

>> NEXT CASE IS MOSLEY VERSUS STATE.

>> MAY IT PLEASE THE COURT, COUNSEL, I AM RICK SICHTA REPRESENTING THE APPELLANT IN THIS MATTER.

WE ARE HERE ON A HABEAS PETITION.

THIS CASE HAS A LOT OF UNUSUAL FACTS GOING ON WITH IT, AND IT AGAINST WITH MR. MOSLEY PRETRIAL REQUESTING TO REPRESENT HIMSELF AND THE JUDGE SAID, WELL, WHEN YOU FILE THE APPROPRIATE MOTION WITH THE APPROPRIATE FACTS, WE'LL HEAR THAT.

IT THEN GOES INTO JURY SELECTION, WHERE THERE IS A JUROR WHO, AFTER BEING ASKED BY THE STATE ATTORNEY IF SHE COULD BE FAIR AND IMPARTIAL AFTER LOOKING AT DISTURBING PHOTOGRAPHS, SAYS I DON'T KNOW. I DON'T KNOW WHAT I WOULD TAKE HOME WITH ME AT NIGHT.

WITHOUT ANY KIND OF REHABILITATION WHATSOEVER. IT THEN PROCEEDS TO TRIAL, WHERE WE HAVE TWO DETECTIVES, COMMENTING IN NO UNCERTAIN TERMS, ABOUT THE MAIN WITNESS, BERNARD GRIFFIN, WHO WAS A CODEFENDANT IN THIS CASE, HIS CREDIBILITY.

YEAH, I THINK HE'S TELLING ME THE TRUTH IN HIS LAST STATEMENT. AND THEN FINALLY WE HAVE IN POST-CONVICTION BERNARD GRIFFIN SIGNING AN AFFIDAVIT WITH OUR INVESTIGATOR SAYING THAT HE DID HAVE A DEAL IN PLACE, HE WAS PROMISED NO JAIL TIME OR LITTLE JAIL TIME AND HE KNEW WHAT HE WAS GETTING AND HE LIED ON THE STAND.

>> SO LET'S START WITH THAT LAST ONE, BECAUSE I THINK YOU USED BRADY, GIGLIO, JONES, YOU KNOW, ON THIS.

>> YES, YOUR HONOR.

>> THE JUDGE MADE -- YOU HAD AN EVIDENTIARY HEARING ON THAT. THE JUDGE MADE FACTUAL FINDINGS. THE ACTUAL LAWYER FOR MR. GRIFFIN OR FOR THE STATE TESTIFIED, SAID THERE WAS NO DEAL.

WHAT DO WE DO WITH THAT FACTUAL FINDING?

>> WELL, --

>> AND ALSO GRIFFIN DOESN'T RECALL ANY PART OF HIS SUBSEQUENT TESTIMONY.

>> THAT'S TRUE.

>> THERE'S COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT IT; THAT IS, THE ASSISTANT STATE ATTORNEY, AND I THINK EVEN GRIFFIN'S LAWYER TESTIFIED AND THE JUDGE'S FINDING, THE JUDGE'S ORDER IN THIS CASE IS, YOU KNOW, 90 PAGES OF ALL SORTS OF FINDINGS, FACTUAL AND OTHERWISE. DOESN'T THAT CLAIM, ISN'T THAT GONE?

>> I DON'T BELIEVE SO, JUDGE, AND THE REASON IS I DON'T -- I DON'T THINK IT'S SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE. AND THE REASON IS THE JUDGE DOES NOT DISCUSS -- NOW, AGAIN, IN NAPUE, U.S. SUPREME COURT CASE, CAME OUT A VERY LONG TIME AGO, CONSIDERATION IS SOMETIMES MORE IMPORTANT THAN PROMISES.

AND HERE IF YOU LOOK AT THE TOTALITY OF THIS RECORD, WHICH GUY WAS SERVED FOOD WHICH THE STATE ATTORNEY IS LIKE, YEAH, THAT RINGS A BELL.

HE WAS SERVED NONJAIL FOOD THE NIGHT BEFORE HE TESTIFIED AGAINST MR. MOSLEY, WHICH DID NOT COME OUT AT TRIAL.

>> BUT REALLY SAYING THAT SINCE HE GOT WAS IT CHINESE FOOD?

>> YEAH.

>> THAT THAT IS THE TYPE OF IMPEACHMENT EVIDENCE THAT WOULD MEET -- THAT SOMEHOW THE STATE

EITHER -- THEY HAD AN OBLIGATION TO TELL ABOUT IT, THEY LIED OR HE LIED WHEN HE SAID THERE WAS NO DEAL BECAUSE HE GOT -- I MEAN, AGAIN, CHINESE FOOD THE NIGHT BEFORE?

AND I UNDERSTAND YOU MAY BE GRASPING AT STRAWS, AND I DON'T MEAN IT UNKINDLY, BUT IT DOES SOUND SOMEWHAT PREPOSTEROUS.

>> I'M NOT GRASPING AT STRAWS. THERE'S MORE THAN JUST THAT, JUDGE.

IF YOU LOOK AT HIS TRIAL TESTIMONY, DO YOU KNOW HOW MUCH TIME YOU'RE FACING ON THIS FIRST-DEGREE MURDER CHARGE?

NO, I DO NOT.

WE KNOW IT WAS UP TO 30 YEARS. WERE YOU PROMISED ANYTHING TO GET YOU TO TESTIFY OR DID ANYBODY SUGGEST TO YOU WHAT YOU MIGHT GET?

NOW, GRIFFIN TESTIFIED, YES, HE UNDERSTOOD.

