MADE CONTRADICTORY STATEMENTS IN THAT SHE APPARENTLY, ACCORDING TO THIS DECEMBER 23, 2005 AFFIDAVIT, SHE SAYS SHE WITNESSED RUTHERFORD STRIKING THE FATAL BLOW.

AND, YOUR HONOR, I POINTED OUT IN OUR REPLY THE STATE ALL OF THE TIME CONVICTS

DEFENDANTS ON THE BASIS OF THAT KIND OF INFORMATION WHERE THEY TELL A JAILHOUSE INFORMANT THAT DID THE MURDER BUT WHEN CONFRONTED BY SOMEBODY IN LAW ENFORCEMENT THEY CHANGE THEIR STORY, COME UP WITH A VERSION THEY'VE NEVER PROVIDED BEFORE AND THAT IS EVIDENCE OF THEIR GUILT.

BUT THE BURDEN HERE IS TO {DMON} {VAT} THAT THERE IS A BASIS THAT -- DEMONSTRATE THAT THERE IS A BASIS THAT FURTHER POST-CONVICTION PROCEEDINGS WOULD RESULT IN RUTHERFORD BEING ACQUITTED OF THIS CRIME, AND I CANNOT -- I'M JUST HAVING AN IMPOSSIBLE TIME SEEING HOW THESE CONTRADICTORY STATEMENTS MEET THAT TEST.

WELL, FIRST LET ME MAKE THE POINT THAT IN THE CROSS-EXAMINATION OF MR.^RUTHERFORD, HE WAS ASKED, SO ONE OF THESE THREE DID THE KILLING, EITHER JOHNNY, ADDAWAY OR MARY FRANCIS HEATON. HIS ANSWER IS I DON'T KNOW. THE STATE WAS MAKING IT CLEAR THAT YOU HAVE NO EVIDENCE THAT ONE OF THESE THREE DID THE MURDER AND ONE OF THESE THREE HAD TO HAVE DONE THE MURDER UNDER THE FACTS OF THIS CASE. THIS IS INFORMATION, NOW, THAT PROVIDES THE ANSWER TO THAT QUESTION THAT ASKED MR.^RUTHERFORD DURING THE CROSS-EXAMINATION. THAT WAS A FEATURE OF THE TRIAL.

CHIEF JUSTICE: YOU ARE IN YOUR REBUTTAL IF YOU WANT TO SAVE ANY TIME.

I WOULD LIKE TO SAVE BUT I WOULD SUBMIT AN ANSWER TO YOUR QUESTION, JUSTICE WELLS. THIS IS IDENTICAL TO WHAT HAPPENED IN STATE V MILLS WHERE THE CODEFENDANT HAD TESTIFIED AGAINST MR.^MILLS THAT MR.^MILLS WAS THE SHOOTER. A JAILHOUSE INFORMANT, MANY YEARS LATER, COMES FORWARD AND SAYS THAT THAT INDIVIDUAL, THE CODEFENDANT HAD TOLD HIM THAT HE, THE CODEFENDANT, WAS THE SHOOTER. AND AN EVIDENTIARY HEARING IS GRANTED AND ON THE BASIS OF THAT EVIDENTIARY HEARING RELIEF WAS GRANTED.

IN STATE V MILLS WAS THAT THE ONLY WITNESS WHO HAD TESTIFIED AS TO WHAT MILLS HAD SAID OR WERE THERE OTHER WITNESSES THAT TESTIFIED?

THAT WAS THE ONLY WITNESS.

ISN'T THAT A DISTINGUISHING FACTOR IN THAT CASE?

THE ONLY WITNESS HERE AS TO HOW THAT CHECK GOT CASHED IS MARY HEATON AND HER NIECE.

OBVIOUSLY THAT'S NOT WHAT I AM ASKING. I'M ASKING IS THAT THE ONLY WITNESS THAT TESTIFIED THAT MR.^RUTHERFORD TOLD THEM THAT HE COMMITTED THE CRIME?

IT IS NOT THE ONLY WITNESS HERE BUT UNLIKE MILLS, MR.^RUTHERFORD TESTIFIED IN HIS OWN BEHALF AND HAD OTHER WITNESSES CORROBORATE HIS TESTIMONY. THAT'S ALSO DIFFERENT THAN MILLS. THANK YOU. I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT, CHARMAINE MILLSAPS REPRESENTING THE STATE. FIRST I'D LIKE TO GET SOMETHING STRAIGHT ABOUT MR.^ADDAWAY'S TESTIMONY. YES, THERE WERE PENDING CHARGES ON THE SIGNIFICANT TESTIMONY OF MARIJUANA, BUT THEN THE PROSECUTOR IN HIS REDIRECT-EXAMINATION GOT IT CLEAR THAT MR.^ADDAWAY HAD MADE THESE STATEMENTS, STATEMENTS SIMILAR TO HIS TRIAL TESTIMONY PRIOR TO BEING ARRESTED FOR THE MARIJUANA. SO, MR.^ADDAWAY'S TESTIMONY WAS NOT IMPEACHED. THERE WERE SEVERAL OTHER WITNESSES WHO TESTIFIED TO MUCH THE SAME THING.

