

COURT OF CRIMINAL APPEALS NO. _____

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF MOBILE COUNTY, ALABAMACIRCUIT COURT NO. CC92-2313.60 and CC92-2314.60 and 2315.CIRCUIT JUDGE FERRILL D. McRAEType of Conviction / Order Appealed From: RULE 32 - DENIED

Sentence Imposed: _____

Defendant Indigent: ☒ YES ☐ NORODNEY KARL STANBERRYVader Al Pennington (334) 438-4691

NAME OF APPELLANT

(Appellant's Attorney)

(Telephone No.)

P.O. Box 40361

(Address)

Mobile, Alabama 36640

(City)

(State)

(Zip Code)

V.

STATE OF ALABAMA

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter
name and address of municipal attorney below.

(For Court of Criminal Appeals Use Only)

1 A. No, sir.

2 Q. And could you tell me when you first saw that
3 document?

4 A. I believe the last time this case was set for
5 trial, if I'm not mistaken -- excuse me, the Rule 32,
6 you showed it to me.

7 Q. Okay.

8 A. In connection with the Rule 32 hearing.

9 Q. Okay. Without going into it, so the Judge
10 can look at it, it's basically -- what does it look to
11 be to you?

12 A. It appears to be a statement from Rene
13 Whitecloud --

14 MS. TIERNEY: Judge, I'm going to object.
15 This statement is hearsay. There is no
16 authentication. There is no hearsay exception.

17 MR. KNIZLEY: Judge, I'm getting to that. We
18 don't have to go over the statement right now,
19 but --

20 THE COURT: Go ahead. Overrule.

21 BY MR. KNIZLEY:

22 Q. What does the statement say? What does it
23 basically look like it is?

24 A. It appears to be a statement from Rene
25 Whitecloud made in Orange County, Town of Monroe, New

1 York -- State of New York on 8-12-1992 taken by
2 investigator Michael Greco from the New York State
3 Police.

4 There's a Waiver of Rights form that's initialed
5 RW with a check by each one of the rights. There's a
6 witness, signed investigator Michael Greco. There's a
7 signature from R-E-N-E, Rene Whitecloud. And
8 underneath that it says one of Angel Melendez's street
9 names. And he says in sometimes in February of '92 --

10 MS. TIERNEY: Well, Judge at this point,
11 could I just ask for five minutes to look at this
12 statement? We have never seen it nor been shown
13 it, and it doesn't appear to be admissible, but
14 at least if we could review it so that we know
15 what's going on.

16 THE COURT: I doubt very seriously if it is
17 admissible. But certainly you can look at it.

18 MR. KNIZLEY: The ultimate representation
19 would be that it comes from the DA's file. They
20 gave it to me. But she can certainly look at it.

21 MS. TIERNEY: I didn't.

22 THE COURT: Okay.

23 (Ms. Tierney reviews document.)

24 MS. TIERNEY: Okay.

25

1 BY MR. KNIZLEY:

2 Q. Have you had an opportunity to review the
3 contents of the statement?

4 A. I have.

5 Q. And does it have information concerning the
6 allegations that were made against Mr. Stanberry?

7 A. It does.

8 Q. Not whether those allegations are true, that
9 his statement is true or not, but had you had the
10 information -- what impact does that information have
11 to you as the attorney for Mr. Stanberry?

12 A. It confirms many of the facts that Mr. Buzz
13 Jordan testified that he thought were made up.

14 Q. And could you be more specific?

15 A. Well --

16 MS. TIERNEY: Well, Judge, before he go into
17 the content of the statement, I feel that first
18 of all they have not established that it's
19 authentic, and if you -- have you got a copy,
20 sir, of the statement? Well, I'll offer you the
21 one that they have given me.

22 THE COURT: Well, let me give you something
23 more important. I haven't heard an iota of
24 testimony as to when the District Attorney's
25 office received that document?

1 MS. TIERNEY: Right. And I'll show it to you
2 in just a --

3 THE COURT: For all that it appears, it was
4 --

5 MS. TIERNEY: Yeah. Where it's been gotten
6 from? Who wrote the narrative? And it's not in
7 the same handwriting as the purported signatory,
8 who is Rene Whitecloud, and that handwriting is
9 very different from the one of the narrative. It
10 is just --

11 THE COURT: Of course I don't see anything
12 wrong with his question. Go ahead.

13 MR. KNIZLEY: Judge, and I don't know why
14 that copy doesn't have a stamp on it, but there's
15 a stamp on this one here, and it says October
16 15th, '93 that I'm suggesting that's the received
17 day.

