

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

1           AGAINST MR. MERSON, AS A DISCOVERY VIOLATION.

2                         THAT'S SUPPOSED TO BE DISCLOSED IN DISCOVERY,  
3           INCLUDING THE J AND S, PURSUANT TO RULE 3.220, AND THE  
4           CASE OF MARTIN V. STATE, 517 SO.2D 737, A FOURTH DCA  
5           CASE, 1987. WE COULD HOLD THAT AT A SEPARATE TIME, OR  
6           PROCEED NOW.

7                         THE COURT: I WOULD BE GLAD TO HEAR WHATEVER  
8           ARGUMENT YOU WANT TO MAKE ON IT.

9                         MR. EIDE: PROCEED AT THIS TIME, YOUR HONOR?

10                        THE COURT: YEAH.

11                        MR. BENDER: COULD WE GO AHEAD AND CALL THIS A  
12           RICHARDSON HEARING AT THIS TIME.

13                        THE COURT: WELL, I'M NOT SURE WHETHER IT'S  
14           NECESSARY TO HOLD A RICHARDSON HEARING ON A JUDGMENT  
15           AND SENTENCE AGAINST THE DEFENDANT, WHO CAN DISCLOSE  
16           TO HIS OWN ATTORNEY WHETHER HE'S BEEN ADJUDICATED  
17           GUILTY, OR NOT.

18                        MR. BENDER: IF I UNDERSTAND WHAT MR. EIDE HAS  
19           SAID, WE HAVE MADE A DISCOVERY VIOLATION. SO I THINK --

20                        THE COURT: I DON'T KNOW WHETHER I HAVE TO RULE  
21           THAT THERE'S A DISCOVERY VIOLATION.

22                        WHAT ARE YOU RELYING ON, MR. EIDE?

23                        MR. EIDE: YOUR HONOR, LIKE I SAID, I'M RELYING  
24           ON THE CASE OF MARTIN VERSUS STATE, 517 SO.2D 737.

25                        YOUR HONOR, IN MARTIN THE SAME TYPE SITUATION

1 CAME BEFORE THE COURT. AT THAT TIME THEY STATED IN  
2 THERE AT THE TOP OF PAGE 738: THE TRIAL COURT ERRED  
3 WHEN IT DENIED THE MOTION IN LIMINE TO EXCLUDE EVIDENCE  
4 OF HIS PRIOR CONVICTIONS AND WHEN COURT DENIED MOTION  
5 FOR MISTRIAL AFTER ADMISSION OF EVIDENCE.

6 IF THE COURT WOULD READ DOWN FURTHER, IT  
7 SAYS UNDER HEADNOTE ONE: "AT THE CONCLUSION OF THE  
8 STATE'S CASE, APPELLANT MADE A MOTION IN LIMINE TO  
9 PRECLUDE THE STATE FROM ASKING IF HE HAD BEEN CONVICTED  
10 OF A FELONY OR OTHER QUALIFYING OFFENSE." THAT IS WHAT  
11 I DID, ALSO, PRIOR TO PUTTING ON OUR CASE.

12 AT THAT TIME THE TRIAL COURT SAID THE STATE  
13 COULD ASK WHETHER OR NOT HE HAD BEEN CONVICTED OF A  
14 FELONY. IF HIS ANSWER WAS YES, THEN THE STATE COULD  
15 ASK HOW MANY TIMES. HE SAID IF HIS ANSWER WAS NO,  
16 THEN THE STATE COULD NOT GO BEYOND THAT POINT UNLESS  
17 THEY HAD J AND S'S.

18 THE APPELLANT IN THIS CASE, THE DEFENDANT  
19 IN THE TRIAL COURT, ASKED THAT, SAID HE HAD NOT  
20 RECEIVED ANY EVIDENCE FROM THE STATE CONCERNING HIS  
21 PRIOR CONVICTIONS. AND, THEREFORE, SUCH EVIDENCE  
22 SHOULD BE EXCLUDED. AND THAT IS IN THE COLUMN ONE,  
23 PAGE 738, ALL THE WAY AT THE BOTTOM, JUST ABOUT THE  
24 LAST PARAGRAPH.