WE TALKED ABOUT SEVERAL TIMES IN OUR QUESTIONS THIS MORNING ABOUT ISSUES OF CREDIBILITY, OKAY? WHY SHOULDN'T THERE BE AN EVIDENTIARY HEARING ON THIS CLAIM WITH THE SCENARIO IN TERMS OF THE DEFENDANT, THE BEST POSSIBLE OUTCOME WOULD BE THAT

SOMEHOW THE TRIAL COURT JUDGE BELIEVED THAT THIS STATEMENT NOW WHERE THIS PERSON SAYS THAT MARY HEATON CONFESSED TO HIM, WAS CREDIBLE, AND THAT THE JUDGE SOMEHOW IN EVALUATING ALL OF THE CIRCUMSTANCES SAID OH, MY GOSH, YOU KNOW, I BELIEVE THIS. I THINK SHE DID TELL HIM AND I'M RALLY CONCERNED, AND I THINK THERE SHOULD BE A NEW TRIAL, BECAUSE OF THIS. AFTER EVALUATING ALL OF THIS, THE CREDIBILITY AND THE CIRCUMSTANCES. AND, OF COURSE, THE OTHER -- THE OUTCOME ON THE OTHER SIDE IS, NO, I DON'T THINK THIS IS CREDIBLE AND SHE TURNED RIGHT AROUND AND GAVE A CONTRADICTIONARY STATEMENT ALTHOUGH IT, YOU KNOW, SAYS THAT SHE WAS PRESENT AT THE SCENE, AND WITH ALL OF THAT I DON'T THINK ANY OF THIS IS BELIEVEABLE AND I DON'T THINK IT WOULD AFFECT THE OUTCOME OF A NEW TRIAL, BUT SINCE THE TRIAL JUDGE IS HEARING THIS AT AN EVIDENTIARY HEARING WOULD HAVE TO EVALUATE ALL OF THAT, WHY SHOULDN'T THERE HAVE TO BE AN EVIDENTIARY HEARING TO RESOLVE IT AND FOR SOMEBODY TO GET A GRIP ON THIS BASED ON THE CREDIBILITY AND WHAT EVIDENCE STACKS UP OVER HERE AND WHAT EVIDENCE STACKS UP OVER THERE?

BECAUSE THE STANDARD IN JONES IS IS IT LIKELY TO PRODUCE AN ACQUITTAL ON RETRIAL.

BUT ISN'T THAT STANDARD APPLIED AFTER THE JUDGE HEARS THIS EVIDENCE? SURELY IF A TRIAL JUDGE BELIEVED THAT SOMEBODY ELSE HAD CONFESSED TO THE CRIME AND THAT THAT CONFESSION IS CREDIBLE, AND BELIEVEABLE AND SUSTAINED PERHAPS BY OTHER SUPPORTING CORROBORATING EVIDENCE, A JUDGE WOULD GRANT A NEW TRIAL, WOULD THEY NOT?

BUT REMEMBER MARY HEATON, THERE ARE TWO CONTRADICTIONARY AFFIDAVITS HERE.

I REALIZE THAT, AND THAT'S WHY I AM SAYING THAT DON'T YOU HAVE TO EVALUATE THAT ON THE BASIS OF HEARING THE TESTIMONY AND THEREFORE SAYING, WELL, THE EXPLANATION FOR THOSE CONTRADICTIONARY THINGS IS THAT, YOU KNOW, THAT SHE IS MENTALLY DISTURBED AND SHE DOESN'T KNOW WHAT SHE IS SAYING, ANYWAY, YOU KNOW, OR WHATEVER, BUT DON'T YOU HAVE TO HAVE AN EVIDENTIARY HEARING IN WHICH THESE WITNESSES TESTIFY AND YOU LISTEN TO THEM, AND YOU SAY OH, I DON'T EVEN BELIEVE THIS AFFIDAVIT, YOU KNOW, WHEN THE PERSON ACTUALLY TESTIFIES THAT SHE TOLD HIM THAT. I DISCREDIT THAT TO BEGIN WITH. OR MY GOSH I CREDIT THAT. THIS PERSON IS VERY CREDIBLE, SO STARTING WITH HIS TESTIMONY I BELIEVE SHE DID TELL HIM THAT, AND NOW WITH THE OTHER EVIDENCE OFFERED BY THE DEFENDANT, I ALSO THINK THAT THIS WOMAN WAS IMPLICATED IN THE CRIME AND SHE DID IT, AND THAT A JURY OUGHT TO HEAR THAT. IN OTHER WORDS, HOW CAN WE MAKE THESE EVALUATIONS WITHOUT THERE BEING AN EVIDENTIARY HEARING?

WELL, YOU CAN READ THIS AFFIDAVIT TO SEE THAT THEY ARE CONTRADICTIONARY AND MOREOVER, WE ARE NOT GOING TO -- THEY ARE GOING TO HAVE TO IF THERE WAS AN EVIDENTIARY HEARING HELD THEY ARE GOING TO HAVE TO CALL MARY HEATON HERSELF. THIS IS NOT GOING TO BE ADMISSIBLE STATEMENT AGAINST PENAL INTERESTS. YOU HAVE TO MEET THREE PRONGS FOR THAT.

CHIEF JUSTICE: TO BRING BOTH OF THESE WITNESSES IN TO AN EVIDENTIARY HEARING, WASN'T THAT THE REPRESENTATION?

BY BOTH OF THEM YOU MEET GLANTZ AND GILKERSON? MARY HEATON WOULD HAVE TO BE PRESENT.

CHIEF JUSTICE: WELL, I ASSUME THAT WAS WHAT THE DEFENDANT WAS PREPARED TO DO.

