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James Aren Duckett v. State of Florida

CHIEF JUSTICE: GOOD MORNING EVERYONE.

GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY TO GO ON THE FIRST CASE. WITHOUT ANY FURTHER ADO, WE WILL CALL THAT CASE IN DUCKETT VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. THE ONLY WITNESS WHO PUTS JAMES DUCKETT WITH THE VICTIM IN THIS CASE, THERESA McABEE, AFTER MR. DUCKETT IS SEEN DRIVING BY HIMSELF ON HIGHWAY 50, IS GWEN GARLEY. THE TRIAL COUNSEL DIDN'T DO HIS JOB AND PRESENT EVIDENCE THAT WOULD HAVE SHOWN SHE WAS LYING. THERE WAS A WEALTH OF EVIDENCE THAT COUNSEL DIDN'T PRESENT.

DIDN'T MR. SALVATORE AND HIS UNCLE, MR. RUBIO, DIDN'T THEY ACTUALLY PLACE THE VICTIM IN THE VEHICLE OF THE POLICE OFFICER AND SHE GOT IN ON ONE SIDE AND THE OFFICER WAS STANDING THERE, AND YOU CAN CONCLUDE BY THAT THAT THE OFFICER WAS ABOUT TO GET INTO THE CAR, SO DO WE JUST HAVE MS. GARLEY'S TESTIMONY CONCERNING THE OFFICER BEING WITH THE VICTIM?

YES, YOUR HONOR, AND THERE WERE SEVERAL STATEMENTS THAT THERESA McABEE THEN GOT OUT OF THE CAR AND HE DROVE OFF TOWARD THE POLICE STATION AND HE THEN CAME AROUND AND PICKED HER UP AGAIN, AND THERE WERE SEVERAL WITNESSES WHO TESTIFIED AT THE TRIAL THAT HE WAS SEEN DRIVING OFF ON HIGHWAY 50, WITHOUT ANYBODY IN HIS CAR, AND ALSO THERE WAS AN ADDITIONAL WITNESS.

WHO WERE THOSE WITNESSES?

THEY WERE SHIRLEY WILLIAMS AND KIM VARGAS, AND COUNSEL SAID HE KNEW ABOUT HER AND HAD A PRETRIAL STATEMENT. SHE WAS IN CALIFORNIA AND HE DIDN'T BRING HER BACK. TRIAL COUNSEL DIDN'T PRESENT HER. SHE NOT ONLY SAYS HE DROVE OFF ON HIGHWAY 50 BUT SAYS SHE WALKED HOME FROM THE CONVENIENCE STORE, AND THE STATE NEVER SAID THAT HE TOOK THERESA McABEE FROM THE POINT SHE WAS SITTING IN HIS CAR AND HE WAS QUESTIONING HER.

NO ONE TESTIFIED THAT SHE WAS IN THE CAR WHEN THE CAR LEFT THE PARKING LOT, IN OTHER WORDS THAT SHE WAS IN THERE WITH HIM?

NO. THAT WAS NOT THE STATE'S CASE. WHAT THEY SAID WAS, AND THEY HAD TO COME UP WITH THIS IMPLAUSIBLE THEORY BECAUSE HE WAS SEEN DRIVING OFF A LOAN, WAS THAT HE THEN -- OFF ALONE, WAS THAT HE THEN DROVE AROUND A LARGE AREA AND CAME AROUND AND PICKED HER UP BY THE DUMPSTER, AND THAT IS WHEN GWEN GARLEY COMES IN. SHE SAYS AT THE TRIAL I SAW THERESA McABEE. I HEARD HIS VOICE AND I TALKED TO HIM EARLIER IN THE NIGHT, SO I RECOGNIZED HIS VOICE. AND I WALKED TO THE CAR AND SAW A SMALL GUN IN THE PASSENGER SEAT.

SO THERE WAS A WITNESS, THEN, THE WITNESS YOU ARE ALLUDING TO THAT TESTIFIED THAT THE CHILD WAS WITH HIM IN THE CAR, LEAVING THE CONVENIENCE STORE PROPERTY.

YES, YOUR HONOR. I AM SORRY. I MISUNDERSTOOD YOUR QUESTION. THERE WERE SEVERAL WITNESSES WHO WERE THERE WHEN MR. DUCKETT WAS QUESTIONING THERESA McABEE ABOUT HER AGE AND CURFEW. THOSE WITNESSES, THE TESTIMONY FROM EVERYBODY THEN WAS THAT MR. DUCKETT LEFT. SOME OF THE WITNESSES DIDN'T SEE MR. DUCKETT LEFT, MR. CARUSO, THAT JUSTICE QUINCE HAS REFERRED TO, BUT GWEN GURLEY SAID I SAW HIM PICK HER UP, AND SHE CAME ALONG, INTERESTINGLY FIVE MONTHS LATER. SHE WAS ALLOWED TO TESTIFY BY VIDEO DEPOSITION BECAUSE SHE WAS FIVE MONTHS PREGNANT. TRIAL COUNSEL DID NOT CROSS-EXAMINATION HER. HE SENT ANOTHER ATTORNEY TO DO THAT. HE WAS NOT EVEN A PARTNER WITH TRIAL COUNSEL BUT SOMEONE WHO SHARED OFFICE SPACE WITH MR. ED MUNS.

WHAT ABOUT THE -- ED MUST NOT.

AND WHAT -- EDMOND.

WHAT ABOUT THE FINGERPRINTS FOUND ON THE POLICE CAR?

THERE WERE FINGER PRINTS FOUND ON THE POLICE CAR, AND AFTER THE EVIDENTIARY HEARING, THERE WAS NO RELIABLE EVIDENCE AND MR. EDMOND DROPPED WILL BALL HERE, TOO. HE SAID CAN YOU TELL US WHETHER ONE FINGERPRINT IS SUPER IMPOSED? HE SAID, NO, I CAN'T TELL YOU --

LET ME ASK YOU THIS QUESTION. THIS CASE WAS LAST HERE AND AN OPINION WAS ISSUED IN 1990. HAVE YOU BEEN POSTCONVICTION COUNSEL FOR THE LAST 13 YEARS?

YES, YOUR HONOR, I HAVE.

AND THIS CASE WAS IN POSTCONVICTION FOR 13 YEARS.

YES, YOUR HONOR.

IN THE TRIAL COURT.

YES, YOUR HONOR.

IS IT DEVELOPED BY THE STATE, THE DNA AVAILABILITY?

YES, YOUR HONOR. I WOULD LIKE TO TALK ABOUT. THAT THERE WAS A PUBIC HAIR ON THE VICTIM THAT THE STATE SAID WAS MR. DUCKETT APARTMENTS HAMPLT WHEN THE STATE, IN POSTCONVICTION -- HAIR. WHEN THE STATE, IN POSTCONVICTION, LOOKED AT IT, THERE WAS NO ROOT ON THE HAIR.

WAS THERE SEEMEN?

I LOOKED AT THIS CASE WITH THE IDEA OF DOING DNA TESTING AND AT THE TIME THE DNA TESTING WAS NOT TO POINT TO ANYTHING THAT HAD BEEN IN THE CASE --

HAS THERE BEEN NIP ATTEMPT SINCE THE STATUTE WAS PASSED IN FLORIDA, TO GET DNA TEST SOMETHING.

