

>>> THE NEXT CASE FOR THE DAY IS
MCLEAN VERSUS STATE OF FLORIDA.

>> MAY IT PLEASE THE COURT, I'M
MARK RIVER WITH CCRC.

I'M REPRESENTING DERRICK MCLEAN.
WHAT I'M HOPING TO TALK ABOUT
THIS MORNING IS THE FIRST CLAIM
IN THE 3850 AND OF COURSE IN THE
BRIEF ALLEGING INEFFECTIVE OF
COUNSEL FOR FAILURE TO EVEN
CONSULT AND THEN POSSIBLY CALL
AN EXPERT IN THE FIELD OF EYE
WITNESS IDENTIFICATION.

NOW, THIS OF COURSE WAS A HOME
INVASION ROBBERY.

THE VICTIM, JAHVON THOMPSON, WAS
A RESIDENT IN THE APARTMENT THAT
WAS INVADED.

LEWIS WAS THE NEXT-DOOR NEIGHBOR
WHO WENT OVER TO THE APARTMENT
WHEN HE HEARD NOISE.

HE WAS GESTURED INSIDE.

THERE WERE TWO PERPETRATORS WHO
WERE INSIDE THE APARTMENT.

ACCORDING TO THE THEORY OF THE
CASE, THE THIRD WAS OUTSIDE A
WAYS AWAY IN A GET-AWAY CAR.

LEWIS BECAME THE EYE WITNESS IN
THIS CASE.

>> LET ME JUST MAKE SURE.

MR. MCLEAN, THE DEFENDANT HERE,
WAS INSIDE THE APARTMENT.

>> WELL, I'M NOT CONCEDING IT.
OF COURSE, OUR WHOLE DEFENSE IS
THAT--

>> BUT HE WAS NOT THE ONE
ALLEGEDLY WHO WAS LEFT OUTSIDE
WITH THE CAR, RIGHT?

>> WELL, THAT ISSUE -- I WOULD
ARGUE THAT THERE IS A FACTUAL
ISSUE WITH REGARD TO THAT, BUT
IT REALLY HASN'T APPEARED IN THE
PLEADINGS.

THE WHOLE STATE'S THEORY WAS 30
THAT IT WAS LEWIS OUTSIDE IN THE
CAR, WAS THE OWNER OF THE CAR
AND WAS THE ONE WHO DROVE IT.

>> OKAY.

SO STATE'S THEORY IS THAT MCLEAN
WAS THE ONE -- ONE OF THOSE

INSIDE THE APARTMENT, CORRECT?
>> IN FACT, YES, THAT MCLEAN WAS
THE SHOOTER.

>> AND THERE WAS -- THE MURDER
VICTIM AND THE ATTEMPTED MURDER
VICTIM INSIDE THE APARTMENT.

>> RIGHT.

>> AND THAT THE ATTEMPTED MURDER
VICTIM IDENTIFIED MR. MCLEAN?

>> YES.

>> OKAY.

>> OKAY.

AND--

>> AND HOW MUCH -- OKAY.
BECAUSE YOU -- YOU KNOW, WE'RE
PROBABLY GOING TO SEE QUITE A
BIT OF THIS.

YOU SHOULD HAVE HAD
IDENTIFICATION WITNESSES BECAUSE
WE KNOW THAT, YOU KNOW, THERE'S
OFTEN SOME QUESTION OF WHETHER
OR NOT AN EYE WITNESS
IDENTIFICATION IS REALLY GOOD.
BUT HOW LONG WAS THE OTHER
VICTIM OF THE ATTEMPTED MURDER
IN THE APARTMENT, AND HOW LONG
DID HE HAVE ACCESS TO SEEING
MR. MCLEAN?

>> YOU KNOW, I DIDN'T MAKE A
NOTE OF THE EXACT NUMBER OF
MINUTES.

IT'S REFERENCED A NUMBER OF
TIMES.

THE FIGURE 18 MINUTES COMES TO
MIND.

>> 15 TO 20 MINUTES, ABLE TO
CLEARLY SEE THE SHOOTER'S FACE.
HE DIDN'T WEAR A MASK.

HE IDENTIFIED MCLEAN AS THE
SHOOTER IN THE THIRD PHOTOGRAPH
AT LINEUP -- TWO, WHERE HE
WASN'T IN THERE AND DIDN'T
IDENTIFY -- MISIDENTIFY, AND HE
HAD NO DOUBT. 31

PLUS YOU'VE GOT CORROBORATING
EVIDENCE OF THE DEFENDANT THAT
THIS WAS THE DEFENDANT.