I DIDN'T UNDERSTAND JUSTICE ANSTEAD'S QUESTION TO BE THAT WITH MARY HEATON, BUT MY POINT IS THAT MARY HEATON'S PART IN THIS PROSECUTION WAS VERY MINOR. WE HAVE FOUR OTHER WITNESSES THAT ARE NOT IMPEACHED AT ALL BY THIS. WHETHER MARY HEATON TESTIFIES DOES NOT --

HOW DO WE KNOW FIRST OF ALL LET'S START WITH DO WE KNOW WHETHER OR NOT MARY HEATON MADE THIS STATEMENT, OKAY, TO THIS PERSON THAT SHE WAS LIVING WITH AT THE TIME? DO WE KNOW, DO WE ACCEPT THAT AS TRUE THAT SHE DID MAKE THAT STATEMENT?

YES, I THINK THAT'S PART OF THE ANALYSIS. YOU HAVE TO ACCEPT THE STATEMENT THAT SHE MADE THAT TO GILKERSON, BUT YOU ALSO HAVE TO ACCEPT AS TRUE REMEMBER WHAT THE TRIAL JUDGE HERE IS, HE HAS TO ACCEPT AS TRUE ALSO THE GLANTZ. WELL, THE SUBSTANCE OF THOSE TWO AFFIDAVITS ARE DIRECTLY, NOT JUST IN DETAIL, BUT IN ONE AFFIDAVIT GILKERSON CLAIMS THAT MARY HEATON TOLD HIM SHE WAS THE ACTUAL PERPETRATOR AND SHE HAD FRAMED RUTHERFORD. IN THE OTHER AFFIDAVIT SHE SAYS SHE IS THERE AND SAW RUTHERFORD STRIKE THE FATAL BLOW.

HOW DO WE SORT THAT OUT UNLESS WE HEAR THE TESTIMONY THEN AND DECIDE WHICH -- WHICH TIME WAS SHE TELLING THE TRUTH?

WELL, BECAUSE YOU LOOK AT THE TRIAL TESTIMONY AND WE HAVE FOUR REMAINING WITNESSES, PLUS RUTHERFORD'S FINGERPRINTS, THREE SETS OF HIS FINGERPRINTS IN THE BATHROOM, A LITTLE USED SPARE BATHROOM THAT THE VICTIM WAS FOUND IN.

I CERTAINLY AGREE THAT THE TRIAL JUDGE HERE, IF HE HAD AN EVIDENTIARY HEARING, WOULD HAVE TO CONSIDER ALL OF THAT, AND IT ALMOST LOOKS OVERWHELMING, BUT DOESN'T HE HAVE TO CONDUCT AN EVIDENTIARY HEARING BECAUSE OF THE POSSIBILITY THAT HE MADE DETERMINE SHE DID SAY THAT AND THAT'S CREDIBLE, THAT IS THAT I NOW BELIEVE AS ONE OF THE PEOPLE INVOLVED IN THIS CRIME THAT, YOU KNOW, THAT SHE HAS SAID THIS AND A JURY OUGHT TO HEAR IT?

BUT, NO, I DON'T THINK HE HAS TO. YOU CAN MAKE THAT DETERMINATION JUST ON THE EVIDENCE, AND YOU KNOW THAT HER STATEMENTS ARE CONTRADICTORY ALREADY FROM READING THE AFFIDAVIT.

IF WE LOOK AT MOST ALL OF THESE CASES WE ALWAYS PLACE IT IN THE CONTEXT OF WHAT THE RECORD SHOWS, AND I WOULD LIKE TO DIRECT THIS REALLY TO BOTH SIDES, AND WE ALSO KNOW THAT IF THE RECORD CONCLUSIVELY REFUTES THAT WHICH IS BEING PRESENTED WE DON'T GO STEPS FURTHER. HOW DOES -- NOT OFTEN, I DON'T THINK I HAVE EVER SEEN NOR HAVE I FOUND A CASE, MAYBE YOU CAN HELP ME, WHERE THERE IS ALREADY IN THE RECORD THIS MENTAL HEALTH ISSUE, AND THERE IS TESTIMONY OR EVIDENCE THAT THE PERSON GETTING THIS EVIDENCE DOESN'T KNOW FACT FROM FANTASY. HOW DOES THAT FACTOR IN? DOES IT FACTOR IN, NOT FACTOR IN? HOW DO WE DEAL WITH THOSE KINDS OF THINGS? I DON'T BELIEVE I HAVE EVER SEEN ONE WHERE ALREADY IN THE RECORD THERE IS TESTIMONY AND EVIDENCE SUCH AS THIS, AND HOW DO WE DEAL WITH THAT? OR WHERE IT JUST DOESN'T MAKE ANY DIFFERENCE AT ALL?

OF COURSE THE IMPEACHMENT WOULD MAKE A DIFFERENCE AND WE DO KNOW THAT FROM THE TRIAL TESTIMONY. MARY HEATON ADMITTED THAT SHE HAD BEEN BAKER ACTED AGAINST HER WILL, AND THAT SHE HAD TROUBLE TELLING FACT FROM FICTION. SHE ADMITTED THAT. SHE SAID SHE WAS PRETTY SURE ABOUT WHAT HAPPENED THAT DAY. MOREOVER, YOUR HONOR, MARY HEATON'S TESTIMONY --

IS THAT PART, THOUGH, THE CREDIBILITY DISCUSSION THAT JUSTICE ANSTEAD IS HAVING WITH YOU OR IS THAT PART OF THE LEGAL ANALYSIS TO COME UP WITH THE FINAL ANSWER AS TO WHETHER YOU NEED ANOTHER HEARING?