NO, YOUR HONOR, AND THE HAIR CONCERNS, THE EVIDENCE, THE CHAIN OF CUSTODY IS SUCH THAT THE HAIR THAT IS NOW BEING CALLED THE UNKNOWN HEAR IS NOT THE UNKNOWN HAIR THAT WAS FOUND ON THERESA McABEE. THERE WAS A SECOND UNKNOWN HAIR THAT WAS FOUND ON THE VICTIM, AND THIS IS AN INTERESTING POINT, BECAUSE IT WAS TESTIFIED BOTH FDLE AND FBI, AND IT WAS FOUND NOT TO BE CONSISTENT WITH THERESA McABEE AND NOT TO BE CONSISTENT WITH JAMES DUCKETT.

WERE THERE TWO HAIRS?

ONE OF WHICH NO ONE HAS EVEN HEARD ABOUT, BECAUSE THE JURY SAID WE HAVE GOT --

YOU ARE MOVING VERY QUICKLY OVER A LOT OF TERRITORY, AND I THINK PART OF JUSTICE WELLS'S INITIAL QUESTION AND QUALIFYING IT TO HIM, WAS THAT WHAT MATERIAL IS OUT THERE, AS FAR AS PHYSICAL EVIDENCE, THAT WOULD BE POTENTIALLY AVAILABLE FOR DNA TESTING, FIRST OF ALL. IS THERE BLOOD, SEMEN, HAIRS? WOULD YOU GIVE US THE CANDID VIEW OF WHAT EXISTS --

YES, YOUR HONOR.

-- OF WHAT EXISTS IN THIS RECORD OR IN THE CUSTODY OF THE GOVERNMENT OR ANYONE ELSE, THAT WOULD BE AVAILABLE FOR DNA TESTING AS WE UNDERSTAND IT.

YES, YOUR HONOR. THE REASON I WAS TALKING ABOUT THE SECOND HAIR, IS I WANTED TO POINT OUT TO THE COURT THAT HAIR HAS BEEN LOST, SO THAT IS NOT AVAILABLE FOR DNA TESTING. THE FIRST HAIR, THE PUBIC HAIR IS STILL IN EXISTENCE. WE WOULD NOT TEST THAT HAIR, BECAUSE IT IS OUR POSITION THAT THAT HAIR IS VERY LIKELY JAMES DUCKETT'S HAIR AND IS NOT THE UNKNOWN HAIR THAT WAS FOUND ON THE VICTIM IN MAY OF 1987. WE PRESENTED A WEALTH OF EVIDENCE ON THE CHAIN OF CUSTODY AND OTHER ISSUES GOING TO THAT, WHICH I WILL GET TO. I WANT TO FINISH ANSWERING YOUR QUESTION. THERE WAS ALLEGEDLY SEMEN ON THE PANTS OF THE VICTIM THAT WAS SENT AWAY FOR DNA TESTING, AND THEY SAID THERE WAS NOT SUFFICIENT AMOUNTS TO DO DNA TESTING.

IS THAT IN OUR RECORD?

YES, YOUR HONOR. THAT IS IN YOUR --

WHERE WOULD THAT BE IN THE RECORD? HAS THAT BEEN ALLUDED TO IN THE BRIEFS THAT HAVE BEEN FILED HERE?

YES, IT HAS BEEN ALLUDED TO. IT WASN'T RAISED AT TRIAL. I AM NOT SURE, YOUR HONOR, TO BE HONEST WITH YOU, WHETHER OR NOT THERE WAS EVER ANY DISCUSSION ABOUT THE SEMEN, OTHER THAN THE FACT IT WAS THERE.

DO YOU BELIEVE THAT THAT IS IN THE RECORD, THAT IS THAT THE SEMEN WAS SENT AWAY FOR POTENTIAL DNA TESTING, AND SOME LABORATORY, AND THAT THE EXPERTS THEY EMPLOYEE DETERMINED THAT THEY COULD NOT DO ANYTHING WITH THAT MATERIAL?

I AM REASONABLY SURE IT WAS BROUGHT UP IN THE EVIDENTIARY HEARING. LIKE OWES IS THE AGENCY THAT LOOKED -- LYCOS IS THE AGENCY THAT LOOK AT THE SEMEN. THE UNDERWEAR THAT WERE CUT AWAY TO DO THE TESTING, WHERE APPARENTLY THE SEMEN WAS FOUND, ARE NO LONGER IN EVIDENCE. I DON'T KNOW IF THEY WERE DESTROYED IN TESTING OR IF THEY WERE JUST LOST, BUT THEY ARE NOT AVAILABLE.

SO THERE IS NOTHING OTHER THAN THE SINGLE PUBIC HAIR THAT IS AVAILABLE FOR DNA TESTING?

NONE OF WHICH I AM AWARE. CANDIDLY TO THE COURT, IT PROBABLY, BECAUSE DNA TESTING IS CHANGING SO QUICKLY ON WHAT THEY CAN TEST AND WHAT MINUET AMOUNTS, IT PROBABLY WOULD BE WORTH SENDING AWAY THE JEANS OR UNDERWEAR, TO SAY IS THERE ANY OTHER EVIDENCE ON HERE THAT WASN'T CUT AWAY THAT YOU MAY BE ABLE TO TEST AT THIS POINT.

HAS THERE BEEN ANY ATTEMPT TO DO THAT?

NOT IN THE LAST YEAR, YOUR HONOR, NO, AND THAT CANDIDLY PROBABLY SHOULD BE DONE. THERE WAS AN ATTEMPT EARLIER AT TRIAL, TO DO THAT.

WE INTERRUPTED YOU.

NEW YORK CITY THAT IS -- NO, THAT IS FINE. BACK TO GWEN GURLEY, THOUGH, SHE WAS THE ONLY WITNESS THAT COULD PUT MR. DUCKETT WITH --

YOU SAID HER TESTIMONY WASN'T TRUE. WE HAVE THE RECANTATION AND DON'T WE ALSO HAVE THE TESTIMONY OF THE PROSECUTOR AND THE POLICE OFFICER WHO SAY THAT HER RECANTATION IS NOT TRUE, SO HOW ARE WE TO DEAL WITH ALL OF THESE DIFFERENT STORIES?

WELL, THERE ARE REALLY TWO ISSUES THERE. ONE IS WHETHER OR NOT THE RECANTATION IS TRUE OR NOT. WHEN SHE WAS CALLED TO TESTIFY IN THE EVIDENTIARY HEARING, THE STATE REFUSED TO GRANT HER IMMUNITY AND WAIVE THE APPLICATION OF THE PERJURY STATUTE TO HER AND SHE TOOK THE FAITH. I WOULD ARGUE THAT THAT MAKES HER UNAVAILABLE AS A WITNESS AND THESE RECANTATIONS SHOULD HAVE COME IN AND WHAT HAPPENED IS THE CIRCUIT COURT DID NOT CONSIDER THE RECANTATIONS. HE DID NOT ADMIT THEM INTO THE EVIDENCE BUT HE MADE A CREDIBILITY FINDING, SAYING SHE WAS NOT CREDIBLE. THERE IS NO TESTIMONY THERE TO SHOW SHE IS OR IS NOT CREDIBLE. IT IS MY POSITION THAT THE CREDIBLE FINDING IS NOT SUPPORTED BY THE RECORD.

THE OFFICERS DID TESTIFY, CORRECT?

THE OFFICERS DID TESTIFY.

AND HE WAS ABLE TO WAIVE THE CREDIBILITY OF THE OFFICERS.

HE DID WAIVE THE CREDIBILITY OF THE OFFICERS, YES, YOUR HONOR.

SO IF ONE PERSON SAYS A AND THE OTHER PERSON SAYS NOT "A-", AND THE PERSON THAT SAYS NOT "A" TESTIFIES AND THE COURT FINDS HER CREDIBLE, AND THEY SAY NOT "A", AND THEN I AM NOT GOING TO FIND NOT "A".

