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George James Trepal v. State of Florida

THE NEXT CASE IS TREPAL VERSUS STATE, TREPAL VERSUS MOORE. JUSTICE QUINCE, JUSTICE WELLS ARE RECUSED ON THIS CASE. ALL RIGHT. YOU MAY PROCEED.

MORNING. MAY IT PLEASE THE COURT. TODD SCHER ON BEHALF OF GEORGE TREPAL. WITH ME AT COUNSEL TABLE IS LEONORE BELLENEU FROM FT. LAUDERDALE. THIS CASE IS CONSOLIDATED ON TWO MOTIONS BELOW FOCUSING 3.850 MOTIONS BELOW. I AM GOING TO FOCUS ON THE CRIME LABORATORY AND THE BRIEFS AND OTHER DOCUMENTS AS TO THE REMAINING ISSUES. THE FBI CRIME LAB ISSUE IN THIS CASE IS SERIOUS, AND IT ARISES AT THIS POINT, BASED REALLY ON TWO VERY SIGNIFICANT DOCUMENTS. ONE IS THE REPORT FROM THE INSPECTOR GENERALS OFFICE FROM THE DEPARTMENT OF JUSTICE, WHICH WAS RELEASED IN 1997, AND THE SECOND EXTRAORDINARY DOCUMENT BEFORE THIS COURT IS JUDGE BENTLEY'S ORDER. IN TERMS OF THE FBI OR THE INSPECTOR GENERAL ERROR, I JUST WANT TO BRIEFLY HIGHLIGHT SOME OF THEIR FINDINGS. OF COURSE, AS THE COURT IS AWARE MR. TREPAL'S CASE ITSELF WAS HIGHLIGHTED IN THE REPORT, AND IN THE --

MR. SCHER, BECAUSE THE TIME IS GOING TO BE LIMITED, AND WE ARE SOMEWHAT FAMILIAR WITH THE FACTS, WHAT I GUESS I WANT TO UNDERSTAND IS, ASSUMING THAT THIS IS, AS EVIDENCE, NOT AVAILABLE, IT SEEMS THAT THE VERY COMPREHENSIVE ORDER OF THE JUDGE RESTS, THE PROBLEM RESTS ON THE SECOND PRONG OF EITHER NEWLY-DISCOVERED EVIDENCE OR INEFFECTIVE ASSISTANCE, WHATEVER YOU KNOW, PRONG YOU ARE GOING TO BE ARGUING FOR, AS TO HOW THIS WOULD HAVE AFFECTED THE GUILT OR THE PENALTY PHASE OR WHETHER IT, YOU KNOW, IF IT IS NEWLY-DISCOVERED EVIDENCE, WHETHER IT MEETS THE JONES TEST, SO IN YOUR RECITATION, IF, THAT IS REALLY MY MAJOR CONCERN.

SURE.

I MEAN, BECAUSE THE JUDGE FOUND FALSE AND MISLEADING TESTIMONY WAS OFFERED.

CORRECT. I MEAN, MY POSITION IS THAT, ASIDE FROM THE ERRONEOUS APPLICATION OF SOME OF THE LEGAL PRINCIPLES THAT CONTROL THIS CASE, MR. TREPAL, I THINK, WOULD HAVE, ONE, BEFORE THE COURT, EXPRESSED HIS CLEAR DISCOMFORT WITH THE RESULT, BUT HE BELIEVED BASED ON HIS READING OF CERTAIN CASES, THAT THAT WAS APPROPRIATE. I THINK THE MAIN ISSUES THAT I WANT TO FOCUS ON, WHICH I THINK ARE THE MOST COMPELLING, ARE THE VIOLATIONS OF GIGLIO VERSUS UNITED STATES AND THE FRYE ISSUES THAT ARE IMPLICATED IN THAT, AS WELL AS BRADY. YOUR HONOR IS CORRECT, IN TERMS OF THE COURT FOUND, THE COURT DID FIND DEFICIENT PERFORMANCE AS TO TRIAL COUNSEL, WITH RESPECT TO THEIR FAILURE TO HIRE AN EXPERT, IN TERMS OF LOOKING AT SOME OF THE TOX LOGICAL ISSUES IN THIS CASE, AND, OF COURSE, THAT FINDING IS DUE DEFERENCE BY THE COURT, IN TERMS OF THE FACTUAL FINDINGS.

LET'S GO TO BRADY FIRST. THAT IS PROBABLY THE EASIEST ONE. WHAT IS THE BRADY VIOLATION?

THE BRADY VIOLATION THAT WE ARE ASSERTING, YOUR HONOR, IS THE NOTES AND THE CHARTS AND THE UNDERLYING DATA FROM ROGER MARKS. AS JUDGE BENTLEY FOUND, THOSE DOCUMENTS ACTUALLY ARE THE EVIDENCE OF THE FALSE TESTIMONY. WHAT HE CONCLUDED, HOWEVER, WAS THAT, UNDER BRADY, THEY DIDN'T BECOME EXCULPATORY UNTIL AFTER MARKS

TESTIFIED FALSELY AT TRIAL.

WELL, THE PROSECUTOR DIDN'T KNOW, EITHER, THAT MARKS'S TESTIMONY WAS BAD AT THE TIME OF THE TRIAL, IS THAT CORRECT?

WELL THAT, IS PART OF THE TEST. I MEAN, UNDER GIGLIO. I MEAN, UNDER BRADY IT DOESN'T MATTER. UNDER GIGLIO, THERE HAS TO BE A SHOWING OF EITHER ACTUAL KNOWLEDGE OR KNEW OR SHOULD HAVE KNOWN, BUT THE OTHER CRITICAL COMPONENT OF THE GIGLIO CLAIM EAR AND, TO A CERTAIN EXTENT THE BRADY CLAIM, IS THAT WE ARE DEAL WAG LAW ENFORCEMENT OFFICER HERE AND SO KNOWLEDGE OF FALSITY UNDER GIGLIO AS WELL AS UNDER BRADY IS IMPUTED, SO THERE IS NO NEED FOR A SHOWING THAT THE PROSECUTOR HAS TO KNOW THAT ROGER MARKS TESTIFIED FALSELY, BECAUSE THE KNOWLEDGE IS IMPUTED TO HIM.

I UNDERSTAND, BUT CAN YOU REALLY USE YOUR THEORY OF IT BEING IMPUTED TO THE STATE, WHERE THE EXPERT LIES TO EVERYBODY?

YES. I MEAN, THAT, I MEAN, THAT IS, BECAUSE THE CONSTITUTIONAL VIOLATION HERE IS THE TAINTED TRIAL. IT IS NOT, YOU KNOW, THE PROSECUTOR WAS BLAMEWORTHY OR MARKS IS BLAMEWORTHY. WE ARE NOT TALKING ABOUT PERSONAL RESPONSIBILITY. WE ARE TALKING ABOUT THE RESULT OF ALL OF THIS ON THE FAIRNESS OF THIS DEATH PENALTY TRIAL. THAT IS WHAT GIGLIO IS CONCERNED WITH. THAT IS WHY GIGLIO DOESN'T REQUIRE ACTUAL KNOWLEDGE ON THE PART OF THE PROSECUTION. SURE, IF IT IS THERE THAT IS FURTHER SUPPORT OF THE GIGLIO VIOLATION, BUT THE COURTS MADE CLEAR THAT THE FOCUS OF GIGLIO AND CERTAINLY BRADY IS THE FAIRNESS OF THE PROCEEDING, AND IN TERMS OF BASICALLY JUDGE BENTLEY, I THINK, WITH THE LAB NOTES AND THE CHART SAID UNDER THE RULES OF DISCOVERY, THOSE WEREN'T DISCOVERABLE. I DON'T THINK THAT IS CORRECT.

