THE STATE RESPECTFULLY REQUESTS THAT THIS COURT REVERSE THE DECISION OF THE 3RD DISTRICT AND FIND THAT THE WITNESS'S CHANGE IN TESTIMONY DID NOT RISE TO THE DISCOVERY LEVEL AND DID NOT SUPPORT A MOTION FOR A JUDICIAL INQUIRY.

LET ME ASK YOU A QUESTION ON THAT. IS THE STATE'S POSITION, IRRESPECTIVE OF WHETHER THERE SHOULD HAVE BEEN A NEW TRIAL, THAT, WHEN, A MONTH BEFORE THE TRIAL, THE POLICE LEARNED THAT THE WITNESS WENT FROM BEING SOMEBODY WHO SAID THAT, ACCORDING TO THE POLICE REPORT, THAT SHE DID NOT SEE THE SHOOTING, TO AN EYEWITNESS NECESSARY TO THE SHOOTING, AND THEY KNEW A MONTH BEFORE, THAT THEY HAD NO OBLIGATION, UNDER FLORIDA'S DISCOVERY RULES, TO ADVISE THE DEFENDANT OF THAT FACT?

WELL, UNDER THE DISCOVERY RULES, AND WHAT THE PROSECUTOR HAD ARGUED TO THE TRIAL COURT BELOW?

NO. I JUST WANT TO KNOW WHAT IS THE STATE'S POSITION THAT THEY HAVE NO OBLIGATION, WHEN A WITNESS GOES FROM BEING A, JUST A WITNESS WHO HASN'T SEEN THE CRIME TO BEING AN EYEWITNESS NECESSARY TO THE SHOOTING, THAT THEY ARE NOT OBLIGATED, UNDER THE DISCOVERY RULES AND THE PRINCIPLES GOVERNING THOSE RULES, TO ADVISE THE DEFENDANT OF THAT FACT.

OKAY. I HAVE A TWO-PART ANSWER FOR YOU. THE FIRST PART IS THAT, UNDER THIS COURT'S CASE LAW, UNDER BUSH -VS- STATE IN 1984 AND, AGAIN, IN STREET -VS- STATE IN 1994, THIS COURT HELD THAT, WHERE TESTIMONIAL DISCREPANCIES OCCUR, THE TESTIMONY CAN BE LAID SIDE-BY-SIDE FOR THE JURY TO CONSIDER, AND THIS WILL DISCREDIT THE WITNESS AND BE FAVORABLE TO THE STATE -- TO THE DEFENDANT.

SO READING THOSE CASES, WHEN THEY FOUND OUT ABOUT CHANGE IN HIS TESTIMONY, WELL IN ADVANCE AFTER TRIAL, AND SOMETHING HERE, WHICH ACTUALLY SHE PERJURED HERSELF IN A DEPOSITION, THAT THEY HAVE INTERPRETED THOSE CASES AS SAYING WE DON'T NEED TO DISCLOSE THAT TO THE DEFENDANT?

I BELIEVE SO. I THINK THAT THOSE CASES SUPPORT THE TRIAL COURT'S RULING IN THIS INSTANCE.

BUT ARE WE -- SEE, THERE IS A BIGGER PRINCIPLE INVOLVED, AND THAT IS WHAT I WANT TO UNDERSTAND, NOT JUST ABOUT THIS CASE, THAT IF THAT IS WHAT THE STATE IS READING FROM OUR CASES, THAT THEY HAVE NO OBLIGATION TO ADVISE THE DEFENDANT OF THIS, SO THAT IT ESSENTIALLY BECOMES A TRIAL BY AMBUSH.

WELL, I UNDERSTAND THE COURT'S CONCERN. WHAT THE STATE'S POSITION IS THAT THIS IS NOT AN OVERWHELMING PROBLEM AMONGST THE STATE ATTORNEYS ACROSS THE STATE. WE HAVEN'T SEEN THIS OCCUR IN ANY OTHER CASE LAW EXCEPT THIS FOR BUSH AND FOR STREET AND, NOW, IN THIS PARTICULAR CASE. I DON'T THINK THAT IT AN OVERWHELMING PROBLEM THAT THE COURT NEEDS TO MAKE ANY --

BUT HOW DO WE KNOW IT IS NOT AN OVERWHELMING PROBLEM? THAT IS IF IT IS THE STATE'S VIEW THAT THEY HAVE NO REQUIREMENT TO MAKE THIS KIND OF A DISCLOSURE, YOU KNOW, WHAT DO WE KNOW, IN TERMS OF WHAT IS GOING ON OUT THERE, AND WHAT PROBLEMS, YOU KNOW, MAY EXIST, AS A RESULT OF THE STATE BEING OF THE VIEW THAT THEY HAVE NO OBLIGATION, NO MATTER HOW SERIOUS THE FLIP-FLOP OR CHANGE OR WHATEVER THAT THEY

HAVE ABSOLUTELY NO OBLIGATION TO DISCLOSE SOME WOULDN'T YOU AGREE THAT THAT IS A RATHER IMPORTANT ISSUE, LEGAL ISSUE, AND SHOULD BE RESOLVED?

I AGREE, URNS, IT IS AN IMPORTANT ISSUE. I BELIEVE THAT THE --

WHY SHOULDN'T THE STATE BE OBLIGATED? LET'S JUST START, AS WE WORKUP TO THE PARTICULAR CASE AND THE WAY THE ISSUE ENDS UP GETTING FRAMED IN THE CONTEXT HERE. WHY SHOULDN'T THE STATE HAVE A CLEAR OBLIGATION? THERE IS A CONTINUING DISCOVERY OBLIGATION. WOULD YOU AGREE?

YES. I DO AGREE THAT THERE IS A CONTINUING OBLIGATION. HOWEVER --

WHY SHOULDN'T THE STATE HAVE A CLEAR OBLIGATION, IF THERE IS A MATERIAL CHANGE IN A WITNESSES'S TESTIMONY THAT COMES TO THE ATTENTION OF THE PROSECUTION?

THAT COMES TO THE WORD "MATERIAL CHANGE". WE DO NOT HAVE A MATERIAL CHANGE.

LET'S AGREE THAT IT IS A MATERIAL CHANGE. SHOULDN'T THERE BE AN AFFIRMATIVE OBLIGATION, ON THE PART OF THE STATE, TO ALERT THE OTHER SIDE TO THAT?

IF THERE IS A MATERIAL CHANGE, THEN I WOULD AGREE, AND UNDER THE DISCOVERY RULES, IT PROVIDES FOR A CONTINUING DUTY TO DISCLOSE STATEMENTS OF WITNESSES, AND IT INCLUDES A SPECIFIC DEFINITION OF A STATEMENT, WHICH DOES NOT INCLUDE AN ORAL STATEMENT, AND IN THIS PARTICULAR CASE, WE HAVE AN ORAL STATEMENT, BUT ASIDE, PUTTING THAT ASIDE, THIS PARTICULAR CASE, IT WAS NOT A MATERIAL CHANGE, AND THE WIT'S TESTIMONY DID NOT -- AND THE WITNESS'S TESTIMONY DID NOT CONTRIBUTE TO THE VERDICT, MAKE SUCH A CHANGE IN THE VERDICT THAT THIS COURT SHOULD DEEM IT A MATERIAL CHANGE. IT, IN NO WAY, IS A MATERIAL CHANGE. WE ARE NOT SAYING THAT THIS PERSON, THIS WITNESS, ONLY HEARD THE SHOTS, LET'S SAY SHE WAS SITTING IN HER HOUSE WITH HER BLINDS SHUT, AND SHE KNEW NOTHING WAS GOING ON AND SHE HEARD SHOTS OUTSIDE OF THE WINDOW AND THAT SHE CALLED THE POLICE, AND THAT WAS HER STATEMENT. I HEARD SHOTS. I DON'T KNOW ANYTHING ELSE, BUT I HEARD SHOTS.