DON'T YOU HAVE DNA?

WHAT ELSE DO YOU HAVE THAT PUTS
HIM AT THE SCENE?

>> DON'T YOU HAVE THE
CODEFENDANTS?

>> THERE ARE CODEFENDANTS AND,
YES INDEED, THEY DID TESTIFY
AGAINST MR. MCLEAN.

>> AND WE ARE SEEING THIS MORE.
AND, YOU KNOW, AND I'M SOMEBODY
THAT MIGHT THINK SOMETIMES THAT
THAT TYPE OF EXPERT MIGHT BE
HELPFUL.

BUT NOT -- BUT THIS CASE, WHAT
WOULD -- WHAT DID YOUR -- WHAT
DID YOUR EXPERT SAY ABOUT THE
IDENTIFICATION AND THAT IT WAS A
FLAWED IDENTIFICATION BY THE
SURVIVING VICTIM?

>> WELL,--

>> NOTHING, RIGHT?

HE DIDN'T REALLY -- HE JUST SAID
THAT SOMEBODY WHO'S UNDER DURESS
OR STRESS MIGHT BE LESS LIKELY
TO MAKE AN IDENTIFICATION?

>> HE SAID QUITE A BIT MORE THAN
THAT.

AND AS FAR AS WHAT THIS WITNESS
SAID, THE JUDGE HERE DENIED
RELIEF AND GAVE THREE REASONS
FOR DOING SO.

THE SECOND ONE OF THOSE REASONS
FOR DENYING RELIEF WAS THAT
DR. BRIGHAM DID NOT SPEAK TO
MR. LEWIS'S IDENTIFICATION.
OF COURSE HE DIDN'T BECAUSE HE
AGREED -- THE DOCTOR AGREED THAT
HE WOULD NOT DO THAT.

THE CASE LAW IS PRETTY CLEAR
THAT THE EXPERT CANNOT SPEAK
DIRECTLY TO THE CREDIBILITY OF
THE WITNESS.

WHAT HE DID, HOWEVER, WAS SPEAK
TO EIGHT SPECIFIC FACTORS THAT
IN HIS VIEW WERE PARTICULARLY
RELEVANT TO THE FACTS OF THIS
CASE.

AND OF COURSE THEY'RE LISTED IN
THE REPORT THAT HE GAVE AND WE
TALKED ABOUT THEM DURING THE
COURSE OF HIS TESTIMONY.

>> IS IT YOUR POSITION THAT
EVERY CASE, EVERY MURDER CASE

THAT HAS A -- SOMEBODY
IDENTIFYING THE DEFENDANT SHOULD
-- AND IT WOULD BE 6TH AMENDMENT
VIOLATION NOT TO -- CONSULT AND
CALL AN EYE WITNESS
IDENTIFICATION EXPERT?

>> WELL, THAT WOULD BE POSSIBLY
THE MOST EXTREME FORMULATION OF
--

>> OKAY.

SO SINCE WE -- WOULDN'T -- I
MEAN, IF YOU'RE GOING TO CALL OR
CONSULT WITH A WITNESS IN ANY
CASE, MAYBE IT WOULD BE WHERE
THERE'S NO OTHER CORROBORATING
EVIDENCE THAT IT'S THE
DEFENDANT, WHERE YOU'VE GOT
CIRCUMSTANCES WHERE YOU'RE NOT
SEEING IT.

BUT IN THIS CASE I GUESS I JUST
-- EVEN IF HE SHOULD HAVE
CONSULTED WITH AN EXPERT, I
DON'T SEE HOW IT WOULD BE
DEFICIENT NOT TO, WHERE'S THE
PREJUDICE?

I MEAN, WHERE WOULD THAT
UNDERMINE CONFIDENCE AND THAT
THIS WAS A GOOD IDENTIFICATION,
PLUS THAT THERE IS SIGNIFICANT
CORROBORATING EVIDENCE THAT THIS
IS THE CORRECT DEFENDANT WHO WAS
CONVICTED?

>> LET ME JUMP DIRECTLY TO THE
CORROBORATING EVIDENCE, BECAUSE
--

>> I DON'T MEAN TO PILE ON, BUT
DIDN'T MR. LEWIS DO A COMPOSITE
DRAWING THAT DEFENSE COUNSEL
LOOKED LIKE A PORTRAIT OF THE
DEFENDANT RIGHT AFTER THIS EVENT
HAPPENED?

