

CROSS EXAMINATION

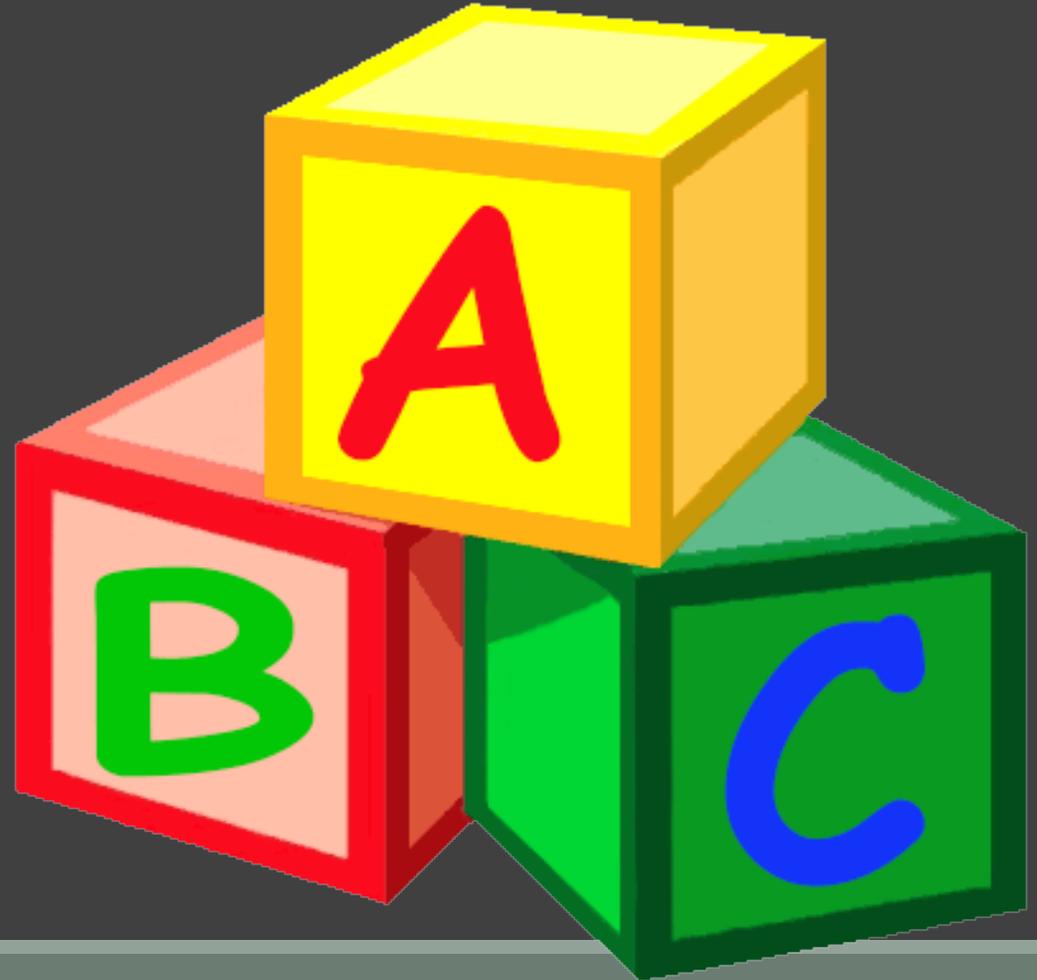
PRESENTED BY:

BILL FITZSIMMONS

NEW JERSEY OFFICE OF THE
PUBLIC DEFENDER

The ABC'S OF CROSS

The Building
Blocks of Cross



ONE RULE FOR MY PRESENTATION:

NO QUESTIONS

Topics of discussion

1. Rules

2. Theory

3. Bible

4. Real Estate

5. Shakespeare

6. Chapters

7. Sequencing

8. Headlines

9. Applying the brakes

10. Identification

1







ONE RULE:

WE ASK
LEADING
QUESTIONS

ONE:

FACT PER
QUESTION

ONE:

