

1 OBTAIN A PROPER J AND S?

2 (THEREUPON, THE SIDE-BAR CONFERENCE WAS CONCLUDED.)

3 THE COURT: WITHDRAW THE JURY.

4 (THEREUPON, THE JURY DEPARTED THE COURTROOM, AFTER
5 WHICH THE FOLLOWING PROCEEDINGS TRANSPIRED:)

6 THE COURT: MR. HYLAND, HOW DO YOU SPELL YOUR
7 NAME?

8 THE WITNESS: H-Y-L-A-N-D.

9 THE COURT: THERE WAS A PLEADING FILED, NOTICE
10 OF INTENTION TO CLAIM ALIBI, FILED BY THE DEFENSE ON
11 THE 27TH OF SEPTEMBER.

12 I DON'T KNOW WHEN THE PUBLIC DEFENDER WAS
13 APPOINTED ON THIS, BECAUSE IT'S NOT MARKED ON THE BOX.

14 MR. BENDER: YOUR HONOR, THAT WOULD HAVE BEEN
15 JUNE 13TH.

16 THE COURT: THE PUBLIC DEFENDER WAS APPOINTED
17 ON JUNE 13TH AND ELECTED TO WAIT UNTIL THE 27TH OF
18 SEPTEMBER TO FILE A NOTICE OF INTENTION TO CLAIM
19 ALIBI, WITH AN IMPROPERLY SPELLED NAME. IT'S SPELLED
20 MICHAEL H-I-G-H-L-A-N-D, WHICH IS IMPROPER DISCLOSURE
21 OF A WITNESS.

22 AT THIS POINT, FOR THE RECORD, THERE'S
23 BEEN A MOTION IN LIMINE REQUESTED ORALLY BY THE
24 DEFENSE, FOR THE STATE NOT TO INQUIRE OF THE WITNESS
25 AS TO WHETHER HE HAS EVER BEEN CONVICTED OF A CRIME.

1 AND THEN HAS MADE ARGUMENT TO THE COURT
2 AT THE BENCH THAT, IN FACT, THE STATE MUST PROVE BY
3 JUDGMENT AND SENTENCE THAT, IN FACT, HE HAS BEEN
4 CONVICTED OF A CRIME BEFORE THEY CAN ASK THE QUESTION.

5 I DON'T KNOW WHAT THE STATE'S POSITION IS
6 REGARDING THIS. BUT, OBVIOUSLY, THERE'S NO WAY FOR
7 YOU TO DETERMINE WHETHER SOMEONE HAS BEEN CONVICTED
8 IF THE NAME IS MISSPELLED IN INITIAL DISCLOSURE TO YOU.

9 MR. BENDER: YOUR HONOR, WE GOT NOTHING BACK ON
10 HIM WHEN WE RAN A RAP. HOWEVER, DURING THE DEPOSITION
11 THAT I HAD WITH MR. HYLAND ON MONDAY, HE DISCLOSED
12 THAT HE HAD BEEN CONVICTED OF ROBBERY CHARGES IN FRONT
13 OF JUDGE CYCMANICK AND RECEIVED A FOUR-YEAR PROBATIONARY
14 TERM.

15 IF I'M INCORRECT, MR. HYLAND, PLEASE TELL ME.

16 THE WITNESS: THAT'S RIGHT.

17 MR. BENDER: YOUR HONOR, I THINK THAT'S ALL THAT'S
18 REQUIRED, TO BE ABLE TO ASK HIM THAT QUESTION DURING
19 CROSS-EXAMINATION.

20 MR. EIDE: WE WOULD HAVE ARGUMENT, YOUR HONOR.

21 THE COURT: ALL RIGHT.

22 MR. EIDE: YOUR HONOR, FIRST OF ALL, THE STATE
23 HAD NOTICE FROM THE BEGINNING, OF THE CORRECT SPELLING
24 OF IT. THE INVESTIGATOR REPORT, THE NAME AS I GOT IT
25 WAS H-I-G-H-L-A-N-D. THAT'S HOW I DISCLOSED IT.

1 THE REASON I DISCLOSED OUR ALIBI ON 9-27
2 WAS WE DID NOT RECEIVE THE NOTICE OF INTENTION TO
3 CLAIM ALIBI FROM THE STATE UNTIL 9-25. I DISCLOSED
4 IT TWO DAYS LATER, WHICH I BELIEVE I HAD TEN DAYS.
5 AND I DISCLOSED IT TIMELY.

