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**Clarence Edward Hill v. State of Florida**

THE LAST CASE ON THIS MORNING'S DOCKET IS THE CASE OF CLARENCE EDWARD HILL VERSUS THE STATE OF FLORIDA. THE CASE IS HERE BECAUSE MR. HILL IS UNDER A DEATH WARRANT, AND THE REHAS BEEN SUBSTITUTED BRIEFING. WE HAVE ALLOTTED 15 MINUTES ASIDE. MR. DOSS, I UNDERSTAND YOU ARE GOING TO TAKE TEN MINUTES AND THEN FIVE MINUTES FOR REBUTTAL.

THAT'S CORRECT, YOUR HONOR.

CHIEF JUSTICE: ARE THE PARTIES READY? GOT THE RIGHT CASE OUT YOU MAY PROCEED.

MAY IT PLEASE THE COURT. THIS COURT HAS NOT HESITATED IN THE PAST TO HOLD HEARING S WHENEVER PROBLEMS WITH THE METHODOLOGY UTILIZED IN EXECUTIONS HAS COME TO THE FLOOR. THAT'S WHAT WE HAVE HERE WITH THE STUDY THAT WAS AUTHORED BY DR. LUBARSKI AND IS FURTHER DEVELOPED IN HIS AFFIDAVIT THAT WE HAD ATTACHED.

CHIEF JUSTICE: SO WE ARE CLEAR, YOU ARE HERE ON THAT YOU ARE ASKING FOR TO REVERSE THE TRIAL COURT FOR AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER A LETHAL INJECTION IS CRUEL AND UNUSUAL PUNISHMENT?

THAT'S CORRECT, BUT NOT LETHAL INJECTION PER SE. IT IS NOT LETHAL INJECTION PER SE THAT IS CRUEL AND UNUSUAL PUNISHMENT BUT THE CURRENT METHODOLOGY THAT IS USED IN THE STATE OF FLORIDA IS CRUEL AND UNUSUAL PUNISHMENT AND WE HAD --.

CHIEF JUSTICE: AND THE PART OF THE STUDY SUGGESTED THAT IN AUTOPSIES THERE WAS SOME CONCERN THAT IN A CERTAIN NUMBER, NOT JUST FROM THIS STATE BUT OTHER STATES, THAT THERE WAS NOT LOSS OF CONSCIOUSNESS?

THAT'S CORRECT. AS MANY AS 43% IT IS THE SODIUM PENTOTHAL.

HOW MANY OF THOSE STUDIES WERE FROM FLORIDA?

NONE WERE FROM FLORIDA. WE WERE DENIED ANY RECORDS IN THE LOWER COURT REGARDING THE.

NO, IN THE STUDY. IN THE STUDY, HOW MANY OF THE

NONE. IT WAS AN ANALYZED TO FLORIDA BASED ON THE FOUR STATES THEY HAD BEEN ABLE TO GET THE DATA FROM WITHIN THE AFFIDAVIT, THE ATTACHMENT I HAVE ON ATTACHMENT A. DR. LUBARSKI LOOKED AT THE PROTOCOLS AND PROCEDURES UTILIZED AS DESCRIBED IN SIMS, AND THOSE WERE SOLIKETHE STATES THAT HE HAD READ THE TOXICOLOGY REPORTS FROM THAT HE SAID TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY THAT HE COULDEXTRA POLATE THOSE FINDINGS AND ALYTHEM TO OUR PROCEDURES HERE IN FLORIDA, AND THAT'S THE ONE WHERE 43% WERE AT A POSITION WHERE THEY COULD BE AWARE AND CONSCIOUS OF WHAT WAS GOING ON, AND INDEED 88% WERE NOT EVEN TO THE LEVEL OF WHAT THE SURGICAL PLAN OF A NEST HESITAT' S REQUIRED

WAS THE RE AN EXACT RELATIONSHIP BETWEEN THE LEVELS OF SODIUM PENTOTHALIN



FLORIDA AS COMPARED TO THE OTHER STATES OR WAS THERE A SIGNIFICANT DIFFERENCE?

I BELIEVE THAT EACH ONE OF THE STATES , WITHIN FLORIDA IT SAYS NOT LESS THAN TWO GRAMS , AND THAT'S , SO THERE IS A - -

AND THE OTHER STATES WERE HOW MUCH?

I BELIEVE IT WAS TWO GRAMS , JUSTICE BELL.

TWO GRAMS ?

AND WHAT COMPOUNDS THE PROBLEM HERE IS THE SECOND CHEMICAL THAT'S USED IS THE PANCURONIUM BROMIDE. THAT'S A PARALYTIC AGENT THAT PARALYZES THE MUSCLES SO IF THE SODIUM PENTOTHAL DOES NOT TAKE EFFECT AND DOES NOT PRODUCING THE DESIRED EFFECT OF ANESTHESIZING THE PERSON BEING EXECUTED . ESSENTIALLY THEY ARE AWARE AND THEY ARE CONSCIOUS AND THEY ARE ABLE TO FEEL THE PAIN IF THEY CAN'T, THEY CAN'T SAY ANYTHING WHATSOEVER IN REGARDS TO WHAT IS GOING ON , AND WHEN YOU LOOK AT THE LIKELIHOOD THAT THERE IS CONSCIOUSNESS , THE LIKELIHOOD THAT THE REISSAWARENESS, THAT'S WHERE WE GET INTO THE ASPECT OF IT BEING CRUEL AND UNUSUAL AND THAT IT IS AN UNNECESSARY INFLECTION OF PAIN.

WHAT'S THE NEW ASPECT OF THIS STUDY THAT WAS NOT AVAILABLE IN SIMS OR OTHERWISE AS TO THOSE RESPECTIVE LEVELS?