HE DIDN'T ALLOW ANY OF HER STATEMENTS IN, SO HE HAS GOT JUST OFFICERS' STATEMENTS IN AND OF COURSE THEY ARE CREDIBLE. THERE IS NOTHING TO COMPARE IT TO AT THIS TIME. THERE WERE STATEMENTS MADE, BUT THEY ARE NOT IN THE RECORD. ADDITIONALLY, ASIDE FROM WHETHER OR NOT HER RECANTATION IS TRUE, THERE WAS EVIDENCE AT TRIAL THAT TRIAL COUNSEL COULD HAVE PRESENTED THAT WOULD HAVE SHOWN THE JURY THAT MISS GURLEY WAS NOT TESTIFYING TRUTHFULLY. SHE WAS WITH TWO OTHER PERSONS ON THE NIGHT IN QUESTION. VICKI DAVIS AND JESSICA HAND. THEY BOTH GAVE STATEMENTS, DIFFERENT VARIATIONS ABOUT WHETHER OR NOT WHAT MS. GURLEY SAYS HAPPENED, DID HAPPEN. BUT --

DID THEIR STATEMENTS SAY THAT THEY WERE WITH HER THAT ENTIRE TIME THAT NIGHT? BECAUSE SHE SAYS THAT SHE CAME BACK AT SOME POINT, WITHOUT THEM, AND THAT IS WHEN SHE SAW WHAT SHE TESTIFIED TO AT TRIAL.

JESSICA HAND'S STATEMENT IS JUST ALL OVER THE PLACE AND I WOULD ASK THE COURT TO READ THAT. HE SAYS I REMEMBER WE WENT DOWN TO THE CIRCLE K THAT NIGHT AND I DON'T REMEMBER SEEING A POLICE OFFICER AND I DON'T REMEMBER GETTING A QUESTION ABOUT CURFEW. WHAT GWEN GURLEY TESTIFIED TO WAS THAT SHE GOT QUESTIONED, ALONG WITH JESSICA HAND GOT QUESTIONS ABOUT THEIR AGE ANSWER HID IN THE BUSHES AND CAME BACK LATER AND THAT IS WHEN SHE SAW THERESA DUCKETT WALKING TOWARD -- THERESA WALKING

TOWARD MR. DUCKETT'S CAR. VICKI DAVIS DOESN'T SAY ANYTHING ABOUT AGE IN HER STATEMENT BUT TRIAL COUNSEL NEVER INTERVIEWED THESE PEOPLE. HAD HE INTERVIEWED THEM, HE WOULD HAVE DISCOVERED THAT VICKI DAVIS SAID THAT AGAIN WANTED ME TO -- THAT GWEN WANTED ME TO SAY THIS, BECAUSE SHE WANTED TO GET OUT OF JAIL IN TIME TO HAVE HER BABY, AND IF YOU LOOK AT THE STATEMENT, IT SAYS THEY NEED TO GET THE FACTS STRAIGHT, AND IF YOU LOOK AT WHAT THAT WAS, SHE SAYS THIS IS WHAT I WAS TOLD TO SAY, IN ORDER TO GET OUT OF JAIL. SHE TURNED OFF THE TAPE DURING THAT STATEMENT: HAD THEY ASKED, SHE SAID THEY TURNED THE TAPE OFF, IN ORDER THAT THEY GET THEIR STORIES STRAIGHT.

SHE DID SAY THAT?

ON THE RECORD SHE TESTIFIED. AND SHE DOESN'T HAVE A DOG IN THIS FIGHT. SHE HAS NO INTEREST IN THIS CASE, ONE WAY OR.

SHE WAS NOT QUESTIONED AT ALL. SHE WAS NOT CALLED AS A WITNESS.

YOU SAID TO JUSTICE CANTERO THAT THE RECONTATION IS NOT IN EVIDENCE, THAT THE JUDGE COULD NOT CONSIDER IT BECAUSE IT WAS NOT EVIDENCE. HOW ARE WE ARGUING IT?

WE OFFERED THE RECONTATION INTO EVIDENCE AND THE JUDGE RULED IT WAS HEARSAY AND DIDN'T ALLOW IT IN. WE HAVE ARGUED THAT SHE WAS UNAVAILABLE AS A WITNESS AND IT SHOULD HAVE COME IN. IT ACTUALLY IS IN THE PAPERWORK YOU HAVE, BUT THE JUDGE IN HIS ORDER, DID NOT RELY UPON IT AND RULED IT INADMISSIBLE IN HIS FINAL ORDER.

OKAY.

THE OTHER THINGS THAT VICKI DAVIS AND JESSICA TAND COULD HAVE MADE CLEAR WHEN GURLEY WAS BEING, TESTIFIED, THEY NEVER WENT TO THE CIRCLE K AND SAW JAMES DUCKETT. NONE OF THEM. VICKI DAVIS TESTIFIED THAT GWEN NEVER LEFT HER, ALL NIGHT. THEY NEVER SAW THERESA GETTING INTO THE CAR. ADDITIONALLY, THERE WERE EIGHT OTHER PEOPLE AT THE CIRCLE K THAT NIGHT.

THIS SAYS MONEY ABOUT OFFICER SALVE CORE AND ALL OF THAT, WERE THEY QUESTIONED ABOUT MS. GIRLY?

ONE WAS ASKED DO YOU REMEMBER HER COMING IN THE STORE AND BUYING A COKE. THE OTHERS WERE NEVER ASKED IF THEY HAD SEEN MS. GURLEY. OTHER PEOPLE WERE INTERVIEWED THAT NIGHT AND NONE OF THEM REMEMBERED THIS. THESE WERE STATEMENTS THAT HE HAD.

CHIEF JUSTICE: THE MARSHAL REMINDS US THAT YOU ARE IN YOUR REBUTTAL TIME.

I WOULD LIKE TO SUMMARIZE THIS POINT THAT THERE WAS CROSS-EXAMINATION THAT WOULD HAVE BEEN AVAILABLE FOR GWEN GURLEY. A, SHE HADN'T LEFT THE STATE AND PROBATION RECORDS SHOW THAT SHE WAS IN THE TOWN THREE MONTHS AFTER THIS TRIAL AND ALSO THAT SHE WAS RELEASED THREE OR FOUR WEEKS EARLY FROM HER SENTENCE AND THAT WAS NOT TOLD TO THE JURY THAT SHE WAS, IN FACT, OUT WHEN HER BABY WAS BORN. I WILL SAFE THE REMINDER FOR -- THE REMAINDER FOR REBUTTAL.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. I AM KEN MONEYLY AND -- I AM KEN NUNNELLEY, AND I REPRESENT THE STATE ON THIS APPEAL. IN THE 13 YEARS THAT THIS CASE HAS BEEN IN POSTCONVICTION, THERE HAS BEEN NO ATTEMPT TO HAVE DNA TYPING DONE ON THE HAIR OR ANYTHING IN THIS CASE. WE ARE ALL WELL AWARE THAT DNA EVIDENCE IS RAPIDLY EVOLVING. THERE HAS BEEN NO ATTEMPT

MADE TO REPEAT DNA TYPING ON THE SEMEN FOUND IN THE VICTIM'S JEANS. WE HAVE HAD THIS CASE, LIKE YOU SAID, JUSTICE WELLS, FOR 13 YEARS. WE HAVEN'T TRIED TO DO THAT YET. MOO MITOCHONDRIAL DNA TYPING HAS BEEN AROUND LONG ENOUGH THAT MITOCHONDRIAL DNA TYPING ON THE PUBIC HAIR COULD HAVE BEEN DONE, HAD DEFENSE COUNSEL WISHED TO PURSUE THAT AVENUE.