6 THE STATE HAS HAD THE OPPORTUNITY TO RUN
7 THE RAP. THEY KNEW WHO HE WAS, BOTH FROM THEIR OWN
8 WITNESSES, FROM THEIR INVESTIGATOR. THEY TALKED TO
9 HIM MONDAY, AND THEY ASKED HIM AT THAT TIME.

10 THE COURT: BY HIS OWN ADMISSION, HE WAS CONVICTED
11 OF CRIME.

12 MR. EIDE: MR. HYLAND, WAS ADJUDICATION WITHHELD?

13 THE COURT: YOU'RE MAKING ARGUMENT TO ME, HERE.

14 MR. EIDE: YES, YOUR HONOR.

15 THE COURT: BY HIS OWN ADMISSION, UNDER OATH, JUST
16 NOW HE ADMITTED THAT HE WAS CONVICTED OF THIS CRIME.

17 MR. EIDE: MAY I INQUIRE OF THE WITNESS, YOUR
18 HONOR?

19 THE COURT: ALL RIGHT.

20 MR. EIDE: MR. HYLAND, WAS ADJUDICATION WITHHELD
21 IN THAT CASE, OR WERE YOU ADJUDICATED AT THAT TIME?

22 THE WITNESS: IT WAS WITHHELD.

23 THE COURT: AND WE'RE TO ACCEPT THE TESTIMONY AS
24 TRUTHFUL AS TO WHETHER ADJUDICATION WAS WITHHELD HERE,
25 OR NOT?

1 MR. EIDE: YOUR HONOR, THE STATE HAS ALL THE POWERS.
2 I CANNOT RUN RAP SHEETS. I DO NOT HAVE THAT INFORMATION.

3 THE COURT: WELL, THEY RAN A RAP SHEET ON MICHAEL
4 HIGHLAND, H-I-G-H-L-A-N-D, AND IT CAME BACK THAT THE
5 PERSON HAD NO PRIOR RECORD.

6 MR. BENDER: I GOT NOTHING BACK.

7 MR. EIDE: THEY HAVE THE NAME, H-Y-L-A-N-D, IN
8 THEIR RECORDS.

9 SECONDLY, WHEN WE WERE UP AT THE BENCH AND
10 THE STATE AGREED NOT TO ASK THE QUESTION, THEY KNEW
11 WHO HE WAS, AND HE SAYS HE'S NOT GOING TO WORRY ABOUT
12 IT OR NOT GOING TO ASK IT AT THAT TIME.

13 THERE WAS NOTHING THAT'S COME ABOUT FROM
14 THE FIVE QUESTIONS OR SO THAT I ASKED MR. HYLAND THAT
15 HAS CHANGED SINCE THE STATE MADE THEIR STATEMENT AT
16 THE BENCH.

17 THE COURT: EXCEPT THAT YOU IMPROPERLY DISCLOSED
18 HIS NAME AS H-I-G-H-L-A-N-D.

19 MR. EIDE: AT THE TIME THAT HE MADE THE STATEMENT
20 HE KNEW EVERYTHING. THE DISCLOSURE OF H-I-G-H-L-A-N-D
21 WAS A TYPOGRAPHICAL ERROR. THEY KNEW THE NAME HE HAS
22 PROVIDED. HE DISCLOSED, AND HE TALKED TO HIM THROUGHOUT.

23 WHEN HE DECIDED TO STIPULATE, TO NOT ASK
24 THE QUESTION, HE KNEW ALL THAT. AND WHETHER IT WAS
25 SPELLED "H-I-G-H," OR "H-Y," WE DON'T THINK IT HAS

1 ANY BEARING.

2 MR. BENDER: YOUR HONOR, WHEN HE WAS TALKING I
3 THOUGHT HE SAID MICHAEL WILLEY. AND ACCORDING TO
4 MR. HYLAND, HE SAYS HE WAS CONVICTED; NOT WITHHELD.
5 I WAS GOING ON HIS ASSERTION.

6 I REALIZE THAT WE DID HAVE THE HYLAND NAME
7 IN THE FILE, BUT I DID NOT PUT TWO AND TWO TOGETHER.
8 SO I JUST ASSUMED THAT WAS THE SAME PERSON.

9 MR. EIDE: YOUR HONOR, I SPECIFICALLY SAID,
10 "HYLAND". AND THEN I SAID, "AS TO WILLEY," AND I SAID,
11 "AS TO MR. MERSON, IF I WERE TO PUT HIM ON."

12 SO THERE WERE THREE DIFFERENT NAMES
13 SPECIFICALLY LISTED.

14 THE COURT: PULL THE FILE. CALL DOWN TO THE
15 CLERK'S OFFICE AND PULL THE FILE. WE'LL BE IN RECESS
16 FOR TEN MINUTES.

