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Lloyd Chase Allen v. State of Florida

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: ALL RIGHT. GOOD MORNING AGAIN. ALLEN VERSUS STATE. IF COUNSEL IS READY TO PROCEED, YOU MAY PROCEED.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS KEN MALNIK, AND ALONG WITH DAN HALLENBERG OF CCRC, SITS AT THIS COUNSEL TABLE. WE REPRESENT MR. ALLEN, A PRISONER OF THE SENTENCE OF DEATH, ON THIS 3.850 MOTION. I WOULD LIKE TO ARGUE WITH RESPECT TO THE HABEAS CORPUS AND PRIMARILY FOCUS TODAY ON GUILT PHASE ARGUMENTS. SPECIFICALLY THE ARGUMENT I WOULD LIKE TO ADDRESS DEALS WITH EXCULPATORY EVIDENCE, EVIDENCE IN THIS CASE THAT THERE WERE HAIRS FOUND ON THE VICTIM'S HAND, ON HER HAND OR IN HER HAND THAT DID NOT MATCH THAT OF MR. ALLEN.

CAN YOU EXPLAIN HOW THAT EVIDENCE WAS EXCULPATORY.

YES. THE TRIAL COURT IN THIS CASE MADE A, WHAT WE CONTEND IS AN ERRONEOUS DECISION THAT IT WAS NOT EXCULPATORY. EXCULPATORY IS DEFINED IN KYLES AND STRICKLAND V GREEN, IS THAT EVIDENCE THAT IS FAVORABLE OR HAVE IMPEACHING VALUE. I WOULD SUBMIT, YOUR HONOR, THAT THIS IS VERY FAVORABLE EVIDENCE TO NEGATE GUILT. IT DOES NOT, IN THIS CASE, AND, AGAIN, I WOULD TURN TO HOFFMAN, WHICH WAS A CASE DECIDED APPROXIMATELY A YEAR AGO BY THIS COURT, WHERE THE SUPREME COURT FOUND THAT HAIRS, ALMOST THE IDENTICAL SAME EVIDENCE, WERE FAVORABLE, BECAUSE THERE WAS AN ARGUMENT THAT COULD BE MADE THAT SHOWED THAT THE ATTACKER IN HOFFMAN COULD NOT HAVE BEEN THE DEFENDANT.

AREN'T THERE A COUPLE OF SDIPTIONS THOUGH? IN HOFFMAN -- DISTINCTIONS THOUGH? IN HOFFMAN, WASN'T IT THE CASE THAT THE ANALYSIS SHOWED THAT THE HAIR WAS NEITHER THE DEFENDANT'S NOR THE VICTIMS, AND ALSO IN HOFFMAN THE DEFENDANT CONTESTED THAT HE WAS NEVER IN THE MOTEL ROOM, WHEREAS HERE THE DEFENDANT WAS, HERE FIRST OF ALL, WE DON'T KNOW WHETHER THE HAIR COULD HAVE BEEN THE VICTIM'S, FROM WHAT THE ANALYSIS SHOWED, AND THE DEFENDANT ADMITTED THAT HE WAS IN THE HOUSE. HE ONLY CONTESTED HE DIDN'T MURDER THE VICTIM.

JUDGE, ESSENTIALLY IT IS A TWO-PART QUESTION, AND THE WAY THAT I WOULD LIKE TO RESPOND TO IT IS CERTAINLY, UNDER THE DEFINITION OF EXCULPATORY, IT IS FAVORABLE, IF EVIDENCE NEGATES GUILT, AND IN THIS CASE, AT LEAST MR. ALLEN WOULD HAVE HAD THE ARGUMENT THAT HE DIDN'T HAVE AT TRIAL, THAT IN THE CLOSEST PROXIMITY TO THE DECEASED, IT WASN'T HIM. SECOND, AND WHAT, MORE IMPORTANT, THERE IS A DISTINCTION BETWEEN HOFFMAN. IN HOFFMAN, MR. HOFFMAN ACTUALLY CONFESSED TO THE HOMICIDE. I WOULD SUBMIT THAT THE EVIDENCE IN HOFFMAN IS STRONGER THAN IN THE INSTANT CASE, AND THE SIGNIFICANCE OF THAT WOULD BE THAT IT UNDERMINES THE CONFIDENCE IN THIS CASE, BECAUSE WHEN WE USE, WHEN WE DO, PERFORM THE ANALYSIS, YOUR HONOR, WE SAY HOW WOULD THE NONDISCLOSURE HAVE AN IMPACT ON THE EVIDENCE THAT WAS PRESENTED? ONE OF THE STATE'S VERY COMPELLING ARGUMENTS, AND IN THEIR CLOSING ARGUMENT, THEY ARGUED THAT THERE WAS BLOOD THAT ALLEGEDLY BELONGED TO THE VICTIM ON MR. ALLEN'S CLOTHES, AND IN ADDITION THERE WAS A TOWEL FOUND WITHIN PROXIMITY OF THE VICTIM

THAT HAD SEMEN. THAT IS A VERY COMPELLING ARGUMENT, TO SAY IN TERMS OF THE PROXIMITY TO MR. ALLEN, LOOK AT ALL THESE THINGS THAT POINT TO GUILT. HOWEVER, THE CLOSEST THING TO MR., TO THE VICTIM, WHICH WAS ACTUALLY ON HER, WAS THESE HAIRS THAT DON'T MATCH HIM.

