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**Jesus Delgado v. State of Florida  
SC04-2274**

THE MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED. CHIEF JUSTICE: ALL RIGHT. THE NEXT CASE ON THIS MORNING'S DOCKET IS DELGADO VERSUS STATE OF FLORIDA. MR. WASSON?

GOOD MORNING, YOUR HONOR. IT IS ROY WASSON REPRESENTING THE APPELLANT, MR. DELGADO IN THE CAPITAL MURDER CASE. INVOLVING NOTABLY TWO DEATH PENALTIES, JUST IMPOSED UPON 9 TO 3 RECOMMENDATIONS BY THE JURY. SOY THINK THAT THE ERROR SINCE THE CASE NEEDED TO BE LOOKED AT WITH THE UNDERSTANDING THAT THREE JURORS ON EACH OF THE SENTENCES DID NOT GO A LONG WITH IT. CHIEF JUSTICE: CAN I ASK A QUESTION? WHAT IS THE RELEVANCE OF THAT? I DON'T SEE YOU HAVING RAISED ANY PENALTY PHASE ISSUE. COUNSEL FOR THE STATE ARGUES HARMLESS ERROR, HARMLESS ERROR. WELL, EVEN WITH THE ERROR, THREE JURORS --. CHIEF JUSTICE: WE'RE TALKING ABOUT GUILT PHASE. THEY WERE UNANIMOUS IN FINDING GUILT. SOME OF THE ISSUES HERE. CHIEF JUSTICE: WHICH ISSUES ARE YOU GOING TO ARGUE?

THE FIRST ISSUE I WOULD LIKE TO ARGUE IS THE PEN REGISTER ISSUE. CHIEF JUSTICE: DOES THAT MEAN YOU ARE GOING TO RELY ON YOUR BRIEF FOR YOUR DOUBLE JEOPARDY ARGUMENT?

CHIEF JUSTICE: . NO , I WIL L B E HAP PY T O A RGUE THAT.

CHIEF JUSTICE: S TART WITH THE PEN REGISTER.

THE FIRST ISSUE I WOULD LIKE TO TALK ABOUT INVOLVES WHAT I THINK IS PRETTY IMPORTANT EVIDENCE THAT WAS PRETTY SIGNIFICANT INDICATOR. THIS IS A TOTALLY CIRCUMSTANTIAL EVIDENCE CASE. IF THIS PEN REGISTER THING WAS ACCURATE, IT SUPPORTED THE STATE'S REVENGE THEORY OR MOTIVE THAT THE DRY CLEANERS BUSINESS DEALGONER WAS THE REASON FOR THE MURDERS. THE EVIDENCE WAS SOP IMPORTANT THAT --. JUSTICE: PEN REGISTERS HAVE BEEN AROUND FOR MANY YEARS, CORRECT?

YES, THEY HAVE BEEN AROUND.

JUSTICE: I ASSUME THAT THERE HAVE BEEN OTHER STATE COURTS AND FEDERAL COURTS THAT HAVE DETERMINED WHETHER YOU NEED TO ESTABLISH THE SAME EVIDENTIARY BASIS TO INTRODUCE PEN REGISTER RECORDS AS YOU WOULD FOR BREATHALYZER TESTS OR OTHER TYPES OF TESTS? WELL, I HAVE ONE THAT SPECIFICALLY HELD IT. I FOUND AT LEAST TWO CASES THAT I CITED IN THE BRIEFS THAT TALK ABOUT THE EXPERT WITNESSES TESTIFYING REGARDING THE PEN REGISTER, AND I FOUND ONE THAT THE CASE OF CROUCH I THINK IT IS CALLED THAT SAID THAT THE EXPERIENCE ON THE PEN REGISTER WAS SUFFICIENTLY QUALIFIED HERE SO THE ISSUE IN THAT CASE WAS THE NEED FOR EXPERT TESTIMONY TO LAY THE FOUNDATION FOR THE PEN REGISTER.

JUSTICE: IS THERE ANY CASE THAT HAS SAID THAT THE EVIDENCE OF PEN REGISTERS COULD NOT BE INTRODUCED AS BUSINESS RECORDS AND YOU NEEDED EXPERT TESTIMONY TO BE ABLE TO INTRODUCE IT? I THINK THE REISADIFFERENCE BETWEEN A BUSINESS RECORD AND SO FORTH AND SOMETHING THAT IS CREATED BY A MACHINE THAT I DON'T

KNO W H OW I T WOR KS I NSIDE. I D ON 'T K NO W --.

JUS TI CE : MY QUE STION I S IS THERE A NY C AS E W HERE OTHER STATE S , F ED ERAL C OURT , T HA T A GREE S WIT H Y OU R P OS ITION THA T E XPER T WIT NE SS TESTIMONY IS NECESSARY? I J US T HAV E THE CAS E THA T I CITED HER E T HA T REF ERRE D T O WH ETHER OR NOT A N E XPER T WAS QUALIFI ED O R T HE N EE D , T HE E XPER T' S T ESTI FYIN G ON THE I SS UE S O T O M E T HOSE I NDICAT E THA T E XPER TS W ER E R EQUIRE D IN T HOSE CAS ES. J US TICE : W HA T' S THE STAND ARD WE APP LY T O THI S ISSUE O F THE PEN REG IS TE R AND THE A DMIS SI ON O F THA T EVIDE NC E ?

I 'M SOR RY ?

JUSTICE: THE STA ND AR D W E A PPLY , I S I T A BUSE O F D ISCRETION?

YES. >> J US TICE : SO HOW DID T HE T RIAL COURT A BUSE I TS D ISCRETION?

IT IS A N A BUSE O F D ISCR ET ION BUT H ERE THE RE I S N O E VI DENCE THA T WOU LD S UPPORT A FINDING THA T THI S WITNESS THA T LAID THE FOUNDATION FOR THIS WAS A N EXP ERT.HE SAID BY HIS OWN TES TIMO NY HE W AS N OT A N EXP ER T O F I F I C AN BACK U P JUS T A L IT TL E BIT I JUST T HINK I NEE D T O M AK E A POI NT THA T Y OU N EE D T O H AV E EXP ER T T ES TI MONY O N THIS, BECAUSE THIS IS T HE SORT OF THING THA T' S BEYON D T HE AVE RA GE PER SON O R T HE A VE RAGE LAWYER. WE DON'T KNOW H OW T HESE T HINGS W ORK , WHA T I T TAK ES .

JUS TI CE : I S A P EN R EGISTE R SOMETHING THA T IF YOU DON'T CAL IB RATE I T RIG HT IT IS GOI NG T O GIV E YOU THE W RONG R ES UL TS ?

I DON'T K NO W BEC AU SE W E DON'T H AVE A N E XPERT T O E XPLAIN T HAT TO U S. J US TI CE: DID YOU H AV E A N EXPERT THA T SAID IN O RD ER T HAT A P EN REG IS TE R I S S OMETHING THA T N EEDS TO B E C ALIBRA TED ON A R EG ULAR B ASIS ?

N O , B UT W E D ON'T K NO W W HA T I T NEE DS , A ND T HAT' S JUST THE PROBLEM HERE. T HE P RO PONE NT O F T HE EVIDE NC E DI D NOT TELL THE JURY WHY THI S M AGIC AL B LACK B OX YOU COU LD P US H A B UTTO N A ND IT W OU LD GIV E EVIDE NC E THA T W AS I MPOR TANT ENO UGH T O ARG UE A ND C LOSI NG , SUP PO RTED T HE P ROSE CUTI ON 'S T HEOR Y. CHIE F JUS TICE: I GUE SSTE THE POINT THA T IN FOLLOWI NG UP WITH JUSTICE C AN TERO 'S Q UESTION, I F THE RE I S NOT T HA T I N C HALL ENGI NG I T T O T HE TRIAL J UD GE A S T O WH ETHER I T SHO UL D COM E I N , I SN'T IT THE OBL IG ATIO N T O E XPLAIN W HY EXP ER T TES TIMO NY IS NEE DE D ?