AND IMPORTANTLY THERE WAS A JAIL PHONE CALL THAT WAS DONE BY GRIFFIN PRIOR TO TRIAL WHERE HE PREDICTS EXACTLY WHAT HE GOT AFTER MOSLEY'S TRIAL.

NOW, IS HE PSYCHIC?

MERE COINCIDENCE?

OR WAS THERE A DEAL IN PLACE? AND THE DEFENSE ATTORNEYS WERE

--

>> NOW, YOU'RE SAYING A DEAL. ARE YOU SAYING THAT THE JUDGE BY FINDING THAT THE ASSISTANT STATE ATTORNEY SAID THERE WAS NO DEAL ABOUT HOW MUCH TIME, BECAUSE IT'S A LITTLE DIFFERENT THAN CHINESE FOOD THE NIGHT BEFORE, THAT WHEN THAT TESTIMONY WAS MADE AND THE JUDGE FOUND IT TO BE CREDIBLE, THAT YOU ARE ASKING US TO DISREGARD THAT FINDING AND THAT TESTIMONY?

>> I'M ASKING YOU TO LOOK AT THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE AND TO SHOW THAT THERE

WAS SOMETHING -- EVERY PERSON --
EVERY DEFENSE ATTORNEY BELIEVED
THAT THERE WAS SOME KIND OF
DEAL.

AND IT'S JUST TOO COINCIDENTAL
FOR HIM TO GET --

>> BUT, AGAIN, WE ARE HERE IN AN
APPELLATE CAPACITY.

THERE WAS AN EVIDENTIARY HEARING
AND THERE WAS A TRIER OF FACT,
THE POSTCONVICTION COURT, THAT
HEARD ALL THE TESTIMONY ABOUT
THIS AND FOR US TO COME BACK NOW
AND SAY, OH, WE'RE GOING TO
DISCREDIT THE TESTIMONY OF THE
ASSISTANT STATE ATTORNEY WHO
TESTIFIED BASED ON THESE
SUPPOSITIONS AND WHAT EVERYBODY
KNEW, THAT JUST WOULD BE A GROSS
DEPARTURE FROM OUR ROLE AS AN
APPELLATE COURT, WOULD IT NOT?

>> YOU HAVE A POINT, YOUR HONOR.
I DON'T WANT TO BELABOR THE
POINT ON THAT.

I WOULD LIKE TO GET TO THE OTHER
ISSUES BECAUSE I THINK THE OTHER
ISSUES ARE IMPORTANT, ESPECIALLY
THE STRUCTURAL ERROR --

>> NOW, ON THE CHINESE FOOD, I
THOUGHT HE HAD NOT HAD HIS
DINNER AND THEY GAVE HIM THE
FOOD BECAUSE SUPPERTIME AT THE
JAIL HAD PASSED.

>> I BELIEVE IF YOU LOOK AT THE
EVIDENTIARY HEARING TESTIMONY,
MR. GRIFFIN TESTIFIED THAT HE
DID HAVE DINNER BUT I TOOK IT
ANYWAY.

>> THERE YOU GO.

>> MAY I SWITCH TO THE --

>> ANYWAY, YOU'VE GOT TO GET TO
EVEN IF THERE WAS SOME BENEFIT
THAT WAS NOT TESTIFIED TO, IT
STILL HAS TO MEET UNDER BRADY
THAT THERE'S, YOU KNOW,
REASONABLE PROBABILITY OF A
DIFFERENT RESULT.

SOMEHOW THIS UNDERMINES OUR
CONFIDENCE IN WHAT THIS
MR. GRIFFIN STATED, AND YET HE

ADHERED STEADFAST TO THE FACTS
AND THERE'S BEEN NOTHING ELSE TO
SUGGEST THAT HE IS ACTUALLY
LYING ABOUT THE FACTS OF THE
MURDER.

SO I FEEL LIKE EVEN IF SOMEHOW
WE SAID, OKAY, MAYBE THAT,
ALTHOUGH I DON'T SEE HOW WE GET
PAST IT, I DON'T SEE HOW IT
MEETS THE OTHER PRONGS.

>> MAY I COMMENT ON THAT?

>> SURE.

>> WE RAISED THREE DIFFERENT
CLAIMS UNDER THAT.

I THINK THE MOST IMPORTANT CLAIM
IS THE GIGLIO CLAIM.

WE KNEW HE LIED AT TRIAL AND I
HIGHLIGHTED THAT IN OUR INITIAL
BRIEF ON SEVERAL RESPECTS,
RIGHT?

THE STATE KNEW THAT, AND SHE
TESTIFIED AT THE EVIDENTIARY
HEARING THAT SHE DID TALK WITH
MR. GRIFFIN AT LEAST FOUR TIMES,
WENT OVER CROSS-EXAMINATION,
WENT OVER WHAT SHE WAS GOING TO
-- WITH WRITTEN QUESTIONS FOR
THE DIRECT EXAMINATION, WHAT HIS
INCONSISTENCIES WERE.

>> HE HAD TESTIFIED AT TRIAL HE
NEVER HAD TALKED TO THE STATE?

>> EXACTLY.

WELL, I TAKE THAT BACK.

HE SAID HE TALKED TO HER TWICE
WITHIN A MONTH, BUT HE DID NOT
-- DID THEY TALK TO YOU ABOUT
WHAT'S GOING TO HAPPEN TODAY?

NO.

13 RECORD 757.

>> IS THAT DIFFERENT, WHAT'S
GOING TO HAPPEN TODAY, VERSUS
WHAT DID THE PROSECUTOR SAY THAT
SHE TALKED TO MR. GRIFFIN ABOUT?