TOPIC PER
CHAPTER

ONE:

- RULE
- FACT PER QUESTION
- TOPIC PER CHAPTER

1

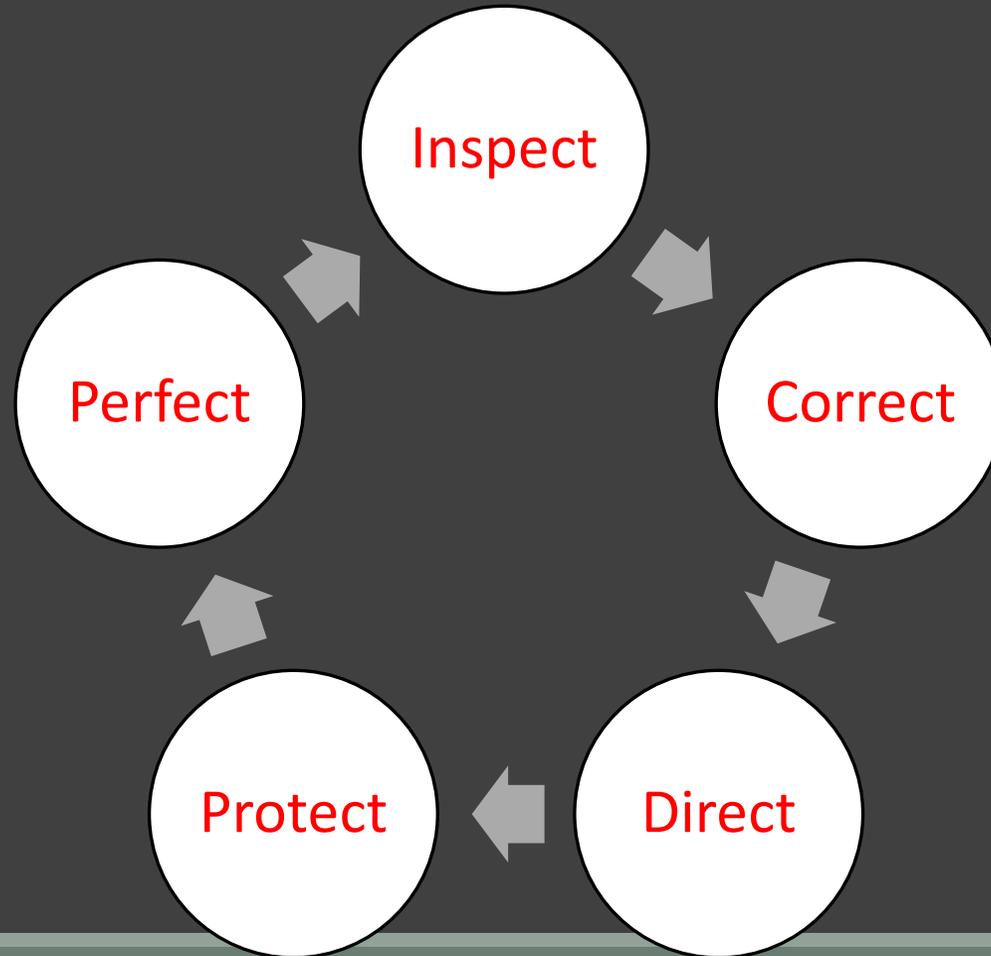
Benefits of Theory-driven preparation:

Craig Mastanuono:

“Determines every action of your case”

– May 13, 2019

Benefits of Theory-driven preparation:





**Preparing her cross
examination
Using a Theory Driven
process**

A Bit of Context

Matthew 3:12 - "To separate the wheat from the chaff..." ≈ separating things of value from things of no value.

- **Chaff**

- **1:** The seed coverings and other debris separated from the seed in threshing grain.
- **2:** Something comparatively worthless.

- **Threshing**

- The process of loosening the chaff from the grain.





Chaff = crap



Wheat =
Not Crap



Preparation



Dr. Frasier Crane:

There's an old real estate maxim that says the three most important things when looking for a property are location, location, location.