BUT IT COULD HAVE BEEN HER HAIR.

CERTAINLY IT COULD HAVE BEEN, BUT I DON'T BELIEVE THE RULING, I DON'T BELIEVE THAT THE COURT'S RULING IN HOFFMAN SAID THAT WE EXPLICITLY HAVE TO RULE OUT, IN HOFFMAN, THEY WERE ABLE TO RULE OUT THAT IT WAS THE MALE VICTIM, BUT I BELIEVE THE ANALYSIS IN HOFFMAN SHOWED THAT, IF THE EVIDENCE WAS FAVORABLE, AND CERTAINLY I WOULD SUBMIT, YOUR HONOR, THAT THIS COULD BE CONSTRUED AS BEING FAVORABLE EVIDENCE THAT WOULD PUT THIS CASE IN A DIFFERENT LIGHT.

WHAT IF ANYTHING, DID YOU KNOW ABOUT HAIRS AT THE TIME OF THE TRIAL? DID YOU KNOW, DID THE DEFENSE KNOW THAT THERE WERE, IN FACT, HAIRS FOUND IN THE VICTIM'S HAND OR ON HER HAND? ON OR ABOUT HER BODY?

YOUR HONOR, THERE WAS A MOTION TO COMPEL, AND THE, THERE WAS A MOTION TO COMPEL FILED. THE MOTION WAS GRANTED. A HAIR SAMPLE WAS TAKEN FROM MR. ALLEN. THE REPORT IS, THE REPORT WAS NEVER FURNISHED, AND THE TRIAL COURT, IN ITS SUMMARY DENIAL, SAID THAT THERE WAS NO EVIDENCE THAT THIS REPORT WAS EVER FURNISHED. NOW, IN TERMS OF RECENT CASES, STRICKLAND, WHICH DEALS WITH THE CRITERIA OF BRADY, DUE DILIGENCE IS, I WON'T SAY IT, THERE IS A DEBATE AS TO WHETHER DUE DILIGENCE STANDARD STILL APPLIES, BUT IN THIS CASE, TO ANSWER YOUR QUESTION, I THINK WHERE THE COURT IS GOING, THIS INFORMATION, THE REPORT, NOT THE HAIRS, BUT THE REPORT WAS NOT EQUALLY AVAILABLE TO BOTH PARTIES. THIS WAS A REPORT THAT WAS, A TESTING THAT WAS FORWARDED TO FDLE.

NOW, ASSUMING THAT THERE IS NO DUE DILIGENCE REQUIREMENT UNDER BRADY, YOU STILL HAVE TO PROVE A PROBABILITY OF A DIFFERENT RESULT. HOW DO YOU PROVE THAT, WITH THIS HAIR THAT MAY BE THE VICTIM'S BUT WASN'T THE DEFENDANT'S.

YOUR HONOR, I THINK WHAT MAKES IT DIFFICULT IN THIS -- DIFFICULT IN THIS CASE, IS THAT THERE WAS A SUMMARY DENIAL.

WHAT WOULD YOU SHOW AT AN EVIDENTIARY HEARING THEN?

WELL, JUDGE, THERE ARE A NUMBER OF CLAIMS, AND IN THE STATE OF THE STATE V GUNSBY, THERE IS A ANALYSIS THAT SAYS IF THE BRADY VIOLATIONS, COUPLED WITH INEFFECTIVE ASSISTANCE OF COUNSEL, USING A KEY POINT OF ANALYSIS, YOU CAN SHOW A REASONABLE PROBABILITY AFTER DIFFERENT OUTCOME. THIS PIECE OF EVIDENCE, I SUBMIT, IS VERY, IS VERY IMPORTANT. WOULD IT ALONE HAVE, WOULD IT ALONE NECESSARILY PRODUCE A DIFFERENT RESULT? I AM NOT CERTAIN THAT IT WOULD. HOWEVER, IN ANALYSIS OF BRADY, A LOT OF TIMES THE CASES DON'T SAY THAT YOU HAVE TO SHOW MORE LIKELY THAN NOT. IT IS WHETHER IT UNDERMINES THE CONFIDENCE, AND I SUBMIT THAT IT IS SHOCKING IN OFFENSIVE THAT THIS PIECE OF EVIDENCE WAS NOT TURNED OVER. AND I DON'T WANT TO CAST ASPERSIONS ON THE STATE, BUT I THINK THERE IS A NECESSITY FOR AN EVIDENTIARY HEARING, TO KNOW WHETHER THIS WAS WILLFUL OR INADVERTENT, AND, AGAIN, THIS CASE --

THAT ISN'T GO TO THE POINT OF WHETHER IT MEETS THE PREJUDICE STANDARD UNDER STRICKLAND.

I AGREE, YOUR HONOR.

SO LET'S GET SPECIFICALLY ON THAT. WHAT WOULD BE ABLE TO -- WHAT IS NEEDED TO BE

SHOWN AT THAT, COULD BE DEMONSTRATED AT THE, AT AN EVIDENTIARY HEARING, THAT WAS NOT BEFORE THE JUDGE IN THIS CASE? IF YOU HAVE TAKEN INTO CONSIDERATION THE ENTIRE RECORD THAT THE JUDGE HAD.

