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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT

MCLEAN COUNTY, ILLINOIS

PEOPLE OF THE)
STATE OF ILLINOIS)
)
Plaintiff,)
)
vs.)
) NO. 99 CF 1017
SUSAN POWELL CLAYCOMB,)
)
Defendant.)

JURY TRIAL

REPORT OF PROCEEDINGS of the trial before the
Honorable DONALD D. BERNARDI and Jury on the 14th day of
August, 2000.

APPEARANCES:

MR. CHARLES REYNARD,
State's Attorney for McLean County,
MS. TEENA GRIFFIN,
First Assistant State's Attorney,
MS. STEPHANIE WONG,
Assistant State's Attorney,
for the People of the State of Illinois;

MR. STEVEN SKELTON,
MR. MAURICE BARRY,
Attorneys at Law,
for the Defendant;

Defendant also present.

Nancy L. McClarty, CSR, CP-RPR
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McLean County, IL

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1 (The following proceedings were had outside
2 the presence and hearing of the jury.)

3 THE COURT: We'll go back on the record in
4 99 CF 1017, People versus Susan Powell Claycomb. People are
5 appearing by Mr. Reynard. Defendant, Mr. Barry and
6 Mr. Skelton.

7 We're going to begin with motions, and we've all
8 agreed the motion to reconsider ought to be first. So,
9 Mr. Skelton, are you going to do that one?

10 MR. SKELTON: Yes, I am, Your Honor.

11 THE COURT: Go ahead.

12 MR. SKELTON: First I'd ask the court to take
13 notice of the transcription that I earlier referred to of the
14 hearing on July 20th of the year 2000.

15 THE COURT: Okay. I've got a copy of that.

16 MR. SKELTON: And the court had earlier made
17 reference to a transcription of court proceedings of a
18 different date. Could you please tell me what date that was?
19 Because I'm going to ask the court take notice of that as
20 well.

21 THE COURT: That was the -- I believe it's the
22 14th. Let me find it, July 14th.

23 MR. SKELTON: That sounds right to me, Judge.

24 THE COURT: That was just the rulings that I ask be

1 filed so there is no confusion. Just a minute. July 14th,
2 so that's filed as well.

3 The record will reflect Miss Griffin has appeared
4 as well.

5 So go ahead, Mr. Skelton.

6 MR. SKELTON: Judge, there are essentially two
7 subject areas that are dealt with in the motion to
8 reconsider. One relates to out-of-court hearsay statements
9 attributable to the declarant James Snow and the process or
10 the steps the court is going to take in pretrial screening,
11 if you will, of that testimony. As the court and counsel are
12 well aware, my position has been from the inception of this
13 issue being raised that they should not be admitted in any
14 circumstances. The court disagreed with me on that, and
15 I -- I'll live with that. I'm not here complaining about
16 that. I don't think it would be appropriate.

17 However, the procedure as is pointed out in the
18 motion to reconsider is packed with potential peril. The
19 court, as I recall, said to me, in essence, well, you can
20 move to strike at any point in time if it appears there is an
21 inappropriate foundation for the exception to the hearsay
22 rule that we've heard so much about here, that is, the
23 statement against penal interest.

24 That puts me on the horns of a dilemma, Your Honor,

1 if, in fact, that were to occur. And if the court allows
2 preliminary testimony in front of the jury from witness A
3 through Z and the court finds that the predicate foundation
4 for the introduction of the hearsay statement under the
5 exception that we're talking about does not exist, then I
6 either move to strike and hope that the jury will be able to
7 excise that from their memories consistent with an
8 instruction or an admonition given to them by the court; or I
9 move for a mistrial, and then we start all over again if that
10 motion were allowed. So I'm not arguing with the court
11 saying I'll listen to this stuff, that being the out-of-court
12 hearsay statements attributable to declarant James Snow, but
13 that it is being done in front of the jury, because I firmly
14 believe and suggest strongly to the court that that's a
15 minefield that we're going to be walking through.

16 So I'm asking the court to reconsider its earlier
17 ruling in so much -- inasmuch as the process that is followed
18 or taken before these people are called to testify. In
19 essence, I'm asking for a screening by the court outside the
20 presence of the jury to determine whether or not the
21 predicate foundation has been laid. That's all I'm going to
22 say about that.

23 As to the other bad acts or criminal behavior
24 testimony, that's the second subject area that is dealt with

1 in the motion to reconsider. One that comes immediately to
2 mind is the proposed testimony of Shane Tallon, who at one
3 point in time after March 31st, 1991 had a relationship, a
4 dating relationship or a live-in relationship, with Susan
5 Powell. He is, the best of my understanding, going to
6 provide testimony that at some point in time, once again,
7 post the death of William Little, with Susan Claycomb in
8 which Miss Claycomb said, in essence, she was using drugs
9 during a vague time frame which would incorporate or include
10 March 31st of 1991. The other witnesses, which would be
11 Julie Knight and Molly Eades, I would suggest are similar.

12 The question that I don't believe the court
13 answered in its own mind from reading the transcript of
14 June -- July 20th of 19 -- of 2000 based on my, once again,
15 my review of what the court said was, what probative value
16 does this have. Does it tend to prove or disprove that Susan
17 Powell assisted James Snow on March 31st, 1991? Or abetted
18 or aided either in the planning or the commission of the
19 offense that is attributed by the State to Mr. Snow?

20 I believe, Your Honor, and I would suggest the
21 court ought agree with me that it has no probative value. It
22 doesn't tend to prove or disprove any element of this
23 offense, and, therefore, it's irrelevant. It's not material
24 to any issue. It's not germane to any issue. It doesn't go

1 to proving the State's theory of the case or disproving the
2 State's theory of the case. And I believe the court
3 overlooked that consideration or that determination in
4 saying, particularly as it relates to Tallon, well, this will
5 flesh out or put in context the conversation he had with her.

6 The conversation clearly can be testified to. But,
7 it doesn't need to include prejudicial aspects or prejudicial
8 language that is going to do nothing to get us toward the
9 issue or the answer to the questions that are going to be
10 posed to the jury. Did Susan Powell assist Jamie Snow? And
11 that I believe is as simply I can put it in the thought
12 process that I have taken, and I believe the court overlooked
13 in making its determination that other bad acts attributable
14 to my client ought be admitted in this -- in the proof that
15 the State provides.

16 THE COURT: You think there was a question about
17 that in the transcript?

18 MR. SKELTON: I believe there was, Your Honor.

19 THE COURT: Do you know where?

20 MR. SKELTON: The court on page 22 at line 15 tried
21 to boil down the question and I -- by saying, well, the
22 portion of the testimony would be to the effect that or at
23 least the State's position that this defendant admitted other
24 offenses with the codefendant, as well as the Clark Station,

1 okay.

2 On page 24 where it indicates the court at page
3 eight, I think that most succinctly sets forth the court's
4 reasoning. And then on page 31 the court essentially
5 announces its decision beginning at line four.

6 THE COURT: Okay. Mr. Reynard -- well, who is
7 going to argue for the State?

8 MR. REYNARD: I am, Your Honor.

9 THE COURT: All right. Go ahead.

10 MR. REYNARD: With regard to the first series of
11 rulings concerning the admissibility of the Snow statements,
12 I had understood the motion to reconsider to be expressly
13 complaining about the admissibility of Snow's statements, but
14 this morning counsel has indicated that he is not so much
15 complaining about the statements coming in themselves but
16 about the danger of the predicate foundation being
17 insufficiently laid at the time the evidence is presented.
18 And in truth, that concern is expressed in the motion to
19 reconsider, the concern about the screening methodology
20 adopted by the court for receiving anticipated evidence for
21 purposes of determining its reliability and for purposes of
22 ruling upon the defendant's motion in limine to preclude the
23 use of these admissions against penal interest.

24 But I would represent to the court, as I have in

1 our response, that the motion to reconsider is the first
2 articulation that defense complain about the methodology
3 adopted by the court. It is the very first time it was
4 raised. And in fact, the court, as I recall, has offered in
5 the past and offered in the context of how are we going to
6 receive this information in order for me to rule on the
7 motion in limine and the -- that methodology was proposed to
8 be done by representation and citations to discovery record
9 and the like. And both sides were permitted to cite to
10 whatever factual record in the discovery or otherwise they
11 thought would fairly represent what the expected evidence
12 would be. And both sides, to my knowledge, took advantage of
13 that to the extent that they could, and I recall absolutely
14 no complaint about the factual representations made
15 about -- made by the State concerning the anticipated
16 evidence, no citations to the discovery record or even
17 defense investigations which would be incorporated in the
18 discovery record which in any way could affect the court's
19 reasonable anticipation of what the evidence would be with
20 respect to what the admissions were and whether they had
21 sufficient indicia of reliability that they might be
22 admissible as declarations against penal interest.

23 And now at this late date we're being asked to
24 torture the trial presentation with a witness-by-witness dry

1 run of foundational matters, which I don't think present any
2 risk at all. They present merely an opportunity to take two
3 swipes at every witness about which the defense complains.
4 That's tactical in the extreme. It's offensive, and I don't
5 think it justifies the motion to reconsider one scintilla.

6 I think the process to be followed is the process
7 which has been adopted by the parties up 'til now, and this
8 motion to reconsider ought not be heard and complain about
9 the procedure that was acquiesced in previously.

10 Now, with respect to the other bad acts motion, the
11 complaint is as to Tallon, Knight and Eades and the fact that
12 they will testify as to certain very specifically oriented
13 reflections made by the defendant herself about her use of
14 drugs at the time of and specifically at the time of the
15 Easter robbery and murder. Tallon's is perhaps the most
16 generalized reference to drug use of the three, as I recall,
17 because it makes reference to how the conversation in their
18 shared living quarters came up in the first place, the
19 conversation in which she admitted being in the car with
20 Jamie Snow that night. And they were talking about their
21 difficulties as a couple with the use of drugs, and Tallon
22 was reflecting upon his history of drug abuse and the
23 problems it has caused him; and she was reflecting
24 reciprocally, I think the context will show, was reflecting

1 upon the problems that she has had and the specific problems
2 it has caused her and others like back when she and Jamie
3 were in the car together the night that he shot the kid at
4 the Clark Station, that they were high that night or words to
5 that effect and that's the very limited purpose for which the
6 context of the conversation which the jury has a right to
7 understand. How did this conversation come up? What makes
8 it sensible in the context of an intimate relationship
9 between Tallon and this defendant, not that it's coming into
10 detail any more specific history other than the history of
11 being a drug user on the night in question?

12 And, I think also referring to not only her use of
13 drugs at that time but Snow's use of drugs that night.

14 Similarly, Knight's testimony concerning her drug
15 use to my recollection is pretty much specifically limited to
16 being high at that time, being high at the time referring to
17 that night. It was only supposed to be a robbery. He wasn't
18 supposed shoot the kid. We were high that night, words to
19 that effect is what we're talking about here, Your Honor.
20 And that clearly goes to explaining what the conduct was all
21 about that night, what was motivating the conduct that night,
22 and I think the court very appropriately during the course of
23 the ruling on the 20th of the -- of July made reference to
24 the motive, probative value of this evidence, both Tallon and

1 in reference to Knight.

2 So, the specific question that Mr. Skelton
3 complains about the court's ruling on was answered in this
4 transcript because the court did reflect upon the probative
5 value of this evidence with respect to motive. And -- and
6 even though motive is not an element of the offense, we're
7 not limited to probative value. Probative value is not
8 limited just to elements of the offense. It's limited to
9 showing who did it and why they did it. The complaint that
10 we're showing what they're state of mind was, what their
11 motive was at the time they committed the offense doesn't
12 make it irrelevant, doesn't make it immaterial. It doesn't
13 have to be specific to her specific intention. It need only
14 be relevant. And I think the court showed repeatedly
15 throughout the transcript of the motion and the court's
16 reflections upon the motion that Your Honor was acutely aware
17 of the balancing test that was involved and the need for a
18 curative instruction which could responsibly deal with what
19 is inevitably I think the court said always prejudicial. And
20 the only issue is whether or not the curative instruction
21 will balance it out so the prejudicial impact is outweighed
22 by the probative value. And the court I think appropriately
23 found that the probative value outweighed the prejudicial
24 effect. And I think that was the basis for the court's

1 ruling.

2 Accordingly, the People would ask the court to
3 confirm it's previous ruling to deny the motion to
4 reconsider.

5 THE COURT: I had asked both of you on more than
6 one occasion to detail the proper procedure from the Wilson
7 case, and it took the docket in Wilson to figure out what
8 happened. And it appears that what happened in Wilson from
9 my reading of the docket is that after one or more of the
10 witnesses testified, Judge Witte then denied the -- actually
11 what he did was grant the motion in limine. And that was as
12 best I can tell, of course, during the trial. And that's why
13 I suggested the motion to strike. No one has yet given me
14 the authority for conducting two trials. And in this case
15 that's what we'd be doing because we have so many witnesses
16 who would be testifying. We would literally have a great
17 portion of the case tried on the reliability question, and if
18 liable or trustworthiness were found by the court, then it
19 would be presented to the jury. And although there is no
20 problem with that in theory, I don't think it's called for by
21 any of the cases that we've seen.

22 Mr. Skelton points out a danger that is inherent
23 anyway and will occur in this case because I can guarantee
24 evidence will be sustained, objections will be sustained and

1 that is always the circumstance that occurs when that
2 happens. The witness has already testified to the
3 inadmissible evidence, and the jury is then ordered to
4 disregard it.

5 We have the limiting instruction. It was my
6 analysis that that was adequate to protect it. In Wilson the
7 process suggested by the defense here was not followed. It
8 is not any authority for that process, nor have the parties
9 cited any cases which is. Wilson pointed out something that
10 I hadn't mentioned earlier from the Williamson-United States
11 Supreme Court case in which they noted that in Wilson the
12 statements were genuinely self-inculpatory, each of them were
13 indicators that the declarant, the codefendants, had been
14 responsible for the conduct which in that case involved armed
15 robbery and murder. And in Williamson, they suggested that
16 that in and of itself, a genuinely self-inculpatory
17 statement, is one of the particularized guarantees of
18 trustworthiness making it admissible under the confrontation
19 clause, and that was cited in Wilson.

20 So there are all kinds of reasons other than those
21 stated by me earlier to have some confidence in the
22 reliability of the statements, and I think that's the only
23 analysis necessary prior to trial. The risk Mr. Skelton
24 suggests is there, but it's always there.

1 And the other bad acts testimony just seems to me
2 that the court's ruling on that was not in error either. The
3 limited comment and the availability once again of a limiting
4 instruction regarding that persuades me once again that those
5 rulings were not in error as well; and prior to today I've
6 reviewed all of your motions and citations that you've
7 previously identified, and that's why I'm confident that that
8 was not an error.

9 So the motion to reconsider is denied. And I'm
10 going to ask Mr. Reynard if you would propose the next motion
11 or issue.

12 MR. REYNARD: I would suggest, subject to
13 Mr. Skelton's input, that we would hear both the motion for
14 sanctions and the motion to suppress identification on a
15 consolidated basis.

16 THE COURT: Okay. And I think, Mr. Skelton, you
17 suggested that might be a good idea last Friday?

18 MR. SKELTON: I have -- yes, I did, and too I
19 discussed it with Mr. Reynard briefly this morning, and I
20 think that would be the appropriate manner in which to
21 proceed.

22 MR. REYNARD: I would like -- I'm sorry.

23 THE COURT: I was going --

24 MR. SKELTON: May I finish, Your Honor?

1 THE COURT: Yes, go ahead.

2 MR. SKELTON: Given the nature of the allegations
3 that are contained in each of those motions that are yet
4 undecided, Mr. Barry will be here for that purpose today to
5 call witnesses and to examine those persons.

6 THE COURT: I take it you have no objection to
7 that?

8 MR. REYNARD: No, I don't. We were going to
9 inquire as to Mr. Barry's presence during the trial and if
10 he's -- is going to be present during the trial, we'd ask the
11 jury to be voir dired on their knowledge of him. But if
12 not -- that seems to be the implication here -- I have no
13 problem with that.

14 THE COURT: Okay. And that's the case,
15 Mr. Skelton?

16 MR. SKELTON: Yes.

17 THE COURT: Give me one moment to read the
18 amendment, if you will.

19 All right. I've finished reading the amended
20 motion for sanctions. And, Mr. Barry, we'll go on then to
21 the motion to suppress and the motion for sanctions.

22 MR. REYNARD: If I might indicate, Judge, I'd like
23 to make a motion with respect to these pleadings, very
24 briefly, and then I'm going to be asking the court to take

1 them under advisement pending full hearing anyway, but I need
2 to make a record of my concerns about the merits of the
3 motions, even on their face.

4 THE COURT: The amended motion?

5 MR. REYNARD: Including the amended, yes, and I
6 guess I'd want to wait until Mr. Skelton returns. I'm
7 assuming he's going to be here during the conduct of the
8 motion.

9 THE COURT: Is he?

10 MR. BARRY: That's correct, yes.

11 THE COURT: Where did he go? Do you know?

12 MR. REYNARD: Detective Katz just went after
13 Mr. Martinez because he will likely be called as a witness in
14 the case.

15 THE COURT: All right. Mr. Reynard, you had a
16 response to the amended motion before we begin with the
17 evidence.

18 MR. REYNARD: Yes. It's actually a motion to
19 dismiss the motion for sanctions and the motion to suppress
20 identification based upon the failure of the motions on their
21 face, including the amended motion, to state a cause or state
22 a basis upon which this relief can be granted. Basically
23 we're suggesting that the -- the motion for sanctions does
24 not state a basis upon which relief can be granted, and I

1 believe the authority cited in the People's response stand
2 for the proposition that those allegations bear as they are
3 on their own would not support this relief. The only thing
4 that comes close to stating a cause for relief I think is in
5 the authorities cited in the amendment, which basically liken
6 what the State has done in this case to destruction of notes,
7 direction by the State's Attorney that no written reports be
8 prepared by an investigator and evidence that there was a
9 practice to have no written reports prepared by
10 investigators.

11 If this evidence were to show any of those things
12 or anything remotely akin to those kinds of things, I'm going
13 to concede upfront that there is a basis for relief that is
14 stated in the motion. So, for -- because of the appearance
15 of impropriety that is raised by that motion and its
16 interaction with the evidence that's contemplated today, I
17 think a full airing of this needs to be conducted even though
18 on the merits it shouldn't be allowed, and on the motion to
19 suppress identification, I'm saying, Your Honor, that
20 exposure to news reportage, a picture in the newspaper, which
21 is the basis for the alleged undue influence, undue influence
22 scenario, which, of course is language that doesn't track
23 with the case law, that is not the kind of undue -- unduly
24 suggestive identification procedure that the case law

1 contemplates to be a basis upon which this kind of relief can
2 be granted.

3 The gist of this kind of motion, a suppression
4 motion, deals with something that the police or the State
5 have done improperly, and there is no allegation of improper
6 conduct of the State. But were there any evidence of
7 improper conduct of the State or police or any suggestion of
8 it, maybe this motion could be brought to snuff. But I'm
9 submitting to Your Honor that ultimately this motion, while
10 you would take it under advisement at this time and hear all
11 of the aspersions being cast by this evidence, I'm submitting
12 to Your Honor that it ought be dismissed outright and the
13 court ought do so at the conclusion of hearing all the
14 evidence.

15 THE COURT: I guess I'll consider that a motion to
16 strike the amendment and the initial motion simply because
17 you haven't had time to file a written motion, and I'll take
18 it under advisement.

19 MR. REYNARD: Thank you.

20 THE COURT: Mr. Skelton, do you have any problem
21 with that? I mean incorporate it in your closing remarks
22 regarding these matters. You can argue both of these I
23 guess.

24 MR. REYNARD: Yes.

1 THE COURT: Is that all right with you?

2 MR. SKELTON: Yes.

3 THE COURT: All right. I'm going to make a note to
4 myself to that effect, and, Mr. Barry, let you go ahead and
5 with the motion to suppress the ID and for sanctions.

6 MR. BARRY: Okay. Your Honor, before we start on
7 that, I would make a motion to exclude witnesses. This is
8 going to be somewhat difficult because we have an admission
9 in the response to the defendant's motion for sanctions that
10 State's Attorney Charlie Reynard and Assistant State's
11 Attorney Teena Griffin were actually witnesses during part of
12 what is being brought to issue in these motions. We would
13 ask that obviously Mr. Martinez, Detective Katz and the other
14 witnesses be excluded during the interrogation on these
15 matters.

16 I don't know how the court wants to handle the
17 trying to exclude both State's Attorneys because we can't do
18 that. What I would suggest, though, is possibly an
19 opportunity to whoever they decide is going to handle this
20 motion they could be the first witness if that would -- if
21 that would allow it to be any easier.

22 MR. REYNARD: I would indicate in response, Judge,
23 I don't believe either counsel need be a witness because
24 the -- I think it's undisputed that Detective Katz was

1 present at the time of everything that went on that could be
2 testified about. If either counsel need to be witness, I
3 think counsel can call whoever he seeks to call. But I think
4 the kind of concern that's expressed here is not real
5 substantial. I don't know of who the other witnesses in the
6 case will be other than Mr. Martinez, Detective Katz and I
7 believe there is a possibility that Mr. Foster, the defense
8 investigator, might also be another witness.

9 If there are any other witnesses besides those
10 three, I have no objection to the motion to exclude
11 witnesses.

12 MR. BARRY: Rick Barkes may also, Your Honor.

13 THE COURT: Okay. The question is whether or not
14 the defense is going to call you, not whether or not I think
15 there are enough people present at this meeting to illuminate
16 me because I don't think that's the standard. We don't -- we
17 don't fritter away witnesses because there are others
18 present.

19 You need to tell me, Mr. Barry, if you're going to
20 call Miss Griffin and Mr. Reynard. If you are, I'll deal
21 with it. If you aren't and you're satisfied with one and
22 then the other while they're present...

23 MR. BARRY: I would plan on calling you.

24 THE COURT: Both are excluded. Get another

1 assistant from upstairs and bring them down, and we'll start
2 the hearing.

3 (Recess.)

4 THE COURT: We'll go back on the record in
5 99 CF 1017. Are we waiting for somebody?

6 MR. REYNARD: Well, I thought they were following
7 me. But let me take this up in the first instance, Judge.

8 THE COURT: Parties appear except Miss Griffin.
9 Go ahead, Mr. Reynard.

10 MR. REYNARD: We have secured Miss Wong to serve as
11 counsel in the event that the court requires her to conduct
12 the People's portion of this hearing. Although obviously I
13 think that is, depending on how literally that requirement is
14 to be interpreted other than simply sitting here and being a
15 warm body with a pulse disables the State considerably.

16 I guess what I would propose, Your Honor, is that,
17 number one, I didn't mention the presence of another witness
18 at the time of a statement as obviating the concerns of the
19 defense. I didn't mention that idly. There is case law to
20 the effect. I can't cite it to you, but it came up also in
21 the context of the S and S cases particularly when there was
22 a voluntariness of statement issue made where the statement
23 was made to -- to the State's Attorney in the presence of the
24 detective at the time of that statement -- statement obviated

1 the necessity of the court to exclude witness from a hearing
2 with respect to the voluntariness of that statement because
3 of the availability of another witness. And there is federal
4 case law and state case law which authenticates that manner
5 of proceeding with respect to statements which are received
6 and witnessed by prosecutors.

7 This is what I would propose specifically so that
8 the court's concern and counsel's concern can be mediated.
9 It would be that I be called first as a witness and that I
10 thereafter be foreclosed from testifying further in this case
11 because I will thereafter conduct the People's portion of the
12 motion, and I think that protects the court's interest.
13 Miss Griffin can be excluded because I can represent the
14 People, but at least I'm the one who is adequately prepared
15 to represent the People in this motion.

16 If the court wants another Assistant State's
17 Attorney present, I would think that would exalt form over
18 substance, but we'll comply with that.

19 THE COURT: Okay. The ruling is that an assistant,
20 not Miss Griffin, be present. You be the first witness.
21 When they're done examining, she may cross. Then when that's
22 conducted, we are back to what you just suggested. You're in
23 the courtroom, and I take it Miss Griffin would be next.
24 When she's done testifying, with the understanding she can't

1 testify again, she may sit at counsel table. That's what
2 we're doing. I probably maybe should have been clearer.

3 MR. REYNARD: Okay.

4 THE COURT: I don't mean to exclude the two of you
5 from the entirety of the hearing. That doesn't make sense.
6 You're only excluded in order to get around the exclusion of
7 witness request, and I'm directing the defense then to call
8 you all first, Mr. Reynard first and then Miss Griffin may be
9 called next.

10 MR. REYNARD: With respect to my cross-examination,
11 Your Honor, I would be asking leave to testify in the
12 narrative, simply because the previously uninvolved Assistant
13 State's Attorney may not know sufficient context --

14 THE COURT: Well, if that happens, you bring that
15 to the attention of the court. That could be.

16 MR. REYNARD: Very good.

17 THE COURT: That could be. I'll certainly consider
18 it. I'm not going to rule ahead of time on that.

19 All right. Show then Miss Wong now appearing.

20 And I guess, Mr. Reynard, you don't need to leave.
21 You're going to call him first, correct, Mr. Barry?

22 MR. BARRY: That's correct.

23 THE COURT: So we will begin the motion to
24 suppress, motion for sanctions. And, Mr. Barry, you may call

1 your first witness.

2 MR. BARRY: Thank you, Your Honor. Call
3 Mr. Reynard.

4
5 (Witness sworn.)

6
7 C H A R L E S R E Y N A R D
8 called as a witness on behalf of the Defendant herein, being
9 first duly sworn, was examined and testified as follows:

10
11 THE COURT: Go ahead, Mr. Barry.

12 MR. BARRY: Thank you, Your Honor.

13
14 DIRECT EXAMINATION BY MR. BARRY:

15
16 Q Would you please state your name?

17 A Charles Reynard.

18 Q Mr. Reynard, you are the State's Attorney for McLean
19 County?

20 A I am.

21 Q How long have you been the State's Attorney?

22 A Since 1987.

23 Q And as part of your involvement and duties you
24 prosecute cases, as well as handle administrative

1 proceedings?

2 A Yes.

3 Q And is it your policy in your office that you
4 administer discovery in cases?

5 A I'm not certain what you mean by your question.

6 Q Okay. Are part of your duties as State's Attorney to
7 administer and monitor discovery within your office?

8 A That's a fair characterization.

9 Q Now, with regard to cases that you specifically
10 prosecute, would you say you have more of a hands-on address
11 of the discovery in that case?

12 A Yes.

13 Q And would that entail cooperation with the various
14 police departments, law enforcement authorities, detectives?

15 A Yes.

16 Q Would this discovery include witness statements?

17 A Yes.

18 Q Would it include lineups and show-ups?

19 A Yes.

20 Q How long would you say you've been involved in the
21 prosecution of this case?

22 A Several months prior to the grand jury proceedings.
23 I've been involved in it to a lesser extent than Miss Griffin
24 from the time that the investigation was initiated at the

1 time of the murder, but in terms of intense involvement with
2 the -- the matter, several months prior to the grand jury
3 investigation would represent a significant change in the
4 degree of involvement.

5 Q So if I understand you correctly, you've been
6 involved in the investigation of this specific case since
7 March or April of 1991 but not --

8 A Yes.

9 Q Not as intensely until the grand jury testimony?

10 A That's fair.

11 Q And the grand jury was when?

12 MS. WONG: Judge, I'm going to object to this
13 as -- I mean this really isn't on point.

14 MR. BARRY: I disagree, Your Honor. I think it is.

15 THE COURT: Objection sustained.

16 MR. BARRY:

17 Q Mr. Reynard, what participation did you have, if any,
18 in the lineups, the show-ups and the review of mugshots back
19 in 1991? And I'm talking about any witness, any witness.

20 A I remember being present for one or two witnesses
21 viewing of the in-person lineup in which James Snow was a
22 participant, and I believe that was in June of 1991. I'm not
23 certain.

24 Q Could that have been June 21st of 1991?

1 A If that's from the discovery, Mr. Barry, I would
2 agree that that would be accurate.

3 Q These in-person lineups where James Snow was present,
4 do you know if either of these lineups were actually
5 witnessed by Mr. Martinez?

6 A I don't recall Mr. Martinez specifically. He may
7 have been one of the witnesses for whom I was present, but I
8 don't have any recollection of that specifically.

9 Q Did you know Mr. Martinez in 1991?

10 A I may have. I may have met him at that time, which
11 would mean the answer was yes, but I have forgotten whether I
12 knew him at that time in that sense.