>> SHE TALKED TO HIM -- HER
CALENDAR REFLECTED IN 2005 SHE
MET WITH HIM FOUR OR FIVE TIMES.
IT MIGHT HAVE BEEN MISTAKEN
BECAUSE THEY DIDN'T TAKE A
DEPOSITION.

SO SHE I THINK SAID FOUR AND

TALKED WITH HIM, ESPECIALLY THE NIGHT BEFORE, ABOUT CROSS-EXAMINATION, DIRECT AND WHAT HIS INCONSISTENCIES WERE BECAUSE HE WAS INCONSISTENT IN HIS EARLIER STATEMENTS.

>> SO HE SAID THEY DIDN'T TELL HIM WHAT WOULD HAPPEN TODAY. DID HE ACKNOWLEDGE THAT HE HAD MET WITH THE ASSISTANT STATE ATTORNEY?

>> HE ACKNOWLEDGED HE MET WITH HER TWICE THAT MONTH.

>> THE STATEMENT DID THEY TELL YOU WHAT WOULD HAPPEN TODAY, THAT TO ME SOUNDS LIKE WHAT THE PROCEDURES WOULD BE, NOTHING TO DO WITH HIS TESTIMONY.

I MEAN, HOW IS THAT -- OH, NO, NO, YOUR HONOR.

WE DID TELL HIM THAT HE WOULD BE EXAMINED AND THE JUDGE WOULD BE THERE.

I MEAN, THAT JUST SEEMS LIKE A PRETTY VAGUE QUESTION FOR THE FACT OF THE PROSECUTOR HAVING TO JUMP UP AND SAY, NO, NO, I TOLD HIM WHAT WOULD HAPPEN TODAY.

I MEAN, IS THAT WHAT YOU'RE HANGING YOUR GIGLIO HAT ON?

>> THAT AND ABOUT FIVE OTHER THINGS THAT HE COMMENTED.

AND, JUDGE, IF I CAN MOVE ON, BECAUSE IT'S PRETTY CLEAR IN THE BRIEF WHAT WE ARGUE.

IN REGARD TO THE FARETTA ISSUE, IN THE 2004 HEARING MR. MOSLEY IS CLEARLY FRUSTRATED WITH THE PROCEEDINGS.

HE'S BEEN WAITING A NUMBER OF MONTHS TO GO TO TRIAL.

HE'S FILING EXPIRATIONS FOR SPEEDY TRIAL.

HE'S TRYING TO GET OUT.

HE'S FILING MOTIONS.

HE'S REQUESTING THE COURT TO GO TO TRIAL SAYING, I DO NOT WANT TO WAIVE MY SPEEDY TRIAL RIGHTS.

THERE'S NO DEPOSITIONS BEING TAKEN, ANYTHING GOING ON.

THE STATE IS STRIKING MY MOTIONS
OBVIOUSLY BECAUSE HE'S BEING
REPRESENTED BY COUNSEL.

TWO TIMES IN THIS HEARING HE'S
LIKE, JUDGE, I'D LIKE TO
PETITION THIS COURT TO GO PRO
SE.

AND THE JUDGE IN THIS CASE SAYS,
WELL, WHEN YOU FILE THE
APPROPRIATE MOTIONS WITH THE
APPROPRIATE FACTS, I WILL HEAR
IT AT THAT TIME.

THEY NEVER REVISIT THAT ISSUE.
IN THE NEXT COURT, CANDIDLY,
MOSLEY FILES A WRITTEN MOTION
ASKING TO PROCEED, AS HE WANTS
TO BE HIS CO-COUNSEL SO HE CAN
FILE THOSE MOTIONS.

AND THEN AT THAT POINT DEFENSE
COUNSEL CONFLICTS OFF THE CASE,
SOMEBODY ELSE IS APPOINTED ON.
THEY TALK ABOUT THAT ISSUE AND
THE RECORD IS UNCLEAR WHETHER
THEY RESOLVED THAT ISSUE ON THE
RECORD, BUT, AGAIN, THE FARETTA
ISSUE IS NEVER RESOLVED.

WHEN THEY PROCEED AFTER THAT,
MOSLEY IS STILL ON THE RECORD
NOT COMPLAINING AS MUCH, BUT
STILL SAYING, JUDGE, I DON'T
KNOW WHEN THIS CASE IS GOING TO
GO TO TRIAL.

I THINK THERE'S A COMMENT WHERE
HE SAYS I DON'T KNOW IF I CAN DO
ANYTHING MORE.

>> IS THIS AN INEFFECTIVE
ASSISTANCE OF COUNSEL APPELLATE
ISSUE?

>> IT IS.

>> ALL OF THIS IS IN THE RECORD
SO APPELLATE COUNSEL YOU'RE
CLAIMING COULD HAVE RAISED AS A
SUBSTANTIVE ISSUE THE FAILURE TO
HAVE A FARETTA HEARING.

>> YES, YOUR HONOR.

AND IN THIS CASE APPELLATE
COUNSEL WAS BARRED BY THIS COURT
FROM -- STRIPPED OF HIS BOARD
CERTIFICATION AND BARRED FROM
THIS COURT FROM PRACTICING

CRIMINAL LAW BASED ON HIS -- NOT MY WORDS --

>> THERE'S NO NEXUS TO THIS CASE, IS THERE?

>> WELL, THAT'S INTERESTING. I TRIED TO LOOK AT THAT.

THERE WAS TWO CASES, HUNTER AND SMITH, AND THEN IT WAS THEN JUSTICE ANSTEAD SAID THERE WERE OTHER SUBSEQUENT PLEADINGS BEING FILED.

THIS CASE WAS FILED --

>> WELL, THAT'S ONE MEMBER OF THE COURT MAKING A STATEMENT.

>> YES, SIR.