YOUR HONOR, IN ORDER TO UNDERMINE, TO DO THE PREJUDICE ANALYSIS, I THINK WE HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE. THIS IS A CASE WHERE MR. ALLEN MADE NO INCULPATORY STATEMENTS PRETRIAL, EXCULPATORY STATEMENTS DURING PRETRIAL. THIS IS NOT A CASE WHERE THERE WAS EVIDENCE LINKING HIM TO A MURDER WEAPON. IT IS IMPORTANT TO DO THE ANALYSIS THAT JUSTICE CANTERO AND JUSTICE WELLS ARE ASKING, YOU HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE. THE STATE'S ARGUMENT, GIVEN THE FACT THAT THERE IS SOME INHERENT WEAKNESSES IN THE CASE THAT WE DON'T HAVE, ALL WE HAVE IS THE PRESENCE THAT NOW YOU HAVE GOT A PIECE OF EVIDENCE THAT IS IN A VICTIM, AND THIS IS REAL IMPORTANT, THAT THIS VICTIM WASN'T SHOT. THIS VICTIM, IF WE GO BY THE STATE'S THEORY IN THIS CASE, THIS VICTIM WAS TIED AND THEN STABBED, WHICH MEANS THERE IS A HIGH PROBABILITY THAT THERE IS A HIGH PROBATIVE VALUE OF THESE HAIRS. YOUR HONOR, SO WHEN YOU SAY IN TERMS OF DOING THE PREJUDICE ANALYSIS, I THINK WE HAVE GOT TO LOOK AT THE STRENGTH OF THE CASE AND THE SIGNIFICANCE OF THIS EVIDENCE. THIS EVIDENCE COULD HAVE REBUTTED A VERY CONVINCING ARGUMENT THAT THE STATE MADE, WHICH IS LOOK AT ALL THIS EVIDENCE THAT POINTS TO MR. ALLEN, BUT THE EVIDENCE OF THE HAIR WOULD SUGGEST THAT THE PERSON THAT WAS ATTACKING HIM WASN'T HIM, AND --

BUT CAN WE GO BACK TO THE BASIC PREMISE THAT, IF YOU CAN'T RULE OUT THAT IT COULD BE THE VICTIM'S, THEN THE PROBATIVE VALUE JUST GOES DOWN TO WHAT? I MEAN --

WELL, YOUR HONOR, I THINK THE PROBATIVE VALUE, AS PART OF WITHHELD EVIDENCE.

IN OTHER WORDS, YOU HAVE A PICTURE OF YOU HAVE GOT HIS BLOOD OR HER BLOOD ON HIS CLOTHES, GOT HIS SEMEN, YOU HAVE GOT THE FACT THAT HE WAS WITH HER, AND WAS SEEN GOING IN AND OUT OF HER HOUSE IN CLOSE PROXIMITY TO THE TIME OF THE MURDER. I THINK THERE IS SOME OTHER CIRCUMSTANCES THAT I AM NOT, SO IF THE JURY WERE TO HEAR THAT SOME HAIR WAS UNIDENTIFIED BUT CONSISTENT WITH THE VICTIM'S, HOW DID DOES THAT CHANGE, AND I REALIZE MY VIEW BRADY IS AN OUTCOME DETERMINATIVE, BUT IT IS AKIN TO STRICKLAND, UNDERMINING CONFIDENCE IN THE RESULT, AND CERTAINLY THE STATE OUGHT TO BE PRODUCING THINGS THAT COULD BE HELPFUL, BUT I JUST, COULD YOU --

YOUR HONOR, MAYBE I MISHEARD THE COURT IN THE QUESTION. THE HAIR WAS NEVER IDENTIFIED, JUST SO WE KNOW. IT IS POSSIBLE THAT IT COULD HAVE BEEN THE VICTIM. HOWEVER, ONE OF THE OTHER PIECES --

HAS IT NOW BEEN -- OKAY. SO WHAT TESTING WAS DONE ON THE HAIR?

WELL, YOUR HONOR, THIS IS THE PROBLEM, AND THE PROBLEM IS THAT THE EVIDENCE, THE HAIR EVIDENCE WAS MISLABELED. ONE OF THE OTHER CLAIMS THAT WE ARE ASSERTING IS CONTAMINATION, THAT THE STATE DIDN'T PROPERLY HANDLE EVIDENCE. SO THE POINT IS PUTTING MYSELF IN THE SHOES OF TRIAL COUNSEL, TRIAL COUNSEL WOULD HAVE THE ARGUMENT, NOT ONLY DOES IT SAY IT IS NOT MY CLIENT BUT MORE IMPORTANTLY, WE CAN'T BE BLAMED FOR THE FACT THAT IT CAN'T BE TESTED, BECAUSE IT WAS MISHANDLED BY THE STATE. WHEN THEY DREW THE HAIRS, THEY MISLABELED THEM, SO THEY WERE NEVER ABLE TO TEST HER HAIR IN COMPARISON TO THE HAIR THAT WAS FOUND IN HER HANDS.