13 Q Do you remember the -- the results of Mr. Martinez
14 viewing the lineup?

15 A I do not specifically recall his witnessing of the
16 lineup.

17 Q If I could --

18 MS. WONG: Judge, I'm going to object to any
19 further questioning along these lines.

20 THE COURT: Let me stop you. Where are you going,
21 Mr. Barry, with your next question?

22 MR. BARRY: Well, the next question is going to be
23 getting into the discovery and this witness' knowledge of the
24 discovery and the results of the Martinez viewing of the

1 lineup in 1991 because as would put forth in the motion, we
2 had a 180-degree turn here between literally a matter of days
3 in July of 2000. I think that's very relevant at this point.

4 THE COURT: Okay. And your objection again,
5 Miss Wong?

6 MS. WONG: Judge, if I understand their motion, I
7 apologize. I'm only looking at it right now. But the gist
8 of it they're suggesting that the show-up, the lineup that
9 was used recently was unduly suggestive so this is really no
10 relevance to the motion.

11 MR. BARRY: Judge, it's a joint hearing, as the
12 parties stipulated to before we started.

13 THE COURT: So you think it bears on the sanction
14 request?

15 MR. BARRY: Yes.

16 THE COURT: All right. Let me find that. All
17 right. How so?

18 MR. BARRY: Well, we've got the discovery which
19 took place back in 1991. We've got Mr. Martinez viewing the
20 lineup and being sure that even though Mr. Snow was in there
21 he's not identified. And then literally in July of this
22 year, last month, we have Martinez completely changing his
23 story and confirming that he knew Snow. He identified him,
24 that type of thing.

1 THE COURT: How does that relate to the sanction
2 motion, I guess is my question.

3 MR. BARRY: It's relevant to the point of what
4 happened, what this witness has knowledge of that happened
5 between June of '91 and July of 2000. This witness in
6 response to our motion has actually put Martinez in an office
7 where apparently this was some sort of revelation, but I
8 think we're entitled to a background.

9 THE COURT: Okay. You're not. Objection
10 sustained. I'm simply finding that this witness'
11 recollection of all the events between '91 and the date
12 you've alleged a suggestive lineup occurred are not relevant
13 to this hearing, nor do they bear on any of the sanction
14 issues because the matters you are now relating to are not
15 disputed. They are a matter of discovery. They don't need
16 to be testified to and Mr. Reynard's knowledge is presumed of
17 that discovery material. I'm simply stating we don't need
18 testimony on that.

19 What we do need testimony on is the particular
20 identification you're seeking to suppress. So for that
21 reason, I'll sustain the objection.

22 MR. BARRY: Okay. For the record, I would ask -- I
23 think we're allowed to go into that under Supreme Court Rule
24 415(g), which was also addressed in the Mahaffey case.

1 THE COURT: Okay. Go into what now?

2 MR. BARRY: Well, the prior knowledge and the
3 foundation, what actually led up to this subsequent reversal
4 by the witness.

5 THE COURT: That's not an issue. That's in the
6 discovery according to your pleading. You've indicated that
7 the information has been tendered to you. So to ask the
8 witness to repeat what the witness has tendered to you in
9 discovery is simply an injudicious use of time.

10 MR. BARRY: Okay.

11 THE COURT: I'm not saying you can't argue those
12 things. I'm just saying that's not part of this hearing.

13 MR. BARRY: Okay, if I may be allowed to proceed.

14 THE COURT: Yes, go ahead.

15 MR. BARRY:

16 Q Mr. Reynard, are you familiar with the policy and
17 procedures for Bloomington Police Department detectives in a
18 murder investigation?

19 A To some extent.

20 Q Is it your understanding that witness statements be
21 reduced to writing?

22 A Yes.

23 Q And has this always been the case?

24 A Yes.

1 Q What about issues relating to identification? Are
2 those also reduced to writing? Are they also in the form of
3 statement?

4 A Generally, yes. Procedures in this case were they
5 were reduced to writing.

6 Q Are there any exceptions to that that you know of?

7 A Well, I think this case raises an example of where an
8 oral statement need not be recorded in order to make it
9 discoverable. If it had been recorded, it would have been
10 discoverable. I'm not certain that's what you're asking me.

11 Q You're right. My question was, do you know of any
12 exceptions to the general rule that when there are statements
13 relating to identification in a murder case that they not
14 need be reduced to writing?

15 MS. WONG: Judge, I'm going to object on the
16 grounds of relevancy in the motions that they've filed.

17 THE COURT: He may answer.

18 THE WITNESS: I know that they are not always
19 recorded. Witness statements are not always recorded. The
20 police work is a judgment driven process. But I know of
21 no -- nothing that the -- no policy or practice of the police
22 to consciously defeat the discovery process by declining to
23 record such statements.

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MR. BARRY:

Q Okay.

A Many exceptions but none that I know of that are employed to defeat the defense.

Q Sometime in July of 2000 you apparently received information that Mr. Martinez was changing the scope of his testimony and identification. Is that correct?

A Actually, no. I -- I discovered that Mr. Martinez was able to identify a person from the lineup that was conducted in June of 1991 by his reference to a photograph of that lineup that he viewed at the time he was being interviewed for trial preparation purposes in preparation for this trial.

Q And how were you informed of that?

A I -- I participated in a portion of the trial-prep interview in Miss Griffin's office and sat in that office with Miss Griffin and Detective Katz and observed the conversation between Mr. Martinez and Miss Griffin, observed Mr. Martinez -- well, first of all, observed Miss Griffin indicate to Mr. Martinez that during the course of his testimony she was going to be asking him questions and was going to make reference to the fact that he viewed a lineup back in 1991 and was going to ask him questions about that lineup. And she indicated to him that during the course of

1 the trial -- during the course of his testimony she would be
2 showing him a photograph of that lineup and asking him if he
3 recalled it. Mr. Martinez then indicated to her inquiring as
4 to whether or not she had that photograph at that time, and
5 she said yes. And he requested to see it. And she provided
6 it to him. He viewed the photograph, and basically then came
7 to the conclusion that he could identify the left most person
8 in the photograph, and I believe that was number six; and I
9 can indicate to you, if you'd like, what he said at that
10 time.

11 Q Please do.

12 A Okay. He initially said, is that him? And he was
13 pointing to the photograph, and I couldn't see specifically
14 who he was pointing at at that moment.

15 Q Now Martinez asked Miss Griffin is that him?

16 A Well, I think he addressed the question out loud to
17 whoever was present, but he was closest to Miss Griffin.
18 None of us answered that question. He then said, that's him,
19 isn't it? And we all looked more closely and saw that he was
20 indicating the left most figure from his perspective in the
21 photograph, which was Mr. Snow. He then said, those eyes, I
22 recognize his eyes, or words to that effect.

23 Q Did you ask him any questions at that time,
24 Mr. Martinez?

1 A No, I did not.

2 Q Did you hear anyone else ask him any questions at
3 that point?

4 A I don't specifically recall who asked the question,
5 but I think there were questions asked by one of the three of
6 us about whether he had seen any -- any photographs in the
7 newspaper of Mr. Snow.

8 Q What was his response to that? Didn't you just say
9 earlier that part of how you got involved with this
10 refreshing recollection that he'd seen something in the
11 newspaper that triggered his memory or something?

12 A No, I didn't.

13 Q Okay. I'm sorry. Go ahead.

14 A I didn't say anything of the sort.

15 Q Okay.

16 A The -- perhaps you should restate your question
17 because maybe I've lost it.

18 Q Well, let's go -- after he makes the statements that
19 you just answered for us, did anybody ask him a question?
20 Did you hear anybody ask Mr. Martinez any question at all?

21 A I'm not certain that the question was asked as to
22 whether or not he saw Snow's picture in the newspaper or
23 whether he mentioned it first himself, but it might well have
24 been a question concerning whether or not he'd seen Snow's

1 picture in the paper at any time. And I believe he indicated
2 he had.

3 Q Okay. So he admitted that he had seen Snow's picture
4 in the paper?

5 A I'm not certain he admitted it at that time. But he
6 subsequently admitted he saw the picture in the newspaper.
7 So I'm not sure when, but he has admitted seeing the picture
8 in the newspaper.

9 Q Without getting into when he made that admission, do
10 you know when he saw the picture in the paper?

11 A At the time Mr. Snow was arrested in Ohio.

12 Q So sometime in 1999?

13 A Yes.

14 Q When was this -- we've been talking about this
15 meeting that took place. Was it in your office or
16 Miss Griffin's office?

17 A Miss Griffin's office.

18 Q When was this?

19 A I think I stated it in my response to your motion,
20 and I did that by reference to calendars.

21 Q Do you want to see a copy of it?

22 A Yes.

23 MR. BARRY: If I may approach, Your Honor.

24 THE COURT: Sure.

1 THE WITNESS: Well, indeed I indicated the second
2 or third week of July of 2000, so at this point I don't
3 recall specifically when it was.

4 MR. BARRY:

5 Q Did anybody in the room ask Mr. Martinez how it was
6 that he could not identify this individual in 1991, that he
7 could identify him now?

8 A I -- the answer is yes. But I don't recall
9 specifically who asked him that question. But we -- it was
10 discussed that that question would come up and -- and so that
11 did become a matter of discussion with him.

12 Q Did you recall what his response was?

13 MS. WONG: Judge, I'm going to object to this.
14 First of all, it's hearsay. Secondly, it really doesn't bear
15 on the motion, I would suggest, of identification.

16 MR. BARRY: I think it certainly does, Your Honor,
17 I think the very basis --

18 THE COURT: I'm going to allow the answer.

19 MR. BARRY: Thank you.

20 THE WITNESS: And the question is, sir.

21 MR. BARRY:

22 Q Did anyone -- did you hear anyone ask Mr. Martinez
23 how it was that nine years ago right after the occurrence he
24 could not identify Mr. Snow, yet in 1999 or, excuse me, last

1 month, he's in your office and he can identify him? You said
2 that somebody did ask him something to that effect?

3 A Somehow that matter of discussion came up and that
4 was discussed.

5 Q Do you recall what his response was?

6 A Yes. Mr. Martinez indicated that the in-person
7 lineup procedure in his recollection of it was from a greater
8 distance than the photograph of that lineup depicted to him
9 on the July date, and your eyes are rolling in your head,
10 counsel. So am I making myself clear to you?

11 Q I think so.

12 A In other words, he indicated he thought the
13 photograph showed him more, and he indicated that the room
14 from which he was viewing the lineup was a little bit darker;
15 and he felt like he was a little bit more in darkness or that
16 the lighting that he had to deal with at the time of the
17 in-person lineup was perhaps not as good as the lighting
18 apparent from the photograph. He also indicated I believe
19 that he was nervous at the time. But beyond that, he
20 indicated he couldn't really explain why he was unable to
21 identify him from the lineup, but that from the photograph,
22 he recognized the man's eyes.

23 Q Wasn't he identifying Mr. Snow in 2000 from the same
24 photograph he had seen in 1991?

1 A He didn't see a photograph -- he didn't see that
2 photograph in 1991. My understanding is that he never saw
3 that photograph until July of 2000. He saw the actual
4 in-person depiction that was found in the photograph, but he
5 didn't see the photograph itself until last month.

6 Q You're not saying that he didn't -- he didn't look
7 through mugshots in 1991?

8 A He did look through a book of photographs that might
9 be described as mugshots, but that was at a different time
10 than the June of 1991 identification procedure about which
11 you've been questioning me.

12 Q Okay. Sometime in April of 1991, according to
13 discovery, he was shown pictures which included a picture of
14 Mr. Snow. Are you familiar with that?

15 A Yes.

16 Q Are you saying that the picture he saw in April of
17 '91 was different than the one he was looking at in
18 Miss Griffin's office last month?

19 A That is correct.

20 Q Okay. When was this picture, the picture that he saw
21 last month, do you know when that was taken?

22 A At the time of the June lineup, June of 1991 lineup.
23 It was an actual picture of the array of men in which James
24 Snow stood.

1 Q So this was a picture of Mr. Snow in the lineup?

2 A Correct.

3 Q That Martinez saw in '91?

4 A Yes, he saw the in-person lineup, and this photograph
5 was a depiction of that lineup.

6 Q Was the photo in the paper similar to the photo from
7 the lineup June of 1991?

8 MS. WONG: Judge, I'm going to object to that.
9 That's subjective. It's speculative.

10 MR. BARRY: Judge, I think it's directly on point.

11 THE COURT: Well, the first question is whether he
12 even knows the answer to that. So I'll let him answer.

13 THE WITNESS: I have my own personal judgments as
14 to the similarity or dissimilarity with that photograph with
15 the lineup photograph, the Ohio photograph and the lineup
16 photograph. And there -- and I -- if I'm permitted to answer
17 as to what those similarities or dissimilarities are, I can
18 do so. But they are my judgments of the matter, and we can
19 produce both of those photographs if that would enable the
20 court to view them for itself.

21 MR. BARRY: Judge, I guess if they're available and
22 if the witness is offering them to be tendered, I won't
23 question him any further as far as similarities or
24 dissimilarities, but I would like them to -- if we could have

1 them...

2 THE COURT: You're not -- you're satisfied that
3 it's not the same photo. You just -- in order to determine
4 similarity you want them produced, though?

5 MR. BARRY: Yes.

6 THE COURT: I take it we can get those.

7 THE WITNESS: Yes.

8 THE COURT: All right. Then I'll order the State
9 to produce them, and you may continue to inquire.

10 MR. BARRY: Thank you.

11 Q Going back to the meeting in Miss Griffin's office
12 last month, was there anyone else present at any time besides
13 yourself, Miss Griffin, Detective Katz, and Mr. Martinez?

14 A I don't believe so.

15 Q Was anybody taking notes?

16 A I don't believe so.

17 Q Did anybody, as far as you know, memorialize this
18 meeting with Mr. Martinez?

19 A No.

20 Q Let me ask you, you did not memorialize anything from
21 this meeting?

22 A That's correct.

23 Q Did you consider this to be an important part of the
24 case?

1 A I didn't know what to consider it at that particular
2 moment. Obviously, though, upon reflection, the witness'
3 ability to identify a codefendant is an important matter for
4 the trial proceeding.

5 Q Was there a reason why you did not memorialize this
6 in writing?

7 A Didn't believe I was obliged to.

8 Q Would this be something that you would consider the
9 clerical duty of the detective who was there?

10 A No.

11 Q You wouldn't think it would be in any way necessary
12 for anybody to reduce the contents of that meeting to writing
13 at that time?

14 A I think that indeed is the case law, and I'm obliged
15 to follow the case law. I don't believe that there was any
16 obligation on any person present to record that meeting.

17 Q That wasn't my question, though. You did not find it
18 to be important at that time to reduce any of this meeting to
19 writing?

20 MS. WONG: Judge, I'm going to object. It's been
21 asked and answered. This is a sanctions motion. The witness
22 has already answered that he didn't record it, therefore, is
23 not subject to disclosing this in discovery since there is
24 nothing memorialized.

1 THE COURT: Whether the witness thought it was
2 important or not is of no legal consequence. So I'll sustain
3 the objection.

4 MR. BARRY:

5 Q Mr. Reynard, you're aware of Mr. Skelton's discovery
6 request in the case?

7 A I am aware of it now.

8 Q Have you ever seen his standard motion for discovery
9 before today?

10 A I saw it on one day last week in the court file, and
11 I can't tell you whether or not I've seen it before. But it
12 does contain a, what I recognize to be a standard provision
13 of request concerning eyewitness identification procedures.

14 Q Did you or anybody in your office ever file any
15 motion striking part of the motion for discovery?

16 A No.

17 Q At the time of -- at the time that Mr. Martinez was
18 shown the picture from the June 1991 lineup he was in
19 custody, correct, in McLean County?

20 MR. SKELTON: Mr. Snow.

21 MR. BARRY:

22 Q I'm sorry, Mr. Snow. Mr. Snow was in custody at the
23 time you showed a picture of Mr. Snow to Mr. Martinez last
24 month?

1 A Yes.

2 Q Did -- were there ever any arrangements made to
3 follow up with the identification of that photo by a lineup
4 with Mr. Snow included in it?

5 A Maybe I'm -- now I am -- I may have misunderstood
6 your previous question. So why don't we back up to it.
7 Could you time reference your previous question again?

8 Q Sure. July 2000 there was a meeting in
9 Miss Griffin's office with yourself, Miss Griffin and
10 Mr. Katz or Detective Katz with Mr. Martinez.

11 A Yes.

12 Q At that time he was shown a photo from June 1991.

13 A Correct.

14 Q And that photo that he, according to your testimony,
15 was picking or asking questions about identified James Snow?

16 A Correct.

17 Q Last month -- at the time of that meeting of July of
18 2000 Mr. Snow was in custody in McLean County?

19 A Correct, that is true.

20 Q Was there ever any arrangements -- were there ever
21 any arrangements made to have a lineup with Mr. Snow in it
22 after Mr. Martinez was asking the questions about the picture
23 which identified Mr. Snow?

24 MS. WONG: Objection, relevance to the motion.

1 THE COURT: Why, Mr. Barry, do you want that
2 answered?

3 MR. BARRY: Judge, there is case law both ways.
4 When an individual is in custody, there have been cases that
5 interpret that having a photo lineup is insufficient if the
6 person that is in custody -- I don't want to represent
7 anything to the court. There are cases both ways. I'm just
8 asking if this was a 180-degree turnaround and Mr. Snow was
9 actually in custody and this witness is basing his change
10 upon a photo and he's already seen the photo in the
11 newspaper, I'm just asking was there any consideration given
12 to a lineup.

13 THE COURT: Okay. The answer is yes. Now how does
14 that help me decide the motions? They considered? What's
15 the next question?

16 MR. BARRY: Why didn't he do it?

17 THE COURT: Because counsel wouldn't permit. We
18 contacted the defense lawyer, and he objected to it. Now how
19 does that help me decide the motion? I'm just hypothetical,
20 of course.

21 MR. BARRY: Well, I don't think it does.

22 THE COURT: All right. And if the answer is yes,
23 you'd like to know about the lineup. So you may ask him if
24 there was a live lineup with Mr. Snow and Martinez, but the

1 negative of that has no bearing on what I have to decide. If
2 you're interested, you may ask that.

3 MR. BARRY:

4 Q Was there a subsequent lineup?

5 A No.

6 Q Was the subsequent lineup not pursued because of any
7 defense objection regarding Mr. Snow?

8 MS. WONG: Judge, I'm going to object again. I
9 mean, I'd like to focus on the issues of this motion, and
10 they have the burden of showing that there has been a
11 suggestive lineup. We're getting beyond that. We're getting
12 into investigative techniques at this point by the nature of
13 the questions.

14 THE COURT: Well, I guess, Mr. Barry, I'm at a loss
15 to understand why their failure to conduct a follow-up lineup
16 bears on this motion. I just can't see the connection I
17 guess. And unless it can be explained to me, I'm going to
18 sustain it.

19 (Off the record discussion between defense
20 counsel.)

21 MR. BARRY: Judge, in one of the previous
22 memorandums in support of our motion we did cite a case to
23 the court that says -- that stands for the premise that in
24 the event the person who's to be identified is in custody,

1 the interpretation of that court was that a photo lineup can
2 be unduly suggestive, and it's determined to be unduly
3 suggestive if the person is available, in custody and can be
4 subject to a lineup. And I think with regard to that it
5 would be relevant.

6 THE COURT: Well, that's true. Then how do
7 we -- then the matters are made worse by conducting the live
8 lineup and having the witness identify him now. Then what
9 good would that have done, and what bearing would that have
10 had on this? I mean, we can posit both alternatives, neither
11 of which have any bearing on it. And that is they conducted
12 a live lineup and there was an ID, to which you're going to
13 file another motion to object based on subjectiveness on the
14 same motions you've filed this one, and we're now further
15 down the path on this consequence. Or whatever we did for
16 whatever reason, the defense said it. We decided not to, and
17 again we're no further down the path of deciding this case.
18 So neither consequence of conducting that second lineup has
19 any bearing on this.

20 The authorities you've cited are there whether he
21 answers it either way or not. And your arguments are
22 preserved either way, so I guess I'm going to --

23 MR. BARRY: Okay.

24 THE COURT: -- sustain the objection.

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MR. BARRY:

Q Mr. Reynard, did you have a meeting with attorney Steve Skelton on or about July 28th?

A Yes.

Q And this was after the meeting with Mr. Martinez?

A I believe it was, yes.

Q Because you've said in your response it was during the second or third week of July?

A Right, that's correct.

Q At any time -- and this meeting had to do with where the two of you were at, where discovery is and setting for the trial, correct?

A Well, no.

Q It had to do with stipulations?

A Correct.

Q At any time during that meeting did you represent to Mr. Skelton that Mr. Martinez had conducted a 180-degree flip in his identification testimony?

A No.

Q As far as you were aware, was there anyone else besides yourself, Miss Griffin, and Detective Katz who knew that Martinez had completely reversed his identification testimony?

A Well, I guess I have problems with the

1 characterization of completely reversed but --

2 Q Why is that?

3 A I think he was -- what he did was he demonstrated
4 that one is able to do something that one wasn't able to do
5 before. But I don't consider that a reversal. And I
6 consider that a little argumentative, and I guess that's why
7 I'm quibbling a little bit. But given the form of the
8 question, I know of no other person as of July 28th we'll
9 say, other than Mr. Martinez, Detective Katz, myself, and
10 Miss Griffin, perhaps Mr. Martinez's wife, that was aware
11 that he had the ability to identify Mr. Snow from the
12 photograph of the in-person lineup.

13 Q Was it your intent to keep it that way?

14 A No. It was not.

15 Q When was it that you were intending to reveal that
16 information to Mr. Skelton?

17 A That question doesn't relate to the former question,
18 counsel. I had -- I had no intentions of depriving
19 Mr. Skelton of that information. Through the office of his
20 own investigation, and if my understanding is, his
21 investigation did indeed disclose the facts concerning
22 Mr. Martinez's identification. We had no intention of
23 depriving him of conducting his own investigation.

24 Q When was it -- when was it your intent that you would

1 provide that information to Mr. Skelton?

2 A We did not intend to provide that information to
3 Mr. Skelton.

4 Q Okay. Mr. Reynard, would you say you've talked to
5 Detective Katz a number of times in this case?

6 A Yes.

7 Q Did you ever talk to Detective Katz either
8 immediately before, during or immediately after the meeting
9 in Miss Griffin's office with Mr. Martinez relating to the
10 generation of a report or any written memorandum as a result
11 of that meeting?

12 A No.

13 Q Did he ever approach you?

14 A No.

15 Q Did he ever suggest any written report?

16 A No.

17 Q Did you or anybody from your office ever specifically
18 direct Detective Katz not to generate a report?

19 A No.

20 Q Who was keeping track of the photos during this
21 meeting with Mr. Martinez in Miss Griffin's office?

22 A We have a box containing the exhibits which are going
23 to be used for trial, and that box was physically located in
24 Miss Griffin's office. So in that sense, she was in control

1 of the photographic exhibits.

2 Q Were you keeping track on a piece of paper, for
3 example, photo A, no reference, photo B, no reference,
4 anything as far as a clerical issue when he was looking
5 through these photos? Was anybody keeping track of what, if
6 any, identification he was making or lack of identification
7 he was making to these other photos?

8 A Not to my knowledge, no.

9 Q Nothing?

10 A Absolutely nothing, and I guess I resent the
11 implication in your tone, counsel. I want the record to
12 reflect the counsel --

13 MR. BARRY: I object, Your Honor.

14 THE COURT: Okay. The record won't reflect that.
15 I'm not going to characterize his tone. So ask another
16 question, Mr. Barry.

17 MR. BARRY:

18 Q Mr. Reynard, you would admit that in this case there
19 has been meticulous documentation of a number of very mundane
20 and irrelevant issues, wouldn't you say that?

21 A I don't think I would say that. Perhaps you have an
22 example in mind.

23 MR. BARRY: If I may approach, Your Honor?

24 THE COURT: With regard to what now?

1 MR. BARRY: Well, these are -- these are certain
2 items that have been reduced to writing as far as the
3 discovery in this case, and the witness just did identify
4 that he's not aware of any --

5 THE COURT: Let's see what you've got.

6 MR. BARRY: There is six very short, most of them
7 one or two sentence, matters.

8 THE COURT: Okay. And the purpose for approaching
9 the witness with these is?

10 MR. BARRY: To ask him if these accurately reflect
11 certain items that have actually been documented in this
12 case.

13 THE COURT: Is this material tendered in discovery?

14 MR. BARRY: Yes.

15 MR. SKELTON: Yes.

16 MR. BARRY: It's page numbered at the bottom.

17 THE COURT: Well, once again, it's unnecessary to
18 make a point that is not arguable. If your question is, are
19 those mundane, he doesn't have to answer. If your question
20 to me is, Judge, these are mundane, they should have pursued
21 a statement of the ID, that you can make without regard to
22 tendering it to the witness.

23 MR. BARRY: Okay.

24 THE COURT: So I'm going to sustain -- well, there

1 hasn't been an objection yet. I'm going to deny the request
2 to approach for that purpose.

3 MR. BARRY:

4 Q Mr. Reynard, during the conversation you had in
5 Mr. Skelton's office on July 28th, you were talking about
6 stipulations and also you talked about M-U-N-A?

7 MR. SKELTON: L-U-N-A. I'm sorry, Luna.

8 THE WITNESS: I recall a conversation about
9 Mr. Luna.

10 MR. BARRY:

11 Q Did you also talk about Mr. Martinez while talking
12 about Mr. Luna?

13 A I don't believe so, but I confess I don't recall
14 whether we talked about Mr. Martinez.

15 Q Mr. Reynard, you would -- you would admit that the
16 content of the meeting with Mr. Martinez in Miss Griffin's
17 office related to his testimony concerning identification?

18 A Among other things, yes.

19 Q And you would agree that identification is a very
20 important part of a murder case, let alone this case?

21 A Yes.

22 Q Are you aware in your years of practice anything of
23 this import that is going to be reflected in testimony for
24 identification evidence that does not get reduced to writing?

1 As far as that being part of policy and procedure?

2 MS. WONG: Objection, Judge. First of all, again,
3 I don't believe that's relevant, the answer to that would be
4 relevant, with regard to what happened in other cases to the
5 motion. I assume he's now addressing the motion for
6 sanctions.

7 MR. BARRY: It's a combined motion, Your Honor.
8 Again, I think this witness' state of mind is relevant to
9 that issue.

10 THE COURT: Okay. Just a second. So what's the
11 sanction you're seeking that it bears on?

12 MR. BARRY: If we're looking at 415, I think the
13 first thing we're asking for is exclusion of any ID made by
14 Mr. Martinez after June 1st, 2000.

15 THE COURT: So how does his description of the
16 number of cases in which this type of material was or was not
17 tendered bear on that?

18 MR. BARRY: I don't think -- that wasn't the
19 question. I wasn't asking for the number. I was just asking
20 if, according to his knowledge, does he know of anything of
21 this importance which is generally not reduced to writing in
22 this type of case.

23 THE WITNESS: May I speak, Your Honor?

24 THE COURT: Hold on. Hold on. Doesn't that

1 require, Mr. Barry, a finding first that this was
2 discoverable and, therefore, this would be the only case that
3 Mr. Reynard is familiar with in which this type of material
4 was never disclosed to the defense? And if it is
5 discoverable, what difference does that make that this was
6 the only one?

7 I mean whether it's discoverable or not is as a
8 matter of law, not opinion. And if it is discoverable and
9 this was the only occasion, how does that bear on the
10 sanction you're requesting, which is exclusion of the
11 evidence? That might be something that would raise the finer
12 link in the jail if we were in a criminal case, if you follow
13 my analogy, but it would have no bearing on exclusion.
14 That's the remedy.

15 THE WITNESS: May I speak to that, Your Honor?

16 THE COURT: Well, on the legal issue?

17 THE WITNESS: Yes. I think counsel's inquiry may
18 be going to the authorities cited in the Szabo case and two
19 other authorities, which are cited as exceptions to the
20 general rule, and I can't remember. The general rule is that
21 this is not discoverable nor is there an obligation to
22 memorialize it. But there were certain authorities in
23 another case that was cited in my brief, which I think is on
24 all fours to this case. But --

1 THE COURT: So are you saying you are asking
2 Miss Wong to withdraw the objection --

3 THE WITNESS: Yes, I think.

4 THE COURT: -- based on that?

5 THE WITNESS: I think I can answer this question.
6 I think it's most arguably pertinent, and I said so in my
7 motion.

8 THE COURT: Go ahead.

9 THE WITNESS: Does the question go to the existence
10 or nonexistence of any policy or procedure by which such
11 information would or would not be recorded for purposes of
12 defeating the defense interest in discovering these facts?

