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Paul Christopher Hildwin v. State of Florida

THE NEXT CASE ON THIS MORNING'S CALE NDAR IS HILDWIN VERSUS THE STATE OF FLORIDA. CO.

MAY IT PLEASE THE COURT. MY NAME IS DAVID HEND RY, AND I REPRES ENT THE AELLANT IN THIS MATTER.

CHIEF JUSTICE: I WANT TO MAKE SURE I UNDERSTAND THE TIME AGAIN. YOU ARE GOING TO TAKE TEN MINUTES, AND THEN MS. MORRISON IS GOING TO TAKE TEN MINUTES FOR REBUTTAL.

YES, YOUR HONOR. THANK YOU. I REPR ESENT PAUL CHRISTOPHER HILDWIN IN THIS MATTER WHOHAS BEEN CONVICTED OF FIRST-DEGREE MURDER AND RECEIVED THE DEATH SENTENCE. AND I AM GO ING TO BE SPENDING THE MAJORITY OF MY TIME, OBVIOUSLY, ON I SSUENUMBER ONE, WHICH INVO LVES NEWLY-DISCOVERED DNAEVIDENCE, WHICH PROVES T HAT WHAT HAENED IN 19 86 W ASTHE STATE SAID THAT PAUL CHRISTOPHER HI LDWIN DEPOSITED HIS S IEMEN AND HIS SALIVA ON SOME IT EMS T HAT WERE LOCATED AT THE CRIME SCENE.

NOW, WE ARE F ULLYFAMILIAR WITH YOUR BRIEFS AND THE FACTS OF ALL OF THAT, SO HOW ABOUT GET TING RI GH T TO THE HEART OF THE MATTER . WHEREDID THE T RIAL JU DGE GO -- WHERE DID THE TR IAL JUDGE GO WRONG IN DENYING THIS CLAIM?

YES, YOUR HONOR. WHERE THE TRIAL JUDGE WENT WRONG IS THE STANDARD THAT WE ARE OPER ATING UNDER IS THE JONES STANDARD, WHICH W E MUST SHOW THAT THE RE IS A PROBABILITY OF ACQUITTAL ON RETRIAL, IN LIGHT O F NEWLY-DISCOVERED DNAEVIDENCE, AND THE TRIAL COURT ERRED IN THE FACT THAT ALTHOUGH IT IS SUORTED BY THE RECORD, B Y COMP ETENT AND SUBSTANTIAL EVIDENCE, THAT THE STATE ARGUE D IF THEY DIDN'T ARGUE RAPE MUR DER, WHAT THEY DID IS THEY SAID THAT PAUL HILDWIN 'S BIOLOGICAL FLUIDS WERE FOUND THEIR AT THE CRIME S CENE. THE JURY OBVIO USLY RELIED VERY, VERY HEAVILY ON THIS EVIDENCE.

CHIEF JUSTICE: WELL, THAT IS, NOW WE , OF COURSE , GET INTO SPECULATION , BUT MY CONCERN IS OBVIO USLY FOR EVERYONE CONCERNED , IT WOULD BE BETTER IF THE TWO ITE MS WERE NE VER INTRODUCED INTO EVIDENCE, AND IT IS HA RD, IN LOOKING AT ALL OF THE OTHER EVIDENCE, TO SEE THAT , UNLIKE OTHER DNA CASES , YOU WOULD AGREE THIS DOES NOT EXCLUDE MR. HILDWIN AS THE KILLER, DOES IT? THE , THIS NEWLY-DISCOVERED EVIDENCE THAT IT WAS NOT HIS SIEMEN ON UNDERPANTS , AND IT WAS NOT HIS DN A ON THE WASH RAG. DO YOU AGREE THAT IT DOESN'T EXCLUDE HIM AS THE KIL LER ?

I WOULD SAY THAT THE STATE ARGUED AT TRIA L THAT THE KILLER - -

CHIEF JUSTICE: I AM ASKING THE QUES TION, DOES IT EXCLUDE HIM AS THE KILLER?

IT IS NOT , WE CANNOT ARGUE THAT 1 00 PERCEN T IT IS DISPOSITIVE .

CHIEF JUSTICE: WELL,AGAIN , IT WAS A B LOCK THAT THE STATE RELIED ON. THE QUESTION WE HAVE TO LOOK AT IS WHAT , HOW SUBSTANCETHAT BL OCK WAS , IN ANALYZING THIS EVIDENCE, AND IF Y OUCOULD, SINCE WE HAVE FO UGHT TO , THIS IS WITHOUT AN EVIDENTIARY HEARING, SO THE COURT IS IN A POSITION A S THE TRIAL COUR T TO BE LOOKING AT THIS, COULD Y OUTELL US IN THE LIGHT MOST FAVORABLE TO THE STATE, WHAT ALL OF THE OTHER EVIDENCE WAS

THAT IS , RE ALLY , UNREBUTTED THAT STILL L INKSMR. HILDWIN TO THE , TO BE THE MURDERER IN THIS CASE?

THE INCULPAT ORY EVIDENCE WHICH WAS PR ESENTED AT TRIAL , OTHER THAN THE SEROLOGY EVIDENCE, WAS THE FACT THAT PAUL HILDWIN WAS IN POSSESSION OF THE VICTI M 'S ITEMS, N AMELY A RADI O, A RING, CHECKBOOK, AND HE WAS ACTUALLY WHAT LED THE STATE TO PAUL HILDWIN, WAS T HEFACT THAT HE WAS SEE N AT A BANK, CASHING THIS VICTIM'S CHECK FOR $ 75 , AND HE LI LT ADMITTED TO -- HE ULTIMATELY ADMITED TO THE POLICE THAT HE HAD FORGED THIS CHECK.

HOW LONG WAS THIS AFTER THE MURDER?

THIS WAS, THE VICTIM WAS LAST SCEN E ON SEPTEMBER 9 , 1985, AND I BELIEVE THAT HE WAS AR RESTED --

NO. THE CHECK CASH ING.

THE CHECK CASHING. I AM SO RRY . THAT WOULD BE ON SEPTEMBER 12 AT AROXIMATELY NOON TO ONE O'CLOCK, IS WHEN PAUL HILDWIN WAS SE EN AT THE BANK , CASHING THIS CHE CK.

IN THE VICTIM'S CAR.

WELL , THERE IS SOM E --

WE A SK YOU T O TAKE IT MOST FAVORABLE TO THE STATE , AND ISN'T THERE EVIDENCE TAKEN MOST FAVORABLE TO T HESTATE THAT IT WAS THE VICTIM'S AUTOMOBILE THAT HE WAS IN AT THE TIME THAT H E WENT TO THE BANK AND O THERTIMES?

THE STATE DID PRE SENT EVIDENCE AND ARGUED THAT THE VICTIM'S CAR WAS USED THROUGH THERE, IN THAT DRIVE-THROUGH, BUT WE WOULD SUBMIT THAT THESE CARS ARE QUITE SIMILAR AND NOT EXACTLY SIMILAR.

SEE, NOW YOU ARE NOT TAKING IT FAVO RABLE TO THE INFERENCE S TO BE DRA WN FR OM THE STATE.

FAVORABLE TO THE STATE. YES, YOUR HONOR.

YOU ARE DISP UTING , SO WE HAVE TO L EAVE THAT TO THE JURY. THE SEMEN AND BLOOD OR WHATEVER, THAT THE DNA WAS DERIVED FRO M, WAS NOT FROM THE VICTIM'S B ODY, CORREC T?

THE SEMEN AND SALI VA WAS FOUND ON A PAIR O F PANT IES , THAT'S CORRECT, SO A PAIR OF PANTIES AND A WASHCLOTH, S O THEY WERE NOT FOUND --

NOT A PAIR OF PANTIES ON THE VICTIM'S BO DY OR EVEN ADJACENT TO THE VICTIM'S BODY. IS THAT R IGHT? INSTEAD WE ARE TALKING AB OUT A LAUNDRY BASK ET OR ITEMS IN A LA UNDRY ?

RIGHT . THAT'S RIGHT.

SO IN ANS WER TO THE EARLIER QUESTION BY T HECHIEF JUSTICE , WH Y IN THIS CASE, REALLY , DON'T WE HAVE SEPARATE PROOF , OK AY , THAT THE KI LLER COULD HAVE BEEN SOMEBODY DIFFERENT FROM THE PERSON THAT MAY HAVE HAD SEXUAL RELATIONS WITH THE VICTIM HERE , A S IS EVIDENCED BY THE SEMEN ON THE PANTIES , LOCATED IN A DIFFERENT PLACE?

