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Richard v. Rhodes v. State of Florida

SC04-31

>> ALL RISE.

OUR FINAL CASE ON THE
THIS MORNING IS ROSE V.
STATE OF FLORIDA.

>> I'M TERRY BACKUS
REPRESENTING RICHARD RHODES,
JR. IN MY CASE.

I AM GOING TO ADDRESS TWO
CASES.

FIRST CONCERNING THE FALSE
TESTIMONY OF FBI AGENT MICHAEL
MALONE AT THE GUILT PHASE,
WHICH WAS IN 1984, THE SECOND
ISSUE IS INEFFECTIVE ASSISTANCE
OF COUNSEL AT RESENTENCING.

THAT OCCURRED IN THE
EARLY 90s, AND WERE TWO
SEPARATE PROCEEDINGS, SO I'LL
BE REFERRING TO DIFFERENT JURY
RECOMMENDATIONS.

I'LL DO MY BEST TO TRY TO KEEP
IT FROM BEING TOO CONFUSING.

>> LET'S GO INTO THE FIRST ONE.

WASN'T THERE REALLY A FALSE
STATEMENT IN THE FIRST ONE?

>> YES.

>> AND THEN WAS THERE THE
FALSEHOOD OF THE KNOWLEDGE OF
THE STATEMENT?

>> YES.

>> AND WHY DON'T YOU EXPLAIN
THAT IN SOME DETAIL FOR US.

>> WELL, THE FALSE TESTIMONY
WAS PRETTY MUCH THROUGHOUT
AGENT MALONE'S TESTIMONY.
FIRST OF ALL, HE TESTIFIED THAT
HE TESTED EACH AND EVERY STRAND
OF HAIR THAT WAS SUBMITTED TO
HIM BY THE PINELLAS COUNTY
STATE ATTORNEY'S OFFICE.

HE NOT ONLY TESTIFIED TO THAT
AT THE TIME OF TRIAL, HE
TESTIFIED TO IT AGAIN AT
RESENTENCING, AND LET ME TELL
YOU WHY THAT'S IMPORTANT.

THIS IS ONE OF THE EXAMPLES OF THE EXHIBITS THAT, THAT AGENT MALONE WAS IDENTIFYING AT TRIAL. THE FACT OF THE MATTER IS THAT HE DIDN'T TEST THIS EXHIBIT NOR ANY OF THE EXHIBITS THAT HE IDENTIFIED AND WERE ADMIT UNDER TO EVIDENCE AT THE TIME OF TRIAL.

>> LET ME ASK A QUESTION.

>> NONE.

>> LET ME ASK A QUESTION ON THAT.

ON THE RECORD PAGE 1877, HE WAS ASKED BY THE STATE, YOU INDICATED THAT ALL THE HAIRS FOUND THAT WERE GIVEN TO YOU FROM COMBING AROUND THE VICTIM'S BODY.

>> YES.

>> WERE THE VICTIM'S HAIR.

>> UH-HUH.

>> YOU ARE SAYING THAT THERE'S OTHER TESTIMONY THAT TALKS ABOUT -- CLARIFY THAT FOR ME.

>> ACTUALLY I WAS CONFUSED ABOUT THAT SO I WANTED TO MAKE SURE WHEN I EXAMINED HIM DURING THE POST-CONVICTION HEARING THAT I WAS COMPLETELY CRYSTAL CLEAR ON WHAT HE WAS SAYING. I ASKED HIM THREE OR FOUR TIMES, IS IT YOUR TESTIMONY THAT YOU TESTED EACH AND EVERY STRAND OF HAIR THAT WAS SUBMITTED TO YOU BY THE PINELLAS COUNTY STATE ATTORNEY'S OFFICE, AND THE SHERIFF'S DEPARTMENT, AND HE ANSWERED THE QUESTION YES ON THREE OR {R} OR FOUR OCCASIONS.

>> ARE WE GETTING DOWN NOW TO THE SOME OF THEM WERE CRUSHED OR WERE UNABLE TO BE EXAMINED?

>> THAT WAS HIS TESTIMONY. THAT WAS HIS TESTIMONY AT THE EVIDENTIARY HEARING THAT HE WAS MISTAKEN AND THAT SOME OF THE HAIRS THAT HE IDENTIFIED IN HIS REPORT AS HAVING BEEN TESTED BY HIM WERE IN FACT NOT SUFFICIENT FOR COMPARISON.

THE PROBLEM WITH THAT TESTIMONY IS THAT IN ORDER FOR HIM TO MAKE THAT DISTINCTION, WHETHER IT WAS INSUFFICIENT FOR THE COMPARISON, HE HAS TO MOUNT THE HAIRS ON A GLASS SLIDE WITH A PERMANENT MOUNT SOLUTION, AND LOOK AT IT THROUGH A STEREOSCOPE, WHICH IS BASICALLY TWO MICROSCOPES SIDE BY SIDE.

THAT WAS HIS TESTIMONY AT TRIAL.

THAT WAS HIS TESTIMONY AT THE EVIDENTIARY HEARING.

THAT'S THE ONLY WAY HE CAN DETERMINE WHETHER A HAIR IS SUITABLE FOR COMPARISON.

THE FACT OF THE MATTER IS THAT ALL OF THE EXHIBITS HE IDENTIFIED AT TRIAL WERE IN A FORM THAT WAS NOT ON GLASS SLIDES.

THEY WERE INSTEAD IN THIS FORM.

EITHER CLUMPS OF HAIR IN ZIP LOCK BAGS OR THEY WERE SINGLE STRANDS IN SMALLER ZIPLOC BAGS.

>> ANSWER JUSTICE BELL'S QUESTION.

HAVE YOU FULLY ANSWERED JUSTICE BELL'S QUESTION ABOUT WHERE THAT TESTIMONY WAS IN THE RECORD THAT HE WAS ASKING FOR.

>> YES, I THINK I CITED FOR IT EXTENSIVELY IN THE INITIAL BRIEF WHEN HE TESTIFIED IN THE EVIDENTIARY HEARING AND WHEN I SIT DOWN BEFORE MY REBUTTAL I WILL DIG OUT THE PAGE NUMBERS.

>> NO, I WAS ASKING AT TRIAL.

>> PARDON ME?

>> THE QUESTIONS THE TESTIMONY AT TRIAL.

>> YES.

>> AND HE WAS ASKED BY THE STATE WHETHER HE TESTIFIED WHETHER HE TESTED THE HAIR COLLECTIVE FROM -- COLLECTED FROM AROUND THE VICTIM'S BODY.

BUT WAS THERE OTHER TESTIMONY
AT TRIAL.

>> YES.

>> THAT WAS --

>> IF YOU LOOK AT PAGE, WELL,
1873, HE SAID ALL, AND I'M, I'M
LOOKING AT THE THIRD PARAGRAPH,
HIS ANSWER, ALL OF THE UNKNOWN
HAIRS FROM THE VICTIM WERE FROM
THE AREA WHERE THE VICTIM WAS
FOUND TURNED OUT TO BE EITHER
HER HAIRS OR THEY WERE HAIRS
THAT WERE BASICALLY NO G. THEY
WERE JUST HAIR FRAGMENTS AND
THEY COULDN'T BE ASSOCIATED TO
ANYBODY.

SO AGAIN, THE BOTTOM LINE AS
FAR AS THE HAIR FROM THE VICTIM
OR THE AREA WHERE SHE WAS FOUND
IS THAT THERE WERE NO FOREIGN
HAIRS AT ALL.

>> AND DID YOU ESTABLISH THAT
AT THE EVIDENTIARY HEARING THAT
THERE WAS HAIR AROUND THAT WAS
OTHER THAN THE VICTIM'S, OTHER
THAN THE ONE THEY COULDN'T
IDENTIFY?

>> THAT HE TESTIFIED TO?

--

>> OR SOMEBODY ELSE.

>> I THINK --

>> I'M MOVING A LIT BIT MORE
TO THE PREJUDICE OR THE
QUESTION HERE.

>> SURE.

CERTAINLY THERE WERE OTHER
HAIRS IN THE AREA.

I MEAN, IT WAS, IT WAS THE
DEMOLITION OF A HOTEL IN WHICH
THE BODY WAS FOUND.

AND CRIME SCENE TECHNICIANS DID
TESTIFY AT TRIAL HOW THEY
GATHERED THE HAIR AND THEY SAID
THAT THEY GATHERED HAIR
EITHER THAT WAS IN HER HANDS OR
IMMEDIATELY ON HER BODY OR VERY
NEAR TO HER BODY.