13 MR. BARRY: I don't think that was my question.

14 THE COURT: Why don't you restate it then.

15 THE WITNESS: Maybe you better ask me your question
16 again.

17 MR. BARRY:

18 Q Are you familiar with any other area of a case of
19 this importance, identification testimony in a murder case,
20 that either as policy or as exception generally is not
21 reduced to writing?

22 A Yes, many areas, including identification, are not
23 reduced to writing not for any conscious purpose but not for
24 any conscious purpose to the contrary. I can think of one

1 case right now in which an identification was not disclosed,
2 and it wasn't considered a discovery violation then; and I
3 don't think it's a discovery violation now.

4 MR. BARRY: Yes. Judge, I'll ask that that be
5 stricken. That does --

6 THE WITNESS: I was asked if I was familiar with
7 any area.

8 THE COURT: Yes, he was. So that answer stands.

9 MR. BARRY:

10 Q Okay. Now it's your point that it's not discoverable
11 because it was not reduced to writing, right?

12 A Yes.

13 Q Had it been reduced to writing, it would have needed
14 to be disclosed promptly?

15 A Yes.

16 Q Whose duty is it to memorialize in writing an
17 investigation relating to identification in a murder case?
18 And by that, I'm saying generally is it the State's
19 Attorney's, detectives, police, investigative authority, who,
20 if you -- if there is a general policy?

21 A If there is to be a memorialization, it can be made
22 by any of those roles.

23 MR. BARRY: Okay. Thank you, Your Honor.

24 THE COURT: Miss Wong, do you have any examination?

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MS. WONG: Just a few questions.

CROSS EXAMINATION BY MS. WONG:

Q Mr. Reynard, so that the record is clear and that I'm clear, Mr. Martinez viewed an inline -- an in-person lineup in 1991 that involved -- whereupon Jamie Snow was present. Is that correct?

A Yes.

Q And there was a photograph taken of that actual lineup. Is that correct?

A Yes.

Q Was that the photograph that was shown to Mr. Martinez in July of 2000?

A Yes.

Q To your knowledge had he seen that photograph before?

A No.

Q I'm going to show you what was previously marked as People's exhibit number 11 and ask if you recognize this exhibit.

A Yes.

Q What is People's exhibit 11?

A It is the photograph of the in-person lineup which took place in June of 1991.

1 Q And is exhibit 11 a fair and accurate representation
2 of what was depicted at that time?

3 A Yes.

4 Q And was exhibit -- was it People's exhibit 11 which
5 was shown to Mr. Martinez on -- in your meeting with him in
6 July 2000?

7 A Yes, he requested it, and it was shown to him.

8 Q Prior -- with regard to that meeting, you indicated
9 that you were present for a portion of that meeting. Is that
10 correct?

11 A Yes.

12 Q Were you present when that photograph -- when
13 Mr. Martinez requested that photograph?

14 A Yes.

15 Q Did anyone, while you were there, did anyone make any
16 statements to Mr. Martinez drawing his attention to any
17 particular person in that photograph?

18 A No.

19 Q Were any questions asked prior to handing that
20 photograph, exhibit 11, to Mr. Martinez?

21 A No.

22 MS. WONG: For purposes of this motion, Judge,
23 we're moving to admit People's exhibit number 11.

24 THE COURT: Is there going to be any objection to

1 that, Mr. Barry?

2 MR. BARRY: No, Your Honor.

3 THE COURT: All right. Number 11 is admitted then.
4 Anything further, Miss Wong?

5 MS. WONG: No, Your Honor.

6 THE COURT: And, Mr. Reynard, do you have anything
7 that was missed that you wish to offer regarding this? And I
8 mean before you testify to that I need to know yes or no.

9 THE WITNESS: I don't think so.

10 THE COURT: Okay. Then any redirect, Mr. Barry?

11 MR. BARRY: Thank you, Your Honor.

12

13 REDIRECT EXAMINATION BY MR. BARRY:

14

15 Q Mr. Reynard, when -- when you stated during that
16 meeting last month Mr. Martinez stated something about the
17 fact that there was a problem with the lighting or something
18 in the lineup --

19 A We asked him or it came up, I'm not sure who asked
20 him or how it came up specifically that he would be asked the
21 question why was he unable to identify someone before July of
22 19 -- excuse me -- July of the year 2000, and he mentioned
23 that the lighting back then wasn't as good or something to
24 that effect. I don't know that he was complaining about the

1 lighting so much as indicating that the lighting in this
2 photograph was excellent. I think he also indicated that the
3 perspective in the photograph is a little bit closer to the
4 subjects of the photograph than he was at the time of the
5 lineup.

6 Q Was this one of the lineups that you were able to
7 view in 1991?

8 A I believe so. I believe it's the same individuals.
9 But I could not say with any great certainty that the other
10 five individuals were in the lineups that I viewed. I
11 believe they were. I believe they were all the same, but I'm
12 not certain.

13 Q Was there more than one lineup?

14 A I can't say with certainty. I mean there were
15 multiple witnesses, so in that sense there was more than one
16 lineup. But I don't know that. I couldn't tell you.

17 Q Is that an accurate representation of the lighting as
18 it was showing on the respective subjects that you -- you
19 stated that photo was an accurate representation of the
20 lineup?

21 A Yes.

22 Q Then would you also agree that the photo is also an
23 accurate representation of the lighting which was shown on
24 the suspects or subjects? I'm sorry.

1 A Not from the perspective at which I stood, which was
2 in proximity to the witness' viewing the lineup from the
3 other side of what we refer to as a one-way mirror in a
4 darkened room. The perspective is a little -- in terms of
5 lighting is a little bit better from the perspective of the
6 camera in this photograph, which doesn't appear to be going
7 through any darkened glass.

8 MR. BARRY: I have nothing further, Your Honor.

9 THE COURT: Anything further, Miss Wong?

10 MS. WONG: No.

11 THE COURT: All right. You have may step down.

12
13 (Witness excused.)

14
15 THE COURT: And, Miss Wong, you're excused, unless
16 you want to stay. And I take it, Mr. Barry, we can call
17 Miss Griffin next?

18 MR. BARRY: All right.

19
20 (Witness sworn.)

21
22 T E E N A G R I F F I N
23 called as a witness on behalf of the Defendant herein, being
24 first duly sworn, was examined and testified as follows:

1 DIRECT EXAMINATION BY MR. BARRY:

2

3 Q Would you please state your full name?

4 A Teena Griffin.

5 Q Miss Griffin, you are employed with the McLean County
6 State's Attorney's office?

7 A Yes.

8 Q How long have you been so employed?

9 A Altogether almost 16 years, 15 years.

10 Q You have had occasion to work on this case,
11 99 CF 1017. Is that correct?

12 A Yes.

13 Q Did you have any involvement in the investigation in
14 this case back in 1991 when the crime occurred?

15 A I know I was present for the in-person lineup that
16 occurred at the jail in June of '91.

17 Q In June of '91 when the lineup took place, did you
18 have occasion at that time to meet a Mr. Martinez?

19 A I didn't have any face-to-face meeting or
20 conversations with him, but he was present at the lineup.

21 Q You're familiar with the outcome of Mr. Martinez's
22 viewing of that lineup in '91?

23 A Correct.

24 Q And what was that?

1 A He was unable to pick out anyone as positively
2 identifying anyone.

3 Q And Jamie Snow was in that lineup?

4 A Yes.

5 Q Now, did you have occasion to work on the discovery
6 disclosures in this case?

7 A Yes.

8 Q All the information relating to Mr. Martinez, dealing
9 with the lineup, the police report, his looking at mugshots
10 back in 1991, that was all disclosed as part of the paper in
11 this case?

12 A Any reports relating to that were disclosed.

13 Q Did you -- when is the first time you met
14 Mr. Martinez?

15 A I believe in April of '99 -- 2000, other than being
16 present at the lineup. When I actually spoke to him would be
17 April of 2000.

18 Q When you spoke to him in April of 2000, who else was
19 present?

20 A Mr. Reynard, I believe Mr. Katz. I'm not sure about
21 if Barkes was there or not. We were meeting with several
22 witnesses that day, and I can't tell you specifically which
23 people were present for which interviews.

24 Q And where did that meeting take place?

1 A Bloomington Police Department.

2 Q Did Mr. Martinez discuss with you his opportunity to
3 identify in this case?

4 A What do you mean by that?

5 Q Well, let me ask you, what did the conversation that
6 the four of you, at least three of you, maybe four of you,
7 had...

8 A Basically had Mr. Martinez relate the events that he
9 observed back on March 31st, 1991.

10 Q And was anybody taking notes at that time?

11 A No.

12 Q Did anybody reduce this to writing later?

13 A No.

14 Q Did you reduce it to writing later?

15 A No.

16 Q Did you specifically ask Mr. Martinez any questions
17 about his identification of -- of any individual in this
18 case?

19 A What exactly do you mean?

20 Q Okay. Did you talk to Mr. Martinez about his viewing
21 the lineup in 1991?

22 A I really don't recall if we got to that part in April
23 of 2000. I don't remember.

24 Q Okay. What did you talk to him about? What did you

1 specifically ask Mr. Martinez on that day?

2 A I just remember him relating his observations of what
3 he saw at the scene there on March 31st, 1991. We had some
4 scenes, crime scene photos, and he indicated on those photos
5 where he was on that evening of March 31st, 1991.

6 Q Did he in any way change his opinion as far as being
7 unable to identify Jamie Snow from the lineup or any photos
8 at that time, April of 2000?

9 A I don't believe he was specifically asked about that,
10 but he never indicated that he could identify anybody at this
11 point if that's your question.

12 Q Okay. So you don't remember anybody asking that
13 question?

14 A I really don't remember that specifically.

15 Q Did he at any time in April of 2000 suggest or
16 represent to you any factors relating to his viewing the
17 lineup in June of '91?

18 A As I indicated previously, I don't recall discussing
19 the lineup from June of '91 with him back in April 2000. I'm
20 really not having any recollection about that.

21 Q When was the next time you saw Mr. Martinez?

22 A It might have been late May, early June. I'm not
23 sure.

24 Q Where was that meeting?

1 A At the Bloomington Police Department.

2 Q And again, who was present there?

3 A It was Jeff Pelo, Mr. Martinez and Detective Barkes
4 or Katz might have been in and out. I don't really remember
5 which one or either -- if either one of them was there for
6 that. I don't remember.

7 Q What was discussed with Mr. Martinez at that point?

8 A Just, again, general events that happened on March
9 31st, 1991, what he saw.

10 Q Was he asked any questions concerning his
11 identification of anybody?

12 A No.

13 Q Were any notes taken at that meeting?

14 A No.

15 Q Was any report generated?

16 A No.

17 Q How long did the meeting take place with
18 Mr. Martinez?

19 A I'm going to guess maybe 15, 20 minutes, 25 minutes.

20 Q About the same length of time as the one in April?

21 A I'd say the one in April was actually longer than the
22 one in May or June.

23 Q Then after this meeting in May or June, did you have
24 an opportunity to speak to Mr. Martinez again?

1 A Yes.

2 Q When was that?

3 A July 18th.

4 Q And who was present at that meeting?

5 A Initially at the meeting was Detective Katz,

6 Mr. Martinez and myself. At some point Mr. Reynard came in.

7 Q And where was the meeting?

8 A In my office.

9 Q Who -- who arranged that meeting?

10 A I believe Detective Katz is the one that personally

11 contacted Mr. Martinez and set up the time.

12 Q Did Detective Katz call Martinez, or did Martinez
13 call Detective Katz, if you know?

14 A I don't know.

15 Q Okay. The meeting took place in your office?

16 A Right.

17 Q Correct? And what was discussed at that time?

18 A At that time it was trial preparation to just let him
19 know the areas that I would specifically be questioning him
20 about, the events that took place on that evening and telling
21 him the photographs of the scene that I'd be showing him at
22 trial.

23 Q What photographs were those?

24 A I don't know specifically off the top of my head, the

1 crime scene ones, some of them that showed the air hose, some
2 that showed the pumps outside the station, some of the door
3 and the alleyway, the alleyway where -- the crime scene
4 photos.

5 Q Were there any photos shown to him for purposes of
6 identification of Mr. Snow?

7 A There was a photo showed later, yes. When he asked
8 for it there was.

9 Q Mr. Martinez asked for it?

10 A Uh-huh.

11 Q How did he ask for it?

12 A I'd indicated to him the other area I'd be
13 questioning him about was about the lineup he saw back in the
14 jail in 1991 and discussing with him about that lineup and
15 indicated I may be showing him a picture at trial of that
16 lineup, and he asked me, do you have a picture of that
17 lineup; and I then showed him a picture of the lineup he
18 wanted to see.

19 Q What did he do when he looked at the picture?

20 A He looked at it.

21 Q And I noticed you're looking at People's 11 now.

22 A Yes.

23 Q Is that the photo?

24 A Yes. He looked at it and stared at it. He

1 actually --

2 Q How long did he stare at it?

3 A A matter of a few seconds. And then he pointed to
4 Mr. Snow and asked is that the guy. And none of us responded
5 as to whether it was or not. And then he indicated that's
6 the guy, and he referred to the fact of the eyes and he was
7 making the comment about the fact that it's the eyes.

8 MR. SKELTON: Judge, could I ask that that answer
9 be read back, please? I didn't catch all of it. I
10 apologize.

11 THE COURT: Let's take a second and do that,
12 please.

13 (The court reporter read back the last
14 answer.)

15 MR. SKELTON: Thank you, Judge.

16 THE COURT: Okay. Mr. Barry?

17 MR. BARRY: Thank you.

18 Q At the time Mr. Martinez said this, were you
19 surprised?

20 A Yes.

21 Q This was contradictory to his prior ability to ID
22 essentially?

23 A As I indicated previously, he didn't identify
24 Mr. Snow in the in-person lineup back in January '91.

1 Q Did you have a copy of the report which was generated
2 from his previous viewing of the lineup in front of you at
3 that time?

4 A I don't believe so.

5 Q You knew what the contents of that was, though?

6 A I'm familiar with that report, yes.

7 Q Did you at the time that he made that identification
8 or that he made the statement to you, did you write any of
9 this down?

10 A No.

11 Q Did Detective Katz?

12 A No.

13 Q Did anybody -- did you view Mr. Reynard writing it
14 down?

15 A No.

16 Q How much longer after Mr. Martinez made this
17 statement was he still in your office?

18 A I'm going to say maybe ten, 15 minutes at most.

19 Q At any time while he was still in your office did
20 you, Mr. Reynard, Detective Katz discuss memorializing this
21 or writing up a report or an addendum?

22 A No.

23 Q At any time after Mr. Martinez left did you,
24 Mr. Reynard and Detective Katz talk about writing this down

1 and memorializing this?

2 A No.

3 Q Did you take any action to supplement the discovery
4 with this new information?

5 A No.

6 Q Did Mr. Martinez say anything about having seen
7 Mr. Snow's picture in the newspaper as far as you can recall?

8 A I don't remember that being discussed. I don't
9 remember if it was. I don't recall that.

10 Q At that time, July 18th, 2000, do you know if
11 Mr. Skelton, the defense counsel for the defendant, was aware
12 of Mr. Martinez's statement that he made to you about
13 identifying Mr. Snow?

14 A Obviously, I have no knowledge of what Mr. Skelton's
15 knowledge is. I don't --

16 Q Did you make any efforts to apprise Mr. Skelton of
17 this change in testimony that Mr. Martinez was having?

18 A No.

19 Q Would you think that would be a tactical advantage
20 for you to have that information and not Mr. Skelton?

21 A That's all anybody could have a different
22 interpretation of that, but I just quite honestly never even
23 thought about reducing it to writing or disclosing it.

24 Q You would agree that this was a complete, complete

1 turnaround from Mr. Martinez's identification or lack of
2 identification?

3 MR. REYNARD: Object to the characterization. I
4 think it more argumentive than probative.

5 THE COURT: Sustained.

6 MR. BARRY:

7 Q Was it discussed by -- well, were you planning on
8 using this identification as part of your case in chief?

9 MR. REYNARD: Objection, Your Honor, relevance to
10 the motion.

11 THE COURT: And, Mr. Barry?

12 MR. BARRY: I think it's relevant for -- well, let
13 me -- can I withdraw that question for just a moment and ask
14 a different question?

15 THE COURT: All right. Go ahead.

16 MR. BARRY:

17 Q Was Mr. Martinez identified as a witness for the
18 State or on behalf of the defense, if you know?

19 A He was originally listed as one of the potential on
20 our list of witnesses in our initial discovery answer. I
21 believe Mr. Skelton filed supplemental or discovery answers,
22 indicated they needed people listed on the State's witness
23 list, may be a witness for the defense as well, if I'm not
24 mistaken.

1 Q When Mr. Martinez looked at that picture the first
2 thing he did was ask is that him?

3 A Is that the guy?

4 Q Is that the guy? And nobody said anything?

5 A Right.

6 Q And then he said what?

7 A Then he indicated that's the guy. It's the eyes.

8 It's the eyes.

9 Q Did he say, that's the guy, isn't it? Or did he say,
10 that's the guy?

11 A His initial statement is, is that the guy. Then he
12 said, that's the guy -- I don't remember if he added isn't
13 it. And then he said that's the eyes. And he kept
14 referencing the eyes.

15 Q Now you stated that when he said is that the guy
16 nobody said anything. Was anybody nodding their head or
17 shaking their head side to side or giving any affirmative --

18 A Nobody was responding to his question at all.

19 Q What did he do after he said that, when he said is
20 that the guy and there was no response? Did he just keep
21 going on his own?

22 A Right.

23 Q Was there any reason why this meeting was at your
24 office and not at the police station like the other two

1 previously had been?

2 A Cause this was the trial -- we'd already started
3 trial jury selection. It was trial prep, everything
4 from -- had been moved over here in terms of working on the
5 case. So this is where we're working out of now.

6 MR. BARRY: Thank you, nothing further.

7 THE COURT: Mr. Reynard?

8

9 CROSS EXAMINATION BY MR. REYNARD:

10

11 Q Miss Griffin, with regard to the -- your
12 understanding of the discoverability of what Mr. Martinez
13 told you on June 18th, did you regard yourself as obliged in
14 any way under the discovery order or the discovery rules that
15 this information be supplied to the defense?

16 A No.

17 Q Is that because it wasn't memorialized?

18 A It was not any type of notes or verbatim report or
19 anything about it.

20 Q And are you aware of any obligation under the law
21 that such notes or memoranda or reports be generated in order
22 to make them discoverable?

23 MR. BARRY: Objection, Judge, that does call for
24 legal conclusion.

1 MR. REYNARD: And this is a sanctions motion.
2 We've been accused of willfully depriving, particularly in
3 the amendment, we've been accused of willfully depriving the
4 defense of discoverable material, and I think I can go into
5 the willfulness issue.

6 THE COURT: But isn't -- doesn't that go,
7 Mr. Barry, though, to my questions of you regarding what
8 sanction you're seeking? Because if it's simply suppression,
9 how does either Mr. Reynard or anyone's opinion of
10 discoverability come into play? I mean that's why I asked
11 about the sanctions. Mr. Reynard is right. If there are
12 some sanctions being sought -- all right. Wait a minute.
13 Maybe I better read the amended motion. Just a second.

14 MR. BARRY: If I may retrieve our copy.

15 THE COURT: Sure. Oh, yes, it's a contempt
16 request. All right. You can answer then, Miss Griffin.

17 THE WITNESS: I'm sorry. I forgot the question.

18 THE COURT: Could you repeat it again, Mr. Reynard?

19 MR. REYNARD:

20 Q I apologize if I don't give it back exactly the way
21 it was before, but the basic gist of the inquiry is this,
22 Miss Griffin. Did you believe this material under the law to
23 be in any manner discoverable?

24 A No.

1 Q Did you regard yourself as being obliged to
2 memorialize it in order to make it discoverable?

3 A No.

4 Q Are you aware of any law that requires you to
5 generate reports or memoranda in order to supply certain
6 information to the defense?

7 A No.

8 Q What if it's Brady material? In other words, what if
9 Mr. Martinez had said something to us that was favorable to
10 the defense? Would we be obliged to then provide such
11 information?

12 A Any Brady material is discoverable, yes.

13 Q But other than Brady material, no such obligation
14 exists, does it?

15 A That's correct.

16 Q Are you aware of any policy in the police department
17 by which reports of such matters are specifically prohibited
18 to be made?

19 A No.

20 Q Do we have any policy in our office that directs
21 police officers not to make reports of such information when
22 that information surfaces in the context like this?

23 A No.

24 Q Did -- did I direct you not to make a memorandum of

1 this conversation?

2 A No.

3 Q Did you direct me or suggest to me in any way that I
4 not do so?

5 A No.

6 Q Did either of us, to your knowledge, direct Detective
7 Katz not to write a report of this matter?

8 A No.

9 Q And did any of the three of us or anyone to your
10 knowledge tell Mr. Martinez not to respond to inquiries
11 propounded to him by the defense or the defense investigator?

12 A No.

13 Q And to your knowledge did, in fact, Mr. Martinez
14 share this information with the defense investigator?

15 A That's part of the pleadings.

16 Q Now, directing your attention back to the questions
17 that Mr. Barry asked of you, my understanding is that in the
18 April 2000 meeting at Bloomington Police Department which,
19 let me ask you this, was that in the nature of preliminary
20 trial preparation, getting to know the witnesses and what
21 they might be saying at the time of trial?

22 A Exactly.

23 Q And during the course of that interview, Mr. Martinez
24 related what happened that night and indicated by pointing to

1 crime scene photos where he was in relation to other things
2 that were depicted in those photographs?

3 A Right.

4 Q And I believe you indicated that no notes of what he
5 told you concerning where he was in relation to the air hose,
6 for example, no notes or reports were made of those
7 indications to you?

8 A Right.

9 Q Why not?

10 A I never take notes in those kinds of situations.

11 Q Are you aware of anybody that does?

12 A No.

13 MR. BARRY: Objection, Your Honor. Is she aware of
14 anybody that does?

15 THE COURT: Sustained, stricken.

16 MR. REYNARD: Nothing further.

17 THE COURT: Mr. Barry?

18 MR. BARRY: Thank you, Your Honor.

19

20 REDIRECT EXAMINATION BY MR. BARRY:

21

22 Q Miss Griffin, we're not talking about a placement of
23 a hose or anything else. We're talking about when

24 Mr. Martinez comes into your office on July 18th he changes

1 his opinion with regard to the identification, correct?

2 MR. REYNARD: Object to the characterization once
3 again.

4 THE COURT: Hold on. What's the objection?

5 MR. REYNARD: The objection to the argumentative
6 characterization, which isn't probative, and I'm going to
7 object on the basis of asked and answered.

8 THE COURT: I think it has been asked and answered.
9 So I'll sustain it for that reason.

10 MR. BARRY:

11 Q Don't you perceive identification in a murder case to
12 be a very important part of the case?

13 A Yes.

14 Q And Mr. Martinez meeting with you in your office on
15 May 18th or on July 18th, 2000 had to do with his
16 identification?

17 A That came up, yes.

18 Q You did know that if you didn't reduce it to writing
19 you wouldn't have to disclose it in discovery, correct?

20 A I never even thought about that.

21 Q Yet, you do know what the law is? If you don't
22 memorialize it in writing, you don't have to disclose it to
23 defense counsel, unless it's Brady material, correct?

24 A I think there are other parameters. Everything

1 that's reduced to writing doesn't have to be disclosed. If
2 you're talking about verbatim reports of witnesses.

3 Q I'm talking about Mr. Martinez's statement to you
4 that he made on July 18th of 2000. You knew if you did not
5 reduce that to writing you did not have to disclose it to
6 counsel?

7 A As a general rule, yes, that's the rule. You do not
8 disclose.

9 Q I'll ask you one more time. July 18th, 2000, you
10 knew that if you did not reduce to writing what Mr. Martinez
11 was saying about the identification that you would not have
12 to disclose that to defense counsel? I'm not asking for a
13 general rule. That item --

14 MR. REYNARD: I think that's been --

15 MR. BARRY: -- correct.

16 MR. REYNARD: -- asked.

17 MR. BARRY: No, she never has answered it, Your
18 Honor.

19 MR. REYNARD: I think she answered that she did not
20 even think of it at that time in response to the almost
21 identical question.

22 THE COURT: And then it was asked again, and she
23 said, yes, that's the general rule. So it has been answered.

24 MR. BARRY:

1 Q I think I asked you before about whether or not you
2 were surprised by this statement Mr. Martinez made on July
3 18th of 2000, and you said you were?

4 A You did on your very first direct examination, yes.

5 Q And you were surprised by this?

6 A That's what I said.

7 Q Did you have any reason to believe that Mr. Skelton
8 would not likewise be surprised by this revelation nine years
9 after the crime?

10 MR. REYNARD: Object to materiality.

11 MR. BARRY: I think this directly goes to the
12 issue. Counsel brought it up during the argument about
13 policy and other matters concerning his office relating to
14 sanctions. I think this going to surprise is another issue.

15 THE COURT: None that I'm aware of. So I'll
16 sustain the objection.

17 MR. BARRY:

18 Q Other than the four of you in your office,
19 Mr. Martinez, Detective Katz, yourself, and Mr. Reynard, did
20 you know of anybody else who had this information that
21 Mr. Martinez could now identify Mr. Snow?

22 A No.

23 MR. BARRY: Thank you. I have nothing further.

24 THE COURT: Mr. Reynard?

1 RE CROSS EXAMINATION BY MR. REYNARD:

2

3 Q Miss Griffin, with regard to that last question of
4 Mr. Barry's, subsequent to the July 18 meeting, do you recall
5 discussing with Mr. Martinez his having mentioned his ability
6 to identify Mr. Snow to his wife, if you recall?

7 A Yes, he mentioned that.

8 Q But that was at a later time --

9 A After that, yes.

10 Q -- that he mentioned to you? Okay, that's all.

11 THE COURT: Mr. Barry?

12 MR. BARRY: Nothing further, Your Honor.

13 THE COURT: You may step down.

14

15 (Witness excused.)

16

17 THE COURT: Is your next witness available and
18 here?

19 MR. BARRY: Mr. Foster is going to be our next
20 witness.

21 MR. SKELTON: He's available.

22 THE COURT: Why don't we take a short recess, and
23 then we'll take him.

24 (Recess.)

1 THE COURT: We'll go back on the record in
2 99 CF 1017.

3 Mr. Barry, you may call your next witness.

4 MR. BARRY: Thank you, Your Honor. We'd call Mark
5 Foster.

6
7 (Witness sworn.)

8
9 M A R K F O S T E R
10 called as a witness on behalf of the Defendant herein, being
11 first duly sworn, was examined and testified as follows:

12
13 DIRECT EXAMINATION BY MR. BARRY:

14
15 Q Would you please state your name?

16 A Mark Foster.

17 Q Mark, what is your business address?

18 A 1566 Hunt Drive, Normal.

19 Q And your employment?

20 A As a private detective.

21 Q How long have you been licensed as a private
22 detective?

23 A Six years.

24 Q Are you licensed in any other state other than

1 Illinois?

2 A No, I'm not.

3 Q Mark, you've had occasion to perform tasks for the
4 defense in this case?

5 A Yes.

6 Q And for how long?

7 A For the past four or five months.

8 Q During the -- during the course of your work, have
9 you ever met an individual by the name of Danny Martinez?

10 A Yes, I have.

11 Q Do you recall when the first time was that you met
12 Mr. Martinez?

13 A I believe it was on July 13th of this year.

14 Q And where was that meeting?

15 A At his residence here in Bloomington.

16 Q And was there anyone other than yourself and
17 Mr. Martinez?

18 A Several of his children were playing, but we were the
19 only adults there.

20 Q And did you have occasion to speak with him?

21 A Yes, I did.

22 Q At that time had you ever met Mr. Martinez before?

23 A No, I had not.

24 Q Had you ever talked to him on the phone?

1 A I had talked to him briefly on the phone to set up
2 the interview for that day.

3 Q Was Mr. Martinez cooperative?

4 A Yes, he was.

5 Q How did you -- how did you find his characteristics?
6 How would you describe him?

7 A When I first met Mr. Martinez, he was cooperative but
8 somewhat hesitant to speak to me.

9 Q Did you talk about his being a witness in this case?

10 A Yes, we did.

11 Q And had you, prior to meeting with Mr. Martinez, had
12 an opportunity to review the -- the reports that had been
13 generated in the discovery in this case?

14 A Yes, I had.

15 Q And you knew of the findings or lack of findings from
16 Mr. Martinez viewing the lineup back in 1991?

17 A That's correct.

18 Q Did you discuss with Mr. Martinez his opportunity
19 back in 1991 and his interaction with the police, the State's
20 Attorney, his cooperation?