YOU ARE ASKING DO WE HAVE PROOF THAT THERE MIGHT HAVE BEEN SOMEONE ELSE WHO WAS THE ACTUALLY KILLER?

WELL , OBVIOUSLY THE STATE'S THEORY HERE IS THAT HILDWIN , AND THAT T HEY BELIEVE THAT THEY PROVED THAT , INDEPENDENT OF THE SEXUAL ACTI VITY , YOU KNOW THAT, IS GOING ON HERE , SO THAT IS REALLY WHAT I AM ASKING. EYE STILL DON'T UNDERSTAND THE QUESTION.

THE DNA DOES NOT GO DIRECTLY TO WHO THE KILLER WAS, IN TER MS OF SI EMEN OR BLOOD OR WHATEVER BEING FOUND ON THE VICTIM'S BOD Y.IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR, BUT WHAT THE STATEARGUED AT TRIAL IS THAT THEY SAID THAT PAUL HILDWIN WAS PART OF A RARE GROUP, A GROUP THAT , ONLY 11 PE RCENT OF THE MALE POPULATION WAS CONSIDERED TO BE A NONSECRETER : THEY SAID SIEMEN AND BLO OD HAD CHARACTERISTICS THAT H ADSIMILARITIES WITH THAT 11 PERCENT OF THE MALE POPULATION THAT --

HE WAS NOT CH ARGED WITH SEXUAL BATTERY.

HE WAS NOT CHARGED WITH SEXUAL BATTERY. THA T'S CORRE CT, YOUR HONOR.

SE XUAL BATT ERY WAS NOT PROVED USED AS PA RT OF PROVE AGO FELONY MURDER, THAT -- PROVE ED USED AS PART OF A FELONY MURDER , THAT --

THEY WERE PARTS O F THE ASSAULT.THE STATE'S THEORY --

CHIEF JUSTICE: LE T'S BE CLEAR ABOUT THAT. IN BOTH PHA SES , THERE IS -- IN BOTH PENALTY PHASES THERE , IS TESTIMONY UNREFUTED THAT MR. HILDWIN COMMITTED A PRIOR RAPE , NOTHING TO DO WITH THIS BUT THAT IS NOT COMING IN , NO MATTER WHAT, CORRECT?

CORRECT.

CHIEF JUSTICE: SO, BUT I N ANSWER TO JUSTICE ANS TEAD'SQUESTION, IN THE RESENTENCING, THERE WAS NOTHING ABOUT A POTENTIAL SEXUAL ASSAULT THAT WAS USED TO, FOR HAC , IS T HAT CORRECT?

TAKE THAT'S CORRECT , YOUR HONOR . -- THAT'S CORRECT, YOUR HONOR, BUT --

CHIEF JUSTICE: IN THE FIRST RESENTENCING , IT DOES AEAR THAT THE TRIAL JU DGE , DID , AND THIS COURT , IN THE CASE ON DIRECT, PRESUMED THERE HAD BEEN A RA PE. I WILL HAVE QUESTIONS FOR MR . NUNNELLEY ABOUT IT BECA USE IT IS DISCONCE RTING , BUT IN THE ANSWER TO JUSTICE ANSTEAD'S QUESTION, THERE WAS NOTHING IN THE RESENTENCING THAT IMPLIED THAT, IN THIS C ASE , THERE WAS A RAP E.

THAT IS IN CORRECT , YOUR HONOR . HERE IS WHY. WHEN THE JUDGE WAS PRES IDING OVER THAT RESENTENCING PROCEEDING, THE STATE WANTED TO INTROD UCE THESE PHOTOGRAPHS INTO EVIDENCE, WHICH SHOWED THIS VICTIM'S BODY NUDE WITH HER LE GS FOLDED OVER HER HEAD , AND WHEN YOU LOOK AT THAT IM AGE , IT IS SO VERY DISTUR BING AND IT IS SU CH AN IMAGE THAT THERE WAS A SEXUAL ASSAULT, THAT JUDGE TOM BRING LOOKED AT THAT PHOTOGRAPH AND SAID I AM NOT GOING TO LET YOU INTRODUCE THAT PHOTOGRAPH INTO EVIDENCE BECAUSE MY UNDERSTANDING IT IS NOT A RAPE CASE.IT IS A MURDER CASE, AND THE STATE SAID THAT PHOTOGRAPH CARRIES NO INFERENCE THAT THERE WAS A SEXUAL ASSAULT HERE, AND JUDGE TOM BRING LOOKED AT THAT PHOTOGRAPH AND SAID IN MY H UMBLE OPINION HERE , THIS IS DEFINITELY EVIDENCE OF RAPE , AND THE JURY CAME BA CK WITH A QUESTION AND THEY WANTED TO KNOW --

CHIEF JUSTICE: WAS THAT PHOTOGRAPH ENTERED INTO EVIDENCE?

IT WAS NOT ENTERED BUT IT WAS PRESENTED TO THE JUR Y, AND THE IMAGE WAS SO VERY --

CHIEF JUSTICE: EXPLAIN THAT TO ME. HOW WAS IT SHOWN TO THE J URY AND NOT PLACED INTO EVIDENCE?

THE MEDICAL EXA MINER DURING HIS TESTIMONY , REFERRED TO THE PHOTOGRAPH. THE PHOTOGRAPH WAS DISPLAYEDTO THE JURY, SO IT WAS USED FOR DEMONSTRATIVE PURPOSES .

TO SHO W THE T-SHIRT OR THE CLOTHING OR HOW SHE GOT STRANGLED.

THE PO SITION OF THE BODY AND THE T-SH IRT , HOW, THECAUSE OF DEA TH.

BUT THE T-S HIRT , THEY FOUND HER WITH THE LIGATURE AND SHOWED IT WITH THE LIGATURE AR OUND HER NE CK.

THAT'S CORRECT, AND WHAT THE PHOTOGRAPH ALSO SHOWED WAS THIS VICTIM'S LEGS FOL DED OVER HER HEAD , THIS NUDE CORPS.

WAS I T EVER -- NUDE CORPSE.

WAS IT EVER ARGUED TO THE JURY? WAS THERE EVER ANY THING OTHER THAN THE PICT URE?

IN THE 1986 PROCEEDING?

YES.

NO, YOUR HONOR, BUT THAT PHOTOGRAPH WAS SO GRAPHIC, SO VERY SUGGESTIVE OF SEXUAL ASSAULT, THAT THAT --

WHAT WE ARE WRESTLING WITH HERE IS THE STANDARD WITH REFERENCE TO GRAN TING A NEW TRIAL ON THE BASIS O F NEWLY-DISCOVERED EVIDENCE,AS OOSED TO, PERHAPS, HARMFUL ERROR THAT W OULD BE REVIEWED ON AEAL , LI KE THE ADMISSION OF THIS EVIDENCE THAT THERE WAS A SEXUAL ACTIVITY OR RAPE , AND T HIS STANDARD IS VERY HI GH, AND THE STATE HERE , IN RESPONSE, SAYS WE HAVE PL ENTY O F EVIDENCE THAT HILDWIN COMMITED THIS MURDER, INDEPENDENT OF THE SEXUAL ACTIVITY, AND SO , REA LLY , THE BOT TOM LI NE I AM ASK ING YOU , BEFORE YOU SIT DO WN , IS THAT WITH THAT VERY HIGH STA NDARD, IF WE EXCLUD E THE EVIDENCE OF ANY SEXUAL ASSAULT OR WHATEVER HERE , ARE WE STILL LEFT WITH A SITUATION WHERE THERE WOULD NOT BE A PROBABILITY OF ACQUITTAL ON A RETRI AL ?