I DON 'T T HINK S O BEC AU SE I T HINK I F T HERE I S S OMETHI NG T HA T I S B EING O FFERED T HA T I S J US T O N THE F ACE OF IT B EYON D THE A VERAGE JUR OR I D ON 'T TH I NK Y OU CAN J US T TAK E O N FAI TH T HAT I F YOU SAY W E H OOK E D U P T HIS BOX T O THE P HO NE A ND P US HED A B UTTO N A ND I T GAV E US THE LAS T NUM BE R I DON 'T T HINK YOU NEED TO MAK E A F ORMAL . J US TI CE : D ID N' T THE STA TE INT RO DUCE T HE COM PUTE R PRI NTOUT O F T HE D EFEN DANT 'S P RIOR REC OR D , W OU LD THE S FA T H AVE T O - - W OU LD THE STA TE HAV E T O P RE SENT EXP ER T T ES TIMONY THA T T HI S PRI NT ER P RINT ED OUT E XA CTLY WHA T' S IN THE C OM PU TE R A ND THA T YOU DON'T NEED TO CAL IB RATE I T , T HAT THI S IS HOW TH I NG S W ORK A ND AS SOON AS Y OU P US H THE P RINT BUT TON T HA T I T PRI NT S O UT E XACT LY W HA T WAS O N THE S CREE N O R E XACT LY T HE PAG E NUM BE RS THA T YOU WAN TED? I MEAN, IS T HA T S OMET HING A LSO THA T I S B EY OND T HE K IN OF THE ORD IN AR Y P ERSON? I D ON'T TH I NK S O B ECAU SE MOS T PEOP L E U SE C OMPU TE RS ALL OF THE TIME AND I T I S C OMMON K NOWLEDGE HOW C OMPUTERS ARE R ELI A BL E AND I T HINK THA T TAK ES Y OU T O T HE S ITUATI ON W HERE I F T HERE WAS A CHALLEN GE T O I T Y OU N EE D T O SAY WHY A N E XPERT W OULD BE NEEDED I N T HA T SITUATION.

JUSTICE: L ET ME G IV E Y OU A CLOSER EXAMPLE. THERE ARE CASES ALL O VE R THE COUNTRY T

HAT HAPPEN I N COURTS ALL OF THE TIM E W HE RE YOU GET A WIRETAP AND A P HONE C OMPA NY PERSON TO COM E I N AND THE P HONE C OM PANY P ER SONN EL W IL L H AV E T HE C OM PANY R UN A LIS T O F PHO NE N UMBERS L IK E WHA T THI S PEN R EGISTE R DOES , A ND THA T'S A DMITTE D A S A BUS INES S RECORD. A ND T HERE H AS NEV ER BEE N T O M Y KNOWL EDGE A NY R EQUI RE MENT T HAT S OM E EXP ER T F ROM T HE P HONE C OMPA NY C OME AND TESTIFY AS TO THE A CCUR AC Y OF THE EQUIP MENT. T HEY S IMPL Y T ES TIFI ED TO T HAT YOU D O A P RI NTOU T O F T HE P HONE C ALLS TO THI S P HONE NUM BE R , YES , A ND WHA T T IM E P ERIO D , YES , AND T HE N T HEY A DM IT TE D I T A S A B USIN ESS REC OR D. I T HAS NEV ER BEE N Q UEST IO NE D A S TO T HE UND ER LY IN G ACCURACY OF THE EQU IPME NT I TSELF . WELL, I D ON 'T KNO W ABO UT THE U NDER LY IN G A CCURACY B UT AT LEAST TESTIMONY FROM THE P ERSON WHO DID T HE TES T A ND CAN SAY I D ID I T AND I D ID I T R IGH T . I DID IT THE R IGH T W AY A ND THE WITNESS HERE W AS N OT T HE P ERSON WHO H OOK E D U P T HE PEN R EGISTE R. EVEN IF YOU DON'T NEE D E XPERT T ES TIMO NY T O LAY THE F OUND ATIO N , YOU NEE D T ESTIMO NY T HA T S OM EB OD Y K NOWLED GEAB LE DID T HE TAS K HER E , S OM EBOD Y WIT H E XPER TI SE DID THE TASK. I'LL GO B AC K TO THE Q UESTION ABOUT C ASES AND IL L S AY THERE IS THE CASE I CIT ED O N P AGE 5 2 O F T HE I NITI AL B RI EF C ALLE D UN ITED STATES VERSU S K OHNE A ND THA T WAS BAS ED , T HA T WAS A M OT IO N F OR N EW T RIAL B AS ED P ARTL Y O N T HE A RGUMENT TH AT THE P EN REG ISTER EVI DENCE WAS P RODUCE D W IT HOUT SUF FICIENT EVIDENCE AND TESTIMONY. THERE IS A QUOTE H ERE A BOUT W HY T HE S PE CIAL AGE NT , F BI A GENT I N T HA T C AS E HAD S UFFICIENT E XPER T T ES TIMONY, A M ONTH OF S PE CI ALIZ ED TRA ININ G A ND EIG HT MON TH S P RA CT ICAL EXP ER IE NC E , R EA D B OOKS DEALING WIT H P EN R EGISTE R SO T HA T CAS E T O M E T HE Y F OUND T HE SKB ER T TO B E Q UL FID I N T HA T CAS E AND THAT STAND S FOR THE PROPOSITION THAT YOU DO N EE D E XPER T TES TI MONY.

JUSTI CE: WAIT A MIN UTE. I SN'T T HERE A L OG ICAL L EA P T HAT Y OU J US T TOO K B ETWE EN SAYING THAT THE EXPERT WITNESS THAT THE STATE H APPENE D T O P RE SENT W AS Q UALIFIED I N THA T C AS E , AND A H OL DIN G THA T A N E XPER T W ITNESS I S N ECESSARY I N T HA T C ASE? I DON'T T HINK T HA T C OURT HEL D THA T AN E XPER T WITNE SS WAS N ECESSARY. O NLY THAT THE STATE , THA T THE STATE PRESENTED A N E XPERT W ITNESS A ND THA T E XPERT WITNESS W AS Q UALI FIED I N TH AT C AS E. W EL L , THE Y NEV ER WOU LD H AVE H AD T O ANS WE R THE QUESTION IF THE EXPERT WAS QUA LIFI ED I F N O E XPER T TES TIMONY IS N EE DE D. I F N O EXP ER T TES TI MONY I S N EEDED YOU SAY , WEL L , W E DON'T CAR E I F THE E XPER T WAS Q UALI FIED O R NOT . > > J USTI CE : A ND C ON VERS EL Y Y OU DON'T HAV E TO H OL D WHETHER THE E XPERT WAS NEEDED, EITHER.

EITHER W AY, BUT Y OU N EVER GET TO THA T Q UESTION IF T HE E XPER T , I F T HE E XPER T T ESTIMO NY IS N OT N EEDE D . I T HINK T HE COU RT U NDERSTAN DS MY POSITION ON THE N EED FOR THE E XPER T TESTIMONY. I J UST M EN TION ED ONC E A GA IN T HA T T HE WIT NESS S AID H E DI D N OT HAV E ANY E XPER TISE I N T HAT A RE A. HE DID N OT VOUC H FOR T HE Q UALI FI CATIONS OF T HE P ERSON WHO H OOK E D THI S U P O R H E S AID HE H AD S OM E EXP ERTI SE B UT HE D IDN'T S AY W HAT I T W AS.