CAN YOU CONFIRM FOR US WHAT MATERIAL IS CURRENTLY AVAILABLE TO BE DNA TESTED AT THIS TIME.

YOUR HONOR, I HAVE NOT REVIEWED THE PHYSICAL EVIDENCE IN THE CLERK'S OFFICE IN THIS CASE. I CAN ONLY RELY UPON THIS COURT'S, THE EVIDENCE FROM RILE AND THIS COURT'S -- FROM TRIAL AND THIS COURT'S SUMMARY ON THE EVIDENCE, THE DIRECT APPEAL DECISION, WHICH WAS AND CLEARLY IS, THAT SEMEN WAS FOUND ON THE VICTIM'S JEANS. I DO NOT KNOW THE STATUS OF THAT EVIDENCE. I SIMPLY DO NOT KNOW. I AM SURE THAT, HOWEVER, A MOTION UNDER THE APPROPRIATE RULE COULD BE FILED AND WE CAN GO FROM, WE CAN PROCEED FROM THERE, SHOULD DEFENSE COUNSEL WISH TO PURSUE THAT AVENUE. WITH RESPECT TO LIFE CODES AND ANY AT-TRIAL DNA TYPING, MY UNDERSTANDING IS THAT THE PUBIC HAIR WAS SENT TO THE LIFE CODES CORPORATION, AND LIFE CODES WAS UNABLE TO CONDUCT DNA TYPING ON THAT PUBIC HAIR. NOW, THIS WAS --

WAS THAT BECAUSE OF THE ABSENCE OF THE ROOT OR WAS THERE AN EXPLANATION?

JUSTICE ANSTEAD, THIS WAS, SHORT ANSWER, YES, IT WAS BECAUSE OF THE AND SINCE OF THE ROOT -- THE ABSENCE OF THE ROOT BUT THIS WAS RNLP DAYS. THIS WAS NOT SHORT TANDEM REPEAT OR MITOCHONDRIAL DNA. THIS WAS A REPEAT THAT IS OLD TECHNOLOGY.

BUT THE FBI LAB, IN FACT, DID DO TESTING ON THIS SAME HAIR AND DETERMINED THAT THEY COULD MAKE A COMPARISON.

BUT THAT WAS HAIR COMPARISON, JUSTICE QUINCE, NOT DNA TYPING. THAT IS AN ISSUE THAT MY, THAT COUNSEL HAS NOT REALLY ADDRESSED, BUT IT WAS A HAIR COMPARISON.

IT HAD NOTHING TO DO WITH DNA.

NOTHING TO DO WITH DNA. THAT IS LOOKING AT THIS THROUGH A MICROSCOPE, AND THE HAIR COMPARISON ISSUE IS FULLY ADDRESSED IN THE STATE'S BRIEF, AND UNLESS THE COURT HAS PARTICULAR QUESTIONS, I DON'T INTEND TO BELABOR THAT ISSUE. THE CLAIM OR THE SUGGESTION THAT --

BEFORE YOU DO THAT, WAS THE FBI ASKED TO DO DNA TESTING ON IT AND DID THEY HAVE THE SAME ANSWER AS THE LIFE CODES?

THEY WERE NOT ASKED TO DO DNA TESTING, JUSTICE QUINCE. LIFE CODES WAS THE ONLY ENTITY TO WHOM A DNA REQUEST WAS MADE. WHY THAT IS, I DON'T KNOW. I DON'T.

AND THAT WAS BY THE STATE.

YES, YOUR HONOR, THAT WAS BY THE STATE. I WOULD POINT OUT, HOWEVER, THAT TRIAL COUNSEL AND POSTCONVICTION COUNSEL DID, IN FACT, RETAIN A HAIR EXPERT. THEY RETAINED THE SAME HAIR EXPERT, AND WE HAVE YET TO HEAR THAT HAIR EXPERT, AN INDIVIDUAL NAMED PETER DEFOREST, WHOM I DO NOT KNOW, TESTIFY IN ANY PROCEEDING. WITH RESPECT TO THE SUGGESTION OR THE CLAIM THAT THE CHAIN OF CUSTODY OF THE HAIR, THE PUBIC HAIR, HAS, IN SOME FASHION, BEEN COMPROMISED, THE VERSION OF THAT CLAIM THAT I HEARD AT THE PODIUM THIS MORNING, IS WHOLLY KNEW TO -- NEW TO ME. I HAVE NOT HEARD THAT CLAIM B THE CLAIM AT TRIAL, WAS THAT, BECAUSE -- THAT CLAIM BEFORE. THE CLAIM AT TRIAL WAS

THAT, BECAUSE LIFE CODES LOST TWO KNOWN SAMPLES FOR A PERIOD OF TIME AND SUBSEQUENTLY FOUND THEM AND RETURNED THEM TO THE LAKE COUNTY SHERIFFS OFFICE, THAT THAT RAISED SOME ISSUE. IT DOES NOT AND THAT IS ENOUGH TO SAY ABOUT THAT, BUT IT IS NOT THE SAME AS THE NEWLY-ARGUED CLAIM THAT THE PUBIC HAIR IS A KNOWN SAMPLE THAT HAS BEEN, SOMEHOW, SUBSTITUTED FOR THE UNKNOWN, WHICH IS WHAT I THINK COUNSEL ARGUED.

MY UNDERSTANDING OF THE EVIDENCE AT THE EVIDENTIARY HEARING WAS THAT THERE WAS TESTIMONY THAT THESE HAIRS HAVE BEEN MISPLACED BUT THEY WERE ALL PREVIOUSLY IDENTIFIED HAIRS THAT HAD BEEN LONGED TO MR. DUCKETT.

THAT'S CORRECT, YOUR HONOR. THERE HAS NEVER BEEN A CLAIM THAT THE UNKNOWN PUBIC HAIR THAT WAS RECOVERED FROM THE VICTIM'S BODY HAS BEEN COMPROMISED WITH RESPECT TO THE CHAIN OF CUSTODY.

CAN YOU ADDRESS THE GWEN GURLEY ISSUE?

THE GWEN GURLEY ISSUE IS QUITE SIMPLY, A CREDIBILITY DETERMINATION THAT, UNDER LONG STANDING PRECEDENT OF THIS COURT, IS THE PROVINCE OF THE TRIAL COURT. UNFORTUNATELY I HAVE HAD THE MISFORTUNE UNION TO ARGUE MOST OF THE CASES THAT YOU ALL CITE FOR THAT PROPOSITION AND THAT WE CITE FOR THAT PROPOSITION, THE LEAD CASE BEING STATE VERSUS SPAZIANO. THE CIRCUIT COURT HEARD THE WITNESSES TESTIFY WITH RESPECT TO AGAIN GURLEY. THEY HEARD VICKI -- TO GWEN GURLEY. THEY HEARD, THAT IS JUDGE LOCKETT, HEARD VICKI DAVIS TESTIFY. HER CREDIBILITY WAS BEFORE THE TRIAL COURT, AS WAS THE TESTIMONY OF THE OTHER INDIVIDUALS WHO TESTIFIED ABOUT THE ALLEGED RECANTATION. RECANTED TESTIMONY IS EXCEEDINGLY UNRELIABLE, AS THIS COURT HAS REPEATEDLY SAID, AND I WOULD SUGGEST THAT THE CIRCUIT COURT DID, IN FACT, HAVE EVIDENCE BEFORE IT THAT REQUIRED IT TO WEIGH CREDIBILITY, AND THE FACT THAT VICKI, EXCUSE ME, GWEN GURLEY TOOK THE FIFTH AMENDMENT ON THE WITNESS STAND, DOES NOT MEAN THE CIRCUIT COURT HAD NOTHING BEFORE IT THAT COULD BE ASSESSED FOR CREDIBILITY. WITH RESPECT TO THE SUGGESTION THAT GWEN GURLEY'S TESTIMONY AT THE CIRCUIT LEVEL, NOT, LET ME BACK UP, WITH, THE IDEA OR THE SUGGESTION THAT THE STATE'S REFUSAL TO GRANT MISS GURLEY IMMUNITY IS, IN SOME FASHION, EQUAL TO UNAVAILABILITY UNDER THE EVIDENCE CODE, IS YET ANOTHER NEW CLAIM THAT IS BEING RAISED FOR THE FIRST TIME HERE. WHILE COUNSEL WAS MAKING THAT ARGUMENT, I REVIEWED THE BRIEF AS QUICKLY AS I COULD. WHAT I THOUGHT OR HOPED WAS THE RELEVANT PORTION, AND I FIND NO REFERENCE TO UNAVAILABILITY UNDER THE EVIDENCE CODE CONTAINED WITHIN THE DEFENDANT'S BRIEF, NOR DO I FIND A CITATION TO THE EVIDENCE CODE IN THE TABLE OF AUTHORITIES IN THE DEFENDANT'S BRIEF. THEREFORE I WOULD SUGGESTION THAT THAT ISSUE IS NOT PROPERLY BEFORE THE COURT.