17 (THEREUPON, COURT RECESSED AT 2:14 P.M., TO RECONVENE
18 AT 2:24 P.M., AFTER WHICH THE FOLLOWING TRANSPIRED:)

19 THE COURT: ACCORDING TO THE RECORD, A MICHAEL
20 HYLAND, SPELLED H-Y-L-A-N-D, ADJUDICATION WAS, IN FACT,
21 WITHHELD.

22 AS I UNDERSTAND THE DEFENSE'S POSITION,
23 THAT BECAUSE ADJUDICATION WAS WITHHELD, YOU CANNOT
24 IMPEACH?

25 MR. EIDE: THAT'S CORRECT, YOUR HONOR. I HAVE

1 CASE LAW FOR THAT.

2 THE COURT: I WOULD LIKE TO SEE IT.

3 MR. BENDER: YOUR HONOR, THE STATE IS NOT
4 CONTESTING THAT.

5 THE COURT: YOU AGREE WITH THAT CONTENTION?

6 MR. BENDER: YES.

7 MR. EIDE: YOUR HONOR, MR. MERSON IS STILL NOT
8 PRESENT.

9 THE COURT: WHERE IS HE?

10 THE COURT DEPUTY: THEY'RE BRINGING HIM IN NOW.
11 AS SOON AS THEY TAKE THE CUFFS OFF --

12 (THEREUPON, THE DEFENDANT ENTERED COURTROOM AT
13 THIS TIME.)

14 MR. EIDE: YOUR HONOR, THERE WAS ANOTHER FILE
15 THAT I JUST GAVE TO THE CLERK. SHE HAS NOT YET HAD
16 A CHANCE TO PULL IT.

17 MR. BENDER: WHAT FILE?

18 MR. EIDE: FOR MICHAEL WILLEY AND MR. MERSON.

19 MY UNDERSTANDING WAS THAT THE STATE WAS
20 NOT GOING TO TRY TO INTRODUCE THAT EVIDENCE.

21 MR. BENDER: YOU INDICATED WILLEY WAS ALSO
22 ADJUDICATION WITHHELD. SO IF THAT'S THE CASE, NO,
23 WE COULD NOT USE IT.

24 THE COURT: YOU HAVE ACTUALLY LOOKED AT THE FILE
25 TO VERIFY IT?

1 MR. EIDE: I HAVE ASKED THE PEOPLE.

2 THE COURT: WELL, THEN YOU CAN'T REPRESENT THAT
3 ADJUDICATION WAS WITHHELD. YOU CAN ONLY REPRESENT
4 THAT THEY REPRESENTED TO YOU THAT ADJUDICATION WAS
5 WITHHELD.

6 MR. EIDE: THAT'S CORRECT.

7 THE COURT: I WOULD LIKE TO SEE THE CASE LAW
8 THAT YOUR REFERRING TO ON IMPEACHMENT.

9 MR. EIDE: FOR THE RECORD, THE CASES THAT I REFER
10 TO AS TO ADJUDICATION WITHHELD NOT BEING USED, FIRST
11 OF ALL, WOULD BE BARBER VERSUS STATE, 413 SO.2D 482,
12 SECOND DISTRICT OPINION, MAY OF 1982.

13 SECOND CASE WOULD BE ROBERTS VERSUS STATE,
14 450 SO.2D 1126, A 1984 OPINION FROM THE FOURTH DISTRICT.

15 THE THIRD CASE WOULD BE UNITED STATES VERSUS
16 GEORGALIS, G-E-O-R-G-A-L-I-S. IT'S 631 FED. 2D 1199,
17 A 1980 OPINION FROM THE U.S. STATE COURTS OF APPEAL,
18 FIFTH CIRCUIT.

19 THE COURT: THAT'S NOT BINDING ON US.

20 MR. EIDE: YOUR HONOR, THE FLORIDA LAW AT THE
21 TIME -- THE FIFTH CIRCUIT WAS IN 1980, AT THE TIME WAS
22 THE ONE ENCOMPASSING FLORIDA.

23 HERE'S THE BARBER CASE. WE WOULD HAVE
24 FURTHER ARGUMENT, IF THE COURT WOULD REQUIRE IT.

25 DOES THE STATE NEED COPIES?

1 MR. BENDER: IF YOU HAVE IT.

2 THE COURT: THEY CITE THE GEORGALIS CASE AS
3 THEIR AUTHORITY FOR THE DICTA IN THE CASE; THAT IT WAS
4 NOT ADMISSIBLE. IF THE STATE DOESN'T TAKE A POSITION
5 THAT IT'S ADMISSIBLE, THEN I CERTAINLY AM NOT.