>> AND THE OTHER CASES, I MEAN, I LOOKED AT THIS, BECAUSE -- TO SEE WHETHER IN THIS CASE THERE HAD BEEN JUST LIKE A BRIEF THAT REALLY SAID NOTHING.

HE RAISED VERY SPECIFIC ISSUES TO DO WITH THIS CASE.

IN FACT, INCLUDING ISSUES ABOUT CLOSING ARGUMENTS, ABOUT THE HUSBAND AND WIFE JAIL CONVERSATIONS, ABOUT NOT GRANTING A CONTINUANCE.

I MEAN, I SAW ALL THE TRYKOWSKY APPEALS.

THIS WAS NOT A COOKIE CUTTER ONE.

LET'S FORGET WHO IT IS, BECAUSE I DON'T THINK THAT IS PERTINENT BECAUSE IT'S NOT JUST A, YOU KNOW, RAISING MERITLESS ISSUES. NEXT TIME UP, HE'S TALKING ABOUT I WANT TO BE APPOINTED AS CO-COUNSEL.

IF IT HAD BEEN RAISED, I DON'T SEE HOW IT WOULD HAVE -- BASED ON WHAT HAPPENED SUBSEQUENTLY, THAT THIS WAS A CONTINUING CLEAR AND UNEQUIVOCAL INVOCATION OF THE RIGHT TO REPRESENT HIMSELF. HOW IS THAT, WITH THE FACT THAT HE SUBSEQUENTLY DID NOT MAKE IT CLEAR, THAT HE NEVER MADE IT CLEAR THAT HE WANTED TO GO IT ALONE?

>> HE MADE IT CLEAR AT THAT

DECEMBER 14, AND THERE'S NO DISPUTE ABOUT THAT.

>> OKAY.

YOU SAY IT.

UNFORTUNATELY-- AND I DON'T KNOW HOW -- THESE PARTICULAR DEFENDANTS -- AND I DON'T KNOW IF THEY DO IT TO GAME THE SYSTEM OR TO -- BECAUSE THEY'RE NOT MENTALLY STABLE OR BECAUSE THEY WANT TO MAKE TRIAL JUDGES' LIVES, YOU KNOW, DIFFICULT, BUT JUDGE IS TRYING TO FIGURE OUT WHAT THE PERSON WANTS.

HE SAYS I WANT TO GO PRO SE.

HE USES THAT WORD.

JUDGE SAYS I NEED YOU TO FILE A WRITTEN MOTION.

OKAY.

YOU SAY HE DIDN'T HAVE TO DO THAT.

SUBSEQUENTLY HE WANTS TO BE CO-COUNSEL.

THE STATE SAYS THE RIGHT CAN BE WAIVED THROUGH CONDUCT THAT INDICATES THAT THEY'RE VACILLATING.

IF IT HAD BEEN RAISED, WE WOULD HAVE REJECTED IT.

>> I DON'T AGREE WITH THAT.

A WAIVER IS ONLY POSSIBLE IF THE JUDGE FOLLOWS THE DUTY TO HAVE THE HEARING IN THE FIRST PLACE. AND THERE IS CASE LAW WE HAVE CITED IN OUR BRIEF, HUTCHINS, COMBS, THAT SAYS THAT.

YOU CANNOT PASS IT ON, TO PUT THE BURDEN ON THE DEFENDANT FOR A LATER DATE TO FILE A WRITTEN MOTION.

>> WELL, I WOULD UNDERSTAND THAT IF HE DIDN'T LATER SAY I WANT TO BE CO-COUNSEL.

IN OTHER WORDS, IF HE SAID THAT AND MAYBE THERE WAS NO OTHER BEHAVIOR THAT WAS INCONSISTENT. BUT WHAT IS IT THAT IS PRESENT IN THIS CASE THAT WOULD INDICATE THAT HE -- THAT WAS AN UNEQUIVOCAL REQUEST TO DISCHARGE

COUNSEL AND PROCEED WITHOUT A
LAWYER?

>> OTHER THAN THE DECEMBER 14
DATE, YOUR HONOR?

>> CORRECT.

>> I THINK THE NEXT ONE WAS THE
JANUARY 5 MOTION, WHICH MOSLEY
ASKS TO REPRESENT HIMSELF AS
CO-COUNSEL AS WELL.

>> SO IS THAT DIFFERENT?

IN OTHER WORDS, IS THAT -- WHEN
SOMEONE SAYS I WANT TO BE -- ARE
YOU ALLOWED TO DO THAT?

IS THAT THE FARETTA?

YOU GET TO BE CO-COUNSEL?

>> NO.

I DON'T THINK THIS COURT ALLOWS
HYBRID REPRESENTATION.

>> HE DOES NUMEROUS MOTIONS
AFTERWARDS, BUT HE DOESN'T EVER
MENTION REPRESENTING HIMSELF.

>> NO, BUT IN ONE OF THOSE LATER
HEARINGS IN THE PRETRIAL HE SAYS
I GUESS I HAVE NO CHOICE WHEN
HE'S AGAIN TALKING ABOUT GOING
TO TRIAL.

HE WANTS TO GO TO TRIAL FROM THE
VERY BEGINNING.

HE SAYS THE STATE HAS NO
EVIDENCE AGAINST ME.

LET THEM BRING IT.

BY THE WAY, JUDGE, THERE IS NO
ISSUE ABOUT MR. MOSLEY'S MENTAL
STATUS.

I MEAN, THE JUDGE NEVER THOUGHT
THAT.

I MEAN, HE WAS CLEAR IN HIS
REQUEST.