IN ONE OF THE PRONGS OF GIGLIO, THAT THE PROSECUTOR KNEW THAT THE TESTIMONY WAS FALSE?

THAT IS ONE OF THE PARTS. I MEAN KNEW OR SHOULD HAVE KNOWN KNOWN. AND UNDER GIGLIO, ALSO, WHEN YOU HAVE A LAW ENFORCEMENT OFFICER HERE, UNDER, THERE IS A NUMBER OF KISSES THAT I CITED IN THE -- OF CASES THAT I CITED IN THE INITIAL BRIEF, AND THAT IS THE STATE'S POSITION THAT THE PROSECUTION CAN'T BE HELD ACCOUNTABLE FOR THAT. THEY CITE ONE CASE FOR THAT PROP POSITION, WHICH IS FROM THE -- FROM THE PROPOSITION, WHICH IS FROM THE U.S. TENTH CIRCUIT.

BUT THE PROSECUTION KNEW THAT THE TESTIMONY WAS FALSE.

KNEW OR SHOULD HAVE KNOWN AND THAT IS THE TEST. IN FACT, GIGLIO IS A CASE INVOLVING IMPUTED KNOWLEDGE, AND SO IT IS NOT, THERE HAS NEVER BEEN A REQUIREMENT, CERTAINLY IN THIS COURT OR IN THIS CIRCUIT, AGAIN, THE ONLY CASE CITED FOR THAT PROPOSITION BY THE STATE IS A TENTH CIRCUIT CASE WHICH, FOR NUMEROUS REASONS THAT I EXPLAIN IN THE REPLY BRIEF, IS NOT EVEN RELEVANT TO THIS PROCEEDING.

YOU ARE SAYING IT IS BECAUSE HE IS A LAW ENFORCEMENT OFFICER. IF WE ARE GOING TO BE SPLITTING HAIRS HERE, DOES IT MATTER THAT HE IS AN FBI? SO HE IS NOT EVEN AN AGENT OF THE STATE.

WELL, THIS WAS A JOINT INVESTIGATION. I MEAN, IT WAS A JOINT STATE AND FEDERAL INVESTIGATION HERE, SO THEY WERE, I MEAN, THE FBI AGENTS WERE JUST AS INVOLVED IN DOING THE SEARCH OF MR. PREPAL'S HOME AND THROUGHOUT THIS PROCESS AS WAS THE LOCAL SHERIFFS OFFICE SO IT DOES EXPAND TO THEM, AND I WOULD CITE TO THE COURT A CASE FROM CALIFORNIA, IN RE BROWN, I BELIEVE, WHICH IS CITED, WHICH ADDRESSED THIS VERY ISSUE,

WHETHER BRADY APPLIES TO LAB NOTES AND TODAY, A UNDERLYING TODAY, A FOR SOMEBODY WHO TESTIFIES AT A TRIAL, AND THEY HELD THAT IT DID, AND I THINK ALSO UNDER THIS COURT'S PRECEDENT IN YOUNG, EVEN IF SOMETHING TECHNICALLY, UNDER THE RULE OF DISCOVERY, IS NOT DISCOVERABLE, BRADY TUFERPS THAT AND I -- BRADY TRUMPS THAT, AND I FAIL TO UNDERSTAND HOW EVIDENCE OF SOMEBODY'S FALSE TESTIMONY CAN'T BE EXCULPATORY UNDER BRADY. IT DOESN'T MAKE A WHOLE LOT OF SENSE TO ME.

HOW ABOUT RELOOKING AT THE JUDGE, HERE, FOUND IN YOUR FAVOR.

CORRECT.

WHEN HE FOUND, WITH REFERENCE TO THE TESTIMONY.

ABSOLUTELY.

BUT WHERE DID THE TRIAL COURT GO WRONG, IN YOUR VIEW? IN OTHER WORDS, NOW, THE TRIAL COURT HAS SAID, BASED ON THE EVIDENCE YOU HAVE PRESENTED, THAT I FIND THAT MARKS'S TESTIMONY WAS FALSE. OKAY. AND NOW, AFTER THAT, REALLY, IN REJECTING ANY RELIEF ON THIS CLAIM, I WILL GENERALIZE OR PARAPHRASE IT, IN A SENSE HE HAS REALLY FOUND THIS NOT TO HAVE BEEN HARMFUL.

CORRECT.

IN THE OVERALL ANALYSIS. NOW, WHERE DID HE GO WRONG IN THAT ANALYSIS? WHAT, IN YOUR VIEW, WOULD HAVE BEEN THE CORRECT ANALYSIS, THEN, IF THAT --

WHERE HE WENT WRONG, AS FAR AS THE GIGLIO CLAIM, WHICH I THINK IS ONE OF THE MOST SIGNIFICANT ONES THAT WE HAVE, IS THAT JUDGE BENTLEY CONCLUDED THAT, IN ORDER TO, THAT THE TEST UNDER GIGLIO, HE WAS GOING TO RELY ON WHAT MARKS ACTUALLY DID TESTIFY TRUTHFULLY TO, WHICH HE NEVER REALLY DISCUSSED, BECAUSE THERE WASN'T A WHOLE LOT THAT HE SAID THAT WAS TRUE, AND THEN THE REST OF THE EVIDENCE, BUT GIGLIO THAT TURNS GIGLIO ON ITS HEAD, BECAUSE ESSENTIALLY WHAT JUDGE BENTLEY DID IS NEVER EVALUATED AT ALL, THE EFFECT THAT THE FALSE TESTIMONY MAY HAVE HAD ON THE JURY.

NOW LET'S FOCUS ON THAT IS THE SECOND PRONG.

CORRECT. WHAT WE HAVE IN TERMS OF THAT, IS JUDGE BENTLEY'S FINDINGS OF FACT. JUDGE BENTLEY FINDS, AS A MATTER OF FACT, THAT MARKS'S TESTING RESULTS OF THE THREE COKE BOTTLE SAMPLES AND THE Q 206 BOTTLE, WHICH WAS A BOTTLE FOUND IN THE GARAGE, WERE THE ONLY DIRECT EVIDENCE OF GUILT QUOTE/UNQUOTE. JUDGE BENTLEY FOUND, IF THE THREE SAMPLES HAD BEEN DIFFERENT A FORM OF THAT WILLIUM DIFFERENT FROM Q -- A FORM OF THALIUM DIFFERENT FROM Q 206, AND HE GOES TO DISCUSS HOW CRITICAL IT WAS TO THE DEFENSE TO BREAK THIS LINKAGE BETWEEN WHAT THE THREE COKE BOTTLES CONTAINED AND WHAT THE BOTTLE FROM THE GARAGE CONTAINED, BECAUSE THAT WAS THE ONLY DIRECT EVIDENCE OF GUILT IN THIS CASE. EVERYTHING ELSE WAS CIRCUMSTANTIAL EVIDENCE INNUENDO INNUENDO. THERE WAS NO DIRECT EVIDENCE, AND IF YOU COULD CALL ANYTHING DIRECT, IT WAS THE SCIENTIFIC TESTIMONY. THE STATE, ALSO, USED THE PLINING AGE --

WHAT IS -- THE LINKAGE --

I THOUGHT IT WAS HE DIDN'T ACTUALLY TEST A THIRD OF THOSE THREE EXAMPLES.

HE LIED AT THE TRIAL ABOUT TESTING THE THIRD.