Woody Boyd:

That's just one thing.

Dr. Frasier Crane:

That's the point Woody.

Woody Boyd:

What, that real estate people are stupid?

Dr. Frasier Crane:

No, that location is the one most important thing in real estate.

Woody Boyd:

Then why do they say that it's three things?

Dr. Frasier Crane:

Because real estate people are stupid.

CROSS EXAM MAXIM:

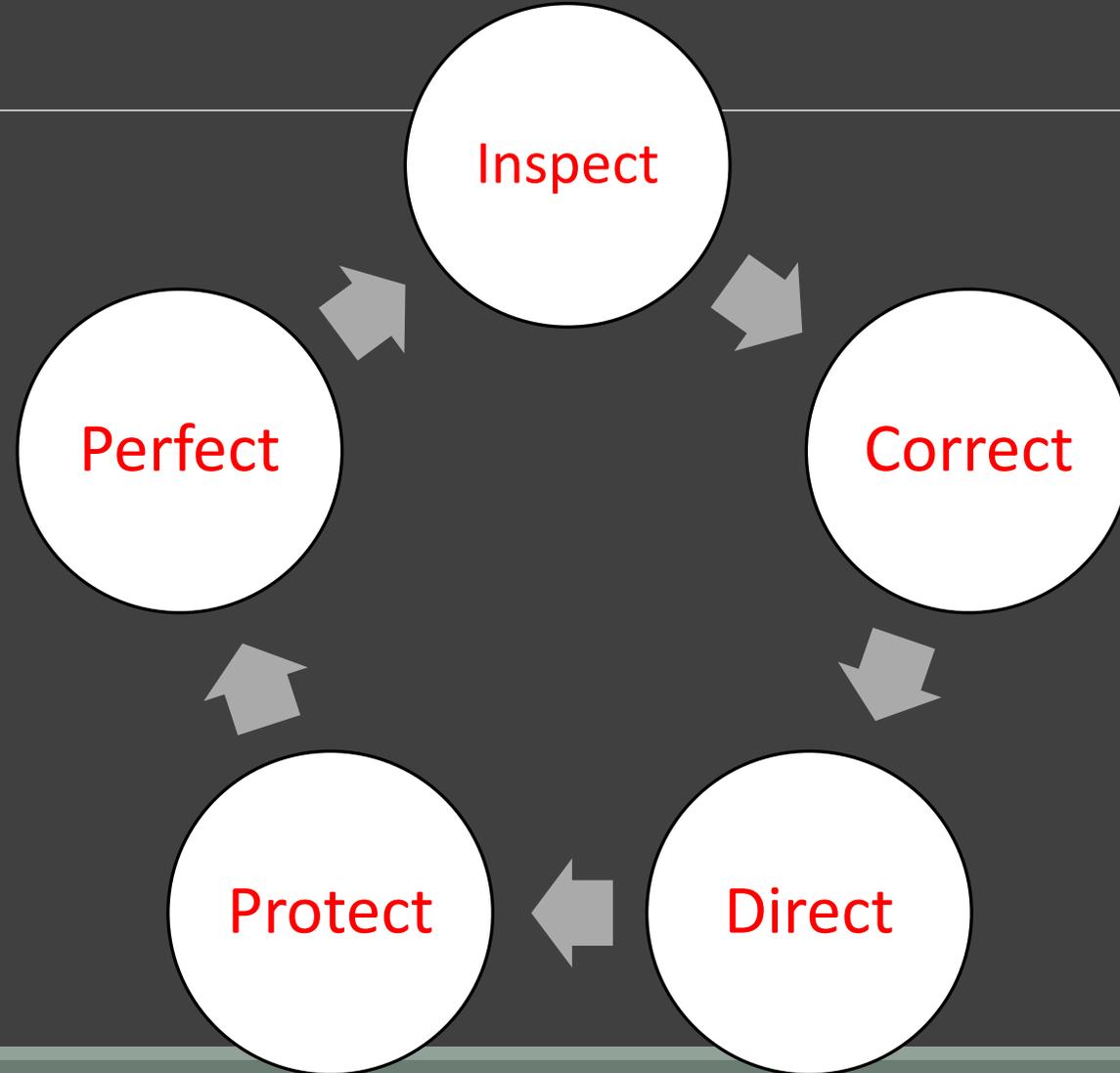
THREE MOST IMPORTANT FACTORS WHEN GETTING CROSS TOGETHER ARE:

1. PREPARATION;

2. PREPARATION; AND

3. PREPARATION!

Our Preparation is Theory-driven



FIRST QUESTION ASK YOURSELF:

**DO I EVEN NEED TO
CROSS THIS
WITNESS?**

TO CROSS OR NOT TO CROSS?

THAT IS THE QUESTION

- ADRIEN MONCUR

Hamlet: Shakespeare's early draft

FINAL VERSION

To be, or not to be – that
is the question:

Whether 'tis nobler in
the mind to suffer

The slings and arrows of
outrageous fortune

Or to take arms against a
sea of troubles

And by opposing end
them.

FIRST DRAFT

*To cross, or not to cross –
that is the question:*

*Whether 'tis nobler in the
mind to suffer the slings
and arrows of outrageous
objections*

*Or to take arms against a
sea of prior inconsistent
statements*

*And by impeachment – end
all credibility*

TO CROSS OR NOT TO CROSS?

Legitimate considerations:

Pre-Game

Is the witness' testimony expected to hurt my case?

Is the witness' testimony inconsistent with my theory of the case?

Game Day

Did the state omit critical testimony/evidence on direct?

Do I allow testimony/evidence to be addressed on re-direct if I cross?

TO CROSS OR NOT TO CROSS?

Non-legitimate Considerations:

- Not being prepared to cross the witness
- Being nervous about crossing the witness because you're not prepared

What is a chapter?
What is the “chapter
method”?

What is the chapter method?

Preparation!!

Chapters

Sequencing

Theory Driven

of preparing cross examination in which questions are broken down into clusters called "chapters," and the "chapters" are put in an order that best drives your theory.

Normal rules of cross still apply

One fact per question

Ask leading questions

Do not ask a question if you do not know the answer

If it does not support your theory, do not ask it

Never ask the one question too far

Basics of the chapter method

Basics of the chapter method

Once you have your theory...

1. Brainstorm all possible areas of cross examination
2. Break down into chapters
3. Put each chapter on its own page
4. Write cross questions
5. Sequence your chapters

What is a chapter?

- ❖ A chapter is a point that you *may* want to make on cross.
- ❖ If the point is necessary for your defense, don't assume it will be covered on direct – plan a chapter of cross for it.
- ❖ The title of the chapter is the point you want to make – it's not something you will actually ask the witness
- ❖ Each chapter is made up of a series of questions to establish the point.

Breaking down into chapters

Break cross down into specific, detailed, identifiable points. Keep breaking each chapter down until it truly focuses on one point and one point only.

What it looks like

What it looks like

Title of chapter at the top

Questions go beneath the chapter

One chapter per page

Keep breaking chapters down further and further until each chapter drives only one point

Don't staple together

Vincent Phillips ID omits

- **Nose**
- **Eyes**
- **Facial hair**
- **Skin condition**
- **Hair**

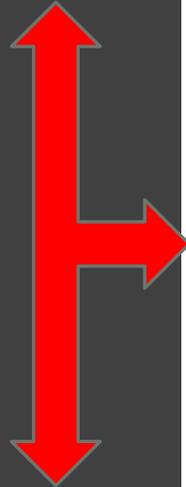
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Window Obstructions

Pictures

- **Brown stuff on window**
- **Rusty Screen**
- **Trees outside window**
- **1000s of leaves**
- **Bushes outside window**

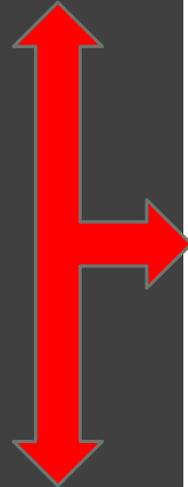
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How would Guy Cardamone have done this cross?