>> WELL, THAT'S -- THE ANSWER IS
YES, HE DID DO A COMPOSITE
DRAWING. 33

I'D ALSO POINT OUT THAT
DR. BRIGHAM TALKED ABOUT ISSUES
WITH REGARD TO THE COMPOSITE
DRAWING.

I'VE LOOKED AT IT.
IT'S IN EVIDENCE.

IT LOOKS SIMILAR, OKAY?
YOU HAVE DEFENSE COUNSEL LATER
ON IN A POSTCONVICTION
PROCEEDING BEING ESSENTIALLY
ACCUSED OF INEFFECTIVE
ASSISTANCE--

>> WOULDN'T THAT OBTAIN THE
FACTORS THAT DR. BRIGHAM
INDICATED THAT A PERSON UNDER
THAT KIND OF STRESS MIGHT BE
UNDER, RIGHT AFTER HE WAS ABLE
TO DO A COMPOSITE WITHOUT EVEN
SEEING HIM AGAIN, AND IT MATCHED
RIGHT UP WITH HIM?

>> I'M NOT SURE I HEARD YOU.
I'M SORRY.

>> WOULDN'T IT OBTAIN THE
FACTORS THAT DR. BRIGHAM GAVE
ABOUT VICTIMS UNDER DURESS AND
STRESS AS RELATES TO THEM
IDENTIFYING A WITNESS, THE FACT
THAT HE CAME UP WITH THE --
PARTICIPATED IN THE COMPOSITE
DRAWING THAT LOOKED JUST LIKE
THE DEFENDANT RIGHT AFTER IT
HAPPENED.

>> WELL, NO.
WOULDN'T OBTAIN IT AT ALL.
THE THINGS THAT DR. BRIGHAM
TALKED ABOUT THAT COULD ALSO BE
TALKED ABOUT BY A NONEXPERT WERE
WEAPONS FOCUS.

THE STRESS ISSUE, THE HIGH
STRESS ISSUE ACTUALLY DOES NEED
AN EXPERT BECAUSE APPARENTLY THE
SCIENCE SHOWS THAT WHILE STRESS
HELPS--

>> I'M SAYING THE PROOF IS IN
THE PUDDING.

HERE IT IS RIGHT HERE.
AND IT MATCHES UP WITH--

>> LET ME ASK YOU THIS.
LAWYERS TESTIFIED -- AT LEAST
ONE OF THE LAWYERS TESTIFIED AT
THE EVIDENTIARY HEARING THAT
THEY ACTUALLY CONSIDERED CALLING
OR CONSULTING AN ID EXPERT OR
EYE WITNESS EXPERT, AND BECAUSE
THERE WAS SO MUCH OTHER
OVERWHELMING EVIDENCE, THEY JUST

THOUGHT THAT IT JUST MADE NO SENSE TO DO THAT. HOW IS THAT NOT A REASONABLE STRATEGIC DECISION ON THE PART OF COUNSEL?

>> I SHOULD SAY I JUST DISAGREE WITH THE TRIAL JUDGE'S CHARACTERIZATION OF THE DEFENSE COUNSEL'S TESTIMONY IN THIS CASE.

AND WHAT THERE WAS WAS ALMOST A PASSING REFERENCE TO, YES, WE THOUGHT ABOUT IT AT ONE POINT BY THE LEAD COUNSEL.

THE TESTIMONY BY THE LEAD COUNSEL WAS QUOTED VERBATIM IN THE BRIEFING HERE, WHICH WAS WE DIDN'T -- IN RESPONSE TO A VERY OPEN-ENDED QUESTION AT A DEPOSITION PRIOR TO THE EVIDENTIARY HEARING, WAS THAT WE DIDN'T -- WE DIDN'T DO IT BECAUSE THE LAW AT THAT TIME AND AT THIS TIME DOES NOT PERMIT US TO USE AN EXPERT WITNESS IN EYE WITNESS IDENTIFICATION, PERIOD, WITH THE WAY "PERIOD" SPOKEN OUT LOUD.

IT WAS A TOTAL, UNEQUIVOCAL RULE WHICH DEFENSE COUNSEL THOUGHT WAS IN PLACE BOTH AT THE TIME OF THE TRIAL AND AT THE TIME OF THE POSTCONVICTION PROCEEDINGS.