AND I BELIEVE THAT THOSE WERE
THE EXHIBITS THAT HE WAS
IDENTIFYING AT THE TIME OF
TRIAL AS THOSE THAT HE TESTED.

BUT THE FACT OF THE MATTER IS,
HE DIDN'T TEST ANY OF THEM.

WHAT HAPPENED, I THINK, WAS THAT -- HE DIDN'T TEST ANY OF THEM.

>> NONE OF THE EXHIBITS THAT WERE ADMITTED AT TRIAL NONE OF THEM THERE WERE GLASS SLIDES, A NUMBER OF GLASS SLIDES IN THE CUSTODY OF THE PINELLAS COUNTY SHERIFF'S OFFICE THAT WERE RETURNED FROM THE FBI. THOSE WERE THE HAIRS THAT HE TESTED.

AND HE TESTIFIED AT THE EVIDENTIARY HEARING THAT HE TESTED ABOUT 63 HAIRS.

THERE WERE HUNDREDS AND HUNDREDS OF HAIRS THAT HE IDENTIFIED AT THE TIME OF TRIAL AS BEING THOSE HE TESTED.

AND IT WAS SIMPLY NOT TRUE.

>> DID YOU PRESENT ANY EVIDENCE THAT, THAT TESTS ON THESE HAIRS WILL COME TO SOME OTHER CONCLUSION THAT IT WAS EITHER, THAT THE DEFENDANT COULD'VE BEEN EXCLUDED AS ONE OF THE HAIRS OR THAT IT BELONGED TO SOMEBODY ELSE?

>> SURE.

WELL, I, I TRIED TO DO IT TWO WAYS.

FIRST OF ALL, I ATTEMPTED TO HAVE DNA TESTING DONE TO ACTUALLY MAKE THAT DEFINITIVE DETERMINATION EXACTLY WHAT WAS HAPPENING.

THE JUDGE GRANTED THE DNA MOTION, AND DNA TESTING WAS CONDUCTED BY FDLE.

HOWEVER, WHEN THE RESULTS CAME BACK, WE WEREN'T GIVEN THE OPPORTUNITY TO DEPOSE THE FDLE PERSON TO FIND OUT EXACTLY WHAT SHE DID --

>> WHAT DID THE DNA TESTS SHOW.

>> WELL, THAT WAS NEVER ADMIT UNDER TO EVIDENCE AT THE EVIDENTIARY HEARING, SO THAT'S ONE OF THE PROBLEMS IS THERE WAS NO ADVERSARIAL TESTING OF THE REPORT AT ALL.

>> DID YOU RECEIVE --

>> IT WAS INCONCLUSIVE.

>> MA'AM, DID YOU RECEIVE THE REPORT --

>> I DID.

IT WAS INCONCLUSIVE.

>> AND THAT'S WHY THERE WAS NO EVIDENCE PRESENTED AT THE EVIDENTIARY HEARING BECAUSE IT DIDN'T HELP --

>> EXACTLY BECAUSE WE DID OUR BEST TO TRY TO MAKE THEIR -- BEST TO TRY TO MAKE THAT DETERMINATION, HOWEVER, ONE OF THE POINTS THAT I MADE AT THE EVIDENTIARY HEARING WAS TO ACTUALLY HAVE THE CLERK OF COURT BRING THE EXHIBITS IN TO SHOW THE JUDGE EXACTLY WHAT WE WERE TALKING ABOUT.

ONE OF THE THINGS, JUST ON A VISUAL EXAMINATION WAS THE HAIR THAT WAS THE SUBJECT OF THE BRADY CLAIM, THAT DISCLOSURE AT THAT TIME, THE HAIR THAT WAS CLUTCHED IN HER HAND WAS A BLONDE HAIR & IT WAS IN A PETRI DISH AND I SHOWED IT TO THE JUDGE, AND THE DEPUTY CLERK TESTIFIED TO THE HAIR, AND WHAT COLOR IT WAS AND WHAT CONTAINER IT WAS IN.

AND I DID SHOW THAT IN THE BOOKING PHOTOS OF RICHARD RHODES AND REALLY AND THERE WERE A NUMBER OF CONVICTION {THAT'S} DESCRIBE MR. ^RHODES FROM VERY EARLY ON IN HIS LIFE, HIS HAIR WAS ALWAYS LISTED AS EITHER BLACK OR BROWN. AND HAS ALWAYS BEEN THAT COLOR.

THE VICTIM --

>> WASN'T -- OKAY, KEEP GOING.

THAT'S THE NEXT ONE.

>> I KNEW WE WERE GOING THERE.

THE VICTIM, AS IT'S, AS IT HAPPENS, ALSO HAD BOOKING PHOTOS, AND I BELIEVE THOSE WERE AT A STATE'S EXHIBIT 5 AA, 2-5 AA.

AND IN THOSE BOOKING PHOTOS OF THE VICTIM'S HAIR IS BROWN.

AND AS YOU CAN SEE FROM THESE OTHER HUGE, THESE HUGE EXHIBITS, VERY DARK HAIR FROM THE VICTIM.

THE HAIR IN THE CLUTCHED IN THE VICTIM'S HAND IS BLONDE.

SO IMAGINE WHAT A DEFENSE ATTORNEY COULD DO WITH THAT INFORMATION KNOWING, KNOWING THAT FBI AGENT MALONE DID NOT TEST THAT HAIR.

>> WELL, WAS IT NOW -- LET ME -- SO GOING BACK TO WHAT JUSTICE CANTERO ASKED YOU, WAS THAT BLONDE HAIR, HAS IT BEEN TESTED?

>> IT WAS -- LIKE I SAID, IT WAS TESTED BY FDLE, WE HAD ADDITIONAL TESTING, BUT AT THIS POINT.

WE DON'T KNOW.

WE DON'T KNOW.

WE DON'T HAVE AN ANSWER.

>> SO WOULDN'T -- ON A WE DON'T KNOW, HOW IS THAT ENOUGH TO HAVE YOU WIN ON A ANY OF THESE CLAIMS?

>> WELL, IT IS ENOUGH BECAUSE AS I WAS ARGUING BEFORE, IMAGINE THAT THIS IS ALL WE KNOW.

THAT THERE IS A BLONDE HAIR CLUTCHED IN HER HAND, AND, AND THAT, AND THAT FBI AGENT MALONE DIDN'T TEST T. IMAGINE WHAT THE DEFENSE ATTORNEY COULD'VE DONE WITH THAT?

REMEMBER, THE JUDGE ALREADY OBJECTED AT THE TIME OF TRIAL TO, TO AGENT MALONE GOING OUTSIDE HIS AREA OF EXPERTISE.

SO IMAGINE WHAT HE COULD'VE DONE WITH THAT.

THE IMPEACHMENT THAT HE COULD'VE DONE AT THIS WITNESS AND WHAT HE COULD'VE ARGUED TO THE JURY, THIS IS ROAD.

>> RIGHT, BUT I GUESS NOW IF IT GOES BACK, IT'S THE TESTING WHICH WOULD SAY IT'S INCONCLUSIVE.

IS THAT ENOUGH THEN TO ESTABLISH

THAT IT WAS NOT HARMLESS HAIR.

IN OTHER WORDS, DO YOU LOOK BACK AT WHAT YOU MIGHT'VE BEEN ABLE TO DO WITH IT THEN, YOU KNOW, WHICH IS SOMEWHAT AGAIN, YOU KNOW, IT'S ALWAYS HARD TO GO SUPERIMPOSE NEW EVIDENCE ON AN OLD TRIAL, OR SHOULD WE LOOK AT HOW IS THIS AT ALL GOING TO EXONERATE MR.^RHODES.

>> SURE.

WELL, I THINK IF THIS CASE WERE SENT BACK, FIRST OF ALL, WE WOULD BE ABLE TO DO THE ADDITIONAL TESTING WE ASKED FOR AT THE EVIDENTIARY HEARING AND WERE DENIED.

REMEMBER, WE DIDN'T -- WE DIDN'T GET TO HAVE ANY TYPE OF ADVERSARIAL PROCEEDING AT ALL ON THIS FBI REPORT.

>> WOULDN'T THAT --

>> ON THIS FDLE REPORT, EXCUSE ME.

>> ASSUMING THAT IS A DISCREET ISSUE, WHY WOULDN'T THE BETTER COURSE, AND I'M SURE MR.^LANDRY HAVE A BETTER RESPONSE FOR THAT, BE TO SIMPLY SEND BACK RELINQUISH JUST FOR TESTING ON THAT HAIR?

>> WELL, WE COULD DO THAT TOO.

>> THAT'S A LITTLE EASIER THAN THE WHOLE --

>> I'M OPEN TO THAT AS WELL.