- Sir you identified these two defendants as being involved in the robbery in the sack of suds
- You made these observations from the window of your house
- This is on the second floor
- I'm going to show you some photographs
- My first question is, do these photographs accurately depict your home on the date of this incident
- Window
- screen

- Trees
- 1000s of leaves
- Bushes outside window
- You saw the two people for only 2 seconds

Sequencing

How to sequence your chapters

- Do not default to chronological order or mirroring the order of the direct
- **Primacy/Recency** – start and end strong
- Use the order to tell a story
- Be strategic – if you sequence chapters purposefully, you can get witnesses to agree to things they would otherwise fight
- When properly sequenced, a cross builds on itself and allows you to make points that you otherwise would not be able to make

General ordering tips

General ordering tips

Build importance of doing a thorough investigation/writing complete reports/etc. before attacking omissions.

If there is a chapter that may make things confrontational between you and the witness, think about what you want to cover before getting there.

Doing several chapters impeaching a lay witness early on may make the witness less likely to fight going forward.

With an expert, do a chapter early on to demonstrate to him/her your familiarity with the topic so he/she won't try to slip things by you.

It's okay to re-order at the last minute

Transitions and control

Headlines



**BREAKING
NEWS**

Transitions and Control

Communicate that you are moving on to a different topic:

“Detective, I now want to ask you some questions about the identification procedure.”

“Mr. Phillips, I now want to ask you some questions about what you saw on Sept. 22.”