I THINK IT IS -- YOU CAN LOOK AT THE FACT THAT THE AFFIDAVITS ARE CONTRADICTORY ON THEIR FACE.

I UNDERSTAND.

PLUS THAT SHE WAS-O WE ARE DEALING WITH A WITNESS WHO THE JURY HEARD, THE JURY HEARD THIS ABOUT AN OPEN ADMISSION. I HAVE TROUBLE TELLING FACT FROM FICTION AND ONE OF THE REASONS YOU CAN ALSO LOOK AT --

SHE HAD TROUBLE, CORRECT? I DON'T THINK SHE ADMITTED THAT AT THE TIME OF TRIAL SHE HAD TROUBLE TELLING FACT FROM FICTION BUT SHE HAD PREVIOUSLY HAD TROUBLE.

SHE SAID HAD. I THINK THAT CAN BE INTERPRETED AMBIGUOUSLY BUT ONE OF THE REASONS YOU WOULD ALSO LOOK AT IS YOU WOULD LOOK AT WHAT DID THE JURY HAVE THAT WHEN YOU HAVE A WITNESS WHOSE CREDIBILITY IS LIKE THIS, WHAT ELSE DID THE JURY HAVE? WE HAVE NOT TALKED ABOUT THE NIECE, THE FACT THAT BOTH THE NIECE AT BOTH ENDS OF HER TESTIMONY OR WE HAVE CUMULATIVE EVIDENCE, WE HAVE THE NIECE PUTTING THE CHECK, THE CHECK IN RUTHERFORD'S HAND AND THEN WE HAVE THE BANK TELLER, ALL RIGHT, WHO SAID EXACTLY THAT THE CHECK WAS CASHED. NOW, SHE DID NOT SEE RUTHERFORD, BUT SHE DID SEE MARY HEATON.

CHIEF JUSTICE: OF COURSE THAT WAS MARY HEATON'S BEING INVOLVED WITH THE CASHING OF THE CHECK WOULD SUPPORT HER INVOLVEMENT BEING GIVEN BY -- I MEAN THIS IS ONE OF THE THINGS THAT, YOU KNOW, \$500 IS A LOT OF MONEY TO BE GIVING FOR HELPING CASH THE CHECK. I GUESS HIS EXPLANATION OR HER EXPLANATION IS THAT SHE WAS DOING WORK FOR HIM OVER A PERIOD OF TIME. SO THE WHOLE THING IS A LITTLE ODD. BUT FOLLOWING UP ON JUSTICE LEWIS, ONE OF MY CONCERNS AND IT WASN'T -- IT WAS RAISED IN THE BRIEF, IS WAS THE DEFENDANT ENTITLED TO OBTAIN MARY HEATON'S MENTAL HEALTH RECORDS SINCE SHE NOW HAS SAID IN THE AFFIDAVIT THAT SHE TOLD THE SAME THING TO MENTAL HEALTH PROFESSIONALS, AND ISN'T THAT A WAIVER OF ANY MENTAL HEALTH PROTECTION? PSYCHO THERAPIST?

I DO NOT THINK THAT.

IF WE CONSTRUED AS A WAIVER, THEN DIDN'T THE TRIAL COURT ERR IN NOT ALLOWING DISCOVERY OF MARY HEATON'S MENTAL HEALTH RECORDS?

NO, YOUR HONOR, THE STANDARD FOR GETTING SOMEONE'S MENTAL HEALTH RECORDS IS EXTRAORDINARILY HIGH, AND THERE WAS NEVER --.

CHIEF JUSTICE: I JUST SAID LET'S ASSUME THE AFFIDAVIT SAYS THAT I TOLD THIS SAME THING. IF SOMEONE TELLS MENTAL HEALTH PROFESSIONALS ABOUT INVOLVEMENT OF A CRIME, YOU ARE NOT TELLING ME THAT A DEFENDANT WOULDN'T HAVE THE RIGHT TO OBTAIN THOSE RECORDS TO AT LEAST HAVE THE JUDGE REVIEW THEM IN CAMERA TO SEE IF THERE IS STATEMENTS RELATING TO THE ACTUAL CRIME?

WELL, NOW, I TOOK THAT PART OF THE AFFIDAVIT TO MEAN SHE HAS TALKED ABOUT THIS. NOT THIS CRIME TO MENTAL HEALTH. NOT SHALL SHE SAID THE EXACT SAME THING SHE TOLD THEM SHE WAS THE PERPETRATOR.

CHIEF JUSTICE: IN ALLOWING THE JUDGE TO REVIEW THOSE RECORDS IN CAMERA, WHAT ABOUT THAT?

THEY HAVEN'T MET THE STANDARD JUST BECAUSE YOU'VE TALKED. YOU HAVE SOMETHING THAT HAPPENED TO YOU THAT WAS RATHER TRAM AT ACHE. -- TRAUMATIC. YOU HAVE AN EXISTING MENTAL CONDITION BEFORE THAT, OKAY? SHE DIDN'T WANT TO BE INVOLVED IN THIS. THEN, AND YOU TALKED TO -- THAT DOESN'T MEAN YOU ARE THE PERPETRATOR. I MEAN, THE STANDARD --

SHE IS GOING TO THE ISSUE OF IS IT CONFIDENTIAL, IS IT PRIVILEGED OR PROTECTED OR DOES IT LOSE THAT STATUS I BELIEVE IS WHERE SHE IS GOING WITH THIS.