THE DIFFERENCES BETWEEN NOW AND SIMS , AND AS FAR AS WHAT DR. LUBARSKI HAS DISCOVERED. WITHIN SIMS, AS IT IS RELATED IN THE OPINION , PROFESSOR RATILET HAD WENT AND RECOUNTED INFORMATION HE HAD GATHERED REGARDING BOTCHED EXECUTIONS , BUT HE HAD SAID THAT IT WAS JUST FROM NEWSPAPER ACCOUNTS. IT WASN'T A SCIENTIFIC STUDY . IT WASN'T BASED ON ANY SKIN AT ALL. IT WAS HIM BASICALLY DOING A THOROUGH INVESTIGATION OF THE VARIOUS NEWSPAPERS OUT THERE . AS FAR AS DR. LITMAN , HE HAD PROVIDED A LIST OF POSSIBLES ON SPECULATION. NOTHING WITH ANY HARD DATA , NOTHING SPECIFICALLY RELATED TO A SCIENTIFIC STUDY , ONLY WHAT HE KNEW MIGHT BE POSSIBLE. HERE, DR. LUBARSKI AND HIS ASSOCIATES, THEY BASE THEIR INFORMATION ON RIGOROUS SCIENTIFIC STUDY. THEY LOOKED AT THE AUTOPSY RESULTS FROM THE STATES THAT HAD ALLOWED THEM TO HAVE THE TOXICOLOGY REPORTS , AND THEY CONDUCTED PERSONAL INTERVIEWS OF STATE OFFICIALS THAT HAD ATTENDED THESE EXECUTIONS , PERSONAL INTERVIEWS THEY HAD GATHERED THEIR PUBLIC RECORDS REQUEST SPECIFICALLY TO THEIR STUDY AND THEN INDEED THE LANCE THAT IT WAS PUBLISHED IN IS A PEER REVIEWED WORLD RENOWNED MEDICAL JOURNAL.

WAS THERE AN ULTIMATE CONCLUSION THAT THE PROTOCOL AROVED IN SIMS LEADS TO THE PROBLEMS THEY ARE CONCERNED ABOUT?

YES, AND THAT'S WITHIN THE AFFIDAVIT THAT WAS SUBMITTED .

WHAT PART OF THE AFFIDAVIT?

IT WAS PARAGRAPH 23 AND PARAGRAPH 24 IS THE CONCLUSARY ASPECT OF IT. HE HAD LAID OUT HIS BASIS IN THE PREVIOUS PARAGRAPHS , BUT I QUOTE FROM PARAGRAPH 23 , IT SAYS ON THE BASIS OF THE INFORMATION CITED IN THE SIMS OPINION, THE PROCEDURE USED IN EXECUTIONS IN FLORIDA IS SUBSTANTIALLY SIMILAR TO THE PROCEDURE IN THE STATES WHICH KEPT AND PROVIDED TOXICOLOGY DATA. THEREFORE, I DRAW THE INFERENCE TO A REASONABLE DEGREE OF SCIENTIFIC CERTAINTY THAT THE LEVELS OF SODIUM PENTOTHAL IN THE BLOOD STREAMS OF PERSONS EXECUTED BY LETHAL INJECTION IN FLORIDA ARE AT BEST SIMILAR TO THOSE LEVELS EXERCISED THERE .



CHIEF JUSTICE: THE I S S U E WASN'T THE P R O T O C O L B U T H O W THE P R O T O C O L O R THE P R O C E D U R E S M A Y B E C A R R I E D O U T ? I N O T H E R W O R D S , T H E S U G G E S T I O N I S N ' T T H A T T H E A M O U N T I N T H E P R O T O C O L , W H I C H I S T H E S A M E A S I N S I M S , I S I N A D E Q U A T E T O R E N D E R S O M E O N E U N C O N S C I O U S , B U T A S U G G E S T I O N I N T H E S E A U T O P S I E S T H A T P E R H A P S L E S S T H A N T H E R E Q U I R E D D O S E W A S G I V E N ? B E C A U S E T H A T ' S A N I M P O R T A N T D I S T I N C T I O N T O U N D E R S T A N D W H E T H E R Y O U A R E A T T A C K I N G T H E P R O T O C O L O R H O W T H E P R O T O C O L I S A C T U A L L Y A L I E D .

THEY ARE I N T E R R E L A T E D I N T H E S E N S E .

CHIEF JUSTICE: C A N Y O U A N S W E R T H A T ?

T H E D O S A G E S I S D E F I N I T E L Y A T I S S U E I N T H E T W O G R A M S I S N O T E N O U G H , A N D I T H I N K T H A T T H E S T U D Y I T S E L F R E L A Y S T H A T I N F O R M A T I O N V E R Y W E L L . T H E R E A S O N T H A T T H E D O S A G E I S I M P O R T A N T I S B E C A U S E T H I S I S A S H O R T A C T I N G A N E S T H E S I . I F I T I S N O T A D M I N I S T E R E D A T T H E P R O P E R L E V E L , I T W E A R S O F F V E R Y , V E R Y Q U I C K L Y .

W O U L D N ' T T H I S H A V E B E E N T R U E B A C K I N 2 0 0 0 ? W H A T H A S C H A N G E D ? I ' M G E T T I N G B A C K T O M Y N E W E V I D E N C E .

I T W A S M E R E S P E C U L A T I O N B A C K I N 2 0 0 0 . N O W W E H A V E S C I E N T I F I C D A T A , H A R D D A T A R A T H E R T H A N J U S T S O M E O N E S A Y I N G , W E L L , T H I S P O S S I B L Y C O U L D H A E N . N O W W E K N O W T H A T I T I S V E R Y L I K E L Y T H A T I T I S H A E N I N G , A N D T H A T

H O W D O W E K N O W T H A T F R O M T H I S S T U D Y ? B E C A U S E A G A I N A L L I S E E I S T H E Y A R E A R G U I N G , I M E A N D O E S T H E S T U D Y S A Y T H A T T H E T W O G R A M S I S N O T E N O U G H ?

I T R E L A T E S T H A T T H E T W O G R A M S , A S A D M I N I S T E R E D , A N D W H E N E V E R T H E Y T A K E T H A T A N D T H E Y G O A N D T H E Y L O O K A T T H E L E V E L S T H A T I S F O U N D I N T H E S E B O D I E S A F T E R T H E A U T O P S Y W H E N T H E Y H A V E B E E N E X E C U T E D , T H E Y S P E C I F I C A L L Y R E L A T E T H E A M O U N T S T O W H A T W O U L D B E R E Q U I R E D T O O B T A I N A S U R G I C A L P L A N O F A N E S T H E S I A A N D R E L A T E I T T O W H E T H E R S O M E O N E I S A W A R E A N D C O N S C I O U S A N D T H E P E O P L E T H A T A R E D O I N G T H I S A R E I M M I N E N T L Y Q U A L I F I E D . D R . L U B A R S K I I S A C T U A L L Y I F Y O U L O O K A T T H E C V T H A T W A S A T T A C H E D I S T H E C H A I R M A N O F T H E D E P A R T M E N T O F A N E S T H E S I A - - A N E S T H E S I O L O G Y .