HOW WOULD THAT MAKE A DIFFERENCE, IF THE JURY KNEW ABOUT TWO OR THREE, I AM TRYING

TO UNDERSTAND --

WELL, BECAUSE I THINK, WELL, FIRST OF ALL, AGAIN, THAT IS NOT THE ONLY PART THAT HE LIED ABOUT. BUT ASSUMING, YOU KNOW, THAT IS WHY I THINK JUDGE BENTLEY IS, GIGLIO ANALYSIS IS FAULTY, BECAUSE HE RELIES ON THE FACT THAT THE JURY MAY HAVE, COULD HAVE RESTED THEIR VERDICT OR WHATEVER, BASED ON WHAT HE COULD HAVE TESTIFIED TO TRUTHFULLY. I THINK IF HE EXPOSES A LIAR, THE JURY COULD WE WILL HAVE SAID IF THIS MAN LIES ABOUT THIS, WE DON'T BELIEVE A WORD HE SAYS, AND SO IT IS AN IMPOSSIBLE BURDEN, UNDER GIGLIO, TO SHOW THAT, WELL, WHAT HE COULD HAVE TESTIFIED TO WAS SUFFICIENT, BECAUSE PART OF GIGLIO IS IMPEACHMENT, AND IF THIS MAN GETS UP THERE AND LIES ABOUT SAYING, TESTING ONE OF THE THREE WHICH WERE ESSENTIALLY THE MURDER WEAPONS, THEY COULD JUST DISCOUNT HIM COMPLETELY, AND SO I THINK THE LYING ABOUT THE THIRD BOTTLE IS OBVIOUSLY IMPORTANT FOR THE FACT THAT HE LIED, BUT, ALSO, IT GOES TO THE CREDIBILITY OF HIS ENTIRE TESTIMONY.

I THOUGHT A PART, THOUGH, OF THE TRIAL COURT'S ANALYSIS WAS SORT OF CONTRARY TO WHAT YOU ARE SAYING NOW, AND THAT IS THAT MARKS'S TESTIMONY DID NOT END UP BEING THAT CRITICAL, WHEN YOU LOOK AT THE OVERALL PICTURE OF THE EVIDENCE THERE. NOW, HELP ME WITH THAT THE.

NO. NO. JUDGE BENTLEY CLEARLY --

HE DIDN'T COME TO A CONCLUSION HERE, THAT THERE WAS MUCH MORE EVIDENCE THAT WAS CRITICAL TO THE STATE'S CASE AND THE PROOF OF THE CONNECTION HERE THAN MARKS'S, AND THAT THERE FOR MARKS'S TESTIMONY IN THE OVERALL SCHEME OF THINGS, ENDED UP NOT BEING THAT CRITICAL?

NOT AS TO THE CONNECTION BETWEEN THE COKE BOTTLES AND THE BOTTLE FOUND IN THE GARAGE. JUDGE BENTLEY, HIS GIGLIO AND HIS BRADY ANALYSIS WAS THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION. THAT IS NOT THE TEST UNDER BRADY OR GIGLIO. HE NEVER SAID THAT THERE WAS, BESIDES MARKS, THERE WAS ANY OTHER EVIDENCE TO CONNECTOR EXPLAIN WHAT THE ACTUAL CONTENTS OF THE THREE COKE BOTTLES WERE VIS-A-VIS THE LINKAGE TO THE BOTTLE FOUND IN THE GARAGE. MARKS WAS THE ONLY ONE THAT EVER TESTIFIED TO WHAT SALT OF THALIUM THE COKE BOTTLES HAD AND WHAT SALT OF THALIUM THE BOTTLE IN THE GARAGE HAD.

THE BOTTLE WAS FOUND IN HIS HOUSE AND FOUND IN THE TWO COKE BOTTLES THAT WERE TESTED, THALIUM WAS FOUND. AND THALIUM IS WHAT KILLED HER.

CORRECT BUT THAT IS NOT WHAT THE STATE'S POSITION WAS AT THE TRIAL, AND THE PROBLEM WITH THAT, WELL, THERE ARE SEVERAL PROBLEMS WITH THAT THEORY. ONE IS THAT, AND THIS IS WHY IS KIND OF WHY THE SALT OF THE THALIUM IS VERY SIGNIFICANT SIGNIFICANT HERE, BECAUSE THERE ARE SEVERAL SALTS OF THALIUM HERE. ONE IS RAT POISON. IF SOMEBODY SAW IT AS GREEN SCHROPP, NOBODY WOULD DRINK IT. -- GREEN SLOP, NOBODY WOULD DRINK IT. THE STATE KNEW IT WAS THALIUM TWO AND-A-HALF YEARS BEFORE THEY ARRESTED MR. TREP HE WILL. THEY -- MR. TREPAL. IT WASN'T UNTIL THE LINKAGE WAS MADE BETWEEN THE FORM OF THALIUM IN THE COKE BOTTLE AND THE FORM OF THALIUM IN THE Q 206 BOTTLE THAT LINKED HIM IN THEORY. IT OPENED UP A WHOLE OTHER CLASS OF INDIVIDUALS, INCLUDING THE VICTIM'S HUSBAND, HAD WHO COULD HAVE BEEN THE PERPETRATOR HERE -- WHO COULD HAVE BEEN THE PERPETRATOR HERE. ONE OF THE THINGS THAT WAS LOCATED WAS THALIUM IN THE GARAGE OF PICAR'S HOME. THE STATE'S THEORY WAS THALIUM IS NATURALLY OCCURRING. THE DEFENSE DID NOT PUT ON ANY EXPERT TESTIMONY TO CONSIDER THAT, WHICH IS ANOTHER ISSUE, BUT THE PROBLEM WITH THAT IS OPENING UP THE THEORY OF THEIR CASE TO THALIUM IS THALIUM CLEARLY INCLUDES THAT THALIUM IN THE VICTIM'S HOUSE, SO THEY WANTED TO NARROW BY

VERY TIGHTLY MR. TREPAL, AND WITHOUT THAT LINKAGE BETWEEN THE TWO, AND BENTLEY FOUND THAT AS A MATTER OF FACT. THAT IS SOMETHING DUE DEFERENCE BY THIS COURT THAT THAT WAS THE ONLY EVIDENCE OF GUILT.

AM I CORRECT THAT THALIUM IS NOT A POISONOUSLY COME BY, THAT IT IS SO POISONOUS THAT IT HAS BEEN OFF THE MARKET FOR YEARS AND YEARS AND YEARS.

CORRECT. CERTAIN KINDS, BUT --

AND SO JUST ANYBODY COULDN'T HAVE IT.

CORRECT. BUT CERTAIN KINDS OF THALIUM WERE COMMON. AND THE STATE CONCEDED THAT. AND SO THAT IS WHY, THAT IS PART OF, THERE IS SO MUCH IN THE CASE, IT IS DIFFICULT TO GET IT ALL TO THE COURT IN SUCH A SHORT PERIOD OF TIME. I THINK I DID THE BEST I COULD IN THE BRIEFS, TO EXPLAIN THE SIGNIFICANCE OF THIS. AGAIN, I THINK JUST MERE FACT THAT TWO AND-A-HALF YEARS GO BY, A YOU WILL THIS EVIDENCE THAT THEY SAY EXISTS, THE STAMPS AND VOODOO AND THE AGO THAT CHRISTI BOOKS -- AND THE AGATHA CHRISTI BOOKS, THEY ALL THEE THAT FOR TWO AND-A-HALF YEARS. -- THEY ALL NEW THAT FOR TWO AND-A-HALF YEARS. NOT UNTIL THIS CAME UP DID THEY LINK HIM. THAT WAS THE REASON THEY WERE ABLE TO LINK HIM TO THE CRIME AND ALSO THE REASON WHY THEY WERE ABLE TO GET INTO THE ACTIVITIES OF THE EARLY '70s IN NORTH CAROLINA, AND I WILL RESERVE THE REST OF MY TIME FOR REBUTTAL.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM CAROL DITTMAR FROM THE STATE ATTORNEY GENERAL'S OFFICE, REPRESENTING MICHAEL MORAN THE STATE OF FLORIDA, THE APPELLEE. THALIUM, YOU ARE CORRECT ON THAT IT IS SUCH A RARE, UNCOMMON SUBSTANCE, AN ELEMENT THAT IS NOT GOING TO BE AROUND, BECAUSE IT IS HEAVILY REGULATED, AND IT IS THE THALIUM AND NOT THE THALIUM NITRATE THAT IS HEAVILY INCRIMINATING. TO BE ABLE TO TAKE THE NEXT STEP AND ADD NITRATE TO THAT CERTAINLY STRENGTHENED THE TESTIMONY, BUT IN FACT YOU COULD HAVE CLEAR EVIDENCE OF GUILT HERE, WITHOUT HAVING ANY TESTIMONY ABOUT NITRATE OR WHAT TYPE OF ION WAS ASSOCIATED WITH THE THALIUM, BECAUSE OF THE RARITY OF THALIUM.