CHIEF JUSTICE: DO YOU WANT TO GO ON TO , ONL Y I T HINK YOU H AV E A DEQU AT EL Y EXPLAINED YOUR POSITION ON THA T . I'LL M OV E T O T HE D OUB L E J EOPARD Y A RGUMENT. THI S WA S A C AS E I N W HI CH M Y C LIENT W AS JUD ICIA LL Y A CQUITT ED O F T HE FIR ST , I N THE FIR ST A PP EA L OF T HI S C AS E S EVER AL Y EARS A GO . HE W AS TRIED O N DUA L THE OR Y !!IE S T HE FIR ST T IM E O F FEL ON Y M URDE R A ND PRE ME DITA TE D M URDER. BOTH OF T HOSE T HE ORIE S I N T HAT TRI AL R EQ UIRE D PRO OF THA T T HE D EFEN DANT I NTE NDE D T O KILL T HE VIC TIMS B EC AU SE THE KIL LING WAS THE O NL Y C RIME THAT T HE S TA TE T HE OR IZED THAT T HE DEF EN DANT INTENDED WHEN H E WAS ON THE V ICTIM' S PR OPERTY , ALL EG EDLY A FTER CON -- C ON -- C ON SENT WAS W IT HD RA WN .

CHIEF JUSTICE: YOU B ELIEVE I T W AS L EGAL I N S UF S S EU V ERSU S - - INS UV SEU ON T HE FEL ON Y M UR DE R BUR GL ARY? I T W AS L EGALLY T HE E VIDENC E W AS L EGAL LY I NSUFFI

CIENT BECAUSE THERE WAS NO EVIDENCE ON THE ELEMENT OF REMAINING IN THE PROPERTY WITHOUT CONSENT.

CHIEF JUSTICE: RIGHT. AND SO HOW DOES THAT AFFECT WHEN WE SEND IT BACK SPECIFICALLY FOR A TRIAL THAT HE SOMHOW IS IN DOUBLE JEOPARDY ON THE PREMEDITATED MURDER?

THE ISSUE OF WHETHER DOUBLE JEOPARDY WOULD BAR THE RETRIAL WAS NOT BRIEFED AND IT WAS NOT ARGUED IN THE FIRST APPEAL. AND I BELIEVE I CITED CASES THAT HAVE HELD THAT EVEN WHERE A PERSON HAS ASKED FOR A NEW TRIAL AND THE CASE IS REMANDED FOR A NEW TRIAL IF THEN WHEN YOU GET BACK TO THE RETRIAL YOU REALIZE DOUBLE JEOPARDY APPLIES HERE. THE FACT THAT YOU ARE NOT ESTOPPED FROM RAISING DOUBLE JEOPARDY DOES NOT ESTABLISH THE LAW OF THE CASE THAT DOUBLE JEOPARDY DOES NOT APPLY, BECAUSE THE PEOPLE, THE PARTIES AND THE COURT DID NOT BRIEF AND ARGUE AND DECIDE THE QUESTION OF DOUBLE JEOPARDY HERE. THE LAW OF THE CASE HERE IT DOES, AND I ASK THE COURT TO THINK ABOUT THIS FOR A MINUTE. THE LAW IN THE CASE IN THIS CASE DOES ESTABLISH THAT THE FELONY MURDER THEOR Y WAS PART OF THE VERDICT IN THE FIRST TRIAL, OKAY? YOU KNOW, WE HAD A GENERAL VERDICT AND THE JURY SAID GUILTY, AND SO YOU CANNOT SAY HYPOTHETICALLY WE DON'T KNOW IF THE JURY FOUND PREMEDITATED MURDER OR FELONY MURDER, BUT BECAUSE THIS COURT REVERSED, BECAUSE THIS COURT FOUND HARM IN THE PROSECUTION OF THE CASE ON THE FELONY MURDER THEOR Y, WE HAVE TO ESTABLISH THE LAW OF THE CASE THAT FELONY MURDER WAS PART OF THE VERDICT IN THE FIRST TRIAL. WELL, THAT FELONY MURDER CHARGE AND TRIAL INCLUDED THE FACT OF INTENT TO KILL, AND AN ESSENTIAL ELEMENT IN THE PREMEDITATED MURDER.

CHIEF JUSTICE: IT WASN'T AN ESSENTIAL ELEMENT OF THE FELONY MURDER, WHICH WAS THE ONLY CHARGE THAT WE FOUND LEGALLY INSUFFICIENT? IT WAS AN ESSENTIAL PART OF THE ACTUAL TRIAL OF THE FELONY MURDER BECAUSE THERE WAS NO INTENT TO COMMIT ANY OTHER CRIME ON THAT PREMISES THAT THE YARGUED WAS SUPPORTED THE BURGLARY. IT WAS AN ESSENTIAL PART OF THE TRIAL. JUSTICE: BUT THE INTENT FOR PREMEDITATED MURDER IS NOT, THAT DOESN'T INVOLVE A FELONY AT ALL. IF THE FULLY FOR MEDITATED.

BUT THIS IS THE ONLY CASE I'VE EVER SEEN IN WHICH THE FELONY INCORPORATED THE SUBSTANTIVE CHARGE BECAUSE HERE THE ONLY FELONY THAT HE WAS ACCUSED OF THE BURGLARY WAS REMAINING ON THE PREMISES WITH THE INTENT TO KILL.

CHIEF JUSTICE: BUT THAT'S WHERE I GO BACK TO WE DIDN'T, WE FOUND THAT TO BE LEGALLY INSUFFICIENT. WE DIDN'T SAY THAT IT WAS FACTUAL, INSUFFICIENT AS TO WHETHER HE LACKED THE INTENT TO KILL, CORRECT? >> NOT THAT.

CHIEF JUSTICE: BUT THAT'S IMPORTANT.

BUT SOME ELEMENT OF THAT CRIME WAS NOT ESTABLISHED. THE ELEMENT THAT WAS NOT ESTABLISHED WAS THE REMAINING IN PREMISES. CHIEF JUSTICE: NOT THE INTENT PART.

NOT THE INTENT PART, BUT, BUT THE DEFENDANT WAS ACQUITTED OF THE FELONY WHICH A SPART AND PARCEL OF THAT BURGLARY WAS THE INTENT TO KILL. >> CHIEF JUSTICE: BECAUSE THERE WAS LEGAL INSUFFICIENCY IN THAT THE REMAINING IN WAS HELD NOT TO BE HAVING BEEN INS TRUCTED ON NOT A PROPER ELEMENT OF BURGLARY SO I THINK WE UNDERSTAND YOUR ARGUMENT ON THAT.

OUR POSITION IS YOU CANNOT TRY A DEFENDANT TWICE, ONCE FOR FELONY MURDER, ONCE FOR PREMEDITATED MURDER IF THE REWAS SOME --.

CHIEF JUSTICE: AND I HAVEN'T GONE BACK , BUT ALL OF T HE SUPREME C OURT C AS ES THAT S AY W HE N THE RE I S A N A LTERNATIVE V ER DICT AND Y OU HAVE A L EGAL I NSUF FI CI EN CY THAT YOU'VE GOT TO REV ERSE WOULD BE DOUBLE J EOPA RD Y CAS ES AND I WOU LD B E HAR D- PRES SED T O T HINK THA T THE SUPREME COURT WAS SAY I N G WHEN YOU REVERSE FOR A NEW T RIAL Y OU R EALL Y C AN'T D O T HAT.