Y O U A R E S A Y I N G T H E R E S H O U L D H A V E B E E N A N E V I D E N T I A R Y H E A R I N G B E C A U S E N O W T H E A M O U N T S A R E N O T E N O U G H . D O T H E Y H A V E A R E C O M M E N D A T I O N ? S H O U L D I T B E 2 7 B . 5 ? I S T H E R E S O M E P L A C E W E A R E G O I N G W I T H T H I S I N T E R M S O F W H A T W O U L D B E - - W H A T W O U L D O C C U R I F T H E R E W E R E A N E V I D E N T I A R Y H E A R I N G I F Y O U A R E N O W A T T A C K I N G T H E P R O T O C O L A S O O S E D T O W H E T H E R I T I S B E I N G C A R R I E D O U T P R O P E R L Y ?

H E M A D E N O R E C O M M E N D A T I O N A S T O T H E A P R O P R I A T E D O S A G E , A N D I T H I N K C I T E D E T H I C A L C O N C E R N S A S F A R A S T O D O N O H A R M .

.

CHIEF JUSTICE: S O W H A T W O U L D W E G E T O U T O F A N E V I D E N T I A R Y H E A R I N G ?

T H E F A C T T H A T A S I T I S A D M I N I S T E R E D T H A T I T I S C R U E L A N D U N U S U A L P U N I S H M E N T .

L E T M E A S K Y O U A B O U T

T H E R E M I G H T B E A N O T H E R M E T H O D .



THE THE S TU DY T HAT W AS CONDUCTED IS BASED ON AUTOP SY REPOR TS IN FOUR STATES?

THAT'S CORRECT.

IS THAT CORRECT? HAS THERE BEEN ANY F ED ERAL O R STATE COURT THAT HAS D EC LARE D THE LETHAL I NJ ECTION I N T HO SE STATES UNCONST ITUT IONA L?

NOT THAT I 'M AWARE OF.

HAS THERE BEEN ANY S TATE O R FEDERAL COURT IN THE UNITED STATES THAT HAS DEC LA RE D E ITH ER IN PRI NC IP LE O R A S ALIED LETHAL INJEC TI ON UNCONSTIT UTIONAL?

NO , A ND AS FAR AS I KNO W , I HAVEN'T FOUND ANY R EP OR TE D DECISIONS THAT DIRECTLY ADDRESS D R. L UB AR SK I 'S STU DY . SDPLOOCH AND A S I U ND ERSTAND IT, YOU ARE N OT A TTACKI NG T HE LETHAL INJ ECTION AS B EING CRUEL AND UNUSUAL , O NLY WHE THER THERE I S E NO UG H O F T HE SEWED JUM SOD IU M P ENT A THAL T O REN DE R SOM EO NE UNCONSCIOUS IF THE Y DON 'T EXPERIENCE

AS IT A LI ES HER E I N FLORIDA BASED ON WHAT W E DO IN FLORIDA . IT IS NOT A C ONCEPT I N GENERAL.

YOU'RE CLA IMING AS U SE D I N FLORIDA, THE PROCEDURE IS USED , RENDER IT UNCONSTIT UTIO NAL BECAUSE IT IS C RUEL AND UNUSUAL PUNISHMENT?

THAT IS CORRECT.

WHAT ABOUT THE 8TH CIR CUIT'S OPINION IN BROWN VERSUS CRA WF ORD?

THEY NEVER REACHED T HE MERITS OF THE C LAIM I N T HAT. THAT WAS A 1 98 3 ACT IO N B RO UGHT ON M R. B RO WN 'S B EH ALF. THEY FOUND THAT IT W AS PROCEDURALLY BARRED B EC AU SE H E HAD N OT EXHAUSTED HIS REM ED IES BELOW SO THE Y N EV ER REA CH ED THAT. INTERESTINGLY ENOUGH IN ONE OF THE F OOTNOT ES I N M Y B RIEF I HAD INDIC AT ED T HE RE H AD B EE N FOUR JUSTICES O N THE U.S . SUPREME C OURT THAT V OTED T O ACCEPT CERT O N T HA T , B UT BECAUSE HE WAS UNDER A DEATH WARRANT IT TAKES FIVE AT THA T POINT.

LET ME ASK YOU THI S BEFORE YOU SIT DOWN. I KNOW YOU ARE IN YOUR REBUTTAL BUT TO A NA LOGI ZE I T TO THE P RE VIOU S MET HO D O F E LECTROCUTION, YOU A RE C LAIMING BEC AU SE NOT E NOUG H S ODIUM P ENTO TH AL I S U SE D , THERE WAS PAIN BEF ORE DEA TH OCCURS. IN A LYIN G E LECT RO CUTION WAS THERE ANY K IND OF AGENT INJECTED INTO THE D EF EN DANT BEFORE EXECUTION?

NO , B UT I B ELIE VE T HE T ESTIMONY I N THO SE CAS ES WER E THAT IT WAS A LM OS T INSTANTANEOUS BECAUSE OF THE AMOUNT O F ELECTRICITY THAT WAS PUT INTO THE BOD Y , B UT INTERESTINGLY ENOUGH, WE HAVE A SITUATION H ER E T HA T I S W HA T ANALOGOUS TO WHERE E VIDENT IARY H EARINGS WERE H AD A FTER PROBLEMS H AD O CCURRE D W ITH I BELIEVE IT WAS JESSE TAF AR RO W ITH A LLEN D AVIS A ND T HOSE CASES THAT THIS COURT A LL OW ED EVIDENTIARY HEARINGS A FTER THAT TO GET TO THE BOTTOM OF THE P ROBLEM SO T O S PE AK A ND THAT'S WHERE WE ARE AT HERE. WE'RE NEVER GOING TO HAV E G RU E !!!!!!! GRUESOME PHOTOS LIK E W E D ID O F MR. DAVIS BECAUSE OF THE WAY IT IS CARRIED OUT .