HE WAS CLEAR IN HIS FRUSTRATION
THAT HE WANTED TO GO TO TRIAL.
AND THE ONLY WAY HE WAS GOING TO
DO THAT WAS TO GET RID OF HIS
TRIAL COUNSEL.

AND THAT'S WHAT HE DID.

HE DID IT TWICE IN THAT
DECEMBER 14 HEARING.

AND THEN IN THE NEXT WRITTEN
MOTION IN JANUARY 5 HE'S STILL
ASKING FOR HIMSELF TO BE ALLOWED
TO FILE THE MOTIONS.

BUT, AGAIN, I JUST LISTENED TO ORAL ARGUMENT 20 MINUTES AGO. WE'RE TALKING ABOUT A PRO SE LITIGANT WHO'S NOT FAMILIAR WITH THE RULES.

BUT HE DID DO WHAT HE WAS SUPPOSED TO DO AND THAT'S REQUEST TO REPRESENT HIMSELF PRO SE.

THE JUDGE UNDER -- MY IMPRESSION IS HE CONFUSED FARETTA WITH NELSON, AS NELSON WOULD REQUIRE SOME KIND OF WRITTEN MOTION AND SAID MAKE SURE IT'S AN APPROPRIATE MOTION, WHICH IS A MISTAKE OF LAW.

AT THAT POINT THERE IS NO WAIVER BECAUSE HE'S ABROGATED THE DUTY TO HOLD THE HEARING IN THE FIRST PLACE.

>> HE DID PETITION THE COURT. IT'S CONCEIVABLE THAT THE JUDGE WAS THINKING ABOUT SOME FORMAL FILING THAT WOULD BE SUGGESTED BY THE WORD PETITION.

AND SO I UNDERSTAND WHAT YOU'RE SAYING.

BUT GIVEN THE WHOLE COURSE OF PROCEEDINGS HERE SUBSEQUENTLY, AS JUSTICE PARIENTE HAS SET OUT, IT'S KIND OF HARD TO SEE HOW GIVEN ALL THESE CIRCUMSTANCES THAT THIS IS A -- HE SHOULD PREVAIL ON THIS AT THIS POINT.

>> I LOOKED INTO THE WORD PETITION, JUSTICE CANADY. IT'S AMBIGUOUS.

BUT THE FACT THAT HE'S TALKING ABOUT IT TWICE IN THIS HEARING, I PETITION THE COURT TO GO PRO SE AND THE JUDGE RECOGNIZES THE FACT THAT HE'S TRYING TO GO PRO SE.

MAKE AN APPROPRIATE REQUEST AND I'LL DO SO.

I COULD PETITION THE COURT NOW ORALLY TO DO IT.

I DON'T THINK THAT IS THE BE-ALL/END-ALL IN THE CASE.

AND MOSLEY IS NOT GIVING UP WITH

THIS ISSUE.
HE'S GOING THROUGH THIS.
HE'S SAYING I WANT TO GO TO
TRIAL.
I DON'T KNOW --
>> [INAUDIBLE] AN ATTORNEY THAT
HE AGREED WAS OKAY?
>> AFTER THE FACT AND IN
POSTCONVICTION, YEAH.
>> AS YOU'VE ALREADY HEARD, IT
SEEMS TO ME ALL ALONG THE LINE
HE'S MADE IT -- HE SAYS CAN I BE
CO-COUNSEL, CAN YOU APPOINT ME
CO-COUNSEL.
HE ENDS UP WITH A NEW COUNSEL.
AND HE SAYS HE'S HAPPY WITH IT.
SO, I MEAN --
>> HE ALSO SAYS IN ONE OF THOSE
PRETRIALS THAT HE DOESN'T THINK
HE CAN DO ANYTHING MORE WHEN
HE'S TRYING TO GO TO TRIAL
AGAIN, AFTER TWO MORE
CONTINUANCES WERE DONE BY HIS
NEW COUNSEL.
SO THERE'S NOT THIS UTTER
SILENCE YOU SEE IN SOME OF THESE
CASES.
I UNDERSTAND I HAVE A MINUTE 48
LEFT.
I'D LIKE TO TALK ABOUT THE JUROR
BIAS ISSUE ON REBUTTAL.
I KNOW I HAVEN'T BROUGHT IT UP
MUCH, BUT IF THE COURT WOULD LET
ME.
THANK YOU.
>> MAY IT PLEASE THE COURT,
COUNSEL, CARINE EMPIT, ASSISTANT
ATTORNEY GENERAL ON BEHALF OF
THE STATE OF FLORIDA.
I'M JUST GOING TO BRIEFLY
ADDRESS THE HABEAS ISSUE JUST TO
ADD A COUPLE FACTS IN THERE.
YES, ON DECEMBER 14, 2004 THERE
WAS A HEARING ON ONE OF
MR. MOSLEY'S PRO SE DEMANDS, ONE
OF MANY THAT HE'D FILED, AND HIS
TWO QUOTES WERE IF I HAVE TO
REPRESENT MYSELF, I WILL DO
THAT.
IT'S THE STATE'S POSITION THAT

THAT WAS CONDITIONAL.

AND LATER THE CONDITION WAS MET BECAUSE HE GOT NEW COUNSEL AND HE WAS PROMISED TO GO TO TRIAL EARLIER, IN MAY.

THE SECOND ONE, WHICH WAS JUST ADDRESSED, I WANT TO PETITION THE COURT TO GO PRO SE, COULD BE READ TO MEAN I'M GOING TO PETITION, I'M GOING TO FILE SOMETHING.

HE'S NOT AN ATTORNEY LIKE WE ARE HERE.

HE PROBABLY DIDN'T KNOW THAT BY SAYING I WANT TO PETITION COULD MEAN REQUEST RIGHT THEN AND THERE.