THERE WOULD ABSOLUTELY BE ACQUITTAL ON A RETRIAL . WHEN THE MOTION FOR GOA -- JOA WAS MADE IN 19 86, THE DEFENSE MADE THE MOTION FOR JOA , AND MADE THE PROPOSITION TO THE COURT, THAT THE VICTIM WAS STAB BED , MADE BY THE JAIL HOUSE SNIT CH, SO THIS EVIDENCE IS COMPLETELY UNRELI ABLE. THIS MOTION FOR JOA SHOULD HAVE BEEN GRANTED, KNOCKEDOUT EVER JOA , ABSENT THE ZR LOGICAL EVIDENCE, BECAUSE THE -- THE ZR LO GICAL EVIDENCE, BECAUSE THE -- THE SEROLOGICAL EVIDENCE, BECAUSE THE ON LY EVIDENCE THAT THE STATE HAD WAS THAT EVIDENCE ALONE. WHEN THE JURY SITS AROUND THE TABLE T O DELIBERATE WHETHER PAUL HILDWIN WAS GUILTY OR INNO CENT, IT IS THE FALSE SEROLOYY EVIDENCE THAT CONCERNS THEM AND THE DNA THAT CONCERNS THEM, A NDTHEY SAID HE MAY BE GUI LTY OF LYING TO LAW ENFORC EMENT AND MAY BE G UILTY OF THEFT , THE STATE AS NOT PRO VED THEIR CASE OF FIRST-DEGREE MURDER, AND I F I CAN SAY THIS, WHEN YOU LOOK AT THE CASE HERE IS WHAT IT I S ABOUT. THE FALSE SERO LOGY EVIDENCE CAUSED THE JURY TO TIP THE VOTE TO BEYOND A REASONABLE DOUBT. WHEN YOU LOOK AT THE NEWLY-DISCOVERED EVIDENCE,IT IS SO GOING TO TI P THE EDGE, THAT THEY ARE GOIN G TO FIND REASONABLE DO UBT .

LET ME ASK YOU ABOUT THAT MOCK TRIAL , BE CAUSE YOU GOT INTO IT. HOW LO NG WAS THE STATE'S CASE AT THE REAL TRIAL?

THEIR CASE WAS AROXIMATELY A WE EK TO WEEK AND-A-HALF.

HOW LONG WAS THE STATE' S CASE IN THE M OCK TRIAL?

THE REAL LIFE PRESENTATION WAS TWO AND-A-HALF TO THREE HOURS AND IT WAS CONDEN SED . ONE OF THE THI NGS THAT I WANT TO THE COURT ABOUT IS HERE IS WHERE IT WAS CUMULATIVELY AROUND, BECAUSE WHAT THIS COURT TALKED ABOUT IN 1988 , THERE WAS EVIDENCE FROM A THIRD PARTY THAT THIS LIVE-IN LOVER HAVE RTY , WAS GUILTY OF MURDER OF THIS PARTICULAR PERSON.MR. HAVERTY WA ITED FOUR DAYS BEFORE HE REPO RTED THE VICTIM MISSING, AND IT WAS AT THE BE HEST OF THE VICTIM 'S SISTER THAT SAID SHOULDN 'T WE REPORT THAT SHOULD N'T WE DO THAT? AND HERE IS AN OTHER THIN G.

CHIEF JUSTICE: YOU ARE SUBSTANTIALLY INTO THE REBUTTAL TIME, WHICH IS FINE AS LONG AS YOU UNDERSTAND THAT. THE HAVERTY LETTER WAS NOT INTRODUCED AT THE ORIG INAL TRIAL. IT WAS NOT. IT WAS INTROD UCED AT POSTCONVICTION.

CHIEF JUSTICE: WAS ITBRADY MATERIAL?WAS IT INTRODUCED AS NEWLY-DISCO VERED EVIDENCEMATERIAL?

THIS COURT R ULED THAT BRADY HAD NOT BEEN ESTABLISHED, AND THEY RULED THAT, HAD IT BEEN INEFFECTIVE ASSISTAN CE OF COUNSEL , THIS WAS THIS ATTORNEY'S VERY FIR STCAPITAL MURDER CASE. IT DI DN'T MEET THE MATERIALITY - -

CHIEF JUSTICE: WHAT DOES THE RECORD SHOW AS TO H OWTHE DEFE NDANT OBTAINED THAT LETTER? IT WAS POST TRIAL? IT WAS NOT SOMETHING THAT COUNSEL HAD IN HIS POSSESSION AT THE TIME OF TRIAL?

IT WAS POSTCONVICTION AND THE ATTORNEY SAID THAT I NEVER SAW THIS NOTE. IF I HAD , I DEFINITELY WOULD HAVE USED IT, SO THE GLARING ERROR IN THE JUDGE TOM BRING'S ORDER , I S CUMULATIVE EVIDENCE OF THE NOTE, THE MOTIVE THAT HAVERTY D MI T ED -- COMMITED THIS MURDER , AND HE DIDN'T REPORT THE MI SSING PERSON UN TIL FOUR DA YS LETTER. AND HE SAID THERE WERE NO EXISTING PROBLEMS.WE HAD NO FIGH TS. HAD THAT NOTE BEEN INTRODUCED TO SHOW THAT HAVERTY HAD A MOTIVE , IN CONJUNCTION WITH THE NEWLY-DISCOVERED EVIDENCE , THERE WOULD HAVE BEEN A PROBABILITY - -

CHIEF JUSTICE: I WA NT TO MAKE SURE. MS. MORRISON HAS COME FROM NEW YORK , AND I WANT TO MAKE SURE SH E HAS -- HOW MUCH TIME?

FIVE MINUTES.

I WILL RESE RVE THE REST BUT I WILL SAY WITH THE STATE'S FAILING TO INTRODUCE THE S A MPLE INTO THE CODE DATABASE, THAT WOULD ENTITLEUS TO REASONABLE DEFERENCE THAT THESE PANTIES HAD SIEMEN INSIDE OF THEM - -

CHIEF JUSTICE: YOU HAVE O PENED UP A WHOL E OTHER ISSUE AND I GU ESS WE W ILL LEAVE IT FOR RE BUTTAL AND HAVE MR . FLYNN COME UP .

MAY IT PLEASE THE COURT. I AM KEN NUNNEL LEY AND I REPRESENT THE STA TE OF FLORIDA IN THIS PROCEEDING.LET ME HIT TWO THINGS REALLY QUICKLY BEFORE I GO INTO SUBSTANTIVE MATTERS. WITH RESPECT TO THE JAILHOUSE SNITCH, AND HIS TESTIMONY THAT HILDWIN TOLD HIM THAT HE HAD KILLED THE VICTIM, AND THAT HE HAD, ALSO, CUT THE VICTIM'S NE CK, THE TESTIMONY OF THE ME DICAL EXAMINER WAS THAT H E COULDN'T TELL IF THE VICTIM'S NECK

HAD BEEN CUT OR NOT BECAUSE HER BOD Y WAS SO BA DLY DECOMPOSED T THAT ARGUMENT ON THE PART OF T HEDEFENDANT IS A RED HERRING. WITH REGARD TO THE TIM E THAT THE DEFE NDANT WAS SEEN AT THE B A NK, CAS HING A FORGED CHECK FOR $ 75 WRITTE N ON THE VICTIM'S ACCOUNT, DRI VING THE VICTIM'S CAR , IT WAS SEPTEMBER 9, THE DA Y OF T HEMURDER, BETWEEN 12:3 0 AND ONE O'CLOCK IN THE AFTERNOON.

CHIEF JUSTICE: NOW , LET ME GET INTO M Y CONCERN HERE.

ONE MORE THING , JUSTICE PARIENTE.

CHIEF JUSTICE: YOU GAVE THE TWO THINGS YOU WANTED TO GIVE.

TWO ME ANS TH REE. THE MOCK TRIAL, THE STATE'S CASE WAS THREE AND-A-HALF PAGES, JUDGE, OUT OF A TRANSCRIPT THAT HIG H. SORRY. THANK YOU.

CHIEF JUSTICE: I KNOW YOU ARE GOING TO GO IN AND TELL US ABOUT ALL OF THE EVIDENCE THAT STILL P UTS MR . HILDWIN AS THE MOST LI KELY SUSPECT AND PROBABLE KILL NER THIS CASE. I AM CONC ERNED ABOUT YOUR STATEMENT THAT THESE , THE UNDERPANTS AND WASH RAG ARE NOT RELEVANT . WHAT WAS THE REAS ON THAT THE STATE SOUGHT TO INTR ODUCE THESE ITEMS AT THE ORIGINAL TRIAL , AND DIDN'T THE , IS N' T THE CLEAR IMPLICATION FROM THE ORIGINAL TRIAL , T HETHEME , THE UNDERLYING THEME WAS THAT THERE WAS A RAPE ASWELL AS A MURDER? BUT I AM ASKING YOU ABOUT WHY THEY INTRODUCED THESE ITEMS, IF THEY WEREN'T RELEVANT.

THE RELEVANCY OF THOSE ITEMS IS CERTAINLY QUESTIONABLE, JUSTICE PARIENTE. I WOULD POINT O UT, AND I AM KIND OF COMING AT THIS FROM THE BACK SIDE , IF YOU WILL. THE DEFEN DANT USED THE SEROLOGY EVIDENCE TO SUGGEST THE MOTIVE FOR HAVERTY HAVING KILLED THE VICTIM.

