

>> YOU AREN'T DOING ANYTHING.

YOU ARE NOT TELLING US THAT WE  
NEED TO DO SOMETHING TO HELP  
MR. VITALE.

THAT'S WHAT MR. BURNS' LETTER  
SEEMS TO BE SAYING.

>> WELL I DON'T -- THAT'S A  
DIFFERENT READING THAN I TAKE OF  
THE BURNS' LETTER.

I DON'T THINK IT REALLY MATTERS,  
THOUGH, BECAUSE I DON'T THINK  
MOLTON AND HENRY AND MESSIAH  
AND --

>> BUT IT IS IMPORTANT AS TO  
WHEN THIS EVEN BEGAN BECAUSE A  
LOT OF THESE LETTERS WERE  
BETWEEN THE TIME, WERE BEFORE  
MR. BURNS' LETTER TO THE STATE,  
WEREN'T THEY?

THE CORRESPONDENCE BETWEEN  
MR. JOHNSON AND MR. VITALE?

>> THEY WERE BEFORE, DURING AND

AFTER.

AND BURNS' LETTER TALKS ABOUT  
"THE AGREEMENT WE MADE A LONG  
TIME AGO."

THIS IS LIKE A CONFIRMING  
LETTER.

A LAWYER CALLS UP ANOTHER LAWYER  
AND SAYS WHAT DO YOU SAY ABOUT  
X, Y AND Z, AND THEN YOU SAY A  
LETTER SAYING PER OUR  
CONVERSATION ON MAY 13TH, THIS  
IS CONFIRMING OUR -- THAT'S  
BASICALLY THAT.

IN FACT, MR. BURNS TESTIFIED TO  
THAT WHEN ADMITTING THIS  
DOCUMENT, THAT WAS THE REASON  
FOR THIS LETTER.

>> I THOUGHT HE TESTIFIED THE  
LETTER WAS TO MOLLIFY HIS CLIENT  
WHO WAS OUT OF CONTROL.

>> AS WELL AS -- FRANKLY, HIS  
MOLLIFYING A DIFFICULT CLIENT IS  
NOT --

>> SO YOU WOULD, YOU'D HAVE TO DISCREDIT WHAT BURNS SAYS AS BEING UNTRUTHFUL, A LAWYER IN THIS COURT TESTIFYING IN ORDER TO ESTABLISH YOUR POINT?

>> I THINK THE WORDS HE WROTE IN THIS LETTER --

>> I'M ASKING YOU THAT A QUESTION.

THE JUDGE MADE A CREDIBILITY DETERMINATION AND MADE FINDINGS OF A FACT ON HIS CREDIBILITY. WE WOULD HAVE TO SAY THE JUDGE WAS INCORRECT, THERE IS NOT -- THIS LETTER IS SUCH A CONTRADICTION TO HIS TESTIMONY, THERE'S NO WAY TO RECONCILE IT.

>> WELL, I BELIEVE THIS LETTER IN CONJUNCTION WITH THE TESTIMONY, I THINK THE JUDGE ABUSED HIS DISCRETION IN THAT CREDIBILITY DETERMINATION.

>> I WANT TO GO BACK TO THE

CENTRAL ISSUE OF WHAT HAS TO BE  
ESTABLISHED.

>> CERTAINLY.

>> THERE'S NO QUESTION THE STATE  
KNEW AT SOME POINT WHAT WAS  
GOING ON, SINCE THEIR  
INVESTIGATOR CAME AND GOT THE  
LETTER.

>> I AGREE.

>> I KNOW YOU DO.

[LAUGHTER]

BUT THE COURT AS RECENTLY AS  
2010 IN CITING TO WHAT YOU MUST  
PROVE FOR A MESSIAH VIOLATION,  
SAY, THAT IS YOU MUST SHOW AN  
OVERT SCHEME BY THE STATE TO  
UTILIZE VITALE AS A GOVERNMENT  
AGENCY -- AGENT TO DELIBERATELY  
ELICIT INCRIMINATING EVIDENCE  
FROM THE -- AND THAT'S JOHNSON  
AND --

[INAUDIBLE]

AND MESSIAH TALKS ABOUT

DELIBERATELY ELICITING FROM THE  
DEFENDANT.

SO DO -- GOING BACK TO YOU  
HAVING QUOTED THAT OTHER CASE,  
ARE WE WRONG IN OUR RECENT CASE  
LAW IN JOHNSON IN INTERPRETING  
MESSIAH TO REQUIRE MORE THAN A  
PASSIVE ACQUIESCENCE OF THE  
INFORMATION FROM THE WITNESS?

>> ONE, I DON'T THINK WHAT  
HAPPENED HERE WAS PASSIVE  
ACQUIESCENCE BECAUSE THE STATE  
WAS INVOLVED, ACTIVELY INVOLVED  
IN GETTING THE INFORMATION.

TWO --

>> SO PICKING -- SOMEONE SAYING  
I HAVE LETTERS, AND I AM A  
CO-DEFENDANT, AND I'M TRYING TO  
GET A DEAL, AND THE STATE  
PICKING IT UP -- THOSE LETTERS  
UP -- THAT IS, IN YOUR VIEW,  
BASED ON OUR CASE LAW ENOUGH TO  
PUBLISH A MESSIAH VIOLATION?

>> YES.

ESPECIALLY IN THE LIGHT OF THE  
BURNS LETTER WHICH HE STATES  
GETTING JOHNSON'S LETTERS WILL,  
UM, REMOVE THE -- THIS IS THE  
LETTER FROM BURNS TO ASA  
PARKS -- "WILL REMOVE THE THORN  
IN THE SIDE OF THE VITALE  
POSSESSION AND PUT IT IN ITS  
PROPER CONTEXT."