YOU WOULD AGREE THAT A MATERIAL CHANGE, IF WE HAD SOMEBODY THAT ALLEGEDLY WAS WITNESS THAT SAID I DIDN'T SEE ANYTHING, AND THAT, LATER, IN TESTIFYING, SAID I SAW THE WHOLE THING --

OKAY. THAT WAS WHAT I WAS GETTING OUT.

SO WOULD YOU AGREE THAT, UNDER THAT HYPOTHETICAL, THAT THAT WOULD APPEAR TO BE A MATERIAL CHANGE?

YES. I WOULD AGREE, BUT WE DON'T HAVE THAT IN THIS SITUATION?

WE ARE TRYING TO SET RULES OF LAW, YOU SEE, AND WHEREAS WE WANT TO, HOPEFULLY, AT THE RIGHT OUTCOME IN A PARTICULAR CASE, WE HAVE GOT A FOCUS ON THESE PRINCIPLES OF LAW THAT WILL HOPEFULLY GET US THERE OR HELP US GET THERE BETTER. SO YOU WOULD AGREE THAT, UNDER THAT HYPOTHETICAL THAT I GAVE YOU, THAT THAT WOULD BE A MATERIAL CHANGE AND THE STATE WOULD HAVE AN OBLIGATION TO NOTIFY THE DEFENSE, IF THERE WAS A PERSON, ONE TIME ALLEGED TO AND WITNESS, WHO SAID I DIDN'T SEE ANYTHING, AND THEN, LATER, TOLD THE PROSECUTOR I SAW THE WHOLE THING, AND IT WAS THE DEFENDANT, AND I WILL TESTIFY FOR YOU TO THAT EFFECT AT THE TRIAL?

UNDER THOSE PARTICULAR FACTS WHERE, AS I WAS SAYING, IF THE PERSON KNEW NOTHING ABOUT IT, ABSOLUTELY NOTHING, AND TOLD THE POLICE THAT ALL SHE DID WAS HEAR THE

SHOTS AND KNEW NOTHING ELSE, THEN, YES, I WOULD AGREE THAT THAT IS A MATERIAL CHANGE, AND THAT THAT SHOULD BE DISCLOSED.

NOW, WHERE DOES YOUR CASE FIT NOW? LET'S START WITH THAT SORT OF RULE THAT YOU HAVE AGREED TO, THE STATE HAVING AN OBLIGATION, WHICH SIDE, WHERE DOES THIS CASE FIT, USING THAT?

OKAY. THERE IS NO MATERIAL CHANGE HERE, BECAUSE THE WITNESS, IN THIS PARTICULAR CASE, THE ONLY THING THAT IS DIFFERENT ABOUT HER DEPOSITION TESTIMONY TO HER TRIAL TESTIMONY IS THAT SHE CAME AROUND THE VAN OR SHE PEAKED AROUND THE VAN AND ACTUALLY SAW THE DEFENDANT WITH A GUN IN HIS HAND AND THE FACT THAT THIS WITNESS WAS --

LET'S MAKE IT A LITTLE SHORTER AND WHAT DID SHE SAY, IN TERMS OF HER IMPLICATING THE DEFENDANT IN HER DEPOSITION? WHAT DID SHE SAY THAT WOULD BE POINTED TO AS INCRIMINATING AND CUPER TO EVIDENCE -- AND CULPATORY OF THIS DEFT DEFT? WHAT DID SHE DO TO POINT THE FINGER AT THE DEFENDANT?

UNFORTUNATELY I DON'T HAVE THE ENTIRE DEPOSITION, JUST WHAT SHE SAID AT TRIAL.

WHAT DID SHE SAY AT THE DEPOSITION THAT WOULD HAVE IN CRIMINAL GRATEFULLYED THE DEFENDANT?

FROM WHAT I CAN GLEAN FROM THE BLUSHS IN THE TRIAL TESTIMONY, THAT IS ALL THAT I HAVE, FROM THOSE BLUSHS, I CAN SEE THAT THE ONLY -- FROM THOSE BLURBS, THE ONLY THANK CHANG THAT I CAN SEE IS THAT SHE PEAKED AROUND THE VAN TO SEE WHAT WAS DOING. S SHE WAS FAMILIAR WITH THE FACTS OF THE CRIME. ANOTHER PROBLEM IS THE WITNESS IS NOT ON THE RECORD. IS THAT THE PROBLEM? SO YOU CAN'T TELL US WHATEVER SHE TESTIFIED TO.

I CAN'T TELL YOU FROM PAGE ONE TO WHATEVER THE PAGES ARE. ALL I CAN USE IS WHAT THE DEFENSE COUNSEL USED TO IMPEACH HER DURING THE TRIAL. I DON'T HAVE A FULL DEPOSITION, AND THE ONLY DIFFERENCE THAT THE DEFENSE COUNSEL POINTED OUT IN THE TRIAL WAS THAT SHE WENT FROM BEING AT THE SCENE AND DUCKING BEHIND A VAN AND NOT SEEING THE ACTUAL SHOOTING TO THAT, YES, SHE DID PEEK AROUND THE VAN AND SHE DID SEE THE SHOOTING, AND SHE DOES KNOW THE DEFENDANT. SHE KNOWS THE VICTIM. SHE KNOWS THE GIRLFRIEND THAT IS INVOLVED IN THIS LOVE TRIANGLE. SHE A PLAYER IN THIS PARTICULAR SET OF FACTS.

IS IT FAIR TO SAY, FROM WHAT YOU HAVE JUST DESCRIBED, THAT SHE HAS GONE FROM SAYING I WASN'T IN A POSITION TO SEE AND I DIDN'T SEE, TO A POSITION, NOW, OF SAYING I WAS IN A POSITION TO SEE, AND I DID SEE?

I BELIEVE THAT IS ACCURATE. YES, URNS.

OKAY. GO AHEAD, NOW, YOU WERE EXPLAINING WHY IT WASN'T A MATERIAL CHANGE.

IT IS NOT MATERIAL, BECAUSE, ONE, WE HAVE THE CONFESSION OF THE DEFENDANT, WHICH THERE WAS NEVER A MOTION TO SUPPRESS THE CONFESSION IN THIS CASE.

BUT WAIT A MINUTE. WE ARE GETTING INTO OTHER TESTIMONY, WHICH MIGHT GO TO SOME KIND OF HARMLESS ERROR ANALYSIS, IF WE GET TO THAT POINT, BUT I THINK, WHEN YOU ARE LOOKING AT JUST WHETHER THERE IS A MATERIAL CHANGE HERE, DON'T YOU HAVE TO ACTUALLY LOOK AT THE TESTIMONY, THE PREVIOUS TESTIMONY, AND THE TRIAL TESTIMONY, AND WHAT WE TRULY HAVE IS HER SAYING, YES, I SAW HIM WITH THE GUN, SHOOTING, AS OPPOSED TO I SAW THINGS AFTERWARDS AND I NEVER ACTUALLY SAW HIM SHOOTING. IS THAT A

MATERIAL CHANGE, OUTSIDE OF WHAT OTHER TESTIMONY MAY HAVE BEEN PRESENTED AT TRIAL?