TELL ME HOW THE MISLABELING WOULD PRECLUDE EXAMINING IT. THEY COULDN'T FIND IT OR --

THAT IS IT, JUDGE. THAT IS WHAT THE FDLE REPORT BASICALLY SAYS. WE CAN'T TEST THIS HAIR AGAINST HER HAIR, BECAUSE WE DON'T KNOW WHETHER THE HAIRS WE HAVE WERE HEAD HAIRS OR PUBIC HAIRS, AND I APOLOGIZE, YOUR HONOR, NOT REALLY HAVING THE EXPERTISE, IN

TERMS OF HAIR ANALYSIS, BUT BHAFKLY THEY SAID IT IS NOT TEST -- BASICALLY THEY SAID IT IS NOT TESTABLE.

SO WHAT ARE YOU CLAIMING THE STATE, WITH EITHER, EITHER WITHHELD OR DIDN'T DISCLOSE, WHETHER INTENTIONALLY OR NOT, BECAUSE BRADY DOESN'T MAKE A DISTINCTION IN TERMS OF THE INTENT, WHAT IS THE, IT, IF THE HAIR, IF THEY COULDN'T GIVE YOU THE RIGHT HAIR, WHAT IS THE BRADY PART? WHAT IS THE -- WHAT IS IT THAT THEY DIDN'T DISCLOSE?

WELL, WHAT THEY DIDN'T DISCLOSE IS THEY DIDN'T DISCLOSE THE RESULT, SO THAT WHEN MR. -- THE REPORT.

RIGHT. SO AGAIN, IN DOING A BRADY ANALYSIS, A LOT OF TIMES YOU ASK YOURSELF WHAT IS THE IMPACT ON THE WAY THE DEFENSE HANDLED THE CASE?

BUT IF THE REPORT WOULD BE INCONCLUSIVE BECAUSE THE EVIDENCE WAS IMPROPERLY PRESERVED, THEN DOESN'T, I DON'T KNOW, HOW DOES THAT --

YOUR HONOR, IT IS NOT NECESSARILY INCONCLUSIVE. THE POSITIVE CONCLUSION THAT THE DEFENSE COULD DRAW, IS IT IS NOT MY CLIENT. THE STATE COULD THEN, THEIR FALL BACK ARGUMENT COULD BE, WELL, IT COULD HAVE BEEN THE VICTIM. HOWEVER, USING BRADY, IT CERTAINLY IS FAVORABLE FOR THIS, FOR TRIAL COUNSEL TO HAVE BEEN ABLE TO ARGUE IT IS NOT --

DID THE DEFENSE KNOW THERE WAS HAIR IN HER HAND AT THE TRIAL? I MEAN, PRETRIAL? WAS THAT KNOWN TO THE --

THERE WAS A MOTION TO COMPEL. ANOTHER REASON FOR AN EVIDENTIARY HEARING, YOUR HONOR, IN THIS CASE IS TO KNOW WHAT TRIAL COUNSEL ACTUALLY KNEW. THE TRIAL COURT JUDGE, IN MAKING HIS FINDINGS, SAID THIS WAS WITHIN THE STATE'S POSSESSION. IT SHOULD HAVE BEEN TURNED OVER. THAT WAS ONE OF THE FINDINGS OF THE LOWER COURT MADE, THAT IT WAS SUPPRESSED.

SO THE ONLY ISSUE IS, AS A MATTER OF LAW, WHETHER IT MEETS THE THIRD PRONG. IS THAT --

YES. BUT IN ORDER TO MEET THE THIRD PRONG, WE HAVE TO SAY HOW DID IT AFFECT THE DEFENSE ATTORNEY'S ABILITY TO PREPARE, AND I GUESS AT THIS POINT I AM GOING TO LEAP INTO ANOTHER ARGUMENT, BECAUSE I THINK IT DOVETAILS, WHICH IS THE DEFENSE IN THIS CASE CLAIMS CERTAIN, A COUPLE ARGUMENTS. ONE ARGUMENT WAS THAT THE THIRD PARTY DID IT. CERTAINLY HAVING THE ABILITY TO SAY THIS HAIR DOESN'T MATCH MY CLIENT WOULD HAVE BEEN CONSISTENT WITH THE THIRD PARTY POSSIBLY DOING IT. NOW, THE STATE COULD CONSIDER AND SAY IT COULD HAVE BEEN THE VICTIM, BUT AT LEAST IT GIVES SUPPORT, BUT THE OTHER PROBLEM IS THE DEFENSE IN THIS CASE MADE AN ARGUMENT THAT THE VICTIM KILLED HERSELF.

WELL, LET ME ASK YOU THIS. LET'S GO BACK TO THE REPORT THAT YOU, THAT WAS NOT TURNED OVER DOES NOT SAY THAT THIS HAIR DOES NOT BELONG TO YOUR CLIENT.

AND I APOLOGYIZE IF I AM NOT BEING CLEAR. IT CONCLUSIVELY SAYS IT IS NOT MY CLIENT'S HAIR. IT JUST CAN'T RULE OUT THE VICTIM.