THAT ARGUED TO THE TRIAL COURT? THAT IS A THAT, BECAUSE SHE TOOK THE FIFTH OR BECAUSE THE STATE WOULDN'T OFFER HER A DEAL, THAT HER TESTIMONY WAS UNAVAILABLE, AND THEREFORE THE COURT SHOULD CONSIDER HER OUT OF COURT STATEMENT?

WELL, JUSTICE ANSTEAD, I AM NOT TRYING TO DEFLECT YOUR QUESTION, BUT THE SHORT ANSWER IS I DON'T REMEMBER, AND THE REASON I DON'T REMEMBER IS BECAUSE IT WASN'T RELEVANT, BECAUSE IT WASN'T RAISED ON APPEAL TO THIS COURT. NO REASON I WOULD BE READING IT FOR THAT, WHEN THE ISSUE IS NOT BEFORE THE COURT IN THE FIRST PLACE.

THIS WITNESS, THOUGH, THAT IS ALLEGED TO HAVE RECANTED, HAS NEVER TESTIFIED BEFORE A COURT, RECANTING HER TESTIMONY, IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

CAN YOU ADDRESS THE ARGUMENT THAT COUNSEL DID MAKE IN THE BRIEF, REGARDING GWEN

GURLEY, AND THAT IS THAT COUNSEL FAILED TO CROSS-EXAMINATION OR EVEN INVESTIGATE A FALSE ALLEGATION OF SEXUAL HARASSMENT THAT SHE HAD MADE ABOUT ANOTHER, ABOUT A SHERIFFS OFFICER, I THINK?

WELL, YOUR HONOR, FIRST OF ALL, I DON'T KNOW THAT THE, THAT THAT IS AN ISSUE OR A MATTER THAT RISES TO THE LEVEL OF STRICKLAND VERSUS WASHINGTON, DEFICIENT PERFORMANCE IN PREJUDICE. IT IS CERTAINLY A MATTER THAT COULD HAVE BEEN LOOKED INTO BY TRIAL COUNSEL. THE FACT THAT HE DID NOT LOOK INTO THAT, GIVEN THE FACTS THAT THIS CASE, WHICH WERE THAT GWEN GURLEY WAS MERELY A WITNESS. SHE WAS NOT ALLEGING SOME IMPROPRIETY ON THE PART OF MASCOT POLICE DEPARTMENT OFFICERS, WITH RESPECT TO HER. THE FACT THAT SHE HAD AN ALLEGATION WITH RESPECT TO ANOTHER LAW ENFORCEMENT OFFICER, DOES NOT, REALLY, HAVE ANYTHING TO DO WITH THE CASE. I MEAN --

IT DOES IMPEACH HER TESTIMONY, RIGHT? IT IS IMPEACHMENT MATERIAL, AND ISN'T, IS SHE THE ONLY ONE WHO TESTIFIED THAT, WHEN OFFICER DUCKETT RETURNED TO THE CONVENIENCE STORE, SHE IS THE ONLY ONE WHO SAID SHE, THAT HE, THEN, LEFT WITH THE VICTIM?

SHE IS THE WITNESS WHO PUTS THE VICTIM IN THE CAR WITH THE DEFENDANT. HOWEVER, WE HAVE OTHER EVIDENCE THAT IS INDEPENDENTLY CORROBORATIVE, WHERE YOU HAVE THE CONVERGENT VALIDITY BETWEEN GWEN GURLEY'S TESTIMONY PUTTING THE VICTIM IN THE CAR, AND THE PHYSICAL EVIDENCE, WHICH WAS THE FINGER, THE VICTIM'S PALM PRINTS ON THE HOOD OF THE POLICE OFFICER'S VEHICLE. YOU HAVE THE TIRE TRACK AT THE SCENE, WHICH PUT THE DEFENDANT'S PATROL CAR AT THE SCENE WHERE THE VICTIM'S BODY WAS DISCOVERED, AND YOU HAVE THE PUBIC HAIR THAT MATCHED JAMES DUCKETT'S.

DOES THAT ANSWER YOU JUST GAVE, DOES THAT GO TO DEFICIENT PERFORMANCE OR TO THE PREJUDICE PRONG?

IT MORE GOES TO PREJUDICE THAN PERFORMANCE, BUT I AM NOT CONCEDED DEFICIENT PERFORMANCE, EITHER, AND THE STANDARD FOR DEFICIENT PERFORMANCE, YOUR HONOR, IS NOT WHAT A GOOD LAWYER WOULD HAVE DONE OR WHAT THE BEST LAWYER WOULD HAVE DONE OR WHAT A GOOD LAWYER WOULD HAVE DONE. IT IS WHAT A REASONABLE LAWYER WOULD HAVE DONE.

LOOK AT THIS CUMULATIVE, CORRECT? YOU WOULD AGREE WITH THAT PRINCIPLE?

GENERALLY YES, YOUR HONOR.

OKAY. IF WE LOOK AT IT CUMULATIVELY, AND WE TAKE THE PROBLEMS WITH THE WITNESS GURLEY, AND WE TAKE THE PROBLEMS WITH THE TIRE TRACKS, AND THE ISSUE THAT HAS NOW BEEN CREATED AS TO WHAT KINDS OF VEHICLES ACTUALLY HAVE THOSE TIRES AND TRACKS, THE PROBLEMS WITH THE PALM PRINTS AND WHAT THE LAWYER DID OR DIDN'T DO WITH THE PALM PRINTS. THE PROBLEMS WITH THE WILLIAMS RULE EVIDENCE, AND THE EXAMINATION OR LACK OF EXAMINATION OF THOSE INDIVIDUALS AND WHETHER THEY COULD HAVE EVEN ACTUALLY HAPPENED, WHERE DOES THAT TAKE US CUMULATIVELY, EVEN IF YOU CAN SEPARATE OUT GURLEY OR SEPARATE OUT THE TIRE TRACKS? SO WE GET A PICTURE OF WHAT IS GOING ON. WOULD YOU PLEASE ADDRESS THAT POSTURE.