IT SEEMS TO M E THA T THE BOTTOM OF THE PROBLEM I N THOSE CASES WAS D EATH W AS N OT I NS TANTANEOUS I N E LECT RO CU TI ON , BUT W E NEVERTHEL ESS U PH ELD THAT IT IS C ONSTITUT IO NAL , A ND IT DOESN'T S EEM UNLESS Y OU C AN CITE ME A CAS E THAT A NY COU RT I N THE C OUNTRY HAS S AI D I N ORDER FOR THE DEATH PENALTY T O BE CON STITUT IONAL A S A LI ED T HAT D EATH HAS TO B E INSTANTANEOUS A ND TOTALLY PAINLESS?



NO , BUT I T C A N N O T B E W A N T O N A N D U N N E C E S S A R I L Y P A I N F U L . B Y T H E W A Y I T I S A D M I N I S T E R E D I N F L O R I D A , T H A T ' S W H A T W E H A V E A N D I W O U L D L I K E T O R E S E R V E T H E R E S T O F M Y T I M E . T H A N K Y O U .

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

C H I E F J U S T I C E : C O U L D Y O U R E F R E S H M Y R E C O L L E C T I O N ? B E F O R E T H E N E W M E T H O D O F E X - A C C U S E W A S S E L E C T E D A N D J U S T A S J U S T I C E C A N T E R O I N T H O S E D A Y S U P H E R E , W E W E R E C O N C E R N E D A B O U T W H E T H E R T H E R E W A S E N O U G H C U R R E N T G O I N G I N .

T H E R E W A S S T U D I E S A N D T H E R E W A S H E A R I N G S W I T H R E G A R D T O T H E A D E Q U A C Y O F T H E S T U D I E S B U T T H A T W A S B A S E D O N A T A K E O N W H E T H E R O R N O T I T D I D N O T R E F L E C T W H A T K I N D O F C U R R E N T T H E R E W A S .

C H I E F J U S T I C E : W E R E W E R E Q U I R I N G T H A T T H E R E B E U P D A T E D P R O T O C O L S S U B M I T T E D T O M O N I T O R T H E S I T U A T I O N ?

I T H I N K T H E R E W A S M O N I T O R I N G W I T H R E G A R D T O W H A T W A S G O I N G O N , B U T T H A T W A S - - .

C H I E F J U S T I C E : D O W E H A V E A N Y C A U S E A N D T H I S I S S O M E T H I N G T H A T O F C O U R S E T H E D E P A R T M E N T O F C O R R E C T I O N S , I M E A N I ' M N O T , I D O N ' T W A N T T O B E C Y N I C A L A B O U T T H I S B U T Y O U U P T H E D O S A G E B Y A N O T H E R . 5 , I M E A N W H A T ' S T H E - - T E L L U S T H E S T A T E ' S P O I N T O F V I E W .

F I R S T O F A L L I D O N ' T T H I N K A N Y T H I N G H A S C H A N G E D S I N C E T H E N A N D I D O N ' T T H I N K T H E L A N C E T A R T I C L E I S A N Y D I F F E R E N T . I M E A N I F Y O U L O O K A T S E E W H A T D R . L I T M A N W A S S A Y I N G H E W A S T A L K I N G I N T H E O R E T I C A L B U T H E W A S A N E U R O P S Y C H O P H A R M A C I S T W H O H A D D E A L T W I T H T H I S , W H O H A D D O N E T H I S R O U T I N E L Y W I T H R E G A R D T O A D M I N I S T E R I N G D R U G S , A N D T H E S A M E S T U D I E S Y O U R E A L L Y G E T D O W N T O W H A T T H E L A N C E T A R T I C L E T A L K S A B O U T T H E S A M E S T U D I E S T A L K I N G A B O U T T H E S A M E T H I N G S H O W V E T V E T S W I L L N O T - - V E T E R I N A R I A N S W I L L N O T U S E T H I S K I N D O F P R O C E D U R E T O E T H A N I Z E A N I M A L S . T H E S A M E K I N D O F P R E S E N T A T I O N T H A T W A S M A D E I N 2 0 0 0 W I T H R E G A R D T O W H E T H E R L E T H A L I N J E C T I O N W A S C O N S T I T U T I O N A L L Y A P P R O P R I A T E A N D A B L E T O B E C A R R I E D O U T . I T H I N K W H A T I S I N T E R E S T I N G W I T H R E G A R D T O T H E L A N C E T A R T I C L E A N D I ' M G O I N G T O M A Y B E M I S S S P E A K B U T I ' M G O I N G T O T H R O W I T O U T T H E R E A N D W E C A N C L A R I F Y I T . I B E L I E V E T H A T N O T A L L O F T H E S T A T E S H A D T H E S A M E D O S A G E L E V E L S . T H E R E W E R E S T A T E S T H A T H A D D O S A G E L E V E L S A T T W O . S O M E T H A T H A D F I V E A N D I N F A C T C A L I F O R N I A W H E R E T H E Y T R I E D T O U S E T H E L A N C E T S T U D Y H A D F I V E O R S I M I L A R E V I D E N C E W A S B R O U G H T O U T W H E R E T H E F I R S T D R U G I S A T A 5 M I L L I G R A M D O S A G E .

5 M I L L I G R A M S , N O T G R A M S ?

C H I E F J U S T I C E : W E H A V E I N F L O R I D A W H A T ?