25 HE THEN ARGUED THAT THERE WAS A DISCOVERY

1 VIOLATION, AS TO THE PORTION OF THE TRANSCRIPT THAT'S  
2 PRINTED IN THE CASE STATES. AFTER THAT THE COURT  
3 CONTINUED THE CASE AND DID NOT PRECLUDE THE STATE  
4 FROM ASKING ABOUT THE PRIORS.

5 THE STATE PRODUCED FOUR ORIGINAL COURT  
6 FILES AND ASSERTED THEY WERE CONVICTIONS, MUCH AS WE  
7 HAVE DONE HERE. THE ORIGINAL COURT FILE CAME IN WITH  
8 THE J AND S'S. AT THAT TIME THEY ASKED FOR A RICHARDSON  
9 HEARING. IT WAS GRANTED.

10 I THINK THE DEFENSE SAID, "HAD I KNOWN  
11 ABOUT THIS AND THAT, AND THAT THEY HAD INTENDED TO USE  
12 IT, THE CASE COULD HAVE BEEN PREPARED DIFFERENTLY."

13 THERE WAS A LOT OF OTHER THINGS WE COULD  
14 HAVE DONE. FIRST OF ALL, MAKING SURE --

15 THE COURT: ARE YOU STATING FOR YOURSELF, OR  
16 ARGUING THIS CASE?

17 MR. EIDE: I AM SPEAKING FOR MYSELF, AS IN THIS  
18 CASE. THERE ARE OTHER THINGS THAT COULD HAVE BEEN  
19 DONE. OUR DECISION TO PUT MR. MERSON ON THE STAND, OR  
20 NOT, COULD HAVE BEEN DIFFERENT.

21 THE COURT: YOU STILL HAVE NOT PUT HIM ON THE  
22 STAND.

23 MR. EIDE: NO, WE HAVE NOT. BUT THE DECISION WE  
24 MADE TO PRESENT OUR DEFENSE AND HOW WE WOULD PLAN OUR  
25 DEFENSE WAS A DECISION MADE TAKING IN MIND THE ENTIRE

1 DEFENSE WE INTEND TO PRESENT. WE HAVE BEGUN THAT.

2 AND AT THIS TIME THE STATE TRYING TO MAKE  
3 ANY CHANGE IN THAT DEFENSE, OR IN OUR STRATEGY, IS  
4 INCORRECT, IS INPROPER. BECAUSE THEY SHOULD HAVE  
5 DISCLOSED THESE THINGS PURSUANT TO 3.220.

6 AND IT STATES FURTHER IN THE OPINION THAT  
7 THE COURT HERE SAID THAT: "WE HOLD THE TRIAL COURT  
8 ERRED WHEN IT FAILED TO EXCLUDE THE EVIDENCE OF PRIOR  
9 CONVICTIONS AND WHEN IT FAILED TO GRANT APPELLANT'S  
10 MOTION FOR MISTRIAL AFTER THE STATE DISCLOSED THAT  
11 THE APPELLANT HAD BEEN CONVICTED OF BURGLARY."

12 YOUR HONOR, THERE WERE THINGS WE COULD  
13 HAVE DONE, TO LOOK AT THE PAST AND MAKE SURE A PLEA  
14 IN THAT CASE WAS TAKEN PROPERLY AND SEE IF THERE WAS  
15 ANY COLLATERAL ATTACKS TO IT.

16 THE COURT: THESE ARE NOT DOCUMENTS PECULIARLY  
17 IN THE POSSESSION OF THE STATE. THESE ARE COURT FILES.  
18 YOU HAVE AS MUCH ACCESS, AS THE STATE DOES, TO  
19 MR. MERSON'S PRIOR CONVICTIONS. PLUS, YOU HAVE THE  
20 ABILITY TO COMMUNICATE WITH YOUR CLIENT AS TO WHETHER  
21 HE'S BEEN PREVIOUSLY CONVICTED, OR NOT.

22 MR. EIDE: BUT THE IDEA IN DISCOVERY IS TO LET  
23 THE OTHER SIDE KNOW WHAT IN THIS CASE, WHAT THE STATE  
24 HAS, WHAT INFORMATION THEY HAD AND WHAT THEY INTENDED  
25 TO USE.