AND I THINK THAT THAT'S KIND OF CORROBORATED BY THE FACT THAT WHAT, NINE DAYS LATER, HE'S FILING A PLEADING -- I'M SORRY, 22 DAYS LATER, ON THE 5TH OF JANUARY'S FILING A PLEADING AND IT IS NOT A PLEADING TO APPEAR PRO SE.

IT IS THE MOTION FOR ADDITIONAL COUNSEL IN WHICH HE'S SEEKING TO JOIN THE PUBLIC DEFENDER'S OFFICE.

AFTER THE FACT WE'VE GOT THE PD, THE ATTORNEY WHO HE'S UNHAPPY WITH, WITHDRAWS.

RICHARD KURITZ IS AT THE HEARING FOR THE MOTION TO WITHDRAW.

HE'S INDICATED THAT HE'S SPOKEN WITH MOSLEY, THAT HE SEEMS HAPPY WITH HIM PROCEEDING TO TRIAL IN MAY.

THE COURT DIDN'T FORECLOSE THE ISSUE.

I HAVE NOT BEEN ABLE TO FIND ANY CASE LAW THAT ONCE SOMEONE SAYS THE WORDS "PRO SE," THAT A FARETTA HEARING HAS TO OCCUR AT THAT MOMENT.

THE LITTLE CASE LAW I FOUND SEEMS TO INDICATE IT HAS TO HAPPEN BEFORE TRIAL.

I DON'T THINK THERE'S ANY HARM IN THE FACT THAT IT DIDN'T OCCUR

AT THAT MOMENT.
BUT THE COURT DIDN'T FOR CLOSE
THE ISSUE.
IT SAID HE WOULD SUGGEST THAT
MR. KURITZ AND MR. MOSLEY
DISCUSS THE ISSUE, THE MULTIPLE
PLEADINGS HE HAD FILED, AND SEE
IF SOMETHING COULD BE HANDLED.
WELL, IT WAS NEVER ADDRESSED
AGAIN BECAUSE CLEARLY MR. MOSLEY
AND MR. KURITZ CAME TO AN
AGREEMENT AND HE WANTED TO KEEP
HIS COUNSEL.
ANOTHER POINT WORTH MENTIONING
IS THAT, YES, HE WAS A VERY
VOCAL DEFENDANT.
HE FILED SEVERAL PRO SE
PLEADINGS THROUGHOUT THE
PENDENCY OF THIS CASE.
WHEN IN COURT, HE WAS VOCAL.
DURING TRIAL HE WAS VOCAL ABOUT
WITNESSES BEING EXAMINED.
AND NEVER DID HE MENTION WANTING
TO GO PRO SE AGAIN, EITHER BY
WRITTEN FORM OR VERBALLY.
AND THEN AGAIN, AS THE COURT HAD
INDICATED EARLIER, AT THE
CONCLUSION OF THIS TRIAL HE
SPECIFICALLY TOLD THE TRIAL
JUDGE THAT HE WAS HAPPY.
IT'S THE STATE'S POSITION THAT
APPELLATE COUNSEL WAS NOT
INEFFECTIVE IN NOT RAISING THE
FARETTA ISSUE.
HE NEVER READDRESSSED THAT DESIRE
FROM THAT PARTICULAR DAY.
HIS SUBSEQUENT BEHAVIOR REFLECTS
THAT, NO DISSATISFACTION WITH
COUNSEL, NO REQUESTS FOR PRO SE.
SO WE WOULD ASK THAT THAT BE
DENIED.
NOW, IN TERMS OF THE, THE COURT
TOOK THE WORDS OUT OF MY MOUTH.
THE TRIAL COURT MADE FACTUAL
FINDINGS AND IT'S THE STATE'S
POSITION THAT DEFERENCE SHOULD
BE GIVEN TO THOSE.
AND THOSE FINDINGS WERE THE
ASSISTANT STATE ATTORNEY, NOW
JUDGE SENTERFITT, HER TESTIMONY

WAS TRUTHFUL, THAT BERNARD GRIFFIN WAS NOT CREDIBLE AND IN FACT THERE'S A FINDING FURTHER IN THE ORDER THAT HE JUST DIDN'T HAVE A DEAL.

SO I THINK THAT THAT INQUIRY ENDS THERE BECAUSE WE HAVE SOME FINDINGS THAT WERE BASED ON COMPETENT, SUBSTANTIAL EVIDENCE.

>> WHAT WAS HE CHARGED WITH, MR. GRIFFIN?

>> TWO COUNTS OF ACCESSORY AFTER THE FACT.

>> AND WHAT WAS THE FINAL SENTENCE THAT HE GOT?

>> INITIALLY I THINK IT WAS TWO YEARS OF COMMUNITY CONTROL FOLLOWED BY EIGHT YEARS OF PROBATION.

HE VIOLATED I BELIEVE IT WAS THREE TIMES AND ULTIMATELY WAS SENTENCED TO 20 YEARS DEPARTMENT OF CORRECTIONS.

>> AND WHAT -- WHAT DEGREE FELONY IS THAT?

>> HE WAS FACING 30 YEARS, FIRST-DEGREE FELONY, 30 YEARS ON EACH.

AND FOR PURPOSES OF THIS MATTER, THE JURY WAS MADE AWARE OF THIS. MR. KURITZ POINTED OUT IN HIS CROSS-EXAMINATION OF MR. GRIFFIN AND ALSO ARGUED IN HIS CLOSING ARGUMENT THAT HE WAS FACING LESSER CHARGES THAT CARRIED A LESSER PENALTY, THAT HE WAS COOPERATING WITH LAW ENFORCEMENT AND THE STATE, BASICALLY TRYING TO ATTACK HIS CREDIBILITY AND EVEN SAID IN HIS CLOSING ARGUMENT SOMETHING LIKE I FIND IT HARD TO BELIEVE THAT HE DOESN'T KNOW WHAT HE'S FACING OR THAT HE HASN'T BEEN GIVEN PROMISES.