W E H A V E T W O , A N D I W I L L J U S T R E A D F R O M O U R R E C O R D I N T H E S I M S C A S E I T S A Y S , T H E Y W E R E H E W A S A S K E D A N D T H I S C O U R T F O U N D T H A T H E A L S O A D M I T T E D H I G H D O S A G E S O F L E T H A L S T A N C E I N T E N D E D T O B E U S E D B Y D O C D E A T H W O U L D C E R T A I N L Y R E S U L T Q U I C K L Y A N D W I T H O U T S E N S A T I O N . T H A T W A S T H E F I N D I N G S B A S E D O N T H E S A M E P A R A D E O F P O S S I B I L I T I E S T H A T W A S P R E S E N T E D T H E M A N D I S N O W B E I N G P R E S E N T E D . T H E R E I S N O T H I N G N E W I N T H I S A R T I C L E T H A T D O E S T H A T . W H A T I S N E W I S T H A T T H E Y H A V E H A D A C C E S S T O S E V E R A L A U T O P S I E S , A N D T H E R E I S S O M E D I S P U T E A S T O W H E T H E R , I N F A C T , T H E A U T O P S I E S O R T H E E V I D E N C E T H A T T H E Y A R E T A K I N G B A S E D O N T H E A U T O P S Y E V I D E N C E I S R I G H T . T H E R E I S C H A L L E N G E S . I M E A N , B E H I N D A L L O F T H I S I S A C H A L L E N G E W H E T H E R T H E A U T O P S Y



PROTOCOLS ARE CORRECT .

THAT COMES OUT AT THE EVIDENTIARY HEARING. THAT WOULD BE FLESHED OUT AT A HEARING SOMEPLACE.

I'M SAYING THERE IS JUST A WHOLE LOT OF THINGS THEY ARE TALKING ABOUT. THE STATE HAS MADE THE ARGUMENT THAT THERE IS A PROCEDURAL BAR WITH WHAT THE TRIAL COURT FOUND. THERE IS NOTHING HERE NEW THAT WOULD RELATE TO A NEW CLAIM WITH REGARD TO POST-CONVICTION AND HE IS PROCEDURALLY BARRED. THERE HAS ALWAYS BEEN THE OPPORTUNITY TO MR. HILL TO RAISE THE CONSTITUTIONALITY OF LETHAL INJECTION AND HE HAS NOT DONE THAT IN THE PAST AND HE HAS NOT DONE IT IN A TIME AND MANNER THAT WOULD HAVE BEEN TIMELY BECAUSE IF YOU ALL RECALL, WE JUST WENT THROUGH IT ALL BUT HE HAD A 2003 POST-CONVICTION MOTION AND OTHER SUCCESSIVE POST-CONVICTION MOTION AND AT THAT TIME HE RAISED IT. HE COULD HAVE CERTAINLY RAISED THE VITALITY AND CORRECTNESS OF LETHAL INJECTION AND HE DID NOT DO THAT.

BUT HIS ARGUMENT IS THAT THIS STUDY, WHICH WAS DONE , WAS NOT AVAILABLE.

NO.

AT THAT TIME , AND SO THIS INFORMATION THAT THE LEVELS MAY NOT BE SUFFICIENT WAS NOT SOMETHING THAT REALLY COULD HAVE BEEN RAISED IN HIS PREVIOUS POST-CONVICTION ?

WELL, I THINK THAT THAT IS TRUE. THE ARTICLE CAME OUT IN APRIL 2005 IN THE LANCET AND I ASSUME IT IS BEING PREPARED BECAUSE IT WAS PREPARED OVER A PERIOD OF TIME DURING THE TIME WHEN HE COULD HAVE CHALLENGED THEM, DONE THE SAME CHALLENGE AND DONE THE SAME INVESTIGATION THAT WAS BEING UNDERTAKEN BY THE SE DOCTORS BUT I MIGHT ADD IF YOU LOOK AT THE AUTHORITIES THAT I HAVE CITED IN MY PLEADINGS YOU WILL SEE SINCE 2000 THERE HAVE BEEN A NUMBER OF PEOPLE LITIGATING THE VITALITY OR THE CORRECTNESS OF LETHAL INJECTION.

CHIEF JUSTICE: IN THIS STATE?

IN THIS STATE, ABSOLUTELY IN THIS STATE. THIS COURT JUST INSUGGS A COUPLE OF DAYS A GODETERMINED WE DID NOT NEED AN EVIDENTIARY HEARING WITH REGARD TO LETHAL INJECTION.

CHIEF JUSTICE: UNTIL THE WARRANT IS SIGNED IT IS NOT QUITE THE SAME THING , BUT WHAT IS THE AGAINST TWO VERSUS FIVE. I MEAN, IS THERE SOMETHING THE DOCTORS , DO THEY CON TINUE TO LOOK AT WHETHER THEY ARE DOING IT IN THE WAY THAT IS MOST LIKELY TO CAUSE , YOU KNOW , OR NOT TO CAUSE UNNECESSARY PAIN?

I THINK THE PROTOCOLS THAT WERE CREATED WERE BASED ON PROTOCOLS THAT HAVE OCCURRED IN MOST OTHER STATES AND THEY ARE THE NUMBERS THAT ARE OCCURRING IN MOST OTHER STATES AND THEY WERE SUCCESSFULLY HAVING EXECUTIONS THAT DID NOT HAVE ANY PROBLEMS . I THINK THAT HAS SO FAR BEEN THE STANDARD BY WHICH THEY HAVE OPERATED. THERE HAS BEEN NO CAUSE, THERE IS NO BASIS.

CHIEF JUSTICE: IS THERE A DOCTOR THAT IS THERE THAT IS ADMINISTERED AND DO THEY HAVE DISCRETION IF THERE IS ANY INDICATION OF SOME CONTINUED CONSCIOUSNESS TO INJECT MORE?

THEY HAVE A SERIES OF NEEDLES THAT HAVE THE REQUISITE AMOUNT OF DRUGS THAT GO INTO A SYRINGE AND THE PLUNGER IS PUNGED AND IT GOES THROUGH THE PROCESS.



THERE IS NO EVIDENCE IN THE EXECUTIONS THAT HAVE OCCURRED AND CERTAINLY NOT THE 16 THAT HE POINTED OUT THAT HE WANTED RECORDS FROM THAT ANY OF THE EXECUTIONS HAD ANY PROBLEMS AT ALL.