CHIEF JUSTICE: BUT IT WAS AFT START OF THE TRIAL , RIGHT , AND SO THEY DIDN'T WANT THIS EVIDENCE TO COME IN, BUT ONCE IT IS IN, T HAT IS THE PROBLEM WITH THIS GRAPHIC PHOTOGRAPH, AND NO W THE EVIDENCE THAT HE IS 10 PERCENT LIKELY TO BE OR EXCLUDES 90 PER CENT OF T HEREST OF THE WO RL D , T HAT THERE IS A C L EAR IMPLICATIONOF A RAPE. I MEAN, EVEN OUR ORIGINAL OPINION ON DIRECT AEAL , TALKS ABOUT HOW SHE WAS , YOU KNOW, AB DUCTED AND SLO WLY RAPED AND THEN KILLED, SO GOING BACK TO THAT , ARE YOU , HOW DO WE H A NDLE THAT , IS WHAT I AM SAY ING. HOW DO WE EX CLUDE THAT PART , NOW, BECAUSE THE JURY THAT WAS AN INTE GRAL PART OF WHAT THEY CONSIDERED WHEN THEY DELIBERATED ?

SEVERAL REASONS FOR THAT. FIRST OF ALL THIS WAS STATE-OF-THE-ART EVIDENCE OR SCIENTIFIC EVIDENCE AT THETIME. IT WAS NOT FALSE EVIDENCE.

CHIEF JUSTICE: CORRECT.

THAT IS RIDICULOUS TO CALL, TO CLA IM THAT IT WAS. THE TES TIMONY ABOUT THE SECRETER NONSEC RETER EVIDENCE, WAS PRESENTED TO THE JURY , WITH A F ULL COMPLETE, AND I MIGHT AD D, VERY, VERY LENGTHY EXPLANATION BY THE TECHNICAL WITNESSES, OF THE LIMITATIONS O F THAT SORT O F EVIDENCE. THERE IS TEST IMONY IN THE RECORD THAT , ABOUT 20 MILLION PE OPLE ARE N ON, MAYBE IT IS 2 00 MIL LION. IT IS QUITE A LOT , A HUGE NUMBER OF PEO PLE THAT ARE NONSECRETERS.

BUT ISN'T THE POINT , IN FOLLOWING UP ON JUSTICE PARIENTE'S Q UESTION HERE, ISN'T THE POINT HERE THAT, WHEN YOU HAVE THIS AD VANCE OF DNA EVIDENCE , THAT IS RECOGNIZED TO BE SO DRAMATIC, AND YOU HAVE THAT EVIDENCE, NOW INDIC ATING THAT THIS PERSON COULD ARGUE THAT, I N FACT, THIS WO MA N WAS BRUTALIZED, BUT SHE WAS BRUTALIZED BY

SOMEBODY ELSE , ISN'T THAT THE TYPE OF FACT THAT NEEDS TO BE PRESE NTED TO A JURY, SO THAT THE JU RY CAN LOOK AT THE W HOLEPICTURE OF WHAT HAENED IN THIS CASE, BASED ON NEWLY-DISCOVERED EVIDENCE?

IF THIS EVIDENCE WAS BASED ON RAPE KIT EVIDENCE,I WOULD AGREE WITH YOU, BUT THIS EVIDENCE IS BASED UPON SOMETHI NG THAT WAS FOUND INTHE VICTIM'S DIRTY LAUNDRY, AND YOU HAVE GOT TO STACK A PILE OF INFERENCES UP , T O GET THE SE MEN STAINS IN THE VICTIM'S UNDERWEAR IN HER LAUNDRY BAG , INTO THIS CASE !

BUT THE PROBLEM I A M HAVING WITH THAT IS T HAT THERE WAS AN EMPH ASIS IN T HEBEGINNING OF THIS CASE , AS THIS CASE CAME TO THIS COURT THE FIRST TIME , O N THE FACT THAT THIS WOMAN WAS STRANGLED AND BRUTALIZED , AND THAT CERTAINLY THE ARGUMENT WAS , AT L E AST REASONABLE TO THIS COURT , THAT THAT WAS PART OF THIS MURDER . NOW , WHY SHOULDN'T THE DEFENDANT HAVE AN OORTUNITY TO ARGUE THAT WAS HAD, IN FAC T, PART OF THE MURDER , AND THAT MY PART WAS JUST A ROB BERY , OBVIOUSLY, BECAUSE I , MY DNA WASN'T THERE!

WELL , JUSTICE WE LLS , THAT FOLDS BACK OVER INTO THE JONES 'S NEWLY-DISCOVERED EVIDENCE STANDARD, WHICH, OF COURSE, INCLUDES ALL OF T HEEVIDENCE FROM TRIAL, WHICH WAS HILDWIN 'S CONFESSION , HIS INCULPATORY STATEMENT T O LAW ENFOR CEMENT , THE VICTIM'S PURSE THAT WAS FOUND OUT IN THE W O ODS BETWEEN THE CA R AND T HE HOUSE.YOU ALL ARE FAMI LIAR WITH THE EVIDENCE, BUT THERE IS A STACK OF EVIDENCE.

CHIEF JUSTICE: RIGHT. LET ME ASK YOU A QU ESTION ABOUT SOMETHING THAT CONCERNS ME GREATLY AS WELL AT WHAT WE HAVE BEEN JUST DISCUSSING, IS THAT THE STATE MADE A VERY ST RONG ARGUMENT THAT HILDWIN HAD TOLD THE POLICE OFFICER THAT THE KILLER , THAT HE SA W THE KILLER , AND THAT THE KILLER HAD A TATTOO, WHICH THEY,THEN, SAID, ISN'T THAT AMAZING THAT HILDWIN HAS A TATTOO, AND THAT D URING THE ATTACK ON THE VICTIM , THE ATTACKER WI PED HIS FACE WITH A RAG , AND THE STATE USED THAT TO SAY, LOO K AT THAT . HILDWIN IS INCUL PATING HIMSELF. HE KNEW T HAT THERE WAS A RAG AND THAT THE KILLER WIPED HIS FACE WITH THIS RAG. WELL , THE QUESTI ON I HAVE I S , WHAT DOES THIS, NOW, THIS EVIDENCE THAT COUL DN'T HAVE BEEN HIS , THAT IT WASN'T HIM THAT WIPED HIS FACE WITH THE RAG , WHAT DOES THAT DO T O THE FACT THAT THE POLICE OFFICER IS SAYING THAT HILDWIN ACTU ALLY , MA YBE INSTEAD OF INCOME EIGH TING HIMSELF , ACTU ALLY THERE -- INSTEAD OF INCULPATE ING HIMSELF , THERE MAY BE ACTUALLY SOME VARIETIESACITY -- VERACITY THAT HE ACTUALLY WITNESSED THIS KILLING.

JUSTICE PARIENTE , THAT DOES NOT DIMI NISH THE INCULPATORY STATEMENT T HAT THEY ARE GOING TO BURN ME FOR THE MURDER.I AM TAL KING ABOUT T WOSTATEMENTS.

CHIEF JUSTICE: I AM ASKING YOU ABOUT T HAT STATEMENT, THOUGH , AND HO W THE STATE USED THAT STATEMENT IN THE TRIAL. THAT IS A POLICE OFFICER G OTON THE STAND, SWORE UNDER OATH THAT MR . HILDWIN SAID THAT THE KILLER HAD WIPED HIS FACE WITH THE RAG, AND THEN THE STATE USED THE FACT THAT THE RAG WAS FROM A NONSECRETER AND THAT I T WAS ONLY A 10 PER CENT OF THE POPULATION WERE NONSEC RETERS , TO SAY LOOK AT THAT. HE WAS EYEDFYING HI MSELF AS THE KILLER. -- LOOK AT THAT , H E WAS IDENTIFYING HIMSELF AS THE KILLER.

LET ME GO BACK AND LOOK AT THE SEROLOYY . THE STATE IS SAYI NG HE WAS THE KILLER AND THE SEROLOGY IS NOT GOING TO SAY ANY THING DIFFERENT. I AM ARGUING THE RE BUTTAL PREMISE OF THIS ARGUMENT,BUT IT WAS NOT I N CLO SING AT THE GUILT STAGE THAT EITHER THE UNDERWEAR OR WASHCLOTH GET MENTIONE D. IN THAT RESPONSE --

CHIEF JUSTICE: IT WASN'T IN THE OPENING STATEMENT?