AGAIN, FOLLOWING UP AND TRYING TO UNDERSTAND, WE ARE TRYING TO FIGURE OUT WHAT THE SIGNIFICANCE OF MARKS'S TESTIMONY WAS BACK WHEN THE CASE WAS TRIED AND HOW HEAVILY THE STATE RELIED ON IT, SO THEREFORE HOW, WHETHER WE SHOULD BE CONCERNED ABOUT WHETHER THIS RESULT WAS REACHED WITH THE USE OF FALSE TESTIMONY. WHAT, THE LINKAGE ISSUE ABOUT WHAT WAS IT THAT MARKS TESTIFIED TO AT TRIAL, KEFERNING CONCERNING THE Q -- CONCERNING THE Q 206 SAMPLE, WHICH AS I UNDERSTAND WAS WHAT WAS FOUND IN TREPAL'S GARAGE.

CORRECT.

AND ITS SIMILARITY OR IDENTICAL CONTENT TO THE COKE BOTTLES AT THE VICTIM'S HOUSE, AND WHAT WAS ABOUT THAT THAT WAS NOT TRUE, AND WHY DOESN'T THAT MAKE A DIFFERENCE.

WELL, THE, WHAT THE TRIAL JUDGE FOUND, WITH REGARD TO THAT WAS THAT THE, NOT SO MUCH THE RESULT THAT MARKS REACHED ABOUT THALIUM NITRATE BEING IN THE TAINTED COCA-COLA BOTTLES, BUT IT WAS THE CERTAINTY WITH WHICH MARKS STATED HIS CONCLUSION THAT JUDGE BENTLEY TOOK ISSUE.

BUT YOU AGREE THAT WAS AN IMPORTANT LINK FOR THE STATE TO BE ABLE TO ESTABLISH TO THAT JURY. IN OTHER WORDS THAT WOULD IMPRESS ME, CERTAINLY, AS A JUROR, THAT THE SAME EXACT CHEMICAL CONTENT OF THE THALIUM, WHETHER IT IS RARE OR EXCEEDINGLY

RARE, BUT THE SUBSET OF WHAT IT WAS WAS IDENTICAL IN THE TWO, YOU KNOW, IN MR. TREPAL'S GARAGE. THAT IS SORT OF LIKE, WOW, THAT IS AS IF FINDING BLOOD EVIDENCE IN THE TWO PLACES, SO I THOUGHT THAT THAT IS THE TYPE, THAT THAT WAS WHERE MARKS HAD TESTIFIED FALSELY, AND THAT THAT CERTAINLY COULD HAVE, WOULD HAVE BEEN VERY SIGNIFICANT IMPEACHMENT FOR THIS JURY TO HEAR, THAT THAT LINK WAS REALLY NOT QUITE AS STRONG AS MARKS HAD MADE IT OUT TO BE.

THAT WAS THE LINK, THE BROWN BOTTLE, THE Q 206 THAT WAS FOUND IN HIS GARAGE, WAS LINKED TO THE TAINTED COKE BOTTLES, BY VIRTUE OF THE PRESENCE OF THE THALIUM AND THE PRESENCE OF THE NITRATE ION. AT THE TIME OF TRIAL, MARKS STATED THAT, WHEN HE GOT THE BOTTLE, THIS BROWN BOTTLE Q 206, HE FIRST DETERMINED THAT, PRIOR TESTING HAD REVEALED THAT IT WAS THALIUM, AND HE CONFIRMED THAT, AND CONFIRMED THAT IT WAS THALIUM NITRATE, THAT DONALD HAVOCOST WAS ANOTHER FBI EXAMINER WHO ALSO CONDUCTED INDEPENDENT TESTS ON Q 206 AND FOUND IT TO BE THALIUM NITRATE, AND AS FAR AS JUDGE BENTLEY, THERE WAS NO QUESTION THAT THAT WAS FOUND IN THE BROWN BOTTLE WAS THALIUM NITRATE.

HE WAS UNDER THE IMPRESSION THAT IT WAS MORE THE NATURE OF CONSISTENT WITH, RATHER THAN, AS I READ IN THE INFORMATION. AM I CORRECT ON THAT? COULDN'T TESTIFY, IF YOU GO BACK TO WHAT THE ACTUAL TESTING WOULD SHOW, IT WOULD JUST SHOW A CONSISTENCY. IT WOULD NOT SHOW THIS IDENTICAL MATCH. THAT IS THE WAY I READ IT. IS THAT --

I THINK, WITH THE Q 206, THAT IS THE FINDING, THAT THAT IS THALIUM ONE NITRATE AND NOT JUST CONSISTENT WITH, AND WHAT DR. WHITE TESTIFIED AT TRIAL, HE FELT LIKE ON THE Q 206, IT IS CONSISTENT WITH, AND YOU NEED ADDITIONAL TESTS, AND HE ALSO ADMITTED THAT HE HAD NOT REVIEWED THE TESTS BY HAVACOST. AND THAT FINDING WITH THE Q 206 BOTTLE, NOW, IT WAS FINDING THAT BOTTLE THAT LED TO MR. TREPAL'S ARREST, SO THE IDEA THAT THE STATE HAS CHANGED ITS POSITION BECAUSE JUST SAYING THALIUM IS THALIUM ISN'T ENOUGH NOW, BECAUSE THEY KNEW THE VICTIMS WERE POISONED WITH THALIUM FOR TWO AND-A-HALF YEARS, SURE, THEY KNEW THAT, BUT THEY DIDN'T HAVE THE BROWN BOTTLE. THAT IS WHAT TRIGGERED HIS ARREST WAS FINDING THALIUM IN THE GARAGE. NOT FINDING THALIUM NITRATE, BUT WHEN THEY TESTED THEY LEARNED IT WAS THALIUM NITRATE. ONE OF THE IMPORTANT TEST MOANS, GETTING BACK TO THE LINK, THOUGH IS I THINK IF YOU LOOK AT THE TRIAL TESTIMONY FROM MARKS AND OTHER FBI EXPERTS, MARKS SAID WHAT HE WAS LOOKING FOR IN THAT BROWN BOTTLE WAS SOMETHING IN ADDITION TO JUST THALIUM NITRATE. HE HOPED TO FIND SOME STRANGE CHEMICAL OR SOMETHING UNIQUE THAT HE COULD, ALSO, TIE INTO THE COKE BOTTLES, TO BE ABLE TO TELL THE JURY THAT NOT ONLY ARE THEY BOTH THALIUM NITRATE, BUT I CAN TELL YOU IT IS THE SAME THALIUM NITRATE THAT CAME OUT OF THAT BOTTLE, AND HE WAS NOT ABLE TO DO THAT.