AND SO ON ANY SUBSEQUENT USE OF THIS, YOU WOULD BE USING THIS TO SAY, THEN, THAT, LOOK, THERE WAS THIS WILL HAIR FOUND ON THE VICTIM THAT IS NOT MY CLIENT, SO THAT SUPPORTS AND DOVETAILS INTO YOUR ARGUMENT THAT YOU WERE JUST SAYING THAT THIS WAS SOMEONE ELSE WHO WAS THERE, ALSO, AT OR ABOUT THE TIME OF THIS LADY'S MURDER. IS

THAT THE USE THAT YOU ARE NOW --

THAT IS THE USE, AND MAYBE IT WOULD HAVE PREVENTED THE DEFENSE ATTORNEY FROM MAKING AN ARGUMENT THAT I SUBMIT JUST DOESN'T SQUARE WITH THE FACTS, BECAUSE GIVEN THE, GIVEN NONDISCLOSED INFORMATION, I IS UP MIGHT -- I SUBMIT IT HAS AN IMPACT. THE PROBLEM IS I AM PUTTING THE CART BEFORE THE HORSE, BECAUSE WE DIDN'T HAVE AN EVIDENTIARY HEARING, AND I THINK THIS COURT, ON NUMEROUS OCCASIONS, SAYS THAT IT IS SO IMPORTANT TO COME UP WITH REASONS FOR STRATEGY, AND IN THIS CASE THE LOWER COURT IS MAKING A LOT OF PRESUMPTIONS. I APPRECIATE AND I WOULD RESERVE MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. SANDRA JAGGARD, ASSISTANT ATTORNEY GENERAL ON BEHALF OF THE STATE. THE DEFENSE DID, IN FACT, KNOW THERE WAS A HAIR, BECAUSE WE MOVED TO HAVE HIS HAIR SAMPLE TAKEN TO COMPARE TO THE HAIR AND TOLD HIM AT THAT TIME WE HAVE GOT A HAIR. WE NEED YOUR HAIR TO COMPARE TO IT. HE KNOWS THERE IS A HAIR. HE KNOWS WE ARE COMPARING IT.

EVERYONE KNEW THIS. THE TESTING WAS DONE, SO WHY DIDN'T THE STATE GIVE -- THERE WAS THE REQUEST FOR DISCOVERY, CORRECT?

FIRST OF ALL, YES, THERE WAS. FIRST OF ALL, WE DON'T KNOW THAT THE STATE DIDN'T TURN IT OVER AT THIS TIME POINT THIS. IS A SUMMARY DENIAL, SO WE ARE SIMPLY ASSUMING THEY DIDN'T BECAUSE THEY HAVE MADE THAT ALLEGATION. IF THERE WERE AN EVIDENTIARY HEARING, THE STATE WOULD, IN FACT, CONTEST THAT IT WASN'T TURNED OVER, BUT THE POINT IS THE DEFENSE KNEW WE WERE DOING THIS TESTING. THE DEFENSE KNOWS THAT WE ARE TESTING IT AGAINST HIS HAIR. THE DEFENSE KNOWS WE NEVER PRESENT THIS PERSON TO SAY IT WAS HIS HAIR. THEREFORE THE DEFENSE KNOWS THAT THE RESULT IS IT IS NOT HIS HAIR.

IS IT YOUR POSITION THAT THE DEFENDANT WAS REQUIRED TO REQUEST THE RESULTS OF THE TEST?

IS IT MY POSITION THAT, IF THE STATE HAD NOT TURNED THEM OVER, YES. HE KNEW THE TESTING WAS GOING ON AND HE SHOULD HAVE REQUESTED THEM. YES.

SO YOUR POSITION, THEN, THAT THERE IS A DUE DILIGENCE REQUIREMENT?

ABSOLUTELY.

AND THAT THAT DUE DILIGENCE REQUIREMENT INCLUDES FOLLOWING UP WITH THE STATE, ONCE THE STATE COMPELS PRODUCTION OF PHYSICAL EVIDENCE TO DETERMINE --

YES. IF YOU WANT TO KNOW WHAT THAT TEST SAYS, AND KEEP IN MIND HE KNOWS WHAT THAT TEST SAYS, BECAUSE WE NEVER PRESENT THE WITNESS WHO SAYS IT DOES MATCH HIM, AND THAT IS ALL THAT REPORT SAYS IS IT DOESN'T MATCH HIM, AND WHEN WE DON'T PRESENT IT DOES, THAT MEANS IT DIDN'T.

IS IT THE STATE'S POSITION THAT THIS IS NOT EX-CONSUMETORY EVIDENCE?

IT IS THE STATE'S POSITION THAT THIS IS NOT MATERIAL EVIDENCE, BECAUSE ALL THEY GET OUT OF THIS IS TO BE ABLE SAY THAT THE EVIDENCE SHOWS THIS WAS NOT MY CLIENT. THIS WOMAN WAS TIED UP WITHOUT A STRUGGLE. WHERE IS SHE PULLING THIS HAIR FROM? SHE IS NOT STRUGGLING WITH WHOM EVER SHE IS HAVING THIS FIGHT WITH.