18 MS. TIERNEY: But it doesn't say DA's office.

19 MR. KNIZLEY: I'm going to ask him.

20 THE COURT: I don't have any idea. Go ahead.

21 MR. KNIZLEY: Judge, I would be happy to
22 testify for them, but I asked for all the
23 discovery, and they gave me this box and that was
24 in it. Now, I'm going to ask Martha --

25 MS. TIERNEY: Wait. Wait. Wait. Who --

1 MR. KNIZLEY: John Cherry.

2 MS. TIERNEY: What, in this?

3 MR. KNIZLEY: Yes.

4 MS. TIERNEY: For the Rule 32?

5 MR. KNIZLEY: Yes. It was before Martha was
6 involved in it. Martha might want to review her
7 -- see if you got it -- I'm sure you do have it,
8 because that's where I got it from. Ain't no
9 other way I could have got it.

10 Judge, may I proceed with --

11 THE COURT: Certainly.

12 BY MR. KNIZLEY:

13 Q. Mr. Nixon, have you reviewed the content of
14 the statement of Mr. Whitecloud?

15 A. I have.

16 Q. And what impact would that have had on you as
17 defense counsel if you had known this document existed
18 at the time you were preparing to try this case?

19 A. Well, I would have --

20 Q. First, let me ask you: What is it about it
21 that impresses you, if anything?

22 A. Well, it verifies. I mean it is consistent
23 with Mr. Stanberry's version of what happened and the
24 other witnesses who said that Mr. Stanberry was not
25 there, and did not participate in it. There are

1 several facts in here that are consistent with what
2 they said.

3 For example, he makes reference to go in a week or
4 so before and shooting guns with Mike Finley, a guy
5 named Mike, which I think that, you know, Mr. Jordan
6 had indicated that he didn't believe that ever
7 happened, and he had indicated that he had -- he was
8 not even sure, didn't think that there was anybody
9 that Rene or "Wish" or -- they didn't exist, they were
10 made up as a cover story. This certainly indicates
11 that that's not correct. It verifies that they were
12 here.

13 At least this gentleman was here, that he had a
14 Glock 9 millimeter pistol that he left on the motel --
15 on the night stand in the motel. The lady -- the
16 expert testified that the lady, Mrs. Finley was shot
17 by a Glock, I think, which was some testimony, that it
18 was missing, and when they came back "Wish" -- seems
19 to indicate that "Wish" and Terrell left, took the
20 Glock. When they came back, they had a bag full of
21 guns at the motel room, which is consistent with the
22 guns that were taken in a sack which was what
23 Mr. Stanberry was told by "Taco" and the others.

24 The time is consistent, the date appears to be
25 consistent. It seem to verify our theory of defense

1 in the case, which was that -- in more particularly it
2 does not mention Rodney at all being there.

3 Q. Had you had that document before the arrival
4 of the case, what if anything would that have caused
5 you to do?

6 A. I would have went to New York.

7 Q. For what purpose?

8 A. To interview this young man, to find out his
9 background and see if he would take a statement, talk
10 to his lawyer, see what his conditions were, ask him
11 more questions about Rodney and Rodney's involvement,
12 if he had any subsequent conversations with "Wish", or
13 Terrell or, you know -- and all of the regular
14 questions that I would need to ask him to verify
15 Mr. Stanberry's theory of defense, and then I would
16 make the steps to get him down here to testify, if he
17 confirmed what is in this -- in this statement.

18 Q. And in your experiences as a criminal defense
19 lawyer and having a statement like this and if you
20 were to interview that person, do you think there may
21 have been any likelihood to develop any further
22 investigation?

23 A. I would think -- if he would have talked to
24 me then, I would think I would have got more
25 information that I could have followed up on.

1 Q. And, again, have you ever seen that document
2 before?

3 A. No, I have never seen this document -- well,
4 excuse me. Prior to the Rule 32 being filed sometimes
5 after the Rule 32 was filed, I received a subpoena to
6 come and testify, you showed me this document and
7 purported that it came from the District Attorney's
8 office when you got the discovery from them.

9 Q. And did you -- when you were back preparing
10 -- I mean, the case for trial have any conversation
11 with Mr. Jordan regarding his interview with
12 Mr. Whitecloud?