THIS C ASE IS DIF FE RENT, BEC AUSE I N T HI S CAS E T HERE W AS A F AC TUAL ELE ME NT M ISSING FROM T HE F IRST , F RO M T HE T RIAL ON F ELON Y M UR DE R , O KAY? CHIEF JUSTICE: W ELL , IT IS A VERY CRE ATIV E ARG UMEN T. W E'LL CONSIDER I T . THANK Y OU . THE N EX T ARG UMEN T I W OU LD L IK E T O MAK E I S O N T HE D EFEN DANT W AS I MP ROPE RL Y H ANDICAPPED I N M AKI N G C LOSING A RGUM EN T O N A V ER Y I MP ORTANT ISSUE ABOUT T HE S TATE'S F AI LURE T O P UT O N A NY D NA E VIDE NC E . THE D EFEN SE C OUNSEL A RGUE S T HE STA TE D ID N' T T ES T T HI S BLO OD THA T W AS O N T HE F LOOR FOR DNA . T HEY DIDN'T D O I T BAC K I N 1 99 8 A ND T HE Y D IDN'T D O I T I N 2 00 4 B EF OR E T HE TRI AL . CHIE F JUS TICE : I S T HA T I SSUE 7?

I 'M SOR RY? CH IEF JUSTICE: ISSUE 7 YOU ARE G OI NG TO N OW ? WEL L , LET M E S EE . CHIE F J USTICE: W HE RE DEL GADO W AS D EPRIVE D O F A F UNDA MENT ALLY F AI R TRI AL WHEN THE TRIAL C OURT SUSTAINED THE S TATE 'S O BJECTION TO DEFEN SE C OUNSEL'S KPLENTS T O C LO SING A RGUM EN T R EGARDING THE STA TE'S F AI LURE T O P RE SENT D NA E VIDE NCE. YES , T HA T'S THE ONE . T HAT IS T HE O NE . O KAY . H ERE COU NSEL , Y OU K NOW , E VERYBODY KNO WS D NA I S THE , I S O N T HE M I N D O F THE P UBLI C I NCLU DING T HE J UR OR S , AND E VERYBODY K NO WS THA T DNA T ESTING IS B ET TE R A ND M ORE R ELIABL E AND MUC H B ETTE R E VIDE NCE T HA N EVI DENC E THA T T HE S TA TE PRESE NT ED HER E W HICH WAS B LO OD G RO UPIN GS W HICH T HERE W AS B LOOD H ER E T HAT WAS C ONSI STEN T WITH T HE VIC TIM'S B LOOD AND B LOOD T HERE T HA T T HEY SAI D W AS C ONSIST ENT WITH THE D EFENDA NT'S BLOOD. T HEY DID NOT, T HI S E VIDE NC E DID NOT E STAB LISH T O A NY D EGREE O F CER TAINTY THAT I T WAS THE D EFENDA NT'S BLO OD O R THE V ICTI M' S B LOOD B UT THE RE WERE C HARA CT ERIS TIC S T HA T MAT CHED I N THE B LOOD G ROUPING. SO I T HINK A VER Y I MP ORTA NT P ART OF THE D EFENSE CLO SING T O Q UE STION THE R ELIA BI LITY OF THA T A ND C OMPARE I T T O W HA T I S , Y OU KNO W , THE W AV E OF T HE P RE SENC E D NA EVI DE NC E A ND DEF ENSE COU NSEL SAI D T HEY D IDN'T TES T I T I N 199 0. T HEY SA I D I T W AS T OO E XPENSI VE AND T HEY D IDN' T TEST I T I N 200 4 , AND T HE N H E M ADE A C OMMEN T YOU W OULD K NOW P OS I T IVEL Y , AND T HA T W AS STR ICKE N. T HAT WAS STR IC KE N . JUSTI CE : DID THE D EFEN SE QUESTION ANY OF THE S TATE 'S W ITNE SSES REG AR DING T HE B LOOD FOUND I N THE H OME? I'M S OR RY . I DID N' T HEAR. W HAT?

JUS TICE: DID THE S TA TE P RESENT ANY WIT NESS ES R EGARDI NG T HE B LOOD F OUND I N T HE HOME?

SOME OF THE B LOOD G ROUPIN GS WERE CON SI ST EN T W ITH.

JUSTICE: AND DID THE D EFENSE COUNSEL C ROSS -EXAMINE THAT WITNESS?

I D O N 'T R EC AL L THA T. I D O N 'T R EC AL L THA T O NE W AY OR T HE O TH ER F OR S OME R EASO N.

JUSTICE: IT SEEMED TO M E THAT THE DEFENSE H AD THE OPP ORTUNITY TO E LICI T O N C ROSS - E XAMINATION SOME OF T HE ARG UMEN TS T HA T W ER E M ADE A T CLO SI NG , A ND I F THA T H AD BEE N D ONE T HE N THE C LO SI NG ARGUMENT WOULD HAV E B EE N LEG I T I MATE I F YOU W OULD HAV E ASKED THE W IT NESS DID Y OU CON DU CT A NY D NA E VIDE NC E , T HE DNA EVI DENC E , W AS I T AVA I LABLE T O CON DU CT DNA EVI DENC E I N P REPA RATION FOR TRIAL I N 2 00 4 , D ID Y OU D O T HAT?

THERE WAS SOME OF THAT OFFERED. I DON'T REMEMBER IF IT WAS ON CROSS-EXAMINATION BUTT HERE WAS SOME DISCUSSION OF DNA TESTING AND WHY IT WASN'T DONE IN THE EVIDENCE, YES. THERE WAS THAT, SO I THINK --.

JUSTICE: I BELIEVE WHERE THIS QUESTION IS GOING IS THAT YOU DO AGREE THAT THE ARGUMENTS OF COURSE ELIEN W HATEVE R THE CASE IS, MUST BE DIRECTED TO THE EVIDENCE THAT'S BEEN PRESENTED TO THE JURY? ABSOLUTELY.

JUSTICE: AND YOU AGREE WITH THAT FUNDAMENTAL PRINCIPLE, AND THEN IS IT YOUR ARGUMENT THAT DNA IS SO, THE RELIABLE COMMON KNOWLEDGE ABOUT DNA THAT THAT IS THE SAME THING AS WHEN YOU WANT TO ARGUE THAT DNA WOULD POSITIVELY DO THIS OR THAT, THAT THAT'S THE SAME THING AS TALKING ABOUT THE MIA MIHERALD?

OR THE SUN WOULD HAVE COME UP IN THE MORNING. IS THAT WHAT YOU ARE SAYING? ABSOLUTELY, YES, YOUR HONOR. THAT IS A FAIR ARGUMENT. I THINK WE ALL KNOW THAT NOTHING IS 100%, NOTHING IS TOTALLY IRREFUTABLE. JUSTICE: BUT YOU DON'T THINK YOU NEED ANY EVIDENCE AT ALL BEFORE THAT ARGUMENT WOULD BECOME A PROPER ARGUMENT? NO EVIDENCE AT ALL WOULD BE NECESSARY? YOU MEAN AS FAR AS THE PERCENTAGE OF THE RELIABILITY OF DNA EVIDENCE, HOW, WHETHER IT IS 90% RELIABLE? I DON'T THINK SO. I THINK IT IS COMMON KNOWLEDGE THAT IT IS, YOU KNOW, IT IS RELIABLE ENOUGH THAT THE PROSECUTION IS STARTING TO TURN PEOPLE LOOSE WHEN THEY GET THE DNA EVIDENCE AND SEE THE WRONG PERSON HAS BEEN --.