IT WAS IN THE OPENINGSTATEMENT BY THE STATE FOR ABOUT HALF A P A GE AT MO ST.

CHIEF JUSTICE: AND --

AND IT WAS IN THE FOR M OF YOU WILL HEAR TEST IMONY FROM THE F BI AGENT THAT THESE ITEMS WERE FROM A NONSECRETER AND THAT MR . HILDWIN IS A NONSECRETER. THAT IS THE OPE NING ARGUMENT. THE STATE DOESN'T - -

CHIEF JUSTICE: HOW MA NY WITNESSES WERE PUT ON TO PUT THESE TWO PIECES OF EVIDENCE ON? WERE THERE FIVE WITNE SSES THAT WERE NECESS ARY IN OR DE R TO GET ALL THE SERO LOYY EVIDENCE IN ?

PROB ABLY SO , IF YOU COUNT THE CHAIN OF CUSTODY BASIS. AS FAR AS TECHNI CA L WITNESSES , I THIN K IT WAS EITHER TWO OR THREE , B UTTHERE WERE NOT, I DON'T BELIEVE , MY MEM ORY IS THERE WERE NOT FIVE TECH NICAL WITNESSES.THERE WERE AT MOST TWO. THERE WERE, OF COURSE , OTHER , THERE WERE OTHER CH AIN OF CUSTODY LAW ENFORCEMENT , LOCAL LAW ENFORCEMENT WITNESSES, BUT AS FAR AS THE GUYS COMING DOWN FROM WASHINGTON FROM THE FBI LAB AND TESTI FYING , I THINK IT WAS EITHER TWO OR TH REE. I CAN'T REMEMBER.

WHAT WAS THE DE FENSE IN THIS CASE?

THE DEFENSE WAS A TWO-PART THEORY. THE FI RST BEING BASED ON HILDWIN 'S TESTIMONY THAT HAVERTY DID IT . THIS IS NOT A "SOME O THERDUDE DID IT" CASE. THIS IS A HAVERTY DID IT BECAUSE HE TO LD ME CASE. AND HILDWIN --

THIS NEW DNA EVIDENCE DOES NOT IMPLIC ATE HAVERTY .

THEY DID NOT ASK FOR A COMPARISON STANDARD FROM MR . HAVERTY, SO WE DON'T KNOW. WE KN OW HE I S A NONSECRETER.

THERE IS NO ALLE GATION THAT IT IS HAVERTY.

NO, AND IF IT WAS, IT MAKES IT TO TALLY IRRELEVANT ALL TOGETHER. THEY ARE LIVING TOGETHER. IF IT WAS IN FACT , HAVERTY , IT WOULD BE COMPLE TELY IRRELEVANT.

WOULD IT REALLY BE COMPLETELY IRRELEVANT , WHEN YOU SKR THE FACT THAT , YES , MR. - - WHEN YOU CONSIDER THE FACT THAT, YES, MR. HAVERTY AND THIS LADY LIVED TOGETHER , BUT IT WAS FOUR DAYS LATER , BEFORE HE EVER EVEN TOLDANYONE THAT THE LADY WAS MISSING, AND THAT PUTS A KIND OF DIFFERENT SPIN ON THIS THING, IF YOU ADD IN THAT M R . HILDWIN IS NOW EXCLUDED AS THE PER SON WHO, SIEMEN AND SWEA T WERE ON THESE TWO ITEMS.

WELL , YOU S T ILL HAVE T O TAKE HILDWIN'S TRIAL TESTIMONY AS THE BAS ELINE FROM WHERE WE START , THIS AND I WOULD POINT OUT THAT WHAT THEY ARE TR YING TO NOW ARGUE AS NEWLY-DISCOVERED EVIDENCE IN THE IR CUMULATIVE ANALYSIS COMP ONENT, IS WHAT WAS LITIGATED IN THIS COUR T THE LAST TIME I WAS UP HERE , AS BRADY CLAIM, AND THIS COURT FOUND AS FACT , THAT DEFENSE COUN SEL HAD ALL OF THIS EVIDENCE , SO - -

CHIEF JUSTICE: THEN IT WOULD HAVE BEEN INEFFECTIVE ASSISTANCE, T O ME THAT NOTE IS ONE MORE THING I WOULD FIND, AS A JUROR , THAT THE NOTE WHERE HE, EVEN T H OUGH IT IS EQUIVOCAL , S TILLSOMETHING MORE THAT M IGHT START TO CREA TE, ALL WE HAV E TO DO HERE IS CR EATE REASONABLE DOUBT, CORREC T? IT IS NOT AN ISSUE OF , WELL , PROBABLY HILDWIN IS THE KILLER. THE IS SUE IS DO WE STA RT TO HAVE A REASONABLE DOUB T AS TO WHETHER OR NOT HE I S GUILTY. THIS IS , WE HAVE THE INNOCENCE PROJECT HERE. THIS ISN'T A CASE WHERE IT LOOKS LI KE WE CAN SAY , B OY , MR. HILDWIN I S ACTUALLY INNOCENT OF THIS MURDER. THE ISSUE IS , IS WHE THER HE IS GUILTY BEYOND AREASONABLE DOUBT.

WELL , THERE IS NO INEFFECTIVE NESS OF COUNSEL CLAIM CONTAINED IN THIS PLEADING AND THERE IS NO INEFFECTIVENESS CLAIM BEFORE THIS COU RT.

CHIEF JUSTICE: WELL, I THOUGHT THE REASON WE REJECTED THE INE FFECTIVE ASSISTANCE OF COUNSEL CLAIM IN ' 92 WAS BECAUSE COUNSEL SAID I T DOESN'T UNDERMINE OUR CONFIDENCE IN THE OUTCOME , BUT NOW LOOKING AT LIGHTBOURNE, CERTAINLY WE CAN LOOK AT THAT EVIDENCE THAT WAS NOT INTRODUCED WITHTHIS EVIDENCE AND SEE IF IT STARTS TO PUT THE WHO LE CASE IN A DIFFERENT LI GHT , CAN'TWE?

IT DOESN'T MEAN YOU CAN TAKE OUT MR . HILDWIN 'S TRIAL STRATEGY AND MR . HILDWIN 'S TESTIMONY UNDER OAT H. ABOUT HILDWIN SAID I KNOW HAVERTY DID IT BECAUSE HE ADMITTED IT TO ME. YOU CAN'T BAKE AWAY FROM THAT AND BACK UP TO HIS TRIAL STRATEG Y AND RESET THIS AND TRY IT AGAIN LIKE HE WANT ED TO DO WITH THE MOCK TRIALS AND CHANGE IT . HE WANTS TO COMPLE TELY CHANGE IT WITH HIS STAR TING POINT.

I AM LOST HERE. HOW DOES MR . HILDWIN GETTINGON THE STAND AND SAYI NG MR . HAVERTY TOLD ME HE HE DID IT, HOW DOES THAT NOT , I F YOU INCLUDED THE CHANGE IN THE DNA EVIDENCE AND EVERYTHING ELSE, WHY DOESN'T THAT MAKE US PAUSE HERE AND SAY , WELL , WAIT A MINUTE. ISN'T THIS MAN ENTIT LED TO HAVE A JURY HE AR ALL OF THIS, INCLUDING ALL OF THE THING S THAT JUSTICE PAR IENTE J UST TALKED ABOUT, THE L ETTER , THE FACT THAT THERE WAS SOME DISCORD BETWEEN THESE PE OPLE , SO ON . WHY SHOULDN'T, I MEAN , HOW DOES MR . HILDWIN 'S STATEMENT THAT MR . HAVERTY TOLD ME , CHANGE ALL OF THAT ?

BECAUSE, I THINK YOU HAVE TO START WITH THE POINT T HAT MR. HILDWIN HAS LOCKED HIMSELF WITH HIS STR ATEGY , BECAUSE HE TESTI FIED AT TRIAL.HE DID NOT --

COULD YOU HAVE A NEW TRIAL, ON A NEW TRIAL WITH NEW EVIDENCE , WE ARE B OUND BY WHAT WENT ON IN THE F I RST TRIAL?

UNDER J ONES WE ARE. WE ARE NOT , IF YOU ALL GIVE HIM A NEW TRIAL, THEN, YOU KNOW, WE MIGHT AS WELL START SPECULATING RIGHT NOW ABOUT WHAT HIS CASE IS GOING TO BE , AND WE MIGHT AS WELL , A LSO , START SPEC ULATING A BOUTWHETHER OR NOT HE CAN GET OVER THE ADMISSIBIL ITY AS TO RELEVANCE AND MATERIALITY OF THIS DNA EVIDENCE IN THE FIRST PLACE.