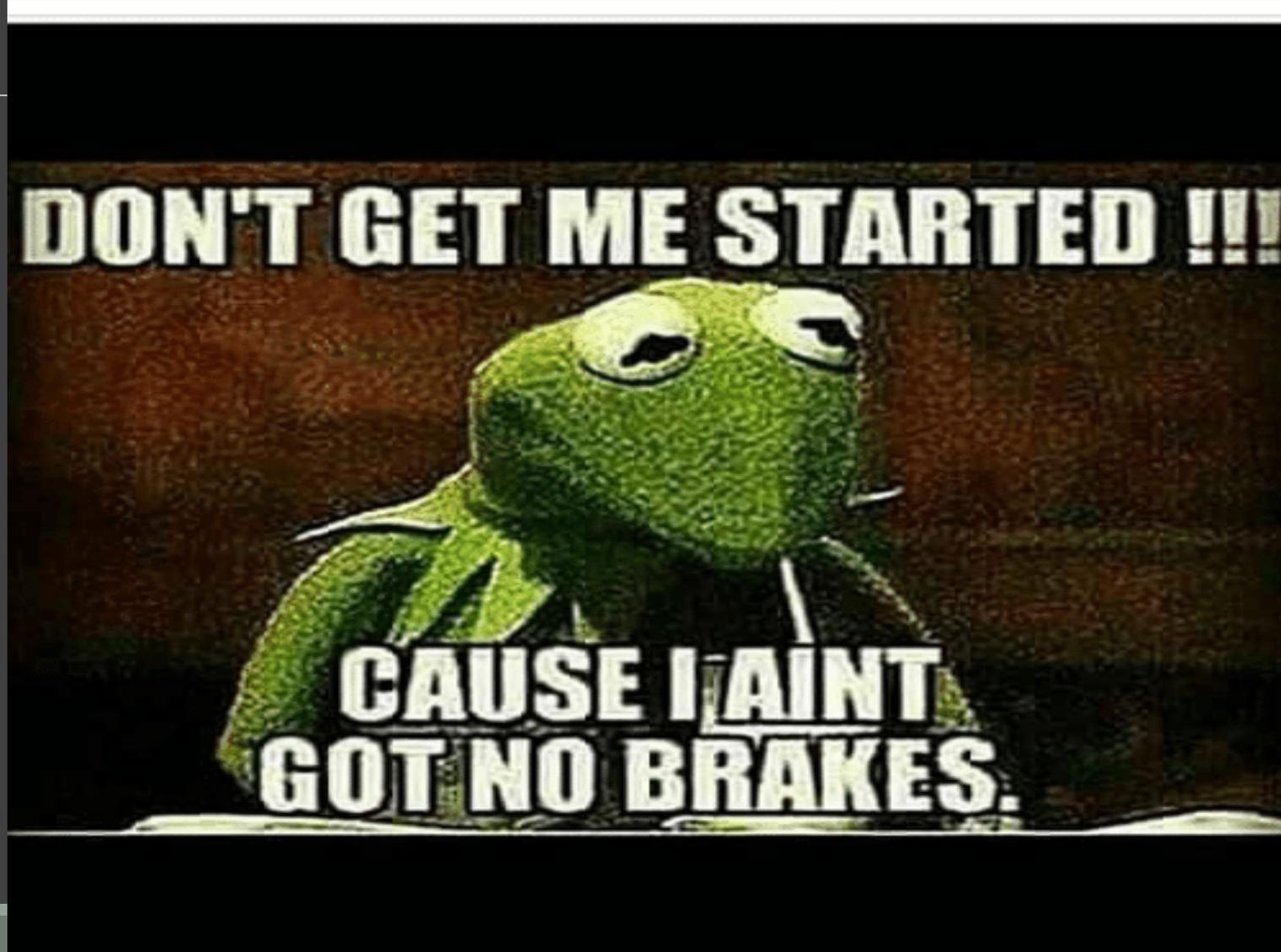
Transitions and Control

Benefits:

1. Short cut in asking witness series of questions
2. Keeps you on point and focused
3. **Keeps jury informed on what you are talking about (aka the Guy Cardamone Rule)

You can never have too many chapters, but you can ask too many questions...

Applying the brakes



Because no one wants to
look like this guy

What did he do wrong?

1. Broke Rule Number 1 – did not ask leading questions!
2. Did not know when to apply the brakes
3. If he had just stopped after the guy said he didn't have his glasses on ...

New Jersey Identification Law

1. State v. Henderson, 208 N.J. 208
(2011)

2. www.njcourts.gov/attorneys/criminalcharges

3. Great starting point for ID cross

Detective, I want to now ask you about three witnesses in this case. Vincent Phillips, David Johnson and Dante Ferring.

Dante Ferring ID

- Black Male
- 18-30 years old
- 5'-8"
- 160-170 lbs
- Medium build
- Dark complexion
- Had a gun
- Gray hooded sweatshirt

- 11 days after the shooting he was shown a photo array
- This photo array contained a photo of Mr. Richardson
- He was told that this related to the shooting on 9/18/16
- He was asked to look at the photographs
- He was asked if he could identify anyone in the photo array
- He was asked if anyone in that array was the shooter who he observed on 9/18/16
- Mr. Richardson's photo was in the array
- He did not identify Mr. Richardson as being the shooter