CHIEF JUSTICE: I DON'T THINK WE ARE ARGUING OR DISCUSSING THAT PROPOSITION. THE QUESTION IS WHAT THE EVIDENCE ESTABLISHED IN THIS CASE. CAN A DEFENSE LAWYER JUST SAY IN ANY CASE WHETHER IT IS NOT DNA EVIDENCE AND THERE IS NO DISCUSSION OF WHY THE REWAS OR WASN'T, CAN THE Y JUST SAY, LOOK, THEY HAD AN OPPORTUNITY TO PUT ON DNA EVIDENCE AND THEY DIDN'T. IS YOUR ARGUMENT THAT IN ANY CASE THAT WOULD BE A PROPER ARGUMENT FOR A DEFENDANT TO MAKE KIND OF LIKE A MISWITNESS ARGUMENT?

WELL, I DON'T THINK IT IS A MISWITNESS ARGUMENT. I THINK IT IS LIKE THERE ARE NO FINGERPRINTS FROM MY CLIENT ON THE MURDER WEAPON.

CHIEF JUSTICE: THAT'S WHAT YOUR POSITION IS?

YES.

DID YOU HAVE TO ELICIT TESTIMONY EITHER ON DIRECT OR CROSS-EXAMINATION THAT THERE WAS BLOOD STILL AVAILABLE FOR TESTING IN 2004, AND THE STATE NEVERTHELESS NEGLECTED TO TEST IT?

WELL, THE STATE ARGUES --.

JUSTICE: DID YOU AT LEAST HAVE TO SHOW THAT?

THAT THERE WAS SOME BLOOD? JUSTICE: AVAILABLE FOR TESTING.

I'LL GO WITH THAT. I'LL ACCEPT THAT FOR THE PURPOSE OF THE DISCUSSION.

JUSTICE: AND WAS THAT ELICITED ON DIRECT OR CROSS-EXAMINATION THAT THERE WAS STILL BLOOD AVAILABLE FOR TESTING?

I THINK IT WAS.

JUS TICE : YOU THI NK . I THI NK T HA T M AKES A BIG D IFFE RENCE WHETHER THERE WAS OR NOT.

AND I'L L E XP LAIN I T H E R E . C OUNSEL A RGUE D THAT T HE EVI DENC E WAS N OT THE RE , B ECAUSE A ND T HE Y S AY O N PAG E 7 8 OF T HE IR ANS WE R B RI EF , T HAT T HE E VI DENCE WAS NOT A VAILABLE T O B E D NA TES TED. H OWEVER , T HA T' S N OT W HA T T HE E VIDE NC E S HO WED. T HE T ES TIMO NY THA T THEY A RE R EFERRI NG T O O N PAG E 7 8 I S T HAT T HERE W AS NOT E NOUG H BLO OD L E F T T O T ES T F OR B LOOD G ROUPINGS O N ALL O F THE S AMPLES. B LOOD GRO UP IN G. S O I F THE RE I S N OT E NOUG H L E F T T O T ES T F OR B LOOD G ROUPINGS WHICH I BEL IEVE T AKES M OR E O F A S AM PL E T HE N T HE S IN GL E HAI R O R THE S INGLE CEL L O R WHA TEVER IT TAK ES F OR D NA T HAT' S N OT E VIDE NC E, I MEA N T HA T' S EVIDENCE THAT T HERE WAS S OM E S AMPLE L E F T B UT N OT E NOUG H TO D O T HE B LO OD GRO UP INGS AND I T H I N K E V E R Y B O D Y K N O W S T H A T I T O N L Y T A K E S A L I T T L E T I N Y B I T O F B L O O D O R HAI R O R A NYTH ING ELSE T O T ES T F OR D NA. S O T HERE WAS E VI DE NC E THAT T HERE I S E NOUG H FOR D NA TES TING .

JUSTICE: WAIT A MINUTE. SO WHAT WAS THE E VIDE NC E THAT THERE WAS E NOUG H B LOOD T O DO THE D NA T ESTI NG T HA T YOU ARE T AL KI NG ABOUT?

T HA T THE T ES TIMO NY T HA T THE RE W ASN' T E NOUG H T O D O B LOOD G RO UP IN G T ESTI NG IMP LIED T HAT T HERE W AS SOM E L E F T AND T HE RE B EING S OM E L E F T I T H I N K I S E NOUG H , B ECAUSE I T H I N K T HA T EVERYBODY K NOWS IT O N L Y T A K E S T HE T INI E ST A MOUN T O F A NY S ORT O F B OD Y TIS SU E T O T EST F OR DNA . CHIE F J USTICE: NOW , Y OU SAV ED A LOT O F T IM E F OR R EBUT TAL BUT YOU ARE S UBST ANTIALLY IN THE TIME Y OU SAV ED . I'L L C LOSE THE N O N THE D IREC T B Y S AY IN G THA T T HE S TATE I MP RO PERL Y A RG UE D A BOUT T HE D EF ENSE L AST-MI NUTE C ON CESSION A BOUT T HE M URDE RS BEI NG P REME DITATED. I BEL IEVE T HE Y ASK ED THE J URY T O Q UE ST IO N W HY T HE D EFEN DANT DID NOT PUT O N EVIDENCE AND ERR ON EOUS LY S HIFTED T HE B URDE N O F PROOF . I T H I N K T HA T --. CHIEF JUSTICE: ON T HA T ARGUMENT, THOUGH , DID IN T HE C LOSING , D ID T HE DEF EN SE C ONCE DE T HAT IT W AS P REME DITATED?

YES.

CHIEF JUS TICE: ALL RIGHT. S O W ASN' T THA T A LL THA T THA T A RGUM ENT SOU GHT T O DIS CUSS , WHICH IS THAT , Y OU K NO W , H ERE W E ARE PUT TI NG O N P REME DITATED M URDER A ND NOW THEY ARE C ON CEDING I T? NO , I T W AS JUS T C AS T THE D EFENSE IN A B AD L IGH T B Y S AYI NG W HY DID N' T W E HEAR THAT TWO WEE KS A GO A T T HE B EGINNING OF T HA T TRI AL A ND IT WAS ASK IN G , P UT TI NG T HE B URDEN O N T HE D EFEN DANT . CHIEF JUS TICE: DID THE TRIAL C OURT SUSTAIN T HAT OR DID T HEY O VERR UL E T HA T?

I T WAS OVE RRUL ED . THE S TA TE SAY S T HERE W AS N O C LEAR R ULI NG O N I T , I B ELIE VE , B UT I W IL L P OI NT T O I T A T THE MOV E F OR M IS TRI AL A ND THE C OU RT SAI D , I' M N OT S USTAINI NG T HA T O B JEC TION E XC EP T FOR I THINK IT S AID S OM ETHI NG L IK E UNT IL YOU D ON'T G O DOW N T HA T R OAD O R S OMETHI NG BUT I' M N OT SUSTAINI NG THAT O B JEC TION SO T HE COU RT I S OVE RRUL I NG THE O B JEC TION . T HANK Y OU V ERY MUCH A ND I ASK T HAT T HE COURT REV ER SE AND DISCHARGE T HE D EFEN DANT . MA Y I T P LEASE T HE C OURT. S AN DR A J AGGA RD , A S S IS TANT A T TORNE Y G ENERAL O N B EHAL F OF THE STATE. WITH REGARD TO J USTICE C ANTERO'S QUESTION ABOUT THE EVIDENCE REGAR DI NG D NA , THA T W AS E LICI TE D O N C ROSS I F Y OU L OOK A T P AG E 2 02 9 T HE L AS T Q UESTION ON THE PAG E. I PRESUME B AC K I N '90 E I THE R D NA W ASN' T A ROUN D O R IT WAS C ERTAINLY MORE EXP EN SI VE THAN IT IS N OW . I S THAT C OR RECT ? T HE ANS WE R A T THE T OP O F 2 03 0 : D NA W AS A ROUN D , W E HAD N OT YET V ALID ATED I T H E R E I N DA DE C OUNTY . SO T HE RE WAS N O E VI DENC E P RE S E N T E D T HAT THE DNA WAS N OT D ONE B ECAU SE I T W AS E XPEN SIVE , AND T HE E VIDE NC E P RE SE NT ED THE DEF EN SE THE MSEL VE S ELI CI TE D F RO M THE C RIME S CE NE T ECHN ICIA N