>> BUT THE HAIR'S ALREADY BEEN TESTED.

>> IT'S BEEN TESTED ONCE BY FDLE, BUT I DON'T KNOW --

>> INCONCLUSIVE.

>> BUT I HAVEN'T HAD AN OPPORTUNITY TO EVEN TALK TO THE FDLE ANALYST.

I HAVEN'T HAD A CHANCE TO GET MY OWN EXPERT TO LOOK AT WHAT SHE DID.

>> BUT DO YOU HAVE A RIGHT ON POST-CONVICTION TO DEPOSE THE DNA EXPERT?

ISN'T THAT WITHIN THE DISCRETION OF THE TRIAL JUDGE?

>> IT IS, AND HE DENIED THAT.

>> RIGHT.

SO WHY, AND WHY IS THAT AN ABUSIVE DISCRETION?

>> WELL, IT IS ABUSIVE DISCRETION WHEN THE WHOLE POINT OF THE, OF, I MEAN THE ONLY PRONG LEFT ON A BRADY GIG LEO CLAIM THAT IT HAS NOT BEEN CONCEDED BY THE STATE AND THE LOWER COURT IS THE PREJUDICE PRONG, AND IF THAT'S THE ONLY

--

>> EXCUSE ME.

I DON'T THINK THE STATE HAS CONCEDED THAT THE STATE PRESENTED FALSE EVIDENCE AT TRIAL.

IT MAY HAVE BEEN MISTAKEN. THEY HAVE NOT CONCEDED THAT IT WAS FALSE TESTIMONY.

>> WELL, THE LOWER COURT FOUND THAT IT WAS FALSE IN ITS ORDER.

SAID THE TESTIMONY WAS FALSE.

>> BUT THE STATE HAS NOT CONCEDED THAT.

>> NO, THE LOWER COURT HAS THOUGH, YES.

>> LET'S PLAY THE, YOU KNOW, I'M HAVING PERHAPS THE, THE ARTICULATION WHEN YOU SAID IMAGINE, YOU KNOW, WHAT THE EFFECT WOULD BE OR WHATEVER, HOW ABOUT PLAYING THAT OUT BECAUSE I WANT YOU TO ARTICULATE WHAT YOU BELIEVE TO BE THE HARMFUL EFFECTS OF WHAT OCCURRED HERE.

SO LET ME -- I'M GOING TO STATE WHAT I BELIEVE THAT, THAT YOU'RE ARGUING AND THEN HAVE YOU ARTICULATE IT BECAUSE I PROBABLY OFF BASE.

THAT IS THAT YOU'RE SAYING THAT THE STATE PUT ON AN EXPERT THAT TESTIFIED THAT THEY HAD TESTED ALL THE HAIRS.

>> CORRECT.

>> AND THAT OF ALL OF THE HAIRS TURNED OUT TO BE OF THE VICTIM AND THERE WAS ONE HAIR POSSIBLY THAT WASN'T, IT WASN'T -- YOU COULDN'T -- ANY, ANYTHING

OF ANY VALUE.

ALL RIGHT BUT THAT THE OBVIOUS VISUAL EXAMINATION OF THESE HAIRS DEMONSTRATED THAT THE HAIRS WERE NOT THE HAIRS OF THE VICTIM AND WERE NOT THE HAIRS OF THE DEFENDANT, THAT IS, THAT THAT WAS JUST BLATANTLY OBVIOUS IN THIS CASE.

>> CORRECT.

CORRECT.

>> AND THAT BECAUSE OF THIS MISREPRESENTATION, THAT THEY HAD ALL BEEN TESTED AND WERE BELONGED TO THE, THE VICTIM, WHEN VISUALLY THAT SEEMED NOT TO BE POSSIBLE.

THAT THE, THAT THE PREJUDICE TO THE DEFENDANT WAS NOT BEING ABLE TO FORCEFULLY ARGUE THAT THESE HAIRS HAD TO BELONG TO A THIRD PARTY.

>> CORRECT.

>> AND IS THAT WHERE YOU ARE?

>> THAT'S CORRECT.

>> ON THIS HERE.

>> CORRECT, AND THE LOWER COURT REALLY UNDERSTOOD THAT WHEN IT GRANTED AN EVIDENTIARY HEARING ON THIS CLAIM, THAT EVEN THOUGH AGENT MALONE HADN'T DIRECTLY IMPLICATED MR. ^RHODES, INDIRECTLY, HE HAD BECAUSE HE SAID, AND THE STATE ARGUED IN HIS CLOSING ARGUMENT THOUGHT JUST BECAUSE THESE HAIRS DON'T SHOW THAT MR. ^RHODES WAS THERE, WAS, WAS, THERE IT DOESN'T SHOW THAT HE WASN'T THERE EITHER. AND SO IT WAS THIS INDIRECT IMPLICATION THAT IS THE PREJUDICE.

MOREOVER, IT WAS ONE OF THE ISSUES THAT WAS AGGRAVATING IN THE CASE WAS THAT MR. ^RHODES HAD GIVEN A NUMBER OF DIFFERENT VERSIONS OF WHAT HE THOUGHT HAPPENED, QUITE THE STORYTELLER.

ONE OF THOSE VERSIONS OR TWO OF THREE OR THREE VERSIONS WAS THAT SOMEONE ELSE WAS INVOLVED, SOMEONE ELSE HAD ACTUALLY COMMITTED THE CRIME.

NOW, OF COURSE, IF THIS CASE WERE SENT BACK, WE'D DO EVERYTHING WE COULD TO FIND OUT IF THAT WAS IN FACT TRUE. BUTS EVEN, EVEN IF WE DIDN'T KNOW THAT, HAD THIS INFORMATION BEEN DISCLOSED TO THE DEFENSE ATTORNEY, HE WOULD'VE BEEN ABLE TO THEY CAN -- TO MAKE THAT ARGUMENT TO THE JURY.

>> ALL RIGHT.

DO YOU HAVE ANOTHER POINT THAT YOU ARE GOING TO ARGUE?

YES, AND THE LAST THING I WANT TO SAY ABOUT, AND REMEMBER AT THE GUILT PHASE IN 1984, IT WAS A 7-5 DEATH RECOMMENDATION, AND THERE REALLY WASN'T THAT MUCH MITIGATION PRESENTED AT THE TIME, SO THAT WAS THE ONLY JURY THAT HEARD ALL OF THIS EVIDENCE.

SO, AND IF YOU'LL RECALL DURING DIRECT APPEAL IN 1984, THIS COURT FOUND THAT THERE WAS PREJUDICIAL CLOSING ARGUMENT, THAT IT, THAT A FLIGHT INSTRUCTION HAD INCORRECTLY BEEN GIVEN TO THE GUILT PHASE JURY SO THERE WERE OTHER ERRORS THAT SHOULD ABOVE BEEN CUMULATIVELY ANALYZED ALONG WITH THIS ERROR THAT MALONE GAVE FALSE TESTIMONY AND HE CONTINUE TODAY GIVE FALSE TESTIMONY AT THE EVIDENTIARY HEARING.

>> BUT DO YOU AGREE OR DISAGREE THAT WE DON'T KNOW WHOSE HAIR IT WAS.

THERE IS NO EVIDENCE THAT IT WAS OR WAS NOT THE DEFENDANT'S OR WAS ANYBODY ELSE'S.

>> WE WEREN'T ABLE TO DO THAT AT THE TIME OF TRIAL, AT THE TIME OF THE HEARING BECAUSE WE DIDN'T GOOD TO DO THE REST OF THE CHALLENGE ON THE --

>> AGAIN, YOU SAY -- AGAIN, YOU SAY --

>> SO WE DON'T KNOW.

>> AGAIN YOU SAY AGAIN WE DIDN'T DO THAT.

YOU ASKED FOR DNA TESTING.
THE DNA TESTING WAS DONE AND IT
SHOWED INCONCLUSIVE TO SAY WELL
WE ASKED FOR THAT TO BE DONE
AND IT WASN'T DONE IS JUST
INCORRECT.

THE TRIAL COURT GRANTED YOUR
MOTION TO
TAKE THE DNA TEST.

>> IT DID.

IT DID.

BUT AT THE SAME TIME --

>> YOU JUST WANT TO GO FURTHER
AND THE TRIAL COURT DIDN'T
ALLOW YOU TO DEPOSE THE DNA
PERSON.

>> BUT AT THE SAME TIME, WHEN
THE FDLE RESULTS CAME BACK, WE
WEREN'T ALLOWED TO ASK
QUESTIONS OF THE EXAMINER.