SO HERE WE HAVE A PROSECUTOR  
EARLY IN THE CASE WHO GETS A  
CONFESSION LETTER TO A MURDER,  
RIGHT?

BUT THEY'RE GOING TO FOCUS ON  
JOHNSON AND USE VITALE TO GET  
LETTERS FROM JOHNSON IN ORDER TO  
PUT THE CONFESSION IN CONTEXT  
AND REMOVE THE THORN FROM THE  
SIDE OF THEIR CASE.

THAT WAS THE ENTIRE SCHEME.

THAT WAS THE OVERT SCHEME OF THE  
CASE.

AND WHEN YOU SAID DID IT HAPPEN?

LOOK AT THE TRIAL RECORD, THAT'S  
EXACTLY WHAT HAPPENED.

THAT'S EXACTLY WHAT HAPPENED IN  
THIS CASE.

OTHER THAN MANNA FROM HEAVEN, I  
CAN'T IMAGINE A MORE OVERT THING  
OTHER THAN HAVING, YOU KNOW,  
PARKS RESPOND TO THIS AND SAY,  
YEAH, WE GOT DEAL DONE.

YOU KNOW?

THIS IS, THIS IS AS SMOKING AS A  
LETTER CAN GET, I BELIEVE, THE  
BURNS LETTER.

ESPECIALLY IN CONTEXT WITH THE  
WAY IT'S WRITTEN.

"REMOVE THE THORN IN YOUR SIDE  
FROM THE CONFESSION LETTER, AND  
DON'T ALLOW MR. STONE" -- WHO  
WAS MR. JOHNSON'S LAWYER -- "TO  
ARGUE THAT IT WAS AN ACTUAL  
CONFESSION FROM VITALE."

>> HE HAD ALREADY, STONE HAD

ALREADY SENT --

>> HE DID.

IN A LETTER THAT SAID SOMETHING  
TO THE EFFECT THAT IF THIS ISN'T  
A CONFESSION, I DON'T KNOW WHAT  
IS.

>> BUT ANSWERING JUSTICE  
QUINCE'S QUESTION, I JUST WANT  
TO MAKE SURE, WERE THERE LETTERS  
FROM JOHNSON BEFORE THAT LETTER?

>> BEFORE WHICH ONE?

>> BEFORE THE CONFESSION LETTER  
THAT STONE SENT TO THE ASSISTANT  
STATE ATTORNEY.

>> I BELIEVE THERE WERE LETTERS  
BEFORE, DURING AND AFTER.

>> SO IF THERE ARE LETTERS FROM  
JOHNSON ALREADY SAYING I NEED  
YOU TO HELP ME OUT BEFORE, BUT  
HOW IS THIS -- WHAT ELSE WOULD  
THE STATE NEED, AND WHAT ELSE  
DID THEY GET AFTERWARDS?

AND IF THAT'S THE CASE THAT



THERE WAS LETTERS BEFORE, THEN  
WOULDN'T THE REMEDY BE ONLY  
SUPPRESSION OF WHATEVER JOHNSON  
LETTERS CAME AFTERWARDS?

>> WELL, NOT NECESSARILY.

IF IT'S A FULL-BLOWN SIXTH  
AMENDMENT VIOLATION --

>> HOW IS IT A -- IF A DEFENDANT  
NOT ACTING IN MAYBE THE WAY HIS  
COUNSEL WOULD HAVE SUGGESTED IT  
OR MAYBE REALIZING THAT THEY'VE  
GOT THIS GUY, I MEAN, THERE'S  
OVERWHELMING EVIDENCE, MOST  
RESPECTFULLY, AGAINST YOUR  
CLIENT AS TO HIS GUILT FOR THIS  
MURDER, BUT ASSUMING THAT THEIR  
BEST DEFENSE IS TO TRY TO PIN IT  
ON VITALE, THEN HE, JOHNSON,  
SAYS I THINK BECAUSE I KNOW THIS  
GUY REALLY CARES ABOUT ME, WE'RE  
SOUL MATES OR WHATEVER, HE THINKS  
WE'RE SOUL MATES, I THINK I CAN  
GET A CONFESSION FROM HIM.

AND, IN FACT, HE DOES.

AND THE DEFENSE USES THAT LETTER  
AT TRIAL TO TRY TO SHOW THAT IT  
WAS VITALE AND NOT HIM.

SO IT'S REALLY JOHNSON'S IDEA TO  
SAVE HIMSELF.

AND WE SEE THIS WITH DEFENDANTS.  
SOMETIMES THEY'RE NOT THE  
SMARTEST IN ACTING IN THEIR, YOU  
KNOW, OWN SELF-INTEREST.

>> WELL, THAT STATEMENT I WON'T  
NECESSARILY -- I'M NOT SAYING  
IT'S IN MR. JOHNSON'S CASE, BUT  
I WON'T DISAGREE WITH THAT.

BUT WE'VE ALSO SEEN  
CO-DEFENDANTS AND SNITCHES WHO  
WILL DO ANYTHING IN THEIR  
SELF-INTERESTS.

HERE'S A GUY WHO'S A SERIAL  
LIAR.

HE COULD BE UNTRUTHFUL TO HIS  
OWN DETRIMENT.

HOW DO YOU DO THAT?