21 A Yes.

22 Q And what did he convey to you during this
23 conversation?

24 A Mr. Martinez clearly conveyed to me that he did not

1 identify the same person he saw in at the Clark Station in
2 any of the mug photos or the lineup.

3 Q How close was Mr. Martinez to -- well, first of all,
4 on March 31st, 1991, was Mr. Martinez at the Clark Station?

5 A He certainly was, yes.

6 Q What was he doing?

7 A He was there to put tire -- I'm sorry -- air in a
8 tire.

9 Q And did he -- at any time did he see anybody leaving
10 the Clark Station?

11 A He stated he did, yes.

12 Q Did he notice anything unusual about the person
13 leaving, either before or after he was leaving?

14 A He stated that the first thing he noticed that was
15 unusual was the individual leaving was backing out of the
16 Clark Station.

17 MR. REYNARD: At this time, Your Honor, I think I'm
18 going to interpose this objection. I think this line of
19 inquiry purports to go to the second stage of the suppression
20 motion, and I would point out to Your Honor that the second
21 stage of the suppression motion is not reached until it is
22 established that there is an unduly suggestive identification
23 procedure, some misconduct by the police or the State that
24 gives rise to then inquiring as to the witness', the

1 eyewitness', ability to identify the codefendant, the
2 lighting and all of those circumstances. So I think we're
3 going into the second stage prematurely.

4 MR. BARRY: If I might address that, Your Honor.

5 THE COURT: Yes, go ahead.

6 MR. BARRY: I think it's necessary for the court to
7 make a proper determination. Here is this individual
8 is -- Mr. Martinez is the person who is making an ID or not
9 making an ID, and I'm trying to provide some background as to
10 his opportunity to identify, the circumstances surrounding
11 the identification, what Mr. Martinez was doing, and we do
12 intend to call Mr. Martinez, but I was trying to, through
13 this witness, give some background information so that the
14 court is well aware these two individuals spoke about the
15 situation, he could recall certain things, he could -- he was
16 familiar with the circumstances, yet he still could not
17 identify.

18 MR. REYNARD: I --

19 THE COURT: Well, it's pled in that way in the
20 original motion, so I'll allow the questions.

21 MR. BARRY: Thank you.

22 Q So Mr. Martinez was going into the Clark Station, and
23 there was something unusual about the person coming out?

24 A Actually, the -- Mr. Martinez stated that the first

1 time he saw that individual he was over next to his vehicle
2 not heading towards the Clark Station yet, but he noticed the
3 individual was backing out of the Clark Station.

4 Q How close did he come to this individual that was
5 backing out of the Clark Station?

6 A He stated to me approximately three feet.

7 Q Looking at him face-to-face?

8 A Face-to-face.

9 Q Did Mr. Martinez hear any -- hear any gunshots?

10 A He did not state he heard any gunshots, no.

11 Q Okay. Now, this individual that he saw leaving the
12 Clark Station, did he describe him to you?

13 A He may have. I don't have a real good recollection
14 of him describing him to me. Basically my questioning to him
15 was whether he could identify the subject or not.

16 Q Did Mr. Martinez recall the incidents from 1991?

17 A Yes, he did.

18 Q Did he relay to you that he cooperated with the
19 investigation?

20 A Yes.

21 Q What did he tell you about the lineup, looking at
22 photos or anything else regarding identification?

23 A During the first meeting with him?

24 Q July 13th.

1 A Okay. He clearly indicated that he would not forget
2 the individual he saw three feet away from him face-to-face
3 at the Clark Station on that date and that he did have an
4 opportunity to look through mug photos and a lineup and did
5 not identify anybody in those lineups or the mug photos as
6 being the same person that came out of the Clark Station on
7 that day.

8 Q By July 13th of 2000 did -- did Mr. Martinez convey
9 to you that he'd had an opportunity to see the picture of
10 James Snow in the paper?

11 A Yes.

12 Q Did he say anything about that?

13 A He said that was not the person that came out of the
14 Clark Station.

15 Q He told you it was not the person?

16 A Correct.

17 Q Did he ever state to you during July 13th, 2000 that
18 he remained confident that he could identify the person if he
19 saw him?

20 A He told me without a doubt he could identify the
21 person if he saw him again.

22 Q During that time, July 13th, 2000, did Mr. Martinez
23 make any reference to you that something -- some of what he
24 was telling you was, quote, off the record?

1 A Yes, he did.

2 Q What was it that he told you at that time?

3 A Mr. Martinez stated -- during that initial
4 conversation several times during our conversation
5 Mr. Martinez would state to me, off the record. I couldn't
6 tell you exact details he said right after that, but he said
7 that approximately four or five times at that first meeting.
8 He would usually convey to me information that was already
9 well known by the defense.

10 Q Okay. Did he ever make any reference to whether or
11 not Jamie Snow was the individual he saw?

12 A Other than the fact that it was definitely not Jamie
13 Snow, no.

14 Q Did Mr. Martinez ever make any reference to you again
15 off the record something to the effect that they've got the
16 wrong guy or they've got the wrong person or anything to that
17 effect?

18 A Yes, he did, several times.

19 Q That was during the July 13th conversation?

20 A That's correct.

21 Q During that meeting you spent about how much time
22 with him?

23 A That first meeting I believe approximately an hour
24 and 15 minutes approximately.

1 Q And everything Mr. Martinez relayed to you at that
2 time was consistent with the written discovery that had been
3 provided in this case?

4 A It was very consistent.

5 Q Did you have occasion again to meet with
6 Mr. Martinez?

7 A I did.

8 Q When was that?

9 A July 28th of this year.

10 Q And where was this meeting?

11 A Again, it was a meeting at his residence in
12 Bloomington.

13 Q And was anybody else present besides you and him?

14 A Again, there was children present, but they were
15 around playing.

16 Q Would you tell me what happened?

17 A I went back to Mr. Martinez's residence after
18 speaking to Mr. Skelton to clarify just a very few things
19 that we wanted answers to. I told Mr. Martinez prior to
20 arriving at his residence on the telephone I needed about
21 five minutes of his time. During this conversation
22 Mr. Martinez again spoke to me, stating offer the record,
23 that detective showed up and showed him a photo lineup, and
24 he had made an identification of a person in the lineup.

1 Q He said the detectives had shown up?

2 A Yes, he did.

3 Q Did you ask him to elaborate on that?

4 A I asked him to elaborate about making the
5 identification. I didn't make him elaborate on the showing
6 up part, no.

7 Q What did he say with regard to the identification?

8 A He said that he identified a Jamie Snow as the person
9 he'd saw at the Clark Station that night.

10 Q What did he say about -- did you ask him about his
11 changing of identification?

12 A No, I did not.

13 Q Did he ask you for any information about the case?

14 A He did not directly ask me for information about the
15 case, no.

16 Q What did you two talk about?

17 A Once he had told me that he had identified Jamie Snow
18 in the photo lineup, we talked mainly about that.

19 Q And he didn't give you any answer as to why he had a
20 complete change in his identification?

21 A During the conversation he stated to me several times
22 that it was his understanding that the State had quite a bit
23 of evidence against the people that were in jail so he must
24 have the right people. But he didn't come out and directly

1 state that that was the reason he changed his mind.

2 Q Did you have occasion to talk to Mr. Martinez then
3 again?

4 A Yes, I did.

5 Q When was that?

6 A August 10th of this year.

7 Q And what came up during that conversation?

8 A At that time I had a very brief conversation with
9 Mr. Martinez, and he stated to me that he was upset with me.

10 Q He was upset with you?

11 A Yes.

12 Q Why?

13 A He was upset because he had learned that some of the
14 information he thought was off the record I had relayed to
15 the defense.

16 Q Did he talk to you then?

17 A At that time he actually had children in his vehicle,
18 so we agreed to talk at a later date.

19 Q And have you talked to him since?

20 A No, I have not.

21 Q Did he relay information to you at that time
22 that -- information that had been contained in the motion for
23 sanctions, in the defendant's motion for sanctions?

24 A No.

1 Q Did he tell you who had contacted him with
2 information that -- why he was mad at you?

3 A Actually, no, I didn't get to ask him any question
4 like that because of the fact we only had a few seconds
5 actually to speak.

6 Q Mr. Foster, when you first spoke to Mr. Martinez, you
7 say he was confident on his identification, lack of
8 identification?

9 A Yes, he was.

10 Q Did he give you the impression later that he was in
11 any sort of trouble as a result of talking to you?

12 MR. REYNARD: Objection to the form of the
13 question.

14 THE COURT: Sustained.

15 MR. BARRY:

16 Q Did -- did Mr. Martinez seem more nervous or agitated
17 talking to you after the first time?

18 MR. REYNARD: Objection to leading.

19 THE COURT: Sustained.

20 MR. BARRY: I think, Judge, he can testify as to
21 observations.

22 THE COURT: Well, that's not the objection.

23 MR. BARRY: I'm sorry.

24 Q How would you describe Mr. Martinez's characteristics

1 at the second meeting, if they were at all different from the
2 first time you guys met?

3 A Mr. Martinez had clearly, my impression with him, had
4 clearly changed his thought on the amount of information the
5 State had on the case.

6 Q Why would you say that?

7 A He repeated to me several times, not just once, that,
8 and he formed it in a question to me was, well, the State
9 must have a lot of information or they would not be in jail.
10 And when I didn't respond to that question, he would state it
11 again after we'd talk about something else. He'd bring it
12 back up, that the State must have the right people or they
13 wouldn't be in jail.

14 Q When -- now the first time that Mr. Martinez spoke to
15 you July 13th, 2000 did he say to you anything that would
16 relate to his inability to identify Jamie or identify the
17 person running out of the Clark Station if he indeed saw him
18 again?

19 A Absolutely not. He clearly indicated to me that he
20 would be able to positively identify the person who came out
21 of the Clark Station.

22 MR. BARRY: Thank you. Nothing further.

23 THE COURT: Okay. Mr. Reynard?

24

1 CROSS EXAMINATION BY MR. REYNARD:

2

3 Q Mr. Foster, procedurally, July 13th was the first
4 visit that you had with Mr. Martinez?

5 A Yes, sir.

6 Q And that was a conversation which he, I think you've
7 indicated, willingly scheduled with you on the telephone and
8 actually then did meet with you at his residence?

9 A That's correct.

10 Q And you indicated he was cooperative but hesitant?

11 A Correct.

12 Q And did he tell you that he was hesitant to talk with
13 you?

14 A No, he did not.

15 Q It was a nonverbal indication to you, and you kind of
16 subjectively assessed him as being hesitant?

17 A Yes.

18 Q Now, with respect to that conversation, did you take
19 any notes?

20 A No, I did not.

21 Q Why not?

22 A Simple fact was he did appear hesitant, like I said,
23 on the best judgment did not worry about taking notes, just
24 to speak to him.

1 Q So you listened closely to what he had to say to you
2 during the course of that conversation?

3 A Yes, I did.

4 Q And promptly upon the conclusion of that meeting with
5 Mr. Martinez did you then go back to some location and write
6 down what it was that he told you?

7 A No, I did not.

8 Q And why not?

9 A Actually, the conversation I had with Mr. Martinez
10 went directly along with what he had given to the police many
11 years ago so basically the same conversation they'd had.

12 Q Which conversation was it that he indicated to you
13 that the picture in the newspaper was not the one?

14 A On July 13th.

15 Q That was the first time, wasn't it?

16 A The first time?

17 Q The first time that you visited with him?

18 A Correct.

19 Q And did you read that anywhere in the discovery
20 record that Mr. Martinez had looked at the newspaper
21 photograph and said he was not the one?

22 A No, I did not.

23 Q So that was new information, was it not?

24 A I didn't -- I didn't perceive it as being new

1 information, no.

2 Q Where, if anywhere, was that written down, whether it
3 was in the discovery or in the stars, where was that written
4 down so that it would not be new information to someone,
5 including yourself?

6 MR. BARRY: Objection, Judge, written in the stars.

7 MR. REYNARD: Apologize.

8 THE COURT: Stricken.

9 MR. REYNARD: I withdraw that portion.

10 THE COURT: All right.

11 MR. REYNARD:

12 Q Did you understand the question?

13 A Yes, sir.

14 Q Where?

15 A Again, I did not perceive it as being new information
16 as it pertained to our case.

17 Q And what was that perception based upon?

18 A Based on the discovery supplied by the State.

19 Q Did -- do you recall anywhere in that discovery it
20 saying that the witness looked at Jamie Snow's picture and
21 said it wasn't him?

22 A No.

23 Q I didn't get from my notes when your second meeting
24 was.

1 A I believe on July 28th.

2 Q And that was at his residence as well?

3 A Yes.

4 Q And he spoke willingly with you on that occasion?

5 A Yes, he did.

6 Q And he didn't give you any indication other than that
7 he was being cooperative with you?

8 A Correct.

9 Q And did he evidence any hesitancy at that time?

10 A Yes.

11 Q And what was that based upon?

12 A Again, my subjective observations of him.

13 Q And was it based upon those subjective observations
14 of him that you decided not to take notes during the course
15 of that interview?

16 A Actually, the course of the interview was, as I
17 stated before, was simply to ask a very limited amount of
18 questions, follow-up questions from my initial interview. So
19 there was no need to take notes, correct.

20 Q Refresh my memory, what were those questions?

21 A I was going to ask Mr. Martinez about the exact
22 distance he was from the gentleman that exited the Clark
23 Station.

24 Q And that's when he said three feet?

1 A Correct.

2 Q During the course of that conversation did he make
3 the reference to -- make reference to the term off the
4 record?

5 A Yes, he did.

6 Q And did you discuss with him at all as to what he
7 meant by being off the record?

8 A No, I did not.

9 Q What did that mean to you, if anything?

10 A During the second conversation?

11 Q At any time that he said off the record to you, what
12 did -- did you believe that to mean?

13 MR. BARRY: I'm going to object, Your Honor, as to
14 what relevance that might have.

15 THE COURT: Why?

16 MR. BARRY: I don't know why it would be relevant
17 to anything as far as what this witness' mindset as to what
18 Mr. Martinez meant by off the record.

19 THE COURT: Mr. Reynard?

20 MR. REYNARD: Well, I think this witness is asking
21 the court to believe his testimony, and I think the declining
22 to take notes and the extent of his recollection of details
23 is something that is enlightened by inquiring as to what in
24 the world was going on in his mind as this communication was

1 going on -- going forth.

2 THE COURT: I guess I agree with that, so I'll let
3 him answer.

4 MR. REYNARD:

5 Q Do you recall the question?

6 A Repeat it, please.

7 Q What did Mr. Martinez's indications to you of off the
8 record mean?

9 A It meant to me that he was clearly hesitant to speak
10 to me from the very beginning and that -- hesitant to speak
11 to anybody of the defense and he felt like if he said off the
12 record he would be able to free himself up a bit or relay
13 information to me.

14 Q Your reading of that then is he was intending to tell
15 you information that would not be passed on to someone else?

16 A Correct.

17 Q Okay. And did you tell him that you were going to
18 repeat that information to someone else?

19 A No, I did not.

20 Q Did you tell him that you wouldn't write it down in
21 notes or on -- in the form of reports?

22 A I didn't mention anything about writing anything.

23 Q Now on your last visit, the date was when?

24 A August 10th of this year.

1 Q My understanding is that he told you at that time
2 that detectives had shown up and that -- and showed him
3 photographs?

4 A That was on the second visit.

5 Q Okay. During the second visit he had indicated to
6 you that he had picked Jamie Snow from a photograph?

7 A Yes, sir.

8 Q Okay. And on the last visit he -- did he repeat that
9 fact to you or maybe I'm just missing something in my notes?
10 Did he repeat that information to you on the last visit, or
11 was that exclusively mentioned to you in the second?

12 A Just the second.

13 Q At any time did you show him any photographs?

14 A No.

15 Q Did he tell you during the second visit how many
16 photographs he viewed at the time that the detectives had
17 shown up?

18 A No.

19 Q The impression that you got was that the detectives
20 had shown up to visit with him and shown him some
21 photographs? Is that the significance or the interpretation
22 that you assigned to what he told you?

23 A Yes.

24 Q Did he tell you that he was the one that showed up in

1 the State's Attorney's office and looked at a single
2 photograph?

3 A No.

4 Q Now, on August 10th you indicated he was upset with
5 you --

6 A Correct.

7 Q -- because you had repeated the information that he
8 had furnished to you to the defense attorney. Did he
9 indicate that to you, or was that your assumption as to why
10 he was upset with you?

11 A I asked him why he was upset.

12 Q Is that what he told you?

13 A His answer was that I had given information that he
14 said was off the record.

15 Q And you had given it to whom?

16 A The defense.

17 MR. REYNARD: No other questions at this time.

18 THE COURT: Mr. Barry?

19 MR. BARRY: Thank you, Your Honor.

20

21 REDIRECT EXAMINATION BY MR. BARRY:

22

23 Q Mark, did you, when you first met Mr. Martinez, did
24 you identify who you were working for?

1 A Yes, I did.

2 Q You told him that you were working for the defense
3 counsel?

4 A Yes, I did.

5 Q Was that fact made perfectly clear to Mr. Martinez?

6 A Yes.

7 Q Did he have any problems with that?

8 A No, he did not.

9 Q The fact that Mr. Martinez told you that the picture
10 in the newspaper was not James Snow, did you find that to be
11 consistent with what you had read in the discovery?

12 A Yes.

13 Q I mean, he had previously been shown photos of Jamie
14 Snow and said this wasn't the guy and this was again another
15 photo of him --

16 MR. REYNARD: Objection to the characterization.
17 Through no fault of his own I think counsel is misstating the
18 evidence in the discovery record. I don't recall a stitch of
19 evidence that he said this is not the guy.

20 THE COURT: Sustained.

21 MR. BARRY:

22 Q Did you -- did you find consistent the fact that
23 Mr. Martinez did not identify Jamie Snow out of the numerous
24 mugshots they looked at, of the lineup that he was shown and

1 the fact that he stated that the picture in the newspaper,
2 this is not the guy?

3 A Yes.

4 Q They were all consistent?

5 A Consistent.

6 MR. BARRY: Thank you. Nothing further.

7 THE COURT: Mr. Reynard?

8 MR. REYNARD: Your Honor, this actually goes to the
9 scope of the original direct. I apologize for going into it.
10 But it is one limited question regarding did he relate to you
11 hearing gunshots. May I inquire?

12 THE COURT: So you're asking to --

13 MR. REYNARD: Reopen my initial cross.

14 THE COURT: Reopen. Any objection, Mr. Barry?

15 MR. BARRY: Judge, actually I did go into that
16 briefly on my direct so I have no objection.

17 THE COURT: Okay. Go ahead.

18

19 FURTHER CROSS EXAMINATION BY MR. REYNARD:

20

21 Q I believe you indicated initially in response to
22 Mr. Barry's questions that Mr. Martinez did not tell you
23 about hearing any gunshots?

24 A Correct.

1 Q Did he relate to you having heard some noises that he
2 characterized as pops, which he associated with possibly
3 being his vehicle backfiring?

4 A Yes.

5 MR. REYNARD: Okay. That's all. And I don't have
6 any additional questions on recross.

7 THE COURT: Mr. Barry, anything further?

8 MR. BARRY: No, Your Honor.

9 THE COURT: Okay. You may step down.

10
11 (Witness excused.)

12
13 THE COURT: How many more do you have, Mr. Barry?

14 MR. BARRY: Probably two.

15 THE COURT: Who are they, Katz and...

16 MR. SKELTON: Martinez.

17 THE COURT: Do you have any addition to that,
18 Mr. Reynard?

19 MR. REYNARD: I don't think so.

20 THE COURT: Okay. So two more. Can you all start
21 at 1:30? Is there any reason why we can't come back at 1:30?

22 MR. SKELTON: No, that would be fine.

23 MR. REYNARD: I did suggest to Mr. Martinez for
24 want of more information that he could leave at a quarter

1 'til noon, and I was estimating about 45 minutes for the next
2 witness. He should be back any moment. I'm wondering if for
3 the sake of his convenience since we're going to wind up
4 inconveniencing the jury under any circumstances if we could
5 delay our lunch and accommodate his testimony sooner rather
6 than later.

7 THE COURT: Well, why don't you check and see if
8 he's out there.

9 MR. REYNARD: Very good. He's not back yet.

10 THE COURT: Not back.

11 MR. REYNARD: I guess we can break.

12 THE COURT: I think we probably have to because
13 otherwise we're waiting around not knowing whether he'll be
14 here in 15 minutes or a half hour. So we'll resume at 1:30.

15

16 (Noon recess.)

17

18 THE COURT: We'll go back on the record in
19 99 CF 1017. Parties appear same as before.

20 And, Mr. Barry, we're ready to go on to your next
21 witness.

22 MR. BARRY: Yes. Mr. Martinez.

23

24 (Witness sworn.)

1 D A N N Y M A R T I N E Z

2 called as a witness on behalf of the defendant herein, being
3 first duly sworn, was examined and testified as follows:

4

5 DIRECT EXAMINATION BY MR. BARRY:

6

7 Q Good afternoon, Mr. Martinez.

8 A Good afternoon.

9 Q Would you please state your full name and address?

10 A My name is Danny Martinez, and I live in Bloomington.

11 Q How long have you lived in Bloomington?

12 A I'd lived there I'd say 35 years.

13 Q And, Mr. Martinez, on March 31st, 1991 do you recall
14 where you were?

15 A Where I was?

16 Q Where you were?

17 A Yes.

18 Q Were you at anytime during that day at the Clark
19 Station in Bloomington?

20 A That's correct.

21 Q What time was it when you were there?

22 A Approximately between 7:30, eight o'clock.

23 Q In the evening?

24 A Yes.

1 Q And what were you doing?

2 A I just gotten home from Easter Sunday, and I had told
3 my wife I was going to put air in the tire and get something
4 to drink at the gas station.

5 Q Okay. You're familiar with the Clark Station as it
6 was set up?

7 A That's correct.

8 Q Had you been there before?

9 A Yes.

10 Q A number of times?

11 A Yes.

12 Q And describe for me, if you would, where you drove
13 your car into the parking lot?

14 A I drove up to the -- into the gas station, up to the
15 parking lot on the east side of the Clark gas station where
16 the air pump is located facing north.

17 Q And approximately how far was your car parked from
18 the entrance into the service station?

19 A Approximately maybe 20 feet.

20 Q And did you proceed to put air in your tires?

21 A That's correct.

22 Q Did anything unusual happen after that?

23 A Well, at the time I was putting air in the tire I
24 heard two bangs and while I was putting my air in the tire.

1 Q Okay. So you -- what kind of bangs?

2 A Well, like if a car was backfiring.

3 Q Okay. And this was -- you heard that while you were
4 putting air in your tires?

5 A That's correct.

6 Q Did it startle you or...

7 A Yes, you know, well, it didn't startle me. I mean
8 it's just I thought maybe it was my car backfiring and --

9 Q Your car was still running?

10 A That's correct.

11 Q Okay. Could you tell where the sound came from?

12 A It had come in front of me, I mean, you know, when
13 I was putting air in the tires, it started, you know, two
14 bangs.

15 Q Okay. How long after that was it that you completed
16 putting the air in your tires?

17 A Maybe I'd say a couple seconds after that.

18 Q And what did you do after that?

19 A I started walking towards the gas station to get
20 a -- something to drink and when I was down putting air in
21 the tire I saw a gentleman coming out the door of the gas
22 station backwards, I don't know, and I started walking to the
23 gas station, and I heard my car like it was going to die so I
24 had turned around; and after I turned back around to go to

1 the gas station I didn't bump into a person, but it was just
2 like I was maybe to me to you but a little bit closer that I
3 saw a person.

4 Q Okay. And did you proceed walking towards that
5 person?

6 A That's correct.

7 Q And the person continued to walk toward you?

8 A Yeah, I mean we were closer and then when he passed
9 me up, he went around the corner, and I started walking
10 towards the gas station.

11 Q So you literally walked right past him?

12 A That's correct.

13 Q And you were able to look at him from a matter of
14 feet?

15 A That's correct.

16 Q What happened next?

17 A I started walking toward the gas station, and a
18 couple seconds later I hear a gentleman say stop, back up,
19 and I had turned around. At the same time somebody also had
20 pulled up to the gas station; and I turned around, and there
21 was an officer that was across the street. And he asked me
22 if I saw anyone. I said, yes, I just saw someone go around
23 the side of the building.

24 Q So the person -- did the person that told you to stop

1 and back up, was that the police officer?

2 A That's correct.

3 Q So the police were actually there before you entered
4 the gas station?

5 A That's correct.

6 Q How far away from the entrance to the gas station
7 were you when you passed the individual that came out?

8 A We were right on the corner of the gas station so --

9 Q Eight, ten feet?

10 A No, less than that.

11 Q Okay.

12 A So...

13 Q Now, subsequent to that, did the -- did the police
14 officer ask you any questions?

15 A He asked me if I had seen anyone.

16 Q Did you respond to him?

17 A And, yes, I'd told him I had -- I'd seen somebody
18 just go around the corner.

19 Q Which corner?

20 A Well, the east side of the gas station. There is the
21 like -- like an opening between the gas station and the house
22 next door.

23 Q Okay. Did the officer pursue --

24 A No.

1 Q -- that person?

2 A No.

3 Q Did you see anybody run after that person?

4 A Not that I recall.

5 Q Did the officer ask you for any more assistance?

6 A Not at that time. He just asked me if I could please
7 back up my car cause I told him I had lived next door and
8 that I'd be over at the house if they needed anything else.

9 Q Okay. Did -- did anyone from the police department
10 contact you again then?

11 A That's correct.

12 Q And who was that?

13 A That was Detective Barkes I think I recall.

14 Q When was that?

15 A That was that night.

16 Q And did he -- did he contact you by phone or in
17 person?

18 A No, he came over in person.

19 Q And did he -- did he ask for assistance from you?

20 A Well, he asked me -- he came over and said, asked me
21 if I -- what I seen and -- I should say what I saw and I told
22 him what I saw.

23 Q Did he ask you to describe the person you saw leaving
24 the building?

1 A Well, he asked me, yes, he did, he asked me what I
2 saw so I told him, and he asked me if I'd be willing to come
3 down to the station and give a description of the person. I
4 said yes.

5 Q Did you go down to the station that night?

6 A Yes.

7 Q And what did you do down at the station?

8 A Well, went down there and did a composite of a
9 drawing that another detective was there.

10 Q And you provided the information for the composite?

11 A That's correct.

12 Q Were you satisfied the composite was accurate?

13 A That's correct.

14 Q Did you do anything else?

15 A That night I think I went through a couple pictures
16 and on what they had there at the station.

17 Q Did the pictures appear to you to be the same person
18 you saw coming out of the gas station?

19 A No.

20 Q How many pictures did you look at that night?

21 A I don't recall.

22 Q And did you look at a --

23 A It was --

24 Q Books?

1 A No, not books. It was a room where files were at
2 that they had pictures at so it was late that night so, you
3 know, maybe I glanced at maybe 20 that maybe I glanced
4 through.

5 Q Did you do anything else that night?

6 A Not that I recall. I think I -- it was early the
7 next morning when I came home so...

8 Q Were you contacted again?

9 A That's correct.

10 Q When was that?

11 A To be honest, I don't recall the date, but I know I
12 had.

13 Q A few days, weeks?

14 A Maybe weeks. I don't recall.

15 Q Okay. And what were you asked to do at that time?

16 A Just went back to the, you know, what I saw, and you
17 know, and that was mostly it, you know, my information of
18 what I saw that night and, you know, the things that were
19 going on.

20 Q Were you shown more pictures?

21 A No, not at that time I don't think.

22 Q Okay. So that was mainly an interview the second
23 time?

24 A I think so.

1 Q Okay. Did you -- did you meet with the police
2 officers again after that?

3 A That's correct.

4 Q And what happened -- well, first of all, how
5 long -- how much later was that when you met with them a
6 third time?

7 A I don't know when that was, but maybe a half hour to
8 an hour.

9 Q And what did -- what were you asked to do at that
10 time?

11 A I think it was Detective Crowe that I spoken to, and
12 just went back through the same thing I had told them, you
13 know, previous times that I have spoken to him.