>> I UNDERSTAND YOUR POSITION.

>> OR DO ANY OF THAT BUT THAT'S
DIFFERENT FROM SAYING WE
WEREN'T ALLOWED TO DO ANYTHING.

>> WELL, WE WEREN'T -- I GUESS
THE BETTER PHRASE WOULD BE WE
WEREN'T ALLOWED TO EXPLORE
EXACTLY WHAT THE CONTEXT OF THE
TESTING WAS AND WHAT THE
PARAMETERS WERE AND MY
UNDERSTANDING FROM READING THE,
THE FDLE REPORT WAS NOT THAT
THEY COULDN'T GET THE DNA
PROFILES FILES FROM THE HAIR
BUT --

>> HAVE YOU CITED TO US A CASE
WHERE WE HAVE FOUND THAT AFTER
THE TRIAL COURT GRANTS A MOTION
TO TAKE DNA TESTING THAT THE
TRIAL COURT HAS ABUSED ITS
DISCRETION AND INN DE{NIG} --
IN DENYING A MOTION TO DEPOSE
FDLE.

>> I CAN'T NAME ONE OFF THE TOP
OF MY HEAD.

>> DID YOU CITE ONE IN THE
BRIEF.

>> NO, I DON'T BELIEVE I DID.
BUT DUE PROCESS APPLIES AT
EVIDENTIARY HEARINGS AND
POST-CONVICTION.

AND JUST SIMPLY SAYING, WELL,

LOOKY HERE, WE HAVE THIS REPORT
AND THERE YOU GO.

YOU TAKE IT AT FACE VALUE.

I DON'T THINK THAT WAS WITHIN
THE MEANING OF DUE PROCESS, AT
AN EVIDENTIARY HEARING.

THE WHOLESALE {PURLS} IS TO
HAVE AN ADVERSE AIR AL-- WHOLE
PURPOSE IS TO HAVE AN

ADVERSARIAL TESTING OF THE
EVIDENCE AND IF ONLY ONE SIDE
GETS TO DO THE TESTING AND GETS
TO CONTROL THE RESULT AND GETS
TO CONTROL REALLY THE

DISCUSSION, ON TESTING, THEN I
THINK THAT --

>> WOULD YOU OBJECT TO THE FACT
THAT THE TRIAL COURT ORDERED
THE TESTING TO BE DONE BY FDLE?

>> NO, BECAUSE IT'S, IT'S
MANDATED IN THE RULE THAT FDLE
HAS TO AT LEAST DO IT THE FIRST
TIME.

BUT THE RULE ALSO GIVES THE
COURT THE DISCRETION TO ALLOW
ADDITIONAL TESTING AT THE
DEFENDANT'S OWN EXPENSE, WHICH
WE REQUESTED AND WERE DENIED.

SO IF THE, IF THE WHOLE PURPOSE
OF THE EVIDENTIARY HEARING WAS
TO GET DUE PROCESS AND TO FIND
THE ANSWER TO THE QUESTION.

>> WELL, LET ME GET TO THE
BOTTOM LINE.

MALONE TESTIFIED THAT FORENSIC
TESTING FOUND THAT QUOTE THERE
WERE NO FOREIGN HAIRS AT -.

>> CORRECT.

>> DO WE HAVE ANY EVIDENCE THAT
THERE WAS A FOREIGN HAIR?

>> WELL, THERE WERE OBVIOUSLY
SOME QUESTIONS ABOUT THAT.
WITH THE FACT THAT THERE WAS A
BLONDE HAIR CLUTCHED IN HER
HAND.

BUT.

>> ANSWER MY QUESTION.

DO WE HAVE ANY EVIDENCE THAT
THERE WAS A FOREIGN HAIR?

AFTER ALL THE TESTIMONY.

>> FROM HIS TESTIMONY, NO BUT
WE DON'T KNOW THAT TO BE THE
CASE.

NONE OF THIS STUFF WAS TESTED.

NONE OF THE EXHIBITS WERE TESTED.

THAT'S THE PROBLEM.

SO WE DON'T KNOW WHAT WAS THERE.

>> THE ARGUMENTS WERE AVAILABLE WHETHER IT WAS TESTED OR NOT.

THIS BLONDE HAIR DOESN'T MATCH EITHER ONE OF THEM.

>> CORRECT.

AND THERE WERE FIBERS AS WELL.

>> WELL, I MEAN, WAS THAT ARGUMENT AVAILABLE TO BE MADE?

AND WAS IT MADE?

>> WELL, I, I DON'T THINK THAT, I DON'T THINK THAT, YOU MEAN AT TRIAL?

>> YEAH.

>> WELL, I THINK TRIAL COUNSEL ASSUMED THAT MR. MALONE WAS TELLING THE TRUTH WHEN HE SAID HE TESTED EVERYTHING.

>> THE ANSWER -- REALLY GOING REALLY INTO YOUR REBUTTAL.

>> ALL RIGHT, I'LL RESERVE THE REST FOR REBUTTAL.

>> DO YOU HAVE ANOTHER POINT.

>> YES, I WILL TALK THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AT RESENTENCING BASICALLY THERE ARE THREE CASES THAT CONTROL HERE.

WIGGINS AND WILLIAMS.

THE DEFENSE ATTORNEY ONLY PLANNED TO CALL ONE WITNESS AND THE DEFENSE, THE DEFENDANT WAS FORCED TO CHOOSE HIS OWN MITIGATION WITNESSES.

THERE'S ABSOLUTELY NO INVESTIGATION.

NO INVESTIGATOR.

SO BASICALLY, NO MORE EXCUSES UNDER ROM PELLA WOULD BE MY ARGUMENT.

THANK YOU.

>> MAY IT PLEASE THE COURT, BOB LANDRY APPEARING ON BEHALF OF THE STATE OF FLORIDA.

MIKE MALONE, I WOULD LIKE TO TURN FIRST TO HIS TRIAL

TESTIMONY.

MALONE TESTIFIED THAT HE EXAMINED THE MATERIAL THAT WAS SENT OUT BY FDLE.

AND THAT THE HOUSE THAT HE EVALUATED AND EXAMINED WERE EITHER THE VICTIM'S HAIRS OR THEY WERE, THEY WERE TOO INSUBSTANTIAL FOR COMPARISON.

AND HE ALSO TESTIFIED THAT THERE WERE NO FOREIGN HAIRS.

>> THAT'S WHAT HE TESTIFIED AT TRIAL.

>> AT TRIAL.

AT TRIAL.

DURING TRIAL HE WAS ALSO ASKED TO OPINE --

>> DID HE ALSO.

DID HE SAY THAT HE HAD TESTED ALL THE HAIRS THAT WERE IN THE VICTIM'S HANDS?

>> WELL, HE WAS, HE WAS ASKED ABOUT THE, THE HAIRS IN THE HANDS AS WELL.

>> THAT'S -- BUT TO ME, AGAIN, HAIRS ALL AROUND, IT'S A MOTEL THAT JUST GOT, YOU KNOW, IT'S ONE THING.

I WANT TO JUST, IF WE CAN, JUST LET ME FOCUS ON THE HAIRS IN THE HANDS.

DID HE TESTIFY THAT ALL THE HAIRS IN THE HANDS WERE THE VICTIM'S?

>> HE, YES, HE TESTIFIED, WELL, HE, HE DESCRIBED, I THINK HE SAID THERE WERE TWO HAIRS IN ONE HAND AND A COUPLE OF HAIRS IN THE OTHER.

>> AND HE HAD TESTED THEM ALL AND THEY WERE ALL THE VICTIM IF?

HIS TRIAL TESTIMONY.

>> RIGHT, TRIAL TESTIMONY.

>> HIS TRIAL TESTIMONY WAS THAT THEY WERE THE VICTIM'S HAIRS.

>> RIGHT AND WE NOW KNOW THAT THAT'S FALSE THAT HE HADN'T TESTED ALL THE HAIRS.

THAT'S WHAT THE JUDGE FOUND? RIGHT?

THAT IT WAS FALSE WELL, THE JUDGE STATED IN HIS ORDER THAT MALONE ADMITTED TO GIVING FALSE

TESTIMONY.

I DON'T AGREE THAT HE --

>> WAS THERE, WAS THE BLONDE HAIR TESTED AT THE TIME OF THE TRIAL?

>>.

>> THE, THE HAIRS, THE, THE ALLEGED BLONDE HAIRS AS I RECALL WAS IN THE RIGHT HAND, AND HE SAID THAT THAT WAS THE VICTIM'S.

>> YOU KNOW, THIS SHOULD BE SIMPLE IF THERE'S NOT A LOT OF HAIR IN THE HAND.