WHAT WE HAD WAS A JURY WHO HEARD, REALLY, TESTIMONY FROM MARKS AT THE ORIGINAL TRIAL, THAT WAS VIRTUALLY UNIMPEACHED, AND IT WAS UNIMPEACHED, BECAUSE THE DEFENSE ATTORNEY, WHETHER INCOMPETENT OR NOT, ASSUME YOU HAVE AN FBI LAB PERSON TESTIFYING, CHEMIST, THIS IS WHAT, AM I GOING TO START CROSS-EXAMINING THESE RESULTS OF THAT. THE GUY SAYS THERE IS NO NITRATE IN COKE. NOW, THERE IS, THAT WASN'T, THAT WAS FALSE. THAT THE CERTAINTY WITH WHICH HE TESTIFIED TO IT, IT SORT OF, AND SO NONE OF THAT WAS EVER TESTED BEFORE THIS JURY, AND I GUESS I AM SORT OF HAVING TROUBLE UNDERSTANDING WHY THAT SHOULDN'T UNDERMINE OUR CONFIDENCE IN THE RESULT. I GUESS IF WE LOOK AT IT UNDER BRADY OR EVEN THE LESSER STANDARD, UNDER GIGLIO, AS TO WHETHER THIS WAS FALSE TESTIMONY THAT A LAW ENFORCEMENT OFFICER USED BY THE STATE OF FLORIDA, TESTIFIED TO IN A COURT OF LAW, AND A JURY, THEN, IN A 9-TO-3, FINDS, YOU KNOW, THAT THIS MAN IS GOING TO RECEIVE THE DEATH PENALTY, AND YOU KNOW, HOW DO WE IN GOOD CONSCIENCE, NOT FIND SOME DUE PROCESS VIOLATIONS IN WHAT OCCURRED HERE?

LET ME CORRECT A COUPLE OF YOUR STATEMENTS. FIRST OF ALL RESPECT DEFENSE COUNSEL DID NOT ASSUME THAT THIS WAS CORRECT BECAUSE THE FBI LAB SAID SO. THE DEFENSE COUNSEL SECURED ALL OF THESE SAMPLES, TOOK THEM TO THEIR OWN EXPERT AT GEORGIA TECH HAD THEIR OWN EXPERT TELL THEM, YEAH, IT IS THALIUM NITRATE. THAT IS WHAT IS IN HERE. SO THEY DID BACK UP AND TRY AND CONFIRM THAT, AND THEIR OWN EXPERT CONFIRMED WHAT THE FBI HAD FOUND IN ITS TESTING THAT, IT IS THALIUM NITRATE, WHICH I THINK NOT ONLY GOES TO DEFENSE COUNSEL BEING REASONABLE AND INVESTIGATING AND BEING SATISFIED WITH THIS BUT GOES TO THE REASONABLENESS OF THE PROSECUTOR, WHEN YOU TALK ABOUT ARE WE GOING TO IMPUTE THIS KNOWLEDGE OF THE FALSITY, TO THE EXTENT IT IS BEING CALLED FALSE TESTIMONY TO THE PROSECUTOR. THE STANDARD IS WHAT SHOULD HE HAVE KNOWN OR REASONABLY KNOWN ABOUT THIS EVIDENCE, AND HE NOT ONLY HAD HIS OWN EXPERTS TELLING HIM THIS WAS THALIUM NITRATE. HE COULD, I THINK, ASSUME FROM THE FACT THAT THE DEFENSE HAD HAD THE STUFF TESTED AND THEN NOT LISTED THEIR EXPERT AS A WITNESS AS TRIAL, THAT THE EXPERT HAD PROBABLY AGREED WITH WHAT THE FBI EXPERT HAD FOUND, AND TO BE, THE JURY, AT THE TIME WAS TOLD BY MARKS, AS WELL AS SOME OF THE OTHER EXPERTS AT TRIAL, THAT THERE IS NO WAY TO SAY THAT IT WAS THALIUM NITRATE IN THE COKE BOTTLES, THAT THAT WAS NOT DEFINITELY BEING TIED TO THE 206, AND SO THAT, THAT IS SOMETHING THAT THE JURY WAS AWARE OF, AND, AGAIN, THE QUESTION IS, COULD IT, WHAT MARKS COULD HAVE SAID, AND WHAT HE COULD HAVE SAID WAS HIS TESTS INDICATED THAT THE PRESENCE OF NITRATE WAS CONSISTENT WITH HIS TEST RESULTS. THE OTHER, I THINK HE MADE A STATEMENT ABOUT THERE IS NO NITRATE IN THE COKE, AND THAT IS FALSE. THAT, AGAIN, IS SOMETHING THAT WAS, IS FACTUAL DISPUTE BELOW, AND --

THAT IS WHERE, AGAIN, NOW, I AM USING WHAT JUDGE BENTLEY FOUND, WHICH IS HIS FACTUAL FINDINGS, THAT MARKS MISLED THE JURY, WHEN HE TESTIFIED THAT NIGHT RATE WAS NOT PRESENT IN THE UNADULT RATED COKE. I MEAN, WE DON'T HAVE MARKS HERE TO LOOK AT, AND WE DON'T HAVE THE OTHER WITNESSES, BUT HE FOUND MARKS TOTALLY INCREDIBLE, AND WE HAVE GOT TO DEFER TO THIS JUDGE'S FACTUAL FINDINGS ON THOSE.

I THINK YOU HAVE TO DEFER TO HIS FACTUAL FINDINGS BUT NOT THE CONCLUSIONS THAT HE DRAWS, AND THE TESTIMONY, AND THE TESTIMONY THAT HE CITES IN DETERMINING THE CONCLUSIONS ABOUT WHETHER NITRATE WAS PRESENT IN UNADULT RATED COKE, WAS THE FACT THAT, WHEN THE REGULAR COKES, WHICH WE KNEW WAS NOT TAINTED, THE KNOWN COKE WAS RUN THROUGH THE IC TESTS, THERE WERE RETENTION PEEKS THAT INDICATED -- RETENTION PEAKS THAT INDICATED PEAKS SIMILAR TO RETENTION PEAKS AND MARKS TESTIFIED AT THE POSTCONVICTION HEARING, THAT ALTHOUGH THAT IS AN INDICATION OF THE POSSIBILITY OF NITRATE, THE FACT THAT HE TOOK THE SAME COKE AND RAN THE CHEMICAL TESTS, THE DP TEST, WHICH IS A SPOT TEST TO CHECK, AND THAT EXCLUDED THE POSSIBILITY OF NITRATE BEING IN THAT COKE, SO HE COULD NOT MAKE THE CONCLUSION THAT THERE WAS NITRATE IN THE COKE, DESPITE HAVING THE INDICATION FROM RUNNING ONE TEST, BECAUSE, AS HE TESTIFIED AT TRIAL, YOU HAVE ONE TEST OR YOU HAVE THE SECOND TEST AND NEITHER ONE OF THEM ARE DEFINITIVE, BUT IF YOU PUT THEM TOGETHER, THALIUM IS THE ONLY, THALIUM NITRATE IS THE ONLY SUBSTANCE THAT WILL GIVE YOU A POSITIVE ON BOTH TESTS. SO IT IS --

LET ME ASK, IS THIS A CORRECT REPRESENTATION, THAT MARKS ACTUALLY MADE ONE MISREPRESENTATION, AND THAT WAS THAT HE EXAMINED ALL THREE COKE BOTTLES, WHEN HE ONLY EXAMINED TWO. OTHER THAN THAT, THE PROBLEM WITH MARKS IS THAT HIS WORK WAS SLOPPY. IS THAT --