I DON'T BELIEVE SO, URNS, BECAUSE THE VERSION OF THE EVENTS DIDN'T CHANGE THAT DRAMATICALLY. SHE KNEW THAT THERE WAS TENSION AT THIS SCENE. SHE WENT THERE. SHE FOLLOWED THEM TO THE CONVENIENCE STORE, BECAUSE SHE THOUGHT SOMETHING WAS GOING TO HAPPEN. THOSE WERE HER WORDS. SOMETHING WAS GOING TO HAPPEN. SHE WENT THERE AND SHE KNEW SOMETHING WAS HAPPENING, AND SHE WAS HIDING BEHIND THE VAN, EITHER TO NOT BE INVOLVED OR TO NOT BE SEEN, AND SHE SAYS THAT SHE WAS DUCKING BEHIND THIS VAN THAT WAS RIGHT NEXT TO THE DEFENDANT'S CAR, WHERE THIS TOOK PLACE.

THE FACT THAT SHE HAS SAID, IN HER DEPOSITION, THAT SHE WAS, IN FACT, AT THE SCENE, IS ENOUGH TO MAKE THIS NOT A MATERIAL CHANGE.

WELL, I THINK WE GO FROM, AT WORST, CIRCUMSTANTIAL EVIDENCE, TO DIRECT EVIDENCE. I DON'T THINK WE HAVE NOTHING TO EVERYTHING.

I DON'T UNDERSTAND SOMETHING. UNDER YOUR RULE, YOUR RULE OF LAW, YOU SAID THE STATE WOULD HAVE A CLEAR OBLIGATION TO ADVISE OF MATERIAL CHANGE IN WITNESSES'S TESTIMONY, SO THE POLICE, WHO ARE TOLD INITIALLY THAT THIS WITNESS DIDN'T SEE ANYTHING, THIS WITNESS COMES TO THEM, A MONTH BEFORE THE TRIAL AND SAID, HEY, I WAS SCARED, BUT I ACTUALLY DID SEE SOMETHING, AND IN FACT I SAW THE DEFENDANT PUT TEN SHOTS INTO THE VICTIM. NOW, WE ARE GOING TO HAVE A RULE OF LAW THAT SAYS WHETHER THEY DISCLOSE THAT TO THE DEFENDANT IS GOING TO DEPEND ON WHOSE EVALUATION BEFOREHAND THAT THAT IS MATERIAL OR NOT? THAT IS WHAT THE PROBLEM IS WITH HOW THIS IS DEVELOPING IS SHOULDN'T THE RULE BE THAT THE POLICE OR THE STATE HAS GOOD FAITH OBLIGATION, WHEN THEY FIND OUT ABOUT CHANGES IN WITNESSES'S TESTIMONY, WHERE PREVIOUSLY THEY PROVIDED THAT WITNESS, THAT THEY HAVE THE OBLIGATION TO ADVISE OF THOSE CHANGES? I MEAN CERTAINLY UNDER BRADY AND STRICKLER, THAT COULD BE IMPEACHING. THIS WENT FROM BAD TO WORSE, BUT IT COULD GO FROM WORSE TO NOT SO WORSE, AND SO WOULDN'T THE BETTER RULE BE THAT WE WANT TO IMPOSE, AND IT CERTAINLY WOULD MAKE YOUR JOB EASIER, AN OBLIGATION TO DISCLOSE, AND THEN, IF THEY DON'T, IN THOSE RARE CASES WHERE THEY DON'T DISCLOSE, WE CAN WORRY ABOUT WHETHER IT WAS HARMLESS ERROR OR NOT, BUT THAT IS MY CONCERN. CAN YOU ADDRESS THAT? THAT IF WE LEAVE IT WITH YOURS, THEN WE ARE LEAVING THE POLICE AND THE STATE OUT, HANGING, FOR THEM TO MAKE A PRETRIAL DETERMINATION AS TO WHETHER THE WITNESS'S TESTIMONY WAS MATERIAL OR NOT?

I CAN UNDERSTAND WHERE YOU ARE COMING FROM, AND I THINK THAT AS I SAID BEFORE, I DON'T THINK THAT THIS IS A SIGNIFICANT CONCERN FOR THE COURT TO MAKE SOME TYPE OF BRIGHT LINE RULE, BECAUSE I DON'T BELIEVE THAT THERE IS AN OVERWHELMING PROBLEM OUT THERE, BUT BECAUSE WE DO HAVE THE CASE LAW FROM BUSH AND FROM STREET, FROM THIS COURT, THAT FINDS THAT THE TESTIMONIAL DISCREPANCIES CAN COME INTO A TRIAL AND CAN BE LAID SIDE-BY-SIDE FOR THE JURY TO CONSIDER, THOSE CASES SUPPORT THE TRIAL COURT'S RULING, HERE, THAT --

IT SOUNDS LIKE "THOSE CASES" AND GOING BACK TO IT, ARE SUPPORTING THE IDEA THAT YOU WOULDN'T DISCLOSE, BECAUSE IT CAN ALWAYS BE USED FOR IMPEACHMENT, IF IT COMES UP, AND THAT DOESN'T STRIKE ME AS BEING THE BETTER RULE TO SAY, WELL, THE DEFENSE ATTORNEY CAN THINK ON HIS FEET, IF HE FINDS OUT THAT, ALL OF A SUDDEN, AFTER CAREFUL PREPARATION, TAKING DEPOSITIONS, THAT THIS WITNESS, WHO HE THOUGHT HE KNEW WHAT THIS WITNESS WAS GOING TO SAY IS GIVING A WHOLE DIFFERENT STORY, JUST USE HIS OR HER ABILITY TO CROSS-EXAMINE, AND IT WILL ALL WORK OUT IN THE END?

IT JUST CERTAINLY DOESN'T -- IT CERTAINLY JUST DOESN'T STRIKE ME, AND IT CERTAINLY WOULDN'T HAPPEN IN THE CIVIL SIDE OF THE COURT, AND I AM NOT SURE WHAT THOSE POLICY REASONS THAT HAPPEN ON THE CRIMINAL SIDE, WHAT THOSE POLICY REASONS SHOULD BE.

I CAN UNDERSTAND YOUR POINT. I, ALSO, WANT TO POINT OUT THAT, IN THIS PARTICULAR CASE, THE DEFENSE COUNSEL DID NOT OBJECT, AT ANY TIME DURING THIS WITNESS'S TESTIMONY --

BUT WE ARE GETTING BACK TO THE SPECIFICS OF THIS. LET ME ASK YOU TWO OTHER QUESTIONS ABOUT THE ACTUAL STATEMENTS. THERE WAS A STATEMENT THAT BROWN SAID THAT THE DEFENDANT MADE TO HER THE NIGHT BEFORE.

GREEN. THE WITNESS WAS GREEN.

OKAY. TO GREEN. THAT GREEN SAID THAT EVANS MADE. WA-WA -- WAS THAT STATEMENT KNOWN BY THE STATE BEFORE TRIAL?

I BELIEVE THAT IT WAS PART OF THE WITNESS'S --

SHE TOLD THE POLICE --

TOLD THE POLICE JUST PRIOR TO TRIAL.

AND WHAT SHE TOLD THE POLICE, WAS THAT REDUCED TO WRITING? WERE THERE POLICE NOTES ON THAT?