I AM TRYING TO FIND OUT WHAT WAS SAID OR NOT SAID AT TRIAL ABOUT THE BLONDE HAIR CLUTCHED IN THE HAND.

ALL RIGHT?

TESTED OR UNTESTED BY MR. MALONE IN FACT NOT IN WHAT HE TESTIFIED AT TRIAL.

>> AT TRIAL, NO ONE DESCRIBED IF AS BEING BLONDE HAIR OR NOT A BLONDE HAIR.

>> THE HAIR THAT WE'RE NOW REFERRING TO IS THE BLONDE HAIR.

DID HE SAY HE HAD TESTED THAT HAIR AND IT WAS THE VICTIM'S?

>> I CAN ONLY SAY WHAT HIS TESTIMONY WAS AT TRIAL.

HIS TRIAL TESTIMONY WAS THAT THE HAIRS IN BOTH OF HER HANDS WERE THE VICTIM'S.

>> OKAY.

AND, AND NOW HASN'T THE DEFENDANT ESTABLISHED THAT THAT TESTIMONY, THAT IS THAT ALL THE HAIRS WERE TESTED AND ALL THE HAIRS WERE THE VICTIM'S IS FALSE TESTIMONY?

>> NO, WELL, I DON'T THINK SO.

I THINK, I THINK THE, THE MALONE CONTINUED TO TESTIFY AT THE EVIDENTIARY HEARING THAT HE EXAMINED ALL THE HAIRS, AND HE PUT LIKE 63 HAIRS ON A SLIDES OR THE HAIRS WERE PUT UNDER SLIDES FOR HIM TO REVIEW.

AND HE LOOKED AT ALL OF THEM.

NOW, I THINK THE DISCREPANCY, IF YOU WANT, IN THE TESTIMONY,

IS THAT THERE ARE APPEAR TO BE
A LOT OF HAIRS IN THE BAG IN
THE CLERK'S POSSESSION, BUT NO
ONE ASKED MALONE ABOUT --
>> I DON'T CARE -- RIGHT NOW I
AM JUST TRYING TO STICK TO THE
HAND BECAUSE THAT'S WHAT
TERRI, MR. BACKUS REFERRED TO
AND I CAN GET MY ARMS AROUND
THAT.

IT SEEMS TO ME SOMEWHAT
SIGNIFICANT THAT IF THE HAIR IN
THE HAND WAS BLONDE AND IT
WASN'T TESTED, AND EVEN IF IT'S
NOW AT THE BEST FOR THE STATE
INCONCLUSIVE, THAT'S, THAT'S
DIFFERENT, THAT'S FALSE, THAT
MEANS THAT MR. MALONE TESTIFIED
FALSELY AT TRIAL.

IF HE TESTIFIED FALSELY, THEN
JILLIO HAS A DIFFERENT STANDARD
ON WHAT WE APPLY, WHICH IS WE
HAVE TO DECIDE WHETHER THE
FALSE TESTIMONY WAS HARMLESS
BEYOND A REASONABLE DOUBT.
THAT'S WHY I'M CONCERNED, AND
AGAIN, I WASN'T AS CONCERNED
UNTIL -- YOU GOT TO HELP ME
CORRECT ME OF WHERE I'M WRONG,
WHICH IS THAT CERTAINLY I WOULD
THINK THAT AT TRIAL, IF THE
DEFENSE LAWYER HAD KNOWN THIS
BLONDE HAIR WAS,
OR THAT IT -- UNTESTED OR THAT
IT CAME BACK INCONCLUSIVE, THEY
WOULD'VE JUMPED ON THE
OPPORTUNITY TO ASK THE JUDGE
FOR MORE TESTING TO ESTABLISH
IF THIS WAS NEITHER THE
VICTIM'S OR NOR THE DEFENSE'S
-- DEFENDANT'S, THEN THAT COULD
BE POWERFUL TESTIMONY.
THAT COULD START TO RAISE A
DOUBT THAT THERE MIGHT HAVE
BEEN SOMEONE ELSE THERE BECAUSE
HAND HAIR CLUTCHED IN THE HAND
MEANS THAT IT PROBABLY HAPPENED
CLOSE IN TIME TO THE MURDER.
SO HELP ME WITH THAT SCENARIO.

WHAT'S WRONG WITH WHAT I JUST
SAID?

>> WELL, MY UNDERSTANDING OF
MALONE'S TESTIMONY AT TRIAL IS

THAT HE EXAMINED THE HAIR IN BOTH HANDS, AND IT WAS THE VICTIM'S HANDS -- IT WAS -- THE HAIR BELONGED TO THE VICTIM'S.

WHEN HE CAME TIME FOR THE EVIDENTIARY HEARING, HE, HE NOTICED THAT HE HAD MADE A MISTAKE IN HIS TESTIMONY, AND THE MISTAKE, THE ONLY MISTAKE THAT HE ADMITTED TO WAS THAT THE HAIR IN THE, IN THE RIGHT HAND WAS STILL THE VICTIM'S BUT THAT THE HAIR IN THE LEFT HAND SHOULD BE INCONCLUSIVE OR NOT SUITABLE ENOUGH FOR COMPARISON. SO THAT'S THE ONLY, THE ONLY ALTERATION.

>> HOW MANY HAIRS WERE IN THE LEFT HAND?

>> I THINK THERE WERE, I DON'T KNOW, I THINK HE SAID TWO OR THREE OR SEVEN.

>> DOES THAT STRIKE YOU, IF YOU'RE LIKE THE TRIAL JUDGE LISTENING TO THIS, THAT THE ONLY, HE SAYS THEY'RE ALL THE VICTIM'S IN THE LEFT HAND, BUT ONE HAIR OF -- SO WE ARE NOT TALKING ABOUT THOUSANDS OF HAIRS OR 60 HAIRS.

THAT THE ONE HAIR THAT'S INCONCLUSIVE AND WASN'T TESTED, WHICH HE MADE A MISTAKE ON, SO HE SAYS, WAS A BLONDE HAIR? WOULDN'T THAT BE THE FIRST THING THAT EVERYBODY WOULD WANT TO SEIZE ON?

>> WELL, I MEAN, THE HAIRS THAT WERE -- THAT WERE INTRODUCED, I MEAN, THEY WERE AVAILABLE FOR EVERYBODY TO LOOK AT FOR THE --

>> NOW THAT MAY BE ANOTHER ISSUE THAT THIS SHOULD'VE BEEN RAISED AND FOUND EARLIER BY THE DEFENDANT AS INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. BUT WE'RE NOT HERE ON, I DON'T -- WE DIDN'T --

>> WELL, THE TRIAL COURT MADE NO, MADE A FINDING THAT, THAT THE DEFENDANT HAD FAILED TO

DEMONSTRATE THAT THERE WAS ANY,
ANY HAIR OTHER THAN THE
VICTIM'S AT THE HEARING.

I MEAN, THEY DIDN'T PUT ON ANY
EXPERT TESTIMONY.

>> THIS QUESTION, WHICH I
UNDERSTAND THAT DISCOVERY IS
GENERALLY A BASED ON ABUSIVE
DISCRETION, BUT IF IT'S
INCONCLUSIVE AND IF THE
DEFENDANT SAYS I NEED TO FIND
OUT A LIT BIT MORE ABOUT THIS
SO I CAN LIKE, IF IT HAD
HAPPENED AT TRIAL, CERTAINLY A
JUDGE WOULD'VE ALLOWED INQUIRY
IF HERE IT IS THE STATE HAS
SAID SOMETHING, WHICH IT WAS
ALL TESTED AND IT WASN'T, WHY
WOULDN'T FURTHER INQUIRY BE
APPROPRIATE?
SO WE CAN GET TO THE BOTTOM OF
THIS.

>> WELL, AT THE HEARING AT THE
-- FOLLOWING THE END OF THE
TESTIMONY AT THE HEARING, THE
JUDGE INQUIRED WHAT NEEDS TO BE
DONE IN TERMS OF DNA OR WHAT'S
PROGRESS ON THAT.

AND AS I UNDERSTAND
MS.^BACKUS'S RESPONSE WAS I
DON'T THINK BASICALLY THAT
ANOTHER EVIDENTIARY HEARING IS
NEEDED ALONG THAT LINE UNLESS
SOMETHING COMES IN, WHICH IS
WAY OUT OF LEFT FIELD IN TERMS
OF REPORT BUT I'LL LEAVE THAT
UP TO YOU, JUDGE.
I'LL LEAVE THAT UP TO YOU TO
DECIDE WHETHER WE NEED ANOTHER
HEARING.