14 Q Were you asked to look at any more pictures?

15 A Not that I recall.

16 Q Did you at that time -- were you shown a lineup? Did
17 you look at individuals?

18 A At one time I was asked if I would come down and look
19 at a lineup.

20 Q Before we -- before we get to that, that wasn't on
21 the third time?

22 A I don't recall. You know, I spoke with the
23 detectives, you know, it's been nine years, so, you know.

24 Q Hard to recall the details?

1 A Well, no, it's not hard to recall. I mean it's
2 just --

3 Q Sure.

4 A -- been so long and so many times, so...

5 Q Do you recall when you were asked to view the
6 lineup --

7 A Yes.

8 Q -- individuals?

9 A Yes.

10 Q Do you remember what month that was?

11 A It had been I think I would say the beginning of the
12 summer.

13 Q '91?

14 A Yes.

15 Q What happened -- did the police initiate contact with
16 you?

17 A Yes, I think so.

18 Q And they set up the time for you to come down?

19 A That's correct, or they asked me if there was a
20 certain time I'd be available for them.

21 Q Okay. Tell me what happened when you went down to
22 the police station at that time?

23 A I went down to the station and they had a lineup and
24 so they brought in the lineup, and as I recall the six guys

1 that came in, six, and they just showed me the lineup that
2 was there.

3 Q And were you able to pick out anybody from that
4 lineup who matched the description of the individual that you
5 saw leaving the Clark Station?

6 A No, because I mean at that time, no, because
7 the -- from the distance from where I was standing to the
8 lineup is I think maybe, it's been a while, farther from me
9 to you, and so -- and it was dark in that room and so I know
10 I had asked for two persons to step forward at that time, and
11 that was it.

12 Q Do you remember which ones you asked to have step
13 forward?

14 A I think it was the two middle ones.

15 Q Okay. Now, you said it was dark. Was it dark in the
16 room that you were in or where the individuals were lined up?

17 A The light was dim. I think the light was dim in the
18 room I was in. And --

19 Q There was no problem with the light where the
20 individuals were?

21 A Well, I mean it was farther away I mean compared if I
22 was me to you. It seemed like that to me.

23 Q Did you complain of these conditions to the police
24 officers --

1 A No.

2 Q -- that were there with you?

3 A No.

4 Q Who was with you at that time?

5 A I think it was Detective Crowe.

6 Q Anyone else?

7 A No, I think that was it.

8 Q At that time were you shown any more pictures?

9 A I'm not sure if I was shown that same day a couple
10 pictures in a book.

11 Q But you couldn't pick out anybody in that lineup,
12 right, as matching the same description that you saw from the
13 individual coming out of the Clark Station?

14 A I mean I was looking more of trying to think back,
15 you know, to the incident there at the gas station, and I was
16 looking more of the person's facial. I really didn't, you
17 know, you know, the hair, you know, cause, you know,
18 remembering, you know, that it was shoulder length hair so
19 that's what I looked at first.

20 Q Any other characteristics that you recall the
21 individual coming out of the Clark Station?

22 A Yes, his eyes.

23 Q Anything else?

24 A Well, his facial hair on his face, you know, like if

1 he hadn't just shaved in a couple days.

2 Q So did he have a mustache and a beard, goatee?

3 A No, it was just like yourself right now. It looks
4 like you haven't shaved in a day or so.

5 Q Oh, well, okay.

6 A But it just, like, you know, you haven't shaved in a
7 day or so.

8 Q Okay. Anything else? Anything else about the color
9 of the hair?

10 A You know, just he had a hat on at that time, but his
11 hair was, you know, shoulder-length hair.

12 Q So you could tell what color it was?

13 A It was a blondish hair.

14 Q Okay. Did you talk with the police again at anytime
15 after the lineup?

16 A Yes.

17 Q How much later was it that you spoke with him again?

18 A I don't remember, you know, what the dates were, but
19 I do remember that I had spoken with them since then.

20 Q What did you do when you went back and spoke to the
21 police again after the -- what, was it still in the summer of
22 '91 or was it later?

23 A I'm sure there was a couple times, I'm not, '91, you
24 know, on up to, right, you know, this year.

1 Q Did you have occasion to look at any more pictures?

2 A Yes.

3 Q Were you able to identify anybody from any of the
4 pictures that you saw?

5 A There was not point a person out, but the eyes
6 features, you know, and stuff, and also just, you know,
7 recently.

8 Q Okay. Let's stay back in 1991. In 1991 when you
9 were looking at these additional pictures did you ever have
10 occasion to identify somebody that looked like the individual
11 coming out of the Clark Station?

12 A Not -- not that I recall, you know.

13 Q Okay. You had stated something about the
14 individual's eyes. How would you describe the eyes?

15 A Someone that had just, you know, been out all night,
16 I'd say, you know, that was under the influence of drugs or
17 alcohol.

18 Q Hopefully you're not going to say like mine.

19 A No.

20 Q Okay. Okay. Well, anything else, other than, I
21 mean, could you tell the color of the eyes?

22 A I mean they were so white, you know, so bright that,
23 like I said, it looked like he was under the influence of
24 something. That's what surprised me. I don't know if he was

1 surprised when I saw him or he was surprised when he saw me,
2 you know.

3 Q After -- after '91 then did you again have occasion
4 to meet with the police?

5 A That's correct.

6 Q Do you remember what year?

7 A Well, this year also. I'm sure it was last year I
8 think, once or twice. I'm not sure.

9 Q Anytime between '91 and '99?

10 A Yes, I think there was an occasion with Detective
11 Crowe there at the house.

12 Q Okay. And did you go through any pictures?

13 A He brought an album of pictures over to the house.

14 Q And this would have been sometime between '91 and
15 '99?

16 A That's correct.

17 Q Were you able to identify anybody in those pictures?

18 A Some pictures, like I said, was looking more the eyes
19 and the feature of the face, you know.

20 Q But you weren't able to say it was a particular
21 person?

22 A Right, right.

23 Q What about -- what about last year?

24 A Last year I think I -- there was a -- the only time I

1 really recognized a face is when in the newspaper on through
2 the eyes when the gentleman was shown in the newspaper as
3 being arrested.

4 Q So the picture that appeared in the newspaper?

5 A That's correct.

6 Q And you thought you recognized that?

7 A Yes, by the eyes. I told my -- my spouse that this
8 is the guy, you know.

9 Q Now, in -- what was it, if you can describe, the
10 picture in the newspaper that led you to believe that?

11 A It was the eyes.

12 Q Anything else?

13 A No, I mean it was the eyes, and that was it. I mean
14 the face and the eyes.

15 Q This was a black-and-white picture, correct?

16 A I'm sure it is. I mean whatever the Pantagraph puts
17 out so...

18 Q Prior to that time seeing the picture in the
19 newspaper, did you ever see a picture that represented to you
20 an accurate description of the person that you saw leaving
21 the Clark Station that night?

22 A There was a couple pictures that I saw but, you know,
23 I'd never -- that looked like the person, but I never knew
24 who they were.

1 Q Now, when you -- did you -- did you -- did you
2 contact anybody at the police department about that?

3 A Are you -- when the officers had brought -- are you
4 talking about --

5 Q Let me back up. In 1999?

6 A Yes.

7 Q When you saw the picture in the newspaper?

8 A Right.

9 Q Did you contact anybody at the police department?

10 A No.

11 Q In 2000, I think you said you spoke with the -- with
12 the police a number of times?

13 A I think I spoke to them a couple of times this year.

14 Q Okay. When was the first time?

15 A I think when I had received a subpoena to come to
16 court I, you know, I'm not sure if that was the time or not.

17 Q Do you remember was that still in the spring or was
18 that early summer?

19 A Probably early in the summer I think it was.

20 Q And who was it that you met with?

21 A It was Detective Katz.

22 Q Anyone else?

23 A I'm sorry?

24 Q Anyone else?

1 A No.

2 Q And what did the two of you talk about at that time?

3 A He just brought the subpoena over.

4 Q Okay. Did you meet with -- did you meet with anybody
5 from the police department or the State's Attorney's office
6 after that?

7 A Yes.

8 Q And who was that?

9 A That was Mrs. Griffin and Detective Katz.

10 Q And when was that?

11 A Probably I think maybe June, June or July.

12 Q Did you at anytime speak with Miss Griffin prior to
13 that time?

14 A Not that I recall. Maybe -- maybe I did when I had
15 an investigator come over to the house and kept on calling me
16 to come over to the house to ask a couple questions and
17 stuff, and I had called Mrs. Griffin for some advice
18 if -- that I was tired of him giving me a call there at the
19 house, that I didn't want to speak with no one. And I
20 mentioned to him that I -- you know, anything they wanted to
21 get from me, they could get from the State's Attorney's
22 office.

23 Q And who was that?

24 A I think his first name was Mark. He was investigator

1 for your defense I think it was.

2 Q Okay. Now, you did speak to Mark at least one time?

3 A Twice.

4 Q Twice?

5 A Yes.

6 Q Do you remember when the first time was you spoke to
7 him?

8 A It's been a couple weeks ago.

9 Q In July?

10 A Yes.

11 Q Okay. Now --

12 A I'm sorry, I think maybe it was in -- in the end of
13 June, beginning of July.

14 Q Now, at that time when you spoke with Mark did he
15 talk to you about your inability to identify anybody from the
16 mugshots and the lineup?

17 A No, not at that time. He had asked me what I saw,
18 and I mentioned to him, I said, you know, anything you like
19 to get from me, get from the State's Attorney's office. And
20 he says, we got the papers from the State's Attorney's
21 office. And I said, oh, okay, whatever it says in there.
22 And so then he showed me a copy of the statement I had given
23 the State's Attorneys.

24 Q And was that accurate?

1 A Yes.

2 Q Mark identified himself as being an investigator
3 working for the defense?

4 A That's correct.

5 Q At that time did you tell him anything about seeing
6 the newspaper picture?

7 A Not the first time.

8 Q When was the second time you met with Mr. Foster?

9 A Maybe a couple weeks ago. Excuse me.

10 Q Between the first and second time you met with
11 Mr. Foster, did you meet -- did you have occasion to meet
12 with the State's Attorney and Detective Katz?

13 A That's correct.

14 Q And where was that meeting at?

15 A That was here at the county.

16 Q In this building?

17 A That's correct.

18 Q What did you tell them at that time?

19 A I told them that, you know, the investigator had come
20 over and mentioned to them again, you know, and we just
21 talked about a picture of the newspaper and that was mostly
22 it.

23 Q What was it that you told the State's Attorneys and
24 the detective at that time about the picture in the

1 newspaper?

2 A I told them that it looked exactly like the guy and
3 we got to the -- I don't know how the conversation came up
4 about the lineup, and I had asked the State's Attorneys if
5 they had a picture of the lineup that I could see. And they
6 pulled out a picture of the lineup, and I saw the person that
7 was at that gas station in that lineup. I looked up closer,
8 and I said this is the guy. Isn't this the guy right here?

9 Q This was after you had seen the picture in the
10 newspaper?

11 A That's correct.

12 Q And approximately nine years after you saw the
13 gentleman leaving the Clark Station, correct?

14 A That's correct.

15 Q The -- during the year 2000 did any detectives ever
16 bring any photos to you?

17 A No, not that I recall.

18 Q Did you go to the police station and review any more
19 photos?

20 A In the year 2000?

21 Q Yes.

22 A No.

23 Q When you were in this building talking to the two
24 prosecuting attorneys and the detective, how long did you

1 meet with them?

2 A Half hour, 45 minutes.

3 Q And during that time period what did you talk about
4 before you asked to see the picture?

5 A We were talking about, you know, I was ready to get
6 this done with after nine years, you know, and what was going
7 on.

8 Q How long did that take? I mean how long did you
9 spend talking about that prior to actually looking at the
10 picture?

11 A Ten, 15 minutes, like I say, I was there only half
12 hour to 45 minutes.

13 Q Did you represent to them that you had seen the
14 picture in the newspaper?

15 A Yes, I think I mentioned to them that I saw the
16 picture in the paper and that's when she took out the picture
17 of the paper -- the picture that was in the paper and --

18 Q So you were shown a picture of Mr. Snow in the
19 newspaper?

20 A No, she brought out a picture, I don't know, a
21 black-and-white picture. I think it was a black-and-white
22 picture that she showed me that I think it was a picture of
23 the newspaper shot.

24 Q Okay. So you recognized that as being the one that

1 was in the newspaper?

2 A That's correct.

3 Q And then did you ask to see more pictures?

4 A Yes, I asked -- well, we got to the conversation of
5 the lineup, and I asked her if she had a picture of the
6 lineup. And she said she did. And I said could I see it.
7 And she pulled it out. And I saw it. And I said this is the
8 guy, isn't it, this is the guy.

9 Q You asked her this is the guy, isn't it?

10 A No, I said this is the guy, isn't it, this is the
11 guy.

12 Q Okay. Were you shown any other pictures at that
13 time?

14 A No.

15 Q Prior to looking at the newspaper picture and prior
16 to looking at the lineup picture did either Mrs. Griffin,
17 Mr. Reynard or Detective Katz talk to you about questions
18 they would ask you at trial concerning your ability to
19 identify the person coming out of the Clark Station?

20 A Yes, I think it was on our first meeting, what kind
21 of questions that --

22 Q What did they say to you?

23 A They just, certain questions, you know, what they
24 would ask me.

1 Q For example, do you recall any of those?

2 A If I was there at that day and time and where I lived
3 and where I parked, same questions you probably would ask me.

4 Q Did they -- did they ask you anything concerning the
5 physical makeup of the individual which you saw?

6 A No, not that I recall.

7 Q Did they ask you anything about his characteristics?

8 A Yeah, I mean they asked me the same questions, you
9 know, my -- what I saw, you know, and I told them what I saw,
10 you know, from what I told them from the beginning. Excuse
11 me. May I have a glass of water, please?

12 THE COURT: Sure. Vince, would you get him a glass
13 of water?

14 THE WITNESS: Thank you.

15 THE CLERK: Uh-huh.

16 MR. BARRY:

17 Q Prior to today have you ever talked with me?

18 A No, not that I recall.

19 Q Have you ever talked to the gentleman who was sitting
20 here a few minutes ago?

21 A Yeah, I spoke to him last time I was here for I came
22 here for a subpoena, and he asked me that -- that they
23 hadn't -- you guys had made me a mistake on giving me a
24 subpoena to show up and then I saw him this morning. He put

1 his hand on my shoulder and said good morning, Mr. Martinez.

2 Q Anything about the case, though?

3 A No.

4 Q When is the last time you spoke to Miss Griffin?

5 A Last Friday I think it was.

6 Q Did you speak to anybody from her office today?

7 A No.

8 Q Speak to Mr. Reynard?

9 A Yes, just hello.

10 Q The first time you met with Mark Foster in I believe
11 you said you thought it was late June, early July, this year?

12 A Yes.

13 Q When you -- when you spoke with him at that time did
14 you tell him that you had never seen a picture of Jamie Snow
15 or never seen him in a lineup or had never seen a picture of
16 or a live shot of the person who came out of the Clark
17 Station?

18 A No.

19 Q After your meeting of -- meeting with the State's
20 Attorney and Detective Katz where you asked for the picture
21 of the lineup and you looked at the picture of the lineup,
22 did you have occasion to talk to Mark Foster again?

23 A I -- yes, I did. He had gave me a call and he kept
24 on pushing to see me. He said I'll be over there in five

1 minutes. I said, well, I'm leaving. He said, oh, I'll be
2 over there in five minutes. I said okay. I got five
3 minutes. He was there in two minutes.

4 Q And did you talk to him at that time?

5 A Yes.

6 Q What did you tell him at that time?

7 A We just had a conversation that, you know, for
8 me -- he asked me -- oh, he had come over to ask me where I
9 was at at the gas station. He brought me a sheet, and he had
10 a picture on the sheet saying could you point out where you
11 were at at the gas station. So I said, that's all you
12 wanted. He goes, yeah. And so I put my finger on the sheet.
13 I said, this is where I was at. And he says, have you seen
14 any pictures? I said, you know, I saw a picture in the
15 newspaper. So...

16 Q What did you tell him about what you saw in the
17 newspaper?

18 A I just saw him -- I told him that the picture I saw
19 in the newspaper was the gentleman that I saw at the gas
20 station.

21 Q When you had the conversation with Mr. Foster, did
22 you -- did you tell him a couple times that you were giving
23 him information that was off the record?

24 A No, not that I recall.

1 Q Did you then see Mr. Foster a third time at your
2 house?

3 A Yes, I did.

4 Q And --

5 A It wasn't at my house. It was across the street.
6 Detective Katz had brought me a subpoena, and I told the
7 Detective Katz that I was leaving with my kids. And when I
8 was leaving, I saw a car parked next door but across the
9 street. And I recognized the, you know, Mark as for the last
10 two appearances I saw him. I backed up, and I said could I
11 help you. He goes, oh, I just was going to come over here
12 and talk to you. You got a minute? I said, no, told you
13 that if you need anything, get it from the State's Attorneys.
14 That's when he said, well, give me a call, and he gave me his
15 card and number.

16 Q Did you ever call him?

17 A No.

18 Q At that time, the third time that you saw Mr. Foster,
19 did you know that there were any proceedings filed in this
20 court about the identification and the fact that you had
21 seen --

22 A No.

23 Q -- the newspaper? Did you ever make the comment to
24 Mr. Foster the first time you saw him that something to the

1 effect they have the wrong people?

2 A No.

3 Q And the first time you met Mark Foster, how long did
4 you spend with him?

5 A Maybe a half hour.

6 Q But it wasn't until you saw the picture in the
7 newspaper that you actually thought you had seen a picture of
8 the guy, right?

9 A When I saw the picture in the paper, I had said that
10 this is the guy. This is the guy.

11 Q But that's the first time since 1991 that you saw a
12 picture that you could say this is the guy?

13 A That's correct.

14 MR. BARRY: Thank you. I have nothing further.

15 THE COURT: Okay. Mr. Reynard or Miss Griffin, who
16 is going to cross?

17 MR. REYNARD: Thank you, Your Honor.

18

19 CROSS EXAMINATION BY MR. REYNARD:

20

21 Q If I understand what you've said, Mr. Martinez, in
22 response to Mr. Barry's questions it is that in 1991 you had
23 numerous visits, at least several visits with the police and
24 that during the course of those several visits you told them

1 what happened and what you saw, gave them a description of
2 the person that you saw and during the course -- well, first
3 of all, is that true so far?

4 A That's correct.

5 Q Okay. And that you on one or perhaps more than one
6 occasion in 1991 when you were visited by the police you had
7 the opportunity to look at a few photographs one time and a
8 few photographs another time and then maybe on a third
9 occasion actually looked through part of a book?

10 A That's correct.

11 Q Of pictures?

12 A That's correct.

13 Q And during that period of time you never found a
14 photograph that you could say with certainty was the person
15 that you had seen come out of the gas station that Easter
16 Sunday evening?

17 A That's correct.

18 Q Okay. If I understand your testimony, it is that the
19 first time that you realized you knew who the man was was
20 when you saw his picture in the newspaper when he was
21 arrested late last year?

22 A That's correct.

23 Q But that you didn't tell -- you didn't call the
24 police about that or tell anyone about that other than

1 telling your wife?

2 A That's correct.

3 Q Now back in July, and I think we figured out it was
4 about July 18th, you visited in the State's Attorney's office
5 to discuss your testimony with Miss Griffin?

6 A That's correct.

7 Q Okay. Now, do you remember whether there was any
8 police officer present during a part of that interview?

9 A That was Detective Katz.

10 Q And was there anyone else that was present at least
11 during part of the time that you were visiting with
12 Miss Griffin?

13 A That's correct.

14 Q And who was that?

15 A That was yourself.

16 Q Okay. Now during the course of that interview was
17 Miss Griffin telling you what kinds of questions she was
18 going to ask so that you could be prepared for this nervous
19 experience?

20 A That's correct.

21 Q Okay. And did she tell you that she would ask you
22 about what happened that night about you taking your car to
23 that location, airing up the tires, hearing the pop and all
24 of those things that you've already related?

1 A That's correct.

2 Q Did she also tell you that she was going to ask you
3 about the lineup that you viewed back in 1991?

4 A Yes.

5 Q And did she tell you that she would probably show you
6 a photograph of that lineup during your testimony in court so
7 that you could look at that photograph again?

8 A That's correct.

9 Q And what, if anything, did you ask of her when she
10 mentioned that photograph?

11 A I asked her if she had a copy of the photograph, and
12 she said she did. And I asked her if I could see it.

13 Q And did she give you that photograph to look at?

14 A That's correct.

15 Q I'm wondering where that photograph went.

16 THE COURT: Mr. Reynard, it's right here.

17 MR. REYNARD: Oh, thank you.

18 Q I'm going to show you what's already been marked for
19 identification as People's exhibit number 11 and ask if you
20 recognize it.

21 A That's correct.

22 Q What is it?

23 A That's a photograph of the lineup that Mrs. Griffin
24 showed me.

1 Q Okay. And did you look at that photograph for a few
2 moments?

3 A Yes, I did.

4 Q And what, if anything, did you do or say after
5 looking at that photograph for a few moments?

6 A I had asked Miss Griffin, I said this is the man.
7 This is the guy right here. And I said, isn't it? I said,
8 this is the guy.

9 Q Now when you said isn't it, did she answer you?

10 A No.

11 Q Did I answer you?

12 A No.

13 Q Did Katz answer you?

14 A No.

15 Q Okay. Then what was said by anyone?

16 A I said, is this the guy. Isn't this the guy? Cause
17 this is the guy, I said.

18 Q Why did you -- did you explain why you were able to
19 recognize him?

20 A Yes, because of the eyes.

21 Q Okay. Now, at some point during that conversation in
22 Miss Griffin's office did you also take a look at what's been
23 marked for identification as People's exhibit number 36?

24 A That's correct.

1 Q And does that appear to be a photograph that -- well,
2 tell me where you recognize that photograph from.

3 A From the Pantagraph.

4 Q Okay. Now, this is kind of important, cause earlier
5 you got me a little confused. During the conversation with
6 Miss Griffin which of these photographs did you look at
7 first?

8 A This one.

9 Q Okay. And where did you see that photograph?

10 A In the Pantagraph.

11 Q Okay. Now, during the course of the interview in
12 Miss Griffin's office was the Pantagraph photograph there?

13 A No. Well, no, no, not at the newspaper but this
14 picture was.

15 Q And so did you see this picture in her office?

16 A Yes.

17 Q Okay. And then you looked at this picture, or which
18 picture did you look at first that day in her office?

19 MR. BARRY: Objection, it's been asked and
20 answered.

21 THE COURT: Overruled.

22 MR. REYNARD:

23 Q If you recall.

24 A I don't recall. But I saw both pictures there at the

1 office that day.

2 Q Okay. Explain to the Judge, what, if any,
3 differences you observed in the two or that you observed in
4 the two photographs when you saw them in Miss Griffin's
5 office?

6 A The eyes of the person on both photographs that
7 caught my attention.

8 Q Are they similar or dissimilar in your judgment?

9 A No, they're similar.

10 Q Were there any dissimilarities that you observed?

11 A Not on the eyes, no.

12 Q Okay. Any other appearances that were similar or
13 dissimilar?

14 A The hair is different being longer.

15 Q What about the age of the individuals?

16 A Yes, aged.

17 Q Which one looks older to you?

18 A This one looks older to me.

19 Q You're pointing to number?

20 A 36.

21 Q Okay. Now, with regard to your having viewed those
22 photographs in Miss Griffin's office, did the presence of
23 those photographs influence your belief as to who the man is
24 that you saw on March 31st, 1991?

1 A When I saw this picture, I knew this was the
2 gentleman, the picture in the lineup, and that is the person
3 that was at the gas station in '91.

4 Q Is there anything that Miss Griffin did or I did or
5 Detective Katz did that in your judgment influenced you to
6 say that?

7 A No.

8 Q And are you -- what degree of certainty do you have
9 with respect to who the man was that you identified in 1991?

10 A I'm 85 percent sure.

11 Q Okay. When you were speaking with Mr. Foster
12 concerning the Pantagraph picture or the picture that you saw
13 in the newspaper, which of the three visits was it with
14 Mr. Foster where you had that part of --

15 A It was the second visit.

16 Q Now, anytime during that conversation did you tell
17 Mr. Foster that the newspaper picture was definitely not the
18 man you saw come out of the gas station that Easter evening?

19 A No.

20 Q It's quite the opposite, isn't it?

21 A It's quite the opposite.

22 MR. REYNARD: Nothing else at this time.

23 THE COURT: Okay. Mr. Barry?

24 MR. BARRY: Thank you, Your Honor.

1 REDIRECT EXAMINATION BY MR. BARRY:

2

3 Q At the time you saw the newspaper picture, I think
4 you said that was late 1999?

5 A Whenever it came out.

6 Q It was before you met Mr. Foster?

7 A That's correct.

8 Q But you didn't tell Mr. Foster at that time?

9 A No, he had brought up the conversation if I saw any
10 pictures in the paper or anything.

11 Q Yes.

12 A So...

13 Q Well, how did you respond to that?

14 A I said, yes, I saw a picture in the paper.

15 Q Did he go on to ask you anything about whether or not
16 that changed your opinion about being able to identify
17 anybody?

18 A Not that I recall.

19 Q And you didn't suggest that the picture you saw in
20 the newspaper was actually the person you saw leaving the
21 Clark Station?

22 MR. REYNARD: Your Honor, that is not the
23 testimony.

24 MR. BARRY: I'm just asking whether or not he

1 brought it up.

2 THE COURT: Let me ask the reporter to read back
3 the question of Mr. Barry that was objected to, please.

4 (The court reporter read back the last
5 question.)

6 THE COURT: And, Mr. Reynard?

7 MR. REYNARD: That misstates the evidence. The
8 witness had just completed saying that he told Mr. Foster
9 that was the person in the photograph, and counsel just said
10 and you've indicated or you didn't suggest that it was the
11 person. It's a prescription for confusion in the first
12 instant, but it certainly misstates what the evidence is.

13 THE COURT: Isn't it asked and answered?

14 MR. BARRY: No, because we got two different
15 visits. That question was premised by the first visit that
16 he had with Mr. Foster.

17 THE COURT: Which question? Which question?

18 MR. BARRY: Whether or not he brought up the fact
19 that the person he saw in the newspaper was the person he saw
20 leaving the Clark Station. He is testifying now that he did
21 tell him on the second time.

22 THE COURT: Who did he testify to that he told him
23 on the second time?

24 MR. BARRY: That he told Mr. Foster.

1 THE COURT: When did he testify to that?

2 MR. BARRY: Just --

3 THE COURT: That's what I'm asking you. Was it
4 Mr. Reynard's exam or yours?

5 MR. REYNARD: Both.

6 MR. BARRY: Both.

7 THE COURT: Go ahead.

8 MR. BARRY: Now I'm asking him why then when he saw
9 Mark Foster two weeks before that --

10 MR. REYNARD: I'm going to withdraw the objection
11 with that clarification.

12 THE COURT: I'm following then too. Why don't you
13 restate the question so Mr. Martinez can answer the question.

14 MR. BARRY:

15 Q Mr. Martinez, I'm not trying to confuse you. The
16 second time you met with Mr. Foster you told him about seeing
17 the newspaper and identifying him as the person you saw
18 leaving the Clark Station, right?

19 A That's correct. He brought up about seeing if I'd
20 seen any pictures.

21 Q Now the first time you saw Mr. Foster was just a
22 couple weeks before that. And you were talking about the
23 incident. And you were talking about the identification.
24 Did you ever suggest at that time that you had actually seen

1 the newspaper picture and that the newspaper picture was
2 indeed the person that you identified as leaving the Clark
3 Station?

4 A No, the only time we talked about the first time is
5 when he asked me what I had said to the State's Attorneys. I
6 said, well, you can get it from the State's Attorneys, and
7 then he brought a copy of the statement that they got from
8 the State's Attorneys I suppose and he showed me. He says,
9 is this what you said to the State's Attorneys, and I said
10 yes.

11 Q But you didn't say since then though I've seen the
12 picture in the newspaper or anything like that?

13 A After the first time?

14 Q At the first meeting.

15 A At the first meeting. No, all we talked about was
16 what I said to the State's Attorney. He says I got a
17 statement from the State's Attorney of what you said; and he
18 said is this correct, and I said yes.

19 Q If I understand correctly, you visited with the
20 police at least two occasions viewing pictures, one occasion
21 reviewing a mug book and then one occasion for the lineup.
22 Is that accurate?

23 A No, there was -- there was a couple times that
24 they -- when they stopped by the house that they brought a

1 album full of photos.

2 Q You knew they were looking to you for an
3 identification of this individual, didn't you?

4 A That's correct.

5 Q And you knew that when you saw the newspaper picture
6 in late '99, didn't you?

7 A That's correct.

8 Q Yet, you didn't tell anybody about this for six,
9 seven months except your wife, that this was the guy?

10 A Well, as being a witness, they subpoenaed me, so I
11 figured, well, I'm going to tell them in court when I go to
12 court.