1                   THEY DID NOT DISCLOSE THIS TO US; ALTHOUGH,  
2                   THEY KNEW ABOUT IT. IN FACT, THIS VOP HAS BEEN PENDING.  
3                   THE STATE HAS KNOWLEDGE OF IT. THEY DID NOT DISCLOSE  
4                   IT TO US, AS THEY ARE SUPPOSED TO.

5                   AND WE RELIED UPON EVERYTHING THAT THEY  
6                   TOLD US, WHAT KIND OF CASE THEY WERE GOING TO PRESENT,  
7                   THROUGH DISCOVERY. WE RELIED UPON THAT IN PREPARING  
8                   OUR CASE AND MAKING OUR STRATEGY.

9                   THE COURT: ASSUMING NOW THAT THE STATE WOULD BE  
10                  ALLOWED TO OFFER THE EVIDENCE OF PRIOR CONVICTION AS  
11                  IMPEACHMENT OF YOUR CLIENT, HOW DOES THAT ALTER YOUR  
12                  DEFENSE OF STRATEGY?

13                  MR. EIDE: YOUR HONOR, WE HAVE BEGUN PLACING AN  
14                  ALIBI DEFENSE ON. AND WE'VE DONE THIS PURSUANT TO  
15                  REQUEST FOR NOTICE OF ALIBI. AND WE'VE DONE IT BY A  
16                  COUPLE OF WITNESSES.

17                  WE BELIEVE THE ALIBI DEFENSE COULD BE  
18                  HAMPERED WITHOUT MR. MERSON TESTIFYING. HAD WE NOT  
19                  PLANNED TO CALL MR. MERSON, WE MAY NOT HAVE GONE  
20                  FORWARD WITH THE ALIBI DEFENSE.

21                  I THINK THAT HAD WE NOT PRESENTED ANY  
22                  DEFENSE TODAY, WE COULD HAVE GONE TO THE JURY AFTER  
23                  JUST THE STATE'S CASE AND PRESENTED AN ARGUMENT TO  
24                  THEM THAT THERE WAS DEFINITELY REASONABLE DOUBT IN  
25                  THIS CASE. BUT DUE TO DECISIONS AND THE STRATEGIES

1 THAT WERE MADE, WE DECIDED TO PUT ON A FULL CASE.

2 THE COURT: BUT MR. MERSON IS NOT IN THE MIDDLE  
3 OF TESTIMONY. YOU STILL HAVE A DECISION TO MAKE AS  
4 TO WHETHER TO CALL HIM, OR NOT.

5 MR. EIDE: NO. BUT THE DECISION TO CALL HIM WAS  
6 MADE BASED UPON AN ENTIRE DEFENSE THAT WE WOULD PRESENT  
7 OR NOT PRESENT. AND WE HAVE BEGUN MAKING, PRESENTING  
8 OUR DEFENSE.

9 THE COURT: LET ME HEAR FROM THE STATE.

10 MR. BENDER: YOUR HONOR, I HAVE ONE POINT TO MAKE.  
11 IF YOU RECALL PRIOR TO THE TRIAL STARTING, WE HAD  
12 DISCUSSED POSSIBLE PLEA NEGOTIATIONS. DO YOU RECALL?

13 THE COURT: HMM-HMM.

14 MR. BENDER: AT THAT TIME WHEN WE WERE WORKING  
15 OUT A SCORE SHEET, MR. EIDE AND I PREPARED ONE, USING  
16 A PRIOR BURGLARY CONVICTION AS PART OF THE SCORE SHEET.  
17 MR. EIDE WAS FULLY AWARE OF IT AT THAT TIME, WHICH WAS  
18 YESTERDAY.

19 ONE OF THE THINGS THAT THE APPELLATE COURTS  
20 LOOK FOR IN DISCOVERY VIOLATIONS IS: WAS IT WILLFUL  
21 OR INADVERTENT? DID IT PREJUDICE THE PREPARATION OF  
22 THE DEFENSE IN ANY WAY?