WHAT IS THE DOWNSIDE OF HAVING AN EVIDENTIARY HEARING IN WHICH THE STATE CAN COME FORWARD AND SAY FIRST OF ALL WE DON'T BELIEVE THESE PROBLEMS EXIST, AND HAVE COMPETENT EXPERT TESTIMONY THAT ESTABLISHES THAT? THAT IF IT COME OVER THE RESULTS OF THE STUDY OR ON THE OTHER HAND SAY WE'VE EXAMINED THE STUDY AND AS A RESULT OF THAT, WE HAVE UPEL THE DOSE OF THIS PARTICULAR DRUG IN ORDER TO AVOID THE POSSIBILITIES THAT ARE RAISED IN THE STUDY, SO THAT THE BOTTOM LINE RISK THAT YOUR OPONENT IS POINTING OUT HERE ARE ELIMINATED THEN. WHAT IS THE DOWN SIDE?

WELL, CERTAINLY WEBER, AN OLD CASE TALKS ABOUT IN TERMS OF EXECUTION THE RELIGIOUS PAIN. IF THERE IS A MISTAKE, WE DON'T WANT THAT TO HAPPEN, BUT WEBER IS OUT THERE BUT MORE IMPORTANTLY I THINK IT IS WE ALREADY HAD A HEARING ON THIS. WE HAD SIMPLY YEARS AGO, NOW BECAUSE WE ARE IN 2006, SIX YEARS AGO AND THERE HAS NOT, ANYTHING THAT OCCURRED THAT HAS CHANGED THAT.

EVENTS HAVE OCCURRED THAT CHANGED THAT. THAT IS THAT WE'VE HAD THIS SCIENTIFIC INVESTIGATION NOW INTO IT AND FOR INSTANCES WITH THE ELECTRIC CHAIR SITUATION, YOU KNOW, WHAT WE HAD SUBSTANTIALLY WAS THESE EVENTS THAT OCCURRED, YOU KNOW, IN PRECEDING EXECUTIONS.

BUT THAT PRECIPITATED A HEARING TO FIND OUT THE PROBLEMS.

HERE WE DON'T HAVE THE EVENTS BUT THE STUDY SEEMS TO SUGGEST THAT BECAUSE OF THIS MASKING EFFECT OF THE WEARING OFF OF THE DRUG THAT THE PERSON IS NOT GOING TO BE ABLE TO ACT OUT OR IN ANY WAY INDICATE THAT THE PAIN IS THERE, AND SO I'M JUST, I'M TRYING TO - - WHAT IS THE DOWNSIDE OF EXPLORING THAT?

BECAUSE I THINK YOU HAVE TO HAVE SOMETHING MORE THAN SAYING THAT THERE IS A POSSIBILITY THAT SOMETHING COULD - - THEY HAVE NOT ONE - - THERE IS NO EVIDENCE THAT ANYBODY SUFFERED ANY PAIN IN ANY OF THOSE OTHER EXECUTIONS. ALL THEY CAN COME UP WITH IS AN AUTOPSY DETERMINATION THAT THE POOLING OF THE DRUGS FROM WHERE THE SPOT OF THE LOCAL OF WHERE THE DRUG WAS TAKEN WAS NOT OF THE SAME LEVEL AS WHEN ADMINISTERED, WHICH IS NOT UNCOMMON, BECAUSE, IN FACT, THIS IS A FAST ACTING DRUG. IT IS NOT TOO AND THIS IS YOU ARE TALKING ABOUT WHEN THE AUTOPSY IS TAKEN, BUT SEVEN HOURS LATER, TEN DAYS LATER, WHENEVER THE AUTOPSY MAY OCCUR. THIS IS NOT THE DRUG THAT KIND OF STAYS IN YOUR SYSTEM AND POOLS AND SITS THERE AND YOU GET A HIGHER DOSE BECAUSE YOUR CHEMICAL OF YOUR BODY DEVELOPS IT. THIS IS ONE THAT GOES INTO YOUR SYSTEM FOR A SPECIFIC PURPOSE AND THE NEED IS SATISFIED SO YOU CAN BECOME AWAKE AGAIN AT SOME POINT IF IT IS USED IN SURGERY. THERE HAS BEEN NO EVIDENCE IN THIS RECORD, THE LANCET, THE ARTICLE IN THE LANCET DOES NOT SAY AS STRONGLY AS BEING PURPORTED THAT, IN FACT THERE IS ANY PROBLEM IN ANY OF THESE CASES. IT IS ALL MAYBE, SHOULD, POSSIBLY, SOME, MAY. THAT'S ALL IT SAYS. AND THAT IS NOT THE BASIS UPON WHICH WE GO FORWARD WITH AN EVIDENTIARY HEARING. THERE HAS TO BE SOMETHING MORE TANGIBLE THAN THAT, BUT MORE IMPORTANTLY, I CAN'T OVEREMPHASIZE THE NEED THAT THERE HAS BEEN THIS CLAIM HAS ALWAYS BEEN AVAILABLE TO MR. HILL. HE COULD HAVE RAISED IT AT THE MOMENT THAT LETHAL INJECTION HE OPTED FOR LETHAL INJECTION AS THE METHOD BY WHICH HE WAS GOING TO BE EXECUTED AT SOME POINT IN THE FUTURE AND HE HAS NEVER CHALLENGED THAT UNTIL NOW ON THE EVENT OF EXECUTION AND I DON'T BELIEVE WHILE I ADMIT THAT MANY TIMES WE DON'T LOOK AT IT AS SERIOUSLY PERHAPS WHEN THEY RAISE IT, YOU KNOW, ON A CASE THAT THAT IS



STILL A VALID METHOD BY WHICH THEY OUGHT TO BE RAISING IT. WE SHOULD NOT DISCOUNT THAT.

YOU SEEM TO BE SAYING MAKE SURE THAT I UNDERSTAND THAT DUE TO THE NATURE OF THIS IS THAT THE SCANS OF ANY AUTOPSIES, SIMPLY CAUTION, CANNOT EVER BE USED AS A - - TO TRANSLATE THE LEVELS AT THE TIME OF THE EXECUTION DUE TO THE NATURE OF THE SUBSTANCE?

THAT'S RIGHT.

IS THAT JUST

THAT'S JUST GENERAL LOGIC ON THIS.

I DON'T KNOW WHETHER IT IS LOGIC OR NOT.

HE IS SAYING IT IS A FAST-ACTING DRUG. HE IS GOING TO BE A WAKE. HOW ARE YOU GOING TO POSSIBLY GET TRACES OR THE LEVEL OF TRACES?