13 Q Do you still have those pictures up there?

14 A That's correct.

15 Q Just so I'm clear, when you were in this building
16 back about a month ago when you were talking about
17 Mr. Reynard, Miss Griffin and Detective Katz, you saw this
18 picture first, correct, that's People's 36?

19 A I don't recall which one I saw first, but I
20 saw -- thought I did see that one first.

21 Q People's 36?

22 A Right.

23 Q Then you went on to talk about whether or not they
24 had a picture of the lineup?

1 A That's correct, conversation came up on questions
2 that she was going to ask me.

3 MR. BARRY: Judge, has People's 36 been offered?

4 THE COURT: Not 36.

5 MR. REYNARD: I'll offer it.

6 MR. BARRY: Okay. I have no objection.

7 THE COURT: Okay, 36 is admitted.

8 MR. BARRY: And 11 already has been I think.

9 THE COURT: Yes, it has.

10 MR. BARRY: I have nothing further. Thank you.

11 THE COURT: Mr. Reynard?

12 MR. REYNARD: Nothing, Your Honor.

13 THE COURT: All right. You may step down.

14
15 (Witness excused.)

16
17 MR. REYNARD: You want Detective Katz.

18 MR. SKELTON: Judge, would it be possible just to
19 take a couple minutes?

20 THE COURT: Is Katz your last one?

21 MR. BARRY: Yes.

22 THE COURT: All right. We'll take a five-minute
23 recess.

24 (Recess.)

1 THE COURT: We'll go back on the record in
2 99 CF 1017. Parties same as before.

3 We're going to bring the jury in for one remaining
4 voir dire question and then go on to excuse them so that we
5 can finish up our motion rather than having them wait around.
6 So I'm going to call the jury in at this time.

7 (The following proceedings were had in the
8 presence and hearing of the jury.)

9 THE COURT: All right. Show for the record the
10 jurors and alternates have appeared, although not sworn yet.

11 And we've got one more question, ladies and
12 gentlemen, that I will make inquiry about first and then see
13 if any of the attorneys have any questions.

14 Some of you have been asked this question. You
15 don't need to answer it again. But not all of you had. And
16 that is, there is another potential witness who may testify
17 by the name of Mark Foster of Bloomington. So those of you
18 who have not been asked whether or not you know him or have
19 heard of him, you don't need to raise your hand. But if
20 anyone else recognizes his name, thinks they know that
21 person, please raise your hand. No one else knows Mark
22 Foster.

23 Okay. I take it, Mr. Reynard, Mr. Skelton, you
24 have no questions?

1 MR. SKELTON: That's correct, Your Honor.

2 MR. REYNARD: That's correct.

3 THE COURT: All right. Ladies and gentlemen, the
4 other matter is this. We have worked into the noon hour, and
5 we are still working on some matters that do not need the
6 jury. And we're trying to diligently complete them. We're
7 afraid that by the time we complete them, you're going to
8 come in here for a very short period of time and then go
9 home. So we're not going to further inconvenience you.

10 What I'm going to ask you to do is this. Once
11 again, not discuss the case with anyone, including spouses or
12 friends. Don't read anything about it. Don't listen or view
13 any TV articles about it. And come back tomorrow at nine
14 o'clock. We'll go until we're done. We're going to start
15 tomorrow fresh with the trial.

16 The only thing I need to let you know is,
17 Mr. Rosendale, you do not have to come back. But,
18 Mr. McClure, you're going to be in his seat and don't worry
19 about it today. We'll make a chart up so we know where we're
20 at. We're just going to move Mr. McClure over to
21 Mr. Rosendale's spot for tomorrow. So, Mr. Rosendale, you
22 don't need to be here. Tomorrow we'll have then 12 jurors
23 and two alternates.

24 We will begin tomorrow at nine o'clock. So at this

1 time I'll ask the bailiffs take charge of all the jurors, and
2 you may gather your belongings. We'll see you back tomorrow
3 morning and begin the trial.

4 (The following proceedings were had outside
5 the presence of the jury.)

6 THE COURT: And, Mr. Skelton, when that material
7 comes from Bloomington, would you just let Vince know so you
8 can go ahead and get Vince started? Oh, he was going to call
9 another witness instead.

10 MR. SKELTON: Right, Foster first. I just want to
11 indicate I've given you a copy of this and ask to file it
12 instanter.

13 MR. REYNARD: Acknowledge receipt.

14 THE COURT: Then are you prepared to go out of
15 order, take one of your witnesses, Mr. Reynard, then?

16 MR. REYNARD: Yes.

17 THE COURT: Do we need Mr. Barry?

18 MR. SKELTON: Yes, I'll get him. He's right out
19 here.

20 THE COURT: All right. Show for the record
21 Mr. Barry is back in. We're going to go out of order to some
22 evidence on behalf of the People.

23 Mr. Reynard?

24 MR. REYNARD: I'd like to call Mr. Foster back to

1 the stand, if he would retake the stand and acknowledge that
2 he's still under oath.

3 THE COURT: All right. Mr. Foster, if you want to
4 go ahead and take the witness stand again.

5 MR. REYNARD: I would ask that Miss Griffin is not
6 present since she was present at the conversation which I'm
7 now going to inquire about from Mr. Foster.

8 THE COURT: All right.

9

10 (Witness recalled.)

11

12 M A R K F O S T E R

13 recalled as a witness on behalf of the People of the State of
14 Illinois, having been previously duly sworn, was examined and
15 testified as follows:

16

17 DIRECT EXAMINATION BY MR. REYNARD:

18

19 Q Would you state your name again for the record?

20 A Mark Foster.

21 Q Same Mark Foster that testified earlier this morning?

22 A Yes, sir.

23 Q Mr. Foster, do you recall that we, during your
24 earlier testimony, we engaged in a little dialogue about the

1 information that was either new information or was consistent
2 information vis-a-vis what was in the discovery?
3 Specifically I'm asking you about information that Mr. Luna
4 shared with you during and now I'm not clear as to whether or
5 not it was the first conversation or the second conversation,
6 in other words, when he told you I saw this person's picture
7 in the newspaper, he was definitely not the person I saw at
8 the gas station. Am I getting you back to this area of
9 inquiry, though?

10 A Correct. I haven't spoke to Mr. Luna yet though.

11 Q What's that?

12 A I haven't spoke to a Mr. Luna yet, though.

13 Q I said Mr. Luna, and I meant Mr. Martinez. Excuse
14 me.

15 A Right.

16 Q Was that the first or second contact with
17 Mr. Martinez in which he made that comment about the
18 newspaper picture?

19 A It was the first.

20 Q Okay. Now, I want to direct your attention to a
21 conversation that I had with you with Assistant State's
22 Attorney Teena Griffin also being present earlier today, and
23 you recall that Mr. Skelton invited me to speak with you and
24 then you and I and Miss Griffin went to the conference room

1 right outside the courtroom?

2 A Yes.

3 Q And is it fair to say that I asked you that -- I told
4 you that I wanted to find out about what it was that
5 Mr. Martinez told you at the various times he talked to you?

6 A Yes.

7 Q And do you recall I asked you how many times you
8 spoke with him?

9 A Yes.

10 Q And do you recall that you told me that you had
11 spoken with him on three occasions?

12 A Yes.

13 Q And did you observe me to be taking notes during the
14 course of our conversation?

15 A Yes, sir.

16 Q And did I ask you what was said during the first
17 conversation by Mr. Martinez to you?

18 A Yes.

19 Q And did you relate to me that basically all he told
20 me was verbatim from the report?

21 A That's correct.

22 Q Okay. Did you at any time tell me that Mr. Martinez
23 had specifically seen a newspaper picture of codefendant
24 Jamie Snow and had said that he was not the person who he saw

1 at the gas station?

2 A No, I did not.

3 Q And is that because you thought that was verbatim
4 from the report?

5 A No, sir.

6 Q And why did you omit to tell me about this key part
7 of the conversation?

8 A Quite honestly what it was we didn't have time to go
9 into the greatest detail. Actually we were interrupted
10 halfway through the conversation. I think if we had a little
11 more time, we would have gotten to that fact.

12 Q That was in the first conversation?

13 A Yes, sir.

14 Q We talked about that first?

15 A Yes, sir.

16 Q Then we went on to the second conversation?

17 A Yes, sir.

18 Q I asked you whether or not you told me everything
19 that was in the first conversation, and you didn't tell me
20 anything new, did you?

21 A I'm not following your line of questioning.

22 Q Did I ask you did you tell me everything that was
23 contained in the first conversation and didn't you say yes?

24 A I don't recall that exact question, no.

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MR. REYNARD: Nothing further.

THE COURT: Mr. Barry?

CROSS EXAMINATION BY MR. BARRY:

Q Mark, if I understand correctly, when Mr. Martinez referred to anything about the newspaper article during the first conversation you had with him, he still said that even that guy was not the guy he saw leaving the Clark Station?

A Correct.

Q Which was consistent with the fact that Martinez had not seen -- still had not seen a photo of the guy he claims to have seen leaving the Clark Station?

A Correct.

MR. BARRY: Thank you.

THE COURT: Anything further, Mr. Reynard?

REDIRECT EXAMINATION BY MR. REYNARD:

Q Well, let's just make it absolutely clear. The newspaper photo of Jamie Snow's -- of Jamie Snow at the time of his arrest to your knowledge was never shown to Mr. Martinez. Is that what you're saying? Or are you saying that you assumed that that newspaper photo of him is

1 disclosed somewhere in the discovery as having been shown to
2 Mr. Martinez?

3 MR. BARRY: I think that's too confusing a
4 question.

5 MR. REYNARD: I'll withdraw it. Let me ask it this
6 way.

7 Q Is it your testimony that the newspaper photo of
8 Mr. Snow at the time of his arrest, that that picture is
9 disclosed by the discovery to have been shown to
10 Mr. Martinez?

11 A No, I did not believe it had been.

12 Q Okay. But the sole substance -- the sum total of the
13 substance of the conversation as you related it to me in our
14 prehearing conversation is that all he told me was verbatim
15 from the report. Isn't that all you told me?

16 A Yes, sir.

17 MR. REYNARD: That's all I've got.

18 THE COURT: Anything further, Mr. Barry?

19 MR. BARRY: No, Your Honor.

20 THE COURT: All right. You may step down.

21

22 (Witness excused.)

23

24 MR. BARRY: Is Mark Foster now released too?

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MR. REYNARD: Yes.

MR. BARRY: Thank you.

THE COURT: Now we need to check on that material from Bloomington?

MR. REYNARD: It's here.

THE COURT: It's here? Have you both looked at it. Do you need a minute to look it over?

MR. SKELTON: Yes.

THE COURT: Okay, go look at it.

(Recess.)

THE COURT: We're back on the record in 99 CF 1017. Parties appear same as before. We're ready to go to the last witness.

(Witness sworn.)

D A N K A T Z

called as a witness on behalf of the Defendant herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. BARRY:

Q Would you please state your name?

A Dan Katz, K-A-T-Z.

1 Q And what is your employment?

2 A Police officer for the City of Bloomington.

3 Q How long have you been so employed?

4 A About 23 1/2 years.

5 Q And what capacity are you within the police
6 department now?

7 A I'm temporarily assigned to the detective division.

8 Q And how long have you been a detective?

9 A About 17 years.

10 Q During the course of your duties as a detective, did
11 you have occasion to work on and investigate into this case,
12 the shooting at the Clark Station back in 1991?

13 A Yes, I did investigate the case.

14 Q And during that course of investigation, did
15 you -- well, how were you brought into the case?

16 A It was the day after Thanksgiving of 1998 when I
17 received a phone call.

18 Q And so that was your first contact with this case?

19 A That was when I began to work on the case pretty much
20 on a full-time basis. I had done little things off and on
21 from probably '92 through '94, '95, helped out when asked.

22 Q Okay. Did you have any occasion to meet Danny
23 Martinez prior to '98?

24 A I don't believe so, no.

1 Q Would you have had -- I'm sorry, you said '92 is when
2 you said you started doing things in the case?

3 A I'm going to guess that I did a few things by helping
4 out Detective Crowe and other detectives sometime after this
5 happened.

6 Q So you would not have had anything to do with regard
7 to setting up the lineup in '91 or any witness interviews in
8 '91?

9 A No, I was involved in the -- in another case.

10 Q Okay. You're familiar with the written discovery in
11 this case?

12 A I believe so, yes.

13 Q And as part of that written discovery, have you been
14 able to review the findings of the lineup that Mr. Martinez
15 participated in as far as an observer?

16 A I think I've read that report, yes.

17 Q And also reviewed the reports with regard to
18 Mr. Martinez looking at groups of photos and mug books?

19 A I think I've either read something about that or was
20 told by another detective about that.

21 Q Okay. Now it is true that the lineup that
22 Mr. Martinez participated in as an observer included Jamie
23 Snow?

24 MR. REYNARD: At this point, Judge, I'm going to

1 object on the basis of lack of personal knowledge foundation.
2 I think the witness has indicated his sources of information
3 are not from personal knowledge but from what others told him
4 or what he read. I think frankly these matters are also
5 undisputed. The motion and its response show that this is
6 not an issue.

7 MR. BARRY: If we can stipulate to the fact, I can
8 move right along into the next line of questions.

9 THE COURT: What facts?

10 MR. BARRY: If we could stipulate to the fact that
11 this witness has been informed and is aware of the fact that
12 James Snow was in the lineup in 1991.

13 MR. REYNARD: His awareness is what's irrelevant.
14 I'm objecting to the awareness of it as being irrelevant.
15 I'm objecting to the awareness because it's hearsay. His
16 awareness isn't an issue in this motion. The fact is the
17 lineup is what it is, and we've not produced any factual
18 issue with respect to this lineup.

19 THE COURT: So I understand it, Mr. Barry, you're
20 asking the witness whether he's familiar with the
21 circumstances of the actual live lineup which took place and
22 it is now embodied in exhibit 11?

23 MR. BARRY: Yes, if he's familiar with the findings
24 as a result of that lineup. I'm not asking if he was

1 actually there. Obviously, he was not.

2 THE COURT: Okay. Well, then why don't you ask
3 that question.

4 MR. BARRY: Okay.

5 Q Detective, you're familiar with the findings which
6 came as a result of Mr. Martinez viewing a lineup in 1991?

7 A Yes, I have read a report about that.

8 Q And do you find that report to be credible?

9 MR. REYNARD: Objection, Your Honor, finding of
10 credibility, as well as what was even contained in the report
11 to prove that he is literate is irrelevant.

12 THE COURT: Sustained.

13 MR. BARRY: Okay.

14 Q Are you aware or not Mr. Martinez ever picked anybody
15 out of that lineup --

16 MR. REYNARD: Objection, same objection.

17 MR. BARRY:

18 Q -- who was the same individual who he witnessed
19 leaving the Clark Station on the evening of March 31st, 1991?

20 THE COURT: Okay. The objection is sustained.

21 MR. BARRY:

22 Q Mr. Katz, when was the first time you talked to Danny
23 Martinez?

24 A I'm going to guess that it was sometime in 1999 I

1 believe with another detective.

2 Q Where did the conversation take place?

3 A At Mr. Martinez's residence.

4 Q And do you remember the name of the other detective?

5 A Detective Barkes.

6 Q You had occasion to talk to Mr. Martinez at that
7 time?

8 A I was more or less there to meet him, and Detective
9 Barkes I believe did the majority of the conversation.

10 Q At that time what was discussed with -- what did you
11 see and hear being discussed with Mr. Martinez?

12 A It was more or less going over the same facts that
13 apparently he had given to the police in the past about what
14 happened the night of March 31st, 1991.

15 Q Did part of that conversation include the
16 identification issue?

17 A No, sir.

18 Q What was it that he was -- what was it that he was
19 talking about?

20 A That he came home from some Easter gathering. He
21 went to the gas station, put air in his tires. What he
22 observed, what he heard at the gas station that night, that's
23 what was talked about.

24 Q Okay. Was it discussed the fact that he passed right

1 by the gentleman that was leaving the Clark Station?

2 A Yes, sir.

3 Q Was it discussed what Mr. Martinez described as the
4 physical makeup and characteristics of the gentleman he
5 passed?

6 A Yes, sir.

7 Q Was it also discussed whether or not Mr. Martinez had
8 identified anybody in a lineup or looking at pictures? Was
9 that ever discussed?

10 A I don't -- I don't -- no, I don't think so.

11 Q You said this was 1999?

12 A I believe it was, yes.

13 Q Was it before or after Jamie Snow had been
14 apprehended?

15 A Prior to.

16 Q All right. Did you or the other detective ever ask
17 Mr. Martinez at that time to look at more pictures?

18 A No, sir.

19 Q Did you show him any more pictures?

20 A I don't believe so, no.

21 Q Did you have an opportunity to meet with -- well, did
22 you take any notes at all at that meeting that you had with
23 Mr. Martinez?

24 A I don't remember, but I don't believe so. I think

1 Detective Barkes ran the interview or talked to him and he
2 might have made a report on it.

3 Q When was the next time you met with Mr. Martinez?

4 A I know there was one at the Bloomington Police
5 Department. I guess you would call it a kind of a trial-prep
6 meeting, and I don't know if there is any in between his
7 house and that one.

8 Q Do you remember when this meeting at the Bloomington
9 Police Department was?

10 A Could have been the summer of '99 to the fall of '99.

11 Q The summer of '99? Who was present at that meeting?

12 A Both attorneys, Charles Reynard, Teena Griffin,
13 myself, and I believe Detective Barkes.

14 Q Okay. And what do you recall being discussed at that
15 time?

16 A Generally the same information as to what he saw on
17 March 31st, 1991, what he heard.

18 Q Were you looking to Mr. Martinez for purposes of
19 identification of the person who was coming out of the Clark
20 Station?

21 A I don't understand what you mean when you say
22 looking.

23 Q Well, with the investigation that was going on in the
24 case, was Martinez one of your identification witnesses?

1 A He was one of the witnesses that saw the individual
2 coming out of the gas station.

3 Q Okay. Up to that point were you familiar with
4 Mr. Martinez ever having made a positive ID from any
5 pictures, any lineups or anything on the individual that he
6 claimed was seen coming out of the Clark Station?

7 A No, he hadn't made a positive identification of
8 anybody.

9 Q When was the next time you met with Mr. Martinez?
10 Now if this was the summer or fall of '99, when was the next
11 time?

12 A I served him a subpoena I believe for trial. I gave
13 him some continuances, so off and on from the fall of '99
14 'til just last week, two weeks ago.

15 Q And you would have intermittent contact with him?

16 A Dropping off subpoenas, continuances, things like
17 that, yes.

18 Q So how many times would you say you actually talked
19 to him even if it was just to say here's your subpoena, you
20 know, be in court next week, Monday at nine o'clock, between
21 the summer of '99 and the present?

22 A Four or five times, maybe six max.

23 Q After the summer meeting of '99 where it was for
24 trial prep, did you ever have occasion to meet with

1 Mr. Martinez as far as trial preparation again?

2 A Yes, I did.

3 Q When was the next time?

4 A July the 18th of the year 2000.

5 Q Did you ever meet with him before that in April, May
6 or June of 2000?

7 A I don't think so.

8 Q Okay. So from summer or early fall of '99 except for
9 serving him with a subpoena or something, you didn't meet
10 with him again until July 18th of 2000?

11 A To sit down and trial prep, that's correct.

12 Q And where did this meeting take place?

13 A Sixth floor, McLean County Law and Justice Center,
14 State's Attorney's office.

15 Q Who was present?

16 A Myself, Teena Griffin, Mr. Martinez, and then
17 partially through the interview Mr. Reynard came in.

18 Q And were you questioning Mr. Martinez?

19 A No, sir.

20 Q Was Teena Griffin questioning Mr. Martinez?

21 A Yes, she was.

22 Q What was being questioned -- what did you observe and
23 hear being questioned of Mr. Martinez?

24 A Miss Griffin was going through the areas that

1 Mr. Martinez would be testifying about. And one of the areas
2 that they got to was the -- the lineup.

3 Q And what do you recall being asked of Mr. Martinez?
4 What do you recall him saying?

5 A If he remembered being at the lineup and he did, and
6 he asked if he could see a picture of that lineup.

7 Q Did he say anything before that? Did he say anything
8 about, you know, he thought he could identify the guy?

9 A I believe he stated that if he saw this individual in
10 the same circumstances, the same lighting, et cetera, that he
11 thought he might be able to identify him.

12 Q Same circumstance, the same lighting as what, the
13 lineup or the parking lot at the Clark Station?

14 A I believe he was talking about the parking lot at the
15 Clark gas station.

16 Q Did you hear Mr. Martinez say anything about the fact
17 of seeing the newspaper picture?

18 A At that point, at that point, no.

19 Q Did Miss Griffin give him a copy of the picture of
20 the lineup?

21 A Yes, she did.

22 Q And did he then identify somebody in that lineup?

23 A Yes, he did.

24 Q Do you ever -- do you ever remember him looking at

1 any other pictures at that time during that meeting?

2 A He did look at another picture after he saw the
3 lineup picture, yes.

4 Q Did he look at any other pictures before he looked at
5 the lineup picture?

6 A No, I don't believe so.

7 Q Do you recall seeing anybody taking notes at that
8 meeting at any time?

9 A No.

10 Q Did you generate any sort of report?

11 A No, sir.

12 Q Did you find -- well, were you surprised when
13 Mr. Martinez actually identified somebody in the lineup
14 picture?

15 A Surprised, I don't know if that's the right word. I
16 was -- I guess you could say I was surprised.

17 Q It had been nine years. He hadn't really identified
18 anybody until now, right?

19 A That's correct.

20 Q Did that -- did that in any way alter the trial
21 preparation that you were undertaking?

22 A I don't understand that question.

23 Q Well, did that allow you to put greater emphasis on
24 Mr. Martinez's testimony for the ID?

1 A No, sir.

2 Q Did it change any of the lines of questioning or the
3 areas of questioning of Mr. Martinez?

4 MR. REYNARD: Objection, relevance.

5 THE COURT: Sustained.

6 MR. BARRY: Judge, if I might be allowed a little
7 leeway here, I'm just getting into why there was not any sort
8 of report generated.

9 THE COURT: Then ask him that.

10 MR. BARRY:

11 Q Did you generate any report?

12 A No, sir.

13 Q In regards to these findings?

14 A No.

15 Q Did you not find this to be a very significant change
16 in his testimony?

17 MR. REYNARD: Objection, relevance, in terms of
18 significance.

19 THE COURT: He may answer that.

20 THE WITNESS: Could you repeat the question,
21 please?

22 MR. BARRY:

23 Q Did you not find this to be a significant change in
24 the context of Mr. Martinez's testimony?

1 A It was a change, yeah.

2 Q And would you consider the identification of the
3 person coming out of the Clark Station to be a significant
4 issue in this case?

5 A I just don't think that he sat there and said one
6 hundred percent this is the guy that came out of the Clark
7 gas station.

8 Q My question to you, though, was, isn't the
9 identification of the person coming out of the Clark Station
10 a significant issue in this case? Wouldn't you think it
11 would be?

12 A No, because it was not the defendant coming out of
13 the gas station.

14 Q Okay. If it would have been the defendant, would it
15 have been a significant issue in this case?

16 MR. REYNARD: Objection, relevance.

17 MR. BARRY: Judge --

18 THE COURT: Go ahead.

19 MR. BARRY: When -- when the witness said, well,
20 wasn't the defendant -- well, it wasn't the defendant, the
21 court is well aware of the correlation between James Snow and
22 the defendant and this case and this case proceeding first,
23 so I'm asking her placing it in the same position if he wants
24 to characterize it that way. I'm just asking doesn't he feel

1 that is a significant issue in this case.

2 THE COURT: Okay, the objection is sustained.

3 MR. BARRY:

4 Q Detective Katz, did you make any notation of the fact
5 that Mr. Martinez had now changed and actually IDed somebody
6 who he thought to be the person coming out of the Clark
7 Station?

8 A No, sir.

9 Q Did you subsequently ever make any written memoranda
10 concerning that change?

11 A No, sir.

12 Q Is there a standard operating procedures manual with
13 the Bloomington Police Department?

14 A Yes, there is.

15 Q And are there guidelines as to when matters should be
16 reduced to writing, as far as you know?

17 A Not that I'm aware of. I know there is an SOP on
18 report writing that explains how you fill out a report.

19 Q Are you encouraged to reduce to writing matters that
20 are of significance in a case?

21 A This was not where I was investigating a case. I was
22 not doing any questioning. I wasn't doing any talking. This
23 was trial prep done by the attorneys with a witness.

24 Q Okay. My question was, though, does the SOP dictate

1 that relevant and pertinent issues in a case should be
2 reduced to writing?

3 MR. REYNARD: Objection.

4 THE COURT: What's the objection?

5 MR. REYNARD: I don't see how it's relevant what
6 the SOP says.

7 THE COURT: I don't know. He may answer. I don't
8 know whether it will be.

9 THE WITNESS: I don't know if it does or not.

10 MR. BARRY:

11 Q Okay. Are you encouraged -- if there is no formal
12 policy, are you encouraged informally to reduce things to
13 writing which are pertinent and substantive matters in cases?

14 MR. REYNARD: Your Honor, I'm going to object again
15 on relevancy grounds. If he can somehow suggest the
16 circumstances under which a police officer is expected to
17 make some sort of memoranda recording of circumstances, maybe
18 this could be made relevant. But this is blanket are you
19 supposed to write stuff down that's important, period, or,
20 question mark, I just think is improper.

21 THE COURT: Well, I understood the question to be
22 are you encouraged to write them down if there is no written
23 policy, and I think that is afield so I'll sustain the
24 objection.

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MR. BARRY:

Q Your personal experience going to be 22 years I think you said you've been with the Bloomington Police Department?

A If, yes --

Q Twenty-three years. And in your years as a detective if -- if somebody makes an ID and they are an identification witness, do you try to reduce that to writing --

MR. REYNARD: Objection.

MR. BARRY: -- make a statement?

THE COURT: Is that the end of the question?

MR. BARRY: Yes.

MR. REYNARD: The objection is relevancy without it, limited circumstances relating to the professional responsibility of the officer in an investigative capacity or some other capacity. Maybe that's to be assumed, but I don't know any longer if that is proper to assume that.

THE COURT: Why don't you explain to me once more, if you will, Mr. Barry, what it is you want him to tell you. Give me your question again.

MR. BARRY: First of all, in the course of his employment when he's investigating the matter when there is an identification of a suspect when that person gives a statement with regard to the identification of the suspect, is that generally reduced to writing?

1 THE COURT: Okay. Does that sufficiently narrow
2 it, Mr. Reynard?

3 MR. REYNARD: It does sufficiently narrow it, and I
4 will object on the basis that that question is not relevant
5 to the circumstances under inquiry because the officer was
6 not investigating the case at the time that he did not write
7 something down.

8 THE COURT: Why isn't Mr. Reynard right about that,
9 Mr. Barry?

10 MR. BARRY: Well, if the -- if the detective wasn't
11 investigating, why is he sitting in the meeting if there is
12 continuous investigation going on? As the court is well
13 aware, there is continuous investigation going on throughout
14 the trial. And there is new information in this case, a
15 perfect example of all of a sudden, boom, July 18th, there is
16 new information right there.

17 THE COURT: Because you say it's investigation
18 doesn't mean it's investigation is the point here. The
19 witness said he was not investigating. You want to know if
20 you were investigating would you have you written it down.
21 Your argument is preserved. He has told you he wasn't
22 investigating. You don't have to like that.

23 You can argue whatever you want, put on any
24 contrary evidence you like. You don't like it apparently.

1 But that doesn't make your question relevant when you change
2 the facts and say when you are investigating, do you write
3 down when someone made an ID because those aren't the facts
4 here. He said it was a trial prep. It wasn't an
5 investigation. So I have to agree with Mr. Reynard that that
6 question is not relevant. If you want to ask him in trial
7 prep does he make notations of IDs that are made, you may do
8 so.

9 MR. BARRY: Thank you. That was my next question.

10 Q During trial prep, do you make notes?

11 A I don't take notes in trial preps.

12 Q Okay. If -- on July 18th did you consider yourself
13 to no longer be investigating in this case?

14 A That evening my job was to have contacted the
15 witnesses, some witnesses that day, schedule appointments,
16 make sure they met with both the attorneys and that was my
17 job. I was not investigating. I was more of a, I guess, a
18 secretary making the appointments for the attorneys that
19 night so they could prep their witnesses for the upcoming
20 trial.

21 Q Have you done any investigation in this case since
22 July 18th, 2000?

23 A Yes, sir.

24 Q So the investigation was continuing. It was still

1 ongoing July 18th?