CHIEF JUSTICE: BUT , SEE , THERE IS WHERE WE GO BACK AGAIN. THE STATE , AND IT IS NOT AN ISSUE OF FA LSE TESTIMONY. THEY THOUGHT THIS WAS PRETTY SIGNIFICANT THAT THE , THIS WASH RAG AND THE UNDER PANTS , AND YOU ARE SAYING , WELL , THESE WERE B U RIED , BUT THE PROSECUTOR IN THE FIRST C ASE TALKED ABOUT HOW IT WAS ON TOP OF THE LA UNDRY BAS KET , AND SO AS I SAID , WE HAVE THIS THEME COMING , G OINGTHROUGH THE ENTIRE GUI LT PHASE , OUR RENDITION OF WHAT THIS CASE WAS ABOUT , THESE GRAPHIC PHOTOGRAPHS SHOWING MS. COX IN A COMPRO MISED POSITION, THE T O RN BRASSIERE. IT WAS THE UNDERPINNI NGS THAT THIS WAS A RAPE AND MURDER. AND IF YOU , NOW , E XCLUDE MR . HILDWIN AS BEING THE RA PIST IN THIS CASE , YOU HAVE, DON'T YOU HAVE ANOTHER CASE THAT YOU ARE, THEN, PRESENTING TO THE JURY ?

NO, MA'A M, I DON'T , AND THE REASON FOR THAT IS THIS , TO AS SUME THAT THE DNA EVIDENCE , LET ME BACK UP . PERHAPS THE ZCHLT ROLOGY EVIDENCE SHOULD -- PER HAPS THE SEROLOYY EVIDENCE SHOULD HAVE BEEN THE SUBJECT , BASED UPON RELEVANCE. IT WASN'T.I DON'T KNOW WHY. PERHAPS THAT SUGGE STION WOULD HAVE BEEN WELL TAKEN. WE DON'T KNOW. PERHAPS A MOTION IN LIMINE TO EXCLUDE IT WOULD HAVE BEEN WELL TAKE N. I DON'T KNOW THE AN SWER TO THAT, EIT HER, BECAUSE I T DIDN'T HAEN, BUT THE BOTTOM LI NE TO THIS WHOLE THING IS THAT, TO LIN K UP THE DNA EVIDENCE TO THE RAPE , THAT WE HAVE NEVER CONTEN DED OCCURRED, YOU --

LET ME JUST HALT YOU RIGHT THERE. WHAT YOU ARE REALLY SAYING IS THAT THIS EVIDENCE WAS , REALLY, IRRELEVANT.

YES, MA'AM.

AND S O IF IT IS IRRELEVANT AND SH OULD HAVE BEEN EXCLUDED FROM THE START , DON'T YOU STILL HAVE TO LOOK IT IN THE CONTEXT OF WHETHER OR NOT THIS IRRELEVANT EVIDENCE WAS SO IMPO RTANT TO THE JURY , THAT IT MAY HAV E TIED THE S CALE I N DEFINING MR. HILDWIN -- INTO FIN DINGMR. HILDWIN GUIL TY OF THIS MURDER?

JUSTICE QUINCE , I DON'T WANT TO SPECULATE ABOUT WHAT THE JURY DID IN THE J URY ROOM, AND I AM CERTAINLY NOT GOING TO T ALK ABOUT THE MOCK TRIAL VIDEOT APES , BECAUSE THEY INVADE THE PROVINCE OF THE JURY, BUT I THINK THE JURY UNDERSTA NDS THE DEF ENSE ELEMENT THAT WAS WELL TAK EN THAT WAS MADE AT TRIAL, THAT THIS EVIDENCE , THE SEROLOGY EVIDENCE , , IS EVIDENCE OF MOTIVE FOR MR . HAVERTY TO HAVE KILLED THE VICTIM , BECAUSE SHE WAS UN FAITH HIMFUL FU L TO HIM -- UNFAITHFUL TO HIM. THEY COULD NEVER AGE , DATE THE STAINS. THEY DON'T KNOW WHEN THEY WERE PUT THERE. THEY WERE FOUND IN THE LAUNDRY.IT IS STATE'S EXHI BIT 6. I AM NOT GOING TO ARG UE ABOUT WHETHER THEY WERE ON THE BAG OR IN THE BAG OR WHERE THEY WERE. IT IS A PICT URE. THE PICTURE SAYS WHAT IT S AYS.

CHIEF JUSTICE: LET'S G O BACK, AGAIN , T O THE ORIG INAL TRIAL.IT WAS ON THE SECOND , ON THE DEFENSE'S CLOSING ARGUMENT , FACED WITH THIS EVIDENCE , AND WHETHER HE WOULD HAVE BEEN ABLE TO SUCCESSFULLY OBJECT ON RELY R A INES -- RELEVANCY, IT WAS IN OVER HIS OBJECTION. HE HAD TO ARGUE , WAS FORCE D TO ARGUE THIS THE ORY T HAT THERE MUST HAVE BEEN SOME CONSENTUAL ROUGH SE X, A NDTHAT IS , THEN , WHAT LED TO THE SECOND CLOSING ARGUMENT.

AND THAT IS WHAT B ROUGHT THE TORN BRASSI ERE UP , WH ICH WAS CLEARLY A PRO PER ARGUMENT BY THE STATE I N RESPONSE TO THE DEFENDANT'S ARGUMENT.

CHIEF JUSTICE: BUT, AGAIN , WITHOUT THAT EVIDENCE IN , HE IS NOT FORCED TO HAVE TO MAKE THAT ARGUMENT. THAT WOULD BE CORRECT , RIGHT? IF THE, IF THERE IS N O UNDERPANTS AND SIEMEN , THE STATE WOULD HAVE TO BE -- UNDERPANTS AND SEMEN, THE STATE WOULD HAVE TO BE REMEMBERED TO -- REQU IRED TO SAY THERE IS NO RAPE CHARGED , NO SEXUAL BATTERY AND N O IMPLICATION THAT MR. HILDWIN WAS INVOLVED IN ANY SEXUAL BATTERY OR RAPE.

NO.

CHIEF JUSTICE: CORRECT?

NO.THAT'S NOT CORRECT. THE TORN, THE VICTIM'S B RAWAS FOUND IN HER PURS E. IT WAS FOUND ON A L INE BETWEEN THE CAR AND HILDWIN'S HOUSE. THE BRA WAS TORN TO S H REDS . THE DEFENDANT ARGUED THAT IT WAS ROUGH SEX AND IT GO T OUT OF HAND. MAYBE SOME PEOPLE DO IT , I DON'T, BUT SOME PEOPLE DO , AND THE DEFENSE SAYS THE BRA IS RIED TO P I ECES , THE EYELETS ARE ON THE SIDE AND IT IS TORN , AND THE DEFENSE GOES ON TO SUGG EST THAT I AM NOT SAYING YOU SHOULD CONVICT THIS MAN , BASED UPON THIS WASH RAG. THAT WAS THE ONLY T IME T HE STATE MENTIONED IN CLOSING AND THAT WAS AFTER THE DEFENDANT BROUGHT IT UP , AFTER THE DEFENDANT SAID IN CLOSING AS HE HA S, AL SO, SAID TWICE BEFORE THIS COURT THAT, IT WAS CONSENTUAL SEX THAT GOT OUT OF HAND.

WERE THE PANTIES OR THE PANTS SO ILED BY PINE STRAW , DIRT , OR OTHERWISE RIED AS THE BRASSIERE WAS?

NO. MY UNDERSTANDING --

CHIEF JUSTICE: AFTER H E SAYS THAT HE IS NOT AS KING THEM TO CONVICT T HEDEFENDANT, BASED ON THESE PANT IES -- PAN TIES OR WASH RAG , WHAT I AM TELLING YOU IS IT IS ONE MORE BLO CK.