YES, YOUR HONOR, AND I DON'T THINK I CAN DO IT IN THE ORDER THAT YOU ASKED THE QUESTION, JUSTICE LEWIS, BUT WITH RESPECT TO THE TIRE TRACKS, THE CLAIM OF A PROBLEM WITH THE TIRE TRACKS IS A RED HERRING. YOU HAVE TWO SETS OF THESE TIRES THAT CAME IN. THEY ARE APPARENTLY KIND OF AN UNUSUAL SORT OF TIRE, THAT CAME INTO THE TIRE DEALERSHIP THAT APPARENTLY SERVICED THE MASCOT POLICE DEPARTMENT VEHICLES. TWO SETS, TWO SETS, THESE TWO SETS OF TIRES WERE PUT ON THE TWO MASCOT MASCOT PD CARS. -- THE TWO MASCOT PD CARS. WHILE YOU HAVE A CLAIM BY THE DEFENDANT THAT THERE WAS A

PROBLEM WITH THE TIRE TRACK EVIDENCE, THE FACT OF THE MATTER IS THAT HE COULDN'T PROVE THAT CLAIM. HE COULDN'T PROVE, BY ANY ADMISSIBLE EVIDENCE OTHER THAN SPECULATION, THAT EVEN HIS OWN WITNESS AT THE EVIDENTIARY HEARING HAD ADMITTED WAS SPECULATIVE, I BELIEVE -- HEARING ADMITTED WAS SPECULATIVE, I BELIEVE, THAT SOMEHOW THE CRIME SCENE GOT COMPROMISED. THERE IS NO EVIDENCE THAT JAMES DUCKETT'S PATROL CAR WENT INSIDE THE CORDONED-OFF AREA AT THE CRIME SCENE. WITH RESPECT TO GWEN GURLEY -

HOW ABOUT WITH RESPECT TO THOSE TYPES OF VEHICLES THAT HAVE THOSE TYPES OF TIRES?

WE STILL HAVE A TIRE TRACK MATCH TO THE MASCOT PD CAR.

AND IT WOULD NOT MATCH THE JEEP CHEROKEE OR ANYTHING LIKE THAT?

THEY HAVE GOOD YEAR SNOW AND MUD ON THEM. WE HAVE AN ALLEGATION AND WE HAVE EVIDENCE FROM THE TRIAL, MATCHING UP THOSE TIRES TO THE TIRE TRACKS.

BUT IT WAS MY UNDERSTANDING THE EVIDENCE AT TRIAL WAS THE ONLY VEHICLES, SOMEWHAT, IN THE WORLD, THAT HAVE THESE KINDS OF TIRES, ARE NOT IN THIS COMMUNITY AND YOU DON'T EVER SEE THEM ANYWHERE, AND THAT IS WHAT ALMOST MAKES THIS LIKE ANOTHER FINGERPRINT.

THERE WAS SOME ARGUMENT ABOUT. THAT I AM NOT SURE THAT THERE WAS EVIDENCE SUFFICIENT TO CALL THE ACCURACY OF THE TIRE TRACK TESTIMONY INTO QUESTION.

IN OTHER WORDS, WAS THERE ANY TESTIMONY AT THE EVIDENTIARY HEARING, AS OPPOSED TO ARGUMENT, THAT THIS TYPE OF TIRE IS COMMONLY USED ON THE JEEP CHEROKEE?

I AM DRAWING A BLANK ON THAT, YOUR HONOR, AS TO WHAT THE SPECIFIC TESTIMONY WAS. I REMEMBER ARGUMENT ABOUT IT BUT I DO NOT REMEMBER SPECIFIC TESTIMONY, ONE WAY OR THE OTHER. I DON'T REMEMBER SPECIFIC TESTIMONY, AND I DON'T BELIEVE ANYBODY TESTIFIED AT THE EVIDENTIARY HEARING, WHO WOULD HAVE BEEN IN A POSITION TO HAVE KNOWLEDGEABLY TESTIFIED ABOUT THAT. ON.

DO YOU RECALL WHETHER ANYONE TESTIFIED ABOUT TIRE TRACKS AT ALL?

THE ONLY TIRE TRACK TESTIMONY THAT I RECALL FROM THE EVIDENTIARY HEARING, CAME FROM DR. NEWT, WHO WAS CALLED BY THE DEFENSE, AND HIS TESTIMONY, AS I RECALL, CONCERNED HIS IMPLICATION OR SUGGESTION THAT THE CRIME SCENE, ITSELF, SOMEHOW WAS COMPROMISED BY LAW ENFORCEMENT VEHICLES ARRIVING ON THE SCENE, BUT HE COULDN'T SAY THAT THE TIRE CASTING AT ISSUE DID NOT, IN FACT, COME FROM THE SECURE AREA OF THE CRIME SCENE, AS WAS THE TESTIMONY AT TRIAL.

COULD YOU FINISH WITH JUSTICE LEWIS'S QUESTION.

THOSE WERE AS TO THE SPECIFIC REFERENCE AS TO WHETHER IT OCCURRED WHILE THE OFFICER WAS ON DUTY AND PARTICULAR TIMES AND THOSE TYPES OF THINGS AND WE TALKED ABOUT DEFICIENT PERFORMANCE AND WITH REGARD TO THE PALM PRINTS AND WHAT THE OFFICER SHOULD HAVE DONE AND WITH REGARD TO POSITIONING ON THE VEHICLE OF A BODY AND WHETHER THAT WOULD HAVE LEFT PRINTS, THOSE KINDS OF THINGS.

WITH RESPECT TO THE PALM PRINT TESTIMONY, AND MY UNDERSTANDING OF THE TESTIMONY IS THAT THE VICTIM'S PALM PRINTS WERE FOUND ON THE HOOD OF THE PATROL CAR, AND MY

UNDERSTANDING OF IT IS THAT THEY WERE IN SUCH A FASHION, WITH, YOU KNOW, FINGERS POINTING TOWARD THE OUTSIDE OF THE VEHICLE OR THE PERIMETER OF THE VEHICLE AS YOU WILL. THE DEFENDANT ATTEMPTED TO CALL THAT TESTIMONY INTO QUESTION BUT, ONCE AGAIN, THE CIRCUIT COURT REJECTED THE ISSUE WITH RESPECT TO THE FINGERPRINT TESTIMONY. YOU, AND AGAIN, WE HAVE TRIAL TESTIMONY THAT HAS NOT BEEN IMPUGNED, ESTABLISHED OR IMPEACHED BY THE EVIDENTIARY HEARING TESTIMONY, ITSELF. WITH RESPECT TO THE WILLIAMS RULE EVIDENCE, THERE IS, THE VICTIM, RATHER THE DEFENDANT DID INTRODUCE A TIME SHEET INTO EVIDENCE THAT PURPORTS TO INDICATE THAT HE WAS OFF DUTY ON FRIDAY, MAY 1, OF I BELIEVE IT WAS, 1987, AND ONE OF THE WILLIAMS RULE WITNESSES TESTIFIED THAT HER ENCOUNTER WITH THE DEFENDANT TOOK PLACE. ACCEPTING FOR THE MOMENT THAT THE TIME SHEET IS ACCURATE, AND ACCEPTING FOR THE MOMENT, THAT THE TIME SHEET WAS NOT ALTERED IN SOME FASHION, AND I AM NOT SURE WE CAN MAKE THAT ASSUMPTION, BUT THERE IS NO EVIDENCE IN THE RECORD AS TO THAT ONE WAY OR THE OTHER, AND I DO NOT WISH TO SPECULATE BEFORE THE COURT. THE DEFENDANT, HIMSELF, TESTIFIED THAT HE DID NOT KNOW ANY OF THE THREE WILLIAMS RULE WITNESSES. EVEN IF YOU HAVE, EVEN HAD THE TIME SHEET COME INTO EVIDENCE, OR EVEN IF DEFENSE COUNSEL HAD USED THE TIME SHEET, WHAT WOULD HAVE HAPPENED AS A RESULT OF THAT, IS SPECULATIVE AT THIS POINT. THERE IS NO EVIDENCE BEFORE THE COURT AS TO IT, BUT IT STILL LEAVES ONE WILLIAMS RULE WITNESS OUT THERE IMPEACHED, UNASSAILED.