2 A As I get assignments from the State's Attorney's
3 office, things they want accomplished, yes, I will go do that
4 myself, Detective Barkes. So while we're doing those things,
5 I guess you could say we're still investigating. But that
6 particular night it was trial prep. The witnesses were
7 talking with the attorneys. I was not investigating. I
8 wasn't questioning anybody. I wasn't taking notes. I wasn't
9 involved in those interviews.

10 Q So regardless of what information would have come up
11 during trial prep, you would not have put the investigator's
12 hat back on. Is that what you're saying, didn't matter what
13 came up?

14 MR. REYNARD: Objection to the hypothetical. I
15 think the fact of the matter is he said he didn't put his
16 investigator's hat on and he didn't take notes.

17 THE COURT: Yeah, I think that's too speculative
18 too. I'll sustain it.

19 MR. BARRY: Nothing further. Thank you.

20 THE COURT: Mr. Reynard?

21 MR. REYNARD: Thank you.

22

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1 CROSS EXAMINATION BY MR. REYNARD:

2

3 Q When you observed Mr. Martinez take the photograph,
4 and I think it's People's exhibit number 11, the lineup
5 photograph, what, if anything, did you observe about his
6 physical appearance or demeanor as he began to look at and
7 say things concerning the photograph?

8 MR. BARRY: I'm going to object, Your Honor. I
9 think that's beyond the scope. He's not investigating or he
10 said he's not investigating. Why would there be any
11 observing characteristics?

12 THE COURT: Overruled.

13 THE WITNESS: It appeared that Mr. Martinez became
14 very pale, as though I guess he'd seen a ghost.

15 MR. REYNARD: One moment, Your Honor.

16 (Off the record discussion between Mr. Reynard
17 and Ms. Griffin.)

18 MR. REYNARD:

19 Q Question regarding your memory of when it was that
20 the attorneys met with you and Detective Barkes and various
21 witnesses and BPD for preliminary trial preparation, I
22 believe you earlier indicated you thought maybe that was in
23 the summer of 1999?

24 A Summer or fall, yes.

1 Q Okay. Could there have been a meeting of that sort
2 in the spring of 2000?

3 MR. BARRY: Objection, not only is that leading but
4 speculative.

5 MR. REYNARD: I am trying to produce a refreshing
6 recollection and I'm just asking does that refresh your
7 memory.

8 THE COURT: Hold it. Whose witness is it?

9 MR. REYNARD: That's right. I am on cross.

10 THE COURT: Okay, objection is overruled.

11 MR. BARRY: Judge, wait a minute. I guess we
12 should have identified him as an adverse witness, but there
13 is no way he could be interpreted as our witness.

14 THE COURT: They're crossing. We've been following
15 that procedure since we started. If you wanted the rules to
16 be changed, you should have told me before you called the
17 detective.

18 MR. BARRY: I apologize for that. But he's merely
19 testifying from the counsel table when he says could it have
20 been. That's clearly contradictory to what he testified to.
21 It calls for speculation, and he's already answered the
22 question.

23 THE COURT: The objection is noted. He may answer.

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MR. REYNARD:

Q Just looking for any clarification that your memory can summon at this point as to when that preliminary trial prep at BPD took place?

A I would think it would be after the arrests were made. And it could have been the spring of 2000, but I can't say for sure.

Q When were the arrests made? Maybe that's a good point of reference?

A End of September, September of '99.

Q Can you contemplate any trial preparation interviews prior to the arrest being made?

A No.

Q Do you think maybe you misspoke yourself a little earlier?

A It seems more reasonable it would be in the spring of 2000, yes.

MR. REYNARD: Thanks, nothing further.

THE COURT: Mr. Barry?

REDIRECT EXAMINATION BY MR. BARRY:

Q So, Detective, it could have been the summer of '99, it could have been the spring of 2000, could have been the

1 summer of 2000. Did you write any of this down so you could
2 go back and refresh your recollection as to when it was?

3 A I might be able to pull up a calendar on my computer
4 at work which would show what Saturday that I did work at the
5 Bloomington Police Department, not guaranteeing that.

6 Q You said that you were pretty sure that the trial
7 prep would have been after the arrests were made, right?

8 A Yes, sir.

9 Q And the arrests were made late fall of last year,
10 '99?

11 A Yes, sir.

12 Q And about that time when the arrest was made, the
13 newspaper picture was in the paper?

14 A That's correct.

15 MR. BARRY: Thank you. I have nothing further.

16 THE COURT: Mister --

17 MR. REYNARD: Nothing further.

18 THE COURT: Nothing further?

19 MR. REYNARD: (Shakes head.)

20 THE COURT: All right. You may step down.

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22 (Witness excused.)

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THE COURT: Anything further, Mr. Barry?

(Off the record discussion between defense
counsel.)

MR. BARRY: Judge, at this time I would call Steve
Skelton to the stand for about three questions.

THE COURT: All right. Mr. Skelton?

MR. REYNARD: I guess I'm going to have to --

THE COURT: Well, let me get him sworn and then go
ahead Vince and swear him and then we'll --

(Witness sworn.)

S T E V E S K E L T O N

called as a witness on behalf of the Defendant herein, being
first duly sworn, was examined and testified as follows:

THE COURT: Well, why don't you take the stand,
Mr. Skelton. And, Mr. Reynard, you can state your objection.

MR. REYNARD: I guess I'm concerned that there
appears to be a problem with the rule excluding witnesses and
perhaps counsel can explain why that isn't a violation of the
court's order.

MR. BARRY: Judge, we'd be asking for an exception
here where there would be very limited testimony concerning

1 only one matter, and that is the meeting that took place in
2 Steve Skelton's office on July 28th. We did not --

3 THE COURT: Meeting with who?

4 MR. BARRY: Mr. Reynard, that Mr. Reynard testified
5 to. Martinez comes into the State's Attorney's office and
6 changes his stories.

7 THE COURT: Oh, all right. Why isn't it better to
8 hear what this is before we resolve whether it's subject to
9 being stricken for that reason or any other?

10 MR. REYNARD: It sounds like precisely the scenario
11 in which the rule has its prophylactic effect. Counsel got
12 to hear what he's now being -- perhaps what he's now being
13 called upon to dispute. I don't know that what claim of
14 inconsistency or contradiction exists.

15 THE COURT: Let me ask a different question.
16 Mr. Barry, can you identify the paragraph or paragraphs in
17 your motions that would support evidence you now propose to
18 offer, which means I'm asking you why do you need to offer
19 it?

20 MR. BARRY: Paragraph nine of the original motion.

21 THE COURT: Of the original?

22 MR. BARRY: Yes. Relating to the most recent
23 personal meeting having occurred on July 28th of 2000 in
24 defense counsel's office.

1 MR. REYNARD: This is the motion for sanctions?

2 THE COURT: Are you talking about the amended one
3 or the original?

4 MR. BARRY: The original motion for sanctions.

5 MR. REYNARD: Yeah, that's on page three, paragraph
6 nine. It indicates, Your Honor, that as of the drafting of
7 this motion nothing has been disclosed to the defense about
8 this potentially important, quote, identification, close
9 quote, either in writing or by telephone or in personal
10 conversations relating to this case between counsel, the most
11 recent personal meeting having occurred on July 28, 2000 at
12 defense counsel's offices.

13 I believe the People's response was to object to
14 those allegations as immaterial. We certainly haven't denied
15 them, but we've denied their materiality.

16 THE COURT: Well, are you telling me that,
17 Mr. Barry, that you believe Mr. Reynard said that he did
18 raise the identification issue in his meeting with
19 Mr. Skelton?

20 MR. BARRY: There was testimony regarding potential
21 stipulation as to Luna on the identification, and the issue
22 of the identification came up.

23 THE COURT: The identification of Martinez?

24 MR. BARRY: I believe so, yes.

1 THE COURT: Well, why didn't you ask Mr. Reynard
2 about that?

3 MR. BARRY: I did.

4 THE COURT: Or do you think you did?

5 MR. BARRY: I did ask him.

6 THE COURT: Okay. Let's see.

7 MR. BARRY: He didn't recall if it actually came up
8 or not. His testimony was he remembered discussing
9 stipulations of Luna and his being in Arizona but he did not
10 recall discussing...

11 MR. REYNARD: I think counsel's lack of history
12 with this case is showing itself, so I don't mean any
13 disrespect to Mr. Barry's characterization of the matter. We
14 discussed stipulations in general terms, that was my
15 testimony earlier. We had conversation concerning Luna, and
16 I think I admitted that earlier.

17 THE COURT: So you don't think and -- do I have to
18 check the record? You don't think you said you do not recall
19 whether you discussed Martinez?

20 MR. REYNARD: I honestly can not recall my
21 testimony at this point. It's -- I don't believe the subject
22 of Martinez came up, but at the very least I don't recall it
23 coming up.

24 THE COURT: All right. Well, I'm going to let him

1 answer because I don't have any way of knowing subject to
2 motion to strike I suppose.

3 MR. REYNARD: That's fine. So go ahead.

4

5 DIRECT EXAMINATION BY MR. BARRY:

6

7 Q Would you please state your name?

8 A Steve Skelton.

9 Q Your business address?

10 A 301 South Center Street, Bloomington, Illinois.

11 Q Mr. Skelton, you are the defense counsel for Susan
12 Claycomb?

13 A Yes.

14 Q Did you have occasion to meet with Charles Reynard on
15 July 28th, 2000?

16 A Yes, I did.

17 Q And where did that meeting take place?

18 A At my office. I'd anticipated it was going to be
19 over here, but Mr. Reynard appeared at my office and so we
20 met there.

21 Q And what -- what areas of conversation were
22 discussed?

23 A Several different areas all pertaining to this case,
24 the most prevalent of the areas would be stipulations that

1 we'd been trying to hash out one way or another in the weeks
2 preceding that meeting.

3 Q And did this have to do with identification
4 witnesses?

5 A I don't -- no, I'd say not because the majority of
6 the stipulations related to forensic evidence, people like Ed
7 Kallal, a man whose name I can't pronounce from the state
8 crime lab in Springfield, and a couple other stipulations.
9 But, no, I don't believe we had any conversation other than
10 possibly in gest about stipulating to Mr. Luna's testimony.

11 Q Was anything discussed with regard to Martinez?

12 A Yes.

13 Q And what do you recall about that?

14 A It was at the tail end of our conversation as I
15 recall. Mr. Reynard had stood up. We'd tried to be as
16 polite as we could in terms of I'll-see-you-later-type stuff,
17 and it was tied into Mr. Luna. And I made the comment I
18 don't even know why you want to bring him back here because
19 it's not going to be pretty on cross-examination. And
20 Mr. Reynard asked me a question about that.

21 Q That was about Luna?

22 A Yes, about Luna and I'd say about identification in
23 general.

24 Q Do you remember anything else being discussed about

1 Martinez's identification?

2 A Yes, when Mr. Reynard asked me a question about Luna,
3 I said he's identifying the wrong guy. And just look at your
4 reports from Martinez and the differentiation between the
5 reports of the clothing that Martinez said he saw somebody
6 wearing, that being the person who left the gas station, and
7 the reports of Mr. Luna relative to the clothing of the
8 person that he said he saw from several hundred feet away.
9 That's not verbatim, but that's -- it did come up.

10 Q Did Mr. Reynard have any response to that?

11 A Yes, he did. But it was -- I think he was pretty
12 much playing by the same rules that I play by. He made some
13 smart-aleck remark to me and we both laughed, and he left.

14 Q Did he --

15 A And I don't mean that he was trying to be insulting
16 by saying that, but it was -- it was a light comment.

17 Q Did Mr. Reynard ever state to you that there had been
18 a meeting on July 18th, 2000 in his office where Mr. Martinez
19 actually claimed to have been pointing a finger at Jamie
20 Snow?

21 A No.

22 MR. BARRY: Thank you, nothing further.

23 THE COURT: Mr. Reynard, any questions?

24 MR. REYNARD: Let me suggest this as a stipulation,

1 Your Honor, as an officer of the court with the
2 acknowledgment that I'm still under oath I think I'd like to
3 offer that I do recall a conversation about Luna's
4 cross-examination and the anticipation of what that would be
5 like, and I do recall Mr. Skelton calling my attention to the
6 discrepancies. I think that was the import of what he was
7 suggesting, between the descriptions given by Mr. Luna and
8 Mr. Martinez. I honestly don't recall what my remark was
9 that he characterized as funny or however you want to
10 characterize it.

11 THE WITNESS: It certainly wasn't insulting, and I
12 didn't mean to imply that in any fashion.

13 MR. REYNARD: So I don't think there is a dispute
14 between us.

15 THE COURT: That's what I just was going to say.
16 It sounds like there is not a dispute about the context other
17 than when you testified you didn't recall there was a comment
18 on Martinez. And whether or not it bears in any way on the
19 motion I can leave for argument. Because it doesn't sound
20 like there was a factual dispute.

21 Unless either of you have any other questions, I'll
22 let Mr. Skelton step down.

23 MR. BARRY: No.

24 THE COURT: All right. Thank you.

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(Witness excused.)

MR. BARRY: We would have nothing else then.

THE COURT: Mr. Reynard?

MR. REYNARD: I believe the only evidence that we would have at this stage of the motion is to request the court to take judicial notice of the filings in the court file, specifically the motion which -- motion for discovery which was filed in this cause and the -- and the file markings on that motion indicating when it was filed. I believe it was filed at or before the time of the general division arraignment in this cause. And I would also ask the court to take note of the fact that at or about the same time there was a motion for bill of particulars filed. I believe that is incorporated within the motion.

Subsequent to that time on a date that I would ask the court to judicially notice there was a -- let me back up. I would ask the court to judicially notice its discovery order, which is indeed the standard Supreme Court Rule 412 order for compliance. I would ask you to note that at some date and time there was scheduled for hearing the motion for bill of particulars.

I would ask the court to judicially take notice of the fact that the motion for discovery was never scheduled

1 for hearing. And the only discovery order in this case is
2 the court's order requiring a Rule 412 disclosure. I'd ask
3 the court judicially notice that the People filed numerous
4 compliances with respect to 412 compliance, and whether or
5 not that complied with the court's order I guess is a matter
6 for argument in the court's determination.

7 THE COURT: All right. Mr. Skelton, are you going
8 to argue this?

9 MR. SKELTON: No, Mr. Barry is.

10 THE COURT: Okay. Mr. Barry?

11 MR. BARRY: Thank you, Your Honor. Please the
12 court and counsel.

13 Judge, we've presented the testimony and I think
14 what the court is looking at is I think the facts are pretty
15 clear. I think on July 18th at the very minimum there was a
16 180-degree turn in the testimony of the identification
17 witness, that being Mr. Martinez, that was done in the
18 presence of Mr. Reynard, Miss Griffin and Detective Katz.

19 We then look at how that occurred. If we believe
20 Mr. Martinez, he claims to have seen the newspaper article in
21 the fall of '99 and that jogged his memory, or he saw
22 something he hadn't seen before, yet he had previously been
23 shown pictures of Jamie Snow. He had been present in a
24 lineup. And for nine years -- for eight years up to that

1 point he could never identify him. Then there is a picture
2 in the newspaper. There is a picture in the newspaper that
3 is the person who is arrested for this crime. It's not just
4 he sees a picture because he was in the newspaper because he
5 won the Lotto. He's the man charged with this crime.

6 Obviously, Mr. Martinez makes that correlation. He
7 then goes on July 18th into the State's Attorney's office,
8 and it wasn't I think at this point I think Mr. Martinez
9 possibly was trying to recollect the best he could. But
10 what's interesting is he doesn't say he looks at the photo of
11 the lineup first. He first looks at the picture. There was
12 someone in the picture that showed in the paper, State's
13 exhibit 36. And it's then later after that that he asks, do
14 you have a picture of the lineup that you're going to ask me
15 about at trial. And then he identifies the individual.

16 It's amazing that the individual can after nine
17 years actually think that now he's identifying the person who
18 he walked by the evening of the crime. What I think is even
19 more interesting, though, according to Mr. Martinez's
20 testimony, Detective Katz's testimony, we have Mr. Martinez
21 meeting with the officers of the Bloomington Police
22 Department. According to Miss Griffin's testimony he met
23 with her at least two times prior to the July 18th meeting,
24 so we have what appears to be four to six different meetings

1 after the arrests. Yet, he never brings this up to anybody.
2 He acknowledges that they're looking to him to be an ID
3 witness. Yet, he never brings this up. He never says to
4 anybody that he saw the picture in the newspaper that jogged
5 his memory that made him believe something, and now he knows
6 what he's doing. Up to that point he was consistent for the
7 eight years prior to seeing it in the newspaper, and he could
8 not pick the person out.

9 We get into what happened at the -- at the State's
10 Attorney's office. The identification was unduly suggestive.
11 If we believe Martinez, by showing him the picture that was
12 in the newspaper and immediately showing him after that the
13 photo of the lineup, somebody who is already within days of
14 the offense, within days of the -- of the viewing not been
15 able to identify, showing him these pictures, especially the
16 one that was identical to the one in the newspaper, State's
17 36, now we've got somebody correlating the one in the
18 newspaper to the picture, and let me see the lineup again,
19 I'll piece it together. It wasn't an independent -- it
20 wasn't an independent, reliable identification. It was
21 piecing something together. It was playing detective. And
22 that's exactly what he did.

23 For that reason, we're asking that based upon the
24 fact it's an unduly suggestive procedure, we're asking that

1 the court strike any identification offered by Mr. Martinez
2 after June 1 of 2000.

3 With regard to -- I don't want to argue much
4 longer. The court's heard the facts. I think getting into
5 the motion for sanctions themselves, what the court looks at
6 here for guidance is Supreme Court Rule 412, and in addition
7 to that, I would ask the court to look at People versus
8 Manley. That's a case that was cited within the context of
9 the Mahaffey case which was cited by the State. And in that
10 case that deals with whether or not there should be sanctions
11 as a result of not reducing to writing the investigative
12 materials to somehow get around the rule, well, it's not in
13 writing so we don't have to produce it.

14 What we've got is, the court can look at the facts.
15 Was there new information available? Well, there is no
16 question that the information, the bomb that was dropped by
17 Martinez on July 18th, 2000, it surprised Detective Katz. It
18 surprised Teena Griffin. There is no question it surprised
19 everybody. The reason it surprised everybody is it was
20 180-degree turn. He now has an opportunity to have a
21 positive ID when for nine years he couldn't identify anybody.

22 Was there an opportunity then for the State's
23 Attorneys to present that to the defense?

24 THE COURT: Why do you use the word opportunity?

1 MR. BARRY: Well, because first of all, we have to
2 deal with the issue of whether or not it was reduced to
3 writing.

4 THE COURT: Well, we know it was not reduced to
5 writing.

6 MR. BARRY: It was not reduced to writing, so
7 according to the case that was cited by the State their
8 opinion is it does not have to be disclosed because it was
9 not reduced to writing. I think if you look at the spirit of
10 the discovery rules and if you also look at again either
11 Szabo, DeStefano or Manley as they're cited in the People
12 versus Mahaffey case, one of the things you can take into
13 consideration was, was there an opportunity to disclose this
14 information, was there an obligation to disclose it and was
15 there an opportunity to disclose it.

16 THE COURT: Well, why don't you -- let's quit
17 dancing around it. Why don't you just show me in 412 where
18 this material is required to be reduced to writing and
19 tendered?

20 MR. BARRY: Well, I can't show you in 412 where
21 it's required to be reduced to writing. I think for that we
22 have to go to the Manley case.

23 THE COURT: And you're telling me that in Manley
24 they tendered pages and pages and pages of discovery and

1 neglected to tender one or two reports? I mean I'm asking
2 you.

3 MR. BARRY: No, the Manley --

4 THE COURT: I mean are the factual circumstances
5 similar? Does Manley include five hundred pages of discovery
6 tendered and one interview not tendered? Or does it involve
7 no discovery reduced to writing so we don't have to give any
8 discovery, that argument? I haven't read Manley. Can you
9 fill me in on the facts?

10 MR. BARRY: I don't think we have either of the
11 extremes the court is talking about there. Manley stands for
12 the premise that there is a holding of a prosecutor in
13 contempt of court where he admitted that it was the practice
14 of his office to refrain from reducing a witness' oral
15 statement to writing in order to surprise the defendant at
16 trial. Now we certainly don't have that here. But what
17 we've got is a situation where there is nothing here but
18 surprise.

19 THE COURT: Well, where, you know -- where in 412
20 are they obligated to reduce to writing oral statements that
21 would be surprising to the defense?

22 MR. BARRY: Not unless it's in writing.

23 THE COURT: Not what?

24 MR. BARRY: Not unless it's in writing. But that's

1 why I'm asking the court to take notice of Manley as well
2 because now we have an opportunity that, well, if you
3 don't -- if we make sure nobody reduces it to writing, we can
4 surprise the defense at trial.

5 THE COURT: Well, that's happened at the 11th hour,
6 though. That's the difference between the cases, is it not?
7 It's not a pattern, nor is it a policy not to reduce it to
8 writing, which distinguishes it from the cases you're talking
9 about where abuse was found.

10 MR. BARRY: We're asking that an abuse finding be
11 made here because of the importance of it.

12 THE COURT: Then how could oral statements of any
13 witness ever not be mandatorily reduced to writing if your
14 rule is right?

15 MR. BARRY: I don't -- I guess I hadn't thought
16 about the full gambit of the oral statements, but here we're
17 not just talking about the oral statement or the color of the
18 car they saw speeding down the street or the relevant height
19 of somebody who is standing near the victim. We're talking
20 about the ID. We're talking about --

21 THE COURT: An ID which you found out through your
22 own devices. Remember you're telling me that there is a
23 discovery violation here and want sanctions, when you figured
24 it out yourself. I'm going to ask you to answer this

1 question. What would have happened if this occurred at
2 trial? Suppose they were less diligent and hadn't
3 interviewed their witnesses and tendered that lineup at trial
4 and there was an ID. Now what? Well, analyze that, and it
5 will be helpful to you in the discussion today because if you
6 do analyze that, you will think through whether or not the
7 State has played a role in that identification where nothing
8 has happened but what they say happened. And by that I mean
9 Martinez. He saw it in the paper. What State action
10 participating in that circumstance led to an improper
11 identification? You'd have to throw up your hands, would you
12 not, and say I guess none, Judge?

13 MR. BARRY: I don't think so.

14 THE COURT: Pardon?

15 MR. BARRY: We still have the meeting on July 18th
16 where they pull out the picture from the newspaper.

17 THE COURT: No, I said that's gone. I said what
18 would have happened if this occurred at trial. You
19 would -- you would be forced, would you not, to conclude
20 Mr. Martinez made this connection from the paper and the
21 newspaper -- from the photograph in the newspaper, which you
22 could not connect to State action. You'd be horribly
23 surprised and you would be able to do nothing about it if
24 that occurred.

1 You would agree with me there, would you not?

2 MR. BARRY: Yes, I would.

3 THE COURT: Okay. So now we take it one step
4 further, and the quarrel that you have is that, Judge,
5 obviously what happened here is the State shows the witness
6 the photograph of the defendant and then the lineup, and my
7 question to you is this. Can you give me one explanation for
8 why they'd do that?

9 MR. BARRY: Because he's the only person who got a
10 look at the person leaving the Clark Station.

11 THE COURT: Okay. So, in other words, they did
12 that to intentionally mislead you and make sure that they had
13 an ID that they otherwise wouldn't have? Is that your
14 proposal?

15 MR. BARRY: They're doing that to intentionally
16 mislead who?

17 THE COURT: You, the defense, and to create a
18 witness who they otherwise wouldn't have.

19 MR. BARRY: At the time that it happened I think
20 that's pretty close to what we're putting in our motion.

21 THE COURT: Okay. So that's, in other words, this
22 was an intentional deception on the part of the State to
23 create an ID witness who did not otherwise exist.

24 MR. BARRY: Very, very minimum it was to conceal

1 his 180-degree turn on his identification. And I guess the
2 point here is --

3 THE COURT: Well, that's a separate issue, right?

4 If you're right about what you just said, then that
5 makes it suggestive and suppresses the ID. You don't even
6 have to get to the discovery violation because you've gotten
7 the relief, right?

8 MR. BARRY: Right.

9 THE COURT: Okay.

10 MR. BARRY: I guess the next biggest point is when
11 we have a situation like that and it's not disclosed now we
12 did find out about it because Mark Foster found out about it.
13 It just happened that Foster was following up with an
14 investigation and learns it from Martinez. Otherwise, we
15 would not have known it. We still would not have known it
16 even though Mr. Reynard was in Steve Skelton's office on the
17 28th. They're talking about Martinez, and he never brings it
18 up. He knows it's different. He knows it's a completely
19 180-degree turn, and yet he never brings it up. And I guess
20 the reason we're asking for sanctions against the State's
21 Attorney is because where else is some of this going on.

22 The court brought up the fact, well, we've got a
23 list of how many witnesses in this case, approximately 107.
24 I guess to afford a fair trial there has to be some sort of

1 safeguard that, you know, this is just one -- one of the
2 incidents that's occurred that we found out about. We don't
3 even know if there are others that we haven't found out about
4 yet. So I think based upon that, taking the totality of the
5 circumstances, the opportunity, the suggestion 11 days later
6 and the failure to state anything about Martinez is clearly
7 sanctionable.

8 THE COURT: As a discovery violation?

9 MR. BARRY: Yes.

10 THE COURT: And you're still not going to tell me
11 what provision of 412?

12 MR. BARRY: Let me, if I might --

13 THE COURT: Do you have 412 in front of you?

14 MR. BARRY: Yeah.

15 THE COURT: You can sit down and look at it for a
16 second. Go ahead. I am even looking at something myself.

17 MR. BARRY: I would not only ask the court to look
18 at 412, but 415, regulating -- 415(g), which regulates
19 sanctions and that can be read very closely also with Supreme
20 Court Rule 219(d), abuse of discovery procedures, and in
21 reading these cases.

22 THE COURT: Yeah, I -- G, 414(g) says that you can
23 impose sanctions, but you have to have a discovery violation.

24 MR. BARRY: The discovery violation is the failure

1 to supplement with information which is clearly contradictory
2 to what has previously been supplied.

3 THE COURT: Now that is a concept that I have never
4 seen in the discovery rules. Do you think you've got an
5 obligation to provide witness statements that are
6 contradictory to the State that are not written?

7 MR. BARRY: Well, you've got an obligation to
8 correct what may have been presented that's misleading.

9 THE COURT: Do you think you do?

10 MR. BARRY: No question under the Supreme Court
11 Rules.

12 THE COURT: Well, you don't think Mr. Foster got
13 contradictory information to the State's discovery and didn't
14 tender it?

15 MR. BARRY: He did on July 28th.

16 THE COURT: Well, he didn't tender that, did he?
17 You know, that's why to answer the question I've asked you,
18 we will then flip to 413 and find the reciprocal rule that
19 you have where you didn't -- and I realize there is no
20 sanction request today by the State, but I'm just pointing
21 out to you that neither side has to reduce oral statements to
22 writing as far as I can tell.

23 MR. BARRY: There is no --

24 THE COURT: Unless the pattern is established that

1 you talk about in Manley and Szabo or either a pattern or
2 simply a flat out policy, well, we're not going to take any
3 notes because then we don't have to provide any.

4 MR. BARRY: Judge, I -- with regard to what Foster
5 obtained, he did not obtain contradictory information. He
6 learned about information that was already in the State's
7 possession which was directly contradictory. What I'm saying
8 is the State continues to rely upon the disclosures which had
9 been made. The disclosures say Martinez was given every
10 shot. He looked at the lineup. He looked at the photos. He
11 looked at the mugshots, and he couldn't identify anybody.

12 Now that's one thing. But when they have
13 information which contradicts, that what they're saying is
14 every day that goes by, every day of trial, every day that
15 they are presentation of evidence, they're resubmitting that.
16 They're resubmitting that as accurate when they know it was
17 not accurate. Now it doesn't matter if he's reducing that to
18 writing or not. The concept is they're resubmitting that
19 information as consistent and accurate when they know it's
20 not. That is subject to a discovery sanction.

21 It would be different if they moved to strike all
22 of Martinez's disclosures altogether. But I guess I don't
23 know if I am even making myself clear to the court but by
24 resubmitting it every single day as accurate that's --

1 THE COURT: I just want somebody to point out what
2 part of 412 is violated other than your own sense that this
3 is unfair. And don't get me wrong. I'm not questioning
4 that. That your own sense of what is fair and unfair is not
5 412. And I'm back to that, and I keep asking for that. But
6 that's -- I understand your argument. Don't get me wrong.