13 A. I did.

14 Q. And what if anything did Mr. Jordan tell you
15 about his interview with Mr. Whitecloud?

16 A. Well, actually, Mr. Jordan gave him, my
17 recollection is he gave me a memo, and I think it's in
18 the file or in my file on what he had produced to me,
19 and it was a -- if I recall correctly, it was a one
20 piece like some kind of a narrative form, and it just
21 had a couple of little chicken scratch in Buzz's
22 handwriting, and when I asked him about that he said
23 that was his interview with Rene Whitecloud in New
24 York, notes of his interview. But I asked him about
25 it, and I think -- I don't -- I think he told me that

1 he didn't tell him anything about the shooting in
2 Mobile.

3 It was very -- from what Mr. -- I could not
4 ascertain any information from the form that I
5 recalled, other than the fact that Mr. Jordan did talk
6 to the man in New York, and when I asked Mr. Jordan
7 about it, what he told me was consistent with what he
8 testified here today, basically that he verified him
9 being there, but I don't think he told me anything
10 significant that Mr. Whitecloud said about the events
11 that occurred down here.

12 He certainly didn't tell me anything that's in
13 this Defendant's Exhibit Number 1.

14 Q. Had you had Defendant's Exhibit Number 1 and
15 taken the action you had represented to the Courts you
16 would have taken, would you have compelled the
17 presence of Mr. White (sic), and he had confirmed that
18 he had said that, would you have compelled the
19 presence of Mr. Whitecloud here if at all possible?

20 A. If other circumstances, I mean, you know, I
21 would have made an evaluation, sure I would.

22 Q. And in your opinion if he would have
23 testified basically consistently to what that said,
24 would that have been a benefit to you in the defense
25 of this case?

1 A. Yes.

2 Q. Do you think it could have -- you think it
3 could have had an affect on the outcome?

4 A. Yes.

5 Q. And once again that -- in your opinion
6 what -- how does that statement compare to your
7 client's theory of the defense?

8 A. I don't see anything in here that is
9 inconsistent with my client's theory of defense as
10 presented at the trial.

11 Q. And how does that statement compare to what
12 you understood Terrell Moore said happened?

13 A. It looks like it corroborates to what Terrell
14 Moore said happened.

15 Q. And just so there is no question, this is not
16 something you received in discovery?

17 A. No, and I think Mr. Jordan would have given
18 me this had he -- as a matter of fact I think -- well,
19 strike that. But, I filed -- if I recall correctly --

20 MS. TIERNEY: Objection. Nonresponsive,
21 Your Honor.

22 BY MR. KNIZLEY:

23 Q. Did you file any discovery request?

24 A. Yes, I filed some rather detailed discovery
25 request, and I filed specific Brady request, numerous

1 specific Brady requests.

2 Q. And in your opinion as a criminal defense
3 lawyer -- in fact, you were a police officer before
4 that; right?

5 A. That's correct.

6 Q. Would that be a -- considered to be
7 exculpatory information?

8 A. Yes.

9 MR. KNIZLEY: Pass the witness.

10 MS. TIERNEY: Judge, may I please borrow
11 that statement back from you?

12 THE COURT: Certainly. Ken was asked by
13 Mr. Knizley if he had sought or filed for
14 specific discovery. First of all everyone in
15 this county knows that I always grant open file
16 discovery. Second, the docket sheet is replete
17 with information showing that Mr. Nixon filed
18 every motion known to man -- or that I'm aware of
19 in behalf of his client to -- and to be specific,
20 four separate motions for discovery.

21 In fact, since I have mentioned all of this,
22 I had Becky go through the docket sheet and list
23 all of the motions that he and Ken had filed in
24 this case. There are 13 in number. However,
25 Mr. Nixon also said that he believe that if

1 Mr. Jordan had this information, he would have
2 produced it. That's what I heard; is that what
3 you said?

4 THE WITNESS: I think the question that was
5 asked me, was this the type of information that
6 should have been produced pursuant to my request,
7 and I said, yes, and I --

8 THE COURT: Did you not say that if
9 Mr. Jordan -- that you thought if Mr. Jordan had
10 this, he would have produced it?

11 THE WITNESS: I think he should have produced
12 it, yes, sir. He might disagree. He might not
13 think it's exculpatory, but I think he should
14 have produced it.

15 THE COURT: I'm not too sure it is either,
16 but that's not the question I asked: Didn't you
17 say that if Jordan had this information, you
18 thought he would have given it to you in
19 discovery?