HOW DO YOU LIE TO YOUR OWN  
SELF-DETRIMENT, RIGHT?  
THIS IS A GUY WHO'S POTENTIALLY  
A PATHOLOGICAL LIAR.  
EVEN HIS LAWYER SAID THAT.  
SO NOW WE HAVE THIS LOOSE CANNON  
THAT THE STATE KNOWS EXISTS THAT  
VITALE HAS SAID MANY TIMES I  
DRAGGED THIS OUT BECAUSE I  
WANTED TO GET MORE INFORMATION  
TO THE STATE.  
HE SAID THAT IN THE EVIDENTIARY  
HEARING AS WELL.  
THAT WAS THE ENTIRE PLAN FROM  
VITALE'S POINT OF VIEW.  
AND THE STATE TOOK ADVANTAGE.  
IT'S NOT JUST BY HAPPENSTANCE.  
THE STATE TOOK ADVANTAGE OF THIS  
INFORMATION AND CIRCUMVENTED,  
MESSIAH, MOLTON, HENRY AND --  
THIS SHOULD NOT BE A SITUATION  
WHERE WE TRY AND PARSE OUT FINE  
AREAS OF LAW AND SEE WHAT THE

STATE CAN GET AWAY WITH IN  
PROSECUTING THIS CASE.

A CASE LIKE THIS MANDATES,  
DEMANDS THE MOST SCRUPULOUS  
ADHERENCE TO ALL CONSTITUTIONAL  
SAFEGUARDS.

AND THAT SIMPLY WASN'T DONE  
HERE.

I THINK I'M RUNNING SHORT ON  
TIME.

I WANTED TO SAVE SOME FOR  
REBUTTAL, SO UNLESS THERE ARE  
QUESTIONS ON THIS PARTICULAR  
POINT, I'LL SAVE THE REST OF MY  
THREE-AND-A-HALF MINUTES LEFT  
FOR REBUTTAL.

>> THANK YOU.

>> MAY IT PLEASE THE COURT,  
LISA-MARIE LERNER, ADDRESSING  
THE CLAIMS.

I THINK IT'S REALLY IMPORTANT  
FOR THIS COURT TO LOOK AT THE  
TIMELINE AND WHAT WAS ACTUALLY

ENTERED INTO EVIDENCE AT TRIAL.

THESE TWO MEN WERE ARRESTED IN

LATE FEBRUARY 2001.

THE LETTERS STARTED THEN.

>> LETTERS STARTED THEN?

IS THAT WHAT YOU SAID?

>> YES.

AFTER THEY WERE ARRESTED.

>> WHO WROTE THE FIRST LETTER?

>> JOHNSON.

AND THERE WAS A LETTER --

>> NOW, JUST TO CLEAR THIS UP, I

THOUGHT IT SAID THAT THESE

LETTERS WERE NOT DATED.

SO HOW DO WE KNOW WHEN THE

LETTERS ACTUALLY STARTED?

>> BY THE TESTIMONY AT TRIAL OF

JOHNSON AND VITALE.

THEY WERE BOTH QUESTIONED ABOUT

THESE LETTERS, AND THEY STARTED

SHORTLY AFTER THEY WERE ARRESTED

AND CHARGED.

AND IT CULMINATED IN THIS

CONFESSION LETTER WRITTEN BY  
JOHN VITALE IN EARLY JULY 2002.  
SO THE LETTERS IN QUESTION COME  
FROM 2001 THROUGH THE FIRST HALF  
OF 2002.

>> SO THE SERIES OF LETTERS THAT  
BEFORE THE ACTUAL CONFESSION  
LETTER, ARE THESE THE LETTERS  
THAT TALK ABOUT YOU NEED TO SAY  
THIS AND YOU NEED TO SAY THAT IN  
YOUR CONFESSION?

>> EXACTLY.

AND THEY'RE ALSO THE LETTERS  
WHERE JOHNSON WAS GETTING  
IMPATIENT BECAUSE VITALE HAD  
PROMISED TO WRITE A CONFESSION,  
BUT HE WAS DRAGGING HIS FEET.  
VITALE HAD NO CONTACT WITH THE  
STATE AT ALL DURING THAT PERIOD  
OF TIME.

HE WAS REPRESENTED BY --

>> LET'S -- YOU'RE TALKING ABOUT  
A TIMELINE.

SO YOU'RE TALKING ABOUT FROM THE  
TIME HE WAS ARRESTED TO WHAT?

>> JULY -- TIL THE TIME HE MADE  
THE CONFESSION LETTER?

>> YES.

AND I ALSO WANT THE COURT TO  
KNOW WHEN YOU GO AND REVIEW THE  
TRIAL RECORD, THE ONLY LETTERS  
THAT WERE INTRODUCED IN TRIAL  
WERE VITALE'S CONFESSION LETTER  
WHICH THE DEFENSE INTRODUCED  
WHEN IT WAS CROSS-EXAMINING HIM,  
BECAUSE THAT WAS THE CENTERPIECE  
OF THEIR TRIAL STRATEGY DEFENSE.  
IN REBUTTAL TO THAT, THE STATE  
CROSS-EXAMINED VITALE AND THEN  
JOHNSON ON THE LETTERS WRITTEN  
BEFORE THAT CONFESSION LETTER,  
THE LETTERS WHICH WERE TELLING  
VITALE WHAT TO SAY TO TRY AND  
MAKE IT SEEM LIKE HEAT OF  
PASSION, YOU KNOW, THE TIMELINE.  
THE ONLY LETTERS ENTERED AT

TRIAL WERE BEFORE THAT JULY 2002

CONFESSION LETTER.

THE NEXT LETTER IN QUESTION IS

THE BURNS LETTER.

UM, AFTER THAT CONFESSION

APPARENTLY VITALE HAD SECOND

THOUGHTS FOR WHATEVER REASON AND

STARTED ASKING HIS ATTORNEY TO

GET A DEAL.