6 MR. BENDER: YOUR HONOR, IT APPEARS FROM THE CASE
7 LAW THAT IT IS NOT. ALTHOUGH, BARBER IS IN CONFLICT.
8 THEY ARE TALKING CONCERNING A JURY VERDICT, WITHOUT
9 THE ADJUDICATION HAVING YET BEEN IMPOSED BY THE COURT.

10 THE COURT: THAT'S CORRECT. AND THE DICTA IN
11 BARBER GOES ON TO SAY: HOWEVER, IF THE JUDGE HAD
12 WITHHELD ADJUDICATION, AN ANOMALY WILL OCCUR, "IF THE
13 COURT CHOOSES TO WITHHOLD ADJUDICATION AND PLACE THE
14 APPELLANT ON PROBATION FOR THE CRIME WHICH THE JURY
15 HAD PREVIOUSLY FOUND HIM GUILTY. SHOULD THIS HAPPEN,
16 APPELLANT CANNOT THEREAFTER BE IMPEACHED BY EVIDENCE
17 CONCERNING THAT CRIME."

18 MY UNDERSTANDING IS -- I HAVEN'T DONE ANY
19 RESEARCH ON THIS LATELY -- THAT, CLEARLY, YOU CAN
20 IMPEACH IF ADJUDICATION HAS BEEN WITHHELD IN THE STATE
21 OF FLORIDA.

22 MR. BENDER: YOUR HONOR, IF THAT'S YOUR
23 UNDERSTANDING THEN I WOULD ASK YOU TO ALLOW THAT TO
24 BE ASKED.

25 MR. EIDE: YOUR HONOR, WE WOULD HAVE FURTHER --

1 THE COURT: I'M GOING BY, YOU KNOW, PROBABLY A
2 CASE I HAD MAYBE FIVE YEARS AGO OR SOMETHING, OR MAYBE
3 THREE YEARS AGO. I DON'T KNOW. BUT I KNOW IT WAS
4 RESEARCHED, AND I WAS SATISFIED AT THAT POINT THAT
5 YOU COULD IMPEACH.

6 BUT I DON'T WANT TO -- I'M NOT GOING TO,
7 WHEN THE DEFENSE HAS PRESENTED THIS AUTHORITY --
8 ALTHOUGH IT'S DICTA; BARBER IS DEFINITELY DICTA, AND
9 GEORGALIS DOESN'T RULE.

10 BECAUSE, CLEARLY, OUR INTERPRETATION AND
11 THE FEDERAL INTERPRETATION IS VERY DIFFERENT ON DICTA
12 RULE. WE CAN ADMIT THE MISDEMEANOR CRIME OF PETIT
13 THEFT. UNDER FEDERAL LAW YOU, CLEARLY, CANNOT; WHICH
14 IS A GOOD EXAMPLE OF HOW WE'RE IN CONFLICT WITH THE
15 FEDERAL. AND THE FEDERAL SUPREME COURT HAS INTERPRETED
16 THAT AS A CRIME OF MORAL TURPITUDE.

17 MR. BENDER: YOUR HONOR, I'M SURE THERE IS A CASE
18 SAYING IT CAN BE DONE, BUT I HAVEN'T HAD A CHANCE TO
19 RESEARCH IT. SO I CAN'T INTELLIGENTLY SAY THAT I KNOW
20 IT CAN BE ALLOWED.

21 BUT, CLEARLY, THESE CASES CERTAINLY DO NOT
22 SUPPORT THE POSITION THAT IT IS CLEARLY NOT ALLOWED.
23 AS YOU SAID, GEORGALIS DOES NOT APPLY, AND IT IS DICTA.
24 SO I WOULD LEAVE IT UP TO YOU.

25 MR. EIDE: YOUR HONOR, WE WOULD HAVE FURTHER

1 ARGUMENT.

2 THE COURT: WELL, I'M NOT GOING TO PERMIT THE
3 IMPEACHMENT ON MR. HYLAND BECAUSE THERE'S A WITHHOLDING
4 OF ADJUDICATION, CLEARLY, ON THE CASE. AND I DON'T
5 HAVE ANY AUTHORITY PRESENTED TO ME.

6 MR. BENDER: ARE THOSE THE FILES?

7 THE COURT: VOP FILE ON -- YOU'RE AWARE THAT
8 MICHAEL WILLEY WAS A CO-DEFENDANT WITH MR. MERSON ON
9 A BURGLARY TO A DWELLING?

10 MR. BENDER: YES, I WAS, YOUR HONOR. BUT I'M
11 UNDER THE IMPRESSION THERE WAS A WITHHOLDING. AND,
12 CLEARLY, WE'RE TREADING ON DANGEROUS GROUND BY BRINGING
13 IN IMPEACHMENT.