SO THERE WERE ATTACKS MADE ON THIS, BUT THE PROBLEM IS THERE WAS NO DEAL.

THERE WAS NO PROMISE.

THERE WAS NOTHING TO HIDE.

>> WHAT ABOUT THE -- AND, AGAIN, THE -- HIM SAYING THAT HE HADN'T DISCUSSED WHAT WAS GOING TO HAPPEN IN COURT WITH THE ASSISTANT STATE ATTORNEY?

>> WELL, ONE I WOULD ARGUE THAT WAS ABANDONED BECAUSE THAT WASN'T ADDRESSED AT THE EVIDENTIARY HEARING.

SENERFITT WAS NOT ASKED ABOUT THAT, WHY SHE DID OR DIDN'T DO ANYTHING ABOUT THAT.

BUT EVEN BEYOND THAT, I CAN ADDRESS THE MERIT.

WHAT HARM COMES OUT OF THAT?

AS I JUST EXPLAINED, THE JURY HEARD ALL ABOUT HIS COOPERATION WITH THE STATE, THE FACT THAT HE WAS FACING LESSER CHARGES.

SO IF HE HAD ANSWERED, YES, I'VE SPOKEN WITH THEM, IT DOESN'T REALLY CHANGE ANYTHING.

>> BUT HE ADMITTED THAT HE HAD SPOKEN WITH THEM.

>> YES.

YES.

AND THE JURY INSTRUCTIONS EVEN ADDRESSED THAT.

IT'S PERFECTLY PERMISSIBLE FOR AN ATTORNEY TO SPEAK TO A WITNESS PRIOR TO TRIAL.

SO THERE WAS NOTHING WRONG WITH THAT.

SO I WANT TO GO AHEAD AND ADDRESS THE JURY SELECTION ISSUE, BECAUSE I KNOW THAT OPPOSING COUNSEL WILL ON REBUTTAL.

IN THIS CASE THE APPELLANT MAKES AN ISSUE OF THE FACT THAT JUROR R REMAINED ON THE JURY, AND PARTICULARLY BECAUSE SHE MADE SOME REMARKS CONCERNING SOME PHOTOGRAPHS THAT SHE WAS GOING TO SEE IF SHE WAS SELECTED FOR THE JURY.

THE PICTURES WERE GOING TO BE PRESENTED, WERE GOING TO SHOW THE ADULT VICTIM, LYNDIA WILKES', BODY, BURNED.

SO THE STATE ASKED IF ANYBODY WHO FEELS AS THOUGH THEY WOULD BE SO BOTHERED OR SO DISTURBED BY HAVING TO LOOK AT THOSE PHOTOGRAPHS THAT YOU COULD NOT BE FAIR AND IMPARTIAL IN THIS CASE?

AND JUROR R RESPONDED I'M NOT SURE HOW I WOULD RESPOND. I THINK THE TIMING OF WHEN WE SEE THEM MIGHT DETERMINE HOW I MIGHT FEEL.

I JUST DON'T KNOW. IN TERMS OF OTHER EVIDENCE THAT WOULD COME BEFORE IT.

THE STATE THEN GOES INTO A LITTLE BIT OF WHERE IT'S GOING TO COME IN, THROUGH A CRIME SCENE INVESTIGATORS OR THE ME. SHE RESPONDS I DON'T KNOW.

I THINK I WOULD TRY, BUT I DON'T KNOW WHAT I WOULD TAKE HOME WITH ME AT NIGHT AND SLEEP WITH.

I JUST DON'T KNOW. IT'S THE STATE'S POSITION THAT THESE ARE COMMENTS THAT FRANKLY YOU WOULD EXPECT FROM ANYBODY WHO'S BEING TOLD THEY'RE GOING TO SEE PICTURES OF BADLY BURNED AND DECOMPOSING BODIES. THESE BY NO MEANS DEMONSTRATE A BIAS TOWARDS MR. MOSLEY. THEY JUST DON'T.

SHE DIDN'T SAY SHE COULDN'T BE FAIR AND IMPARTIAL.

SHE EXPRESSED SOME SQUEAMISHLY ABOUT SEEING GORY PICTURES.

>> THERE WAS A MOTION FOR CAUSE OR THERE SHOULD HAVE BEEN A MOTION FOR CAUSE.

>> THAT WOULD BE THE POSITION, YES.

>> AND THE CAUSE WOULD BE --

>> BIAS AGAINST THE DEFENSE?

>> THEY'D HAVE TO PROVE UNDER CARATELLI -- DID SHE SIT?

>> SHE DID.

>> WAS SHE ACTUALLY BIASED.

>> EXACTLY.

THAT'S THE STANDARD UNDER

CARATELLI, WHICH IS LACKING
HERE.

SHE SAID SOME PRETTY GOOD THINGS
THAT I THINK KEPT HER ON THE
JURY.

SHE DESCRIBED HER FEELINGS ABOUT
THE DEATH PENALTY.

SHE SAID THAT SHE WOULDN'T
AUTOMATICALLY IMPOSE IT OR
RECOMMEND IT, THAT IT WOULD
REQUIRE A LOT OF WEIGHING.

SHE ALSO WAS ASKED ABOUT THE
DEFENDANT'S AFFAIRS.

IN THIS TRIAL THERE WAS A LOT OF
TESTIMONY AND EVIDENCE ABOUT
MR. MOSLEY, WHO WAS A MARRIED
MAN, HAVING AFFAIRS WITH
DIFFERENT WOMEN.