23 AS YOU CAN TELL, YOUR HONOR, OTHER THAN  
24 THE DISCLOSURE YESTERDAY BY MR. EIDE, I WAS UNAWARE  
25 THAT THERE WAS A CONVICTION UNTIL JUST A FEW MOMENTS

1           AGO. SO, CLEARLY, THIS WAS INADVERTENT ADMISSION OF  
2           DISCOVERY.

3                       AS YOU HAVE INDICATED, THEY HAVE ACCESS TO  
4           THE COURTS FILE, AS WELL. MR. EIDE KNEW THAT HE, AT  
5           LEAST, HAD ADJUDICATION WITHHELD FOR THE BURGLARY.

6                       AND I JUST ASSUMED THAT AS WELL, AND I DID  
7           NOT CHECK INTO IT. AND THAT'S MY FAULT. BUT MR. EIDE  
8           KNEW HE WAS CONVICTED YESTERDAY, AND NOW HE'S TRYING  
9           TO ARGUE THAT HE DIDN'T KNOW.

10                      THE COURT: WELL, FOR THE ASSESSMENT OF THE  
11           POINTS, FOR GUIDELINE POINTS FOR SCORING, IT DOESN'T  
12           MATTER WHETHER HE WAS CONVICTED, OR NOT.

13                      MR. BENDER: WELL, I UNDERSTAND THAT.

14                      MY UNDERSTANDING WAS -- CORRECT ME IF I'M  
15           WRONG, ERIC -- THAT WE HAD TALKED ABOUT A CONVICTION  
16           YESTERDAY.

17                      THE COURT: WELL, WE ALL USE THE WORD "CONVICTION"  
18           IN A LOT OF DIFFERENT WAYS, AT LEAST AS FAR AS PRIOR  
19           RECORD IS CONCERNED.

20                      MR. EIDE: FOR THE RECORD, MY UNDERSTANDING OF  
21           THIS WAS THAT ADJUDICATION WAS WITHHELD IN THIS CASE.

22                      THE COURT: WHAT WAS THE BASIS FOR UNDERSTANDING  
23           THAT THE ADJUDICATION WAS WITHHELD?

24                      MR. EIDE: TALKING TO MY CLIENT.

25                      THE COURT: SO IF YOU ELECT TO RELY ON YOUR



1 CLIENT AND HE LIES TO YOU, THEN THAT'S NO BASIS FOR  
2 YOUR OBJECTING AT THIS POINT TO THE INTRODUCTION OF  
3 EVIDENCE THAT'S CLEARLY ON THE RECORD.

4 MR. EIDE: WELL, THE OBJECTION COMES ABOUT --

5 THE COURT: IT'S THE SAME REPRESENTATION THAT WE  
6 HAD ON THESE OTHER WITNESSES; THAT THERE WAS NO PRIOR  
7 RECORD, OR THAT ADJUDICATION WAS WITHHELD.

8 WHEN, IN FACT, YOU WERE RELYING ON THEIR  
9 STATEMENTS, NOT ON YOUR VIEW OF THE CASE. AND I THINK  
10 THAT'S AN IMPORTANT DISTINCTION.

11 YOU, AS AN OFFICER OF THE COURT, OBVIOUSLY  
12 CAN'T MAKE A REPRESENTATION OF THAT. YOU DON'T HAVE  
13 DIRECT KNOWLEDGE, IF YOU CAN ONLY REPRESENT WHAT YOUR  
14 CLIENT OR SOMEONE ELSE HAS TOLD YOU.

15 IF YOUR CLIENT ELECTS TO INDICATE TO YOU  
16 THAT HE HAS NOT BEEN ADJUDICATED OF A CRIME, AND YOU  
17 PLAN YOUR DEFENSE AROUND THAT REPRESENTATION, AND IT  
18 TURNS OUT THAT THAT IS AN UNTRUE REPRESENTATION, YOU'RE  
19 ASKING THE COURT TO PRECLUDE THE STATE FROM OFFERING  
20 EVIDENCE OF A PRIOR CRIME AS A SOURCE OF IMPEACHMENT  
21 OR A METHOD OF IMPEACHMENT AS TO THE CREDIBILITY OF  
22 THE WITNESS; WHICH, CLEARLY, THE STATE WOULD NORMALLY  
23 HAVE A RIGHT TO DO, BASED ON YOUR NEGLIGENCE OR THAT  
24 OF YOUR CLIENT.