REGARDLESS OF WILLIAMS RULE, IT ARGUES THAT TRIAL COUNSEL WAS DEFICIENT IN REFUSING TO CONSOLIDATE THE SEXUAL BATTERY CHARGE WITH THE MURDER CHARGE, AND THESE WILLIAMS RULE WITNESSES WERE RELEVANT ONLY TO THE SEXUAL BATTERY CHARGE.

JUSTICE CANTERO, I DON'T KNOW HOW THEY WOULD HAVE MANAGED TO SEVER THE COUNTS. I WOULD SUGGEST THAT, I WILL AGREE TO CONSOLIDATE THESE CASES, THE SEX BATTERY WITH RESPECT TO THE MURDER VICTIM, WITH THE MURDER TRIAL IS, WAS NOT A GOOD BET OR FIGHTING CONSOLIDATION WAS NOT A GOOD BET FOR THE DEFENDANT. WE ALL, WE FREQUENTLY, FREQUENTLY SEE CASES COME INTO THIS COURT, WHERE YOU HAVE SEXUAL BATTERY CASES COMING ALONG WITH A MURDER DURING THE COURSE AFTER RAPE. THE ONE THAT COMES TO MIND IS THE THOMAS GUDINAS CASE, WHERE WE HAD NOT ONLY THE SEX BATTERY OF THE MURDER VICTIM BUT THE ATTEMPTED SEX BATTERY COMMITTED AGAINST ANOTHER VICTIM THE SAME EVENING, SO IT WOULD HAVE BEEN --

WELL, WOULDN'T THE WILLIAMS RULE ISSUE, THOUGH, HAVE BEEN A CRIME ISSUE FOR COUNSEL TO HAVE ARGUED FOR SEVERANCE, AS OPPOSED TO AGREEING TO CONSOLIDATION? THAT IS OF SAYING HERE IS AN ADDITIONAL REASON WHY THESE CASES SHOULD BE SEVERED, BECAUSE YOU ARE GOING TOLL ALLOW THIS WILLIAMS RULE EVIDENCE, WITH REFERENCE TO THE SEX CRIME, BUT THERE IS NO WAY THAT THE JURY, THAT A SANE JURY IS NOT GOING TO BE ABLE TO USE THAT AGAINST THE DEFENDANT FOR THE MURDER, UNLESS THERE IS A SEVERANCE, AND COUNSEL SEEMED TO JUST READILY AGREE TO THIS, AND AS A MATTER OF FACT THAT WAS THE STATE'S POSITION, AND THAT SEEMED TO CONCLUDE IT, WAS, WELL, SINCE THE DEFENSE LAWYER HAS AGREED, TO CONSOLIDATION, JUDGE, THERE IS REALLY NO ISSUE ABOUT THIS.

WELL, JUSTICE ANSTEAD, I AM OUT OF TIME. IN FACT, IF I HAVE THE COURT'S INDULGENCE TO ASK THE FINAL QUESTION, YOU HAVE, IN THIS CASE, A PATTERN OF A POLICE OFFICER DEFENDANT WHO HAD A PRACTICE IN THE PROCEEDING SIX MONTHS OF THIS MURDER, OF PICKING UP YOUNG WOMEN, YOUNG PETITE WOMEN, WHO BORE AT LEAST AT PHYSICAL RESEMBLANCE TO THE VICTIM IN THIS CASE, AND PROPOSITIONING THEM FOR SEXUAL ACTIVITY. I WOULD SUGGEST THAT IT GOES FAR BEYOND THE SEX BATTERY AND TIES INTO, AS PART AND PARCEL OF THE MURDER, THE FACT THAT HE ULTIMATELY MURDERED ONE OF THESE WOMEN.

WOULD THE POLICE -- WOULD YOU PLEASE ARGUE THAT, THOUGH, BECAUSE THE JUDGE INSTRUCTED THE JURY TO CONSIDER THIS EVIDENCE ONLY AS TO THE SEXUAL BATTERY CHARGE

AND NOT THE MURDER CHARGE.

BUT THE SEX BATTERY CHARGE IS STILL PROPERLY CONSOLIDATED WITH THE MURDER.

I UNDERSTAND THAT, BUT I DON'T THINK WE CAN DETERMINE NOW, THAT THIS WILLIAMS RULE EVIDENCE WAS RELEVANT TO THE MURDER CHARGE, WHEN THE JURY WAS INSTRUCTED OTHERWISE.

I WILL CONCEDE THAT, YOUR HONOR, BUT, AGAIN, THE ARGUMENT FOR SEVERANCE OF THE TWO CASES WAS NOT A WINNING ARGUMENT. IT WAS NO PROPER BASIS FOR SEVERANCE OF THE TWO CASES. WITH ALL DUE RESPECT, I WOULD ASK THE COURT TO AFFIRM THE DENIAL OF POST-CONVICTION RELIEF AND DENY THE DEFENDANT'S PETITION FOR HABEAS CORPUS RELIEF. THANK YOU.

THANK YOU VERY MUCH. COUNSEL, REBUTTAL. MR. MARSHAL, HOW MUCH TIME? FIVE MINUTES?

YOUR HONORS, OTHER THAN JUSTICE LEWIS, NOBODY HAS TALKED ABOUT THE CUMULATIVE ANALYSIS THAT IS NECESSARY IN THIS CASE AND THIS CASE BEGS IT, BECAUSE FIRST OFF ON DIRECT APPEAL ONE OF THE WILLIAMS RULE WITNESSES WAS ALREADY THROWN OUT. THERE WAS A WEALTH OF EVIDENCE PRESENTED AT TRIAL. IT WAS A CIRCUMSTANTIAL EVIDENCE CASE. IT IS NOT WE SAW JAMES DUCKETT SHOOT SOMEBODY. IT IS NOT THAT CASE AT ALL.

CAN YOU TELL US WHETHER THERE WAS ANY EVIDENCE PRESENTED AT THE HEARING, OTHER THAN COUNSEL'S ARGUMENT THAT THE TIRES THAT WERE USED IN THIS CAR WERE COMMONLY USED ON JEEP CHER KEYS?

IT IS MY RECOLLECTION THERE WAS A DOCUMENT IN TRIAL COUNSEL'S FILE WITH THAT INFORMATION ON IT.

THAT IS NOT MY QUESTION. THE QUESTION IS THAT THE EVIDENTIARY HEARING BELOW, WAS THERE ANY EVIDENCE THAT THE SAME TIRES WERE USED ON JEEP CHEROKEES?

IT IS MY RECOLLECTION THAT HE WAS ASKED ABOUT THAT BUT I HAVEN'T READ HIS TESTIMONY IN THE LAST WEEK.

I WOULD BE THINKING IT WOULD BE PRETTY IMPORTANT AS TO WHETHER OR NOT THERE WAS EVIDENCE PRESENTED, AS TO DEFICIENT PERFORMANCE BELOW, THAT THIS WAS A COMMONLY-USED TIRE USED ON THESE POLICE VEHICLES?