>> LET ME, BEFORE YOU GO TOO FAR

WITH THE BURNS' LETTER, IS THERE

ANYTHING IN THE RECORD

INDICATING ANY KIND OF MEETING

BETWEEN MR. BURNS AND THE STATE

PRIOR TO THE BURNS' LETTER?

>> WELL, WHAT MR.-- FROM MY

MEMORY AND FROM WHAT MR. BURNS

SAID AT THE EVIDENTIARY HEARING,

THERE WERE NO MEETINGS.

THERE WERE DISCUSSIONS LIKE IN

THE COURTROOM OR IN THE HALLWAY

WHEN THEY HAD COURT APPEARANCES

SAYING, LOOK, MY GUY WANTS TO



WORK WITH YOU, CAN WE SEE IF WE  
CAN WORK OUT A DEAL.

HE'LL TESTIFY AGAINST JOHNSON.

IT WAS THAT SORT OF DISCUSSION.

THERE WAS NO FORMAL MEETING WITH  
VITALE PRESENT.

>> AND DID THEY DISCUSS THESE  
PRIOR LETTERS, THE ONES BEFORE  
THE CONFESSION?

THAT IS, MR. BURNS WITH THE  
PROSECUTOR THAT THEY DISCUSS ALL  
THESE OTHER LETTERS PRIOR TO  
MR. VITALE'S CONFESSION?

>> NO.

THE STATE DID NOT HAVE THOSE  
LETTERS UNTIL --

>> NO, NOT THAT THEY HAD THEM,  
DID THEY DISCUSS THEM.

>> I DON'T REMEMBER WHAT  
MR. BURNS SAID AT THE  
EVIDENTIARY HEARING.

HE SAID THAT VITALE WANTED TO  
COOPERATE WITH THE STATE AND GET

A DEAL.

>> SO ARE YOU SAYING -- LET ME  
MAKE SURE ABOUT THIS BECAUSE,  
YOU KNOW, THERE IS, THERE SEEMS  
LIKE THERE'S SOMETHING NOT  
RIGHT.

NOW, WHETHER IT IS AS -- I DON'T  
SEE IT AT THIS POINT AS BEING  
THIS OVERT SCHEME, BUT ARE YOU  
SAYING THAT NO LETTERS CAME IN  
FROM JOHNSON AFTER IT APPEARS  
THAT THE STATE AND BURNS AND  
MAYBE VITALE HAD CONVERSATIONS,  
THAT NO LETTERS AT TRIAL WERE  
INTRODUCED?

>> CORRECT.

>> WELL, THAT'S PRETTY IMPORTANT  
BECAUSE --

>> YES.

>> WHAT IS YOUR VIEW?  
SAY THAT WE DO FIND THAT THERE  
IS AN ESTABLISHED MESSIAH/HENRY  
VIOLATION?

WHAT WOULD BE THE REMEDY IF  
THERE WERE TO BE A RETRIAL?  
WOULD, YOU KNOW, SORT OF LIKE  
THIS ISSUE WHEN THERE'S A  
MIRANDA VIOLATION, IF SOMEONE'S  
CONFESSED AT ONE POINT BUT THEN  
GIVEN THE, YOU KNOW, IT DEPENDS.  
NOT EVERYTHING'S KEPT OUT.

SO WHAT IS IT THAT, YOU KNOW,  
WHERE HE'S CONFESSED AND THEN HE  
INVOKES HIS RIGHT TO SILENCE,  
SAY?

WHAT WOULD BE THE REMEDY IF WE  
FOUND THAT THERE WAS EVIDENCE  
ESTABLISHING THAT THE STATE DID  
IN 2003 WANT MORE FROM  
MR. VITALE?

>> WELL, WITHOUT CONCEDED THAT  
THAT'S WHAT HAPPENED, THE STATE  
WOULD HAVE TO HAVE EVIDENCE THAT  
INCRIMINATED JOHNSON AFTER IT  
ORIGINATED THIS SCHEME TO  
COOPERATE WITH VITALE OR HAVE

VITALE ACT AS THEIR AGENT.

THEN THEY WOULD HAVE TO USE THE  
INFORMATION THEY GOT.

THEY'RE, THEY DID NOT USE ANY  
INFORMATION OTHER THAN HAVING  
VITALE TESTIFY ABOUT, YOU KNOW,  
HIS PARTICIPATION AND JOHNSON'S  
PARTICIPATION IN THESE CRIMES.

AND THE STATE DID TURN OVER ALL  
THE PLEA AGREEMENTS AND ALL THE  
LETTERS WRITTEN BY THE TWO  
DEFENDANTS.

>> BEFORE TRIAL.

>> BEFORE TRIAL.

>> YEAH.

LET'S GO TO THIS BURNS' LETTER

WHICH IS REFERRED TO BY

APPELLANT AS "A SMOKING GUN."

IS IT YOUR VIEW THAT AT LEAST IT

WASN'T TURNED OVER UNTIL

POSTCONVICTION?

WHY WASN'T THAT LETTER TURNED

OVER TO THE DEFENDANT?

AND CERTAINLY THERE'S A CHANCE  
FOR SOME MORE FRUITFUL  
CROSS-EXAMINATION OF VITALE AS  
TO HIS MOTIVE VIS-A-VIS JOHNSON,  
ESPECIALLY WHEN IT SAYS "MY HOPE  
IS THAT VITALE'S COOPERATION  
WOULD EARN HIM A LIGHTER  
SENTENCE, AND YOURS IS THAT  
JOHNSON WOULD CONFESS TO  
VITALE."