THAT CONTAINERS THAT HAD HELD BLOOD SAMPLES WERE NOW EMPLOYED BECAUSE THEY HAD BEEN CONSUMED, AND THE REWAS TESTIMONY FROM THE SEROLOGIST THAT HE COULD NOT EVEN CONDUCT ALL OF THE TESTING HE WANTED BECAUSE THE TESTING CONSUMED THE SAMPLE AND THERE WAS NO MORE SAMPLE LEFT TO CONTINUE HIS TESTING SO THERE WAS NO EVIDENCE THAT WE COULD, THAT WE DIDN'T DO THE TESTING IN '90 BECAUSE IT WAS EXPENSIVE AND THERE WAS NO EVIDENCE TO SUGGEST THAT WE STILL HAD SAMPLES LEFT. IN FACT, THE EVIDENCE THAT WAS PRESENTED SUGGESTED WE DIDN'T, AND YET THE DEFENSE GOT UP IN CLOSING AND SAID YOU HEARD FROM ALPizar today, DNA IN 2000 ALL THE YHAVE TO DO IS SUBMIT IT. THAT IS WHAT GETS THE OBJECTIONS SUSTAINED BECAUSE THAT IS NOT ONLY SUPPORTED BY THE EVIDENCE BUT IS ACTUALLY CONTRARY TO THE EVIDENCE. AFTER THAT OBJECTION IS SUSTAINED THE DEFENSE THEN COMMENTS HE TESTIFIED HIS STUFF WAS NOT DNA TESTED SO THE JURY KNEW WE DIDN'T DO DNA TESTING. THE PROBLEM WAS WHEN HE GOT UP AND MADE COMMENT THAT WERE CONTRARY TO THE EVIDENCE ABOUT WHY IT WASN'T DNA TESTED AND BECAUSE THEY WERE CONTRARY TO THE EVIDENCE, THE TRIAL COURT PROPERLY SUSTAINED THAT OBJECTION. WITH REGARD TO THE PEN REGISTER, THE WAY YOU GET A PHONE BOOK, A PHONE BILL IS BECAUSE THE PHONE COMPANY HAS PENREGISTERS ON THE LINE. CALLERID IS A PENREGISTER THAT RECORDS THE INCOMING CALLS AS OPPOSED TO THE OUTGOING CALLS. THERE WAS NO NEED FOR AN EXPERT TO TESTIFY ABOUT A PHONE BILL AND BEFORE THE 9TH CIRCUIT IN A PUBLICLY HEARD DECISION SAID THE REWAS NO NEED TO HAVE AN EXPERT TESTIFY ABOUT A PEN REGISTER. THAT IS THE ONLY DECISION THE STATE WAS ABLE TO FIND THAT EVEN DISCUSSES THE MATTER. THE CASES THAT MY OPPONENT SUGGESTED TO YOU DO HOLD THAT WAS A CASE IN WHICH AN OFFICER HAD ACTUALLY GIVEN AN OPINION ON THE RELIABILITY OF A PEN REGISTER. DETECTIVE REYES WAS NEVER ASKED HIS OPINION ON THE RELIABILITY OF THE PEN REGISTER. HE JUST IDENTIFIED IT. THERE IS NO BUT TO NON THE PEN REGISTER THAT YOU PUSH. THE BUTTON IS ON THE PHONE WHICH IS THE LAST NUMBER DIALED BUTTON. WITH REGARD TO THE DOUBLE JEOPARDY ARGUMENT THERE WAS NO DOUBLE JEOPARDY. THERE WAS NO LAW ON REMEDIATION AND NO LAW ON FELONY MURDER. THERE WAS A DETERMINATION THAT THE THEORY WAS LEGALLY INSUFFICIENT BECAUSE OF THE CHANGE IN THE DEFINITION OF BURGLARY THAT OCCURRED IN THE INITIAL APPEAL IN THE CASE, AND THE PROBLEM WITH THAT BECAUSE THAT. CHIEF JUSTICE: FRANKLY THE ISSUE THAT WAS RAISED LAST IS THE ISSUE THAT I'M MOST CONCERNED WITH, AND IT IS A SERIES OF THINGS - - IT IS A SERIES OF THINGS. IT HAS BEEN AWHILE SINCE THE PROSECUTOR HAS REALLY BEEN STEPPING OVER THE LINE, AND THE TRIAL JUDGES STARTED RECOGNIZING THAT, AND JUST SOME OF THE THINGS THAT HAPPENED AT SIDEBAR WHERE THE PROSECUTOR IS TALKING ABOUT SOMEONE BEING A LOAD OF CRAP AND LUDICROUS AND THINGS I AM SURE YOU JUST CRINGE.

THEY CERTAINLY WEREN'T SAID IN FRONT OF THE JURY AND COULD NOT POSSIBLY HAVE AFFECTED ANYTHING. CHIEF JUSTICE: LET'S GO THROUGH. IT DOES SEEM THAT SHE SAYS AND THE COMMENT I'M CONCERNED WITH IS THAT IT IS ALL WELL AND GOOD FOR HIM TO STAND UP NOW AFTER WE HAVE BEEN IN TRIAL FOR TWO AND A HALF WEEKS AND TELL YOU, YES, THESE ARE HORRIBLE REMEDIATED MURDER BUT THE PROBLEM IS TWO AND A HALF WEEKS AGO I DIDN'T HEAR THAT CONCESSION AND THEY DON'T HAVE TO CONCEDE ANYTHING. THERE IS AN OBJECTION, AND THE JUDGE HAS A WHOLE LONG SIDEBAR AND THAT'S WHERE THERE IS A LOAD OF CRAP COMMENT, AND THEN THE JUDGE SAID, YOU KNOW, I DON'T THINK THAT I DID DO THAT. THE JUDGE SAYS YOU CAME CLOSE TO IT. THE MOTION IS DENIED BUT I'M NOT SUSTAINING THE OBJECTION EXCEPT TO THE EXTENT I DON'T WANT YOU TO PURSUE ANYTHING THAT WOULD SUGGEST A BURDEN. SO IT DOESN'T SEEM THAT THE JUDGE DID SUSTAIN THE OBJECTION TO, WOULD YOU AGREE WITH THAT, THAT THE JUDGE DID NOT SUSTAIN THE OBJECTION?

I WOULD AGREE THAT THE JUDGE SEEMS TO HAVE BEEN ALL OVER THE PLACE ABOUT WHAT

HE WAS RULING BECAUSE HE B O T H SAYS I 'M NOT SUS TAIN IN G THE O BJECTI ON BUT P RO SECU TO R I'M ADM ONISHI NG YOU , WHI CH I S W HY I S UGGE STED THA T T HERE IS N O DIS TINC T RULIN G O VERRUL E !!IN G . CHIE F J US TICE: AND T HE N THE PROSECU TO R FOL LOWS U P A ND S AYS THA T THE COU NSEL SAYS I WENT THROUGH A P IL E OF EVIDENCE A ND T HA T D OESN 'T PROVE THE D EF ENDANT DID I T , A ND THE N S HE S AY S I WOU LD S UBMI T T O Y OU THE DEF EN SE I S N EV ER S ATIS FI ED WIT H A NYTHING I N A C RI MI NA L C ASE.