THAT'S TRUE. THERE WAS ONE OTHER MISREPRESENTATION, ONE OTHER INACCURACY IN HIS TESTIMONY, THAT JUDGE BENTLEY FOUND, AND MARKS ADMITTED, AT THE POSTCONVICTION HEARING, AND THAT WAS WITH REGARD TO THE TRIAL TESTIMONY, AS HE DISCUSSED THE FIRST TEST, THE DP TEST, AND HE SAYS HE GOT THE BLUE COLOR, WHICH IS INDICATIVE OF 9 NITRATE AND HE EXCLUDE -- INDICATIVE OF THE NITRATE, AND HE EXCLUDE THE THE POSSIBILITY OF

SULFUR FLUORIDE, AND THE PROSECUTOR ASKED HIM DID YOU CONCLUDE FROM THAT TEST THAT THE NITRATE WAS FOUND IN THAT COKE, AND HE ANSWERED YES, AND THEN HE GOES ON TO TALK ABOUT THE IC TEST THAT HE RAN AND THAT CONFIRMED IT. IN THE POSTCONVICTION HEARING, HE CLARIFIED THAT HIS CONCLUSION ABOUT IT. HALIUM NITRATE BEING ADDED TO THE COKE WAS SIMPLY NOT BASED ON THAT DP TEST, WHICH IF YOU LITERALLY READ HIS TESTIMONY, HE IS SAYING AT ONE POINT, YES, IT IS BASED ON THAT TEST, AND HE SAID THAT IS NOT TRUE. IT WASN'T JUST ONE TEST T WAS THE COMBINATION OF BOTH TESTS, SO THAT IS THE SECOND, IN ADDITION TO NOT TESTING THE THIRD, THE Q-3 BOTTLE, WHICH HE ALSO ADMITTED CANDIDLY AT THE POSTCONVICTION HEARING THAT, HE HAD NOT TESTED THE Q-3 BOTTLE. I THINK THAT THAT, IN ITSELF, IS INSIGNIFICANT, BECAUSE I THINK THIS THAT WILLIUM -- THIS THALIUM NITRATE IS LIKE HAVING A FINGERPRINT. IF YOU HAVE ONE FINGERPRINT AT THE VENN, YOU -- FINGERPRINT AT THE SCENE, YOU DON'T NEED FIVE, AND I THINK THIS WAS ONE NOT FIVE. MARKS TESTIFIED AT THE HEARING THAT HE TESTED TWO AND HE WAS COMFORTABLE WITH THE RESULTS AND HE DID NOT FEEL IT WAS NECESSARY TO TEST THIRD BOTTLE. WHAT THE TRIAL JUDGE CONCLUDED OR WHAT JUDGE BENTLEY CONCLUDED BELOW IS THAT CONFIDENCE IN THE OUTCOME OF THIS PROCEEDING HAD NOT BEEN UNDERMINED BY ANY OF THE POSTCONVICTION HEARING, AND THE PRIMARY CRITICISM OF MARKS WAS HIS PAPERWORK, HIS DOCUMENTATION, THE SLOPPY NOTES, THINGS THAT DID NOT MEET UP TO STANDARDS. THE OTHER EXPERTS AT THE POSTCONVICTION HEARING --

CAN I GO BACK TO THAT. THE JUDGE TESTIFIED THAT, IF MARKS HAD TESTIFIED TRUTHFULLY, THE ONLY DIRECT EVIDENCE IN THIS CASE WOULD HAVE BEEN GREATLY WEAKENED. IS THAT, YOU SAY THAT IS HIS CONCLUSION THAT WE HAVE TO GO BACK AND LOOK AT EVERYTHING AGAIN, TO SEE IF WE AGREE THAT, IF MARKS HAD BEEN TESTIFIED TRUTHFULLY OR BEEN SUBJECT TO CROSS-EXAMINE, THE ONLY DIRECT EVIDENCE IN THIS CASE WOULD HAVE BEEN GREATLY WEAKENED. HOW DO WE EVALUATE THAT FINDING?

THAT IS BENTLEY'S FINDING, AND FRANKLY I DON'T UNDERSTAND HOW HE CHARACTERIZES THIS AS DIRECT EVIDENCE, BECAUSE TO ME IT STILL, ALTHOUGH IT IS EXTREMELY INCRIMINATING, IT IS STILL CIRCUMSTANTIAL EVIDENCE, BECAUSE --

WHETHER, I MEAN, THERE IS NO FINGERPRINTS OVER TOE HOUSE.

THAT'S CORRECT.

OF WHAT EVIDENCE. THERE IS NO EYEWITNESSES THAT HE WAS THERE. THIS IS THE MOST -- OVER AT THE HOUSE.

THAT'S CORRECT.

OF WHAT EVIDENCE. THERE WAS NO EYEWITNESSES THAT HE WAS THERE. THIS IS THE MOST --

THAT'S CORRECT.

OF WHAT EVIDENCE. THERE WAS NO EYEWITNESSES THAT HE WAS THERE.

IT WAS NOT JUST TESTIMONY ABOUT THE THALIUM AND THE PRESENCE OF THAT WILLIUM, BUT ALL OTHER TRIAL TESTIMONY, WHICH POINTED FROM SO MUCH OTHER EVIDENCE, THE EVIDENCE OF TREPAL'S GUILT, AND I THINK THE JUDGE WAS CONSIDERING ALL OF THE EVIDENCE AS TO WHETHER OR NOT THERE WAS ANY PROBABILITY THAT THE JURY WAS AFFECTED, AND HE USED THAT CORRECT LEGAL STANDARD WHEN HE APPLIED IT, AND HE DETERMINED THAT, IN LIGHT OF THE DEFENDANTSIES AND WHAT MARKS COULD HAVE -- OF THE DEFICIENCIES AND WHAT MARKS COULD HAVE TESTIFIED TO, HE ALSO NOTES THAT, HAD THESE ITEMS BEEN -- HAD IT BEEN IDENTIFIED PRIOR TO TRIAL, THESE WOULD HAVE BEEN RETESTED, AND OF COURSE THEY ARE SITTING AROUND TODAY AND NO ONE HAS EVER TESTED THEM. SO THE DEFENSE SUGGESTION

THAT IT IS NOT THALIUM NITRATE IN THE THIRD BOTTLE, AND NOBODY COULD EVER COME IN AND SAY, NO, IT IS NOT THALIUM NITRATE.

ISN'T THERE A TRUE FRYE PROBLEM HERE, OR DOES THIS HAVE TO DO WITH THE COMPETENCY OF THE EXPERT, RATHER THAN A FRYE PROBLEM?

IT HAS TO DO WITH THE COMPETENCY OF THE EXPERT, BECAUSE THE SCIENTIFIC TESTING, ITSELF, NOT SUBJECT TO ATTACK. THE EXPERTS FOR THE DEFENSE BELOW DID NOT SAY THIS IS NOT RELIABLE SCIENTIFIC TESTING. THEY WERE, THEIR DEFICIENCY, THEIR CRITICISMS WERE TO PROCEDURES THAT MARKS USED, AND I THINK BURMEISTER IN HIS TESTIMONY AT THE EVIDENTIARY HEARING, SAID, YOU KNOW, IF I WERE DOING IT PERSONALLY, I WOULD HAVE RUN THIS OTHER STANDARD ON THE IC TEST, WHICH WAS ONE OF THE BIG CRITICISMS OF THE WAY MARKS PERFORMED THE IC TEST, BUT HE SAID MY PERSONAL STANDARDS ARE HIGHER THAN WHAT IS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY, AND GENERALLY-ACCEPTED IN THE SCIENTIFIC COMMUNITY, THIS IS FINE WHAT MARKS DID, IT IS JUST THAT MY PERSONAL STANDARDS, I WOULD HAVE DONE ANOTHER, HIGHER TEST, AND I THINK THAT IS THE MOST THAT ANYBODY AT THE POSTCONVICTION HEARING HAD TO SAY ABOUT THE FRYE STANDARD, BECAUSE FOR THE MOST PART, THEY ARE GIVING THEIR OWN OPINIONS, AND WHAT YOU ARE DEALING WITH IS A CASE WHERE YOU SIMPLY HAVE EXPERTS AT POSTCONVICTION DISAGREEING WITH THE TRIAL EXPERTS.