THEY WERE NOT INTRODUCED AT TRIAL. IF THEY WERE, THE POLICE OFFICER THAT SHE SPOKE WITH WAS NOT -- DID NOT TESTIMONY FOOI -- DID NOT TESTIFY AT TRIAL. I SEE THAT I AM RUNNING INTO MY REBUTTAL TIME. I WOULD LIKE TO HAVE THE FEW MOMENTS LEFT REMAINING. THANK YOU.

THANK YOU. MR. LIPINSKI.

MAY IT PLEASE THE COURT. JOHN LIPINSKI ON BEHALF OF THE APELEE, BERNARD EVANS. I SUBMIT TO THE COURT THAT IT WAS MORE THAN A CHANGE. IT WAS A COMPLETE REVERSAL FROM WHAT MISS GREEN, GREEN GREEN-KENNEDY, HAD STATED BEFORE. AS A MATTER OF FACT SHE TESTIFIED IN THIS PARTICULAR CASE, AND THIS IS REFLECTED IN PAGE 330 OF THE TRANSCRIPT, THAT SHE HAD ONLY TOLD A PART OF THE TRUTH TO POLICE IN DEPOSITION, AND WHEN QUESTIONED AT PAGE 331 OF THE TRANSCRIPT, YOU HAVE TOLD US THAT, ON TWO PRIOR OCCASIONS YOU DID WHAT? "I LIED." SO BASICALLY AS THE COURT HAS NOTED SHE CAME OUT AND SHE TOLD BOTH THE POLICE OFFICERS AND, APPARENTLY, THE STATE, IN PREPARING FOR THIS A MONTH BEFORE TRIAL, SOMETIME IN MARCH, AND THIS TRIAL WAS IN MAY, A MONTH OR A LITTLE MORE --.

WHAT WAS THE STATUS OF THE RECORD, HERE OR BELOW, AS TO THE STATUS OF THE EXAMINATION THAT WAS MADE AT THE REQUEST FOR THE RICHARDSON HEARING? WHAT DID DEFENSE COUNSEL DO WHEN --

AT PAGE 317, DEFENSE COUNSEL STATED, "BUT WE HAVE BEEN BLIND-SIDED BY HER DIRECT TESTIMONY, FOR WHAT HE HAS BEEN TALKING ABOUT IN THE LAST HOUR DIDN'T COME UP IN THE DEPOSITION." COURT DIDN'T HAVE A RICHARDSON INQUIRY.

WAS THAT A REQUEST?

THAT WAS PUT ON THE COURT.

I DIDN'T HEAR THE WORD "RICHARDSON" HERE.

THAT WAS UP FOR THE COURT TO DECIDE. WHEN IT WAS SUBMITTED TO THE COURT THAT THERE IS A DISCREPANCY BETWEEN THE DISCOVERY THAT WAS GIVEN.

WOULD THAT OBJECTION COME WITHIN BUSH?

WELL, BUSH IS, AS I RECALL THE FACTS IN BUSH, THE BUSH TESTIMONY WAS OF A CONVENIENCE STORE OWNER WHO HAD, ON ONE OCCASION, SEEN A PHOTO I.D. OF MR. BUSH, AND SHE HAD EVIDENTLY TOLD AN INVESTIGATOR PREVIOUSLY THAT SHE COULDN'T IDENTIFY ANYBODY, AND AT THAT AT THIS MIND POINTE SHE COULDN'T I HAD -- AT THIS POINT SHE COULDN'T IDENTIFY ANYBODY. SHE WAS, AND IF I REMEMBER THE FACTS OF THE CASE, THERE WAS ANOTHER PERSON WHO WAS PASSING THE STORE ON THE WAY TO DELIVER PAPERS, AT AND PROBLEMS MATTLY 2:00 A.M. TO 3:00 A.M. ON THE DATE OF THE CRIME, THEY LOOKED INTO THE STORE AND SAW MR. BUSH INSIDE THE STORE AND, ALSO, DID A PHOTO I.D., SO THAT THE WITNESS IN QUESTION IN BUSH WAS NOT THE EYEWITNESSNESS, WHEREAS HERE THIS -- WAS NOT THE EYEWITNESSNESS -- THE EYEWITNESS, WHEREAS HERE THAT WAS THE CASE.

YOU DON'T WAIT FOR A WITNESS TO TESTIFY FOR AN HOUR OR SOMETHING AND THEN GET UP AND OBJECT AND SAY I HAVE BEEN BLIND-SIDED BY THAT TESTIMONY. DOESN'T THE DEFENSE HAVE AN OBLIGATION, AS SOON AS THERE IS ANY INDICATION OF A DISCOVERY VIOLATION OR A FAILURE TO DISCLOSE SOMETHING, THAT THE STATE WAS OBLIGATED TO DISCLOSE OR WHATEVER, ISN'T THERE AN OBLIGATION TO OBJECT IMMEDIATELY, BECAUSE THE SOONER YOU OBJECT, THE SOONER THE COURT CAN CONSIDER WHAT THE CIRCUMSTANCES WERE AND WHETHER SOMETHING CAN BE DONE ABOUT IT, BUT IS IT CORRECT, HERE, THAT THIS FIRST OBJECTION WAS AFTER THE WITNESS HAD GIVEN ALL OF THAT TESTIMONY?

A PART OF IT. THIS WAS DURING THE WITNESS'S TESTIMONY.

I THINK YOU READ A PART OF IT. YOU SAID FOR THE LAST HOUR OR SOMETHING?

THAT WAS PART OF IT.

WHY -- IN OTHER WORDS HOW IS THERE ANY JUSTIFICATION, AND WASN'T COUNSEL OBLIGATED NOT TO WAIT AND LISTEN TO STATEMENT AFTER STATEMENT THAT COUNSEL, APPARENTLY, WAS TAKING THE POSITION THAT THEY HAVE BEEN BLIND-SIDED, AND UNDER RICHARDSON, YOU HAVE GOT A GOBBLEATION TO -- YOU HAVE GOT AN OBLIGATION TO OBJECT RIGHT AWAY, DO YOU NOT?

I THINK THIS WITNESS WAS BECOMING NOT ONLY AN EYEWITNESSNESS BUT, ALSO, A CUPER TO STATEMENT THE NIGHT -- A CULPATORY STATEMENT THE NIGHT BEFORE. THE DEFENSE COUNSEL WAS PROBABLY FRANTICALLY GOING THROUGH DEPOSITION TO SEE WHETHER OR NOT SHE SAID THIS.

DON'T YOU THINK THAT DEFENSE COUNSEL HAD PREPARED BEFORE TRIAL?

IN STANDING UP AND OBJECTING TO THIS, IT WAS PROBABLY THE DEFENSE COUNSEL WOULD LOOK BEFORE STANDING UP TO OBJECT.

THIS IS APPEAL THIS. IS NOT A DRAMATIC CIRCUMSTANCE. CERTAINLY YOU HAVE GOT TO LOOK ON PAGE 42 AND READ LINE 31, TO BE SURE THIS IS EXACTLY WHAT THE -- IF WE ARE TO ACCEPT YOUR POSITION, THIS IS GOING FROM NOT BE AGO WITNESS TO THE EVENT TO BEING AN EYEWITNESSNESS.

ABSOLUTELY.

YOU DON'T HAVE TO GO THROUGH A LOT TO RECOGNIZE A CHANGE LIKE THAT, DO YOU?

I WOULD HAVE HOPED, FOR MY PURPOSES, THAT THE OBJECTION WOULD HAVE BEEN MORE TIMELY MADE.