20 THE WITNESS: I did not, Judge. I said, I
21 thought he should have given it to me.

22 THE COURT: Did I not grant open file
23 discovery?

24 THE WITNESS: Yes, sir.

25 THE COURT: Is it not common in open file

1 discovery for an attorney to go to the DA's,
2 office, physically pick up their file, physically
3 go through it piece of paper by piece of paper?

4 THE WITNESS: Not necessarily, Judge. More
5 often times than not, that is not the way it's
6 done, because the DA's file -- if I may answer
7 your question?

8 THE COURT: Certainly.

9 THE WITNESS: Because the DA's file has notes
10 and memos that the DA makes between --
11 well from conversations --

12 THE COURT: Of course that would be work
13 product.

14 THE WITNESS: Right. So what they do rather
15 than give you the file as an open sounds, they
16 take the items out of the file, and copy them for
17 you and give you copies of them, or let you look
18 at them and tell them what they want, but they
19 keep the file and whatever that they feel is
20 privileged or that you are not entitled to get,
21 they don't show it to you.

22 That's why I filed the motions anyway --

23 THE COURT: Well, I don't mind telling you
24 and the whole world, when I grant open file
25 discovery, that's what it means.

1 They are not the ones to determine what is
2 and what is not privileged. But, go ahead.

3 THE WITNESS: Judge, and in fact in this case
4 Mr. Jordan, I think the files will reflect we had
5 -- he would document every time he would send me
6 discovery, he would list it on a list, please
7 find enclosed this, this, this, this, this and
8 this pursuant to the discovery, and those were
9 updated over the years.

10 THE COURT: I think that's a very good
11 practice on the part of Mr. Jordan. But go
12 ahead.

13 CROSS EXAMINATION

14 BY MS. TIERNEY:

15 Q. Mr. Nixon, as you went through this statement
16 you indicated that there were statements contained in
17 it that were consistent with what Rodney Stanberry
18 told you; is that correct?

19 A. No, I said they were consistent with Rodney's
20 theory of defense.

21 Q. Is that not the same thing, sir?

22 A. No, it's not.

23 Q. Well, what did he tell you? What did Rodney
24 tell you?

25 A. Well, I have already told you what he told me

1 basically. I mean, if you could ask me about his
2 theory of defense, but --

3 Q. Right.

4 A. -- the only thing I'm saying is that some of
5 this information was consistent with Rodney's theory
6 of defense, but was not told to me by Rodney, it was
7 what other witnesses had seen.

8 Q. Okay. So you knew that there had been a
9 fellow named Rene Whitecloud in Mobile in February of
10 '92; did you not, sir?

11 A. Yes.

12 Q. Okay. Before you got this statement;
13 correct?

14 A. Well, I just got this statement -- I mean
15 today.

16 Q. No. My question was: You knew when you were
17 representing Rodney that in February '92 there was a
18 Rene Whitecloud here during Mardi Gras?

19 A. Yes.

20 Q. Which is what's in this statement?

21 A. That's correct. That was part of my theory
22 of defense.

23 Q. All right. And you knew that they were
24 hanging out in a motel at the time that you were
25 representing Rodney, and before this became produced

1 to you --

2 A. Sure. That was also a part of my theory of
3 defense.

4 Q. Well, let me finish my question. Or else
5 we're just stepping on each others words.

6 A. Can I answer it? Are you finished?

7 Q. Well, it was really a yes or no question that
8 you knew these people came down at Mardi Gras of 1992
9 before you ever got this, which you say you got during
10 the Rule 32 proceeding, when you were representing him
11 before he went to trial, you knew that there was a
12 Rene Whitecloud; did you not, sir, yes or no?

13 A. You asked me about 15 questions, Ms. Tierney.

14 Q. Well, let me just ask them one at a time.

15 A. Thank you.

16 Q. You knew there was a Rene Whitecloud when you
17 took this man to trial?

18 A. Sure. That was part of my theory of defense.

19 Q. You knew he had come to Mobile at Mardi Gras?

20 A. Yes.

21 Q. You knew he had a gun?

22 A. Yes.

23 Q. You knew he had some friends who had gone to
24 Mike Finley's house?

25 A. Yes.

1 Q. And you knew everything that's contained in
2 this statement as a matter of fact; did you not?

3 A. It looks like everything that's contained in
4 this statement was right on point with our theory of
5 defense --

6 Q. Exactly.

7 A. -- yes.

8 Q. My point, you could have gone yourself to
9 New York and you could have subpoenaed Mr. Whitecloud?
10 This is nothing new that you didn't know; is that
11 correct, sir?