JUST BECAUSE YOU SAY I TALKED TO MY PSYCHIATRIST?

NO, ABOUT THE CRIMINAL EVENTS, THE CRIMINAL CONDUCT? IS OUR LAW SO BROAD THAT I'M SORRY THAT IT IS SO BROAD THAT IT WOULD PROTECT STATEMENTS MADE OF CRIMINAL VIOLATIONS, INCLUDING HOMICIDES, IS OUR PRIVILEGE AND PROTECTION THAT BROAD?

OUR PRIVILEGE AND PROTECTION IS PRETTY BROAD.

NOT PRETTY BROAD. IS IT BROAD ENOUGH TO COVER THE CRIMINAL CONDUCT?

IF SHE HAD TOLD THEM NOT JUST TALKED ABOUT IT IN A GENERAL, BUT IT SAYS THAT SHE WAS, THE ALLEGATIONS WERE THAT SHE WAS THE ACTUAL PERPETRATOR.

CHIEF JUSTICE: THE SPECIFICS IS MISS HEATON TOLD ME SHE HAD DISCUSSED THE FACTS OF THE CRIME, INCLUDING HER PRESENCE AT THE SCENE, WITH MENTAL HEALTH PROFESSIONALS, INDIVIDUALLY AND DURING GROUP HEALTH SESSIONS.

OKAY. BUT HER PRESENCE ISN'T, SHE IS GOING TO HAVE TO BE THE PERPETRATOR.

CHIEF JUSTICE: THAT'S PRETTY SIGNIFICANT THAT SHE HAS NEVER SAID THAT SHE WAS PRESENT AT THE SCENE. NOT EVEN REMOTELY THAT SHE KNEW ANYTHING ABOUT THE MURDER OF THE VICTIM, AND IF --

THAT DOES NOT UNDERMINE RUTHERFORD'S GUILT. THAT MAY INCREASE HERS, BUT IT DOES NOT UNDERMINE RUTHERFORD'S.

CHIEF JUSTICE: MY QUESTION WAS WHETHER IT WAS ERROR TO DENY THE DISCOVERY OF THOSE RECORDS.

NO.

CHIEF JUSTICE: YOU ARE SAYING EVEN IF THEY ALL SAID THAT SHE CORROBORATED AND WAS PRESENT AT THE SCENE IT WOULDN'T PROBABLY PRODUCE AN ACQUITTAL; IS THAT WHERE YOU ARE GOING ON THIS?

YES.

HOW ABOUT IF THEY SAY SHE DIDN'T COMMIT THE MURDER?

I THINK THAT WOULD BE THE KIND OF THING THAT IF THEY HAD MADE THAT ALLEGATION THAT SHE HAD TOLD THE PSYCHIATRIST THAT SHE WAS THE ACTUAL PERPETRATOR, THEN THAT PROBABLY IS SOMETHING THAT -- YOUR HONOR, WE HAVE VERY STRONG PRIVILEGE, BUT IT DOESN'T MEAN IT CAN'T BE PIERCED AT ANY TIME. THE STATE'S POSITION ISN'T THAT IT COULD NEVER BE PIERCED. BUT MUCH MORE THAN THIS SHOWING THAT SHE HAD JUST TALKED ABOUT THE FACTS OF THE CRIME. THINK HOW AMBIGUOUS THAT IS. THE FACTS THAT, YOU KNOW, I CASHED A CHECK AND HERE I WAS AND --.

CHIEF JUSTICE: HER PRESENCE AT THE SCENE. THAT'S WHAT SHE TALKED ABOUT.

OKAY. BUT EVEN THAT DOES NOT UNDERMINE RUTHERFORD'S CREDIBILITY, THAT DOES NOT UNDERMINE RUTHERFORD'S GUILT. THAT MAY INCREASE MARY HEATON'S GUILT BUT THAT DOES NOT UNDERMINE RUTHERFORD'S GUILT. WE STILL HAVE FOUR WITNESSES AND THREE SETS OF FINGERPRINTS.

CHIEF JUSTICE: I WANT TO ASK ABOUT THE BRADY. I JUST WANT TO MAKE SURE YOU ADDRESS THE BRADY CLAIM.

I WANTED TO ASK HER. YOU KEEP TALKING ABOUT THE OTHER WITNESSES, HOW MUCH OF MARY HEATON'S TESTIMONY WAS ACTUALLY CORROBORATED BY THE NIECE, ELIZABETH? DID SHE ACTUALLY GO THROUGH THE FACT THAT RUTHERFORD CAME THERE AND ASKED THEM TO ACTUALLY SIGN THE CHECK AND ALL OF THOSE KINDS OF INFORMATION THAT CAME OUT IN MARY HEATON'S TESTIMONY?