THAT IS ESTABLISHED TO THE POINT THAT EVEN IF WE GOT TO DO AN ANALYSIS, THAT'S NOT THE ROAD YOU CAN GO DOWN?

RIGHT. I AGREE.

IT HAS TO BE SOME OTHER ROAD?

AND I THINK THERE IS NOTHING IN THIS RECORD. IF YOU COMPARE WHAT THE LANCET, THE ARTICLE IN THE LANCET AND WHAT THEIR CONCLUSIONS, AND THAT'S THE BEST, THAT'S A GENEROUS STATEMENT, THEIR CONCLUSIONS DRAW AND YOU READ WHAT WAS PRESENTED AND WHAT THIS COURTFATHOMMED FROM WHAT DR. LITMAN TESTIFIED TO AND WHAT HIS RECORDS SHOW THE RE IS NOT A LOT OF DIFFERENCE. THE ONLY DIFFERENCE IS NOW THEY HAVE SOMEBODY COMING IN AND SAYING, WELL, WE THINK THAT THE AUTOPSY REPORT COULD SHOW THIS. COULD SHOW IT. NOT THAT THEY DO. COULD SHOW IT. AND THEY HAVE NOT IDENTIFIED ONE SINGLE LET HALI INJECTION EXECUTION WHERE PROBLEMS HAVE OCCURRED WHERE, IN FACT, AN INDIVIDUAL WOULD HAVE, IN FACT, A WAKENED.

AND ARE THESE AVAILABLE, THE EXAMINATION REPORTS, AVAILABLE FOR INDIVIDUALS TO REVIEW AND HAVE EXPERTS REVIEW OR HAVE THOSE BEEN PRODUCED TO ANY ONE ANYWHERE?

NOTHING HAS BEEN PRODUCED. ALL THAT WAS PRODUCED WAS THE LANCET ARTICLE AND I ASSUME THAT WE HAVE ACCESSTO WHATEVER THE STUDY WOULD SHOW. BUT THAT WAS NOT ATTACHED TO ANY OF THIS. ALL WE HAVE IS THIS ARTICLE THAT WAS PRODUCED AND AS I THINK THE COURT HAS MENTIONED, IT HAS BEEN PRESENTED IN OTHER COURTS WITH REGARD TO LETHAL INJECTION ON THE EVE OF EXECUTION AND HAVE BEEN REJECTED AS NOT BEING SIGNIFICANT.

BUT IS THE AUTOPSY - - ARE THESE SIMILAR AUTOPSY REPORTS IN FLORIDA AVAILABLE?

THE AUTOPSY

ACCESSIBLE?

WELL, THE AUTOPSY INFORMATION IS AVAILABLE IN THE SENSE THAT THAT THE MEDICAL EXAMINER RETAINS INFORMATION WITH REGARD TO WHAT TRANSPIRED IN DOING ANA



UTOPSY BECAUSE AN AUTOPSY WAS REQUIRED IN EVERY CASE.

I GUESS WOMAN LINE -HEB OTTOM LINE, THIS IS BASED ON TEXAS, VIRGINIA , GEORGIA , A COUPLE OF OTHER STATES?

COULD HAVE BEEN IN FLORIDA.

COULD THAT INFORMATION HAVE BEEN OBTAINED FROM FLORIDA ?

SURE.

AND NO PROHIBITION?

IN FACT , ONE OF THE FOOTNOTES IN THIS CASE IN HIS I THINK REPLY BRIEF IS , IN FACT, IN THE RONALD KNIGHT CASE THE TRIAL COURT HAS ORDERED AN EVIDENTIARY HEARING WITH RAILROAD TO THIS SO WE - - WITH REGARD TO THIS SO WE ARE GOING TO HAVE SOME SORT OF HEARING BUT THAT'S AN INITIAL POST-CONVICTION MOTION .

WHAT IS THE ISSUE THERE ? IS IT THE SAME ISSUE OF WHETHER OR NOT TWO GRAMS - -

ALL I CAN SAY IS I KNOW THERE HAS BEEN A HEARING AND THAT WAS REFLECTED IN HIS LEADING - - PLEADINGS . I DON'T THINK THEY HAVE ACCESS , THEY DIDN'T GET ACCESS TO THE MATERIALS BUT THEY ARE GOING TO HAVE A HEARING ON SOMETHING. I DON'T KNOW WHAT THEY ARE GOING TO HAVE A HEARING ON.

YOU'RE SAYING THAT THE PUBLIC CANNOT OR A DEFENDANT CANNOT GET ACCESS TO THE AUTOPSY? THEY CAN OR CANNOT?

THEY CAN, YES, AND, IN FACT , THE INFORMATION THERE WAS A PUBLIC RECORDS REQUEST MADE OF THE MEDICAL EXAMINER FOR THE 8TH JUDICIAL CIRCUIT IN RONALD KNIGHT, AND, IN FACT , THEY PRODUCED THOSE PIECES OF EVIDENCE, AND THE PROBLEM EXISTS WITH THOSE FILES IS THAT WHERE ARE THEY? THE MEDICAL EXAMINER SWEARS THAT HE SENT THEM TO THE REPOSITORY AND THE REPOSITORY SAYS THEY DON'T HAVE THEM , BUT WE KNOW THAT THERE IS GOING TO BE AN EVIDENTIARY HEARING IN RONALD KNIGHT.

HOW DOES THAT MAKE SENSE TO HAVE AN EVIDENTIARY HEARING IN THAT CASE ON THIS ISSUE WHERE THERE IS NOT AN EXECUTION PENDING, AND YET DENYING AN EVIDENTIARY HEARING IN THIS CASE BEFORE THE EXECUTION IS PENDING?

THAT HAS BEEN SET FOR A NUMBER OF MONTHS AGO. THE STATE HAS OBJECTED TO THAT. THERE IS NO NEED FOR - - I AM NOT GOING TO TALK ABOUT THAT CASE BUT THE STATE IS

IS THAT AN INITIAL MOTION?

YES, IT IS.

I GUESS OUR RULE PROVIDES THAT THERE SHALL BE EVIDENTIARY HEARINGS ON ALL ISSUES?

YES, YOUR HONOR.