WHEN THE FDLE REPORT DID
FINALLY COME IN, AND IT IS
BASICALLY INCONCLUSIVE, THAT
THERE'S NO DNA ON THIS HAIR,
AND THAT'S THE ALLEGED BLONDE
HAIR IS ONE OF THE ITEMS THAT,
THAT WAS LOOKED AT.

>> WHEN YOU SAY ALLEGED BLONDE
HAIR, I MEAN, IS THERE A BLONDE
HAIR THAT'S THERE OR IS THERE
NOT?

>> WELL WE HAVE MS.^BACKUS
SAYING IT'S A BLONDE HAIR.

>> OKAY.

SO YOU SAY THAT'S IN DISPUTE
THEN.

>> WELL, I MEAN, THE JUDGE, THE
JUDGE SAID IN HIS ORDER, I'M
NOT A HAIR EXPERT AND WE
HAVEN'T HEARD FROM ANY EXPERT
AS TO WHETHER OR NOT PEOPLE CAN
HAVE DIFFERENT COLORED HAIR.

>> DID SOMEBODY IN THE RECORD
DESCRIBE THIS AS A BLONDE HAIR?

BESIDES --

>> I'M NOT CERTAIN WHETHER
CLERK TERESA CRAFT TESTIFIED
ABOUT THE EXHIBITS THAT SHE HAD
IN HER THING.

I DON'T KNOW WHETHER SHE
DESCRIBED IT AS A BLONDE HAIR.

THE RECORD WILL HAVE TO
REFLECT.

>> YOUR OPPONENT HAS
PHOTOGRAPHS.

WERE THESE PHOTOGRAPHS
INTRODUCED AT ANY OF THE
HEARINGS?

I DON'T RECALL WHETHER THEY
WERE INTRODUCED OR NOT.

>> ARE YOU CONCLUDING THE
PHOTOGRAPHS SHE DISPLAYED ARE
-ARE NOT TRUE REPRESENTATIONS
OF WHAT WAS THERE?

>> NO, I DON'T KNOW, I DON'T
KNOW WHETHER OR NOT THEY WERE
INTRODUCED AS EXHIBITS IN THE
RECORD OR NOT.

I'LL HAVE TO LET THE RECORD
REFLECT.

>> HELP US WITH WHAT YOU DO
HAVE IN THE RECORD EITHER BY
WAY OF TESTIMONY OR BY WAY OF
PHOTOGRAPHS, YOU KNOW,
WE HAVE WHAT ON ITS FACE SEEMS
TO BE SORT OF A LOGICAL
ARGUMENT, THAT IS, MY
GOODNESS,, YOU KNOW, THIS WAS
A, A, A VICTIM WAS BLONDE.
AND THE HANDS, THE HAIR IN HER
HANDS WAS A BIG WAD OF BLACK
HAIR.

OKAY?

AND YET THE TESTIMONY WAS THAT
THIS BIG WAD OF BLACK HAIR
BELONGED TO THE VICTIM WHO WAS

BLONDE.

AND THERE'S SOMETHING
INCONGRUOUS ABOUT, YOU KNOW,
WHAT'S GOING ON HERE, AND ALL
WE'RE REALLY ASKING IS FOR A
LOGICAL EXPLANATION TO RESOLVE
WHAT ON ITS FACE SEEMS TO BE AN
INCONGRUITY.

SO HELP, HELP US.

>> WELL, I THINK THE ONLY
INCONGRUITY IS THAT THERE IS,
ACCORDING TO THE DEFENSE, A
BLONDE HAIR IN, IN THE VICTIM'S
HAND.

>> BUT ARE WE TALKING ABOUT A
BLONDE HAIR?

OR ARE WE TALKING ABOUT A WHOLE
WAD OF HAIRS?

>> NO, NO I THINK, WELL, I, I
UNDERSTOOD THAT SHE WAS TALKING
ABOUT THAT THERE WAS A BLONDE
HAIR.

>> SO WE'RE JUST TALKING ABOUT
SINGLING STRAND OF HAIR?

>> THAT IS BLONDE.

THAT, THAT'S WHAT HER, I
UNDERSTAND HER COMPLAINT TO BE
THAT THERE IS A SINGLE BLONDE
HAIR AND HOW COULD A BLONDE
HAIR COME FROM A DARK-HAIRED
WOMAN.

>> AND WHAT, AND WHAT HE
TESTIFIED TO IS THAT THAT HAIR
WAS NOT SUITABLE FOR
COMPARISON, IS THAT CORRECT?

>> UH.

>> THAT WAS THE MISTAKE.

>> NO, NO.

I THINK HE TESTIFIED THAT THIS
HIS MISTAKE WAS THAT THE
HAIR IN THE LEFT HAND WAS NOT
SUITABLE FOR COMPARISON BUT THE
HAIR IN THE RIGHT-HAND HAND WAS
MICROSCOPICALLY
INDISTINGUISHABLE FROM THE
VICTIM, FROM THE DEFENDANT.

>> IN THE RIGHT HAND.

>> YES, SIR.

>> SO HOW DID HE TESTIFY?

I'M CONFUSED HERE.

IS THERE A DIFFERENCE HERE, ONE
THAT WAS NOT SUITABLE FOR
COMPARISON AND THE BLONDE HAIR,
ARE THEY TWO DIFFERENT

HAIRS?

>> IS TESTIMONY AT THE EVIDENTIARY HEARING WAS I MADE AS IN TRIAL TESTIMONY WHEN I SAID LEFT HAND WERE ALSO THE VICTIM'S HAIRS AS SHOULD HAVE BEEN UNSUITABLE FOR

TALKING ABOUT SO-CALLED BLONDE A HAIR.

>> NO I THINK THE -- THE THAT -- THAT HAIR WAS ON THE RIGHT HAND WHICH HE -- MAINTAINED BELONGED TO THE VICTIM.

>> I THINK YOU GUYS ARE PASSING IN THE NIGHT I DON'T THINK YOU ARE RESPONDING TO HIS QUESTION.

LET'S START AT THE BEGINNING.

>> HOW MANY HAIRS IN QUESTION.

>> AS I UNDERSTAND HIS TESTIMONY I THOUGHT HE SAID THAT THERE WERE A FEW HAIRS IN THE LEFT AND RIGHT HAND, I WILL HAVE TO RELY ON THE TESTIMONY, THAT --

>> THERE IS ONLY ONE HAIR THAT WHERE INCONCLUSIVE Q-13 ONE STRAND OF HAIR.

>> THE ONE APPARENTLY DESCRIBED AS BLONDE HAIR.

>> THAT WAS THE ONE THAT HE THAT WAS NOT TESTED OR THAT WAS INCONCLUSIVE HE SAID ALL AT TRIAL ALL THE STRANDS OF HAIR WERE FROM THE VICTIM'S HANDS, AND AT THE EVIDENTIARY HEARING HE SAID WELL NO, THERE IS ONE STRAND OF HAIR INCONCLUSIVE THAT IS THE ONE WE ARE TALKING ABOUT THEY DON'T THINK SO I THINK HE WAS TALKING ABOUT THE HAIR IN THE LEFT HAND WAS BEING UNSUITABLE FOR COMPARISON BUT THAT THE HAIRS IN THE RIGHT HAND -- -- HE -- HE THAT HAIR BELONGED TO VICTIM.

>> WHAT IS YOUR

UNDERSTANDING OF WHERE THE TRIAL COURT SAYS ON PAGE 11 OF THE TRIAL COURT'S ORDER, THAT THE THAT THE DEFENDANT HAS NOT SHOWN THAT THE HAIR BELONGED TO ANY ONE BESIDES THE VICTIM WHAT IS YOUR UNDERSTANDING WHAT HAIR THE TRIAL JUDGE IS REFERRING TO?

>> I THINK HE IS PROBABLY REFERING TO THE ALLEGED BLONDE HAIR, I THINK HE MAILS BE I DON'T KNOW IF HE IS ALLUDING TO FDLE REPORT BECAUSE APPARENTLY A LOT OF TESTING WAS DONE WHICH ALL CAME BACK INCONCLUSIVE.

>> DOES THE FDLE REPORT REFER TO THIS AS A BLONDE HAIR.

>> NO THE FDLE REPORTS TO IT HERE IS A IN THE LEFT HAND HAIR IN THE RIGHT HAND, MICROSCOPIC SLIDES, GIVES -- IF YOU MEAN OOE NUMBERS HOW FDLE REPORT DID IT WHAT THE RESULTS WERE.