25 NOW, I'M NOT SUGGESTING THAT THE PUBLIC

1 DEFENDER OR ANY OTHER ATTORNEY, EVERY TIME THEIR  
2 CLIENT TELLS THEM SOMETHING, HAS TO RUN DOWN TO THE  
3 CLERK'S OFFICE. BUT IF THEY FEEL THAT THEY ARE IN  
4 DOUBT ABOUT SOMETHING, THEY NEED TO GO CHECK THE RECORD.

5 AND WE JUST HEARD AN EARLIER REPRESENTATION,  
6 UNDER OATH, BY THIS WITNESS THAT, IN FACT, HE WAS  
7 CONVICTED OF THE CRIME. AND THEN WE GO TO THE COURT  
8 FILE, AND IT SHOWS HE WASN'T CONVICTED OF THE CRIME.

9 SO WE KNOW NOW ON TWO INSTANCES, ON THE ONLY  
10 TWO WITNESSES THIS HAS REALLY CROPPED UP, OTHER THAN  
11 SOME IFFEY DISCUSSIONS CONCERNING MR. WILLEY, THAT BOTH  
12 OF THEIR REPRESENTATIONS WERE INCORRECT CONCERNING  
13 THE PRIOR RECORD.

14 MR. EIDE: YOUR HONOR, FIRST OF ALL, I ASKED THE  
15 ONE QUESTION TO MR. HYLAND: "WERE YOU ADJUDICATED OR  
16 WAS IT WITHHELD?" HE SAID, "WITHHELD."

17 THERE'S ALSO A QUESTION AND CONFUSION AS TO  
18 "CONVICTION". AND, APPARENTLY, MR. BENDER DIDN'T ASK  
19 THAT QUESTION AT DEPOSITION.

20 SECOND, THE WHOLE CRUX OF THIS ARGUMENT  
21 HERE IS THE PREJUDICE. I KNEW THERE WAS A CHARGE OF  
22 '84. I UNDERSTOOD IT TO BE A WITHHOLD AT THE TIME.

23 THE STATE NEVER GAVE ME ANY INFORMATION,  
24 AS THEY ARE SUPPOSED TO, ACCORDING TO MARTIN AND 3.220.

25 THE COURT: ANYTHING IN 3.220 THAT REQUIRES IT?

1 MR. EIDE: ANY EVIDENCE THAT'S EXCULPATORY.  
2 IT'S A GENERAL CLAIM, AND THAT'S WHERE MARTIN CAME UP.

3 THE COURT: BUT THERE'S NO SPECIFIC STATEMENT IN  
4 3.220 CONCERNING THIS?

5 MR. EIDE: I WOULD HAVE TO LOOK, YOUR HONOR.

6 THE OTHER THING I WANT TO POINT OUT IS,  
7 EVEN TODAY, 20 MINUTES BEFORE THIS HEARING BEGAN THE  
8 STATE HAD SAID THEY WEREN'T GOING TO WORRY ABOUT THE  
9 PRIOR. THIS WASN'T A CONCERN TO THEM AT ALL, AND  
10 THEY WERE JUST GOING TO GO ON FROM HERE.

11 AND, YOU KNOW, THE STATE COULD HAVE LOOKED  
12 IT UP. THE STATE COULD HAVE PROVIDED IT. THEY DIDN'T.  
13 IT WAS OUR UNDERSTANDING ALL OF THE WAY THROUGH THAT  
14 THEY WEREN'T GOING TO CALL IT. WE BASED OUR DEFENSES  
15 ON THAT.

16 AND THE STATE GAVE US NO IDEA OR INKLING AT  
17 ALL, WHETHER THROUGH DISCOVERY OR EVEN TALKING TO THEM  
18 BEFORE TRIAL, OR IN TRIAL, THAT HE WAS GOING TO USE THE  
19 PRIOR.

20 THE COURT: DOES THE STATE AGREE THAT THEY ARE  
21 OBLIGATED UNDER 3.220 TO DISCLOSE THE PRIOR RECORD  
22 OF THE DEFENDANT FOR PURPOSES OF IMPEACHMENT, IF THE  
23 DEFENDANT TAKES THE STAND, ON A NORMAL DISCOVERY  
24 PROCEEDINGS?