AND--

>> WASN'T THERE ALSO TESTIMONY THAT DEFENSE COUNSEL SAID THEY HAD USED IDENTIFICATION EXPERT IN OTHER CASES?

>> WHAT SHE SAID WAS THAT SHE HAD CONSULTED ONE AND THAT IT MAY HAVE BEEN DR. BRIGHAM.

I'M -- YOU KNOW, I'VE USED -- ACTUALLY, I USED A BIT STRONGER LANGUAGE IN THE BRIEF.

I SAID I BELIEVE THAT THERE IS A FACTUAL ISSUE HERE.

I BELIEVE -- I TAKE THE POSITION THAT THE JUDGE HERE MADE THE WRONG FACTUAL CALL IN THE POSTCONVICTION PROCEEDING ABOUT

WHAT DEFENSE COUNSEL ACTUALLY SAID.

>> BUT DOES IT REALLY -- OKAY. ASSUMING THE DEFENSE COUNSEL ERRONEOUSLY BELIEVED THAT THEY COULD NOT CALL AN EXPERT EYE WITNESS.

IT GOES REALLY BACK TO JUSTICE PARIENTE'S QUESTION IS WHERE IS THE PREJUDICE HERE?

>> WELL, THERE -- ONE POINT I DO WANT TO MAKE IS THAT THE PHYSICAL EVIDENCE THAT WAS RECOVERED FROM NEAR THE CRASH, WHICH WAS THE NOKIA PHONE AND ARTICLES OF CLOTHING, BASEBALL HAT, THE GLOVE AND SO FORTH, AND THEN THE MARIJUANA THAT WAS TAKEN, WHICH WAS IN THE BUICK ALSO AT THE SCENE OF THE CRASH SHORTLY AFTER IT, IF YOU TAKE THESE ITEMS OF PHYSICAL EVIDENCE, THEY DO NOT -- I'M MAKING THE ARGUMENT HERE THAT THEY DO NOT PUT MR. MCLEAN IN THE APARTMENT.

THEY PUT HIM CONNECTED WITH THAT CAR AT THE CRASH SCENE, AND HE OF COURSE WAS THE COUSIN OF MORRIS LEUEN AND HE'D BEEN IN AND OUT OF THAT CAR ANY NUMBER OF TIMES.

WHEN THE POLICE WENT INTO THE CAR AND OBTAINED THE MARIJUANA, THEY ACTUALLY SET UP AND MADE A LITTLE STAGES SETTING RIGHT INSIDE THE CAR AND TOOK A PICTURE OF IT.

THAT WHOLE SCENE HAD BEEN HOPELESSLY CONTAMINATED.

THERE WAS DNA FLOATING ALL AROUND THE INSIDE OF THE CAR. THE FORENSIC INVESTIGATION OF THE APARTMENT ITSELF, OF THE 36 INTERIOR OF THE APARTMENT ITSELF, DID NOT YIELD ANY PHYSICAL EVIDENCE THAT MATCHED UP TO MR. MCLEAN.

NOW, ANOTHER POINT IN THAT REGARD IS IF YOU TAKE THAT--

>> EXCUSE ME.

WHAT ABOUT THE CODEFENDANT'S TESTIMONY?

THAT PUTS HIM THERE, DOESN'T IT?

>> I -- YEAH.

I DON'T -- I DON'T HAVE ANYTHING PARTICULARLY SPECIFIC TO SAY ABOUT THE CODEFENDANT'S TESTIMONY ASIDE FROM THE FACT THAT'S VERY OBVIOUS HERE, WHICH IS THAT THEY WERE INDICTED FOR FIRST-DEGREE MURDER THEMSELVES. THEY CUT DEALS FOR 20 YEARS AND 22 YEARS RESPECTIVELY. THEY TESTIFIED AGAINST DERRICK MCLEAN.

IT TOOK THEM -- WORKING ON THEM QUITE A LONG TIME TO GET THEM TO DO IT.

BY THE TIME THEY GAVE TESTIMONY AGAINST MR. MCLEAN, BY THE TIME THEY SAID ANYTHING AGAINST HIM ALREADY, THEY HAD ALREADY HAD ALL THE DISCOVERY, ALL THE INFORMATION ABOUT THE CASE. THEY COULD HAVE -- THEY WERE IN A POSITION TO MAKE UP ANY STORY THEY WANTED TO MAKE THAT WOULD BETTER SERVE THEIR PURPOSES.