WHAT RELIEF WAS ASKED FOR, HERE, BY THE DEFENSE, WHEN THEY DID SAY THAT THEY HAD BEEN BLIND SIDED IN? WHAT RELIEF WAS ASKED FOR?

THEY INFORMED THE COURT THAT WE HAVE BEEN BLIND-SIDED BY THE TESTIMONY. IT IS COMPLETELY DIFFERENT THAN THE DEPOSITION. AT THAT POINT, PURSUANT TO THE CASES WE HAVE CITED, THE COURT HAD AN OBLIGATION TO CONDUCT A HEARING.

I AM ASKING WHAT RELIEF WAS ASKED FOR BY THE DEFENDANT?

THEY DID NOT SPECIFICALLY ASK FOR A HEARING.

DID SHE ASK FOR ANY RELIEF?

WELL, THEY HAVE ASKED FOR MISTRIALS, AS THE CASE WENT ON, BECAUSE OF THIS, AND I COULD GO THROUGH. ON THE SEVERAL OTHER TIMES THAT THEY BROUGHT TO THE COURT'S ATTENTION, PRIOR TO THE BELATED RICHARDSON HEARING THAT WAS HELD, AND IT WAS, ONLY, AFTER ALL THE TESTIMONY, THAT --

WAS THERE EVER A REQUEST THAT THIS TESTIMONY BE STRICKEN?

I DEFER TO THE RECORD BUT I DON'T BELIEVE SO. THERE WAS OBJECTIONS TO IT, JUST AS THERE WAS OBJECTION TS TO THE -- THERE WAS OBJECTION TO MISS GREEN, MISS KENNEDY --

WHEN YOU SAY THERE WERE OBJECTIONS TO IT, AGAIN, I AM HAVING DIFFICULTY. IF THERE WAS TESTIMONY, FOR ABOUT AN HOUR, OF CHANGE, WHERE THE WITNESS WAS GIVING A DIFFERENT VERSION, THAT, OBVIOUSLY, WASN'T A CONTEMPORARY OBJECTION TO ANYTHING THERE, BUT IN OTHER WORDS, WHAT, WHEN THIS BLIND-SIDED STATEMENT WAS MADE, DID THE DEFENSE COUNSEL SAY TO THE COURT, "I WANT YOU TO SUSTAIN AN OBJECTION TO THAT LAST ANSWER" OR "I WANT YOU TO STRIKE THAT"? IN OTHER WORDS I AM TRYING TO GET TO WHAT WAS THE RELIEF THAT THE TRIAL COURT WAS ASKED TO GIVE TO THE DEFENSE LAWYER THAT WASN'T GRANTED?

AS TO WHAT HAPPENED DURING THAT PERIOD OF TIME, THE RECORD WILL REFLECT THAT TRIAL COUNSEL, AT SEVERAL DIFFERENT PLACES, WAS OBJECTING TO THE TESTIMONY, PAGE 257, 272, AND 277, THE TESTIMONY AS TO THE STATEMENT. THERE WAS A LONG DISCOURSE OF APPROXIMATELY 20-25 PAGES, WHICH I SUPPOSE EIGHT UP PART OF THAT HOUR, REGARDING THE ADMISSIBILITY OF THE TESTIMONY OF THAT STATEMENT THE NIGHT BEFORE.

WHAT RELIEF DID DEFENSE COUNSEL ASK FOR THAT DEFENSE COUNSEL DIDN'T RECEIVE?

SPECIFICALLY DEFENSE COUNSEL DID NOT ASK -- DEFENSE COUNSEL OBJECTED TO THAT STATEMENT COMING IN, THE STATEMENT THE NIGHT BEFORE, WHICH WAS CONSISTENTLY OVERRULED AT THOSE THREE DIFFERENT PLACES.

AS TO THE STATEMENT, THERE WASN'T AN OBJECTION AS TO THE STATEMENT THAT HAD HADN'T BEEN DISCLOSED. IS THAT CORRECT?

THERE WAS AN OBJECTION. WELL, THERE WAS OBJECTIONS THAT THE PREDICATE WAS NOT LAID, THEN THERE WAS A COUPLE SUBSEQUENT OBJECTIONS THAT WERE IMMEDIATELY OVERRULED, WITHOUT, BUT THERE WERE OBJECTIONS MADE TO IT.

CERTAINLY AS TO THAT, THE DEFENSE LAWYER WOULD KNOW THAT SHE HADN'T SAID ANYTHING ABOUT THE NIGHT BEFORE, SO WHAT WOULD HAVE -- I CAN UNDERSTAND, MAYBE, BEING IN SHOCK ABOUT BECOME AGO EYEWITNESSNESS, BUT THE STATEMENT THE NIGHT BEFORE WASN'T EVEN PART OF, EVEN REMOTELY PART OF HER DEPOSITION, SO HOW CAN WE EXCUSE ANYTHING TO DO WITH THE STATEMENT COMING IN, IF THE DEFENSE LAWYER DIDN'T ADVISE THE COURT OF THE BASIS THAT THAT STATEMENT SHOULDN'T COME IN, BECAUSE IT HADN'T BEEN DISCLOSED IN PRETRIAL DISCOVERY?

I SUBMIT TO THE COURT THAT THAT WAS FUNDAMENTAL, UNDER THE RULE OF DISCOVERY, WHICH REQUIRES THAT ORAL STATEMENT TO BE GIVEN, PURSUANT TO THE CASES OF VOICE ELLEN AND DELGADO, WHICH WE CITED IN OUR BRIEF. THAT IS FUNDAMENTAL, THAT THAT STATEMENT HAS TO BE DISCLOSED.

WAS THERE ANYTHING IN THE RECORD THAT THAT DEFENSE ADVISED WHY, BY THE WITNESS, WHAT THE DEFENDANT SAID, WHY IT WASN'T DISCLOSED?

YES. THE DEFENSE BASICALLY SAID, WITH REGARD TO THE DISCOVERY RULES, WE HAVE AN OBLIGATION WITH RECORDED STATEMENTS, AND TO FURNISH TO THE DEFENSE. IT TALKS ABOUT A STATEMENT "DEFINED STATEMENT, INCLUDING A WRITTEN STATEMENT", AND THIS WAS NOT JUDGED. THIS WAS NOT A STATEMENT THAT WAS WRITTEN IN WRITING. THIS IS NOT A STATEMENT THAT WAS WRITTEN.

BUT AS TO THE EYEWITNESSNESS WITNESS, IN FACT, AND AND THAT IS THE QUESTION I WANTED TO ASK YOU, IT LOOKS LIKE THERE IS A GAP IN THE DISCOVERY RULES, WHERE STATEMENT, AS TO A DEFENDANT'S STATEMENT, INCLUDES ORAL STATEMENTS, BUT AS TO WITNESS STATEMENTS, IT ONLY REFERS TO STATEMENTS THAT ARE REDUCED TO WRITING. IS THAT HOW YOU READ THE DISCOVERY RULES, THAT, IN FACT, THAT IT IS NOT ORAL STATEMENTS OF THE WITNESS'S?