ABSOLUTELY, AND THAT'S WHY I SAY WHAT HAPPENED WAS RUTHERFORD DROVE OVER TO THE HOUSE, AND BOTH MARY HEATON WHO IS HER AUNT AND THE NIECE, ELIZABETH WARD, TESTIFY RUTHERFORD CAME OVER THERE. HE ASKED MARY HEATON TO FILL OUT THE CHECKS. SHE SAID I CANNOT WRITE. SO I CANNOT FILL OUT THE CHECK, AND HE ASKED, WELL, CAN YOUR NIECE FILL OUT THE CHECK AND RUTHERFORD WENT OUT. SHE WAS IN A BUS. SHE WAS OUTSIDE THE HOUSE, AND THE NIECE WAS, AND RUTHERFORD ASKED HER TO FILL OUT THE CHECK. SHE -- IT IS THE NIECE WHO LITERALLY FILLS OUT THE CHECK.

CHIEF JUSTICE: DOES THE NIECE IDENTIFY THAT IT WAS MRS. SALAMON'S CHECK? DOES THE NIECE KNOW THAT?

SHE DIDN'T SEEM TO HAVE BEEN, BUT SHE FILLS OUT A CHECK. WE HAVE A 14-YEAR-OLD, 13-YEAR-OLD FILLING OUT A CHECK. SO SHE DIDN'T KNOW HOW TO FILL ONE OUT, EITHER, BUT SHE SAID TELL ME HOW TO DO IT AND I CAN DO IT FOR YOU SO HE HAD TO DIRECT HER HOW TO FILL OUT THE AMOUNT AND THINGS LIKE THAT. OBVIOUSLY SHE DID NOT HAVE A CHECKING ACCOUNT. SO, YES, WE HAVE THE NIECE FILLING OUT THE CHECK.

CHIEF JUSTICE: WERE THERE ANY FINGERPRINTS RECOVERED FROM THE CHECK?

THERE WERE SETS OF FINGERPRINTS. THEY WERE NOT MATCHED TO RUTHERFORD AND THEY WEREN'T MATCHED TO ANYONE, BUT THERE WERE FINGERPRINTS ON THE CHECK BUT YOU WOULD EXPECT JUST FROM THE STATE'S CASE FOR THERE TO BE FINGERPRINTS ON THE CHECK BOTH THE NIECE AND MARY HEATON'S FINGERPRINTS WE WOULD EXPECT TO BE ON THE CHECK MAYBE AS WELL AS THE BANK TELLER'S.

CHIEF JUSTICE: IN YOUR REMAINING TIME JUST ADDRESS THE BRADY CLAIM. I GUESS THE BRADY CLAIM IS THE FACT THAT AT LEAST MARY HEATON IS SAYING I TOLD LAW ENFORCEMENT THAT I WAS PRESENT AT THE SCENE.

AND SAW RUTHERFORD STRIKE THE FATAL BLOW. START OUT WITH THAT AN EXCULPATORY. WE NOW HAVE AN EYEWITNESS TO THE CRIME IF YOU TAKE THAT SECOND AFFIDAVIT AS ALTHOUGH AS TRUE IN THE SENSE BUT REMEMBER WE ONCE AGAIN ARE -- THE BRADY AFFIDAVIT CONFLICTS WITH THE NEWLY DISCOVERED EVIDENCE.

CHIEF JUSTICE: WHAT YOU ARE REALLY SAYING IF THE LAW ENFORCEMENT KNEW THAT, THEY WOULD HAVE PUT THAT ON AS PART OF THEIR EVIDENCE?

IT IS PRETTY HARD TO BELIEVE THAT THE STATE WOULD HAVE AN EYEWITNESS AND NOT -- BUT THE SECOND PRONG, THE THIRD PRONG OF BRADY IS THERE IS NO PREJUDICE, AND BECAUSE WE HAVE FOUR INDEPENDENT WITNESSES, REMEMBER HOW THESE WITNESSES --.

CHIEF JUSTICE: THERE IS NO EVIDENCE THAT ACTUALLY SOMETHING LIKE THAT WAS IN THE POSSESSION OF LAW ENFORCEMENT.

THERE ARE NO PUBLIC RECORDS, THERE IS NO PUBLIC RECORDS, NONE OF OUR PUBLIC RECORDS

SHOW THAT THERE WAS ANY STATEMENT LIKE THIS.

SO ALL OF THE PUBLIC RECORDS WERE, IN FACT, DISCLOSED TO THE DEFENSE?

RIGHT, YES, YOUR HONOR. SO THIS IS NOT EXCULPATORY. IT IS NOT SIGNIFICANT IMPEACHMENT. IT IS NOT -- WE DON'T HAVE IT, AND THEN LAST THERE IS NO PREJUDICE, BECAUSE THE BRADY IS SIGNIFICANTLY UNDERMINED THE PREJUDICE PRONG OF BRADY IS THAT YOUR CONFIDENCE IN THE OUTCOME WOULD BE SIGNIFICANTLY UNDERMINED. WE HAVE FOUR WITNESSES HERE THAT RUTHERFORD TOLD THREE OF THEM HOW DETAILS ABOUT HOW HE WAS GOING TO KILL THIS WOMAN BEFORE, AND THEN HE FINDS ONE OF OUR WITNESSES CALLED UP THE SHERIFF BECAUSE HE HAD HEARD OR READ THE NEWSPAPER AND THE DETAILS MATCHED WHAT HE HAD SAID SO MUCH. SO THESE AREN'T JUST I'M GOING TO KILL SOMEBODY. A LOT OF THIS, I'M GOING TO MAKE IT LOOK LIKE AN ACCIDENT, AND PUT HER IN THE BATHTUB AND SHE IS, IN FACT, FOUND IN THE BATHTUB.