>> I THINK THE TROUBLE I'M HAVING WITH YOUR THEORY, AT LEAST YOUR ARGUMENT -- AND I -- EYEWITNESS IDENTIFICATION EXPERTS SHOULD HAVE BEEN CONSULTED AND CALLED IS THAT I CAN SEE THAT IN A SITUATION WHERE THE VICTIM OR THE WITNESS SAW THE CULPRIT FOR JUST A SPLIT SECOND, THE LIGHTING WAS BAD, STRESSFUL SITUATION.

BUT IN THIS INSTANCE, I MEAN, HE WAS IN THAT APARTMENT FOR A LONG TIME.

HE HAD A CHANCE TO LOOK AT HIM. EVEN ASSUMING OR THE STRESS THAT WAS INVOLVED IN THE SITUATION AND HOW THAT COULD LEAD TO SOMEONE MISIDENTIFYING SOMEONE, THAT'S A LONG TIME.

>> WELL--

>> AND WHEN HE DREW THE PICTURE WITH THE ARTIST, I MEAN, IT LOOKED PRACTICALLY LIKE A PHOTOGRAPH OF YOUR CLIENT. SO, I MEAN, I JUST DON'T KNOW WHAT AN IDENTIFICATION EXPERT COULD HAVE ADDED IN THIS INSTANCE WHEN YOU HAVE ALL THIS OTHER EVIDENCE.

>> WE DON'T LOOK AT 20,000 PEOPLE ON WAITING LISTS, BUT AN ISSUE OF IS THIS PERSON REALLY -- WAS HE SAFE, EVEN GOING TO GROUP HOME UNRESTRICTED WHEN HE HAD BATTERED SOMEBODY NINE YEARS BEFORE?

SO WHERE IS THAT PETITION REQUIREMENT IN THE STATUTE.

>> RIGHT.

AND REMEMBER THAT THIS IS A FACIAL CHALLENGE TO ñ

>> FIRST OF ALL, I, I DISAGREE WITH THE NOTION THAT THE COMPOSITE PHOTO, I MEAN, COMPOSITE DRAWING IS STRONG AS IT IS BUT AS I SAY IT IS IN EVIDENCE.

IT'S SOMETHING TO BE LOOKED AT. DEFENSE COUNSEL HERE CHALLENGED THE IDENTIFICATION, NOT JUST IN THE MOTIONS TO SUPPRESS BUT ALSO HE HAVE ABOUT THE JURY.

DEFENSE COUNSEL CROSS-EXAMINED THEO LEWIS WITH REGARD TO HIS IDENTIFICATION AND IN DOING SO HE POINTED OUT WHEN HE WAS SHOWN A PHOTOGRAPHIC LINEUP, HE SAID THAT, HE WAS NOT SURE.

HE SAID HE WAS 90%.

THAT WAS THE INDIVIDUAL.

LATER ON WHEN HE WAS SHOWN A, A LIVE LINEUP, THAT WAS PUT TOGETHER BY THE DETECTIVE IN THE CASE, THEN HE MADE AN IDENTIFICATION.

DEFENSE COUNSEL CHALLENGED THE IDENTIFICATION AND DID SO AGAIN DURING CLOSING ARGUMENT.

SO SAY THAT DEFENSE COUNSEL HAD, WHAT, ABANDONED THE ISSUE OF THE

CREDIBILITY OF THE IDENTIFICATION OR HAD, WAS OVERWHELMED BY IT? YOU KNOW, SIMPLY NOT BACKED UP BY THE RECORD AND, SO, HERE'S MY REJOINDER.

HOW IN THE WORLD IS DR. BRIGHAM'S TESTIMONY, ASSUMING IT GETS IN, HOW IN THE WORLD IS IT GOING TO HURT? BECAUSE THAT ARGUMENT WAS MADE BY THE STATE HERE THAT SOMEHOW THAT UNDERMINED COUNSEL'S CREDIBILITY.

COUNSEL IS MAKING THAT ARGUMENT, THEMSELVES, SO HOW IN THE WORLD WOULD BOLSTERING IT THROUGH 30 YEARS OF RESEARCH HURT OR UNDERMINE CREDIBILITY?