12 A. No, this is new. This statement here I did
13 not know that Rene Whitecloud had told anybody this.

14 Q. But the contents of this statement are not
15 new to you, sir, are they?

16 A. Yes, the contents of this statement are new,
17 yes.

18 Q. No, the story related, you just testified you
19 knew it was his theory of the defense?

20 A. Sure. I knew his theory of defense. Did I
21 know of --

22 Q. Thank you. And I have another question now,
23 if you don't mind, sir.

24 A. Okay.

25 Q. Do you know whose handwriting this is?

1 A. You don't want me to answer your question?

2 Q. Well, you have, sir.

3 A. Okay.

4 Q. Mr. Nixon, I'm going to just ask you briefly
5 about some allegations made by the petitioner where he
6 has alleged that you represented him ineffectively.
7 And even though you have an extraordinary good
8 reputation in this community, I will still ask you
9 these questions.

10 A. Sure.

11 Q. He says you failed to read police reports and
12 to investigate this crime. Is there any truths to
13 that, sir?

14 A. Well, if this is a police report, I failed to
15 read it, Defendant's Exhibit 1. But other than that,
16 I read every report that I was provided.

17 Q. And you did request continuances in this
18 case, did you not; sir?

19 And he alleges that it was continued for over 30
20 months?

21 A. I did request continuances and Mr. Jordan
22 requested continuances. And as I recalled neither
23 one of us objected to the other continuances.

24 And I would have if I thought it was in
25 Mr. Stanberry's interest to do so.

1 A. I have no idea.

2 Q. Do you know whose handwriting this is?

3 A. I have no idea.

4 Q. Do you know who prepared this?

5 A. No idea.

6 Q. Do you know how you got it?

7 A. Yes, I do.

8 Q. Where did you get it?

9 A. Mr. Dennis Knizley put it in my hands about
10 15 minutes ago.

11 Q. Okay. You have no idea of the authenticity
12 of this document, do you, sir?

13 A. No.

14 Q. Do you know where it was prepared?

15 A. I have no idea.

16 Q. Do you know what state or what city or what
17 facility?

18 A. No, ma'am.

19 Q. Do you know who was present?

20 A. No, ma'am.

21 Q. Did you ever discuss with Mr. Stanberry
22 bringing Rene Whitecloud, aka "Ponytail" Barbosa to
23 testify at trial?

24 A. I'm sure that I did, but if I --

25 Q. Thank you Mr. Nixon.

1 Q. But in fact wouldn't you agree that it was
2 more in his interest to delay this case in the event
3 that the victim were to die?

4 A. Well, it's a Catch-22. I knew her testimony
5 was not preserved. I knew that Mr. Jordan was trying
6 to develop -- or trying to get somebody to cut a deal
7 and testify or locate witnesses, you know.

8 Q. Do you remember telling me at one time a few
9 months ago that if the victim had died, the Defendant
10 would have walked, may very well have walked? Do you
11 remember saying that to me in one of the previous
12 settings in this case?

13 A. No, but I don't doubt that I did tell you
14 that, because of the way I see it, that was the only
15 evidence against Mr. Stanberry.

16 Q. Now, he says that you failed to subpoena some
17 records from various outfits relating to his bus
18 route. But isn't it true, sir, that you presented
19 numerous witnesses -- I mean not his bus route, his
20 garbage truck route, his BFI truck route.

21 Isn't it true, sir, that you introduced numerous
22 witnesses to establish -- and records to establish his
23 alibi?

24 A. It is true that I introduced numerous records
25 to establish his alibi. I do not know whether I

1 failed to subpoena any particular records.

2 Q. Okay. He says that you did not prepare him
3 for the rigors of trial. Do you prepare your
4 witnesses -- your clients for trial, sir?

5 A. I do.

6 MR. KNIZLEY: Judge, these are not any
7 allegations that we have laid a foundation for
8 and to subject Mr. Nixon to this inquiry, I think
9 -- well, first me, confronting him with such
10 would be inappropriate.

11 THE COURT: I think what she's referring to
12 is the many allegations that Mr. Stanberry,
13 himself, made in these motions --

14 MR. KNIZLEY: Judge, this affords no evidence
15 to support him and to -- before the Court right
16 now there has been no testimony solicited to
17 Mr. Nixon or even a place in controversy. And I
18 don't think she should explore this area.