>> THAT'S WHAT --

>> "REMOVING A THORN IN THE SIDE  
OF YOUR CASE BY PREVENTING BOB  
STONE FROM CLAIMING THAT THE  
LETTER'S A TRUE CONFESSION."

THAT'S THE TROUBLING PART --

>> NO, I UNDERSTAND.

BUT MR. BURNS TESTIFIED, UM, AT  
THE EVIDENTIARY HEARING THAT  
THAT, THOSE WERE HIS WORDS, NOT  
THE STATE'S WORDS.

HE WAS, HE OFFERED VITALE UP IN  
ORDER TO GET A CONFESSION AND

ALSO TO COOPERATE.

>> WHEN WAS THE DEAL STRUCK

WHERE HE GOT THE, WHERE VITALE

GOT THE 20-YEAR SENTENCE?

>> YES.

>> WHEN WAS IT STRUCK?

>> WHEN WAS --

>> THE DEAL STRUCK THAT HE GOT

THE 20-YEAR SENTENCE.

>> I BELIEVE IN LATE 2003.

AND THE --

>> SO IT WAS NOT UNTIL -- SO DID

HE AFTER THE, AFTER THE BURNS'

LETTER THE PLEA AGREEMENT WAS

ENTERED SOMETIME AFTER --

>> I THINK ABOUT A YEAR AFTER.

AND THE STATE WAS NOT, UM,

RESPONDING TO EITHER MR. VITALE

WHO KEPT WRITING THEM LETTERS

BEFORE THE DEAL.

AND THE COURT WENT THROUGH IN

ITS ORDER ON PAGES 14 AND 15 AND

OUTLINED THE DATES OF ALL THE

RELEVANT LETTERS.

AND I'D ASK THE COURT TO LOOK AT THAT.

BUT VITALE STILL DIDN'T HAVE A DEAL IN LATE 2003, MAYBE EVEN EARLY 2004.

>> BUT WHAT ABOUT, IT SEEMS TO ME, THAT ONE OF THE TROUBLING ASPECTS THE FACT THAT THE STATE SENT ITS INVESTIGATOR TO MR. VITALE AND ACTUALLY GOT THESE OTHER LETTERS.

AND SO THIS WAS AFTER MR. BURNS' LETTER, CORRECT?

>> HIS LETTER'S IN JANUARY, AND THE VISIT WAS IN OCTOBER.

>> OKAY.

AND SO WHY?

I MEAN, IF THERE WAS NOTHING REALLY GOING ON HERE THAT THE STATE WAS PARTICIPATING IN, WHY DID THE STATE SEND ITS INVESTIGATOR OVER TO MR. VITALE?

>> WELL, THERE WERE PLEA  
NEGOTIATIONS GOING ON.  
BUT NOTHING TO DO WITH VITALE  
TRYING TO GET A CONFESSION FROM  
JOHNSON.  
THEY WEREN'T IN THE SAME CELL.  
THE STATE NEVER AGREED TO THAT.  
THEY NEVER SAID, GREAT, WEAR A  
WIRE.  
GREAT, CONTINUE THE LETTERS.  
THE STATE DIDN'T DO ANYTHING.  
>> WELL, THEY AT LEAST FROM WHAT  
WE, FROM THIS RECORD EVIDENCE  
WAS NOT PRODUCED AND, AGAIN,  
OTHER THAN -- AND I'M NOT  
UNDERMINING THESE ASPECTS, BUT  
OTHER THAN THE FACT THAT THE  
INVESTIGATOR PICKED UP THE  
LETTER THAT BURNS WROTE THE  
LETTER HE DID, AND I THINK THERE  
WAS ONE OTHER PIECE OF EVIDENCE.  
THE PROSECUTORS OR THE OTHER  
JAIL PEOPLE NEVER TESTIFIED IN



THIS EVIDENTIARY HEARING, IS  
THAT CORRECT?

>> THAT'S CORRECT.

THE ONLY LETTER THAT POSSIBLY  
WAS NOT TURNED OVER WAS THE  
BURNS LETTER.

AND THE STATE ARGUES THAT IT'S  
NOT EXCULPATORY.

>> WELL, LET'S ASSUME IT IS  
EXCULPATORY.

DOES IT UNDERMINE CONFIDENCE IN  
THE OUTCOME?

>> NO.

COULD IT HAVE BEEN USED ITSELF?

>> WELL, YES --

>> AS FAR AS CROSS-EXAMINATION?

>> IT COULD HAVE BEEN USED.

BUT THE PLEA AGREEMENT ITSELF  
WAS USED.

AND MR. STONE OR MR. GARLAND  
EXTENSIVELY CROSS-EXAMINED  
VITALE ON THE PLEA AGREEMENT  
WHICH HE REACHED, BROUGHT OUT

THE FACT THAT HE WAS PLEADING  
ONLY TO ACCESSORY AFTER THE  
FACT, ABOUT 20 YEARS.

GOT OFF ON, YOU KNOW, A MURDER  
CHARGE.

ALL OF THAT WAS BROUGHT OUT.

THIS LETTER WOULD NOT HAVE ADDED  
ANYTHING ELSE, ESPECIALLY SINCE  
THE LETTERS ABOUT VITALE  
CONFESSING AND EVERYTHING ELSE  
CAME IN.

THE OTHER THING I WANTED TO  
REMINDE THIS COURT IS WHEN  
MR. VITALE WAS FIRST PICKED UP,  
I BELIEVE ON FEBRUARY 21ST OF  
2001, HE TOLD THE POLICE EXACTLY  
THE SAME THING HE TESTIFIED TO  
AT TRIAL.