14 THE COURT: WELL, I DON'T --

15 MR. BENDER: I WAS AWARE OF IT.

16 THE COURT: I DON'T DISAGREE WITH YOU.

17 ON MERSON, ADJUDICATION WAS WITHHELD. NOW,
18 I DON'T KNOW, I ASSUME THE PROBATION VIOLATION MAY
19 HAVE CAUSED A LATER ADJUDICATION.

20 MR. EIDE: THE VIOLATION IS PENDING NOW, BEFORE
21 THE COURT, YOUR HONOR.

22 THE COURT: BASED ON THE NEW CHARGE?

23 MR. EIDE: YES.

24 THE COURT: THERE'S BEEN NO VIOLATION BETWEEN
25 THE TIME HE WAS PLACED ON PROBATION AND NOW?

1 MR. EIDE: NOT THAT I WAS AWARE OF.

2 THE COURT: ADJUDICATION WAS WITHHELD ON MERSON.

3 ADJUDICATION WAS WITHHELD ON WILLEY. HE
4 WAS SENTENCED TO 364 DAYS IN JAIL.

5 MR. BENDER: AGAIN, I THINK IT'S ANOTHER ONE OF
6 THOSE --

7 MR. EIDE: YOUR HONOR, I UNDERSTAND THERE WAS A
8 VIOLATION. MR. MERSON DID HAVE A PRIOR VIOLATION.
9 I HAD MISUNDERSTOOD HIM.

10 AND HE SAID THAT THEY STILL WITHHELD
11 ADJUDICATION, AS FAR AS HE KNOWS. THIS IS A 1984
12 CASE THAT HE SAID THEY JUST RE-INSTATED HIS PROBATION.

13 THE COURT: JOHNSON VIOLATED HIS PROBATION.
14 WILLEY VIOLATED HIS PROBATION. THERE'S A WARRANT IN
15 MR. MERSON'S VIOLATION OF PROBATION.

16 MR. EIDE: THAT'S THE CASE THAT'S PENDING RIGHT
17 NOW.

18 THE COURT: FILED THE 28TH OF APRIL, 1988, ALLEGING
19 ASSIGNATION TO COMMIT PROSTITUTION.

20 MR. EIDE: THAT WAS THE ORIGINAL VIOLATION.

21 THE COURT: IT SHOWS PROBATION RESTORED ON MERSON.
22 ADJUDICATION OF GUILT WAS ENTERED 7 JUNE 1988, ON
23 SCOTT RAY MERSON. HERE'S THE JUDGMENT. COUNSEL,
24 APPROACH THE BENCH.

25 HERE'S THE ORIGINAL JUDGMENT. PROBATION

1 WAS MODIFIED, AND HE WAS EXTENDED TO NINE YEARS. THE
2 FINE WAS INCREASED.

3 MR. BENDER: DOES IT SAY ANYTHING AS TO WILLEY?

4 THE COURT: NO, THERE'S NO J AND S. ON HIS
5 VIOLATION?

6 MR. BENDER: RIGHT.

7 THE COURT: YOU CAN LOOK THROUGH IT IF YOU WANT.
8 BUT THEY ALL THREE VIOLATED THEIR PROBATION. HERE'S
9 WILLEY. HERE'S AN ORDER OF MODIFICATION OF PROBATION.

10 AND THE NEXT THING IS THE WARRANT ON MERSON,
11 AND THAT WAS ON SOMETHING DIFFERENT. VIOLATIONS OF
12 ONE, FIVE, 13 AND 16; ORDERED THAT HE GO INTO THE
13 PROBATION RESTITUTION CENTER. BUT THERE'S NO J AND S,
14 AND NEITHER IS THERE ON JOHNSON, EITHER.

15 THERE'S NO CHECK ON JOHNSON AS TO ADJUDICATION
16 OF GUILT. I DON'T KNOW WHAT THE STORY IS ON WILLEY.
17 THERE'S NOTHING TO SHOW A J AND S ON HIM. MOST OF
18 THIS STUFF IS JOHNSON AND MERSON.

19 MR. BENDER: BUT WE DO HAVE A CONVICTION FOR
20 MR. MERSON.

21 MR. EIDE: WOULD THE STATE BE INTENDING TO USE
22 IT, MR. BENDER?

23 MR. BENDER: CERTAINLY.

24 MR. EIDE: YOUR HONOR, WE WOULD OBJECT. AND WE
25 WOULD ASK FOR A HEARING AS TO THE USE OF THAT J AND S