I THINK URNS IS REFERRING TO THE CHANGE IN -- I THINK YOUR HONOR IS REFERRING TO THE CHANGE IN MISS GREEN'S TESTIMONY FROM NOT HEARING THE HOT SO -- -- THE SHOT TO BEING AN EYEWITNESSNESS. THIS IS A CASE IN WHICH THE WITNESS POINTS OUT THAT SHE COMMITTED PERJURY, AND AT THAT POINT --

BUT AT THAT POINT RICHARDSON WAS DEVELOPED TO ADDRESS VIOLATIONS OF PROCEDURAL RULES, AND IS THERE A PROBLEM, IF THE PROCEDURAL RULES THAT GOVERN THIS, NOT THE BRADY ISSUES BUT THE PROBABLY RULES DON'T APPEAR TO REQUIRE ORAL STATEMENTS OF A WITNESS TO BE DISCLOSED TO THE SDMFS.

I SUBMIT TO THE COURT THAT THIS IS A BIT MORE THAN AN ORAL STATEMENT THIS. IS A LIE. I SUBMIT TO THE COURT THAT A RULE COULD OR SHOULD BE ADOPTED THAT, WHEN A WITNESS, A STATE WITNESS, A MATERIAL WITNESS, IN THIS PARTICULAR CASE, LIES ON DEPOSITION, AND THE STATE SUBSEQUENTLY FINDS OUT ABOUT THAT LIE, THAT SHOULD BE DISCLOSED TO THE DEFENSE.

IS THAT DEVELOPING A NEW RULE, OR IS THAT CONSISTENT WITH PREEXISTING LAW?

I BELIEVE THAT IS CONSISTENT WITH CONTINUING DUTY TO DISCLOSE. WHICH IS WHAT THE 3RD DISTRICT SAID IN THIS PARTICULAR CASE.

THAT IF YOU HAVE A WITNESS THAT YOU HAVE ALREADY SUPPLIED WHAT THEY HAVE SAID AND NOW YOU FIND OUT THEY ARE SAYING SOMETHING DIFFERENT, THAT THAT IS TO BE READ IN THAT RULE THAT YOU MUST DISCLOSE THAT CHANGE.

YES, JUDGE, AND I BELIEVE THAT IS CONSISTENT -- I AM SORRY. I DIDN'T MEAN TO INTERRUPT THE

COURT. I BELIEVE THAT IS CONSISTENT WITH THE CASE OF MOBLEY, WHICH WE CITED IN OUR BRIEF. IN MOBLEY, THERE WAS AN EYEWITNESSNESS THAT -- AN EYEWITNESS THAT WAS DISCLOSED THE DAY OF TRIAL.

IF WE KEEP ON WORRYING ABOUT IT BE AGO MATERIAL CHANGE, THEN WE DON'T WANT THE STATE TO WORRY ABOUT THE FACT IS THIS PERSON GOING FROM AN EYEWITNESS TO A WITNESS THAT IS MATERIAL IN THIS CASE. ON THE OTHER HAND, WHERE A WITNESS COMES IN BEFORE TRIAL, TO GO OVER THEIR TESTIMONY WITH THE STATE, AND MAYBE THERE IS AN ADDITIONAL DETAIL THAT HASN'T BEEN PREVIOUSLY TESTIFIED TO, AT WHAT -- BUT YET IT IS, YOU KNOW, IT IS JUST A DETAIL. HOW IS THE STATE TO DETERMINE WHETHER -- THEY ARE NOT GOING TO BE DISCLOSING THAT PRIVATE CONFERENCE THAT THEY ARE HAVING WITH THE WITNESS, SO HOW DO WE DRAW THE LINE BETWEEN THAT SITUATION AND THIS VERY DRAMATIC, IN YOUR WORDS, SITUATION, OF THIS TOTAL CHANGE IN TESTIMONY?

WELL, I WOULD SUGGEST THAT THERE COULD BE A RULE OR A PRINCIPLE THAT, WHEN THE STATE LEARNS OF EYEWITNESS TESTIMONY THAT HAS NOT PREVIOUSLY BEEN DISCLOSED, IT MUST PROMPTLY DISCLOSE THAT EYEWITNESS TESTIMONY, AND I THINK THE COURT IS REFERRING TO THE CASE OF JOHNSON -VS- STATE, WHICH I WAS INVOLVED IN, WHERE THE WITNESS IN THAT PARTICULAR CASE SAID I WENT FROM BEING 80% SURE OF THE IDENTIFICATION TO 100% SURE, I THINK, A WEEK TO TEN DAYS BEFORE TRIAL, AND, HE SAID, THE DIFFERENCE WAS THAT, AT ONE POINT THE DEFENDANT WAS WEARING A CAP AND AT THE OTHER POINT HE WASN'T. THAT, SUBMIT, TOTALLY DIFFERENT FROM BEING 80% SURE TO POSITIVE.

BUT AREN'T WE RUNNING A REAL DANGER, HERE, IN A STATE WHICH HAS PRETRIAL DISCOVERY, LIKE FLORIDA, WHICH IS, REALLY, A PLUS TO THIS SYSTEM, THAT IS DIFFERENT FROM THE FEDERAL SYSTEM, AND -- BUT WHAT WE ARE HEADED TOWARD IS A SITUATION IN WHICH THERE IS A DEPOSITION TAKEN AFTER WITNESS FORM THE WITNESS TESTIFIES AT TRIAL AND TESTIFIES TO SOMETHING DIFFERENT AT THE TRIAL, AND THEN THERE IS GOING TO BE A CLAIM THAT, WELL, WE HAVE GOT TO GO BACK AND DO THIS AGAIN, BECAUSE THERE WAS A DEVIATION OF SOME KIND BETWEEN WHAT THE WITNESS'S TESTIMONY AT TRIAL AND THE PRETRIAL DEPOSITION? I MEAN THAT SYSTEM SEEMS, TO ME, THAT THE ONLY RESOLUTION THERE IS JUST TO NOT HAVE ANY PRETRIAL DEPOSITIONS.

I SUBMIT TO THE COURT THIS IS MUCH MORE THAN A DISCREPANCY. THIS GOES FROM, IF THIS WAS A CIVIL CASE, A COURT CASE, IN WHICH SOMEBODY SAID I DIDN'T SEE THE ACCIDENT, AND THEN THEY SAW THE ACCIDENT, I AM SURE TRIAL COUNSEL WOULD JUMP TO THEIR FEET AND BE SCREAMING DURING TRIAL. I SUBMIT -- AND THAT --

BUT IT SEEMS TO ME THAT WAS THE SENSE OF BUSH AND STREET, IS THAT WE HAVE GOT TO TAKE INTO CONSIDERATION, IN THESE INSTANCES, AND THE REASON WE HAVE TO HAVE A RICHARDSON HEARING IS TO FIND OUT WHETHER THIS WAS SOMETHING THAT WAS AVAILABLE TO BE ASKED AND THERE AT THE TIME THE WITNESS WAS DEPOSED, OR WHETHER THIS WAS SOMETHING THAT CAME UP AFTER THAT, AND THAT IS WHAT I AM REACTING TO. HERE WE DIDN'T EVEN HAVE A REQUEST FOR A RICHARDSON HEARING.