LET'S GO BACK, BECAUSE SOMETIMES IN TRYING TO MAKE SURE THAT BRADY AND REALLY WHAT IS THE INTENT OF BRADY IS FULFILLED. YOU KNOW, WE WANT TO MAKE SURE FOR THE FUTURE

CASES, THAT THE STATE IS ON THE RIGHT TRACK. WHEN A HAIR SAMPLE IS TAKEN FROM A DEFENDANT AND THE STATE TESTS IT AND FINDS OUT THAT THAT HAIR IS NOT THE DEFENDANT'S, YOU WOULDN'T WANT US TO WRITE AN OPINION THAT SAYS THAT, UNLESS THE DEFENDANT THEN SUBSEQUENTLY ASKS FOR THE REPORT, THE STATE DOESN'T HAVE TO TURN OVER A REPORT THAT SAYS THE HAIR IS NOT THE DEFENDANT'S.

WELL, FIRST OF ALL, KEEP IN MIND SUMMARY DENIAL. WE ARE SIMPLY IS ASSUMING THEY DIDN'T TURN IT OVER.

THAT IS WHAT WE HAVE TO ASSUME.

YES. WE ABSOLUTELY HAVE TO ASSUME THAT, BUT I AM NOT CONCEDED THAT IT WASN'T TURNED OVER, AND THERE WERE SOME COMMENTS MADE.

IF IT WAS TURNED OVER, WE --

I UNDERSTAND. MY POINT, THOUGH, IS ASSUMING IT WASN'T TURNED OVER, THIS DEFENDANT KNEW THERE WAS THIS HAIR. THIS DEFENDANT KNEW WHAT THAT RESULT WAS, WHEN WE DON'T PRESENT IT AS HIS HAIR, AND THAT IS ALL THAT REPORT IS GOING TO SAY, AND IT IS NOT THE REPORT HE NEEDS. IT IS THE INFORMATION HE NEEDS, SO HE HAS THE INFORMATION.

SO LET'S ASSUME THAT A DEFENDANT, YOU ARE SAYING THE DEFENDANT HAS TO ASSUME, BECAUSE THE STATE IS NOT GOING TO USE IT, THAT THIS SHOWED THAT IT WAS NOT HIS HAIR, SO HE WOULD, THEN, GET TO COURT AND TRY TO PRESENT THIS, WITHOUT KNOWING WHETHER OR NOT IT IS, IN FACT, HIS HAIR.

AT THAT POINT GO AHEAD AND SAY, OKAY, WHO TESTED IT? STATE. ASK THEM. IT IS JUST THAT SIMPLE. GET THE WITNESS. DEPOSE THEM.

WHAT GOES BACK TO PUTTING THE BURDEN ON THE DEFENDANT, WHEN IT IS THE STATE WHO HAS THE BURDEN OF TURNING OVER THIS KIND OF EVIDENCE, ISN'T IT?

BUT THE DEFENDANT HAS A DUE DILIGENCE REQUIREMENT UNDER BRADY TO SEEK THE EVIDENCE.

IF WE LOOK AT STRICKLER, AS YOU KNOW, THERE IS NO DUE DILIGENCE REQUIREMENT IN THERE.

WELL, I DISAGREE.

YOU DISAGREE THAT STRICKLER SAYS THERE IS A DUE DILIGENCE REQUIREMENT?

I DISAGREE THAT STRICKLER WROTE OUT THE DUE DILIGENCE REQUIREMENT. THERE IS A FOOTNOTE IN STRICKLER THAT SAYS THEY ARE NOT MENTIONING IT IN THIS CASE FOR THESE SPECIFIC REASONS.

IF THE DEFENSE LAWYER KNEW THAT HIS CLIENT'S HAIR WAS BEING TESTED AND DOESN'T, AND DOESN'T FIND OUT THAT THE HAIR SAMPLE IS OR IS NOT THE CLIENT'S HAIR, AND DOESN'T USE THAT FACT IN THE TRIAL, WHY ISN'T THAT SOMETHING THAT, THEN, YOU HAVE GOT INEFFECTIVE ASSISTANCE OF COUNSEL, SINCE IF THE WHOLE DEFENSE WAS IT WASN'T MY CLIENT, AND YOU HAVE GOT HAIR BEING GRIPPED IN A HAND, IT SEEMS TO ME THAT ANY REASONABLY-COMPETENT DEFENSE LAWYER WOULD WANT TO USE THAT TO AT LEAST SAY, LOOK, THE MOST DAMNING PIECE OF EVIDENCE, WHICH IS HAIR IN THE HAND, IS NOT MY CLIENT'S. I MEAN, IN OTHER WORDS IN TERMS OF TRYING TO UNDERSTAND THIS FROM WHY THERE WAS NO EVIDENTIARY HEARING IN THIS CASE, DON'T THOSE TWO ARGUMENTS DOVETAIL TOGETHER? YOU EITHER HAVE INEFFECTIVE ASSISTANCE OR YOU HAVE GOT A BRADY PROBLEM.