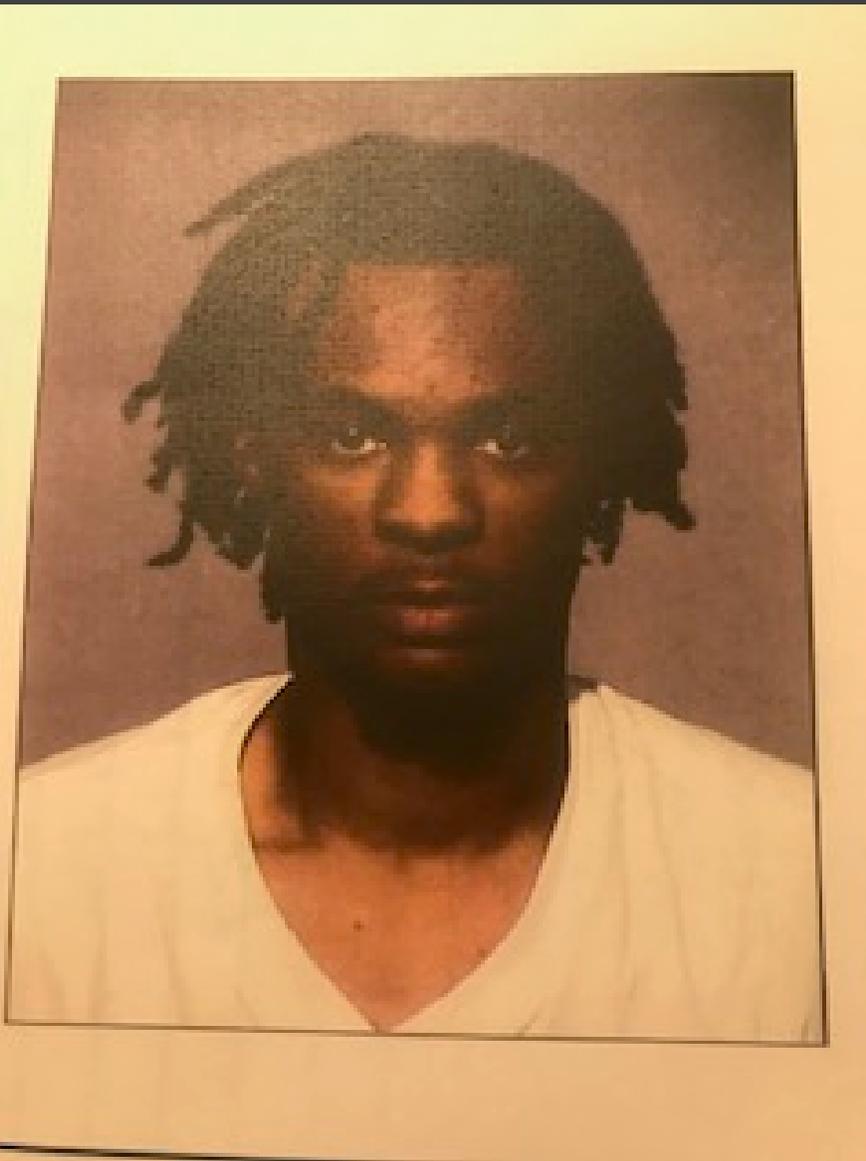
David Johnson ID

- He is the victim's brother
- He was with his brother when he was shot
- Right next to him
- He was right next to his brother when he was shot

- On May 1, 2018 he was shown a photo array.
- This array contained a photo of Mr. Richardson
- This was 19 months after the shooting
- He was told that this related to the shooting on 9/18/16
- He was asked to look at the photographs
- He was asked if he could identify anyone in the photo array
- He was asked if anyone in that array was the shooter who he observed on 9/18/16
- Mr. Richardson's photo was in the array
- He did not identify Mr. Richardson as being the shooter

Vincent Phillips ID

- He lives near the shooting
- Said he did not recognize the shooter
- Said he had never seen him before
- Black male
- Brown/medium complexion
- Late 20s/early 30s
- 5'8-5'9"
- 170-180
- Gray hooded sweatshirt
- Hood up
- Saw handgun
- Shoot with both hands
- On April 29, 2018 he was shown a photo array.
- This array contained a photo of Mr. Richardson
- This was 19 months after the shooting
- He was told that this related to the shooting on 9/18/16
- He was asked to look at the photographs
- He was asked if he could identify anyone in the photo array
- He was asked if anyone in that array was the shooter who he observed on 9/18/16
- Mr. Richardson's photo was in the array
- I want to show you what has been marked as State's exhibit 1.
- This is the phot array identification form
- Mr. Phillips said photo # 3 "looks like the guy"
- Nowhere on this form does Mr. Phillips indicate how certain he was



ONE:

- RULE
- FACT PER QUESTION
- TOPIC PER CHAPTER

1

*Now there's so much that
time, time and memory fade
away*

*We got our own roads to ride
and chances we gotta take
We stood side by side each
one fighting for the other
We said until we died we'd
always be blood brothers*