THE ONE WHO DIED, LYNDA WILKES,
WAS ONE OF HIS MISTRESSES.

HER RESPONSE WAS I DON'T THINK
IT HAS MUCH TO DO WITH THE
MURDER CHARGE.

THREE OTHER POTENTIAL JURORS WHO
ANSWERED IN A GOOD WAY ABOUT
INFIDELITY REMAINED ON THE JURY,
WHERE THE ONES WHO SAID
SOMETHING NOT SO GOOD WAS
STRUCK.

SO SHE WAS A BENEFICIAL JUROR.

AND SO I GUESS MY ULTIMATE
ARGUMENT HERE IS THAT WHAT'S THE
PREJUDICE?

I MEAN, WE DON'T HAVE ANY ACTUAL
BIAS AND WHAT WAS THE PREJUDICE
OF KEEPING HER ON.

>> DO WE EVEN KNOW FROM THIS
RECORD WHETHER OR NOT ALL THE
PEREMPTORY CHALLENGES WERE USED
IN THIS CASE?

>> THEY WERE NOT.

I HAVE THAT NOTE.

THE DEFENDANT HAD TWO LEFT.

>> WAS THE -- THERE WAS AN
EVIDENTIARY HEARING ON A LOT OF
ISSUES, INCLUDING WHY MR. KURITZ
DID NOT OBJECT TO CERTAIN
ARGUMENTS IN CLOSING.

WAS HE ASKED ABOUT WHY HE KEPT
THIS JUROR ON?

>> THIS WAS SUMMARILY DENIED, SO THE COURT DIDN'T ENTERTAIN IT. I CAN ASSUME AND MY POSITION WOULD BE THAT IT'S BECAUSE SHE SAID GOOD THINGS OTHERWISE. THE AFFAIRS -- THE TRIAL HAD A LOT TO DO WITH THE AFFAIRS. AND IF YOU'RE GOING TO WORRY ABOUT SOMEBODY CONVICTING BECAUSE HE'S BEEN UNFAITHFUL, YOU DON'T WANT THAT JUROR ON. >> IF IT WASN'T A BASIS FOR A CAUSE CHALLENGE, THAT ENDS IT ANYWAY.

>> RIGHT.

RIGHT.

RIGHT.

YEP.

UNLESS THE COURT HAS ANY MORE QUESTIONS OF ME, I WOULD JUST ASK THAT YOU AFFIRM THE TRIAL COURT'S RULING IN DENYING THE POST-CONVICTION MOTION.

THANK YOU.

>> BRIEFLY, OBVIOUSLY, THIS COURT NEEDS TO LOOK AT THE SECOND DCA OPINION IN HUTCHINS IN REGARDS TO THE FARETTA ISSUE. IN THAT CASE THE DEFENDANT ORALLY ONE TIME SAYS I WANT TO GO PRO SE AND THE COURT DOESN'T DO ANYTHING ABOUT IT.

AND THE SECOND DCA VERY ELOQUENTLY REVERSED, EXPLAINING WHAT I SAID EARLIER.

THAT IS, THE TRIAL COURT'S DUTY TO HOLD THAT HEARING AND NOT SWITCH IT AND MAKE THE DEFENDANT PROVE LATER THAT HE DIDN'T WAIVE IT.

OKAY?

SO -- AND A LOT OF OTHER DISTRICT COURT CASES THAT WE'VE CITED IN OUR BRIEF, BETS, COMBS AND HUTCHINS EXPLAIN THAT. THERE IS NO WAIVER BECAUSE THE TRIAL COURT HAD THE OPPORTUNITY TO DO THAT AT THAT HEARING AND ON MISTAKE OF LAW DECIDED NOT TO.

WE DIDN'T GET AN EVIDENTIARY HEARING ON THE BIASED JUROR ISSUE.

AS TO WHETHER THIS JUROR WOULD HAVE BEEN STRUCK FOR CAUSE, I SUBMIT THAT I BELIEVE THIS COURT IS GOING TO FIND THAT ISSUE QUITE EASILY, CONSIDERING ITS LATEST OPINIONS WITH MATTARRANZ AND OTHER CASES.

IF SOMEBODY IS SAYING THAT THEY ARE -- THEY MIGHT BE SO DISTURBED THAT THEY MIGHT NOT BE FAIR AND IMPARTIAL, THAT'S GOING TO BE A CAUSE CHALLENGE ALL DAY. AND SHE ALSO SAYS I DON'T KNOW WHAT I'M GOING TO TAKE HOME WITH ME.

THAT WOULD SCARE ME AS A TRIAL ATTORNEY.

THAT WOULD SCARE ANY ATTORNEY. AND THERE WAS ANOTHER JUROR THAT WAS STRUCK -- AND I AGREE WITH THE STATE'S BRIEF THAT THIS OTHER JUROR WAS STRUCK BECAUSE SHE HAD OTHER ISSUES WITH HER, BUT THAT WAS ONE OF THE ISSUES THAT DEFENSE COUNSEL CITED, WAS THAT SHE HAD ISSUES WITH THE GORY PHOTOGRAPHS.

SO WE WOULD REQUEST AN EVIDENTIARY HEARING ON THAT, REQUEST THIS COURT TO REVERSE AND ALLOW US TO HAVE A HEARING SO WE CAN FIND OUT WHY MR. KURITZ DID NOT OBJECT TO A JUROR THAT WAS PROBLEMATIC TO HIS CASE.

>> THANK YOU FOR YOUR ARGUMENT. COURT'S IN RECESS UNTIL 3:00 TODAY.

>> ALL RISE.