>> WELL I MEAN, BUT THE POINT BEING IS THAT YOU'RE SAYING IT IS INEFFECTIVE ASSISTANCE. WHEN YOU ARE SAYING HOW COULD IT HURT, DIDN'T SEEM YOU'RE NOT MATCHING ON THE STANDARDS THAT ARE HERE.

I MEAN YOU'RE SAYING YOU'RE INEFFECTIVE FOR NOT DOING THAT BUT YET YOU'RE SAYING HOW COULD IT HURT.

THAT'S NOT THE STANDARD.

>> I AGREE.

>> HE SHOULD HAVE DONE X BECAUSE.

THAT SEEMS TO ME TO BE THE MORE VIEWPOINT AND, AND I'M CONCERNED THIS AREA WE'RE REALLY HEADED FOR ANYTIME THERE'S AN EYEWITNESS AVAILABILITY, WE'RE GOING TO BRING SOMEBODY IN AND IN EVERY CASE AND GOING TO SAY, OH, WELL THERE IS STRESS.

I HAVEN'T SEEN ONE OF THESE THAT THERE WASN'T STRESS.

YOU MAY HAVE SOME OTHER FACTORS, LIGHTING AND OPPORTUNITY, SEEMS LIKE THIS IS THE DEFENSE DE JURE.

IT IS LIKE, IT IS JUST, AND THIS ONE SEEMS THAT THAT'S CLEARLY

WHAT IT IS HERE, RATHER THAN ONE OF THOSE QUESTIONABLE AREAS.

WHERE IS THE LINE?

I MEAN I THINK, YOUR ARGUMENT ALMOST IS THERE IS NO LINE AND SHOULD COME IN ALL THESE CASES?

>> WELL I, I'M NOT PROPOSING A LINE.

I'M CERTAINLY ARGUING MORE EXPANSIVE VIEW THAN CERTAINLY THAN THE EXCLUSIONARY RULE, OR, WHAT APPEARED TO COME FROM SOME SOURCES, SOMEWHAT LATER, IT IS DISCRETIONARY BUT DON'T EVER USE DISCRETION TO ADMIT SEEMS TO BE THE ADDITIVE IN SOME QUARTERS.

I DID WANT TO TALK ABOUT --

>> BUT THE POINT IS, THIS IS POST-CONVICTION, WHAT YOU HAVE TO, WITH A LAWYER FACED WITH THIS CASE, THESE CIRCUMSTANCES, AND THE OTHER PHYSICAL EVIDENCE AND WHAT EVERYONE ELSE POINTED OUT, THE SKETCH AFTERWARDS, HOW COULD IT POSSIBLY BE, AND THE STATE OF THE LAW, EFFICIENT, AND EVEN IF IT WERE, EVEN IF BY SOME STRETCH, WHICH I DON'T SEE IT WAS DEFICIENT, YOU STILL HAVEN'T REALLY ANSWERED, WHERE'S THE PREJUDICE?

>> WELL, THE, ONE OF THE ISSUES WITH, YOU KNOW, LET ME START OVER AGAIN HERE.

AS I SAID, DEFENSE COUNSEL DID MAKE THE ARGUMENT OF DEFICIENCY, THIS IS WIGGINS CASE.

AS YOU SAY IT IS A POST-CONVICTION CASE.

COUNSEL IN MY VIEW, I THINK THE RECORD IS CLEAR, DID NOT EVEN CONSULT OR INVESTIGATE THE USE OF AN EXPERT IN IDENTIFICATION. WITH REGARD TO PREJUDICE THERE IS ALSO THE POINT THAT YOU CAN LOOK AT ALL OF THIS PHYSICAL COOPERATING EVIDENCE AND SWITCH THE ROLES OF MAURICE LEWIN WHO REPORTEDLY WAS DRIVING THE CAR AND DERRICK McLEAN, MY CLIENT,

WHO IS CONVICTED OF BEING THE SHOOTER AND YOU GET PRETTY MUCH THE SAME EVIDENCE IN THE CASE. AND THAT IN MY VIEW --

>> I THOUGHT WHEN THEY CRASHED INTO THE PATROL CAR, I THOUGHT THE OFFICER WAS ABLE TO IDENTIFY, PUT CERTAIN, PUT DEFENDANTS IN CERTAIN PLACE AND THEY DIDN'T PUT MR. MACLEAN BEHIND THE McLIEN'S BEHIND THE DRIVER'S WHEEL?

>> NO.