25 MR. BENDER: NO, YOUR HONOR, THAT IS NOT MY

1 UNDERSTANDING OF 3,220. AND WE ROUTINELY -- HOWEVER,  
2 WHEN I HAVE DISCOVERY ON CASES, IF I HAVE IT IN THE  
3 FILE, I WILL SUBMIT A RAP SLEET. WE HAVE NEVER SUBMITTED  
4 J AND S'S. WE NEVER SEND THAT AS PART OF DISCOVERY.

5 THE COURT: WELL, YOU DON'T HAVE J AND S'S, DO YOU?

6 MR. BENDER: EXACTLY. SO ALL WE CAN DO IS SEND  
7 A RAP SHEET, WHICH YOU KNOW 90 PERCENT OF THE TIME IS  
8 INCOMPLETE.

9 THE COURT: MR. MERSON WAS REPRESENTED BY THE  
10 PUBLIC DEFENDER, PUBLIC DEFENDER ROGER WEEDEN?

11 MR. EIDE: YES, HE WAS.

12 MR. BENDER: YOUR HONOR, MR. EIDE INDICATED TO  
13 ME THAT ADJUDICATION WAS WITHHELD. IT WAS MY OPINION  
14 SINCE ADJUDICATION WAS WITHHELD, WE COULD NOT IMPEACH.

15 SINCE WE CHECKED THE FILE AND NOW I SEE WE  
16 DO HAVE AN ADJUDICATION, THIS IS THE FIRST TIME I WAS  
17 AWARE OF IT.

18 SO WE'VE DIVULGED IT. WE MADE HIM AWARE OF  
19 THE PRIOR CONVICTION, TO MR. EIDE. THAT'S THE EARLIEST  
20 THAT WE COULD HAVE DONE IT.

21 HE IS AS MUCH TO BLAME AS I, FOR NOT  
22 CHECKING THE FILE. BUT I DON'T BELIEVE IT'S A DISCOVERY  
23 VIOLATION, YOUR HONOR. IT HAS NOT PREJUDICED THE  
24 DEFENSE. BECAUSE ANY TIME --

25 THE COURT: I CAN'T IMAGINE THE STATE WOULD GO

1 BACK ON EVERY CRIMINAL CASE THAT YOU GET -- I KNOW YOU  
2 RUN RAP SHEETS TO GIVE US TENTATIVE IDEAS, FROM THE  
3 STANDPOINT OF SENTENCING.

4 BUT I CAN'T IMAGINE THE STATE WOULD GO BACK  
5 ON EVERY CASE, ON EVERY DEFENDANT THAT IS PROSECUTED  
6 AND LOOK AT THE COURT FILE TO SEE IF, IN FACT, THE  
7 PERSON IS ADJUDICATED.

8 MR. EIDE: THAT'S WHAT'S REQUIRED. AND THERE  
9 ARE JUDGES IN THIS CIRCUIT THAT REQUIRE THE STATE IN  
10 ORDER TO USE A CHARGE AS IMPEACHMENT, TO DISCLOSE IT  
11 TO THE DEFENSE BEFOREHAND. THERE ARE LEAST TWO JUDGES  
12 THAT I KNOW OF, AND BOTH OF THEM DENIED THE STATE FROM  
13 USING IT.

14 THE COURT: HAS ANYBODY SHEPARDIZED IT?

15 MR. EIDE: YES, I HAVE. AND THAT'S CURRENT.

16 THE COURT: ARE THERE ANY OTHER CASES?

17 MR. EIDE: THERE'S NOTHING ELSE, THAT I KNOW OF,  
18 AT THIS TIME. BOTH JUDGE MILLER AND JUDGE CONRAD  
19 HAVE AGREED AND REQUIRED THE STATE THAT IN A TRIAL  
20 SITUATION IF THEY INTEND TO IMPEACH, THAT THEY MUST  
21 PRESENT THE J AND S'S PRIOR TO TRIAL AND NOTIFY THEM.