AS FAR AS THAT PARTICULAR QUESTION, THAT IS REFLECTED AT PAGE 342 OF THE TRANSCRIPT, IN WHICH THE DEFENSE COUNSEL TALKS TO MS. GREEN ABOUT HER TESTIMONY. NOW WE ARE AT LINE 8. "TELL US ABOUT THE CASE. TELL US WHAT YOU KNOW ABOUT IT. ANSWER TO TELL YOU THE TRUTH I DIDN'T KNOW ANYTHING ABOUT THE CASE. OKAY? I ONLY KNOW WHAT I SAW THAT DAY." THEN SHE WAS ASKED WHAT SHE HEARD AT DEPOSITION. AND THEN, AT DEPOSITION, SHE SAID I JUST HEARD THE SHOTS. SHE GOES FROM BEING A TANGENTIAL WITNESS, ALMOST HEARING THE SHOT, AND BEING SHOT FOUR TIMES, TO BEING AN EYEWITNESSNESS. I SUBMIT TO THE COURT THIS IS MORE THAN A MERE CHANGE, AND THAT IS WHY I SUGGESTED TO THE COURT THAT A POSSIBLE RULE COULD BE, WHEN THERE HIS EYE WIT TESTIMONY TO A -- WHEN THERE

HIS EYE WIT TESTIMONY TO A -- EYEWITNESSNESS TESTIMONY TO A CRIME, I THINK THAT IS FULL DISCOVERY, ALLOWING FOR A FULL TRIAL OR A FAIR SETTLEMENT OF CASES, WHERE EACH SIDE KNOWS WHAT THE OTHER SIDE HAS.

BUT IS THAT POSITION RULING OUT A RICHARDSON HEARING? DOES YOUR POSITION RULE OUT A RICHARDSON HEARING, IF THE STATE COMES INTO POSSESSION OF THIS INFORMATION AND DOESN'T DISCLOSE IT? ARE YOU SAYING THAT RACH ARRESTED SON HEARING IS NOT REQUIRED TO SEE WHETHER OR NOT OR JUST --

I WOULD SUBMIT THAT A RICHARDSON HEARING IS POSSIBLY -- WHEN YOU GO FROM NOTHING TO AN EYEWITNESSNESS, JUDGE, I SUBMIT THAT IS ALMOST A BRIGHT LINE RULE, BECAUSE I DON'T KNOW OF ANY ATTORNEY, ANY TRIAL ATTORNEY IN -- I AM NOT ONE AND I KNOW THE COURT HAS SOMEONE ON THE PANEL WHO WOULD WANT TO IMMEDIATELY, IN THE MIDDLE OF A TRIAL, GO FROM HAVING A CASE THAT IS CIRCUMSTANTIAL, AS THE STATE HAS SAID, TO AN EYEWITNESSNESS.

BUT IF YOU TAKE A POSITION THAT A RICHARDSON HEARING EITHER IS OR IS NOT REQUIRED, BECAUSE IF IT IS REQUIRED, THERE IS SOME DOUBT OF WHETHER IT WOULD REALLY REQUEST IT, AND IN THIS CASE, IF YOU SAY THAT THE STATE COMES INTO POSSESSION OF THIS INFORMATION AND IT IS CRITICAL INFORMATION, THEY ARE AUTOMATICALLY OBLIGATED TO PASS IT ON TO THE DEFENSE. THERE IS MUTUAL DISCOVERY GOING ON. SO I DON'T THINK YOU CAN TAKE A GRAY AREA. YOU CAN'T RIDE THE HORTS HORSE BOTH -- YOU CAN'T RIDE THE HORSE BOTH WAYS.

I WOULD SAY GOING FROM NOTHING TO A WITNESS, THAT WOULD BE HARMFUL, PER SE. AS FAR AS OUR OTHER ISSUES, IN THIS PARTICULAR CASE --

WOULD YOU ADDRESS --

I AM SORRY.

-- ON THE TECHNICAL ASPECT, IS THERE ANYTHING ABOUT THIS CHANGE THAT WOULD HAVE VIOLATED THE RULE, WITH REGARD TO THE DISCLOSURE OF THE CATEGORY OF WITNESS THIS PERSON WOULD BE IN?

WELL, AN EYEWITNESS WOULD CERTAINLY BE A WITNESS.

I CAN UNDERSTAND, BUT WAS SHE LISTED AS AN EYEWITNESS IN THE DISCLOSER?

YES, SHE WAS, AND THE STATE HAS LISTED IN ITS BRIEF THAT SHE WAS THE STATE'S CHIEF WITNESS.

WAS SHE LISTED AS AN EYEWITNESS?

NO. SHE WAS NOT LISTED IN HER DEPOSITION AT ALL. HER MAIN TESTIMONY, EVIDENTLY WHEN THIS WAS TALKED ABOUT, EVIDENTLY THERE WAS A NINE YEAR-OLD BOY WHO PURPORTEDLY MAY HAVE BEEN EYEWITNESS NECESSARY TO THIS, BUT HIS TESTIMONY WAS ALL OVER THE BOARD AND AS A MATTER OF FACT HE WAS NOT PRESENTED BY THE STATE, SO WHEN THE CASE CAME TO TRIAL, THEY EITHER THOUGHT THEY HAD A NINE YEAR-OLD BOY WHO MAY OR MAY NOT HAVE BEEN A WITNESS, WHOSE TESTIMONY MAY HAVE BEEN ALL OVER THE PLACE, OR A CIRCUMSTANTIAL CASE, AND THAT IS WHAT WE HAVE GOT HERE. THIS WOMAN HAD HAD HER STATEMENT TAKEN BY THE POLICE AND HER DEPOSITION TAKEN AND SHE HAD NOT SEEN ANYTHING ELSE ABOUT THE ACCIDENT, ITSELF, OR THE SCENE. IT IS CLEAR FROM HER TESTIMONY, FROM PAGE 316, SHE SAW NOTHING. DURING HER DEPOSITION, 328, SHE DIDN'T SAY SHE SAW ANYTHING. 330, SHE DIDN'T TELL THE TRUTH AT THE DEPOSITION. PAGE 343, SHE NEVER TOLD THE POLICE ABOUT THE KFERTHS WITH THE DEFENDANT THE DAY BEFORE -- ABOUT THE

DFERINGS WITH THE DEFENDANT THE DAY BEFORE THE SHOOTING.

WAS IT EXPLORED AS TO WHETHER THIS CHANGE WAS IN ANY WAY REDUCED TO A STATEMENT OF ANY KIND OF ANYONE IN THIS FILE? BECAUSE WE DON'T HAVE THE POLICE RECORDS OR REPORTS, DO WE, IN THIS RECORD? ANY POLICE.

NO. IT WAS UNDISPUTED BY THE STATE THAT SHE TOLD THE POLICE, APPROXIMATELY A MONTH BEFORE --

DON'T WE HAVE A REQUIREMENT THAT THEY DISCLOSE OR HAND OVER THING THAT IS ARE REDUCED TO WRITING IN SOME FASHION?

I SUBMIT TO THE COURT THAT, AS FAR AS THE ORAL STATEMENT THAT COMES UNDER OATH IN 3220, THAT THAT HAD TO BE DISCHROD. -- DISCLOSED.

WE ARE TALKING ABOUT A STATEMENT. BUT WHAT THE WITNESS LATER TOLD POLICE, UNDER SOME STATEMENT THIS COULD BE TURNED INTO MATERIAL THAT COULD BE DISCLOSED IN THE FORM OF -- IT IS REDUCED TO WRITING, CORRECT?

I DON'T KNOW IF THE POLICE ACTUALLY FILED A SUPPLEMENTARY REPORT OR NOT. I KNOW THAT I CAN ONLY INFORM THE COURT THAT THE POLICE ADVISED THE PROSECUTOR AND THE PROSECUTOR --

SO THIS WASN'T FERRETED OUT AT THE TRIAL LEVEL, WHAT THEY DID OR DID NOT DO, IS THAT WHAT YOU ARE SAY SOMETHING.