LET'S JUST SAY THERE WAS A NEW TRIAL IN THIS CASE. OBVIOUSLY, I THINK PRETTY OBVIOUSLY THE STATE WOULD NOT USE MR. MARKS, BECAUSE HE CERTAINLY COULD BE SIGNIFICANTLY IMPEACHED WITH WHAT, NOT ONLY WITH, IN THIS, WITH THIS CASE BUT WITH AM NOT BEING A TRUTHFUL PERSON. ARE YOU REPRESENTING, OR IS THERE ANYTHING IN THE EVIDENTIARY HEARING THAT, THE STATE, AFTER REALIZING THAT MARKS WAS, HAD BEEN VIRTUALLY INDICTED BY THIS REPORT THAT WAS ISSUED BY THE UNITED STATES GOVERNMENT, HAD THIS, THESE SAMPLES RETESTED AND CONFIRMED THAT NOT ONLY IS IT CONSISTENT BUT IT IS WHATEVER, IT IS AS STRONG AS TESTIMONY AS MARKS HAD GIVEN, WOULD BE GIVEN AT ANOTHER TRIAL. IS THERE ANYTHING IN THIS RECORD TO HELP US IN THAT REGARD?

THE STATE IS VERY CONFIDENT THAT, IF THIS CASE WERE TO BE RETRIED, THE TESTIMONY ABOUT THE THALIUM NITRATE IN THE COKE BOTTLES WOULD BE STRONGER THAN IT WAS AT THE TIME OF TRIAL.

WHAT I AM ASKING, IS THAT IN THIS RECORD, THAT, YOU SAID THAT THE DEFENDANT DIDN'T RETEST IT TO SHOW US OR THE JUDGE THAT MAYBE THERE WAS NOW A QUESTION AS TO WHAT IT IS. WHAT I AM ASKING, IS THERE ANYTHING IN THIS RECORD THAT SHOWS THAT THE STATE HAS RETESTED IT, AND THAT IT IS WHATEVER MARKS SAID ORIGINALLY WOULD BE EVEN STRONGER THROUGH ANOTHER EXPERT.

THERE ARE ADDITIONAL ANALYSIS THAT HAVE BEEN DONE OF MARKS'S DATA, WHERE OTHER EXPERTS HAVE DETERMINED, NOW, THEY BELIEVE THAT THALIUM, YOU CAN CONFIDENTLY SAY, WITHIN REASONABLE SCIENTIFIC CERTAINTY, THAT THALIUM NITRATE WAS ADDED TO THE COCA-COLA, NOT JUST CONSISTENT WITH. BASED ON THE QUANTIFICATION THEY HAVE DONE OF THE THALIUM AND THE NITRATE.

DOES IT HAVE TO BE BASED ON MARKS'S CALCULATIONS. IN OTHER WORDS IS THIS SOMETHING WHERE THERE IS DESTRUCTIVE TESTING, WHERE THERE AREN'T SAMPLES LEFT TO BE TESTED?

NO. THE SAMPLES ARE THERE AND THERE IS ENOUGH TO BE TESTED. I AM RELUCTANT TO SPEAK FOR THE PROSECUTOR. I ASSUME THAT THE STATE WOULD HAVE IT RETESTED, BECAUSE OBVIOUSLY THE GUILT, IT IS THE STATE'S BURDEN TO PROVE THIS. AT THE POSTCONVICTION HEARING, THE STATE DID NOT SEEK TO HAVE THESE THINGS TESTED BECAUSE IT WAS NOT OUR BURDEN, AND WE HAD EXPERTS, JORDAN SAYING I DON'T REALLY HAVE A PROBLEM WITH WHAT

MARKS DID AND BUTTER MEISTER SAYING -- AND BURMEISTER SAYING IT COULD HAVE BEEN BETTER, AND SO YOU HAVE A LOT OF EXPERTS NOT INDICATING THAT IT NEEDED TO BE RETESTED. I THINK PROBABLY THE STATE, JUST TO AVOID THE QUESTIONS, WOULD GO AHEAD AND HAVE THAT DONE, AND THE QOK IS AVAILABLE, AND THE Q -- AND THE COKE IS AVAILABLE, AND THE Q 206 IS AVAILABLE TO BE RETESTED, IF ANYBODY WANTED TO RETEST IT.

ONE OF THE CATCH PHRASES THAT HAS BEEN USED IN THE CASE LAW, AS COURTS TRY TO CAPTURE THIS SORT OF PREJUDICE ELEMENT OF THESE VARIOUS RULES, INCLUDING THE BRADY RULE, IS THAT THE MISTAKE OR THE WITHHELD EVIDENCE OR WHATEVER THE CATEGORY ENDS UP BEING, ONCE IT IS DISCLOSED THAT IT IS, THAT IT ENDS UP PUTTING THE CASE IN A WHOLE NEW LIGHT. COULD YOU TAKE THAT CATCHPHRASE AND APPLY IT HERE. I ASSUME THAT THE STATE'S POSITION WOULD BE THAT, IF YOU APPLY THAT TEST HERE --

THERE IS NO NEW LIGHT.

-- IN FULL DISCLOSURE, THAT IT DOESN'T, BUT TELL US, IN SHORT AS YOUR LAST COMMENT HERE, WHY IT DOESN'T, BECAUSE YOUR OPPONENT MADE A VERY PASSIONATE ADDRESS HERE THAT THIS WAS THE ONLY DIRECT EVIDENCE, AND THAT THIS UNDERMINED THAT ONLY DIRECT EVIDENCE, AND THEREFORE IT DOES, YOU KNOW, THE LOGICAL CONCLUSION BEING THAT IT DOES CAST THE CASE IN A WHOLE NEW LIGHT.

YOU HAVE JUDGE BENTLEY'S CONCLUSION THAT THIS IS, THAT MARKS COULD HAVE PROPERLY TESTIFIED THAT HIS RESULTS WERE CONSISTENT WITH THE FINDING THAT THE NITRATE HAD BEEN ADDED, AND I THINK IF YOU LOOK AT WHAT ELSE THESE RESULTS COULD HAVE BEEN CONSISTENT WITH, AND FIND THEY REALLY WOULDN'T HAVE BEEN CONSISTENT WITH ANYTHING ELSE, BECAUSE WE KNOW THAT THE SULFATE IS EXCLUDED. WE KNOW THAT THE CHLORIDE IS EX-CLUEDED. IT COMES VERY, VERY CLOSE TO SAYING THAT WILLIUM NITRATE WAS ABSOLUTELY, POSITIVELY ADDED TO THE COKE, AND I THINK THAT IS SUCH A SLIM DIFFERENCE BETWEEN -- THAT TH AMOUNT LIUM NITRATE WAS ABSOLUTELY, POSITIVELY ADDED TO THE COKE, AND I THINK THAT IS SUCH A SLIM DIFFERENCE BETWEEN WHAT WAS SAID AND WHAT THE EVIDENCE IS, SO I WOULD ASK THIS COURT TO AFFIRM THE CONVICTION 30ES THE -- POST RELIEF. THANK YOU.