CHIEF JUSTICE: BUT DID THE PRESS REPORT SHE WAS FOUND IN THE BATHTUB BEFORE THE PERSON SAID THAT'S WHAT AD RUTHERFORD SAID TO THEM?

IN THE TRIAL RECORD IT JUST SAYS THAT I DON'T THINK IT IS THAT DETAILED. THEY DON'T SAY WHAT THE PRESS -- WHAT THE NEWSPAPER ARTICLE SAID.

CHIEF JUSTICE: IS THERE ANY CONNECTION BETWEEN THESE SEVERAL WITNESSES THAT ENCULPATE MR.^RUTHERFORD? DO THEY KNOW EACH ONE?

SOME OF THEM DO. THEY ARE FRIENDS. ONE OF THEM IS HIS UNCLE.

CHIEF JUSTICE: RUTHERFORD'S UNCLE? DID YOU SAY ONE OF THEM IS RUTHERFORD'S UNCLE?

ONE OF THEM IS RUTHERFORD'S UNCLE. MR.^COOK IS RUTHERFORD'S UNCLE. MOST OF THEM WERE FRIENDS, COWORKERS.

CHIEF JUSTICE: HOW WAS HE IMPEACHED?

MOST OF THESE PEOPLE WERE NOT IMPEACHED. THEY DIDN'T HAVE PRIOR CONVICTIONS. THEY WERE ELECTRICIANS THAT WORKED WITH RUTHERFORD. HE WAS A CARPENTER. MOST OF THESE PEOPLE WERE NOT IMPEACHED AND I WOULD SAY ADDAWAY WAS NOT IMPEACHED, EITHER, BECAUSE HE GAVE THESE STATEMENTS BEFORE HE WAS ARRESTED FOR THE MARIJUANA BUT MOST OF THEM WERE ASKED DO YOU HAVE PRIOR FELONY CONVICTIONS AND THEY ANSWER, NO.

DO YOU KNOW WHAT MR.^GILKERSON WAS CONVICTED FOR?

NO, YOUR HONOR, BUT I COULD CERTAINLY SUPPLEMENT WITH THAT IF YOU WOULD LIKE.

CHIEF JUSTICE: WITH OUR HELP YOU HAVE USED UP YOUR TIME.

THANK YOU.

QUICKLY, IN REFERENCE TO THE NO PUBLIC RECORDS, REGARDING MARY HEATON'S STATEMENTS, OR NOT STATEMENTS THERE IS ALSO NO PUBLIC RECORDS REGARDING MR.^COOK OR MR.^PITTMAN. THAT WAS THE DISCOVERY VIOLATION THAT OCCURRED AT THE FIRST TRIAL. SUPPOSEDLY THEY REPORTED THAT MR.^RUTHERFORD HAD MADE INCRIMINATING STATEMENTS AND THERE IS ABSOLUTELY NO RECORD OF THAT, AND THEY ARE CALLED AS WITNESSES AND THE DEFENSE ATTORNEY IS LIKE WHERE DID THIS COME FROM AND THE PROSECUTOR SAYS, WELL, I DIDN'T EVEN KNOW ABOUT IT UNTIL YESTERDAY EVEN THOUGH HE HAD LISTED HIM AS A WITNESS.

CHIEF JUSTICE: WHY WOULD THE STATE WITHHOLD IF A WITNESS SAYS I WAS PRESENT AT THE SCENE AND I SAW MR.^RUTHERFORD STRIKE THE FATAL BLOW?

IF SHE GAVE DIFFERENT STORIES AT DIFFERENT TIMES, HER FINAL STORY WAS, NO, I WASN'T THERE.

CHIEF JUSTICE: THEN WHY ISN'T THAT A GILIO VIOLATION?

AT THIS TIME WE'RE TRYING TO FIND OUT THE INFORMATION. ALL WE HAVE IS MARY HEATON MAKING THAT CLAIM AND THAT IS NOT WHAT HER TESTIMONY WAS AT TRIAL. SHE SPECIFICALLY INDICATED THAT SHE DIDN'T BECOME INVOLVED UNTIL 11:30 WHEN MR.^RUTHERFORD SHOWED UP AT HER HOUSE. THAT WAS HER TESTIMONY SO THIS IS IMPEACHMENT OF THAT STATEMENT.

BUT THAT DOESN'T DO ANYTHING TO UNDERMINE RUTHERFORD'S GUILT. IT JUST INCREASES HERS.

THE FACT THAT SHE HAS LIED, IMPEACHES HER AND SUPPORTS THE NOTION SHE IS THE MURDERER. SHE IS THE ONE THAT WROTE THE CHECK ON THE WOMAN'S ACCOUNT. IF SHE IS LYING ABOUT RUTHERFORD, WHY ISN'T SHE THEN LYING ABOUT HIS INVOLVEMENT TOTALLY?

THEN WHY ISN'T SHE LYING ABOUT HER GREATER INVOLVEMENT NOW?

EXACTLY. WE DON'T KNOW. FOR EXAMPLE, THE MENTAL HEALTH RECORDS, THAT'S OUR POINT. SHE HAS INDICATED THAT IN HER BREAKDOWNS THAT SHE HAS TALKED ABOUT THIS, AND THE FACTS OF THIS CASE TO THE MENTAL HEALTH PROFESSIONALS. THERE HAS NOT BEEN AN IN CAMERA INSPECTION.