22 MR. BENDER: YOUR HONOR, IN DISCOVERY WE DID SEND  
23 THE POLICE REPORT BY INVESTIGATOR ROACH, WHICH DID  
24 INDICATE THAT SCOTTY MERSON HAD BEEN ARRESTED FOR  
25 BURGLARY AND THERE WAS AN OUTSTANDING VOP AND ALSO

1           THERE HAD BEEN AN ARREST FOR ASSIGNATION FOR  
2           PROSTITUTION.

3                         ALL OF THAT WAS AVAILABLE TO MR. EIDE. WE  
4           CANNOT SEND A NICE LITTLE PACKET OF ALL THE J AND S'S.  
5           BUT THE RICHARDSON VIOLATION IS NOT WHAT MR. EIDE OR  
6           THIS CASE HAS DEMONSTRATED. THE RICHARDSON VIOLATION  
7           MUST BE FOUND TO BE WILLFUL AND THAT IT CAUSES EXTREME  
8           PREJUDICE.

9                         AND I DON'T SEE ANY INDICATION OF THAT HERE  
10          TODAY, WHEN MR. EIDE WAS FULLY AWARE, JUST AS MUCH AS  
11          WE WERE. HIS CLIENT WAS AWARE HE WAS CONVICTED. AND  
12          WE JUST FOUND OUT TODAY IN THE FILE, AND THIS WAS THE  
13          FIRST TIME I WAS AWARE OF IT. SO I DON'T KNOW HOW I  
14          WAS SUPPOSED TO LET MR. EIDE KNOW ABOUT IT.

15                        THE COURT: AND YOU SAID MR. EIDE REPRESENTED TO  
16          YOU EARLIER THAT ADJUDICATION HAD BEEN WITHHELD?

17                        MR. BENDER: YES, YOUR HONOR.

18                        MR. EIDE: YOUR HONOR, IT'S NOT OUR POSITION TO  
19          PROSECUTE THE CASE. AND ALL WE DO IS LOOK TO MARTIN.  
20          THE PREJUDICE IS OBVIOUS. WE ARE WE'RE IN THE MIDDLE  
21          OF PRESENTING OUR DEFENSE.

22                        IT SAYS THE COURT THERE, WHEN IT FAILED TO  
23          EXCLUDE THE EVIDENCE AND WHEN IT FAILED TO GRANT THE  
24          MOTION FOR MISTRIAL AFTER IT CAME IN, PERMITTED AT  
25          THAT TIME ERROR.

1 PUTS MR. EIDE ON NOTICE THAT THE STATE WAS CERTAINLY  
2 GOING TO USE ANY PRIORS THAT HE MAY HAVE HAD. I DON'T  
3 KNOW WHAT ELSE WE CAN DO, YOUR HONOR.

4 THE COURT: WELL, IT SHOWS ADJUDICATION WAS  
5 WITHHELD, ORIGINALLY.

6 MR. EIDE: THAT'S CORRECT, YOUR HONOR.

7 MR. BENDER: AND THAT'S WHAT I WAS RELYING ON.

8 MR. EIDE: AND THAT'S WHAT I WAS RELYING ON.

9 THE COURT: AND IT JUST SHOWS PROBATION VIOLATION,  
10 BUT IT DOESN'T SHOW THE DISPOSITION ON THE PROBATION  
11 VIOLATION FOR 1988.

12 MR. BENDER: SO WE HAVE COMPLIED WITH THE DISCOVERY  
13 UNDER 3.220, THAT MR. EIDE IS STATING. WE HAVE PROVIDED  
14 A RAP SHEET THAT WE HAD, AND THAT THAT'S ABOUT ALL I  
15 CAN DO, JUDGE; PARTICULARLY, WHEN I JUST FOUND OUT ABOUT  
16 IT TODAY.

17 THE COURT: ALL RIGHT. I'LL GRANT THE DEFENDANT'S  
18 MOTION TO EXCLUDE THE J AND S AND THE QUESTIONING  
19 CONCERNING THE WITNESS, AS FAR AS IMPEACHMENT IS  
20 CONCERNED, BASED ON THE MARTIN CASE, 517 SO.2D 737,  
21 WITH A COMMENT THAT IT REALLY REACHES THE LEVEL OF  
22 OF ABSURDITY THAT THE DEFENDANT, WHO IS THE PERSON  
23 INVOLVED IN THE CASE ORIGINALLY, WOULD KNOW WHETHER  
24 HE HAS BEEN ADJUDICATED OR NOT; MISLEADS HIS ATTORNEY  
25 AS TO ADJUDICATION, AND THEN IS ALLOWED AT TRIAL TO