WELL, THE INEFFECTIVE ASSISTANCE CLAIM WOULD NEED TO BE PLED. IT HAS NEVER BEEN PLED. BUT BEYOND WHICH, YOU END UP WITH MATERIALITY UNDER BRADY IS THE SAME AS PREJUDICE UNDER STRICKLAND, AND WHAT YOU END UP WITH IN THIS CASE IS THE DEFENSE GETS AN ARGUMENT THAT THIS WOMAN HAD A HAIR ON HER HAND. IT IS NOT CLEAR SHE IS HE GRIPPING IT IN HER HAND. IT IS JUST ON HER HAND. THAT DOESN'T MATCH MY CLIENT. THAT WE DON'T KNOW, AND THE STATE RESPONDS, WELL, THE EVIDENCE HERE IS THERE WAS NO STRUGGLE, SO WHERE IS SHE PULLING THIS HAIR OUT OF THIS DEFENDANT'S HEAD? SHE IS TIED UP. THERE WAS NO STRUGGLE. THERE ARE NO DEFENSIVE WOUNDS. THAT SHE ENDS UP WITH THIS HAIR ON HER HAND THAT MAY BE HERS. IT MAY BE OFF THE FLOOR FROM SOMEBODY WHO BELONGS IN THAT HOUSE, SO WHAT YOU HAVE HERE IS YOU HAVE A PIECE OF EVIDENCE THAT IS COMPLETELY AND TOTALLY AMBIGUOUS, AND YOU END UP WITH THE ARGUMENT THAT COUNSEL MADE, WHICH IS, AND HAD AMPLE EVIDENCE TO SUPPORT, WHICH IS THAT THE STATE SCREWED UP PROCESSING THIS CRIME SCENE, AND THAT IS ALL YOU END UP WITH OUT OF IT.

I WAS UNDER THE IMPRESSION THAT THERE WAS AN IN EFFECTIVE CLAIM, WITH REGARD TO EXAMINATION OF WITNESSES, WITH REGARD TO OTHER PERSONS BEING IN AND ABOUT THE PROPERTY AND THOSE KINDS OF THINGS AND WOULD NOT AN EVIDENTIARY HEARING KIND OF PULL ALL OF THIS TOGETHER OR WHY WOULD IT NOT? I GUESS, WHY WOULD IT NOT PULL ALL OF THIS TOGETHER, IF YOU HAD AN EVIDENTIARY HEARING WITH REGARD TO WHAT HAPPENED WITH REGARD TO THE TESTING OF THE HAIR AND THEN, ALSO, WHY THE ATTORNEYS DID OR DID NOT DO CERTAIN THINGS WITH THIS THEIR PERSON POSSIBILITY.

WELL, IT WASN'T REALLY A THIRD PERSON POSSIBILITY. IT IS A REASONABLE DOUBT DEFENSE. THE STATE DIDN'T EXCLUDE THE POSSIBILITY THAT IT WAS SUICIDE, THAT IT WAS A THIRD PERSON THAT, IT WAS THIS, THAT IT WAS THAT. ALL THE STATE HAS PROVEN TO YOU IS HE WAS AT THE CRIME SCENE AND WE HAVE CONCEDED THAT. WAS THE DEFENSE. WITH REGARD TO --

THE QUESTION IS AS TO OTHER PEOPLE BEINGS ON THE SCENE. AM I -- TO OTHER PEOPLE BEING ON THE SCENE.

WITH REGARD TO OTHER PEOPLE BEING ON THE SCENE, THE FIRST WITNESS THEY ARE TALKING ABOUT HAVING FAILED TO IMPEACH IS A WITNESS WHO, THE THE DAY OF THE CRIME WAS WORKING ACROSS THE STREET AND THE DEFENSE ADMITS WAS THE PERSON WHO WENT UP TO THIS PERSON, SO WE ARE TALKING ABOUT CROSS-EXAMINING SOMEBODY BASICALLY IN BAD FAITH, BECAUSE THE CLIENT ADMITS THAT IS HIM. THIS PERSON WAS ABLE TO DRAW A COMPOSITE PHOTOGRAPH OF THE DEFENDANT. THIS PERSON WAS ABLE, ONE OF THE THINGS LEFT AT THE CRIME SCENE WAS A CAMERA WITH UNDEVELOPED FILM. THEY DEVELOPED THE FILM. WE DON'T HAVE THE DEFENDANT. THEY TAKE THE PICTURE TO HIM AND SAID IS THIS THE PERSON YOU ARE TRYING TO DESCRIBE TO US? YES. THEY BRING HIM UP AT TRIAL. THEY DO AN I.D. WHEN THEY CATCH THE DEFENDANT. YES. THIS IS HIM. THEY DO HIM IN COURT. YES, THIS IS HIM. AND WHAT THEY ARE TALKING ABOUT DOING IS HIS WEIGHT AT THE TIME OF THE TRIAL COMPARED TO HIS WEIGHT NOW.

I THOUGHT THERE WAS ANOTHER WITNESS THAT PLACED ADDITIONAL PEOPLE ON THE PROPERTY EARLIER THAT DAY.