BASED ON THAT INTERVIEW WITH  
VITALE, THE POLICE THEN WENT AND  
INTERVIEWED MR. JOHNSON WHO  
CORROBORATED MOST OF VITALE'S  
FIRST STATEMENT SAYING THAT

JOHNSON DID IT.

SO ALL OF THESE LETTERS AND  
VITALE'S CONFESSION, IT'S JUST  
SMOKE.

BECAUSE IF YOU LOOK AT THE  
INITIAL STATEMENTS BEFORE VITALE  
CAME UP WITH THIS CONFESSION,  
BEFORE HE CAME UP WITH THESE  
ADDITIONAL COMMENTS THAT WE  
TALKED ABOUT ON DIRECT APPEAL,  
HE GAVE A DETAILED ACCOUNTING OF  
THAT NIGHT AND OF THE MURDER AND  
OF GETTING RID OF THE BODY.

>> YOU'RE TALKING ABOUT  
MR. JOHNSON, NOW, GAVE A  
DETAILED ACCOUNT.

>> VITALE DID TOO.

VITALE SPOKE FIRST --

>> BUT THIS IS MR. JOHNSON, THE  
DEFENDANT WE HAVE BEFORE US, AND  
THAT'S THE ONE THAT IS OF  
CONCERN AT LEAST AT THIS POINT  
BECAUSE HIS THEORY OF DEFENSE

WAS THAT MR. VITALE COMMITTED  
THIS MURDER WHILE HE WAS PASSED  
OUT.

HE HAD HAD SOME ECSTASY OR  
SOMETHING THAT NIGHT AND THAT HE  
PASSED OUT AND THAT MR. VITALE,  
I GUESS BECAUSE HE WAS JEALOUS  
OF MR. JOHNSON BEING WITH A  
WOMAN, ACTUALLY COMMITTED THIS  
MURDER.

AND SO THAT'S WHY THAT'S OF  
INTEREST.

>> AND THE OTHER THING I WANTED  
TO MENTION --

>> DO YOU AGREE WITH THAT  
SCENARIO THAT JUSTICE QUINCE  
JUST --

>> BASICALLY, YES.

THEIR DEFENSE WAS THAT VITALE  
DRUGGED JOHNSON AND KILLED  
THIS --

>> SO IT'S IMPORTANT TO ME  
WHETHER OR NOT MR. JOHNSON GAVE

THE DETAILS OF THIS CRIME PRIOR  
TO ANY DISCUSSION WITH  
MR. VITALE.

>> YES.

>> OKAY.

AND THAT WAS WHEN?

>> IN HIS CONFESSION WHICH  
WAS --

>> I'M SORRY, I CAN'T HEAR YOU.

>> IN HIS CONFESSION WHICH WAS  
AUDIO AND VIDEOTAPED AND PLAYED  
TO THE JURY.

>> AND THIS WAS AT THE TIME THAT  
HE --

>> WAS ARRESTED.

>> -- ARRESTED.

>> YES.

HIS FIRST INTERVIEW.

>> HOW DETAILED WAS HIS  
CONFESSION, JOHNSON'S  
CONFESSION?

>> WELL, IN TERMS -- UM, HE GOES  
THROUGH THE NIGHT.

HE MET THIS YOUNG WOMAN AT THE  
BAR, YOU KNOW, THEY GO AROUND.  
HE DRAGS HER INTO THE APARTMENT  
BECAUSE SHE'S HYSTERICAL.  
HE TALKS ABOUT, YOU KNOW, HAVING  
SEX WITH HER, AND HE SAYS THAT  
HE PUT HIS HANDS ON HER THROAT,  
AND SHE DIED.  
BUT HE -- ALL THE DETAILS OF THE  
EVENING, UM, HE PUTS IN THERE.  
HE THEN DETAILS HOW HE WRAPPED  
HER UP IN THE DEFLATED AIR  
MATTRESS, WENT AND BOUGHT A  
COOLER, IT WAS HIS SUGGESTION TO  
GET THE ROCKS AND THE CHAINS --  
>> WHAT YOU'RE SAYING THERE IS  
THAT HE NEVER EVEN AT THE  
BEGINNING SAID, LISTEN, I DID  
HAVE SEX WITH HER, AND THERE'S  
NO QUESTION, BUT THERE WAS SEX,  
AND IT WAS VOLUNTARY UP TO A  
CERTAIN -- IN THE DIFFERENT  
PLACES, IN THE STATE PARK AND

UNTIL THIS UNFORTUNATE, TRAGIC  
CIRCUMSTANCE OCCURRED.

BUT HE NEVER SAID, LISTEN, I WAS  
HAVING SEX WITH HER, BUT VITALE  
IS THE ONE THAT KILLED HER?

>> NO.

AND HE NEVER SAID I HAD SEX AND  
THEN I PASSED OUT.

HE SAID, "I PUT MY HANDS AROUND  
HER NECK, AND SHE DIED."

AND THE POLICE SAID HOW DO YOU  
KNOW SHE WAS DEAD?

>> "SHE STOPPED MOVING.

I TRIED TO GET HER TO MOVE, AND  
SHE STOPPED.

SHE WOULDN'T MOVE."

THAT WAS HIS FIRST STATEMENT TO  
THE POLICE.

ADDITIONALLY, THE ONE LAST THING  
I WANT TO ALERT THIS COURT TO  
ABOUT THESE LETTERS THAT THE  
STATE ADMITTED IN REBUTTAL, NONE  
OF THESE LETTERS ARE

INCRIMINATING ON THE CHARGES  
THEMSELVES, WHICH IS NECESSARY  
UNDER MESSIAH.