AND T HA T OBJ ECTI ON I S S USTAIN ED . CHIEF J USTICE: T HAT'S S USTAINED , AND A T T HA T POI NT T HEY ARE ASK IN G FOR A M OTIO N F OR M IS TR IA L , RIG HT ? AND THE N I T B ECOM ES THE IR BUR DE N T O S HO W A N ABS OLUT E N ECESSITY T HA T DEP RI VE D HIM OF A FAI R T RIAL AND N OT M Y BURDEN T O S HOW. T HE P ROBL EM WIT H C ONSI DE RING T HI S A S A C OM MENT THA T S HI FTED T HE BUR DE N I S YOU H AVE T O REM EMBER T HI S C AS E W AS TRIED ORI GINA LL Y ON T HI S S EL F- DEFENSE T HEORY T HAT TH E DEFENDANT WAS THERE FOR A B USINES S MEE TING . T HE DEF ENSE VOI R D IR ES O N T HAT. THEY DON'T D O A N O PENING A ND THE Y GO T HR OU GH AND DUR ING T HE S TATE 'S CAS E THE Y PRESENT EVIDENCE TO S HOW THERE WAS S OME STRUG GLE BETWEEN THE V IC TI M A ND THE DEF ENDA NT A ND T HE N HAV IN G P RESENT ED E VIDENCE THEY ARE NOW IN THE MIDDLE O F T HE S ANDW ICH CLO SING AND THE STATE HAS G ON E T HR OU GH ARG UI NG D URING I TS I NITIAL C LOSING A RGUM EN T T HA T W E P RESE NTED AMP LE EVI DE NC E T HA T THIS W AS N O SEL F D EFENSE, T HA T T HI S WAS A P REMEDITATE D M URDE R BEC AUSE LOOK AT A LL OF THESE HORRIBLE INJURIE S TO THE SE PEOP LE. YOU DON'T SHOW U P WITH A GUN W IT H A SER IA L NUM BE R , A LL O F T HIS A ND T HEN ALL OF T HE SUDDEN THE D EFEN SE G ETS U P IN THE IR CLO SING ARG UMENT A ND S AY S I D ON'T KNO W W HY S HE P RE SENT ED , THE REA SO N S HE P RESE NTED T HA T C RI ME S CENE E VIDENCE T O Y OU IS N OT TO S HO W PRE ME DI TATI ON B UT T O C ONVINCE Y OU THA T T HI S WAS A H ORRIBL E CRIME AND Y OU N EED T O C ON VICT SOM EBOD Y . A ND SHE H AD N O P URPO SE I N THA T. OF C OURS E T HI S I S A P REME DITATED M URDE R S O W HA T SHE IS DOING I S SHE IS GET TING UP AND R ES POND IN G T O T HA T AND S HE S TA RT S OUT T HA T COMMENT BY SAYING I'M T HE ONE WITH THE BURDE N OF P ROOF . AND I HAD T O S HO W Y OU TH I S W AS A P RE ME DI TATE D M URDE R A ND THA T' S W HY I P RE SENT ED A LL OF T HIS EVIDENCE TO YOU ABOUT IT BEING A P RE ME DITATED M URDER , A ND NOW H E S AY S I S HO UL D N EV ER H AVE DON E THA T BEC AUSE I D IDN' T N EED T O P RO VE P RE ME DI TATION AND THE PROBLEM IS I H AD N O IDE A THA T WAS GOI NG T O BE T HE C AS E I S W HA T SHE I S B ASICALLY S AYING. I HAD TO DO THIS. I HAD T HE BUR DE N OF P RO OF A ND A S SOON AS T HAT I S OVE R S HE TEL LS THE J UR Y A GA IN I 'M T HE ONE W IT H T HE BUR DE N O F P ROOF. IT NEVER SHI FTED THE BUR DEN OF P ROOF, AND THE B RIEF C OMMENT S ABOUT THE DEF ENSE N EV ER BEI NG S AT ISFI ED DOE S NOT CREATE A N ABS OL UT E NEC ESSITY F OR A M ISTR IA L . U NLESS THE COU RT HAS ANY F URTH ER QUE ST IONS , THE S TATE W ILL R ES PECT FU LL Y R EQUEST T O AFFIRM.

CHIEF JUSTICE: T HANK YOU . I W OU LD LIK E T O S PEND A M INUTE O R T WO TAL KIN G ABO UT THE H ARMF ULNE SS O F THE E RRORS H ER E , BEC AUSE - - . J US TICE: FIRST CAN YOU RESPOND T O YOU R O PP ONEN T' S A RGUMEN T J US T NOW THAT T HE PRO SE CU TOR 'S COM ME NTS HERE IN CLOSING WERE A REA CT IO N T O THE D EFEN SE C OUNSEL'S C OMMENT S A ND K IN D O F I MPUGNING THE M OTIV ES O F T HE P RO SECUTO R I N P RESE NT IN G A LL OF TH I S EVIDENCE O F P REME DI TATION WHEN IT W AS THE S TA TE'S BURDE N TO D O S O? W HY W ASN' T T HA T FAI R C OMMEN T ? WEL L , BECAU SE H E G OE S B AC K AND ASK S T HE QUE ST IO N WHY D IDN' T W E H EA R A NY EVIDENCE FROM THE - - W HY D IDN' T W E H EAR SOM ETHING FROM THE DEFENDANT WHEN THE DEFENDANT HAS NO BURDE N T O P RO DUCE ANYTH ING OR M AK E ANY ARGUMENT OR MAKE ANY C ONCE SSION.

CHIEF JUSTICE: AT T HA T POI NT I S W HE N THE RE I S A S IDEBAR THAT T HE J UDG E SAY S D ON'T GO INT O I T ANY F URTH ER AND THE P ROSE CUTO R DOE S NOT . T HE P ROSE CU TO R E XP LA IN S ONCE A GA IN T HA T I T I S H ER BURDEN. S O A ND THE N T HE OTH ER C OMMEN T T HAT I W AS C ONCE RNE D A BOUT T HA T THE DEF EN SE I S NEV ER S ATIS FIED WITH ANYTHING IN A C RI MI NA L C AS E , T HAT O BJECTI ON WAS SUS TAINED. I T W AS , B UT THE M IS TR IA L W AS D EN IE D

A ND T HA T' S WHY I W AN TE D T O DIS CU SS H ARMFUL NESS OF THE E RR OR , B ECAU SE I --.

J USTICE : H ELP M E O UT F IRST B EFOR E YOU G ET I NT O THAT. AT O P E N I N G S T A T E M E N T , W H A T D I D T H E D E F E N D A N T P R E S E N T A S T H E I R D E F E N S E , I F A N Y ? W H A T W A S I T G O I N G T O B E ? W A S I T S E L F D E F E N S E ?