7 All right. Mr. Reynard?

8 MR. REYNARD: If it please the court and counsel.

9 The Supreme Court in Mahaffey had the closest
10 imaginable circumstance to the circumstances of this case,
11 and it was a situation in which a young witness who was
12 interviewed by the prosecutor one month before trial said
13 that he was 99 percent certain that the defendant was the
14 perpetrator of the crime in that case. If I'm not mistaken,
15 that might have been an armed robbery and murder. And the
16 Supreme Court held that the prosecutor was not required to
17 disclose the oral statement of the eyewitness which had not
18 been memorialized.

19 Now, I guess I can understand the outrage from that
20 degree of surprise if it is experienced by the defense in
21 this case, as well as in the Mahaffey case. But that happens
22 to be Supreme Court Rule 412, and that happens to be the
23 Supreme Court interpreting Supreme Court Rule 412; and all
24 the whining in the world about fairness or unfairness isn't

1 going to change the state of the law in the State of
2 Illinois.

3 Now, what we're basically dealing with here is a
4 weight rather than admissibility issue. Amazing after nine
5 years, counsel argues. And, indeed, I think that's a
6 reasonable argument, which he ought be entitled to make to
7 the jury. How amazing after nine years that somebody who has
8 been trying to figure something out finally gets it figured
9 out and recalls, sees something that jogs his memory, and he
10 now can make an identification with respect to which he
11 indicates an 85 percent level of certainty?

12 While I can appreciate the defense's surprise on
13 that issue, the defense has been diligent and the defense
14 investigation has disclosed that the People in no way
15 discouraged anyone from sharing this information with them.
16 Indeed, Mr. Martinez did share this information with
17 Mr. Foster, and it came to their attention the way many
18 things come to the parties' attention in litigation, the
19 old-fashioned way. They worked for it. And they found it
20 out. And that's wonderful. In fact, all of the issues now
21 can be presented to the jury.

22 The point is, we were not obligated to disclose
23 this to the defense. The case law in Davis, for example,
24 suggests that we are not obliged to disclose evidentiary

1 weaknesses to the defense unless it rises, of course, to the
2 level of Brady material. The court in another case which
3 hasn't been cited to the court, In Re E. V., indicates that
4 that the State's failure to disclose police memoranda
5 indicating that a handgun seized from a juvenile was being
6 subjected to test to determine if it was a weapon used in a
7 fatal shooting prior to that juvenile's entry of a guilty
8 plea to a delinquency charge for an unlawful use of a weapon,
9 that didn't constitute a Brady violation since the materials
10 at issue were not exculpatory.

11 Obviously, we are held to do justice to this
12 defendant. But we are not obliged to be of tactical
13 assistance to her. The fact of the matter is that this
14 information is damaging to the defense, and unless we're
15 obliged to memorialize it, she isn't entitled to it from us.
16 That's period, end of discussion. Under the law of Illinois
17 whether we as a matter of lenity or grace decide to tell her
18 that, she's got no complaint when we chose not to.

19 Now, did we mislead counsel in a conversation on
20 July 28th when I harrumphed in some sort of humored fashion
21 in comments about discrepancies between clothing descriptions
22 between Martinez and Luna? I think not. I don't think that
23 shows any deception at all.

24 Is there any evidence in this case that we've

1 requested the destruction of notes, directed that no written
2 reports be prepared by investigators or in any fashion
3 articulated or admitted a practice of having no written
4 reports prepared by investigators in order to obtain tactical
5 advantages at trial by basically abusing the law of discovery
6 in Illinois? The answer is no.

7 There is no contempt of court. There is no abuse
8 of discovery. There is no relief to which these pleadings
9 entitle the defendant. And once more, I guess I need to
10 argue on the identification suppression.

11 The reality of this evidence, which is, there is
12 nothing that the State did that produced this identification.
13 The uncontroverted evidence in the case is that Mr. Martinez
14 saw a picture in the newspaper. It jogged his memory, and he
15 knew that this was the person that he saw on March 31st,
16 1991. And he withheld that information from everyone
17 apparently except his wife, who incidentally we'd like to
18 notice on our list of witnesses. The fact is that he later
19 saw a picture, that same picture that was published in the
20 newspaper, in Miss Griffin's office. Whether he saw it
21 before or after the lineup is a little bit in doubt here.

22 Counsel wants to argue that that's been proven by
23 clear and convincing evidence that somehow Mr. Martinez
24 thinking that maybe he saw that before he saw the lineup

1 picture, which I think is his testimony, he thinks maybe he
2 did, but really he said he also said I'm not sure which one I
3 saw first, that that somehow establishing by clear and
4 convincing evidence that that was what the State did in order
5 to induce his pointing at the lineup photograph and say
6 that's him, that's his eyes. Well, I submit that that isn't
7 a credible inference from this evidence.

8 I remembered, Miss Griffin remembered and Detective
9 Katz remembered that that photograph was discussed at a later
10 point, albeit only a few minutes later, after he had looked
11 at that lineup photograph. But let's say, for example, that
12 he did see that photograph before he saw the lineup photo.
13 Well, that's not really hypothetical, is it, Judge? Because
14 he did see it. The uncontroverted evidence is that he saw it
15 back in September of 1999, and that's when he decided he
16 could identify Codefendant Snow.

17 All of that is a scenario for explaining to the
18 jury why that is either a believable identification or not.
19 The State ought not be punished for having elicited that
20 because the uncontroverted evidence is that we didn't elicit
21 it. It came long before we interacted with that reality
22 because indeed we were surprised. We didn't know that that
23 result existed within Mr. Martinez's mind until he pointed at
24 that lineup photograph and said that's him.

1 Thank you.

2 THE COURT: Okay. Mr. Barry, anything further?

3 MR. BARRY: No, Your Honor.

4 THE COURT: Give me one second here. I'm looking
5 at my notes of Mr. Martinez.

6 Well, the -- my notes and my recollection indicate
7 that Mr. Barry was following a chronological path in
8 questioning Mr. Martinez, and he had indicated long ago, last
9 year, that when he saw the photo in the paper is when he made
10 the identification and informed his spouse, and then
11 Mr. Barry led him up chronologically to the conversations
12 with the parties in this case, including the defense
13 investigator, and then to the conversation a few weeks ago
14 with the State's Attorney. And when asked whether or not
15 Mr. Martinez told the State's Attorney that he'd seen the
16 defendant in the paper, he said he thought he mentioned it to
17 them that he'd seen the picture in the paper, and she,
18 meaning Miss Griffin, brought out a black-and-white photo.
19 And I think it was the newspaper photo. And then when we got
20 to the discussion of the lineup, he asked if you've got that
21 photo and she pulled it out. That's when he went through the
22 that's the guy and his explanation for them. And thereafter
23 on cross we went through the same thing trying to get that
24 timing down. And then it was still, though, with Mr. Barry's

1 questions that Mr. Martinez was asked about the order, which
2 came first. And Martinez said it was the Pantagraph photo.

3 It wasn't I can tell you because I was looking at
4 him referring to 36, but he mentioned it as the Pantagraph
5 photo. Then Mr. Barry asked him if that one was first, and
6 he said he thought it could have been. But the initial
7 response was that it was the Pantagraph photo, referring to
8 the fact that late last year he had seen the picture in the
9 paper. So that's my best recollection. I think the record
10 reflects that that's the case. We can all sit here and argue
11 about whether the Pantagraph photo, when he responded in that
12 fashion, meant the exhibit or the picture he saw last year.
13 I took it to mean the picture he saw last year, and then
14 later he acknowledged that he thought that the actual photo
15 was first, but he wasn't sure about that.

16 And the real question here, and there is an issue
17 here today, and the issue is simply this. It doesn't have
18 anything to do in my view with whether or not the State
19 violated discovery because there is nowhere in 412 that
20 anyone can point to me a requirement that what happened in
21 the State's Attorney's office in prepping this witness would
22 require that that be disclosed, reduced to writing and
23 disclosed. And if someone could point that out to me, then,
24 although not an issue today, that same complaint of refusal

1 to reduce matters to writing could then be made of the
2 defense investigator who on three occasions met with
3 Martinez, who is now a defense witness, who under Beauclaire
4 would be required to be -- notes to be produced because of an
5 interview with the State's witnesses, which is not
6 specifically in the rule, but which is a Supreme Court Rule
7 now, but there is all doubts removed because Mr. Martinez has
8 become a defense witness. So if the State has an obligation
9 to reduce oral statements of their witnesses to writing and
10 tender them, the defense has the same obligation to reduce
11 oral statements of their witnesses to writing and tender
12 them.

13 So I don't see the discovery is the issue. The
14 question here today is a very legitimate one, and that is
15 whether or not conduct of the State under the circumstances
16 here taints the identification such that it should be
17 suppressed. And I'm sure you all are familiar with Wade
18 versus United States. It's one of those ID cases that sets
19 forth in it a lot of descriptions of tainted IDs. This is a
20 388 US 218. It's a 1967 case. And on page seven of the
21 decision, and I don't have the official decision so I can't
22 tell you for sure you'll find this on page seven, they do
23 talk about the kinds of things that we deal with in tainted
24 identifications. An identification involving a lineup of six

1 men, one of which is oriental and the defendant is oriental.
2 Black-haired suspect among a group of light-haired suspects
3 where the defendant is light haired. Those are traditional
4 suggestive identification procedures.

5 They note participants in a lineup grossly
6 dissimilar in appearance to the suspect. Only the suspect
7 required to wear clothing which the culprit had worn at the
8 time of the offense. The suspect being pointed out before or
9 during the lineup, which is probably as close to what we've
10 got here if you believe that Mr. Martinez was actually shown
11 the photo because I don't think a newspaper photograph can in
12 any stretch be State conduct or police conduct. Or that
13 participants are ordered to try on articles of clothing that
14 only fit the suspect.

15 I mean these are the kinds of occasions where this
16 suggestiveness has been demonstrated, and the Supreme Court
17 outlines numerous indications.

18 So all of this turns on what happened in this case
19 both before and during the interview in July with the State's
20 Attorneys. And it seems to me that Mr. Martinez identified
21 the individual in this lineup based on a photo in the paper,
22 and that he did that prior to coming to the State's
23 Attorney's office; and that's I think what the evidence
24 establishes. I think he also was shown the photo at the

1 State's Attorney's office, which was 36, but I don't find
2 that he was shown that before the lineup in large part
3 because that is the most foolish thing I've ever heard of to
4 be honest. I can't even imagine why anyone would do that.

5 Number 36, I can not imagine a reason number 36
6 would ever be proffered to Martinez in the trial of this
7 case. So if someone can come up with an idea, they
8 can -- they can tell me that. I guess I can see where a
9 lineup where he didn't make an ID could come up in this case.
10 But not the actual photo. It would be as foolish to present
11 36 to that witness in court and then the lineup as it would
12 be for the State to have done it in private. And four
13 witnesses testified in my view consistently, and I don't find
14 that that pattern occurred but that, in fact, Martinez
15 figured this out beforehand because of the photo in the
16 paper. And it is notable that neither Martinez, Katz,
17 Reynard or Griffin suggested that the State agreed that the
18 person he was pointing to was the right person.

19 So, if you were foolish enough to create witnesses
20 in preparation for trial and walk in and show him 36, now I
21 want you to see the picture of the guy we said did the
22 killing, and then look at your lineup again. Does anything
23 ring a bell? If you were foolish enough to do that, it seems
24 to me that you would polish it all off and say, very good,

1 you got the right one, number six. So I realize that what
2 I've just said relies in large part on the credibility of the
3 people I heard, but it does. And I'm resolving that issue of
4 credibility in the way that I've just described it. And that
5 is that Martinez figured this out before he came. And so if
6 he did do that, that's not State action. That's not unduly
7 suggestive procedures, which are why we suppress
8 identifications.

9 And I guess Mr. Reynard has put his finger on
10 what's going to happen in this case, and that is, that you
11 mean to tell me after nine years you can make an
12 identification. And that's why that I tend to agree that it
13 goes to weight, and it's an issue where the defense will
14 mightily cross Mr. Martinez on this particular circumstance
15 and whether or not it is reasonable to believe that he can
16 make the ID under those circumstances and after nine years
17 will be one left for the jury, which I think is where it
18 belongs based upon what I've heard.

19 So I'm going to deny the request for sanctions and
20 for a bar of the July ID for the reasonings I've stated, and
21 I'd like to go to the Bowers issue.

22 And ask, Mr. Skelton, if you could make argument on
23 that.

24 MR. SKELTON: Yes, Your Honor.

1 Mr. Bowers I have known for several years
2 professionally. He has conducted a great number of
3 polygraphic examinations for me during that period of time,
4 probably the last ten years, that I contacted him. He did,
5 in fact, interview and conduct a polygraphic examination of
6 my client. As the court knows, as counsel knows, the results
7 of polygraphic examinations are not admissible in court, and
8 the case law is replete with cautions against using the word
9 polygraph in any fashion during the course of a trial.

10 As set forth in my response and as corroborated by
11 the actions that were taken relative to information that was
12 garnered by my agent, Mr. Bowers, during the pretesting
13 interview and the exit report, if you will, the report of the
14 results of the polygraph, were used in plea negotiations.
15 And I think it can fairly be stated that for a substantial
16 period of time I tried to convince the State through
17 conversations, through the tendering of information to them,
18 including the requested notes of Mr. Bowers that were related
19 to the polygraphic examination, of my client's innocence with
20 the goal of having this case dismissed.

21 No matter how much I may disagree with the State's
22 decision not to do so, I nonetheless made substantial and
23 continued efforts to convince them that my client is
24 innocent, and part and parcel of that was initially the

1 written report concerning the result of the polygraph
2 conducted by Mr. Bowers. At a later point in time
3 Mr. Reynard asked me to produce for him, if I would, the
4 notes, if any, that were generated by Mr. Bowers in the
5 pretesting interview, and I did that, once again in an effort
6 to have a resolution of this cause without the necessity of a
7 trial.

8 Those are plea negotiations, and the case law is
9 also very clear that plea negotiations, just as factual
10 statements that are made during abortive plea attempts, are
11 inadmissible. And I would suggest that no matter how we try
12 to paint Mr. Bowers or have him wear a hat that is absolutely
13 false, that is to characterize him as a defense investigator,
14 which he isn't and wasn't and never will be, doesn't solve
15 that problem.

16 What we've got is a tendering by me at the request
17 of the State of reports that preceded the test in an effort
18 to get this case resolved, in an effort to get it dismissed.
19 And, you know, once again, whether I disagree or agree with
20 the decision that's been made by the State, it doesn't alter
21 the fact that this was part of pretrial plea negotiations
22 and, ergo, it's inadmissible. And that in sum and substance
23 is what took place and what it is.

24 THE COURT: What's the answer that you're referring

1 to now?

2 MR. SKELTON: I'm sorry, Your Honor, what answer
3 are you asking me about?

4 THE COURT: That the State has announced and
5 intends to call Edward Bowers as a witness.

6 MR. SKELTON: Well, just look at the motion in
7 limine they filed.

8 THE COURT: I don't have that. Maybe that's what
9 I'm -- when was that filed?

10 MR. REYNARD: This morning, Your Honor.

11 THE COURT: I've got the response. Wait a minute.
12 It's over here. Just a second. Okay. I do have it. It was
13 tendered this morning. It was out of place. Just give me
14 one second here.

15 Okay. I've got the motion now. All right.

16 Mr. Skelton, do you have anything further?

17 MR. SKELTON: I would tender to the court People

18 versus Ousley, O-U-S-L-E-Y, reported at 230 Illinois
19 Appellate Third 758, which stands for the proposition that
20 I've earlier indicated to the court concerning plea
21 negotiations being per se and under any circumstances
22 inadmissible.

23 THE COURT: Okay. Just a second, Mr. Reynard.

24 Okay. Mr. Reynard?

1 MR. REYNARD: With respect to the Ousley citation,
2 Judge, I'll confess my not knowing the contents of the
3 decision. But I'm advised by assistant present that that
4 case is very distinguishable, having to do with statements
5 that came out during the presentation of or the attempted
6 presentation of a plea agreement, and that it's manifestly
7 distinguishable; but the court having the opportunity to
8 review the case might review it with at least with that
9 observation in mind to see whether counsel's observation that
10 it is pertinent or our observation that it is distinguishable
11 is the best description of the case.

12 There isn't any quarrel about the general
13 observation that plea discussions and bargaining are not
14 admissible. And I'm reading now from Hunter's Trial Handbook
15 For Illinois Lawyers on that subject, and it observes the
16 following. In determining whether an admission by a
17 defendant was plea related and, therefore, inadmissible, a
18 court must inquire as to a number of things, whether the
19 accused demonstrated a subjective expectation to negotiate a
20 plea and, two, whether this expectation was reasonable under
21 the totality of objective circumstances, where a defendant
22 manifests no explicit subjective expectations in making the
23 statement at issue, the objective circumstances surrounding
24 the statement take precedence in determining whether it was

1 plea related.

2 Before a statement may be characterized as plea
3 related, it must contain the rudiments of the negotiation
4 process, i.e., a willingness on the part of the defendant to
5 enter a plea of guilty in return for concessions by the
6 State. And then the handbook cites People V. Thomas, 1989, a
7 Fourth District case and a citation.

8 I can show all of that to the court. Do you want
9 me to read the citation, Your Honor? 191 Ill. App. Third
10 187, 138 Illinois Decisions 568, 547 Northeast Second 735.

11 In hearing Mr. Skelton's argument on the motion, I
12 don't think we've got any factual quarrel. But let me review
13 it from my perspective. I received a letter from Mr. Skelton
14 enclosing a copy of a report, along with his -- and that
15 letter was dated February 11th of this year. And that letter
16 and that report purported to request of me to see the obvious
17 fact that Mr. Skelton's client was innocent and that the
18 charges ought be dismissed. And I take such requests for
19 consideration quite seriously, and I reviewed that material,
20 and I did in the subsequent request the opportunity to
21 scrutinize that material we had during one of the delays in
22 the case supplemental procedures conducted in Chicago without
23 going into detail about that. We were trying to verify the
24 veracity of the defendant, which was volunteered to us as a

1 basis of us seeing the light and deciding to see this case in
2 the manner that defense counsel saw this case.

3 There was never ever in the context of these
4 disclosures any express or implied notion that the defendant
5 was expressing a willingness to enter a plea of guilty in
6 return for concessions. This was a request for the State to
7 see the facts, to see them as she had reported them to a
8 representative of the defense who was investigating her
9 veracity. And I don't care how you slice it, we refer to
10 polygraph investigators in the past as investigators. And
11 we've done it quite serviceably in sanitizing the record so
12 it comports with the law that references to polygraph not
13 ever been brought before the jury; and I can cite numerous
14 examples of having done that.

15 Well, the fact of the matter is statements that
16 were made by this defendant to this investigator are in the
17 context of all of the other evidence in the case highly
18 incriminating. And we believe that those statements were
19 volunteered to us for us to scrutinize the truth of those
20 statements, and we believe that they in themselves constitute
21 evidence of lying on her part with regard to an essential
22 piece of the defense in this case, this purported alibi
23 defense. There were no plea negotiations about this
24 material. It wasn't offered to us in the spirit of

1 negotiation. It was offered to us in the spirit of trying to
2 determine what the truth of the matter was. And we suggest
3 to Your Honor it does constitute evidence of the truth in
4 this case.

5 And the statements are clearly admissible. We
6 ought to be able to call Mr. Bowers, as we've called these
7 kinds of investigators in the past; and my motion only goes
8 to how are we going to by agreement ensure that this record
9 does not violate the law by making reference to the status of
10 this particular investigator as a polygraph examiner. That's
11 the purpose of the motion so that we can proceed to opening
12 statements safely.

13 And, accordingly, I would propose only that we
14 refer to Mr. Bowers as a defense investigator. If there is
15 some other way that we can refer to him that doesn't violate
16 the law, we're certainly open to complying with whatever
17 nomenclature the defense counsel thinks can accomplish that
18 or that the court thinks can accomplish that.

19 Thank you.

20 MR. SKELTON: Judge, there has been a number of
21 questions posed by the court as to Supreme Court Rules. I
22 would direct the court's attention, if I could, please, to
23 Supreme Court Rule 402(f), which reads, if a plea discussion
24 does not result in a plea of guilty, neither the plea

1 discussion nor any resulting agreement, plea or judgment
2 shall be admissible against the defendant in any criminal
3 proceeding.

4 In Ousley that was cited for authority, as well as
5 People versus Enoch, reported at 122 Illinois Second 176, to
6 try to attach to this the clothing that the State is asking
7 to attach to it, since Steve didn't say, well, my client is
8 willing to plead guilty to something, Judge, that just
9 doesn't make any sense. I mean if you're a prosecutor and I
10 come to you and say I think this case ought to be dismissed,
11 that is part of pretrial plea negotiations, and the results
12 of the polygraph and the interview that preceded the
13 polygraph certainly laid the foundation for that request that
14 was made, but it's plea negotiations, Your Honor.

15 Whether a case is dismissed or reduced or there is
16 an agreed sentence, it's all plea negotiations. And 402(f)
17 speaks directly to the question that is before the court.

18 THE COURT: Did this all just come up today I
19 presume?

20 MR. REYNARD: It came up only in the context of my
21 motion in limine asking for the court's guidance as to the
22 proper nomenclature. The issue about the underlying
23 admissibility I had no notion that there was going to be
24 bootstrapped as plea discussion because I think it's

1 spurious. We issued a subpoena for Mr. Bowers at the prior
2 setting. Certainly counsel would have known about that. At
3 least I assumed that to be the case. I don't think this
4 response about the admissibility of this evidence is timely
5 at all.

6 MR. SKELTON: Well, Judge, if --

7 MR. REYNARD: Yeah, we listed Bowers as a witness.

8 MR. SKELTON: If you just look at Ousley, it
9 states, quote, in recognition of the devastating effect the
10 use of plea negotiation testimony may have, however, the
11 Illinois courts have held that the use of such testimony is
12 so prejudicial as to require reversal as plain error. In
13 Ousley we had polygraph stuff that was brought in without
14 objection by the defense. It's plain error.

15 MR. REYNARD: Then we're talking about a
16 nomenclature issue, referencing it as a polygraph.

17 MR. SKELTON: You can't --

18 THE COURT: Well, you mean to tell me that
19 polygraph evidence consists only of pass or fail? I mean
20 that's why I asked you when did this come up. Because there
21 have to -- first of all, I've never heard of a polygraph
22 interview being admitted. So that suggests to me that
23 they're aren't a lot of cases on this. And whether or not
24 it's characterized as plea negotiations or not, I'm not sure

1 is dispositive.

2 Mr. Reynard, your belief is that the term polygraph
3 evidence, which is admissible for no purpose under Illinois
4 law that I can tell, refers only to the results, so if you
5 can avoid a pass-fail type determination, then the statements
6 have potential admissibility?

7 MR. REYNARD: Oh, there is no question about that.

8 THE COURT: Okay. What case stands for that
9 proposition?

10 MR. REYNARD: A number of the S and S cases stand
11 for that proposition, although I can't cite that to Your
12 Honor right now.

13 THE COURT: That's what I think I need.

14 MR. REYNARD: The fact -- the fact of it being a
15 polygraph examination, any reference to that word is nuclear.
16 You can't mention the word. You can talk about what the
17 statements were. And that's abundantly clear in the case
18 law. And I'll get the cases for Your Honor and get them to
19 you in the morning.

20 I mean it was -- it was done in the Glenn Wilson
21 case. He was tested in Chicago, and we couldn't mention the
22 polygraph examination, but we were able to say what he told
23 the examiner. And that was litigated, and it was affirmed
24 again and again on appeal.

1 THE COURT: And that was a defense, though,
2 obviously, a defense polygraph?

3 MR. REYNARD: It was not. That is distinguishable.
4 It was not a defense polygraph.

5 THE COURT: Well, I guess I need to see some
6 authorities on that. I mean, you all are hoping to argue to
7 the jury tomorrow morning the significance of Bowers or the
8 statements to Bowers?

9 MR. REYNARD: Well, I'm not sure the detail of that
10 we'd be touching on in opening statement but I guess --

11 THE COURT: Well, I take it you're not going to
12 talk anything -- say anything about it, Mr. Skelton, in
13 opening remarks?

14 MR. SKELTON: If I would, I'd be held in contempt
15 and it would be a mistrial, Your Honor.

16 THE COURT: Okay. Would both of you, even if you
17 don't have them by tomorrow morning, get me those references.
18 There is some in this criminal law decision handbook. There
19 are some cases that sort of touch on it that I was reviewing
20 while you all were discussing it. People versus Melock,
21 which is a Supreme Court case. You know, there is a few here
22 that I'd like to look at. But if you think there is some
23 authorities for that, this may well turn on my reading of
24 plea negotiations. But I -- and I have never seen a reported

1 decision that identifies what that means. I will simply tell
2 you that. And if it's going to turn out to be what I believe
3 it to be from my practice, then I'll be happy to tell you
4 what I think it is. But --

5 MR. SKELTON: Would you please?

6 MR. REYNARD: Well, I can cite another case, Your
7 Honor, that I would direct your attention to, People versus
8 Norma Jefferson.

9 THE COURT: On what issue now? On admissibility of
10 polygraph, or what plea negotiations consist of?

11 MR. REYNARD: On admissibility of polygraph
12 statements.

13 THE COURT: All right. Go ahead.

14 MR. REYNARD: 184 Illinois Second 486, 235 Illinois
15 Decisions 443, 705 Northeast Second 56. Defendant was
16 convicted of attempted first degree murder. Supreme Court
17 held in the testimony that the defendant -- well, testimony
18 by prosecution witness that unspecified appointment with
19 technician had been scheduled for defendant before defendant
20 gave inculpatory statement did not improperly allude to the
21 fact that the appointment was with polygraph technician.
22 Where the witness carefully avoided making any reference to
23 polygraph examination and the evidence that the defendant had
24 agreed to undergo that examination became admissible once

1 defendant chose to challenge the circumstances causing her to
2 make statement. That's not directly on point, but that
3 obviously shows that we can introduce evidence about the
4 procedure so long as we don't label it for what it was,
5 polygraph.

6 THE COURT: Does it fairly -- well, here is part of
7 my problem. I don't know what either side claims the
8 defendant told Bowers.

9 MR. REYNARD: Well, I can point that out as well.
10 We have an exhibit that we could probably tender by agreement
11 to the court.

12 THE COURT: And if a defendant can plead guilt to a
13 charge without acknowledging having done it, why is not the
14 proffer of evidence that the defendant didn't do it just as
15 legitimately plea negotiations as an offer to plead to an
16 attempt or anything else? Why does the State think, and I'm
17 asking this for purposes of maybe citing some authority, that
18 the tender of a polygraph indicating noninvolvement is not
19 plea negotiations? And I raise that because of the very
20 peculiar, peculiarly sanctioned process, the Alford plea,
21 that the Supreme Court of the United States acknowledges and
22 Illinois does not as far as I'm aware, that you can plead
23 guilty even if you don't acknowledge your guilt. And I
24 ask -- I think that's connected. It's connected because the

1 proffer of a polygraph indicating that I didn't do it, I'm
2 not guilty, you should dismiss, does not mean that that
3 person could not plead guilty to something. And so is the
4 only issue one in which where I have to decide whether
5 Mr. Reynard says no, Mr. Skelton says yes that plea
6 negotiations have become -- begun? Or do you think that
7 there are something either in the statement of Bowers'
8 interview or someplace else that would point me in a
9 direction or some authority as to what plea negotiations
10 mean?

11 So I guess I just want to raise those things when
12 you all do your research. We don't have to resolve it before
13 tomorrow morning, but I'll make a note of the 184 -- what was
14 the name of that case, 184-486.

15 MR. REYNARD: 184 Illinois Second 486.

16 THE COURT: People versus what?

17 MR. REYNARD: Jefferson.

18 THE COURT: Jefferson, okay. That's what I didn't
19 get.

20 Okay. We'll be in recess until nine o'clock
21 tomorrow for opening remarks then.

22 Oh, did you all resolve or have a proposal on the
23 prior convictions of the witnesses so that once we start -- I
24 don't know who was going to be called first.

1 Do we have any witnesses that will require we
2 resolve that tomorrow?

3 MS. GRIFFIN: I don't think so.

4 MR. REYNARD: I don't think so.

5 THE COURT: All right. Because the two of you are
6 going to kind of talk, and if you can't decide what are
7 impeachable, you're going to let me know.

8 MR. REYNARD: And I would request a brief
9 discussion in chambers on another matter that we were going
10 to touch on before the end of the day.

11 THE COURT: All right. We can do that. We'll go
12 off the record and be in recess until tomorrow morning.

13 (The trial was adjourned to August 15, 2000 at
14 nine o'clock a.m.)

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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

I, Nancy L. McClarty, an Official Court Reporter
and Certified Shorthand Reporter in and for the Eleventh
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