YES, MA'AM. I CAN'T ARGUE ABOUT AGAINST. THAT HE SAID WHAT HE SAID, BUT THE -- I CAN'T A RGUEAGAINST THAT. HE SAID WHAT HE SAID, BUT THE BOTTOM LINE IN THIS CASE IS WE HAVE GOT EN OU GHEVIDENCE TO CONVICT , AND THIS COURT HAS CONFIR MED EVEN WITH LESS EVIDENCE , EVEN TAKING OUT THE TWO CONFESSIONS WE HAVE IN T HIS CASE. I AM ALMOST OUT OF TI ME, A NDIF I CAN HAVE THE COUR T'S INDULGENCE FOR JUST A MO ME NTWITH RE SPECT TO THE C ODUSARGUMENT. THAT ARGUMENT CAME UP LESS THAN A WEEK BEFORE THE OPENING BRIEF WAS FILED BY THE DEFENSE IN THIS CASE. IT WAS NEVER PRESENTED TO THE CIRCUIT COURT . I WAS PLACED IN THE POSI TION OF HAVING TO FILE WITH THIS COURT, A LETTER FROM THE FLO RIDA DEPARTMENT OF LAW ENFORCEMENT, WHICH IS THE CODUS ADMINISTRATOR IN T HIS STATE.THEY HAVE NEVER HA D THE OORTUNITY TO AEAR OR B E HEARD , A ND IT IS, I AM , YOU KNOW HAD, THAT IS REA LLY ABOUT ALL I CAN SAY TO THAT. IT NEVER CAME UP BEF ORE. THE INNO CENCE PROJECT IN THEPRO HAC VICE MOTION INDICATES THAT THEY HAVE BEEN INVO LVED I N THIS CASE FOR A COUPLE OF YEARS. WHY IT CAME U P A T THE LAST MOMENT, I CANNOT T ELL YOU. MAYBE THEY CAN. IN CONCLUSION, I WOULD A SKTHIS COURT TO CONFIR M THE TRIAL COURT'S CONVICTION. DNA EVIDENCE THAT WE HAVE , WHEN CONSIDERED FA IRLY U NDERJONES, DOES NOT CREATE A REASONABLE PROBABILITY OF A DIFFERENT RESULT. THANK YOU.

CHIEF JUSTICE: THANK YOU, MR. NUNNELLEY . GOOD MORNING.

MAY IT PLEASE THE COURT. GOOD MORNING AND I WANT TOTHANK YOU FIRST OF ALL, FOR ALLOWING ME TO AEAR TODAY,ESPECIALLY CONSIDERING THELAST MINUTE CHANGE OF LINEUP. I OCCASIONALLY GET TO BE HISUNDER STUDY BUT FRAN KLY NEVER IN A CASE OF THIS IMPORTANCE. I WOULD LIKE TO CONFINE MY ARGUMENT TO TWO COURT ISS UES , THE FIRST OF WHICH WAS ASKED AND THE SEC OND A SUBSTANTIAL MOTION. THE FIRST IS HOW IMPORTANT WOULD IT BE TO THE DEFENSE ARGUING ON RE TRIAL THAT THE STATE HAS NOT PROVED ITS BURDEN THAT MR . HILDWIN IS CONVICTED OF MURD ER.

CAN YOU STATE WHAT THE EVIDENCE WAS IN SUCH A NATURE THAT IT WOULD PROBABLY PRO DUCE ACQUITTAL ON RETRIAL.

I WOULD BE HAY T O.IN THE J ONES CASE WHEN IT WAS DECI DED, THE EVIDENCE ISSUE WAS THE TYPE THAT IS MORE COMMONLY SEEN IN THIS TYPE OF CASE, WHICH IS STATEMENTS FROM WITNESSES TEN YEARS AFTER THE FACT , WHERE THEY SAY THE REAL PERPETRATOR CONFES SED TO ME , SOMEBODY LIED, SOME BODY ADMITED WAS FAB INDICATED. -- FABRICATED .

WE HAVE GOT MORE THAN THAT IN THIS CASE.

YOU CERTAINLY DO , AND THERE IS A REMARKABLE CONSENSUS IN THIS STATE AND NATIONALLY ABOUT THE PROBATIVE P OWER OF DN A EVIDENCE.

DOES THE SUPREME COURT HAVE A CASE BEFORE IT ON THE STANDARD OF DNA?

IT DOES AL THOUGH CERTAINLY IF IT CAME OUT , IT IS THE HO USE V BALL CASE THAT IS GOING TO COME UP I N JANUARY, THAT IS MY CASE AS AMICUS. IT IS UNDER DE LLO, SO CERTAINLY A RESULT OF THE PETITIONER IN F A VOR OF THE PETITIONER IN THAT CASE , BUT HERE UNDER JONES, TO ANSWER THE QU ESTION.

WHAT WAS THE C ASE?

HOUSE V ERSUS BE LL.

AND IT ALSO INV OLVED A CASE IN WHICH THE DEFEND AN T WAS SAID TO BE A NONSE CRETER AND THERE WERE SEMEN STAINS ON THE VICTIM 'S CLOTHING, AND IT WAS A SEXUAL AS SAULT AND MURDER. SO LET'S FOCUS HERE ON THE ISSUE OF PROBABLE ACQUITTAL ON TRIAL AND REASONABLE DOUBT. THIS CASE WAS ABSOLUTELY DEVASTATING TO THE DEFENSEAND HERE IS WHY . THE DNA WAS THE ONLY EVIDENCE THAT WAS SCIENTIFIC EVIDENCE THAT WAS INCONSISTENT WITH THE DEFENSE THAT ALL HE DID WAS STEAL HER PROPERTY AND HE DID NOT TOU CH HER AND HE DID NOT MURDER HER.

HOW DID H E EXPLAIN THAT HE D ROVE --

HE DENI ED THAT HE D ROVE HER CAR.

HE WAS IN HER CAR , CASHING A CHECK ON THE D AYTHAT SHE WAS MURDERED A ND THAT HE HAD LEFT THE VE HICLE OF HIS GIRLFRIEND , W ITH NO MONEY NO, ASSETS, AND HE WENT TO A CONVENIE NCE STORE IN THE AREA WHERE SHE WAS FOUND.

SURE BUT LET'S KEEP IN MIND WHAT DNA HAS TAUG HT U S ABOUT EYEWIT NESS RELIABILITY.THAT IS THAT THIS WAS BASED ON THE WORD NOT OF THE TELLER WHO ACTUALLY SA W THE CAR.IT WAS AN OTHER CUSTOMER IN LINE WHO SAID I THINK THAT CAR HAD A SUN ROOF TWO WEE KSLATER.

I TH OUGHT I T W ASDESCRIBED AS THE SA ME AS THE VICTIM'S CAR AND THAT THE TAILLIGHTS WERE SIMILAR.

BUT TO PUT THIS I N PERSPECTIVE, WHEN YOU COMPARE THAT, DI FFERENT SPITTING CONTESTS ABOUT A CAR, I CAN'T TELL YOU HOW MANY CASES M Y O F FICE HAS HAD WHERE PEOPLE DESC RIBED A CAR TO THE TEE THAT WAS T HEDEFENDANT AND WE DID A SINGLE PERPETRATOR IN A RAPE CASE WHERE THERE IS NO INDICATION WHERE IT CAME FROM AND THE PERSON CAME OU T TO BE 1 00 PERCENT INNOCENT, AND IT HAS TO DO WITH THE DNA IMPACT ON JURIES.

THIS WAS NOT DNA PLENTYED TO THE JURY AT TRIAL - - PRESENTED TO THE JURY AT TRIAL , WAS IT? THEY DIDN'T SAY THAT THIS DNA CAN COME FROM ON E OUT OF A POPULATION OF 1 65 MI LLION PEOPLE, WHICH IS WHAT YOU GET NOW. WHAT YOU SAY IS THIS I S AVAILABLE TO 11 PERCENT OF THE POP ULATION.

BUT HE ALSO SAID AND THIS IS CRITICAL, REMEMBER IN THIS HISS CLOSING ARGUMENT , I HAVE A REFERE NCE HERE, PAGE 973, WELL , JUST 11 PERCENT OF THE POPU LATION ARE NONSECRE TERS. REMEMBER IT WOULD HAVE TO BE A -- HAVE TO BE A NONSECRETER IN THE SAME PLACE AT THE SAME TIME WITH THE SAME OORTUNITY TO BE THE SAME, AND THAT MAKE S THE ODDS LOOK HIGH FOR SOMEONE OTHER THAN THE DEFENDANT.

WAS THIS BASED ON THE CONTEXT OF THE ALLE GATION THAT IT WAS HAVERTY THAT PROBABLE KILLED HER?

NO. THIS WAS BASED ON SOMEONEELSE DID IT. IN HIS CLOSING HE SAID HAVERTY DID IT, SOMEONE ELSE DID IT , BUT LET ME GET BACK TO THE CORE PO INT HERE IF I MAY, WHICH I S THIS W OMAN WAS SEXUALLY ASSAULTED. THERE IS NO DISP UTE ABOUT THAT. THE ONLY REASON THAT MR . HILDWIN WAS NOT CHAR GED WITH RAPE WAS THAT THE BODY WAS TOO DECOMP OSED .