>> I STILL COME BACK, TO THE FACT IS, WHERE -- WHAT RECORD LABELING OF THE HAIR -- LABELS AS ANY OF THE HAIR AS A A BLONDE HAIR? IN THE RECORD SOME WITNESS? OR CAN YOU -- SOME EXHIBIT?

>> HE -- WELL ON THE FDLE REPORT WHICH I BELIEVE IS RECORD 6, 930 AND 931, IT TALKS TO ABOUT THERE IS A WHOLE LIST IT TALKS ABOUT SLIDE FROM Q-TEN HAILED HAIR FROM THE RIGHT HAND, AND BELOW THAT SLIDE FROM Q15 HAIR FROM ON THE BODY AND IS THERE IS ANOTHER PART, Q-13 HAIR FROM THE LEFT HAND. AND THEY GIVE THEIR OWN IDENTIFICATION NUMBERS FOR THAT.

.
>> SO WHAT DID HE TESTIFY AT TRIAL AS TO WHOSE CHAIR Q-13 WAS?
THAT SO CALLED BLONDE HAIR;

CORRECT?

>> HIS TESTIMONY AT TRIAL WAS THAT THAT THE HAIR IN BOTH HANDS OF THE VICTIM BELONGED TO THE VICTIM AND HE CORRECTED THAT AT OF THE EVIDENTIARY HEARING SAYING I MISSPOKE THAT THE HAIR IN THE LEFT HAND THE HAIR IN THE RIGHT HAND WAS HERSELF THE HAIR IN THE LEFT HAND WAS UNSUITSABLE FOR COMPARISON.

>> IS THAT Q-13 HE IS SAYING UNSUITABLE FOR COMPARISON.

>> PRESUMABLY -- -- NO, NO, Q-13, CAME FROM THE RIGHT HAND.

.
>> NO IQ-13 CAME FROM THE LEFT HAND Q-TEN FROM THE RIGHT HAND, BUT HIS TRIAL TESTIMONY WAS BOTH HAIRS WERE FROM THE VICTIM, HE ALSO TESTIFIED THERE IS NO DEFENSE HAIR AT ALL BASICALLY OH, NO DEFENSE HAIR IT MIGHT BE POINTED OUT THAT THE DEFENSE ATTORNEY AT TRIAL WAS BASICALLY GLEEFUL WITH MALONE'S TESTIMONY HE COULDN'T INculpATE DEFENDANT HE ASKED HIM A COUPLE OF QUESTIONS SAYS BASICALLY YOU CAN'T HELP US OUT HERE YOU CAN'T EXPLAIN ANYTHING -- THAT AATTACHES TO MY CLIENT.

>> BUT ISN'T THAT AGAIN LET ME GO BACK TO HOW IT COULD BE USED, AGAIN WE HAVE TO LOOK AT THE -- YOU KNOW, WAS IT HARMLESS BEYOND A REASONABLE DOUBT IF WE ASSUME THE FIRST TWO PRONGS WERE MET.

IT SEEMS TO ME THAT IF AND THIS IS WHAT I'M JUST STILL STRUGGLING WITH IS THAT INSTEAD OF IT BEING ALL THE HAIRS OF THE VICTIM'S HERE IS A WHY HE CAN'T HELP HIM OUT, DOESN'T HAVE ANYTHING BEING THE DEFENDANT'S HAIR IT STILL IS A STEP MORE --

POSSIBLY GOES TO
ESTABLISHING REASONABLE
DOUBT IF YOU GO, AND NOW,
WHAT YOU FOUND WAS ONE OF
THE HAIRS IN THE VICTIM'S
HANDS WHO TESTED WAS
INCONCLUSIVE COULD YOU -- YOU
CAN'T SAY IT WAS VICTIM'S
HAIR OR CLIENT'S HAIR IT
COULD HAVE BEEN SOMEONE
ELSE'S HAIR ISN'T THAT
CORRECT, YEAH I GUESS SO
ISN'T IT CORRECT THAT THAT
-- HAIR IS -- BLOND IN
COLOR, AND THAT A HAIR
DOESN'T MATCH THE VICTIM OR
MY CLIENT?
ISN'T THAT CORRECT MR. --

>> YES.

>> NOW, I CAN ARGUE TO THE
JURY THAT THERE IS A FOREIGN
HAIR THAT ISN'T THE
DEFENDANT'S OR THE VICTIM'S,
AT LEAST NOT CONCLUSIVELY,
THAT IS THERE, DO I START TO
GET A POSSIBILITY OF
REASONABLE DOUBT?
THAT IS WHAT WE ARE JUST
THAT IS WHAT I'M TRYING TO
GET TO THE -- FOR ME,
EVERYONE ELSE MIGHT HAVE A
DIFFERENT WAY OF LOOKING AT
THIS BUT THAT IS -- HOW I'M SEEING
THIS THING.

>> SOMEONE HAD ASKED MALONE
WHAT ABOUT THIS ISN'T THIS A
BLONDE HAIR HE MIGHT HAVE
BEEN ABLE TO EXPLAIN THAT,
IT ITS REALLY NOT BLOND HAIR
IT IS BROWN WHATEVER.

>> INSTEAD OF BEING IT WAS
ALL VICTIM'S HAIR
INCONCLUSIVE WHOSE
IT IS,
INSTEAD OF NOW WE HAVE A
QUESTION AND IT IS, OF WELL
WAIT A SECOND, IT MIGHT BE
SOMEONE ELSE, THAT LAWYER
COULDN'T MAKE THAT ARGUMENT,
AT THE TIME OF THE ORIGINAL
TRIAL.

.
>> WELL, BUT THE HE HAD HE
HAD THE ARGUMENT AT TRIAL,

WHICH HE UTILIZED, AND THAT IS THERE IS NO HAIR OF MY CLIENT -- SO -- WHAT IS A BIG DEAL ON THIS.

>> THE BIG DEAL IS AS WE ALWAYS LOOK AT THESE CLUTCHED IN THE HAHNED CASES, WHEN WE THINK IT IS A BIG DEAL IS THAT IT IS A PRETTY BIG DEAL FIRST OF ALL CERTAINLY A BIG DEAL TO THE STATE IF WHAT IS CLUTCHED IN THE HAND IS THE DEFENDANT'S HAIR.

THAT IS A PRETTY BIGGING I SLAM-DUNK FOR THE STATE.

SO THAT IS BIG DEAL.

ALL RIGHT SO THAT IS GOOD WHEN IT FOR THE DEFENDANT WHEN IT IS NOT THE DEFENDANT

-- IT IS A PRETTY BIG DEAL IN TERMS OF ITS JUST VICTIM'S HAIR THAT MEANS IT DOESN'T I MEAN ANYTHING, STILL NOT -- HOW IT GOT THERE SHE WAS BRUSHING HER HAIR OR SOMETHING.

NOW WE'VE GOT THERE IS A HAIR THAT IS UNDETERMINED IN THERE, AND AGAIN, THIS IS WHERE IT IS A LITTLE DISCONCERTING, NOT TO KNOW IF IT IS BLONDE OR NOT BUT LET'S FOR THE SAKE OF THIS ARGUMENT, MR. -- BACKUS IS GOING TO HAVE TO GIVE US HOW WE KNOW IT IS BLONDE BUT LET'S JUST SAY IT IS THAT SHE IS CORRECT IT IS A BLONDE HAIR.

NOW, IT BECOMES A BIGGER DEAL IF THE DEFENDANT'S HAIR ISN'T BLONDE, AND IT IS INCONCLUSIVE DO YOU NOT SEE THE QUALITATIVE DIFFERENCE OF THOSE THREE --

>> I DON'T SEE DIFFERENCE AS IT AFFECTS THIS DEFENDANT BECAUSE THERE IS NO HAIRS, OF THE DEFENDANT, IMPLICATED AT THE CRIME SCENE AT THAT YOU WILL REMAINS THE SAME. THE EVIDENCE NOW, WITH RESPECT TO THE DEFENDANT IS

SAME AS AT TRIAL WHICH THAT
IS HIS HAIR ISN'T ANYWHERE
NEAR IT ISN'T, ASSOCIATED
WITH THIS CASE SO THE STATE
HAD TO BUILD ITS
CHIROPRACTORS PROGRESSIVE
-- KACE WITH OTHER EVIDENCE
-- DOESN'T AFFECT HIM AT
ALL, THE --

>> YOU DIDN'T HURT HIM YOU
ARE TAKE ISSUE THAT IT
DOESN'T HELP THINK WHERE MR.
MISS BACKUS WOULD SAY NO, IT
HELPS HIM I'M SEEING HOW I
COULD SEE, THAT IT HELPS
HIM, SO, YOU ARE NOT
CONCEDING OR AGREEING THAT
IT COULD POSSIBLY HELP HIM.