>> I MAY BE MISSING SOMETHING THEN.

>> I MIGHT BE MISTAKEN TOO BECAUSE I SAW A REFERENCE TO THE OFFICER WHO WAS ON THE SCENE WHO, HE SAID THAT WAS DERRICK. SO FAR AS I KNOW THERE WAS NO OFFICER, IF I READ THIS RECORD, AND I HAVE, QUITE A BIT -- NO OFFICER IDENTIFIED McLEAN. SO --

>> DIDN'T IDENTIFY WHO WAS BEHIND THE DRIVER'S AND PASSENGERS?

>> NO.

THE PASSENGER, JAGGON, WAS TRAPPED IN THE PASSENGER SIDE AND SO HE WAS SPOTTED THERE RIGHT AWAY.

LEWIN, WHO ACCORDING TO THE STATE'S THEORY, WAS THE DRIVER, WAS APPREHENDED LATER ON. BUT SHORTLY THEREAFTER.

AND IT TOOK HIM A WHILE TO --

>> YOU USED ALL OF YOUR TIME. I WILL GIVE YOU AN ADDITIONAL MINUTE FOR REBUTTAL.

>> OKAY.

THANK YOU.

>> GOOD MORNING.

SCOTT BROWNE ON BEHALF OF THE STATE.

TRIAL COUNSEL IN THIS CASE MADE A REASONABLE TACTICAL DECISION NOT TO CONSULT WITH, RETAIN OR PRESENT AN EYEWITNESS IDENTIFICATION EXPERT.

THERE WAS A CLEAR CREDIBILITY

FINDING BY THE TRIAL COURT
BELOW.

WHILE IN TRIAL COUNSEL'S
DEPOSITION SHE INDICATED THAT
SHE DID NOT BELIEVE THE CASE LAW
CONDONED USE OF AN EYEWITNESS
IDENTIFICATION EXPERT.

SHE CLARIFIED HER TESTIMONY
DURING THE EVIDENTIARY HEARING.
SHE DID IN FACT CONSULTED WITH A
EYEWITNESS IDENTIFICATION EXPERT
PREVIOUSLY.

NOW THIS COURT HAS THIS CASE ON
POST-CONVICTION REVIEW.

SO THE QUESTION ISN'T WELL, WHAT
COULD IT HAVE HURT.

IT IS WHETHER OR NOT OR NO
REASONABLE DEFENSE ATTORNEY
UNDER THESE FAXES UNDER THESE
CIRCUMSTANCES WOULD HAVE FAILED
WITH TO CONSULT WITH, RETAIN AND
PRESENT WITH AN IDENTIFICATION
EXPERT.

I SUBMIT TO YOU THIS RECORD
SHOWS VERY CLEARLY WHY YOU WOULD
HAVE NOT DONE THAT AND TRIAL
COUNSEL TESTIFIED SHE DID NOT
WANT TO LOSE CREDIBILITY WITH
THE JURY.

WHAT HAPPENED DURING THE
POST-CONVICTION HEARING?

WELL, DR. BRIGHAM GOT UP AND HE
TESTIFIED TO ALL THESE FACTORS
THAT COULD HAVE IMPACTED AN
IDENTIFICATION IN GENERAL.

ONE OF THOSE FACTORS HE ADMITTED
IN HIS REPORT WAS WRONG.

THERE WAS NO SUGGESTIVE
INSTRUCTIONS TO THE SURVIVING
VICTIM WHILE IN LINEUP.

HE ADMITTED WHAT HE PUT IN HIS
REPORT WAS WRONG.

HE ALSO WAS FORCED TO ADMIT THAT
HE WASN'T AWARE OF ALL THE OTHER
EVIDENCE IN THIS CASE THAT
IDENTIFIED MR. McLEAN, WHICH
CORROBORATED THE SURVIVING
VICTIM, MR. LEWIS'S
IDENTIFICATION OF HIM.

INCLUDING THE SKETCH WHICH,

JUSTICE PERRY, LOOKS EXACTLY LIKE
MR. McLEAN.

IT IS AS IF HE HAD TAKEN A
PHOTOGRAPH.

>> THE EXPERT HAD NOT SEEN THE
SKETCH AND THE EXPERT DID NOT
KNOW A SKETCH HAD BEEN MADE?