COUNSEL, CAN YOU MAKE CLEAR THE VERY DIRECT EVIDENCE, TALKING ABOUT WHETHER IT IS DIRECTOR NOT, AND THEN WHETHER OR NOT IT DOES, INDEED, NOW, CAST A BLACK CLOUD OVER THIS CONVICTION AND CAST THE CASE IN A WHOLE NEW LIGHT.

SURE, AND TO QUOTE MY OPPOSING COUNSEL, THALIUM NITRATE IS LIKE A FINGERPRINT IN THIS CASE. SHE CONCEDED. THAT WHAT WE HAVE HERE, AND I WANT TO CLARIFY, IN TERMS OF SOME OF THESE STATEMENTS, BECAUSE THEY MADE THESE SIMILAR MISSTATEMENTS IN THEIR BRIEF. THE SIMILAR POSITION IS THAT JUDGE BENTLEY CONCLUDED THAT ALL MARKS COULD HAVE SAID IS THAT HIS RESULTS WERE CONSISTENT WITH THALIUM NITRATE HAVING BEEN ADDED. THAT IS NOT WHAT HE FOUND. JUDGE BENTLEY FOUND THAT ALL THAT HE COULD HAVE SAID WAS THAT ALL HE COULD HAVE SAID WAS IT WAS CONSISTENT WITH NITRATE ION BEING ADDED. THERE IS A DIFFERENCE BETWEEN THALIUM NITRATE BEING ADDED AND NITRATE ION, BECAUSE NITRATE DOES NOT EXCLUDE OTHER RESULTS. WHERE? THAT WAS THE PROBLEM? MARKS DID ALL OF THIS OTHER TESTING. NONE OF IT CAME UP WITH THALIUM NITRATE. WHAT DID IT COME UP WITH? THALIUM CHLORIDE, ALL DIFFERENT SALTS. THE REASON FOR IT WAS BECAUSE THE STATE'S THEORY AT THE TRIAL WAS THE THA LIMIT I -- THE THALIUM, IT IS TRUE, WHAT WAS ACTUALLY IN Q 206 WAS Poured IN THE COKE BOTTLES, BUT THAT WAS WHAT THEY ARGUED. THAT WAS THE INFERENCE. THEY WANTED THIS JURY TO MAKE THAT CRITICAL LEAP, AND IF YOU LOOK AT PAGE 93 AND 94 OF THE CLOSING ARGUMENT, OF THE RECORD, THAT THALIUM ONE NITRATE, THEY COULD NEVER SHOW IT WAS THALIUM ONE VERSUS THALIUM THREE NITRATE. WHAT THEY ARGUED WAS IT WAS THALIUM ONE NITRATE IN THE Q 206. WE COULDN'T PROVE

THAT, BECAUSE THALIUM ONE NITRATE DOESN'T ALTER THE FORM OR APPEARANCE OF THE COCA-COLA, AND SO THEY INSISTED THAT THE JURY MAKE THAT LEAP THAT WHAT WAS IN THAT GARAGE WAS IN THOSE COKE BOTTLES AND THAT, ACCORDING TO THE STATE WAS THE FINGERPRINT, AND THERE IS NO DOUBT ABOUT THAT THAT WAS THE FINGERPRINT. ALL OF THIS OTHER EVIDENCE, AGAIN, THEY HAD IT ALL, YOU KNOW THALIUM, HERE THIS MORNING, I HEAR THAT THALIUM IS SO RARE. IT WAS IN THE VICTIMS' PROPERTY. THALIUM ONE NITRATE IS WHAT IS RARE, NOT THALIUM, BECAUSE THALIUM IS NATURALLY OCCURRING. THAT IS THE ONLY WAY THEY COULD EXPLAIN AWAY THE THALIUM THAT WAS FOUND ON THE VICTIMS' PROPERTY.

DIDN'T THEY SAY IT WAS TRACE AMOUNTS.

THEY -- YES, AND THAT WAS PART OF THE PROBLEM, AND DR. LINNEY WAS SOMEBODY THAT JUDGE BENTLEY LATER FOUND SOMEONE TO BE HIGHLY CREDIBLE, TESTIFIED THAT THE TYPE OF TEST THAT THEY USED WASN'T THE MOST SOPHISTICATED AND WASN'T THE MOST SENSITIVE, AND IN HIS EXPERT OPINION IT IS VIRTUALLY IMPOSSIBLE FOR HIM TO OPINE THAT IF THERE WAS THALIUM THERE, IT WAS ONLY IN THAT ONE TINY LITTLE AREA, BECAUSE THE STATE'S THEORY IT ISN'T GOING TO APPEAR IN A DRAIN PIPE UNDER A SINK IN JUST ONE AREA. IT IS GOING TO BE MORE PERVASIVE IN THE HOUSE. AND THAT WAS ANOTHER REASON WHY THE FAILURE TO HIRE SOMEBODY ON THE DEFENSE SIDE TO LOOK INTO, A TOXICOLOGIST THE, THEY HAD DR. WILLY, A PATHOLOGIST LOOKING INTO OTHER ISSUES, HE TOLD THEM TO GET A TOXICOLOGIST THE.

WHO WAS THE GEORGIA TECH PERSON?

HE HAD VOLUNTEERS. THE GEORGIA, AND I AM GLAD YOU BROUGHT THAT UP. THE GEORGIA TECH PEOPLE DID NOT DO THE SAME TESTING THAT MARKS DID. GEORGIA TECH, AS MR. CONNOR, TRIAL COUNSEL CONNOR EXPLAINED VERY CLEARLY, I AM NOT A SCIENTIST, SO I DON'T WANT TO SAY EXACTLY WHAT IT WAS, BUT I DO KNOW IT WAS NOT THE SAME TESTING. THEY DID NOT COME TO THOSE RESULTS. THEY HAD ASKED THE GEORGIA TECH PEOPLE ESSENTIALLY, TO SEE IF THEY COULD COME UP WITH ANY CONCLUSION THAT IS WHAT WAS IN, THAT THE ATOMIC WEIGHT OR SOMETHING OF WHAT WAS IN Q 206 COULD BE MATCHED OR NOT TO THE COKE BOTTLES.

DO YOU AGREE THAT THE ISSUE OF NOT TESTING Q 3, REALLY, WOULD JUST GO TO IMPEACHING HE SAID HE TESTED Q 3 AND HE DIDN'T BUT IT DOESN'T REALLY AFFECT WHAT HE FOUND AS TO Q 1 AND 2.

WELL, THE LYING ABOUT TESTING Q 3 IS AN ISOLATED LIE, WHICH I THINK WOULD CERTAINLY CLOUD THE REST OF HIS TESTIMONY, BUT THE OTHER THING THAT I WANT, THERE WAS SOME EVIDENCE ABOUT, YOU KNOW, THIS HASN'T BEEN RETESTED, AND WE STILL KNOW AT THIS POINT THAT THE Q 1 AND 2 BOTTLES HAVE THALIUM ONE NITRATE. THAT IS ABSOLUTELY INCORRECT. JUDGE BENTLEY MADE A FACTUAL FINDING, EXPRESSLY DECLINING TO FIND THAT Q 1 AND 2 CONTAINED THALIUM ONE NITRATE, SO WE DON'T KNOW WHAT WAS IN THOSE COKE BOTTLES, AND THAT WAS PRESENTED TO THE JURY AS THE FINGERPRINT. CONFIDENCE IS CLEARLY UNDERMINED HERE.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.