AM I TO UNDERSTAND THE ORIGINAL DOCUMENTATION WITH REGARD TO ALL OF THE AUTOPSIES AND THE TOXICOLOGYS CANS FOR ALL EXECUTIONS PREVIOUSLY PERFORMED HERE IN FLORIDA , ALL THAT DOCUMENTATION IS NOW LOST OR CAN'T BE FOUND?

NO, NO , NO.



I THOUGHT THAT'S WHAT YOU SAID.

THEY MADE COPIES. THEY MADE COPIES FOR THAT CASE AND WE WERE TRYING TO LOCATE THEM, AND WE THINK THAT THE DEFENSE LAWYER HAS THEM.

BUT THE SOURCES DOCUMENTS ARE STILL THERE?

THEY ARE THERE AND THEY ARE AVAILABLE.

AND YOU WERE TALKING ABOUT ONE SPECIFIC CIRCUIT AS WELL, NOT THE ENTIRE STATE, CORRECT?

CORRECT. THAT'S IN SOUTH FLORIDA, RIGHT. IF THERE ARE NO FURTHER QUESTIONS THE STATE WOULD ASK THAT YOU AFFIRM THE TRIAL COURT'S DENIAL OF POST-CONVICTION RELIEF BASED ON PROCEDURAL BAR AS TO ALL OF THE CLAIMS PRESENTED. THANK YOU.

CHIEF JUSTICE: REBUTTAL, MR. DOSS?

AS THE DR. LITMAN'S QUOTE IN I BELIEVE THE STATE HAD INDICATED THE QUOTE OUT OF SIMS WHERE IT SAYS DR. LITMAN ADMITTED THAT LETHAL INJECTION IS A SIMPLE PROCEDURE AND THAT IF THE LETHAL SUBSTANCE IS TO BE USED BY DOCTORS ADMINISTERED IN THE PROPER DOSE AND SEQUENCED AT THE APPROPRIATE TIME THEY WILL BRING ABOUT THE DESIRED EFFECT. INTERESTINGLY ENOUGH, DR. LUBARSKI IN THE ARTICLE RELATES THAT THAT THAT'S AN OVERLY SIMPLISTIC VIEW AND HE CONCLUDES OTHERWISE IN HIS STUDY ON PAGE 1412 HE STATES THE ASSUMPTION OF TWO GRAMS OF SODIUM PENTOTHAL IS OVERLY SUPERFLUOUS POLICE, HOWEVER, AND HE PROCEEDS TO CONCLUDE ON PAGE 1413, BASED ON THE POSTMORTEM REPORTS, MOST INMATES HAD IT NOT ENOUGH TO PERFORM THE RYAN AND 63% HAD SIMPLE TONSIL STENT SYMPTOMS WITH A SURINFECTION.

WHY WOULD SOMEONE NOT GET THOSE RECORDS FOR THIS CASE RATHER THAN TALKING ABOUT IT?

WE SPECIFICALLY ASKED FOR THAT. WE WERE DENIED BELOW SAYING WE DIDN'T PRESENT A CREDIBLE CLAIM.

TO EVEN GET THE DOCUMENTS?

TO EVEN GET THE DOCUMENTS.

WHEN DID YOU REQUEST IT?

REQUESTED THEM ON DECEMBER 7TH.

DECEMBER 7TH OF 2005?

2005.

THEY WEREN'T -- HAD NOT BEEN REQUESTED AT ANY PRIOR TIME IN THIS PROCEEDING?

NO, SIR.

HAVE YOU FAMILIARIZED YOURSELF WITH THE KNIGHT CASE IN TERMS OF WHAT THE MOTION IS THERE AND WHAT IS SET FOR AN EVIDENTIARY HEARING AND CAN YOU RELATE THAT TO US?

I HAD SPOKE WITH DEFENSE COUNSEL ON THAT CASE. MY UNDERSTANDING IS THAT THE



Y WERE SET. IT WAS BASED O N D R. L UBAR SK I' S STUDY. THAT IT IS ANA LO GOUS T O W HA T WE HAVE HERE, AND THEY HAV E NOT B EEN GIV EN P UB LI C R ECOR DS , IT IS MY UNDER STAN DING, THE LAST TIME I SPO KE WITH COU NS EL ON THAT C ASE.

WHEN IS THE EVIDE NT IARY HEARING SCHEDULED IN THAT CASE?

I RONICALLY ENO UGH I B EL IEVE IT IS JAN UARY 24TH , T HE D AY O F M R. HILL'S E XE CU TION.

AND WHAT CIRCU IT I S T HA T IN?

PALM B EA CH C OUNTY. I BELIEVE IT IS JUDGE GARRISON.

LET ME A SK A R EA L QUI CK QUE STION. THIS LANCE T A RTICLE IS T IT LE D A RESEARCH LETTER AND THERE IS A NOTE THAT O NE OF THE AUT HORS IS AN A TTOR NE Y W HO REPRE SE NT S DEATH INM ATES, A ND P ARTICIPATING C OLLECT IN G A LL OF T HI S D AT A. WHAT EVIDENCE O F PEER REVIEW DO WE HAVE O F THI S LET TER?

THAT IS ACT UA LL Y C ONTA INED , I BELIEVE , W ITHIN T HE LAN CET. THERE IS A DR. H EA TH T HA T H AD RESPONDED TO THA T . I H AD NOT S EEN AN YB OD Y ELSE. I K NOW DR. H EATH HAD A CTUA LLY BEEN PRODUCED AS AN E XP ER T W ITNESS I N K EN TU CKY , IN I BELIEVE IT WAS

IS THERE E VI DENCE THA T T HI S RESEARCH LET TE R WAS P EE R REVIEWED?

ABSOLUTELY , AND IT MEN TI ON S THAT IN THE AFFIDAVIT T HAT I T GOES THROUGH PEER REVIEW BEFORE IT I S EVE N P UB LI SHED IT GOES T HR OUGH THE P EE R R EV IE W .

CHIEF JUSTICE: THANK YOU, MR. DOSS. THE COURT WILL TAKE THE CAS E UNDER ADVISEMENT , A ND T HE COURT WILL BE IN REC ES S .

THE MARSHAL: PLEASE RISE.