WELL, YOUR HONOR, THERE WAS OTHER EVIDENCE ON THE TIRE THAT HASN'T BEEN TALKED ABOUT, AND THAT WAS THAT WHEN THE POLICE OFFICER WENT BACK TO THE SCENE LATER IN THE NIGHT, THERE WERE PLASTER TRACKS OF EVIDENCE TAKEN OUTSIDE THE PERIMETER WHERE THE POLICE CARS HAD BEEN DRIVEN. ALSO THERE IS NOT AN ARGUMENT THAT JAMES DUCKETT EVER DROVE INSIDE THE PERIMETER, BECAUSE HE WASN'T THERE BEFORE THE PERIMETER WAS ESTABLISHED, BUT THE OTHER POLICE CAR DID DRIVE INSIDE THE PERIMETER. THERE IS ARGUMENT THAT SOME OF THE CARS WERE PULLED UP AND PULLED BACK.

ARE YOU ALLEGING, THEN, THAT WHAT WAS REALLY TESTED AND COMPARED WERE TRACKS THAT WERE MADE OUTSIDE THE CRIMINAL SCENE?

THERE WAS EVIDENCE OF THAT THAT COULD HAVE BEEN PRESENTED AT TRIAL. YES, YOUR HONOR, WE ARE ALLEGING THAT, THAT SOME OF THE TIRE TRACKS THAT WERE TESTED WERE ACTUALLY OUTSIDE THE CRIME SCENE.

WHAT EVIDENCE IS THERE OF THAT? ANOTHER POLICE OFFICER WHO WENT BACK TO THE SCENE

AFTER THE CRIME SCENE HAD BEEN TAKEN DOWN, AND HE TESTIFIED IN THE EVIDENTIARY HEARING, THAT THE ONLY EVIDENCE HE SAW OF PLASTER CASTS WAS OUTSIDE THE CRIME SCENE AND NOT WITHIN THE CRIME SCENE.

LET ME ASK ONE QUICK QUESTION. DO EITHER YOU, DO YOU OBJECT TO THE STATE SUBMITTING TO DNA TESTING, EITHER THE PATCH WITH THE SEMEN OR THE HAIR?

I AM GLAD YOU ASKED THAT, YOUR HONOR. WE DO OBJECT TO THE HAIR. I WOULD LIKE TO, FIRST, ADDRESS MR. NUNNELLEY'S CONTENTION THAT WE HAVEN'T ARGUED THE CHAIN OF CUSTODY. THAT IS ARGUED ON PAGES 39-THROUGH-43 OF OUR BRIEF IN DETAIL. ALTHOUGH WE DON'T SAY IN THERE --

SUBJECT TO CHAIN OF CUSTODY, IS THERE, SUBJECT TO THE CHAIN OF CUSTODY COMPLAINT, DID THE NA TESTING BEING DONE ON EITHER THE SEMEN OR THE PUBIC HAIR?

NOT ON THE SEMEN BUT ON THE PUB LICK HAIR, BECAUSE WE ASSERT BECAUSE OF THE PROBLEMS WITH THE CHAIN OF CUSTODY THERE, IS NO RELIABLE EVIDENCE TO DETERMINE WHAT EVIDENCE IS THERE. THE STATEMENT THAT WE THINK IT WAS PROBABLY JAMES DUCKETT WAS ONLY MADE, AND I DIDN'T PUT IT IN MY BRIEF BECAUSE IT IS NOT RELEVANT, WAS, YES, WE DID THE TESTING. LOOK AT THAT. AT THE TIME OF THE DNA HEARING, WHETHER DNA TESTING COULD HAVE BEEN DONE AT THAT TIME, HE TESTIFIED HE COULD NOT HAVE. WITH RESPECT TO LOOKING AT THE EVIDENCE, AND THE SEMEN, I DON'T HAVE OBJECTION TO LOOKING AGAIN TO SEE IF THERE WAS SOMETHING THERE. WHEN I LOOKED AT THE EVIDENCE AND IT WAS TO DETERMINE IF THERE WAS ANYTHING WE COULD DNA TEST, THE PATCHES FROM THE JEANS AND THE UNDERWEAR THAT ALLEGEDLY HAD THE SEMEN ON THEM HAVE DISAPPEARED FROM THE EVIDENCE. I DON'T KNOW WHERE THEY ARE. THEY ARE NOT IN EVIDENCE ANYMORE. THEY MAY BE ABLE TO CHECK THE JEANS AND SEE IF THERE IS MORE ON THERE, AND I DON'T HAVE AN OBJECTION TO THAT, NO, YOUR HONOR.

TO SEE WHY YOU ARE FOCUSING ON THIS QUESTION HERE, WE HAVE TO LOOK AT TWO LEVELS. ONE IS WHETHER THERE WAS DEFICIENT PERFORMANCE THAT UNDERMINES THE OUTCOME IN WHAT HAPPENED, AND I GUESS ANOTHER JURY MIGHT SAY THERE IS SOME MORE DOUBT. THE OTHER QUESTION IS THAT CERTAINLY PREVALENT IN EVERYONE'S MIND IS CERTAINLY CLAIMS OF ACTUAL INNOCENCE. IF THERE IS ACTUAL PHYSICAL EVIDENCE THAT COULD BE DNA TESTING, IT WOULD SEEM THAT YOUR CLIENT WOULD BE SCREAMING OUT THAT THAT SHOULD BE DONE, BECAUSE IT MIGHT EXONERATE HIM, AND SO THERE IS SOME CONCERN, WHEN IT IS JUST SORT OF THERE, BUT IT IS AN AFTERTHOUGHT. I MEAN, IF MR. DUCKETT IS TRULY INNOCENT, WOULDN'T HE HAVE WANTED THIS DONE IMMEDIATELY? NOW, THAT MAY NOT BE A LEGAL QUESTION, BUT IT IS SOMETHING THAT CERTAINLY GOES TO EVERYONE'S MIND IN THIS DAY AND AGE. IF THERE IS, IF IT IS THERE, IT SHOULD BE TESTED AND NOT WAIT UNTIL A WARRANT TO SAY WE SHOULD HAVE SOME MORE DNA TESTED.

ABSOLUTELY, BECAUSE WE BELIEVE MR. DUCKETT IS INNOCENT AND WE HAVE ALWAYS BELIEVED AND HE HAS ALWAYS SAID THAT HE IS INNOCENT, AND IF YOU CAN PROVE ANYTHING, SHOW IT. WE HAVE REAL CONCERN ABOUT WHAT HAPPENED TO THE HAIR EVIDENCE HERE, SO WE NEVER FELT, DURING THE INVESTIGATION INTO THIS CASE, THAT THAT WAS A SAFE THING TO DO, BECAUSE WE DON'T KNOW WHERE THAT HAIR CAN CAME FROM, AND THERE IS NO WAY TO TELL. THERE ARE SOME SIMILAR CONCERNS THAT, IF THEY HAVE DONE SOMETHING WITH THE HAIR, WHAT HAVE THEY DONE WITH THE SEMEN? TO BE CANDID, I DO NOT THINK THERE IS ANYTHING TO TEST. I HAVE NO PROBLEM WITH US ATTEMPTING TO TEST IT. WE CERTAINLY LOOKED AT IT DURING THE EVIDENTIARY HEARING TO MAKE THAT DETERMINATION AND DIDN'T BELIEVE THERE WAS ANYTHING THERE TO BE TESTED, BUT, YES, MR. DUCKETT WOULD LOVE TO HAVE THAT DONE AND WOULD LOVE TO BE EXONERATED.

CHIEF JUSTICE: I AM AFRAID WITH THAT YOUR TIME IS UP, BUT THANK YOU BOTH, VERY MUCH.