>> SO MR. JOHNSON NEVER IN ANY  
OF THESE LETTERS MAKES ANY  
STATEMENT THAT CAN BE  
INTERPRETED AS HE COMMITTED THIS  
MURDER.

>> NO.  
NOT ONE.

THESE LETTERS ONLY SHOW HIM  
COACHING VITALE ON WHAT TO SAY  
IN ORDER TO MAKE THE CONFESSION  
CONSISTENT AND TO GET A  
SECOND-DEGREE MURDER AS OPPOSED  
TO FIRST.

THAT'S WHAT THESE LETTERS SHOW,  
WAS HIM COACHING VITALE.

NOTHING IN THESE LETTERS  
INDICATED THAT HE COMMITTED A  
SEXUAL BATTERY, A KIDNAPPING OR  
A MURDER.

>> BUT IN FAIRNESS, IF THE STATE



DELIBERATELY HAD VITALE GO TO  
JOHNSON TO HAVE JOHNSON DO  
CERTAIN THINGS, IT'S CERTAINLY  
NOT HELPFUL TO THE DEFENDANT  
THAT HE'S THE ONE THAT TRIED TO  
GET VITALE TO CONFESS.

I MEAN, SO WHEN WE SAY THEY'RE  
NOT INCRIMINATING, HE MAY NOT  
HAVE SAID, LISTEN, YOU KNOW, I  
DID THE CRIME, BUT I NEED YOU TO  
TAKE THE FALL.

THESE LETTERS ARE NOT -- THE  
STATE CERTAINLY WOULD, WANTED TO  
USE THE LETTERS TO DISCREDIT THE  
VITALE CONFESSION.

>> YES.

BUT JOHNSON STILL WAS LEFT WITH  
THE ARGUMENT THAT HE WAS ONLY  
DOING THIS BECAUSE HE DIDN'T DO  
IT, AND HE WANTED VITALE TO  
STAND UP AND TAKE  
RESPONSIBILITY.

I MEAN, THAT WAS THE ARGUMENT

THAT THEY WERE LEFT WITH, AND  
IT'S A VALID ARGUMENT EXCEPT FOR  
ALL THE OTHER EVIDENCE AGAINST  
JOHNSON.

AND FINALLY IN TERMS OF -- AND  
IF THE COURT FINDS A BRADY  
VIOLATION ALTHOUGH THE STATE  
DOESN'T CONCEDE THERE WAS ONE,  
HE CAN'T SHOW THE NECESSARY  
PREJUDICE.

>> WELL, I MEAN, IT SEEMS TO ME  
THAT THIS WAS A LETTER THAT HE  
WROTE AND THAT TO SOME EXTENT IT  
MIGHT BE MITIGATING, WE'RE  
TALKING ABOUT THE BURNS'  
LETTER --

>> YES.

>> THAT'S THE ONE THAT WAS NOT  
TURNED OVER TO THE DEFENSE PRIOR  
TO THIS EVIDENTIARY HEARING.  
AND SO WHAT PART OF BRADY IS NOT  
SATISFIED WITH THIS BURNS'  
LETTER?

>> WELL --

>> WHETHER THERE'S HARMLESSNESS  
OR, THAT ISSUE IS A SEPARATE  
ISSUE.

BUT WHY ISN'T THIS A BRADY  
VIOLATION?

>> WELL, TO BE A BRADY VIOLATION  
THE DEFENSE ALSO HAS TO SHOW  
THAT, UM, HE WAS PREJUDICED SO  
MUCH THAT THE JURY VERDICT WOULD  
HAVE BEEN DIFFERENT.

AND IT WOULDN'T HAVE BEEN  
BECAUSE THE JURY ALREADY KNEW  
ABOUT THE PLEA DEAL AND  
NEGOTIATIONS, AND VITALE WAS  
CROSS-EXAMINED ON THAT.

THIS LETTER JUST SHOWS THAT  
VITALE WANTED TO WORK WITH THE  
STATE, BUT THE JURY ALREADY KNEW  
THAT BECAUSE VITALE WAS  
TESTIFYING FOR THE STATE AND GOT  
A PLEA DEAL.

SO YOU CAN'T SHOW ANY NECESSARY

PREJUDICE UNDER BRADY.

BUT IT'S THE STATE'S POSITION  
THAT MR. JOHNSON FAILED AT THE  
EVIDENTIARY HEARING TO PROVE A  
MESSIAH, BRADY OR GIGLIO CLAIM.

AND IF THE COURT DOESN'T HAVE  
ANY FURTHER QUESTIONS, I ASK YOU  
TO AFFIRM THE LOWER COURT'S  
DENIAL OF RELIEF.

>> THANK YOU.

REBUTTAL?

>> FIRST OFF, WITH REGARD TO THE  
TEMPORAL ASPECT OF WHEN THE  
LETTERS WERE WRITTEN, THERE'S A  
LETTER FROM APRIL 2004 FROM  
MR. VITALE TO THE STATE ATTORNEY  
SAYING, IN ESSENCE, I SPOKE WITH  
MR. BURNS, MY LAWYER, HIS  
ASSISTANT LAST WEEK IN REGARDS  
TO THE LETTERS, THE MISSING  
LETTERS.

AND SHE HAD INFORMED ME SHE HAD  
FOUND A BUNCH OF THEM AND WAS

GOING TO MAKE COPIES FOR YOU.  
SO IT'S OBVIOUS EVEN UP UNTIL  
APRIL 2004, MR. VITALE IS BEING  
USED AS A CONDUIT WITH HIS  
LAWYER TO FUNNEL THOSE  
LETTERS --

>> ALL RIGHT.