I D O N ' T R E M E M B E R . I D O N ' T R E M E M B E R T H E O P E N I N G S T A T E M E N T O R A N Y I S S U E A B O U T T H E O P E N I N G S T A T E M E N T . J U S T I C E : T H E N H O W W A S I T R E S P O N D E D T O O V E R T H E T W O W E E K S O F T H E T R I A L ? W A S T H E D E F E N S E W E W E R E N ' T T H E R E , H E D I D N ' T D O I T , O R I T W A S S E L F D E F E N S E ? N O , I T I S T H E S T A T E D I D N ' T P R O V E I T S C A S E B E Y O N D A R E A S O N A B L E D O U B T W A S T H E D E F E N S E . C H I E F J U S T I C E : S O I T S E E M S P R E T T Y , L E T ' S J U S T M A K E S U R E . T H E R E I S A P R E T T Y B I G D I F F E R E N C E B E T W E E N S E L F D E F E N S E , W H I C H W A S T H E F I R S T C A S E , T H E F I R S T T R I A L . I W A S T H E R E , A N D W H O E V E R D I D T H I S H O R R I B L E M U R D E R I T W A S N ' T M E . A R E Y O U T E L L I N G M E A S T H E A P P E L L A T E A T T O R N E Y Y O U D O N ' T R E M E M B E R W H A T T H E D E F E N S E W A S D U R I N G A T W O - W E E K T R I A L ? N O , B U T M Y M E M O R Y O F W H A T H A P P E N E D I N T H E T R I A L A N D M Y P E R S O N A L K N O W L E D G E A B O U T W H A T T H E T R I A L S T R A T E G Y W A S I S F R O M T A L K I N G T O T R I A L C O U N S E L I S B L U R R I N G T O G E T H E R S O I F E E L U N C O M F O R T A B L E A B O U T M I S S I N G A N Y T H I N G B E C A U S E I T H I N K I M A Y - - . J U S T I C E : L E T M E A S K Y O U A Q U E S T I O N W I T H R E F E R E N C E T O Y O U R F A M I L I A R T I W I T H T H E R E C O R D , T H O U G H . C A N Y O U T E L L U S W H E T H E R T H E R E I S A N Y T H I N G E L S E I N T H E R E C O R D , Y O U K N O W , T H A T W E H A V E A N D I N D I S C O V E R Y O R O T H E R W I S E W I T H R E F E R E N C E T O T H E A V A I L A B I L I T Y O F A B L O O D S A M P L E F O R D N A T E S T I N G A T T H E T I M E O F T H E T R I A L ? I S T H E R E A N Y T H I N G E L S E I N T H E R E C O R D B E S I D E S W H A T Y O U A L L H A V E Q U O T E D T O U S I N Y O U R B R I E F S ?

N O , J U S T I D O N ' T R E M E M B E R A N Y T H I N G . W H A T I A M T H I N K I N G I S T H A T T H E T E S T I M O N Y W A S T H A T T H E B L O O D S A M P L E W A S N O T E N O U G H T O D O T H E S E O T H E R T E S T S , A N D A S S O M E O F T H E T H I N G S W E R E E M P T I E D B U T T H A T I M P L I E S T O M E T H A T O T H E R S W E R E N O T E M P T Y , B U T T H E R E W A S N O T E N O U G H B L O O D T O D O A L L O F T H E T E S T S T H A T H E W A N T E D . H E D I D N ' T W A N T T O D O D N A T E S T I N G B U T T H E R E W A S N O T E N O U G H T O D O O T H E R K I N D S O F T E S T I N G S O T H A T ' S E V I D E N C E T O M E T H A T T H E R E W A S B L O O D I N T H E R E , A N D I T H I N K I T I S E N O U G H T O W O U L D B E E N O U G H B L O O D T O D O D N A T E S T I N G O N . J U S T I C E : I T C O U L D H A V E B E E N A S K E D D I R E C T L Y , C O U L D I T N O T , W H I L E D E F E N S E C O U N S E L W A S Q U E S T I O N I N G T H E T E C H N I C I A N A N D P O I N T I N G O U T T H E D N A T E S T I N G W A S N O T D O N E , T H E L O G I C A L N E X T S T E P I F T H A T ' S G O I N G T O B E A P O I N T I S , W E L L , Y O U S T I L L H A V E T H E B L O O D , D O Y O U N O T , A N D Y O U S T I L L H A V E T H E P O T E N T I A L T O D O D N A T E S T I N G , B U T T H A T W A S N O T D O N E , R I G H T ? T H O S E Q U E S T I O N S W E R E N O T A S K E D ?

I D O N ' T T H I N K S O .

J U S T I C E : O K A Y .

I ' D L I K E T O J U S T P O I N T O U T O N T H E H A R M F U L N E S S O F E R R O R , I T I S N O T F I R S T O F A L L N O T H I N G I S T H E D E F E N D A N T ' S B U R D E N , O F C O U R S E , I T I S T H E S T A T E ' S B U R D E N T O C O N V I N C E T H E C O U R T T H A T T H E E R R O R W A S H A R M L E S S B E Y O N D A R E A S O N A B L E D O U B T , A N D B U T I B E L I E V E T H E S T A T E D O E S T H A T E R R O R E O U S L Y T O O O F T E N A N D I ' M T R Y I N G T O S E T T H E S T A T E R I G H T A B O U T H A R M L E S S E R R O R , A N D W E D O N O T N E E D - - T H E C O U R T D O E S N O T N E E D T O F I N D T H A T T H E V E R D I C T W O U L D P R O B A B L Y H A V E B E E N D I F F E R E N T , C O U L D H A V E B E E N D I F F E R E N T , M I G H T H A V E B E E N D I F F E R E N T . T H A T I S N O T T H E T E S T F O R H A R M F U L E R R O R . T H E T E S T U N D E R T H E D I G U I L I O C A S E I S N O T T H A T . I F T H I S E R R O R W A S L I K E A B R I C K I N T H E W A L L O F T H E V E R D I C T , I T A F F E C T E D , I T C O N T R I B U T E D T O T H E V E R D I C T E V E N I F Y O U T A K E T H A T B R I C K O U T , T H E W A L L I S S T I L L G O I N G T O S T A N D . E R R O R D O E S N O T C O N T R I B U T E T O T H E V E R D I C T W H E N I T I S O N S O M E T H I N G T H A T I S T O T A N G E N T I A L T O I T . I T I S N O T L I K E A B R I C K T H A T T H E J U R Y P U T S I N T H E W A L L O F T H E V E R D I C T .

JUSTICE: ACCORDING TO THAT THEORY ANY MISTAKE WOULD BE HARMSFUL BECAUSE EVERYTHING IS A BRICK.

NO, AND THE EXAMPLE I GIVE IS THAT IF SOMETHING IS SO FAR AWAY FROM BUILDING THE CASE AGAINST THE DEFENDANT THAT THE JURY COULD SEE AND DISREGARD AND SAY THAT IS NOT GOING TO ENTER INTO OUR THINKING. THAT IS NOT A BRICK THAT IS A ROUND ROCK AND THAT DOES NOT GO INTO THE WALL. THAT DOES NOT ENTER INTO OUR THINKING THEN IT DOES NOT CONTRIBUTE TO THE VERDICT, BUT HERE ALL OF THESE THINGS CONTRIBUTE TO THE VERDICT AND JUST REALLY QUICKLY ON THIS, THERE IS NO NEED TO PROVE OR TO THINK THAT THE VERDICT WOULD HAVE BEEN DIFFERENT BECAUSE IF A VERDICT WOULD HAVE BEEN DIFFERENT THEN THAT ERROR SUBSTANTIALLY CONTRIBUTES TO THE VERDICT. EVERYBODY AGREES, I HOPE, THAT IF THE VERDICT WOULD HAVE BEEN DIFFERENT THE ERROR SUBSTANTIALLY COULD DO IT. IT MUST HAVE BEEN BECAUSE IT TOOK IT FROM A GUILTY VERDICT TO A NOT GUILTY VERDICT. THAT SUBSTANTIALLY CONTRIBUTES. THE KNOWLEDGE FROM THIS COURT REJECTED THE IDEA THAT THE ERROR HAS TO SUBSTANTIALLY CONTRIBUTE TO THE VERDICT. IT JUST HAS TO CONTRIBUTE, THEREFORE THIS ERROR WAS HARMFUL EVEN IF THE VERDICT WOULD HAVE BEEN THE SAME WITHOUT IT, AND I WOULD ASK THAT THE COURT REVERSE IT. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU. THE COURT WILL TAKE THIS CASE UNDER ADVISEMENT AND