19 BY MS. TIERNEY:

20 Q. All right. Well, let me ask you something
21 else. You had a defense in this case, didn't you,
22 sir, and it was basically the alibi that he was at
23 work and these others committed the crime; correct?
24 Meaning Terrell Moore, and "Wish" who is also Angel
25 Melendez Iho, and "Taco" back at the motel; isn't that

1 what your defense was?

2 A. My theory of defense was that he did not
3 participate in it.

4 Q. And these people supported that; isn't that
5 right?

6 A. What people?

7 Q. "Taco" Donnard, he came to testify, did he
8 not sir?

9 A. Yes.

10 Q. Okay. And you attempted to introduce
11 information that it was Terrell Moore and "Wish";
12 correct, sir?

13 A. I attempted to, yes.

14 Q. Okay. And that he was working at the time;
15 correct?

16 A. That's correct.

17 Q. Okay.

18 MS. TIERNEY: Just one second, Judge. That's
19 all I've got, Judge.

20 MR. KNIZLEY: We'd like to recall Mr. Jordan?

21 THE COURT: Certainly.

22 BUZZ JORDAN

23 having been previously sworn was called

24 back to the stand and testified

25 as follows:

FURTHER REDIRECT EXAMINATION

BY MR. KNIZLEY:

Q. Buzz, I'm going to show you what's marked as Defendant's Exhibit 1.

A. Yes.

Q. Take a look at it. Now your previous testimony in this case was that you had never delivered to Mr. Nixon or anyone else on behalf of the Defendant any written statements of Rene Whitecloud taken by law enforcements.

Was that correctly summarized to what you testified to previously?

A. Yes.

Q. And did you not deliver that statement to Mr. Nixon, Defendant's Exhibit 1?

A. I don't know if I've ever known about this statement, because I was not present-- I was not present whenever this statement was taken.

This was not taken at Ryker's Prison, so I am not -- I am not sure I'm aware of this.

Q. My question to you is: Did you give Ken that statement?

A. I don't think so.

Q. Okay. Have you had an opportunity --

A. Now, I'm going to rely on Mr. Nixon because I

1 don't recall this statement. If I would have known
2 about this statement, I would have given this to
3 Mr. Nixon in my opinion.

4 Q. Well, your testimony has been, you've given
5 no written statement; is that right?

6 A. Right. Because I'm not aware of -- this is
7 the first I'm aware of this.

8 Q. And you stand by that; don't you?

9 A. Yes.

10 Q. All right. Now, have you had an opportunity
11 to review the District Attorney's file to see if that
12 statement is in there?

13 A. I have not. And I don't work in the DA's
14 office anymore, and I have not reviewed the DA's file.

15 Q. Okay. And in this case the Judge has
16 alluded to open file discovery, and Judge McRae does
17 that routinely?

18 A. Absolutely. In fact, every Judge did it, and
19 we complied with that.

20 Q. But in some cases in doing so you would --
21 and I think you could see it in this case that there's
22 a number of letters you would send to Mr. Nixon saying
23 enclosed is a copy of this discovery; would you not?

24 A. I would try to do that, yes. I might not do
25 it consistently, but I've tried to do that, yes.

1 Q. And that is the matter in which Ken would
2 receive the discovery materials in the case?

3 A. That's one way.

4 Q. And as Ken said, there are sensitive matters
5 in the DA's file which you would not make open to a
6 defense counsel, is there not?

7 A. Occasionally.

8 Q. And so though we characterize it as open
9 file, and Judge McRae means it to be everything in the
10 file, but certainly not your work product; is that
11 right?

12 A. Not my work product.

13 Q. And for that reason there are some things
14 that you must remove or not give to defense counsel?

15 A. Sometimes, sometimes not. Kind of like what
16 Judge McRae said, open file, come up and look at the
17 file and go through the box and go through -- and the
18 way I would do it, I'd usually have a box --

19 Q. Well, let me ask you, Buzz --

20 A. -- with individual files, labeled by
21 witnesses.

22 Q. You didn't have a question, but let me ask
23 you one, okay.

24 A. Okay.

25 Q. On open file discovery, you are not saying

1 that you would let a defense counsel look at every
2 single piece of paper in the proper file are you?

3 A. Oh, yes I would do that too.

4 Q. Every piece of paper?

5 A. Every piece of paper.

6 Q. In other words, your notes about this witness
7 said this, and I think this is our theory of the case,
8 you are going to let them look at all of that too.

9 A. I wouldn't write down this is my theory of
10 the case in my notes or anything like that, but --

11 Q. I thought you just told us from time to time
12 there were some documents that you would pull out?
13 Did I misunderstand you?