WERE THOSE, WERE THOSE  
LETTERS -- MS. LERNER SAID THAT  
THE LETTERS AFTER 2003 WERE NOT  
INTRODUCED INTO EVIDENCE.

WERE THEY INTRODUCED INTO  
EVIDENCE?

>> THERE WERE HUNDREDS OF THEM.

I'M NOT EXACTLY SURE WHICH  
ONES --

>> WELL, IT'S IMPORTANT TO ME.

>> YES.

>> AND THIS -- IT'S IMPORTANT  
THAT IF THE LETTERS BEFORE THE,  
WHAT LOOKS LIKE MR. BURNS  
GETTING INVOLVED AND MR. VITALE  
TRYING TO WORK OUT A DEAL, IF

LETTERS AFTER THAT WEREN'T EVEN  
INTRODUCED, THEN THE ISSUE OF  
WHETHER THE LETTERS BEFORE THAT  
WERE INTRODUCED DO NOT  
CONSTITUTE A VIOLATION IS  
IMPORTANT.

>> WELL, I BELIEVE THERE WERE  
LETTERS INTRODUCED AFTER THE  
VITALE CONFESSION.

I DON'T RECALL OFF THE TOP OF MY  
HEAD FROM THE RECORD IF THEY  
WERE LETTERS WRITTEN BY  
MR. JOHNSON AFTER JANUARY OF --

>> BUT YOU UNDERSTAND WHY THAT'S  
IMPORTANT.

>> I DO.

>> BECAUSE IF SOMEBODY, FOR  
EXAMPLE, CONFESSES TO A CRIME --

>> RIGHT.

>> -- AND THEN THEY SAY I DON'T  
WANT TO TALK ANYMORE AND AFTER  
THAT THERE'S MORE CONVERSATION,  
THEN THAT IS -- WHICH ACTUALLY

MAY HAVE HAPPENED IN YOUR CLAIM  
FOR YOUR HABEAS HERE -- YOU  
STILL GET THE EVIDENCE OF WHAT  
WAS SAID BEFORE THE INVOCATION  
OF THE RIGHT TO REMAIN SILENT.

>> RIGHT.

THE PROBLEM IS, IS BURNS WASN'T  
AWARE OF HOW LONG AGO HE WAS  
TALKING ABOUT WHEN HE SAID THIS  
AGREEMENT.

WE HAD A LONG TIME AGO, THAT WE  
SPOKE A LONG TIME AGO.

SO TEMPORALLY IT'S DIFFICULT TO  
SAY, BUT WE DO KNOW THAT LETTERS  
WERE WRITTEN BEFORE, DURING AND  
AFTER AND THAT UP UNTIL AND  
INCLUDING IN APRIL THE CONDUIT  
WAS STILL OPEN TO --

>> BUT YOU'RE STILL, YOU STILL  
HAVEN'T ANSWERED HER QUESTION,  
AND THAT IS WHAT CAME INTO  
EVIDENCE.

YOU KEEP GOING BACK TO BEFORE,

DURING AND AFTER.

THAT REALLY DOESN'T HELP US ON  
THAT ISSUE.

>> I -- WHAT I SAID IS I  
BELIEVE, MY RECOLLECTION OF THE  
RECORD IS THAT THERE WERE  
LETTERS AFTER THE VITALE  
CONFESSION LETTER WHICH I THINK  
WAS AUGUST OF 2003 --

>> I THINK SHE ASKED ABOUT THE  
BURNS LETTER.

>> RIGHT.

AND THAT'S THE ANSWER THAT I  
DON'T IMMEDIATELY KNOW THE  
RECORD CITATION TO THAT.  
BUT MY POINT IS SINCE THE BURNS  
LETTER OPENS UP WITH THE  
AGREEMENT WE HAD A LONG TIME  
AGO, I DON'T THINK IT'S A DEAL  
BREAKER WHETHER THE LETTERS WERE  
LETTERS WRITTEN BY MR. JOHNSON  
AFTER JANUARY OF 2003 WERE  
ADMITTED.



BECAUSE THE AGREEMENT WAS A LONG  
TIME AGO.

BACK IN THE DISTANCE.

SO, CERTAINLY, THAT WOULD COVER  
THE TIME PERIOD IN WHICH SOME OF  
THESE LETTERS WERE OBTAINED.

THAT'S MY READING OF THE RECORD.

I WOULD ALSO LIKE TO NOTE THAT  
MR. VITALE GAVE AT LEAST THREE  
DIFFERENT STATEMENTS ABOUT THIS,  
AND EACH STATEMENT GOT  
SUCCESSIVELY WORSE FOR  
MR. JOHNSON AS HIS ORGANIZATION  
WITH THE STATE GREW, AND THE  
FACT THAT MR. JOHNSON MAY HAVE  
HAD SOME DETAILS ABOUT THE CRIME  
PERFECTLY FITS IN WITH THE  
DEFENSE THEORY THAT THE  
CONFESSION OF VITALE WAS  
LEGITIMATE IN THAT HE DRUGGED  
MR. JOHNSON AND MADE HIM THINK  
HE DID IT.

SO IT'S COMPLETELY CONSISTENT

WITH THE DEFENSE THAT VITALE'S  
THE ACTUAL MURDERER AND DUPED  
MR. JOHNSON INTO BELIEVING IT.

I SEE MY TIME IS OUT.

THANK YOU VERY MUCH.

>> THANK YOU FOR YOUR ARGUMENTS.

THE COURT WILL BE IN RECESS FOR  
TEN MINUTES.

>> ALL RISE.