YES, JUDGE.

OKAY.

AS FAR AS THE SECOND ISSUE --.

YOUR TIME HAS CONCLUDED.

THANK VERY MUCH.

THANK YOU VERY MUCH.

JUST A FEW FACTUAL THINGS THAT I WANTED TO POINT OUT. ON PAGE 317 OF THE TRANSCRIPT, AS MR. LIPINSKI POINTED OUT, THE DEFENSE COUNSEL ADMITTED THAT, FOR THE LAST HOUR, TESTIMONY HAD BEEN GOING ON THAT HE HAD NEVER HEARD BEFORE, AND HE MADE OBJECTIONS, BUT THEY WERE TO HERE SAY OR TO LEADING OR TO -- TO HEARSAY OR TO LEADING OR TO NO PROPER PREDICATE, AND FOR HIM TO HAVE AN OPPORTUNITY TO STAND UP AND SAY I HAVE NEVER HEARD THIS BEFORE, FOR THE TRIAL COURT TO GO AHEAD AND ISSUE SOME SORT OF REMEDY, EITHER HAVE A RICHARDSON IN QUICHE I, AND -- INQUIRY, AND IF A VIOLATION WAS FOUND, THE COURT HAVE EITHER LIMITED THE TESTIMONY OR CONTINUED FOR ANOTHER DEPOSITION TO BE TAKEN. HERE THE TRIAL COURT HAD NO REMEDY. THE DEFENSE ASKED FOR A MISTRIAL, AFT WITNESS GREEN HAD CONCLUDED HER TESTIMONY REGARDING WHAT SHE SAW, AND AS THE PROSECUTOR DECIDED TO QUESTION HER, PANTS PENNSYLVANIA TORELY REHABILITATING HER, THAT IS WHEN THE DEFENSE COUNSEL JUMPED UP, BECAUSE THE PROSECUTOR WAS TAKING THE WIND OUT OF HIS SAIL. HE COULDN'T GET UP THERE AND SHOW THE INJURY THAT SHE HAD NOT BEEN TELLING THE TRUTH.

DID THE DEFENSE GIVE AN OPENING STATEMENT?

THE STATE DID NOT. THE DEFENSE DID.

DID THE DEFENSE TELL THE JURY ABOUT THE STATEMENT -- DID THE STATE TELL THE JURY ANYTHING ABOUT THE NIGHT BEFORE OR ANYTHING ABOUT THAT THEY WERE GOING TO HAVE AN EYEWITNESS NECESSARY TO THIS CASE?

I REREAD IT THIS MORNING, JUST TO MAKE SURE, AND THE STATE TALKED ABOUT SOME OF THE FACTS THAT WOULD COME OUT, BUT THEY DID NOT SAY WE ARE GOING TO HAVE A WITNESS NAMED GREEN COME UP AND TELL YOU X, Y AND Z, BUT THEY DID TALK ABOUT THE FACTS THAT SHE EVENTUALLY TESTIFIED TO.

BUT FOR TRIAL PURPOSES, AS FAR AS THE DEFENSE IS CONCERNED, DON'T YOU END UP WITH THE PRACTICAL SITUATION OF THE DEFENDANT OF THE STATE NEVER ASSERTING OR NEVER LETTING ON THAT IT HAS AN ACTUAL EYEWITNESS? UNTIL YOU GET INTO THE TRIAL, AND IT IS KNOWN, THE STATE HAS KNOWN, ALL THE TIME, THAT IT HAS HAD AN EYEWITNESSNESS THAT IT HAS NOT DISCLOSED THAT INFORMATION TO THE DEFENSE. ISN'T THAT THE PRACTICAL PROBLEM HERE?

-- AND ISN'T THAT THE THING THAT WE ARE TRYING IT TO AVOID BY RECIPROCAL DISCOVERY, THAT YOU HAVE TO DISCLOSE THIS? BECAUSE, HERE, YOU KNOW, IF YOU TRY CRIMINAL CASES, YOU -- THAT IS PRETTY IMPORTANT, WHETHER YOU GOT AN EYEWITNESS AGAINST YOUR CLIENT OR NOT, IF YOU ARE A DEFENSE COUNSEL, AND HERE DEFENSE COUNSEL GOES TO TRIAL THINKING, WELL, IT IS A LITTLE MORE A CIRCUMSTANCE CASE BUT NOBODY CAN SAY THAT THEY ACTUALLY SAW IT, AND BOOM. RIGHT IN THE MIDDLE OF TRIAL, HERE IS A WITNESS THAT YOU HAVE -- YOU LOOKED AT HER DEPOSITION AND IT SAYS ONE THING, AND NOW SHE IS COMING UP SAYING I SAW IT. ISN'T THAT A PROBLEM?

WELL, IN THIS CASE, THE STATE DID HAVE HER ON THE WITNESS LESS -- ON THE WITNESS LIST. THE DEFENDANT HAD AN OPPORTUNITY TO DEPOSE HER AND DID, AND THE PROSECUTOR POINTED OUT, AT ONE POINT IN THE TRIAL, THAT THE DEFENSE COUNSEL DIDN'T ASK HER VERY MANY QUESTIONS. AGAIN, I DON'T HAVE A COPY OF THE DEPOSITION TO SEE WHATEVER, BUT THE PROSECUTOR SAID THAT THE DEFENSE COUNSEL DIDN'T ASK HER VERY MANY QUESTIONS. IT IS IN THE TRIAL TRANSCRIPT THAT WE HAVE THE ONE STATEMENT, AND WHAT THE DEFENSE COUNSEL ASKED HER, IT IS AT PAGE 325, THE WITNESS DIDN'T TELL POLICE THAT SHE WENT AROUND THE VAN OR THAT SHE SAW THE DEFENDANT SHOOT THE VICTIM. THOSE ARE THE ONLY TWO THINGS THAT WE HAVE THAT ARE DISCREPANCIES. AGAIN, SHE WAS AT THE SCENE. SHE KNEW EVERYBODY INVOLVED. SHE KNEW WHAT WAS GOING ON. SHE KNEW THE CONFLICT AMONGST THE VICTIM AND THE DEFENDANT, AND PRESENT AT THE SCENE. WE KNEW THAT. EVERYBODY KNEW THAT THE ENTIRE TIME, FROM DAY ONE, ON, AND THE OTHER THINGS THAT I WOULD LIKE TO POINT OUT, GREEN, THIS WITNESS GREEN WAS NOT THE STATE'S CASE. SHE WAS NOT THE ENTIRE CASE THAT WE HAD. WE HAVE A CONFESSION THAT WAS FREELY AND VOLUNTARILY MADE. THERE WAS NO MOTION TO SUPPRESS. THERE WAS NO OBJECTION TO IT IT COMING IN, AND -- OBJECTION TO IT COMING IN, AND ON TOP OF THAT THE CONFESSION, THE THEORY OF IT WAS SELF-DEFENSE. HOWEVER, IF YOU REALLY TAKE A LOOK AT THE CONFESSION, PAGE 383-385, THE DEFENSE WAS OH, THE VICTIM WAS YELLING AT ME AND YELLING PROVE AND ITS AT ME, BUT THERE WAS NEVER A THREAT AND NEVER AN ACT AND NOTHING TO DEFEND AGAINST. THE STATE RESPECTFULLY REQUESTS THAT THIS COURT REVERSE THE DECISION OF THE 3RD DISTRICT. THANK YOU.

THANK, COUNSEL.