14 A. No, Mr. Knizley, I don't know if, you know,
15 in your practice you probably don't do everything the
16 same way every single time.

17 Q. Right.

18 A. But you try to be consistent, and open file
19 discovery, I know what that means. I know Judge McRae
20 -- if you asked me if I held this back from Mr. Nixon,
21 absolutely not --

22 Q. I haven't said that.

23 A. -- ever.

24 Q. I haven't said that.

25 A. And would not period.

1 Q. You say you would not?

2 A. I would not period. If I was aware of this

3 --

4 Q. Now --

5 A. I would not, not turn this over to Mr. Nixon,
6 period.

7 Q. Okay.

8 A. I can assure you of that.

9 Q. You're not saying there's never been any
10 cases in which discovery material that you've been
11 remiss about does not deliver in your discovery
12 material; have you? You're not saying that?

13 A. I would never hide any discovery exculpatory,
14 Brady material, anything refused to give out to the
15 defense attorney.

16 Q. And in Butch Nettles (phonetic) case where a
17 new trial was granted for not delivering information
18 about favorable testimony to Vince Beard (phonetic)
19 when Judge Johnston granted the new trial, that was
20 your case; wasn't it?

21 A. That was definitely my case.

22 Q. And a new trial was granted because some
23 information was not delivered to defense counsel;
24 right?

25 A. No, I don't think that was the situation, but

1 I don't really remember the situation right now. I
2 wish I -- it was clear on it.

3 MR. KNIZLEY: Thank you.

4 MS. TIERNEY: May I, Judge, just very brief.

5 THE COURT: (Nodding head.)

6 FURTHER RECROSS EXAMINATION

7 BY MS. TIERNEY:

8 Q. And I'm sorry, Buzz, if this is redundant but
9 have you ever seen this statement before?

10 A. I don't recall seeing this statement before,
11 but I mean that doesn't mean I didn't see it, but I
12 don't recall seeing this. I was not present during
13 this statement. This is not when I went to New York.

14 And this was done when I -- and I'm quite frankly
15 surprised at this, and at the same time, this is
16 consistent with what Mr. Stanberry said that something
17 about his people going to the New York Police and
18 talking to them at some point, which I wasn't aware of
19 that. I was not present during this. I was not a
20 party to this statement. And if I had known about
21 this, I would have gladly given this to Mr. Nixon.
22 This is not even to me exculpatory.

23 Q. Okay. And that's what I want to ask you
24 regarding exculpatory. How would it impact the trial
25 of the case if you had known of that document and

1 produced it of course if you felt it was exculpatory,
2 and I'm sorry I'm making a long sentence here. But
3 you say it's not exculpatory. Regardless, how would
4 it have impacted the trial of your case if it had been
5 observed through open file discovery?

6 A. Well, irrespective of this, this is
7 Mr. Stanberry's strategy of theory that I knew of the
8 case the whole time. This was their theory. And I
9 had -- of course Mr. Nixon could have at anytime
10 brought "Ponytail" to trial which he would never have
11 done. Mr. Nixon's too good of a defense lawyer to
12 have ever brought Mr. "Ponytail" to this courtroom. I
13 wish he would have. With or without this statement he
14 was not going to bring "Ponytail" to this courtroom --

15 Q. Why?

16 A. -- during Mr. Stanberry's trial, because that
17 would have played right into my hands. That would
18 have just given me one more nail to put into this
19 case. It would have actually bolstered and
20 strengthened my case. With Mr. "Ponytail" here, with
21 Valerie being able to identify him, put him on the
22 stand, he could have read this statement or backed up
23 Mr. Stanberry, he could have corroborated everything
24 he wanted to. I wished Mr. Nixon would have brought
25 him here, and he could have brought him here, but I

1 know why he didn't. And so that's. . .

2 Q. And of course he was a convicted felon;
3 right, sir?

4 MR. KNIZLEY: Well, now, I object. That's
5 not been the testimony. He was charged. He
6 don't know one way or the other unless he's
7 got some other information.

8 THE COURT: I don't think it makes any
9 difference one way or the other, but go ahead
10 and answer.

11 THE WITNESS: All I know he was a suspect or
12 convicted, or on trial, or under arrest for
13 murder in New York City which was consistent with
14 what he had did down here as well.

15 BY MS. TIERNEY:

16 Q. And of course you would have been able to
17 establish that this "Ponytail" character was after all
18 Rodney Stanberry's friend; correct, sir?