>> NO. I THINK THE EXPERT KNEW
THE SKETCH HAD BEEN MADE BUT HE
DIDN'T MAKE ANY COMPARISONS.
HE JUST SAID, IN GENERAL, A
SKETCH, IF YOU USE A HOLISTIC
APPROACH, IT IS BETTER THAN
CONFIGURAL APPROACH.

I DON'T KNOW WHERE HE GOT THE
SCIENCE FOR THAT OR THE STUDY
BUT HE INDICATED SOMETIMES A
SKETCH CAN ACTUALLY BE
DETRIMENTAL TO AN EYEWITNESS'S
RECOLLECTION.

THEN WHAT I DID, I WENT THROUGH
ALL THE OTHER EVIDENCE IN THIS
CASE, WHICH CORROBORATED THE
SURVIVING VICTIM'S TESTIMONY.
WHICH INCLUDED THE TWO
CODEFENDANTS WHO KNEW
MR. McLEAN.

WHO DIDN'T NEED TO IDENTIFY HIM
FROM A LINEUP WHICH INCLUDED
MR. McLEAN'S COUSIN.

THE EVIDENCE FROM THE PILLOW
SHAM TAKEN FROM THE VICTIM'S
APARTMENT HAD A LARGE BLOOD
STAIN ON IT.

THERE WERE THREE.

THAT WAS MR. McLEAN'S DNA.

WE KNOW MR. McLEAN WAS IN THE
APARTMENT THEY'RE.

THE BLOOD WAS FOUND ON THE
PILLOW SHAM TAKEN FROM THE
APARTMENT AND IT WAS IDENTIFIED
TO MR. McLEAN BEYOND EVERYONE
IN THE ENTIRE GALAXY APPARENTLY.
THE OTHER EVIDENCE, AND I
PROBABLY WON'T GO THROUGH ALL
THE DETAILS, BUT IT INCLUDED THE
HIGH POINT .380 WEAPON FOUND
FROM THE CASH SCENE INCLUDING
GLOVES WITH MR. McLEAN'S DNA
ON IT.

AND THE CELL PHONE FROM THE
CRASH SITE WHICH ALSO
CONVENIENTLY HAD A PHOTOGRAPH OF
MR. McLEAN HOLDING WHAT LOOKED
TO BE THE MURDER WEAPON, WHICH
WAS MATCHED TO THE HIGH POINT
.380.

SO IF YOU TAKE ALL THESE
CIRCUMSTANCES, AND I DID IN THE
POST-CONVICTION HEARING,
ASSUMING ALL THESE HYPOTHETICAL
FACTS ARE TRUE, IT LOOKS LIKE
MR. LEWIS'S IDENTIFICATION OF
THE DEFENDANT IN THIS CASE WAS
ACCURATE.

YOU KNOW WHAT HE SAID?

WELL, PROBABLY, YES.

WHAT COMPETENT ATTORNEY WOULD
PRESENT DR. BRIGHAM AT TRIAL,
AND ALLOW A PROSECUTOR TO GO
THROUGH ALL THE EVIDENCE HE HAD
JUST PRESENTED IDENTIFYING HIM
AND HAVE HIM AGREE, YEAH, IT'S
PROBABLY CORRECT?

I SUBMIT WHAT WAS ACTUALLY
PROVED WAS THAT TRIAL COUNSEL
MADE THE ONLY PROFESSIONALLY
COMPETENT DECISION THAT COULD
HAVE BEEN MADE IN THIS CASE.

IF THERE ARE NO FURTHER
QUESTIONS, WE ASK THAT YOU
AFFIRM THE DECISION THE
POST-CONVICTION COURT.

>> THANK YOU.

REBUTTAL?

>> QUICKLY POINT OUT THAT I
OBJECTED TO EVERY ONE OF THOSE
QUESTIONS THAT WERE ASKED DURING
THE POST-CONVICTION HEARING AND
IF I HAD ASKED THOSE SAME TYPES
OF QUESTIONS OF A WITNESS UNDER
THOSE SAME LEGAL CIRCUMSTANCES
I'M PRETTY CERTAIN THAT AN
OBJECTION WOULD HAVE BEEN
SUSTAINED.

BEYOND THAT, IF THERE ARE NO
FURTHER QUESTIONS I WILL THANK
YOU ALL FOR YOUR ATTENTION TO
THE CASE.

>> THANK YOU FOR YOUR ARGUMENTS.

THE COURT WILL BE IN RECESS FOR
10 MINUTES.
>> ALL RISE.