THERE WAS ANOTHER WITNESS WHO GAVE AN INITIAL STATEMENT TO THAT EFFECT, AND IS DEPOSED BY DEFENSE COUNSEL AND DOESN'T SAY. THAT SHE SAYS THERE WAS ONE CAR. I COULD HAVE BEEN MISTAKEN ABOUT TWO CARS. I COULD HAVE THOUGHT THAT IT WAS A NEIGHBOR'S CAR. SO YOU ARE TALKING ABOUT BRINGING THIS OUT AS IMPEACHMENT. IMPEACHMENT IS NOT SUBSTANTIVE EVIDENCE. YOU CAN'T ARGUE THERE WAS A SECOND CAR THERE, BASED ON IMPEACHING THIS WOMAN. SHE SAYS I LOOKED ACROSS A CANAL WITHOUT MY GLASSES ON, IN HER DEPOSITION, AND I SAW A STOUT WOMAN WITH A YOUNG-LOOKING THIN MAN. THE EVIDENCE AT TRIAL IS THIS DEFENDANT HAS GAINED A LOT OF WEIGHT BEFORE WE

EVEN GET TO TRIAL, THAT HE WAS THIN AT THE TIME OF THE CRIME. SHE ADMITS THAT, WHEN SHE LOOSE ACROSS IN THE DEPOT, SHE SAYS -- WHEN SHE LOOKS ACROSS IN THE DEPO, SHE SAYS I LOOK ACROSS AT PEOPLE BUT I REALLY DON'T SEE THEM, SO YOU ARE GOING TO HAVE SOMEBODY UP THERE TO PRESENT THIS THAT IS GOING TO END UP BEING IMPEACHED BY THE STATE, AND TO PRESENT EVIDENCE, THE FIRST OF WHICH YOU ARE NOT GOING TO BE ABLE TO PRESENT AS SUBSTANTIVE EVIDENCE, BECAUSE THAT IS NOT GOING TO BE HER TESTIMONY, BASED ON WHAT SHE TOLD COUNSEL AT DEPO. IT WAS ONE CAR, AND THEN YOU ARE GOING TO PUT HER UP TO SAYING IT WAS A YOUNG-LOOKING PERSON AND MY CLIENT ISN'T YOUNG-LOOKING, AND SHE IS GOING TO BE IMPEACHED WITH, BUT I REALLY DIDN'T SEE HIM, WHICH IS WHAT SHE SAID IN DEPO.

GETTING BACK TO THE BRADY VIOLATION, WHICH I AM SORRY TO SKIP AROUND, BUT YOU SAID EARLIER THAT THE DEFENDANT DIDN'T HAVE THE INFORMATION, HAD THE -- HAD THE REPORT BUT DIDN'T HAVE THE INFORMATION. WHAT DO YOU MEAN BY THE INFORMATION?

THE HAIR TEST REPORT. WHAT THE REPORT SAYS IS THAT IT DIDN'T MATCH THE DEFENDANT. WHAT THE STATE SAYS IN SAYING WE LIST THE WITNESS AND SAY WE ARE GOING TO PRESENT THEM AS THEY DO MATCH. THAT MEANS IT DIDN'T MATCH.

THAT MEANS THEY HAD THE INFORMATION THAT THERE WAS A REPORT THERE THAT CAME BACK AND SAID THAT IT WASN'T HIS HAIR.

BUT HE -- THAT INFORMATION, HE DIDN'T V.

HE DIDN'T HAVE THE REPORT, BUT HE KNEW FROM THE FACT THAT WE ARE NOT PRESENTING IT AS HIS HAIR, WHICH THE ONLY REASON WE ARE DOING THE TESTING IS TO PRESENT IT AS HIS HAIR, AND WHEN WE DON'T SUBSEQUENTLY COME BACK AND SAY, OKAY, NOW WE HAVE A WITNESS WHO SAYS NOT NATURAL THAT A WOMAN COULD COMMIT SUICIDE, A WOMAN WHO IS LONELY. HE BASICALLY ATTACKED THE ME AS, I THINK IT WAS MORE THAN TONGUE IN CHEEK, AND I THINK THAT, BECAUSE IT IS SO ABSURD, IT TOTALLY LESSENS HIS CREDIBILITY WITH THE JURY.

THE STATE'S ARGUMENT IS THAT --

GO AHEAD.

THE STATE'S ARGUMENT THAT THIS WAS PART OF THE ACTUAL DEFENSE, WHICH WAS THAT THE STATE FAILED TO PROVE IT WAS HIM BEYOND A REASONABLE DOUBT, WHETHER IT WAS A THIRD PARTY OR SUICIDE OR SOMETHING ELSE. IT JUST WASN'T HIM, AND THEY FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT IT WAS. I MEAN, ISN'T, THE SUICIDE DEFENSE WAS REALLY PART AND PARCEL OF THE OVERRIDING DEFENSE OF FAILURE TO PROVE HIM BEYOND A REASONABLE DOUBT.

YOUR HONOR, I HAVE GONE OVER, IF I COULD ANSWER --

RESPOND TO THE QUESTION.

THAT'S CORRECT. THEY DID ARGUE A REASONABLE DOUBT, BUT THE PROBLEM IS, YOUR HONOR, THAT THEY, ALSO, BY RAISING THIS DEFENSE, IT WAS A DEFENSE LACKING ANY FACTUAL FOUNDATION, AND I THINK THAT PER SE, AS JUSTICE PARIENTE SAID, IT SUGGESTS DEFICIENCY, AND CERTAINLY COULD HAVE PREJUDICED THE OUTCOME OF THIS CASE T WASN'T THE SOLE ARGUMENT, BUT IT WAS A PRIMARY ARGUMENT. THANK YOU ALL.

CHIEF JUSTICE: THANK YOU. THE COURT IS GOING TO TAKE A TEN-MINUTE RECESS BEFORE WE HEAR THE LAST CASE. IN RECESS FOR TEN MINUTES.

MARSHAL: PLEASE RISE.