HOW DO WE KNOW T HAT SHE WAS RAPE D?

HER BODY WAS N UDE , LE GS SPREAD EAGLE AB OVE HER HE AD , HER BRA TORN U P . WOMEN

DON'T END UP NA KED IN THE TR UNK OF THE IR CAR , UNLESS THERE WAS AN AS ALL .

AND THE AN US?

IT COULDN 'T BE TOLD I F THERE WAS AN ASSAULT BECAUSE THE CARS WAS LO CKED IN A HOT TRUNK -- THE BODY WAS ABOUT LOCKED IN A HOT CAR FOR SEVERAL DA YS . MR. NUNNELLEY THE FIRST TIME IN THIS VOLUMI NOUS RE CORD , I HAVE EVER HEARD IT SAID IN WAS INSIDE THE LAUNDRY BA G. EVERY SINGLE RECORD SAYS IT WAS NOT OUT SIDE THE LA UNDRY BAG. IT WAS INSIDE THE B LUE SHORTS THAT SHE WAS WE ARING , ACCORDING TO HER BOYFRIEND, ON THE DAY SHE DISAEARED.

BUT IT WAS NOT IN THE CAR AT THE SC ENE WHERE HER BODY WAS TOMBLY FOUND. THIS WAS AT ANOTHERLOCATION.

IN.NO. IT WAS IN THE BACKSEAT OF THE CAR. I AM ABSOLU TELY 100 PERCENT POSITIVE ABOUT THAT. THEY RECO VERED HER BODY INTHE CAR. THE WI NDOW WAS DOW N. THE TRU NK WAS LOCKED. IN THE BACK OF THE BACK SEAT ON TOP OF AND ADJ ACENT TO THE BAG WAS HER BLUE SHORTS WITH SEMEN ENCR USTED UNDERWEAR AND NEXT TO IT A WASH RAG. LET'S KEEP IN MIND W HEN TALKING ABOUT THE WAS H RAG , HOW CR ITICAL BOTH ITEM S OF EVIDENCE WERE, NOT JUST TO PROVING SHE HAD A BIOLOGICAL ON THE SCENE BUT T O DESTROYING THE DEFEND ANT'S CREDIBILITY ON THE STAND. YOU KNOW, IF HE DIDN'T ACTUALLY KILL HER , WHA T IN THE WORLD WAS HIS SEMEN DOING THERE? IF HE DIDN'T ACTUALLY TELL THE POLI CE, YES, I CH OKED HER TO D EATH O R THE MAN HAD A TAKE TOO ON HIS BACK -- A TATTOO ON THE BACK , WHY WAS HE LYING ABOUT THE WASH RA G, WHEN THIS AP PEARED ON THE RASH RAG? THIS IS -- A WASH RAG? THIS IS SOMETHING THE JURY WOULD BE ENTI TLED TO CONSIDER AT TRIAL , AND THE LAST POINT THAT MR . NUNNELLEY ASKED ASK ED ME TO TALK TO, IS THE IS SUE ABOUT THE DATA BA NK . I WILL CONCEDE REA DILY THAT THIS IS NOT A CASE YET , IN WHICH THE DNA PROVES MR. HILDWIN 'S INNOCENCE. THAT IS NOT THE S FD . THE STANDARD IS M E RELY -- THAT IS NOT THE STANDARD.THE STANDARD MERELY IS W ITH ALL OF THE WE IGHT OF THE PROCEEDINGS , WHAT WOULD THE JURY DO? WOULD THEY FIND REASONABLEDOUBT.SO HE DIDN'T NEED TO P ROVETHAT IT ACTUALLY COMES FROM THE MURDER LETTER -- MURDERER, JUST SOUG HT JURY COULD FIND THAT IT IS NOT HIM, AND THE STATE IS UNCONCIONBLY DEPRIVING MR. HILDWIN OF THE OORTUNITY TO SHOW THAT IT IS 100 PERCENT ABSOLU TELY THE KILL ER.

WHEN DID THE STATE START WORKING --

I GOT INVOLVED IN A YE AR , A YEAR AND-A-HA LF A GO AND OVER THE CHRIST MAS , I REALIZED THAT THIS HAD NEVER BEEN ENTERED INTO THE DATA BEIGE.

CHIEF JUSTICE: OUR -- DATA BANK.

CHIEF JUSTICE: OUR COURT IS NOT IN A PO SITION TO CONSIDER THIS.IT WOULD SEEM PROPERLY PLO PRODUCED TO THE -- PROP ERLY PRODUCED TO THE TRIAL COURT . THEREFORE IF WE DON 'T HAVE THE POWER, WHAT ARE WE ARGUING AT ISSUE HERE?

WE HAVE TO AD MIT THAT WE ARE ENTITLED TO AN INTEREST , THAT IF THIS PROFI LE WERE RUN AND I HAVE SEEN S O M ANY CASES WHERE NOBODY THOUGHT THE EVIDENCE WAS ACTUALLY RELATED TO THE CRIME, IF THIS PROFILE WERE RUN , AN D HE DOES NOT DISPUTE ANY LONGER THAT IT IS FULLY ELIGIBLE TO BE RUN AND THEY HAVE HAD IT FOR A YEAR AND-A-HALF AND NOT RUN IT .

THAT IS ABSOL UTELY NOT - -

CHIEF JUSTICE: I WOULDASK YOU NOW TO FIN ISH YOUR ARGUMENT. I AM GOING TO HAVE MR .

NUNNELLEY RESPOND TO THAT LAST ALLEGATION.

WE HAVE PUT IN ADMISSIONS AS TO ELIGIBILITY AND I WOULD ASK THAT THEY S PEAK FOR THEMSELVES, BUT NUMBER ONE, LET ME SP EAK SO MANY WAYS --

CHIEF JUSTICE: YOU H AVE USED UP YOUR TIME , AND IF YOU HAVE ANYTHING ELSE ON THE ISH THAT WE ARE HAVING TO -- ON THE ISSUES THAT WE ARE HAVING TO F ACE ON A EAL , W E WILL LO OK AT THAT WITH THE OTHER ISSUES.

AND ALSO WITH RE GARD TO MR. HAVERTY , HE IS IN THE DATA B ANK.

CHIEF JUSTICE: THAT IS BEYOND THE ISSUES HERE.

THE LAST ISSUE I WA NT TO ADDRESS WITH REGARD TO THE QUESTION --

CHIEF JUSTICE: YOUR TIME. THANK YOU VERY MUCH .

I ARECIATE IT .

CHIEF JUSTICE: MR.NUNNELLEY TO THAT ONE STATEMENT YOU MAY RESPOND.

WITH RES PECT TO THE CO DUS DATABASE ISSUE, I THINK YOU ARE CORRECT THAT THE, YOU , JUSTICE PARIENTE, ARE CORRECT THAT THAT ISSUE IS NOT BEFORE THIS COURT. THE NOTION THAT THE STATE HAS CONCEDED THAT THE PROFILE IS ELIGIBLE FOR SUBMISSION, IS ABSOLUTELY FALSE. THE STATE , THE LETTER FROM THE FLORIDA DEPART MENT OF LAW ENFORCEMENT IS SELF-EXPLANATORY. I WOULD RE LY ON THAT.

CHIEF JUSTICE: WE WOULD HOPE, MR. NUNNELLEY, A THAT IF THIS IS ELI GIBLE FOR SUBMISSION, T HAT THE STATE IN ITS TRUTH-SEEKING FUNCTION, WOULD CERTAINLY WANT TO PLACE THERE I N THE DATABASE, TO MAKE SURE THAT MR. HILDWIN IS NOT THE , T HAT THERE MIGHT BE SOMEONE E LSE INVOLVED IN THIS CASE.

YOUR HONO R, HAD THIS PROFILE BEEN ELIG IBLE FOR SUBMISSION TO CODUS , IT WOULD HAVE LONG AGO BEEN SUBMITTED .

CHIEF JUSTICE: THANK YOU VERY MUCH.

WITH THE COURT'S INDULGENCE, W E WOUND UP WITH AN INEL IGIBLE PROFI LE , AND MR. HILDWIN 'S IN SIST SE NSE.

CHIEF JUSTICE: THANK YOUVERY MUCH. THE COURT WILL TAKE ITS MORNING REC ESS OF 15 MINUTES.

MARSHAL: PLEASE R ISE .