19 A. I would have had a field day if Mr. Nixon
20 would have put "Ponytail" on the stand. It would have
21 done everything to help me out in this case to just
22 strengthen my case. It would have just corroborated
23 everything that Mrs. Finley said in my opinion.

24 Q. So in your views strategically speaking, it
25 would have been doomed for the defense to bring him

1 down, strategically?

2 A. Of course he would have been crazy to bring
3 him down.

4 MS. TIERNEY: That's all I got, Judge.

5 MR. KNIZLEY: Judge, just on the question
6 of exculpatory.

7 FURTHER REDIRECT EXAMINATION

8 BY MR. KNIZLEY:

9 Q. You said that Mr. Whitecloud's statement
10 there if it is in fact correct does confirm Mr.
11 Stanberry's theory of the case?

12 A. Oh, yes. This is basically what
13 Mr. Stanberry told me when I interviewed him.

14 Q. And would you consider a witnesses statement
15 that confirms the theory of the Defendant's case
16 something exculpatory that the Defendant would want to
17 know about?

18 A. I would not characterize this as exculpatory,
19 but I mean you might have different opinions, but
20 that's irrespective. If I had have known of this, I
21 would have given it to Mr. Nixon rather it was or was
22 not exculpatory because the Judge had an open file
23 rule. So, it's much broader than Brady material.

24 MR. KNIZLEY: That's all.

25

FURTHER RECROSS EXAMINATION

BY MS. TIERNEY:

Q. Do you see anywhere in this statement, Mr. Jordan, where it says Rodney Stanberry didn't do it?

A. I haven't read it, but.

Q. Well, review it real briefly, and see if you find anywhere something that says Rodney didn't do what he is charged with and convicted with doing?

A. (Reviews document.) No, I don't see that in here. Quite frankly I suspect that Whitecloud went to Greco. I don't think this guy --

MR. KNIZLEY: Judge, now, Buzz is guessing now.

THE COURT: Sustained.

THE WITNESS: Well, that's what it looks like on this document.

BY MS. TIERNEY:

Q. Did Mr. Greco ever call you about this?

A. About this statement? No, I don't recall ever discussing this with him.

MS. TIERNEY: That's all I have, Judge.

MR. KNIZLEY: Nothing more.

THE COURT: Dennis, I realize perfectly well that you didn't file this, but I'm having a hard time understanding what in the world your client

1 means. Let me read it, the second inquiry for
2 this Court is whether the trial was so corrupted
3 by the State Attorney -- that means Mr. Jordan,
4 as to render the resulting convictions a denial
5 of "due process". What in the world does that
6 mean?

7 MR. KNIZLEY: Judge, I appreciate you
8 pointing out that I am not the author of that.

9 MS. TIERNEY: Judge, that's what they call a
10 conclusory allegation.

11 THE COURT: Oh, I understand what it is, but
12 whoever put it down here had to have something in
13 their mind, but I was really -- the language
14 corrupted by the State Attorney. If somebody
15 goes back and counts the objections, I ruled
16 against him more than I did Ken. I kept his 80
17 page prized confession out.

18 So how in the world did he corrupt anybody?
19 I don't understand that. In addition, it says --
20 and I will be the first to say that you didn't
21 offer this thing.

22 The attorney for the defense functioned as an
23 adversary to the State's prosecution, absolutely
24 blows my mind. I'm sitting here with the
25 information -- and you know since we're putting

1 everything in the record, I want to put this in
2 the record.

3 I have tried literally thousands upon
4 thousands of criminal cases. How many -- or if
5 I had to guess I'd say eight, ten, twelve,
6 fifteen thousand, I don't know. I know of no
7 attorney that represented their client any better
8 than Ken Nixon did in this case. And I have in
9 my hand a copy of 13 motions filed, which is far
10 more than are usually filed.

11 And looking at the scope and depth of those
12 motions, that man did an awful lot of work, put
13 an awful lot of his time and efforts on the
14 Defendant's behalf, and then have the Defendant
15 say he was actually a witness for the State, that
16 just blows my mind. Anything else?

17 MR. KNIZLEY: Judge, I would like to put
18 Mr. Stanberry on briefly.

19 THE COURT: Certainly. He can stand right
20 there. Turn around, Linda.

21 RODNEY STANBERRY

22 was sworn and testified as follows:

23 DIRECT EXAMINATION

24 BY MR. KNIZLEY:

25 Q. State your name.