WHAT'S THE EXTENT OF THE EVIDENCE ON THAT? YOU SAID BREAKDOWN. YOU ARE SAYING PLURAL SO GIVE US AS BEST YOU CAN REAL QUICKLY.

AT TRIAL, THERE IS AN INDICATION THAT SHE HAD A BREAKDOWN AFTER THE CRIME AND BEFORE HER FIRST TESTIMONY, WHICH IS IN FEBRUARY. AND I HAVE IT IN MY HEAD. I CAN'T PINPOINT WHERE. I THINK MAYBE IT IS FROM WHAT SHE SAID TO MR.^GLANTZ THAT THERE HAD BEEN ADDITIONAL THINGS AFTERWARDS, AND I THINK SHE HAS BEEN TREATED RECENTLY, ALSO, AND THAT'S ALSO WHAT MR.^GILKERSON IS SAYING SHE HAD A REPUTATION FOR BEING CRAZY. SO IT IS MY UNDERSTANDING THAT'S WHY WE ASKED FOR IT, TO OBTAIN THE MENTAL HEALTH RECORDS.

SO THEN GIVEN THE FACT THAT SHE IS ADMITTED BY EVERYONE HERE AND AT TRIAL OR THE WITNESSES THAT SHE IS MENTALLY UNSTABLE, AND THAT SHE ADMITTED AT TRIAL AT THE TIME OF THE CRIME ON AUGUST 22, 1985, SHE HAD TROUBLE DISTINGUISHING FACT FROM FANTASY, HOW DOES ANYTHING THAT SHE SAYS NOW IN AN AFFIDAVIT HAVE A PROBABILITY OF RESULTING IN ACQUITTAL FOR MR.^RUTHERFORD?

BECAUSE SHE IS THE ONE WHO CASHED THE CHECK. SHE CLEARLY, CLEARLY WAS INVOLVED IN THE RHYME CRIME. CLEARLY. SHE IS THE PERSON THAT KNOWS WHAT HAPPENED AND THE FACT THAT SHE IS CRAZY MAY BE AS A RESULT OF HER INVOLVEMENT. SHE IS AT THE HEART OF THE CASE.

HOW IS A JURY GOING TO BELIEVE ANYTHING THAT SHE SAYS AT A NEW TRIAL IF THEY ARE GOING TO HEAR EVIDENCE THAT AT THE TIME OF THE CRIME SHE CANNOT DISTINGUISH FACT FROM FANTASY?

THE TRIAL AND THE CLOSING ARGUMENT SHOWED, THE IMPEACHMENT OF MR.^RUTHERFORD WAS THIS IS A CREDIBILITY BATTLE BETWEEN MR.^RUTHERFORD AND MARY HEATON.

LET'S GO BACK TO THE QUESTION I WAS ASKING, AND THAT IS HOW PROCEDURALLY, HOW DO WE DEAL WITH THIS, BECAUSE WE DO HAVE A RECORD AND WE ALWAYS KNOW DOES THE RECORD CONCLUSIVELY REFUTE, HOW DO WE DEAL WITH THIS FROM A BURDEN, A BURDEN CARRYING BURDEN?

MY POINT IS IN THIS INSTANCE WHERE THERE IS A TRIAL AND WHERE MR.^RUTHERFORD TESTIFIES, THE STATE AND THE CIRCUIT COURT TREATED THE STATE'S EVIDENCE AT THE TRIAL IN THE LIGHT MOST FAVORABLE TO THE STATE. IGNORED ANY IMPEACHMENT. IGNORED MR.^RUTHERFORD'S TESTIMONY AND ONLY VIEWED IT IN LIGHT FAVORABLE TO THE STATE, BUT WE HAVE A TRIAL WHERE THE EVIDENCE IS CONTESTED AND CONTRADICTED AND SO YOU CAN'T JUST TAKE ONE SIDE OF IT AND SAY THAT CONCLUSIVELY REFUTES, BECAUSE THAT GOES TO THE CREDIBILITY DETERMINATION AFTER AN EVIDENTIARY HEARING.

CHIEF JUSTICE: BEFORE YOU SIT DOWN, ARE YOU PREPARED, WERE YOU PREPARED TO HAVE MARY HEATON TESTIFY AT THE EVIDENTIARY HEARING?

SHE IS LISTED IN THE 3.850 AS A WITNESS THAT WE WOULD CALL AT THE EVIDENTIARY HEARING. THE NEW RULE REQUIRES US TO LIST THE WITNESSES, AND SHE IS ONE OF THE WITNESSES LISTED, YES.

CHIEF JUSTICE: WOULD SHE BE THE CRITICAL AT WHICH TIME?

ABSOLUTELY, AND THAT'S ALSO WHY IT WOULD BE IMPORTANT TO HAVE HER MENTAL HEALTH RECORDS, WHATEVER, I MEAN WOULD BE SUBJECT TO AN IN CAMERA INSPECTION I WOULD SUBMIT BUT WHATEVER IS THERE, CERTAINLY IF SHE HAS CONFESSED TO THE MURDER TO THE MENTAL HEALTH EXPERTS THAT WOULD BE IMPORTANT, AND THAT'S WE DON'T KNOW THE ANSWER TO THAT.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL TAKE THE CASE UNDER ADVISEMENT, AND THE COURT WILL BE IN RECESS.

THE MARSHAL: PLEASE RISE.