>> IT DOESN'T HELP HIM ANY
MORE THAN WHAT HE ALREADY
HAD AT TRIAL TO WIT THE
DEFENSE CAN ARGUE, MY CLIENT
ISN'T ASSOCIATED WITH THIS
THERE IS NO DISPUTE.

>> I GUESS WE CAN GO AROUND
AND AROUND DON'T YOU SEE
BEING ABLE TO SAY NOT ALL
THE VICTIM'S HAIR IS BETTER
FOR THE DEFENDANT, THAN IT
IS ALL THE VICTIM'S HAIR?

>> I DON'T THINK -- WELL --
WE STILL DON'T KNOW THAT IT
IS NOT THE VICTIM'S HAIR BUT
I DON'T SEE THAT THAT THAT
THERE IS ANY -- REACHES THE
MATERIALITY PRONG THAT IS.

>> WHAT THAT'S WHAT TRIAL
JUDGE FOUND HE SAID WITHOUT
EXPERT OPINION INDICATING A
PERSON CAN ONLY HAVE ONE
HAIR COLOR AT A TIME THE
COURT FINDS ARGUMENT
UNPERSUASIVE BECAUSE THERE
WAS NO EVIDENCE THAT THE
HAIR WAS ANYTHING OTHER THAN
THE -- WE DON'T KNOW WHOSE
HAIR IT WAS CORRECT.

>> FROM THE DNA TESTING --
THERE IS NO -- IT IS ALL
INCONCLUSIVE NOT SHOWN.

>> IS THAT BECAUSE THERE WAS
NO DNA?

>> -- SUITABLE FOR TESTING
OR WHAT IS THE

INCLUSIVE -- --

>> REPORT OF FDLE BASICALLY SAYS NO DNA RESULTS WERE OBTAINED FROM A EXHIBIT -- 116789A, 84 AND 2 WHICH IS THE HAIR FROM THE RIGHT HAND, 8402, HAIR FROM THE LEFT HAND, Q-13 SLIDES -- SO BASICALLY --

>> NO DNA THERE WASN'T A ROOT OR SOMETHING IS THERE THEY COULD GET DNA FROM?

>> THEY APPARENTLY TESTED SOMETHING BUT COULDN'T FIND ANY DNA.

>> WITH OUR ASSISTANCE YOU HAVE WELL WILL EXCEEDED YOUR TIME SO WILL YOU BRING YOUR ARGUMENT TO CONCLUSION PLEASE.

>> WOULD I JUST LIKE TO POINT OUT THAT DEFENDANT HAS ARGUED RELIED ON HOFFMAN, IN THIS CASE, TO SHOW THAT ERROR WAS COMMITTED LIKE TO POINT OUT THE COURT DISTINGUISHED HOFFMAN IN THE ALLEN CASE 8547 SECOND 125 A ASIDE FROM THAT -- MATTER OF FACT, CLAIM WE SUMMIT THAT THE EVIDENCE AT THE EVIDENTIARY HEARING CUMULATIVE, TRIAL COUNSEL WAS NOT DEFICIENT, THANK YOU.

>> MISS BACKUS?

>> --

>> MY 34 SECONDS.

>> -- I DIRECT THE COURT'S ATTENTION TO PAGE 49, AND 50 OF THE INITIALLY BRIEF THAT IS WHERE I QUOTE DIRECTLY FROM AGENT MALONE'S TESTIMONY THAT HE TESTED EACH AND EVERY STRAND, I ALSO -- DIRECT.

>> WHAT IN THE RECORD THAT SHOWS THIS IS A BLONDE HAIR?

>> I PRESENTED IT THROUGH THE DEPUTY CLERK TERESA CRAFT,

>> AND WHERE IS THAT, COULD YOU GIVE US THE RECORD THAT RECORD?

>> I DON'T HAVE THAT IN
FRONT OF ME I WOULD BE HAPPY
TO SUMMIT THAT AS A
SUPPLEMENTAL --

>> IN YOUR BRIEF?

>> YES.

>> PHOTOGRAPHS ENTERED INTO
EVIDENCE --

>> THESE PHOTOGRAPHS
THEMSELVES WERE NOT PETHE
EXHIBITS THEMSELVES WERE.
SO THESE ARE PICTURES OF THE
EXHIBITS AS THEY WERE
ENTERED INTO EVIDENCE, THIS
IS STATE'S EXHIBIT A AND B,
WHICH, 13A AND B, WHICH IS A
COMPOSITE HAIR SAMPLES FROM
THE LEFT SIDE LEFT SIDE OF
VICTIM, ENTERED INTO
EVIDENCE, AUGUST 19, '85,
THIS IS STATE'S EXHIBIT 10A,
AND B, COMPOSITE HAIR
SAMPLES, FROM VICTIM'S RIGHT
HAND.

>> WAS THERE AN ARGUMENT
MADE, AT THE TRIAL THAT THIS
HAIR THAT WE ARE TALKING
ABOUT HERE WAS BLONDE?

>> THEY DIDN'T THEY DIDN'T.

>> THERE WAS NO ARGUMENT
MADE ABOUT THIS HAIR.

>> YOU THEY DIDN'T, THEY
RELIED COMPLETELY ON AGENT
MALONE'S TESTIMONY.

>> THERE WAS NO ARGUMENT A,
THOUGH, THAT LOOK, WE ARE --
REGARDLESS WHAT AGENT MALONE
TESTIFIED THIS HAIR AS YOU
JUST ARGUED HERE THIS
MORNING WAS OBVIOUSLY FROM A
DIFFERENT PERSON?
THAT ARGUMENT WASN'T MADE.

>> NO.

NOT AT ALL.

>> FROM A VISUAL --

>> NO.

>> THE -- BECAUSE THEY
RELIED ON THE ON THE
TESTIMONY OF AGENT MALONE,
WHICH IS AT PAGE 1873, OF
THE RECORD.

>> BUT IF THE HAIR --

>> THE HAIR FROM BOTH HANDS
WERE --

>> AS YOU WERE DESCRIBING
IT --
>> -- THAT THIS WOMAN
HAS BEEN A DIFFERENT --
COLOR HAIR ALL OF HER LIFE.
>> UM-HMM.
>> -- AND ALL OF THE SUDDEN
YOU HAVE GOT SOME STRAY HAIR
HERE.
>> RIGHT.
>> -- CAN'T UNDER THAT
WOULDN'T HAVE BEEN FOCAL
POINT DURING THE TRIAL?
>> ALL I CAN SAY IS THAT THE
TRIAL COUNSEL RELIED ON
AGENT MALONE'S TESTIMONY
WHEN HE SAID TESTED IT THE
FACT OF THE MATTER IS HE
NEVER TESTED IT.
>> DID TRIAL COUNSEL AT THES
TESTIFY TO THAT FACT.
>> NO HE TESTIFIED HE DIDN'T
EVEN RECALL GETTING THE FDLE
REPORT.
>> DID TRIAL COUNSEL TESTIFY
TO WHAT YOU ARE SAYING.
>> NO.
>> -- THAT HE WOULD HAVE
DONE ANYTHING DIFFERENTLY.
>> NO HIS TESTIMONY WAS HE
DID NOT RECALL EVEN SEE THE
REPORT FROM AGENT MALONE
THAT WAS HIS TESTIMONY
BASICALLY THAT THEY WERE
RELYING ON WHERE THEY HAD
THE HAIR WASN'T INTRODUCED
IN EVIDENCE AT THE ORIGINAL
TRIAL?
>> CORRECT, THE -- THE HAIR
EXHIBITS WERE ONLY
INTRODUCED AT THE TIME OF
TRIAL, CORRECT.
>> YOU JUST RETLOOIND FACT
THEY WERE ALL THE VICTIM'S.
>> RIGHT.
THEY RELIED ON HIS TESTIMONY
THAT THEY WERE ALL THE
VICTIM'S, AND THAT WAS HIS
TESTIMONY, HE SAID, THE
QUESTION WAS, AND THE RESULT
OF YOUR EXAMINATION WAS THAT
THOSE HERE IS A WERE THE
VICTIM'S HERE IS A, YES THE
HAIRS WERE BOTH HER HANDS

WERE HER OWN.

>> WORTH ASSISTANCE YOU HAVE
UTILIZED MORE THAN YOUR
TIME.

>> THANK YOU YES.

>> THANK YOU FOR ARGUMENTS
WE'LL TAKE THE CASE UNDER
ADVISEMENTS COURT WILL STAND
IN RECESS UNTIL 9:00
TOMORROW MORNING.

>> ALL RISE.